

MEMORANDUM

October 9, 2024

TO: County Council

FROM: Livhu Ndou, Senior Legislative Attorney
Bilal Ali, Legislative Analyst

SUBJECT: Bill 16-24, Development Impact Tax – Amendments

PURPOSE: Addendum

A staff report for Bill 16-24, Development Impact Tax - Amendments, was posted on Monday, October 7, 2024. This addendum provides two additional proposed amendments and includes additional requested written testimony.

Additional Amendments Recommended by Council Staff

1. Expedited bill

Bill 16-24 includes a transition clause that states the bill takes effect on January 1, 2025. Under Section 112 of the Charter,

All legislation, except expedited legislation, shall take effect ninety-one days after the date when it becomes law, unless a later effective date is prescribed in the legislation. Expedited legislation shall take effect on the date when it becomes law, unless a different effective date is prescribed in the legislation.

Given the timing of the legislative process for this bill, an effective date of 90 days would be after the date prescribed in the transition clause. Therefore, to take effect on January 1, 2025, Bill 16-24 would need to be expedited. Council Staff proposes the following language to create an expedited bill that does not take effect immediately but does take effect in less than 90 days.

* * *

Sec. 2. [[Transition.]] Expedited Effective Date. The Council declares that this legislation is necessary for the immediate protection of the public interest. The amendments made in Section 1 take effect on January 1, 2025, and must apply to any application for a building permit filed on or after January 1, 2025.

2. Amend Section 52-59 [Lines 161-170]

The GIP recommends “Allow[ing] funds collected as UPPs to be used for capital projects adding capacity at schools adjacent to the school for which the funds were collected, as outlined in the School Utilization Report.”¹ This would require an amendment to Section 52-59(e). The bill as transmitted did not include this amendment. Council Staff proposes the following language:

52-59. Utilization Premium Payment.

* * *

- (e) The Department of Finance must retain funds collected under this Section in an account to be appropriated for:
 - (1) any public school improvement that adds capacity designed to alleviate overutilization in the school service area from which the funds were collected; or
 - (2) for capital projects adding capacity at any school adjacent to the school for which the funds were collected. Adjacent schools must be determined using the Planning Board’s Annual School Utilization Report.

<u>This packet contains:</u>	<u>Circle #</u>
Letter from Greater Colesville Citizens Association	© A1
Letter from Montgomery County Board of Education	© A4
Letter from Miles & Stockbridge representing MCB White Oak, LLC	© A6
Letter from William Kominers of Lerch, Early & Brewer	© A8
Letter from Lerch, Early & Brewer representing Lerner Enterprises	© A16
Letter from Lerch, Early & Brewer representing Community Three Maryland, LLC	© A19
Letter from Miles & Stockbridge land use practice group	© A22

¹ The PHP Committee recommended approval of this recommendation.

Greater Colesville Citizens Association
PO Box 4087
Colesville, MD 20914
September 10, 2024

Montgomery County Council
Attn: Andrew Friedson
100 Maryland Ave
Rockville, MD 20850

Re: Growth & Infrastructure Policy and Bill 16-24

Dear Council President Friedson:

The Greater Colesville Citizens Association (GCCA) has commented for decades on the Growth & Infrastructure Policy (GIP) and its predecessor documents as well as the related impact tax rules (Bill 16-24) The staff proposed changes are largely small adjustments to make the existing process work better. GCCA supports the recommendations in the draft document, except as noted below.

The council desires to encourage economic development and especially the production of affordable housing, which GCCA also strongly supports. The high cost of obtaining county approvals has stemmed such development. Two parts of that high cost come from the LATR requirements and another part from the impact taxes. The GIP and related impact tax recommendations from the Planning Board allow the council to reduce both of these cost elements. Specific changes are:

- GCCA supports Recommendation 2.1 to simplify LATR investigations by reducing the number of boundaries.
- GCCA supports Recommendation 3.2 to not require LATR studies for small projects – those under 50 peak-hour vehicle trips.
- GCCA supports Recommendations 3.4 and 3.5 to simplify the non-motor vehicles adequacy tests.
- GCCA support Recommendation 3.8 to update and refine the proportionality guide.
- GCCA supports Recommendations 3.11a, 3.11b and Table 13 (Impact Tax Exemptions). To reduce the cost, LATR should not be required for affordable housing and mixed-income Housing. Also, the school and transportation impact taxes should be eliminated for this category of development.
- GCCA supports Recommendations 3.13 and 3.14 to exempt daycare and bioscience development from the LATR requirement. GCCA also supports maintaining the existing impact tax exception for bioscience projects (Table 13 and Recommendation 4.7)
- GCCA supports the recommendations in Table 13.
- GCCA supports Recommendation 4.3 to apply a 50% impact tax reduction for single family housing under 1800 sq ft as a means of linking the tax to the degree of impact.

Many units of this small size will often be used by two adults or a couple with one child. Thus, the impact would be less than with larger families.

- GCCA supports Recommendation 4.5 to completely eliminate impact taxes for multifamily units with at least three bedrooms. This would help provide housing for low-income families with multiple children.
- GCCA supports Recommendation 4.6 dealing with office-to-residential conversions. We support an exemption for both the situation where the existing structure is used (as recommended) and when the existing building is demolished (as not recommended). It is often not economical to repurpose office buildings. We also do not want buildings to sit empty and become a blight on the community. We expect the transportation demand will be typically lower for residential use than office use, so imposing a transportation impact tax would not be fair.
- GCCA supports Recommendation 4.9 to maintain the impact tax exemption (both transportation and school) for opportunity zones. We also support continuing this exception should the federal program expire. Most of the development in east Montgomery County has been delayed because of covid. This is especially true for the Viva White Oak Project. The exemption is needed to allow the project to economically proceed, in part since the developer will be required to provide a lot more infrastructure than in many other parts of the county. The opportunity zone applies to economically distressed communities.

GCCA supports Recommendation 3.1a in part. That recommendation creates the White Oak Downtown area (Tech Rd and Industrial Pkwy) and a White Oak area (New Hampshire Ave). The citizens in this part of the county consider the downtown area to be on New Hampshire Ave at Lockwood Dr/US29. Having two area with the name “White Oak” is confusing. As indicated below we recommend they be combined. However, If they are kept separate, we suggest the name of “Life Science” be used for the Tech Rd/Industrial Pkwy area as indicated in the Master Plan.

Nearly all of the combined area (White Oak Downtown and White Oak) is covered by the White Oak Science Gateway Master Plan. That combined area should be classified as “red,” since it is covered by the Local Area Transportation Improvement Program (LATIP) which replaces LATR, and thus most of the GIP transportation rules do not apply to them. We also consider the area from New Hampshire Ave to Briggs Chaney and east of Old Columbia Pike/US29 as being a single large activity center. Thus, this entire area should be considered as a single red policy area.

If the council retains the two policy areas, the small area along Cherry Hill Road between Viva White Oak, Federal Research Center and Prince George’s County should be in the DownTown/Life Science area, not the White Oak area. Otherwise, this small area would be separated from the remainder of the White Oak Policy Area by the large FRC and Adelphi Labs. This area is already built-out and consists of half the small shopping center and three of the garden apartment buildings. The remainder of the shopping center and garden apartment development is in PG County.

Note that in Bill 16-24, the bracket is misplaced under the list of Orange Policy Areas to exclude White Oak.

Recommendation 3.1b is not clear since it appears to be attempting to redefine the LATIP area to be only one of the three activity centers it covers. As indicated above, we oppose splitting the existing LATIP area.

Transportation Impact Rate Adjustment for NADMS. The Policy establishes non-auto driver mode share (NADMS) goals but fails to reduce the transportation impact tax to account for achieving the goal or exceeding it. The current LATR contains two tables that could be used to address this shortcoming: Appendixes 1a and 1b. Appendix 1a adjusts the ITE vehicle trip generation rate to reflect local conditions. Appendix 1b could be modified and updated to identify existing NADMS rates. Using those two tables, the transportation impact tax should thus become:

= ITE rate * Appendix 1a factor * (1 – Appendix 1b NADMS rate) * tax rate

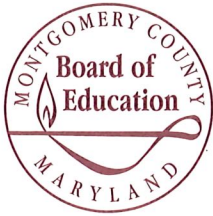
Appendix 1b would represent the default NADMS rate. However, if the developer could demonstrate a higher NADMS, that higher value would be used in place of the Appendix 1b value. The NADMS would most likely vary by the nature of the development in terms of number of auto trips, provision of public transportation, and any measures the developer puts in place to encourage non-auto trips. The tax rate would be value per auto trip. Thus, trips taken by transit, walking or biking would not be charged an impact tax, thus encouraging their usage.

Thank you for considering our recommendations.

Sincerely

Daniel L. Wilhelm

GCCA President



MONTGOMERY COUNTY BOARD OF EDUCATION

Expanding Opportunity and Unleashing Potential

15 West Gude Drive ♦ Suite 100 ♦ Rockville, Maryland 20850

September 27, 2024

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

Re: 2024–2028 Growth and Infrastructure Policy

Dear Council President Friedson:

Thank you for the opportunity to comment on the 2024–2028 Growth and Infrastructure Policy currently under review and the accompanying Bill 16-24, *Development Impact Tax – Amendments*. We appreciate that Montgomery County Public Schools (MCPS) is a significant component of the overall public infrastructure of Montgomery County, and we share the collective goal of ensuring a robust public infrastructure that meets the current and future needs of our growing community.

Our primary concern relates to the revenue projections and the need for revenue enhancement in the structure of the Growth Policy. The Council’s Approved Fiscal Year (FY) 2025–2030 Capital Improvements Program (CIP) included significant funding to reflect the ongoing needs for systemic infrastructure projects; however, it also deferred several important school capacity and renovation projects. The Council approved funding that is \$52.1 million less than the previously approved CIP funding level and \$145.7 million less than the level requested by the Board of Education (Board). Last year, the County’s Office of Finance revised Recordation Tax revenue projections down from previously assumed levels, one factor which led to the reductions to the Board’s requested CIP. We know there is a shared understanding of the facility infrastructure needs of the school system, and we ask you to ensure that revenue measures are in place to adequately fund the MCPS CIP now and in the future.

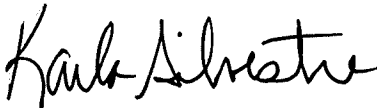
We acknowledge that there are many competing policy priorities related to structuring growth and development patterns in the county, as well as a range of options for incentivizing growth that reflect policy objectives. However, we are very concerned that the County’s Office of Finance estimates more than \$20 million of lost revenues due to the provisions around both school and transportation infrastructure and the proposed Impact Tax discounts and reductions. We strongly urge the Council to implement robust and appropriate revenue measures that will meet the County’s growth objectives while maintaining positive trajectories for revenues that support needed facility infrastructure to meet that growth.

MCPS does not support Recommendation 4.1, Calculation of School Impact Taxes, which would reduce the calculation by the amount of State Aid programmed in the CIP. The State Aid reflected in the CIP is, in many cases, only projected and is contingent on review and approval by the State on a project-by-project basis. In addition, the CIP State Aid projections include both traditional State Aid formulas and the remainder of the Built To Learn allocation, which have different calculations and approval levels. These factors and others could result in artificially low calculations of Impact Taxes needed to support the ultimate cost of school construction.


MCPS supports Recommendation 2.3 of the Planning Board’s proposed policy, which allows funds collected from Utilization Premium Payments to be allocated to areas adjacent to the impacted cluster. This aligns with the MCPS capital planning approach to use all school facilities in an area to address capacity needs and also aligns with the direction from the State Interagency Commission on School Construction to consider adjacent school capacity when planning construction.

Thank you for including these comments in your consideration of the Growth and Infrastructure Policy and Bill 16-24, *Development Impact Tax – Amendments*. We appreciate your partnership and support in providing the infrastructure needed to create a high-quality educational environment for all Montgomery County staff, students, and families.

Sincerely,



Karla Silvestre
President



Thomas W. Taylor, Ed.D., M.B.A
Superintendent of Schools

TWT:EM:mms

Copy to:

- Ms. Alfonso-Windsor
- Ms. McGuire
- Mr. Mamoon
- Ms. Webb
- Mr. Lockman

Scott C. Wallace
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October 3, 2024

BY EMAIL

The Hon. Andrew Friedson, President, and
Montgomery County Councilmembers
Montgomery County Council
100 Maryland Avenue
Rockville, MD 20850

Re: MCB White Oak, LLC – VIVA White Oak – Bill 16-24, Development Impact
Tax Amendments (the “Bill”)

Dear Council President Friedson and Councilmembers:

This office represents MCB White Oak, LLC (“MCB”), the contract purchaser and developer of the VIVA White Oak Project in Eastern Montgomery County (“VIVA”). On behalf of MCB, please include the following testimony in the record of the referenced Bill.

VIVA White Oak is a large-scale, multi-phased mixed-use project that will create a new live/work/play community adjacent to the FDA headquarters. As envisioned in the White Oak Science Gateway Master Plan, the project will have a transformative impact on East County. MCB is currently processing amendments to existing approvals with the Montgomery County Planning Board and expects to begin site development work in the second half of 2025.

The project is in a federally designated Opportunity Zone and leveraging the economic advantages of this designation is critical to the project’s success. One advantage is the existing exemption from County impact taxes for properties in Opportunity Zones. The Planning Board Draft of the Growth and Infrastructure Policy (the “Draft GIP”) recommends retaining this exemption and that recommendation is reflected in the Bill as introduced. We ask the Council to maintain the exemption as a way to incentivize much needed investment in Opportunity Zones. This is particularly critical given that the impact of the Opportunity Zones to attract investment has been muted first by the pandemic, and subsequently by high interest rates and construction costs.

Further, for long-term projects with existing plan approvals like VIVA, it is essential that this exemption be maintained after the designation expires as also recommended in the Draft GIP. In this regard, the Bill as introduced includes, at Lines 125-126, a provision to continue the exemption for areas formerly designated as Opportunity Zones.

The Hon. Andrew Friedson, President
And Montgomery County Councilmembers
October 3, 2024
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In order to ensure the stability and continuity of the economic assumptions and projections that support the financing of the project, we urge the Council to adopt the Bill with this provision and maintain the impact tax exemption after the Opportunity Zone designation expires.

If you need any additional information or have any questions, please do not hesitate to contact me.

Thank you for your consideration of this testimony.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Scott C. Wallace', is written over a light blue horizontal line.

Scott C. Wallace

cc: Ms. Pamela Dunn, Sr. Legislative Analyst
Ms. Livhu Ndou, Sr. Legislative Attorney
Mr. Bilal Ali, Legislative Analyst
Mr. Carlos Bonner, Sr. Managing Director,
MCB White Oak Developer, LLC



William Kominers
Attorney
301-841-3829
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October 3, 2024

The Honorable Andrew Friedson, Council President
Montgomery County Council
100 Maryland Ave., 6th Floor
Rockville, MD 20850

Re: Bill 16-24 Development Impact Tax -- Amendments (the "Bill")

Dear President Friedson and Members of the Council:

This letter is to transmit my comments on Bill 16-24, Development Impact Tax -- Amendments. Please place this letter in the Record of the public hearing on the Bill.

I presented my comments at the September 10 public hearing on the Draft 2024-2028 Growth and Infrastructure Policy (the "GIP"). Bill 16-24 is designed to implement legislative changes consistent with the Planning Board's recommendations as put forth in the Draft GIP. Thus, my comments on certain of the Impact Tax recommendations in the GIP are equally applicable to those elements of the Bill that would implement those recommendations. Therefore, I wish to express my support for those portions of the Bill that reflect the relevant GIP recommendations. A copy of my earlier testimony is attached.

Opportunity Zones (Lines 55-58 and 123-126; GIP Recommendation 4.9)

The recommendation to continue the Impact Tax exemption for properties in Opportunity Zones represents a critical economic development and equity matter for the County.

During its existence, the federal Opportunity Zone program has not solved all the problems of the distressed areas to which it applied. The County's Impact Tax exemption supports these same goals, but also has not yet achieved the desired results. The Planning Staff and the Planning Board recognized the need to continue the exemption from Impact Taxes for Opportunity Zone areas, beyond the completion of the federal tax benefits. Retaining the Impact Tax exemption for those areas previously designated as Opportunity Zones will continue to support the efforts of those areas to climb out of the circumstances that caused the Opportunity Zone designation in the first place. The challenges faced by these areas require long-term efforts, care, and some special treatment.

Recognizing the continuing struggle of these Opportunity Zone areas, the Planning Staff and Planning Board propose to continue the exemption from Impact Taxes once the federal

Opportunity Zone program and its designations expire. The Opportunity Zones can continue to be used to delineate geographic areas within which the Impact Tax exemption continues to apply.

Without the continued exemption for Opportunity Zones, areas such as downtown Silver Spring, downtown Wheaton, and White Oak, just as examples, will suffer severely negative effects on development activity. Construction costs in those areas are no different from those in Bethesda, while rental rate structures lag well behind the corresponding Bethesda rates. Adding the Impact Tax as a new cost into the financial equation for development in those areas can be expected to have a serious negative impact on the continued success of redevelopment.

Unfortunately, the time needed for overcoming of the distress in these areas requires a longer duration, and relief has a longer gestation period, than the life of the government designations as an Opportunity Zone. Therefore, the Impact Tax exemption for those geographic areas should be continued, by use of whatever means of identification can be established.

Bioscience Facilities (Line 62; GIP Recommendation 4.7)

The exemption from Impact Taxes for bioscience facilities is a valuable part of the toolkit to encourage bioscience uses in Montgomery County. Continuing the exemption for bioscience projects is appropriate and in the public interest. Adding the exemption to the Code will provide interested companies with assurance of greater certainty and consistency, which will benefit the County's pursuit of bioscience businesses.

Credits for Improvements to State Roads (Lines 77-82; GIP Recommendation 4.8(a))

This is change that is long overdue. The importance of this credit has escalated over time, as there are more frequent requests to make improvements to state roads (including non-vehicular facilities, such as sidewalks, bike paths, and crosswalks, as well as roadways). Often, those improvements are not called for by the state, but instead result from directions in County master plans or policies. Where the County is the source of the requirement, a credit should be given for the work, even if the improvement involves a state road.

In addition, the threshold requirement to "increase capacity" in order to receive a credit, should be eliminated. Such a measurement is very difficult to evaluate with non-vehicle facilities. Even for vehicles, there may be safety or significant roadway maintenance needs that are called for and satisfied by an applicant, where capacity is not increased, but the public interest is served. These too deserve credit.

School Construction Costs (Lines 146-149; GIP Recommendation 4.1)

This recommendation proposes to adjust the School Impact Tax to reflect the state aid portion of construction cost for schools. This is simply a matter of fairness. Applicants should only be asked to pay for the share of construction otherwise provided by the County. If part of construction is funded by a third party, the development should not have to duplicate that amount.

The Impact Tax should reflect only the cost to the County to build these facilities. To the extent that funds come from others, such as the state, those amounts should be deducted from the equation calculating the County share, and consequently, the applicant's assigned responsibility.

Thank you for your consideration of my comments.

Very truly yours,

LERCH, EARLY & BREWER, CHTD.

William Kominers

William Kominers

Enclosure

WK/bp

cc: Councilmember Gabe Albornoz
Councilmember Marilyn Balcombe
Councilmember Natali Fani-González
Councilmember Evan Glass
Councilmember Will Jawando
Councilmember Sidney Katz
Councilmember Dawn Luedtke
Councilmember Kristin Mink
Councilmember Laurie-Anne Sayles
Councilmember Kate Stewart
Livhu Ndou, Esquire

2024 – 2028 GROWTH AND INFRASTRUCTURE POLICY

Testimony of William Kominers

(September 10, 2024)

Good afternoon President Friedson and members of the Council. My name is Bill Kominers. I am an attorney with Lerch, Early & Brewer, but I am testifying today as an individual on the Planning Board Draft 2024 – 2028 Growth and Infrastructure Policy ("GIP" or the "Draft"). There are many positive thoughts and recommendations in the GIP, but there are also those that call for adjustment, or that should be included in the GIP, but are absent.

Recommendation 3.2. Returning the analysis threshold to 50 or more new peak hour vehicle trips is a positive change. The vehicle trips are easier to understand and identify. The language of the GIP should clarify that the 50 trips represent "50 or more new peak hour vehicle trips." The word "new" needs to be inserted into the recommendation.

Recommendation 3.4. The change in the non-motor vehicle adequacy test proposed by this recommendation – one test rather than three tests -- is hard to discern, and seems to be one of semantics rather than substance. Currently, as the Draft points out, there are three individual mode tests (pedestrian, bicycle, transit). The recommendation proposes changing to a single test that will encompass five modes -- stating that "the test will have five components" (the current three, plus ADA and illumination). This appears merely to be camouflage for a non-change change. Instead of three different tests, the recommendation proposes one test with five different components. A distinction without a difference? Similar to the Lord of the Rings with "one ring to rule them all," the GIP will have "one test to include them all."

Recommendation 3.5. Standardizing the study area distances across all policy areas (Table 9) is a positive change. However, the distances required for analysis for each of the different modes are not uniform and often seem excessive. The variation in distances can range over 500%. (For example, the Pedestrian Level of Comfort or PLOC must be analyzed for double the distance of ADA compliance. Bicycles are analyzed for over three times the distance of ADA).

Especially in urban areas (where the County wishes to focus development), there are vast numbers of facilities within these distances, all translating to costs. Improvements to these non-motor vehicle transportation modes can be particularly costly, not always because of the cost of the facilities themselves, but because of the cost of relocating the existing utilities that interfere. There is also no consideration of whether the facilities in question, such as curb ramps, are in compliance with the standards when they were built originally (which may be recently). Instead, they are evaluated against current standards, often requiring replacement of newer facilities.

To truly simplify the GIP, use the same study distances for each mode in the analysis.

Illumination. A separate category is proposed for illumination. Yet, the inventory of existing illumination (*i.e.*, streetlights) is held by the County and is established based on County standards. In order to obtain streetlight information to satisfy this test, the applicant must seek the

information from the Department of Transportation. That same information is then returned to the County as a part of the analysis. This seems like an unnecessary duplicative step, since the County already has the information desired. If streetlights are missing, the County should install them without being dependent on a nearby development.

Off-Site Improvements/Use of Impact Taxes. To simplify even further, the GIP and the subsequent LATR Guidelines, could dispense with analysis of these off-site non-vehicular elements such as sidewalks, streetlights, bike paths, and transit, and eliminate the "fix or fund" obligation on applicants. Instead, the "funding" for the "fix" should come from the Impact Tax payments that are required from the Project and be implemented by the County. Particularly today, when there is a preference not to make actual "road" improvements, these off-site improvements to support other modes of travel seem a proper use for Impact Tax revenues.

As an alternative to the individual project having to "fix" or "fund," an applicant could be required only to make the appropriate studies, to provide data on the conditions. Thereafter, the County would have that information for deciding where to spend Impact Tax dollars. In either case, the County could take the revenues and prioritize improvements to the greatest need, rather than obtaining improvements only as the serendipitous result of development proposals.

Recommendation 3.6. Managing speed for safety is certainly a valid concern. But before imposing the corrective burden on an applicant, consider how the analyses are conducted and determine whether the applicant can actually provide certainty of an answer or solution.

Recommendation 3.8. A factor should be added to the proportionality calculation formula to account for the development's percentage utilization of the quantity of impacts that trigger the need for an improvement. If a new development contributes only 10% to the quantity of impact, its responsibility should be limited to that same 10%. That percentage impact should be added as another multiplier in the calculation for the payment contribution. In short, if a new development becomes the straw of impact that crosses the quantity line and breaks the transportation camel's back, the applicant should only be responsible to mitigate its straw, rather than the entire camel.

Recommendations 3.9 and 3.10. Expanded use of fee-in-lien funds. The logic of these recommendations is understandable and reasonable. However, applying them undermines the nexus between the development and a payment based on the need for certain facilities to serve that development. If the payments can be used in adjacent areas, or for other modes of travel, they are no longer being used to solve the problems from which they arose. This seems to dilute or eliminate the nexus between the payments and the conditions that give rise to them.

Recommendations 3.11.a, b; 3.12; 3.13. These LATR exemptions represent positive steps toward meeting and supporting County goals. The LATR exemptions have a direct connection to implementing County policy decisions and should be approved.

Recommendation 3.14. Bioscience exemption from LATR. Extending the bioscience exemption from all LATR tests continues a favorable mechanism to support the County's economic development focus on bioscience facilities. Removing the three-year period for filing the building permit makes this exemption more practically usable.

Bioscience research and development does not proceed on a strictly linear basis. Scientific progress sometimes gets ahead of, or sometimes falls behind, the development review process in Montgomery County. Trying to keep in alignment those two parallel paths, each of uncertain duration, can be a challenge that is not always successful. Even with the best of intentions, a bioscience project may end up with the physical facility approved by the County, but delays from unexpected research setbacks, obstacles in clinical trials, or delays in FDA approval, may prevent the project moving forward on the building schedule as originally planned. The previous requirement in the GIP that an application for a building permit must be filed within three years after the approval of the Preliminary Plan or Site Plan, can cause application of the exemption to terminate and with it, a corresponding adverse effect on the underlying plan approval and its adequate public facilities review. Removing this limitation is a positive step to support this industry.

Recommendation 4.1. This recommendation proposes to adjust the School Impact Tax to reflect the state aid portion of construction cost. This is a matter of fairness, so that applicants are only being asked to pay for the share of construction provided by the County. If part of construction is funded by a third party, the development should not have to duplicate that amount. The Impact Tax should reflect only the cost to the County to build these facilities. To the extent that funds come from others, such as the state, those amounts should be deducted from the equation calculating the County share, and consequently, the applicant's assigned responsibility.

Recommendation 4.6. Office to residential conversions. The text notes correctly that the credits that currently exist are based upon applying the tax that "would have been" required for the office building that is being removed. That amount will then be credited against the tax required for the new residential building. This is consistent with the treatment that has been used heretofore and should be continued. The text notes quite correctly that a credit is only given for the transportation Impact Tax for the original office use against the transportation portion of the new residential tax cost.

Recommendation 4.7. Bioscience exemption from Impact Taxes. In a similar vein to the LATR exemption, the exemption from Impact Taxes for bioscience facilities is a valuable part of the County's toolkit to encourage bioscience uses in Montgomery County. Continuing the exemption for bioscience projects is appropriate and in the public interest. Adding the exemption to the Code will provide assurance of greater certainty and consistency, which will benefit pursuit of bioscience businesses.

Recommendation 4.8(a). Credits for improvements to state roads. This is a change that is long overdue. The importance of this credit has escalated over time, as there are more frequent requests to make improvements to state roads (including sidewalks, bike paths, and crosswalks, as well as roadways). Often, those improvements are not called for by the state, but instead result from directions in County master plans. Where the County is the source of the requirement, there should be a credit given, even if the improvement involves a state road.

In addition, the threshold requirement to "increase capacity" in order to receive a credit, should be eliminated. Such a measurement is very difficult with non-vehicle facilities. Even for

vehicles, there may be safety or significant maintenance needs that are called for and can be satisfied by an applicant. These too deserve credit.

Finally, the private sector should be included in the working group discussed in the Draft. This will help bring the perspectives and pertinent details from those who actually undertake the work to the consideration of what will be required and how it will be implemented.

Recommendation 4.9. Opportunity Zones. The recommendation on Opportunity Zones represents a critical economic development and equity matter for the County. During its existence, the federal Opportunity Zone program has not solved all the problems of the distressed areas to which it applied. The County's Impact Tax exemption supports these same goals, but also has not yet achieved the desired results. The Planning Staff and the Planning Board recognize that there is a need to continue the exemption from Impact Taxes for Opportunity Zone areas, beyond the completion of the federal tax benefits. Retaining the Impact Tax exemption for those areas previously designated as Opportunity Zones will continue to support the efforts of those areas to climb out of their present circumstances that caused the Opportunity Zone designation in the first place. The challenges faced by these areas require long-term efforts, care, and some special treatment.

Recognizing the continuing struggle of these Opportunity Zone areas, the Staff and Planning Board propose to continue the exemption from Impact Taxes once the federal Opportunity Zone program and its designations expire. The Opportunity Zones can continue to be used to delineate geographic areas within which the Impact Tax exemption continues to apply.

For ease of understanding and to facilitate taking advantage of this economic development measure, the maps of those Opportunity Zones should be included in the GIP, just like the transportation policy area maps. In this way, the boundaries and the applicability to specific properties will be very clear.

Without the continued exemption for Opportunity Zones, areas such as downtown Silver Spring, downtown Wheaton, and White Oak, will suffer severely negative effects on development activity. Construction costs in those areas are no different from those in Bethesda, while rental rate structures lag well behind the corresponding Bethesda rates. Adding the Impact Tax as a new cost in the financial equation for development in those areas can be expected to have a serious negative impact on the continued success of redevelopment.

Unfortunately, the time for resolution of the distress in these areas has a longer duration, and relief has a longer gestation period, than the life of the government designations as an Opportunity Zone. Therefore, the Impact Tax exemption for those geographic areas should be continued, by use of whatever means of identification can be found.

New Recommendation. Address No Impact and De Minimis Impact.

No Impact. A development application that does not propose any additional square footage, or proposes a change of use that does not generate any net new peak hour trips, or proposes only *de Minimis* impacts should be exempt from providing any improvements (frontage improvements or other improvements called for by any master, sector, or functional plan), and should be deemed

to satisfy adequate public facilities standards by virtue of being an existing condition that is not changing.

This proposed exemption will recognize that when producing no new impacts on public facilities, there is no nexus for requiring any new improvements.

De Minimis Impact. In addition to the no impact scenario above, a development application that proposes new development of only a *de Minimis* quantity should also be exempt from adequate public facilities review and from providing any improvements, (whether frontage or other improvements called for by any master, sector, or functional plan). For this purpose, "*de Minimis*" would mean traffic generation of up to [a number to be decided] commercial trips, or up to [a number to be decided] residential trips, including an equivalent combination of both, and up to a total of [a number to be decided] school students of all levels.

Thank you for your consideration of these comments and recommendations. I am happy to try to answer any questions you may have.

Elizabeth C. Rogers
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October 3, 2024

The Honorable Andrew Friedson, President
And Members of the Montgomery County Council
Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850

**Re: Development Impact Tax Amendment – Bill No. 16-24
Adjustment to Infill Impact Area Boundaries in Germantown and Definition of
“High-rise unit”**

Dear President Friedson and Members of the County Council:

Our firm represents Lerner Enterprises, the long-time owner and master developer of the project commonly known as “Black Hill,” in Germantown, Maryland. The overall Black Hill development is comprised of approximately 107 acres of land located along Crystal Rock Drive and Century Boulevard (surrounding the intersection of the two streets), just west of I-270 and approximately 1.5 miles north of the Germantown Center (the “Property”). The Property is zoned Commercial/Residential CR 0.75, C-0.5, R-0.5, H-145T and also located in the Germantown Transit Mixed Use Overlay zone. The Black Hill development is a multi-phased, mixed-use development which is currently approved for up to 3,284,000 square feet of total development (the “Project”). Several phases of the Project have been built to-date, including approximately 97,000 square feet of office use, 140 Assisted Living beds, approximately 6,400 square feet of retail use, and 355 multi-family dwelling units, along with a significant amount of open space and amenities. There are an additional 292 multi-family dwelling units that are approved and “building permit” ready, pending favorable economic conditions.

We are requesting that the County Council (1) reject the change proposed to the definition of “high-rise units” in Bill 16-24 and (2) adjust the proposed School Impact Area designation for the Property. These requested changes will better align with current County policy and facilitate the construction of additional, much-needed housing on this Property and others.

I. Definition of High-Rise Units in Proposed Impact Tax Legislation

Currently, Chapter 52 of the County Code defines high-rise units to include “any dwelling unit located in a multifamily residential or mixed-use building that is taller than 4 stories, and any 1-bedroom garden apartment.” (*Emphasis added*). Bill 16-24, as currently proposed, eliminates

one-bedroom garden apartments from this definition. This would have significant negative impacts on currently planned projects. It is also a matter of fairness, as many developers have relied on this definition, which has been unchanged since 2003 (*see* Bill 31-03), in preparing development budgets and feasibility for projects. This change would have a drastic, negative economic impact on those garden apartment projects that have relied on this calculation. The Black Hill development is a prime example. Lerner Enterprises has obtained Site Plan and building permit approval for the next phase of the multi-family development in Black Hill, comprised of six multi-family residential buildings and 292 dwelling units. However, due to the challenges presented by high construction costs and persistently high interest rates, although the building permits have been “approved,” Lerner has not pulled the building permits. As a result, these buildings have sat “building permit ready” since August 2022. This proposed change would only further setback the next phase, and this desirable, additional residential development. This change alone, with all else remaining equal, would add \$1,084,314 in additional development impact taxes to the 292 units planned in the next phase of the project. We ask that the Council reject this proposed modification or, if the Council is not so inclined, at least provide grandfathering for those projects that are already well into the entitlement process, and proceeding in reliance on this long-standing definition.

II. School Impact and Transportation Policy Area Designations

We applaud the Planning Board for recommending that Germantown be reclassified in the Orange Policy Area, which is appropriate for “[c]orridor cities, town centers, and emerging transit-oriented development (TOD) areas where premium transit service (*e.g.*, Corridor Connectors and bus rapid transit) is planned.” (Planning Board Draft, 2024-2028 Growth and Infrastructure Policy, Page 6). Germantown is planned to have numerous Corridor Connector and Bus Rapid Transit routes. The Property sits at the terminus of the Manekin West Connector. In fact, Lerner Enterprises has funded the design of the future Dorsey Mill Road Bridge, which would provide for a direct connection between the Manekin West Connector and the Milestone/COMSAT East Clarksburg Connector, if constructed. As such, the Property certainly fits within the definition ascribed to Orange Policy Areas. This reclassification is reflected in Bill 16-24 and we support this change.

However, the Property is proposed to be located in a Turnover Impact Area, which is not reflective of the existing and planned development. As such we are requesting that the County Council expand the Infill Impact Area to also include the Property. Infill Impact Areas are intended to include those areas with “[h]igh housing growth predominately in the form of multi-family units that generate relatively fewer students on a per-unit basis.” (Planning Board Draft, 2024-2028 Growth and Infrastructure Policy, Page 4) (*emphasis added*) (as opposed to Turnover Impact Areas that are intended for areas with “[l]ow housing growth where enrollment trends are largely dependent on the turnover of existing single-family units.” *See Id. Emphasis added.*). This Property is certainly aligned with an Infill Impact Area classification, given the largely multi-

family residential development that is approved and/or planned for the residential component of the Black Hill development.

This change is fair as it would treat the Property similarly to other multi-family developments in the County. And from a practical perspective, it would have a positive impact on increasing housing production, which the County desperately needs. As discussed herein, Lerner Enterprises is trying to get the next phase of the Black Hill development, which includes 292 multi-family dwelling units, off the ground. Lerner Enterprises has obtained all necessary approvals for the next phase but has not moved forward with construction due to economic factors. This modification would provide a meaningful economic change to help get this next phase out of the ground.

We appreciate your time and consideration of our requests.

Sincerely,


Elizabeth Rogers

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October 3, 2024

The Honorable Andrew Friedson, President
And Members of the Montgomery County Council
Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850

**Re: Development Impact Tax Amendment – Bill No. 16-24
Exemption from Impact Taxes for Projects Providing No Parking and Located near
Metro**

Dear President Friedson and Members of the County Council:

Our firm represents Community Three Maryland, LLC, (“Community Three”), the owner of the property located at 4725 Cheltenham Drive in Bethesda, Maryland (the “Property”). The Property contains approximately 0.24 acres and is zoned CR 3.0, C-2.0, R-2.75, H-90’ and located in the Bethesda Overlay Zone. Community Three has obtained Sketch, Preliminary and Site Plan approvals, and even its building permit, for the redevelopment of the underutilized Property (previously used as a single-story automotive detailing use), transforming it into a unique residential apartment building containing eight (8) live/work units and 102 dwelling units, with 15% Moderately Priced Dwelling Units and the market rate units designed to target workforce housing rent levels within HUD AMI parameters (the “Project”).

We use the term unique, in large part, because the approved Project is not providing any parking on-site. The Property is located within the Bethesda Parking Lot District and Community Three made the decision to provide no parking long before the approval of ZTA 23-10, which allows certain transit-accessible residential developments to eliminate its parking requirement. The County has long since sought to incentivize reduced parking, given the important planning and policy objectives this promotes (as recognized by the Council in its adoption of ZTA 23-10). To further this important public policy objective, we are requesting that the Council provide an **exception that would eliminate any impact tax obligation if a project, located within ½ mile**

of a Metro station, and within a Parking Lot District, provides no parking on-site.¹ This mirrors the distance requirement in ZTA 23-10.

We recognize that this request is coming to the Council a bit late in the process; however, for the reasons set forth in this correspondence, we believe it makes sense to include this exemption. We also would note that, although they did not consider this specific request, an important focus of the Planning Board in its review of the GIP and associated modifications to the Development Impact Taxes was how the County can implement policies that will promote desirable development.² This fits that bill.

Why provide the exemption for both transportation and school impact taxes? For the transportation impact tax, first and foremost, a project that provides no on-site parking is placing little to no stress on the road network where the transportation impact taxes are designed to be utilized. Using Vehicle Miles Traveled (“VMT”) as a measure to assess the need for transportation impact taxes leads to the conclusion that a project without parking will generate the least amount of VMT’s. Instead, these future residents will likely be utilizing transit and thus, providing the additional ridership that the region’s transit services critically need. As far as the school impact tax is concerned, that exemption is like other exemptions in the Code, which seek to promote an important policy objective. Nonetheless, we would note that market forces will dictate which building can successfully provide no parking on-site. A building that has no parking is almost certain to contain smaller units (primarily studios and one bedrooms), and thus, generate far fewer students, if any, as compared to a buildings that has larger units and on-site parking. As such, there is a clear nexus to waiving the transportation and school impact tax requirements for buildings that provide no parking. Simply put, under current economic conditions, as is, the impact tax policy severely limits, if not eliminates, the ability to build workforce housing units with no parking.

Not only does this exemption further an important policy objective, but from a practical point of view, it will allow for the advancement of much-needed additional housing near transit. Community Three has been working to move their Cheltenham project forward without great success. High construction costs and persistently high interest rates have taken its toll on the Project’s feasibility. Providing the exemption will help close the gap and truly make a difference

¹ If the Council wanted, this exemption could further be limited to projects in Red Policy Areas. Red Policy Areas are envisioned for “Downtowns with current or master planned high-density development and premium transit service (e.g., Metrorail, Purple Line, BRT).” (See Public Hearing Draft, Growth and Infrastructure Policy 2024-2028, page 24).

² We would note that the Planning Board’s support for ZTA 23-10 is applicable to this requested exemption. In the Planning Board’s transmittal statement to the County Council in connection with ZTA 23-10, date December 27, 2023, the Board noted: “The Planning Board is very supportive of these changes, as they align with many of its recent planning initiatives that are working to reduce vehicle miles traveled, reduce car dependency, and generally create great spaces that are made for people rather than vehicles.”

in getting this Project off the ground (as opposed to the continuation of the automotive use of the Property).

The Development Impact Taxes are an important tool in the County's tool box for implementing important land use policies and objectives. This requested exemption is a specific and important upgrade to those policies – further reinforcing the Planning Board's initiatives to “reduce car dependency, and generally create great spaces that are made for people, [at all income levels,] rather than vehicles.”

We appreciate your time and consideration of our request.

Sincerely,



Steven A. Robins



Elizabeth Rogers

October 9, 2024

Andrew Friedson, President and
Members of the Montgomery County Council
100 Maryland Avenue, 6th Floor
Rockville, Maryland 20850

Re: Bill 16-24: Development Impact Taxes – Amendments

Dear President Friedson and Members of the Montgomery County Council:

The attorneys at Miles & Stockbridge P.C.’s land use/zoning practice group in Rockville (the “Miles Group”) wish to provide written testimony on Bill 16-24: Development Impact Taxes – Amendments (the “Bill”). The Miles Group requests the Bill provide a transportation impact tax credit for the undergrounding of existing utilities. We believe this addition will enhance the County’s development impact tax law as a significant tool for implementing beneficial policy goals, including supporting a diverse transportation network, enhancing economic competitiveness, and promoting environmental resilience.

Recent master plans have consistently encouraged development projects to underground existing utilities as a frontage improvement.¹ Countywide functional master plans have also recognized there are transportation benefits for pedestrians and cyclists associated with undergrounding existing utilities.² A requirement to underground existing utilities, however, can render a desirable development project

¹ See, e.g., 2023 Fairland and Briggs Chaney Master Plan, pgs. 86, 108 (“[u]tilities should be underground”); 2022 Silver Spring Downtown and Adjacent Communities Plan, pg. 132 (“[r]elocate existing utilities underground”); 2021 Ashton Village Center Sector Plan, pg. 99 (“[b]ury existing overhead utilities, if feasible”); 2021 Shady Grove Sector Plan Minor Master Plan Amendment, pg. 141 (identifying “undergrounding of utilities” as a priority public benefit under the optional method of redevelopment); 2020 Forest Glen/Montgomery Hills Sector Plan, pg. 50 (“[e]mphasize the importance of undergrounding utilities during redevelopment”); 2019 MARC Rail Communities Sector Plan, pg. 54 (“[e]valuate relocating existing overhead utilities underground”); 2018 White Flint 2 Sector Plan, pg. 104 (identifying “undergrounding of utilities” as a priority public benefit under the optional method of redevelopment).

² See, e.g., 2023 Pedestrian Master Plan, pg. 2 (identifying “removing obstructions like utility poles from pedestrian pathways” as a “particularly significant recommendation”); 2018 Bicycle Master Plan, pg. 143 (stating utilities should “not conflict with the future construction of the bikeway”).

financially infeasible and/or result in increased costs for renters and homeowners due to the complexity and expense involved.

As a result, the Bill should be amended to add undergrounding of existing utilities to the list of improvements eligible for an impact tax credit under Sections 52-47 and 52-50 of the County Code. Although the Miles Group believes it is appropriate to provide a full credit for the entire cost associated with undergrounding existing utilities, providing even a partial credit for 75% of the cost is worthwhile for several reasons. Undergrounding existing utilities is similar to many transportation improvements already eligible for impact tax credits under Section 52-50 of the County Code (such as bicycle and sidewalk facilities) that promote walking, biking, and rolling, and reduce reliance on the automobile. Allowing impact tax credits for undergrounding existing utilities can also support the economic viability of development projects that advance important County priorities, such as sustainability, housing attainability, and safety.³ Additionally, providing development impact tax credits for undergrounding existing utilities recognizes the shared responsibility of the private and public sectors to enhance our built environment.

Thank you for your consideration of our comments.

Sincerely,

MILES & STOCKBRIDGE P.C.



Casey L. Cirner



Phillip A. Hummel

Scott C. Wallace / by:
P.A.H.

Scott C. Wallace

cc: Livhu Ndou, Senior Legislative Attorney
Bilal Ali, Legislative Analyst

³ For reference, Gaithersburg's recently adopted revised Zoning Ordinance provides a density bonus for the undergrounding of overhead utility lines along MD 355. See § 24-4.4(C)(2)(c)(iii) of the Gaithersburg City Code.