

Bill No. 28-05
Concerning: Building Permits –
Adequate Public Facilities
Revised: 3-13-06 Draft No. 3
Introduced: October 11, 2005
Enacted: March 21, 2006
Executive: April 3, 2006
Effective: July 3, 2006
Sunset Date: None
Ch. 5, Laws of Mont. Co. 2006

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

By: Council President at the request of the Planning Board

AN ACT to:

- (1) revise the standards and process for determining the adequacy of certain public facilities with respect to applications for certain building permits;
- (2) shift certain authority to determine the adequacy of certain public facilities from the Director of the Department of Permitting Services to the Planning Board;
- (3) repeal certain obsolete temporary provisions regarding the process for determining the adequacy of certain public facilities; and
- (4) generally amend the law regarding the issuance of building permits.

By amending

Montgomery County Code
Chapter 8 Buildings
Sections 8-30 through 8-36

Boldface	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

The County Council for Montgomery County, Maryland approves the following Act:

1 **Sec. 1. Sections 8-30 through 8-36 are amended as follows:**

2 **Article IV. Timely Adequate Public Facilities Determination.**

3 **8-30. Purpose; definitions.**

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

8 (b) *Definitions.* In this Article, the following words and phrases have the
 9 meanings stated, unless the context clearly indicates otherwise.

10 (1) *Development* means proposed work to construct, enlarge, or alter
 11 a building for which a building permit is required. [It]
 12 Development does not include an addition to, or renovation or
 13 [reconstruction] replacement of, an existing [structure] building
 14 if, as measured under guidelines adopted by the Planning Board
 15 for calculating numbers of vehicle trips and students [gross floor
 16 area does not increase by more than 5,000 square feet.]:

17 (A) occupants of the [[renovated or reconstructed]] building
 18 would generate fewer than 30 total peak hour vehicle trips;
 19 or, if they would generate more than 30 trips, the total
 20 number of trips would not increase by more than 5; and

21 (B) the number of public school students who will live in the
 22 [[renovated or replacement]] building would not increase
 23 by more than 5.

24 (2) *Non-residential development* means any development that [is]
 25 does not [exclusively for] contain only any type of dwelling or
 26 dwelling unit (including a multiple-family building, mobile home
 7 or townhouse) [that is] as defined in Section 59-A-2 [of the

28 Zoning Ordinance], and any [extensions, additions] extension,
 29 addition, or accessory building.

30 [(3) Owner means any owner of record of property as shown on the
 31 tax rolls on July 1, 1989, and includes any successors in interest
 32 prior to January 1, 1990.]

33 [(4) Tenant means a lessee under a written lease with an owner or its
 34 agent that was executed on or before July 24, 1989 and who
 35 occupies the leased space for the conduct of its normal business
 36 operations on that date. It does not include assignees or
 37 successors in interest after July 24, 1989.]

38 (3) Existing building means a building that was standing and
 39 substantially occupied [[at all times]] during the 12 months
 40 before an application for a building permit for renovation or
 1 reconstruction is filed.

42 (4) Renovation means an interior or exterior alteration that does not
 43 affect a building's footprint.

44 (5) Replacement means demolition or partial demolition of an
 45 existing building and rebuilding that building. A replacement
 46 building may exceed the footprint of the previous building.

47 (6) Recorded lot means any parcel, lot, or other tract of land recorded
 48 as developable property among the County land records.

49 [(5)] (7) Timely adequate public facilities determination means an
 50 adequate public facilities determination by the Planning Board
 51 that is required [as a prerequisite to the issuance of] before a
 52 building permit is issued, or is within the time limits prescribed
 53 by law for the validity of an adequate public facilities
 4 determination, or both. [It encompasses all standards and

55 requirements of the adequate public facilities ordinance and any
56 adopted growth policy, including standards for adequacy of
57 transportation facilities.]

58 [(6) Traffic mitigation agreement means an agreement executed in
59 accordance with Section 42A-9A of this Code.]

60 [(7) Transportation Director means the Director of the County
61 Department of Public Works and Transportation, or the Director's
62 designee.]

63 **8-31. Requirement for timely adequate public facilities determination; [special**
64 **provisions for proposed non-residential development on pre-1982 recorded or**
65 **approved lots or parcels]; applicability.**

66 (a) [Except as] As provided in subsection (b), the Director may issue a
67 building permit only if the Planning Board has made a timely
68 determination [has been made] that public facilities will be adequate to
69 serve the proposed development encompassed by the permit application
70 under:

- 71 (1) Chapter 50, if required;
- 72 (2) Chapter 59 for project plans or site plans, if required; or
- 73 (3) Section [8-34 of this article] 8-32 for development if the Planning
74 Board or its designee finds that a new adequate public facilities
75 determination is required under this Article, Section 50-20, or
76 other applicable law.

77 The [proposed] work performed after the permit is issued must conform
78 to the uses and amount of development for which the adequacy of
79 public facilities was [determined] reviewed.

80 (b) Applicability. This Article applies to each applicant for a building
81 permit on a recorded lot for which no valid finding of adequate public

82 facilities has been made, including any recorded lot for which an
 83 original finding of adequate public facilities has expired.

84 [(b) *Requirements for proposed non-residential development on pre-1982*
 85 *recorded or approved lots or parcels.* Until July 25, 2001, the
 86 Department of Environmental Protection may issue a building permit,
 87 without a timely adequate public facilities determination, for a proposed
 88 non-residential development on a lot or parcel recorded before January
 89 1, 1982, or otherwise recorded in conformance with a preliminary plan
 90 of subdivision approved before January 1, 1982, that is registered under
 91 Section 8-32, if:

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

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

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

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

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

106 [(c) *Transit related projects.* An applicant may satisfy local area
 107 transportation review requirements under subsection (b), when road
 108 improvements are not practical, by absorbing the proportional cost of

109 transit or ridesharing related projects that reasonably may be expected to
110 mitigate the traffic generated by the proposed development.]

111 [(d) *Transportation improvement cost credit.* The Director of the
112 Department of Public Works and Transportation may grant a
113 construction cost credit in a public improvement agreement to an
114 applicant required to provide transportation improvements to satisfy
115 local area transportation review under subsection (b) for previously
116 constructed public highway capacity that is unused by the original
117 subdivision at the time of the building permit application for the
118 proposed non-residential development. The credit must be based on the
119 original improvement cost and must not exceed the cost at the time of
120 construction for the unused capacity provided by the added
121 improvements. The Planning Board must have required the original
2 improvement to meet an adequate public facilities requirement at the
123 time of preliminary plan of subdivision approval, as shown by the
124 Planning Board opinion, related memoranda, or similar written
125 documentation. The Director must not give a credit for roads inside the
126 subdivision, roads required to provide necessary access, sidewalks, or
127 similar improvements.]

128 **[8-32. Registration of certain properties.**

129 (a) *Obligation to register.* Each owner of a non-residential lot or parcel
130 recorded before January 1, 1982, or otherwise recorded in conformance
131 with a preliminary plan of subdivision approved before January 1, 1982,
132 must register with the planning board before January 1, 1990. The
133 county executive, in consultation with the planning board, must provide
134 at least 5 months notice to potentially affected property owners of the
5 requirements of this section and the need to register. The registration

136 deadline may be extended, administratively, as appropriate, to
137 accommodate transfers of property in the last two quarters of calendar
138 year 1989, late notice, or similar circumstances.

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

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

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

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

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

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

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

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

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

161 (e) *Effect of failure to register.* Non-residential development on a property
 162 that is not registered must receive an adequate public facilities
 163 determination under Section 8-31(a)(3).]

164 **[8-33. Partial exemption from full compliance with local area transportation**
 165 **review requirements.**

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

169 (1) is subject to a site plan applied for or approved on or before July
 170 24, 1989;

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

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

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

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

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

183 (ii) intended to accommodate specific and defined
 184 employment and operational needs of an owner or tenant
 185 identified by registration under Section 8-32 if such owner
 186 or tenant maintains its level of occupancy in all existing
 7 buildings and will be the principal occupant of the

188 proposed development. Occupancy is measured by the
189 gross square footage used by employees of the owner or
190 tenant in the conduct of its business. The owner or tenant
191 must occupy at least 70% of the new building or buildings
192 to be occupied, in the aggregate, excluding common areas
193 for use by the public or use by occupants, at the time of
194 initial occupancy; and

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

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

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

213 (2) An applicant for an exemption under subsection (a)(3) of this
214 section may be granted an exemption only for square footage

215 covered by the foundation plans. An application remains subject
216 to the provisions of Section 8-25(b).

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

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

226 (2) Necessary transportation improvements should be considered
227 feasible under paragraph (1) unless:

228 (i) the improvement is inconsistent with the relevant master
229 plan or plans;

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

232 (iii) the incremental cost of all improvements makes the
233 proposed development uneconomical. For purposes of this
234 subparagraph only, an incremental cost that exceeds 10%
235 of the total construction cost for the development or \$7 per
236 square foot (as adjusted for inflation), whichever is less,
237 without the transportation improvements, will be presumed
238 to make the project uneconomical. However, an applicant
239 may show, through clear and convincing evidence, that a
240 lesser amount should apply in the particular case.

241 Construction costs include all related structures and

242 parking facilities, as well as site work and post-design
243 architectural and engineering supervisory services.
244 Estimated construction costs may be calculated with
245 reference to industry standards or other appropriate bases
246 for estimates, as determined by the Director of the
247 Department of Public Works and Transportation. An
248 adjustment for inflation under this subparagraph must be
249 calculated from the second quarter of 1989 under an
250 appropriate construction cost index set by executive
251 regulation.

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

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

- 265 (1) registration and ownership information;
266 (2) an owner's or tenant's business or facility management plan, if
267 any:
.8 (3) staging plans;

- 269 (4) layout and design;
 270 (5) lease or financing arrangements;
 271 (6) occupancy projections;
 272 (7) construction costs of the applicant;
 273 (8) market conditions and constraints;
 274 (9) construction costs and experience of comparable projects; and
 275 (10) any other relevant factors.

276 (e) In determining whether an owner or a tenant is the same entity
 277 identified by registration, related subsidiaries, affiliates, holding
 278 companies, or the equivalent, at the time of registration for owners or on
 279 July 24, 1989 for tenants, must be treated as if they are the same entity.
 280 A successor in interest to the owner or tenant by acquisition, merger, or
 281 other transfer of a controlling interest, must be treated as if it is the same
 282 entity if it maintains the corporate name and identity of the owner or
 283 tenant in the same business at the same location.]

284 **[8-34] 8-32. Administrative procedures.**

285 (a) *Initial referral of applications.* [The Director must refer all applications
 286 that require a new adequate public facilities determination under Section
 287 8-31(a)(3) or that may require local area transportation traffic review
 288 under Section 8-31(b) to the Director of the Department of Public
 289 Works and Transportation and the Planning Board. The procedures of
 290 subsections (c) through (f) apply to applications considered under either
 291 Section 8-31(a)(3) or Section 8-31(b).] The Director must refer each
 292 building permit application to which this Article applies to the designee
 293 of the Planning Board to conduct an adequate public facilities analysis
 294 for the Board's review.

295 (b) Review by other agencies. The Director must also refer each application
 296 to which this Article applies for comments on the adequacy of public
 297 facilities to:

- 298 (1) the Department of Public Works and Transportation;
- 299 (2) the Superintendent of the Montgomery County Public School
 300 System;
- 301 (3) the County Fire and Rescue Service; and
- 302 (4) the Department of Police.

303 Each of those agencies and departments must submit any comments on
 304 the application to the Planning Board within 30 days after receiving the
 305 application from the Director.

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

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

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

321 (3) Staff Recommendations. Upon receipt of a complete traffic study,
 322 the Planning Department must send a copy to the Director of the
 323 Department of Public Works and Transportation. After reviewing
 324 the traffic study, the appropriate staff of the Planning Department
 325 and the Department of Public Works and Transportation should
 326 consult with the applicant to discuss the traffic conditions posed
 327 by the proposed development and the need for any transportation
 328 improvements. The applicant should be notified in writing, within
 329 45 days after receiving a complete traffic study, of any
 330 transportation improvements that will be recommended by either
 331 staff.

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

337 [(c) *Preliminary recommendation of Director of the Department of Public*
 338 *Works and Transportation.* The Director of the Department of Public
 339 Works and Transportation must submit the Director's preliminary
 340 recommendations on the application, including any request for an
 341 exemption, to the Planning Board, before the Planning Board's review
 342 under subsection (d).]

343 [(d)] (c) *Review and finding by Planning Board.*

344 (1) *Standards and Conditions.* The Planning Board [must] may
 345 consider an application for timely adequate public facilities
 346 determination [or a Section 8-31(b) review in accordance with the
 7 criteria set forth in subsection (f)(1). Planning Board

348 consideration may be made] as part of a site plan review under
 349 Division 59-D-3 [of the Zoning Ordinance] if site plan review is
 350 otherwise [applicable] required. The [Planning] Board may
 351 condition its [recommendation] adequacy finding on the
 352 execution of appropriate agreements with an applicant to the
 353 extent permitted for adequate public facilities determinations
 354 under subdivision or site plan [reviews] approval procedures.

355 (2) *Hearing Requirement.* An applicant for a building permit or
 356 other interested person must be given the opportunity for a
 357 hearing before the Board acts under this Section. [However, a]
 358 The Planning Board [decision does not constitute] finding is final
 359 agency action for purposes of judicial review.

360 (3) *Planning Board [Recommendation] Finding.* When the Planning
 1 Board receives all necessary information from the applicant and
 362 [the preliminary recommendation of the Director of the
 363 Department of Public Works and Transportation] reviews any
 364 comments received from other public agencies and any other
 365 person, the [Planning] Board must [make written
 366 recommendations on the application to the Director within the
 367 time required by law for preliminary plan of subdivision
 368 decisions. The Planning Board must transmit to the Director of
 369 the Department of Public Works and Transportation a copy of the
 370 Board's recommendation to the Director] find, consistent with the
 371 adopted Growth Policy, whether all applicable public facilities
 372 will be adequate to support the proposed development.

373 (4) The [Planning] Planning Board may establish procedures to carry
 4 out its responsibilities under this Section, including procedures to

375 delegate the review of certain applications to a designee of the
 376 Board.

377 [(e) *Final recommendation of the Director of Public Works and*
 378 *Transportation.* Within 30 days after receiving a Planning Board
 379 recommendation under subsection (d), the Director of the Department
 380 of Public Works and Transportation must submit a final
 381 recommendation to the Director of Environmental Protection.]

382 [(f)] (d) *Decision by Director.*

383 (1) *Administrative Decision.* After receiving the [recommendations]
 384 adequacy finding of the Planning Board [and the Director of the
 385 Department of Public Works and Transportation], the Director
 386 [must decide on an application and any request for an exemption,
 387 using the criteria of this Article, the adequate public facilities
 8 ordinance, any adopted growth policy, and related administrative
 389 regulations, as appropriate. The Director] may issue, deny, or
 390 condition any permit, as appropriate, including requiring [the
 391 execution by] the applicant [of] to execute binding agreements
 392 with the Planning Board [or the Department of Public Works and
 393 Transportation].

394 (2) *Appeal.* An applicant or other interested person may appeal the
 395 decision of the Director [in accordance with] as provided in
 396 Section 8-23. The Planning Board must receive notice of [all
 397 decisions] each decision of the Director under this Section and
 398 any appeal to the Board of Appeals. The Planning Board may
 399 intervene, request a hearing, and otherwise participate fully in a
 400 proceeding before the Director, the Board of Appeals, or any
 J1 court with respect to the adequacy of public facilities.

402 [(g)] (e) *Time limit.* An adequate public facilities determination made under
 403 this Section remains valid for not less than 5 or more than 12 years, [[as
 404 provided]] using the standards in Section 50-20.

405 **[8-35] [[8-33. Penalties.**

406 The knowing submission of a false registration application or a false
 407 application for an exemption under this article is a violation of this Chapter for
 408 purposes of Section 8-22.]]

409 **[8-36. Regulations.**

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

413 (b) Prior to the granting of a transportation improvement construction cost
 414 credit under Section 8-31(d), the County Executive must adopt
 5 regulations that establish the procedures and methodology used for
 416 calculating the credit.]

417 **8-33, 8-34, 8-35, 8-36. Reserved.**

418 **Sec. 2. Transition.** Any replacement building for which a site plan
 419 application was accepted by the Planning Board before this Act became law need not
 420 comply with the requirements of Section 8-31, as amended by Section 1 of this Act,
 421 for a timely adequate public facilities determination if:

422 (a) the building was not required to obtain that determination before this
 423 Act took effect; and

424 (b) the replacement building would be less than 1,000 square feet larger
 425 than the building it would replace.

426 *Approved:*

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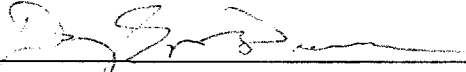
3/21/06

George L. Leventhal, President, County Council

Date

429 *Approved:*

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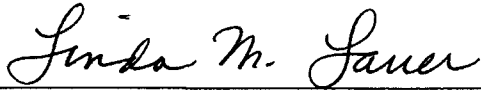
3/23/06

Douglas M. Duncan, County Executive

Date

431 *This is a correct copy of Council action.*

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4/4/06

Linda M. Lauer, Clerk of the Council

Date