



To: Jon Laria, Chair, Maryland Sustainable Growth Commission  
Maryland Sustainable Growth Commissioners

From: Frank Hertsch, Chair, APFO Leadership Workgroup

Subject: Report on MSGC APFO Workgroup Review of 2012 APFO Reports

**Workgroup Participants:** Frank Hertsch, Chair, Jon Laria, Greg Bowen, David Carey, Jenny King, Arabia Davis, Chuck Boyd, Tyler Grote, Philip LaCombe, and Ryan Hall.

The APFO Leadership Workgroup has convened three conference calls to discuss the role and tasks of the workgroup to meet the Sustainable Growth Commission's charge to:

*Review the reports of local jurisdictions on adequate public facilities development restrictions required by Article 66B, § 10.01 of the Code, and assess whether and to what extent adequate public facilities ordinances affect the achievement of the goals of the State economic growth, resource protection, and planning policy;*

Members of the workgroup requested a status report on the submission of the required Adequate Public Facility Ordinance (APFO) Annual Reports. The workgroup members indicated that they were interested to identify the positive and negative effects of these ordinances, particularly as they may relate to limiting or halting development activities within Priority Funding Areas (PFAs). The workgroup members expressed a concern that insufficient capacity for public facilities, such as, roads and schools could have a consequence of directing growth to areas not intended for growth.

- MDP Staff reported that APFO Reports are due every two years. The first APFO Reports were due July 1, 2010. The second APFO Reports were due July 1, 2012. Currently, there are thirty-nine (39) jurisdictions with adopted APFOs, fourteen (14) counties and twenty-five (25) municipalities.
- The MDP Yearbook 2012/2011 contains the first summary report on the impacts of APFO's, where required. The summary report includes information received from fifteen (15) jurisdictions, including 10 counties and 5 municipalities.
- The MDP 2012 APFO Inventory for Maryland Jurisdictions Report provides a complete overview of all APFOs, including facilities evaluated, links to ordinances; level of service standards by facility type; timing of APFO tests; and qualifying APFO exemptions.
- The MDP 2012 APFO Tracking Matrix provides a listing of all APFO Reports received, by jurisdiction; an inventory of any APFO restrictions, by jurisdiction and facility type; identification of any remedies; and an inventory of residential and non-residential development totals.

- As of September 19, 2012, the MDP staff is working with Anne Arundel County, Calvert County, Annapolis and Frederick to receive their APFO Reports for 2012.
- Statewide, there are limited reports of APFO restrictions that remain unresolved. Wide variations in reporting and level of service standards make comparisons between public facilities somewhat problematic. To address this issue, the Leadership team agreed that in the future a reporting template would need to be developed for consistency purposes.

#### **Summary of Reported Restrictions:**

- Baltimore County reported restrictions in fifteen (15) school districts, seven (7) signalized intersections and one (1) sewer service area. It was not clear from the information provided that the proposed remedies resolved all restrictions. For the sewer restriction, the resolution is expected to take between 5-10 years. No incremental data is provided. Staff will continue to coordinate with Baltimore County to more fully understand the scope of the remedy and proposed resolutions.
- Montgomery County reported that School Fee Payments were required for fourteen (14) schools. It was not clear that the School Fee Payments were sufficient to address the restrictions. Staff will continue to work with Montgomery County to more completely understand the conditions, including reports that the City of Rockville is considering amending the level of service standards for schools from 110% to 120%.
- Howard County reported restrictions in multiple Elementary, Middle and High Schools affecting eighteen (18) subdivisions. It was not clear from the information provided that the proposed remedies would resolve all restrictions, as the APFO Report only reports that fifteen (15) of the (eighteen) 18 new proposed subdivisions had identified a remedy. Staff will continue to work with Howard County to more completely understand the conditions.
- Queen Anne's County reported a restriction on new residential development due to School APFO restrictions. The County identified that the capacity for schools was amended from 100% to 120%. This change to the APFO standard for schools was sufficient to remove the restriction. However; the change to the APFO standard is subject to voter referendum approval in November.
- Carroll County has suspended school impact fee collection for two years.

#### **APFO Workgroup Initial Framework:**

The members discussed a framework for the APFO workgroup assessment to generally address:

- What are the effects?
- Is the restriction legitimate or not?
- What needs to be done to remedy the issue?
- What are the impacts on Smart Growth?
- Who pays?

### **Workgroup Member Questions:**

- The workgroup members questioned whether or not local APFO reviews were conducted at the site plan stage or the permit stage? Workgroup members also questioned whether or not local APFOs prohibited new construction if the public facility was overcrowded or whether or not the APFO allowed applicants to build or buy their way out?
- Workgroup members questioned if there was any Maryland case law which prevented local governments from restricting development after a 5-7 year period, due to infrastructure deficiencies. MDP staff was requested to research and to provide workgroup members with a list of any relevant case law on this topic.
- Workgroup members questions whether or not there were any existing sewer moratoria issued by the MDE that was currently limiting development within a PFA? There was also a discussion of identifying sewer systems that are currently required to prepare a Management Plan for facilities that have reached 80% of its approved capacity. MDP staff is coordinating with MDE to seek answers to these questions.

### **Workgroup Discussions:**

The workgroup discussed the need to prepare a frame work to address the types of impacts that the group wanted to address and strategy for getting something done, including:

1. The standards for an APFO ordinance and questioned if existing APFOs could contain language which was overly or underlie permissive. Suggestions to consider were:
  - Examine a few of the ordinances to ensure that they are valid and well written;
  - Examine if APFO ordinances are supporting Smart Growth;
  - Evaluate any restrictions to Smart Growth projects, such as, TODs;
  - Evaluate if available State funding uses a rationale method; and
  - Consistency of APFO ordinances with Twelve State Visions and Bay Restoration.
2. Whether or not local governments were using APFOs to protect the public health or to restrict development activity?
3. How development activities impacted by APFO would result in a moratorium for a temporary period of time until the capacity issue was resolved?
4. How much capacity was available for public facilities and whether or not development in preferred growth areas had been effected?
5. A need for a trigger for more capacity and if capacity issues were a result of the County/Towns not funding additional capacity or that the State wasn't doing its part?
6. If local governments had financial plans to remedy infrastructure deficits and what is being done at the local and state levels to get more infrastructure in the right places? What are the capital processes and funding mechanisms for curing infrastructure deficiencies?

### **Adequate Public Facilities Report Outline:**

The committee discussed a general outline for the report that the group would produce. There is concern that a report limited to analysis of the available data may be less than satisfactory due to the wide variation of Adequate Public Facilities Ordinances (APFO) and the limited data available.

The following outline was suggested as a frame work for the report within which the available data could be used to provide more specifics where hard data is available:

1. Discuss the predecessors to APFO
  - a. Building moratoria imposed to address immediate threats to public health and safety.
  - b. The limitations of such growth control.
    - i. After the fact reaction to health threats
    - ii. Failure to go beyond health threats and address quality of life issues
    - iii. Failure to provide in solutions to inadequate facilities
2. Adequate Public Facilities Ordinances may address issues beyond public health concerns
  - a. Adequacy to meet expectations and provide levels of service relating to quality of life over and above threats to health.
  - b. Facilities including but not limited to those necessary to address immediate health concerns.
3. Types of facilities APFO may address
  - a. Sewers
  - b. Potable Water
  - c. Roads
  - d. Schools
  - e. Fire protection services
  - f. Police protection
  - g. Libraries
  - h. Recreation Facilities
4. Levels of service and adequacy beyond immediate health threats
  - a. Sewers
    - i. Bacteriological control
    - ii. Resource protection
  - b. Potable Water
    - i. Bacteriological control
    - ii. Water quality standards
    - iii. Daily consumption
    - iv. Fire protection
  - c. Roads
    - i. Life safety
    - ii. Intersection congestion
    - iii. Air quality and environmental protection

- d. Schools
    - i. State capacity construction funding
    - ii. Community expectations
    - iii. Temporary classrooms
  - e. Fire protection
  - f. Police protection
  - g. Libraries
  - h. Recreation
5. Types of APFO
- a. The simplest ordinances set a standard for adequacy in a category and prohibit building activity until the standard is met. These have some recognized shortcomings.
    - i. Corrective Measures may be lacking. Within the most lively and polarized debates concerning APFO all sides agree the growth limitations should be of a temporary nature for the purpose of allowing time to provide or otherwise relieve demands on facilities. With no mechanism to provide adequate facilities the circumstances which lead to substandard facilities may simply continue without improvement.
    - ii. Risk of underutilization. When multiple APFO tests are imposed the cumulative effect is that the perfect is the enemy of the good. If for example a jurisdiction has adopted standards for 4 categories and on fails adequacy the public investment in other categories may go unused until the on inadequate facility is resolved.
    - iii. Growth areas are more susceptible to facilities limitations
  - b. There are a number of variations of adequate public facility ordinances which not only imposes moratoria but attempt to provide a mechanism for relief. There are several variations to this general theme.
    - i. Some require the construction of facilities of sufficient capacity to bring the facilities to adequacy standards
    - ii. Some require the construction of facilities of sufficient capacity to offset the capacity required to serve the proposed development
    - iii. Some require the payment of fees collected for the purpose of contributing to construction costs of facilities necessary to meet adequacy standards
6. APFO and public policy initiatives
- a. Smart Growth
  - b. Community preservation
  - c. Economic growth and jobs formation
  - d. Chesapeake Bay water quality
  - e. Twelve State Visions
7. The timing issue and fixed limits
- a. Facility design to meet peak demands
    - i. May be necessary for facilities with direct health consequences
    - ii. May result in economic waste where facilities are underutilized for long periods of time in order to meet maximum demands

b. Specifics

- i. Should we design roads to meet all peak demand
- ii. Should we design sewers to meet all peak demand
- iii. Should we build enough schools to eliminate temporary classrooms
- iv. How many major fires should our water system be ready to fight

8. Conclusions and Recommendations

## Adequate Public Facilities Ordinances

### I. State Law Authorization

Article 66B §10.01 – applies to all jurisdictions (Land Use Article “LU” §§7-101 to 7-103)

§10.01.

(a) To encourage the preservation of natural resources or the provision of affordable housing and to facilitate orderly development and growth, a local jurisdiction that exercises authority granted by this article may enact, and is encouraged to enact, ordinances or laws providing for or requiring:

(1) The planning, staging, or provision of adequate public facilities and affordable housing;

(2) Off-site improvements or the dedication of land for public facilities essential for a development;

(3) Moderately priced dwelling unit programs;

(4) Mixed use developments;

(5) Cluster developments;

(6) Planned unit developments;

(7) Alternative subdivision requirements that:

(i) Meet minimum performance standards set by the local jurisdiction;

and

(ii) Reduce infrastructure costs;

(8) Floating zones;

(9) Incentive zoning; and

(10) Performance zoning.

(b) Notwithstanding any other provision of law, a local legislative body that exercises authority granted by this article may enact ordinances or laws providing for the transfer, with or without consideration, of real property belonging to the local jurisdiction to a public or private entity, to use in developing or preserving affordable housing.

(c) The authority provided under this section is not intended to limit a local jurisdiction’s authority to:

(1) Exercise any planning and zoning powers not expressly authorized under this section; or

(2) Adopt other methods to:

(i) Facilitate orderly development and growth;

(ii) Encourage the preservation of natural resources; or

(iii) Provide affordable housing.

Article 28 §7-120 – applies to Prince Georges and Montgomery Counties (LU §23-106)

(a) In addition to any other authority granted by this article, the County Council of Montgomery County and the County Council of Prince George's County, by legislation, may impose in their respective county standards and requirements for the purpose of avoiding the scattered or premature subdivision or development of land because of the inadequacy of transportation, water, sewerage, drainage, school, or other public facilities.

(b) In Prince George's County:

(1) Notwithstanding the provisions of subsection (a) of this section, the County Council of Prince George's County shall impose adequate public facilities standards and requirements under subsection (a) of this section with respect to schools; and

(2) This subsection does not apply to any property located in an infrastructure finance district approved before January 1, 2000.

## II. Maryland Case Law on Adequate Public Facilities

*Malmar Associates v. Prince Georges County*, 260 Md. 292 (1970)

- A Prince George's County special exception ordinance that required proof of adequacy of school facilities before the granting of a special exception was legal

*MNCPPC v. Rosenberg*, 269 Md. 520 (1973)

- Prince George's County APFO assumed valid
- Court overturns decision of MNCPPC to deny subdivision based on school adequacy based on testimony in case

*Annapolis Market Place v. Parker*, 369 Md. 689 (2002)

- Rezoning premised on adequacy of public facilities are legal
- Court overturns Board of Appeals finding that applicant had met the burden of proving adequacy because the applicant had not presented affirmative evidence on the adequacy of facilities as required by the ordinance.

*Nes v. Anne Arundel County*, 95 Fed. Appx 497 (2004)(4<sup>th</sup> Circuit Court of Appeals)

- Property owner challenges Anne Arundel County's APFO in federal court on equal protection grounds arguing that the APFO imposed development conditions on her that were not imposed on other developers.
- Federal appeals court held that County did not impose different development conditions that would violate the equal protection clause.

## III. Seminal Out-of-State Case

*Golden v. Town of Ramapo*, 30 N.Y.2d 359 (1972)

New York's highest court held that:

- Town's APFO (sewer, drainage facilities, parks, schools, roads and firehouses) was constitutional and not a unconstitutional taking of property without compensation.
- Restrictions in APFO must be of a certain duration, i.e., not permanent, and founded upon estimate determined by fact.

*Golden* is cited by the Maryland Court of Appeals in *MNCPPC v. Rosenberg*, 269 Md. 520 (1973)