OFFICE OF THE COUNTY ATTORNEY

Isiah Leggett
County Executive

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County Attorney

MEMORANDUM

August 24, 2007

TO: Sandra L. Brecher, Administrator
Commuter Services Section

VIA: Marc P. Hansen MPH
Deputy County Attorney

FROM: Clifford L. Royalty CLR
Chief, Division of Zoning, Land Use, & Economic Development

RE: Siena Corporation - Transportation Management District Fee Payment

By letter dated July 6, 2007, you requested this office's opinion as to whether Siena Corporation, the owner of "EZ Storage," a business located in the North Bethesda Transportation Management District, must pay the County's transportation management fee.

Summary of Opinion

Siena Corporation must pay the transportation management fee.

Background

Chapter 42A ("Ridesharing and Transportation Management") of the Montgomery County Code creates various mechanisms and programs for managing and reducing traffic congestion. Two such mechanisms are the traffic mitigation agreement ("TMAg") and the traffic mitigation plan ("TMP"). The TMAg is authorized under §§ 42A-9A and 42A-25 of the Code. Section 42A-9A states that the "purpose of the traffic mitigation agreement is to reduce single occupancy vehicle traffic from a proposed development . . . ." A TMAg entered into under § 42A-9A may provide for, *inter alia*, limits on parking spaces, "preferential parking requirements for carpools and vanpools," and subsidies for transit or vanpools. The requirements of § 42A-9A are triggered when a "traffic mitigation agreement . . . is required to

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be executed with the County . . . under Chapter 8, as a prerequisite to the issuance of a building permit." A TMAg executed under § 42A-9A is "in addition to, and not in lieu of, any other transportation requirement imposed on the applicant under law." *§ 42A-9A(a)(3).*[1]

Section 42A-25 also provides for a TMAg for any "proposed subdivision or optional method development" located in a transportation management district. *§ 42A-25(a).* The TMAg "must specify transportation demand management measures that the applicant or a responsible party must carry out." *§ 42A-25(a).* The TMAg (similar to the § 42A-9A TMAg) may limit parking spaces, establish "parking charges," and provide subsidies for "employees not using single-occupancy vehicles." *§ 42A-25(a).* A TMAg entered into under § 42A-25 must be "agreed to by the applicant, the Department [of Public Works and Transportation], and the Planning Board." *§ 42A-25(d)(1).*

A third pertinent transportation management tool is the traffic mitigation plan ("TMP"). Section 42A-24(b) provides that any "employer who employs more than 25 or more employees" in a transportation management district must submit a TMP to the Director of the Department of Public Works and Transportation ("DPWT"). A TMP "may include an alternative work hour program, carpool or vanpool incentives, subsidized transit passes, preferential parking, peak period or single-occupancy vehicle parking charges . . . and other transportation demand measures." *§ 42A-24(c).*

The cost of reviewing and monitoring the foregoing transportation agreements and plan is defrayed by a transportation management fee. Under § 42A-29(a)(1), the Department "must annually charge" the transportation management fee to "an applicant for subdivision or optional method development in a [transportation management] district and each successor in interest." If a resolution creating a transportation management district so provides, the Department must also assess the fee to "an owner of existing commercial and multi-unit residential property." *§ 42A-29(a)(2)(b).* Pursuant to Bill 36-05, which was enacted in January of 2006, the Council determines the amount of the fee.

According to the legislative history that you provided and our own research, excepting the Bill 36-05 revision, the foregoing operative language has been in effect since 1993. Thus

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[1] All statutory references are to the 2004 Montgomery County Code unless otherwise noted.

that language was in effect in 2003 when, according to your records, a TMAg was first negotiated with Siena Development Corporation ("Siena"). You provided us with a copy of a document titled "Traffic Mitigation Agreement" dated August 8, 2003, between Siena, the Montgomery County Department of Public Works and Transportation and the Montgomery County Planning Board. That TMAg was signed by Siena and the Planning Board, but not the County. You have also provided a second document titled "Traffic Mitigation Agreement" that is dated April 5, 2004, and that is executed by Siena, Montgomery County, and the Montgomery County Planning Board.

You have advised us that Siena is located in the North Bethesda Transportation Management District and that there was no transportation management fee assessed to that district from January 1, 2000, to May 25, 2006, when the Council adopted Resolution 15-1481. That resolution established a transportation management fee of $0.10 per square foot of gross floor area for commercial space located in the district. Pursuant to correspondence dated April 30, 2007, DPWT notified Siena of the applicability of the fee and invoiced Siena in the amount of $8,700.00. By letter dated May 11, 2007, Siena claimed that the "invoice was issued in error." Siena alleges that it is exempted from the fee by "Clause 2" of its TMAg.[2] That clause reads as follows:

> Satisfaction of TMD Requirements. Siena will provide a residential dwelling within the Project which will house the full-time employees of the Project. Accordingly, there will be no employees of the Project accessing the Project by vehicle during the peak travel hours in the North Bethesda Policy Area. It is further evidenced that fewer than 25 employees are generated by the Project; thus, the requirements of Chapter 42A of the Montgomery County Code are inapplicable to the Project. This fully satisfies the TMD Requirements of Siena.

Siena contends that, because its business allegedly generates "fewer than 25 trips," Chapter 42A, inclusive of the transportation management fee, is "inapplicable" to Siena. By letter dated June 7, 2007, DPWT advised Siena that it would seek the County Attorney's opinion concerning Siena's contention.

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[2] In the letter, Siena identifies itself as "Siena Corporation." We will assume that "Siena Corporation" is the successor to "Siena Development Corporation."

Discussion

The "Clause 2" upon which Siena relies is included, verbatim, in both versions of the Siena TMAg that you provided. However, because the August 2003 TMAg was not signed by the County, we will assume that it is not operative. Also, because neither TMAg references any specific provision of Chapter 42A, we are unsure what provision of that chapter the TMAg was intended to effect. As is discussed above, a § 42A-25 TMAg requires the Planning Board to be a signatory. Because the Planning Board executed the April 2004 TMAg, we will assume that TMAg was entered into pursuant to § 42A-25. You have also advised us that there has been a practice of combining portions of the TMAg with a TMP. We are unsure whether the Siena TMAg was intended to satisfy any applicable TMP requirement.

We have been unable to determine the provenance of the foregoing "Clause 2." We have been advised that the language is not standard to any TMAg or TMP and was likely the product of a negotiation with Siena. The language may have been drafted by Siena's counsel.

Nevertheless, with respect to the "Clause 2" language, we acknowledge that, standing alone, the language lends some support to Siena's claim. However, the language does not stand alone. The language must be harmonized with the other provisions of the TMAg and must be read within the larger legal context. *See County Commissioners of Charles County v. St. Charles Associates*, 366 Md. 426, 784 A.2d 545 (2001). The most salient provision that must be harmonized with "Clause 2" is contained in the recitals. Specifically, Section G of the TMAg quotes from a Planning Board staff memorandum that recommends requiring Siena to enter into a traffic mitigation agreement that

> shall include a traffic mitigation plan that will define the applicant's obligations to assist in mitigating traffic including cooperating with the traffic mitigation organization for the following:
>
> [t]o pay the traffic management fee established by the County to support the TMD.[3]

[3] The Planning Board approved the recommendation of its staff. *See Montgomery County Planning Board Opinion, Preliminary Plan 1-01072, October 16, 2001.*

As is discussed above, at the time that the TMAg was entered into, there was no applicable transportation management fee. The law *authorized* a fee, but no fee was being imposed in Siena's district. The recital language may be read as contemplating that Siena will be responsible for the fee. And the "Clause 2" language that refers to the inapplicability of Chapter 42A, may be interpreted as only referencing the then-applicable provisions of the chapter.

Moreover, Siena's claim that its low trip generation exempts it from the fee does not square with the statutory language. Trip reduction is a goal to be achieved through the TMAg and TMP; the achievement of that goal does not create an exemption from the fee. The fee expressly applies, *inter alia*, to "an applicant for subdivision or optional method development approval." *§ 42A-29(a)(1)*. Under the law, as long as Siena fits within that category (or another applicable one), it is liable for the fee. An agreement cannot alter the law. *See Chesapeake Outdoor Enterprises v. Baltimore*, 89 Md. App. 54, 597 A.2d 503 (1991); *McGinley v. Massey*, 71 Md. App. 352, 525 A.2d 1076 (1987).

We conclude with a caveat. While we reject the Siena interpretation, a court may not. Siena may well benefit from the lack of precision in the language of the TMAg. We recommend against allowing this language to sneak into any future agreements.

Please contact us if you would like to discuss our opinion.

cc: Arthur Holmes, Jr., Director of DPWT

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