

SUBSTITUTE #4 TO ORDINANCE NO. 00-102

TO AMEND CHAPTER 13 OF THE NEW CASTLE COUNTY CODE (UNIFIED DEVELOPMENT CODE OR “UDC”), ARTICLES 11 AND 33, REGARDING LEVEL OF SERVICE WAIVERS AND TRAFFIC MITIGATION AGREEMENTS

WHEREAS, *New Castle County Code* Chapter 13 (the Unified Development Code or “UDC”), article 11, requires that development occur only where there are adequate transportation facilities in place or programmed for construction; and

WHEREAS, in designated infill areas, the Southern New Castle County Sewer Service Area or existing developed areas where there are existing roadway segments or intersections functioning at unacceptable levels of service (LOS) and where it is unlikely that capital improvements will eliminate the problem, an applicant may ask New Castle County Council to approve an LOS Waiver; and

WHEREAS, every LOS Waiver must be based upon a Traffic Mitigation (TM) Agreement designed to insure and implement a satisfactory reduction in the traffic generated by the proposed land development; and

WHEREAS, New Castle County recognizes that the Delaware Department of Transportation (DelDOT) possesses the technical expertise to accommodate analysis and review of trip reduction/transportation demand management (TDM) measures in connection with proposed LOS Waiver-related Traffic Mitigation (TM) Agreements; and

WHEREAS, toward the end of working together to craft and enforce TM Agreements, DelDOT and the County have entered a joint agreement to effect that goal; and

WHEREAS, it is appropriate that New Castle County and DelDOT work together to craft each TM Agreement and to see that the ultimate goals contained in the TM Agreements are reached; and

WHEREAS, New Castle County Council has determined that the provisions of this ordinance substantially advance, and are reasonably and rationally related to, legitimate government interests (i.e., promoting the health, safety, morals, convenience, order, prosperity and/or welfare of the present and future inhabitants of this State).

NOW, THEREFORE, THE COUNTY OF NEW CASTLE HEREBY ORDAINS:

Section 1. Section 11.130 (Traffic Impact Study Requirements), Article 11 (Transportation Impact) of Chapter 13 of the *New Castle County Code* is hereby amended by adding the material that is underlined and by deleting the material that is bracketed [].

Section 11.130 TRAFFIC IMPACT STUDY REQUIREMENTS

- A. A traffic impact study shall be prepared.....
 - 1. The anticipated peak hour....
 - 9. Recommendations regarding what, if any, [traffic mitigation measures] trip reduction/transportation demand management (TDM) measures would be necessary to attain an acceptable level of service. If the report indicates that level of service will be exceeded, a Traffic Mitigation (TM) [plan] Agreement shall be submitted detailing the infrastructure improvements to be made [and a statement of the maximum development that can be accommodated without mitigation].
 - 10. A statement signed by the applicant and referenced on the plan certifying that:
 - a. The project information in the study is true and correct;
 - b. The traffic analysis was conducted in accordance with the requirements of this Chapter;

Cross-reference should also be made to Section 11.230 of this Chapter for further specifics regarding TM Agreements.

- [c. For projects approved based on applicant sponsored trip reduction programs, that such programs shall be completed by the applicant or the applicant’s successors in interest;
- d. A financial guarantee in a form acceptable to the Department shall be submitted by the applicant with the record plan to guarantee preparation of a follow-up report on the effectiveness of the trip reduction programs no later than one year after the last certificate of occupancy for the project.
- e. Should the results of such follow-up report reveal that the expected trip reductions were not achieved, additional measures shall be taken by the applicant to enhance and/or modify the trip reduction program, which additional measures shall be subject to review and approval by the Department with advice from DelDOT; and
- f. That the applicant will provide notice of the requirement for a follow-up study and the possible requirement for additional trip reduction measures to any future purchasers or successors in interest of the subject property.]

Section 2. Section 11.150 (Subdivision or Land Development Traffic Impact Study Plan Approval), Article 11 (Transportation Impact) of Chapter 13 of the *New Castle County Code* is

hereby amended by adding the material that is underlined.

Section 11.150 SUBDIVISION OR LAND DEVELOPMENT TRAFFIC IMPACT STUDY PLAN APPROVAL

- A. Upon receipt of the traffic impact study....
- B. Based upon the above criteria....
- C. If the traffic impact study is approved or approved with conditions for a major plan, the applicant must proceed with the exploratory plan review and a preliminary plan submission as provided in Article 31. The applicant and future owners shall provide educational materials and conduct informational programs with employees and/or residents regarding available modes of transportation. This may include, but is not limited to, the explanation and availability of bus and train schedules, information on Ride Share Delaware, location of bike paths, etc. A note regarding the owner's responsibility to provide alternate mode of travel education shall be added to the Record Plan.

Section 3. Section 11.155 (Rezoning Traffic Impact Study Plan Approval), Article 11 (Transportation Impact) of Chapter 13 of the *New Castle County Code* is hereby amended by deleting the material that is bracketed [].

SECTION 11.155 REZONING TRAFFIC IMPACT STUDY PLAN APPROVAL

Rezoning Applications. In addition to the provisions contained in Section 11.150 (A) above, the Department may request DelDOT's assistance in determining if the cumulative impact of proposed zoning changes for a given review period requires additional highway improvements or whether only a portion of the requested zoning changes for a review period can be supported. The Department may permit testimony and additional information to be submitted regarding any proposed mitigation. In considering a rezoning, the Department's and Planning Board's recommendations shall take into account the cumulative impact of the proposed rezonings, any mitigation proposed, and the factors that must be considered for rezonings set forth in Article 31 of this Chapter. [If a rezoning is granted by County Council, the applicant must submit a final plan to the Department within three (3) years of the granting of the rezoning.]

Section 4. Section 11.220 (Traffic Mitigation Measures), Article 11 (Transportation Impact) of Chapter 13 of the *New Castle County Code* is hereby amended by adding the material that is underlined and by deleting the material that is bracketed [].

SECTION 11.220 TRAFFIC MITIGATION MEASURES

- A. Traffic mitigation measures shall be required if the applicant proposes to develop at a density that would exceed the current levels of service as set forth in Section 11.210. To be considered, traffic mitigation measures must result in an acceptable level of service

and may include any one or all of the following:

1. A reduction in the proposed density or intensity of development;
2. The phasing of construction to coincide with the completion of programmed transportation construction projects which are identified in DelDOT's six-year capital improvements program;
3. The construction of off-site highway improvements by the applicant;
- [4. The extension of bus or train service to the site or the provision of transit-related site improvements, approved by the Department, with advice from the Delaware Transit Corporation;
5. Any combination of the measures listed in subsections A through D of this Section or additional measures which are approved by the Department with the advice of DelDOT such as travel link, transit check and Rideshare Delaware.
6. Transportation demand measures developed by the applicant to reduce the number of trips to the site during peak periods, whether through vanpools, carpools, changes in work schedules or some other measure acceptable to DelDOT and the Department and designed to achieve the goal of the WILMAPCO Metropolitan Transportation Plan of a ten percent (10%) mode shift by the year 2020.]

B. The specific mitigation measures shall be chosen based on their ability to [reduce the traffic generated by the proposed subdivision or land development, in order to] achieve and maintain acceptable levels of service for roadway segments and intersections within the area of influence of the project. All proposed traffic mitigation measures approved by the Department shall be recorded in the form of a declaration of restrictions which must be submitted to the Department with all necessary recording fees. All deed restrictions shall be prepared by the applicant and approved by the Department and the Department of Law prior to final approval of a plan by the Department or the granting of a rezoning by County Council. The declaration of deed restrictions may contain a clause indicating that the restrictions do not become effective unless the proposed development is approved by County Council. No development for which mitigation is required shall be permitted until the approved mitigation is under construction or is under contract awarded by DelDOT. Zoning changes may only be approved if the needed mitigation project is part of that current year's capital budget.

C. Traffic Mitigation (TM) Agreements shall be used by an applicant when an acceptable level of service cannot be reasonably achieved and when an applicant is unable to phase or reduce the density or intensity of the development proposal and unable to provide highway improvements to meet LOS standards. As part of the LOS Waiver process, a TM Agreement shall be prepared and approved pursuant to Section 11.230 of this Chapter.

Section 5. Section 11.230 (Level of Service Waiver), Article 11 (Transportation Impact) of Chapter 13 of *the New Castle County Code* is hereby amended by adding the material that is underlined and by deleting the material that is bracketed [].

Section 11.230 **LEVEL OF SERVICE (LOS) WAIVERS AND TRAFFIC MITIGATION (TM) AGREEMENTS**

A. **Level of Service (LOS) Waiver.** If the proposed development is located in a designated infill area, the Southern New Castle County Sewer Service Area, or existing developed area where there are existing roadway segments or intersections functioning at unacceptable levels of service, as defined by Section 11.210, the applicant may, in writing, request County Council to adopt a resolution approving an LOS Waiver. The LOS Waiver request shall be accompanied by a TM Agreement, and filed with New Castle County Council and the New Castle County Department of Land Use with DelDOT’s recommendation and comment. [forwarded to the Department for a recommendation. The Department shall then have twenty (20) days to issue its recommendation to County Council. The Department shall consider the following when developing a recommendation:

1. The locations of the roadway segments and intersections that will have unacceptable levels of service and the relative effect construction of the subdivision or land development will have on the roadway segments and intersections;
2. The number and types of current and future constructed projects in the area of influence of the proposed development and the effect the projects had on the results of the traffic impact study;
3. The types of traffic mitigation measures or transportation improvements proposed by the applicant to reduce traffic congestion from the proposed development;
4. The potential for transportation improvements that will result in the attainment of acceptable levels of service being included in future DelDOT capital improvement programs; and
5. The extent to which the proposed development represents the logical infilling or completion of an established land use pattern, offers the opportunity to advance affordable housing, economic development or other objectives of the Comprehensive Development Plan. The applicant’s ability to achieve the goals of the WILMAPCO Metropolitan Transportation Plan ten percent (10%) mode shift shall also be considered.]

B. Traffic Mitigation (TM) Agreement. Every applicant who requests an LOS Waiver

from New Castle County Council shall be required to enter into a TM Agreement with DeIDOT. In connection with the application to obtain an LOS Waiver, DeIDOT will coordinate its negotiations with the applicant in the preparation of a TM Agreement with the Department of Land Use. Every TM Agreement shall be executed by the applicant and DeIDOT. Each TM Agreement will typically contain the following:

1. Primary trip reduction measures that the applicant must implement in order to achieve quantitative trip reduction goals, which shall include at a minimum no more than 85 employee vehicles per 100 employees arriving during the morning, peak traffic period or departing during the evening peak traffic period on any given day. A Trip Reduction Measures Selection Form is found in Appendix 6, Miscellaneous Items of the UDC, from which the applicant may select, on a case-by-case basis, the specific measures to be incorporated into the TM Agreement. This form shall not be considered to be an exhaustive list of potential measures.
2. Contingent trip reduction measures, some or all of which shall be utilized in the event that the primary measures fail to achieve the trip reduction goals.
3. A requirement that the applicant will pay the reasonable costs of a third-party consultant (retained and supervised by DeIDOT) to serve as an auditor. The Department of Land Use shall participate on the consultant selection committee. The third-party auditor will annually audit the applicant's progress on implementation of the specific TDM measures it has agreed to implement and the effectiveness of such measures in achieving trip reduction goals.
4. A requirement that the applicant will develop a budget of the total costs that the applicant expects to bear for the implementation of the TDM measures for the five (5) years following the issuance of the Certificate of Occupancy (CO), exclusive of the cost of the independent auditor. This budget shall be developed by the applicant and approved jointly by DeIDOT and the Department of Land Use prior to, and as a condition of, the issuance of a CO. DeIDOT shall retain the consultant by use of its normal consultant contract procedures, including but not limited to the use of an appropriate hourly-fee based method for compensation, as well as the normal DeIDOT limitations on profit, overhead, and chargeable fees.
5. A requirement that the applicant will secure the implementation of the TDM measures with a financial guarantee, deposited with and held by DeIDOT. The financial guarantee shall be provided by a bond, certified check, letter of credit, or other form of security in a manner and form approved by DeIDOT. The guarantee must be posted at the time the CO is issued, shall be in an amount equal to one hundred and fifty (150) percent of the total costs of implementing the TDM measures and shall remain in effect for five years. For multi-phased projects such a financial guarantee shall be posted at the time that the CO is issued for each subsequent building. DeIDOT may also draw on the financial guarantee to pay for the cost of the auditor, should the applicant fail to make payment within a reasonable period of time. The amount otherwise drawn upon the financial

guarantee shall be limited to an amount equal to the amount thus far unexpended by the applicant under the approved budget for such costs, up to the one hundred and fifty (150) percent limit.

6. In connection with an LOS Waiver, any other provision(s) that New Castle County Council adds or adopts as a condition of an LOS Waiver. The waiver thus will be conditioned on the applicant and DelDOT accepting and agreeing to the provisions.

C.[B.] LOS Waivers and TM Agreement Approval.

1. After DelDOT (in consultation with the Department) and the applicant have negotiated the TM Agreement, the applicant may submit a written request to County Council and the Department for an LOS waiver which shall be accompanied by TM Agreement and DelDOT's comments and recommendations with regard to the TM Agreement.
2. The New Castle County Department of Land Use will review the LOS waiver, TM Agreement and DelDOT's comments and recommendations and shall submit its written recommendation within (20) days to County Council. The Department shall consider the following when developing a recommendation:
 - a. The locations of the roadway segments and intersections that will have unacceptable levels of service and the relative effect construction of the subdivision or land development will have on the roadway segments and intersections;
 - b. The number and types of current and future constructed projects in the area of influence of the proposed development and the effect the projects had on the results of the traffic impact study;
 - c. The types of traffic mitigation measures or transportation improvements proposed by the applicant to reduce traffic congestion from the proposed development; The potential for transportation improvements that will result in the attainment of acceptable levels of service being included in future DelDOT capital improvement programs; and
 - d. The extent to which the proposed development represents the logical infilling or completion of an established land use pattern, offers the opportunity to advance affordable housing, economic development or other objectives of the Comprehensive Development Plan.
3. Upon receipt of the Department's recommendation, County Council shall act on [a] the LOS Waiver resolution of approval at one of its next two regularly scheduled public meetings. Any action taken by County Council regarding the resolution that is inconsistent with a recommendation of disapproval from the

Department shall require the approval of not less than two-thirds of all members of County Council.

4. If County Council grants an LOS Waiver, it may approve the TM Agreement with or without conditions. If conditions or additional provisions are required, approval of the LOS Waiver will be contingent upon agreement to the conditions or additional provisions by DelDOT and the applicant, and execution of an amended TM Agreement including the conditions or additional provisions.
5. Upon approval by County Council, with or without modifications, the TM Agreement shall be incorporated into the grant of the LOS Waiver and shall be recorded in the New Castle County Office of the Recorder of Deeds at the cost of the applicant, as a deed restriction that runs with the land. All deed restrictions shall be prepared by the applicant and approved by the Departments of Land Use and Law prior to final approval. The applicant's final record plan shall indicate the Book and Page where the deed restriction is recorded. A copy of the TM Agreement and the LOS Waiver shall also be provided to the WILMAPCO by the applicant.
6. As an additional condition of the grant of an LOS Waiver, the applicant shall post a financial guarantee of its obligations under the TM Agreement with DelDOT, as described in subsection B.5. above.

D. Employer Reports, Compliance Audits and Enforcement of trip reduction/transportation demand management (TDM) measures.

1. **Compliance Audits.** While the TDM measures are being implemented by the applicant in accordance with the TM Agreement:
 - a. DelDOT will retain a third-party consultant at the applicant's expense, pursuant to B.3. above, to serve as an independent auditor of the applicant's implementation of the TM Agreement; and
 - b. Beginning with the issuance of the CO for the first building, the applicant will, for two (2) years or until the independent auditor confirms that such measures have been fully implemented, whichever first occurs, provide to DelDOT and the Department semi-annual reports (beginning six (6) months after the CO is issued or earlier if required by DelDOT) on the progress of its implementation of the TDM measures in the TM Agreement. In connection with a multi-phase development, a new two-year period shall begin with the issuance of each CO; and
 - c. The independent auditor will provide the applicant, DelDOT, the Department and WILMAPCO annual audits on the progress of the applicant's implementation of the TDM Measures in the TM Agreement and achievement of the trip reduction goals.

2. **Enforcement.** Should either DeIDOT or New Castle County determine that the applicant has failed to make a good faith effort to implement, or to continue to implement, the TDM measures in the TM Agreement, one or more of the following actions may be initiated or undertaken by either DeIDOT or New Castle County. Before either DeIDOT or New Castle County determines that the applicant has failed to make a good faith effort to implement, or to continue to implement, the TDM measures, and/or before any enforcement action is initiated or undertaken by either DeIDOT or New Castle County, the applicant shall be afforded notice and an opportunity to be heard before the government or governmental department contemplating enforcement action. In the event that the applicant does not resolve the concerns raised by the government or governmental department contemplating enforcement action within sixty (60) days of notice, any of the following options may be utilized by the enforcing government or governmental department:

- a. The imposition of fines;
- b. DeIDOT's drawing upon the financial guarantee that the applicant has posted with it, in order to carry out TDM measures within the area of influence of the applicant's project (if such guarantee has been imposed as a condition of the development). The amount drawn upon the financial guarantee shall be limited to an amount equal to the amount thus far unexpended by the applicant under the approved budget for such costs, up to the one hundred and fifty (150) percent limit;
- c. Refusal to issue further building permits by New Castle County for any building(s) on the site for which the TDM measures were developed; and
- d. Any and all other remedies available at law or in equity.

3. **Reduction of Financial Guarantee.** DeIDOT may reduce the financial guarantee the applicant has posted with it, based on the implementation of TDM measures in the TM Agreement and/or progress toward trip reduction goals. In any event, the term of the financial guarantee posted with DeIDOT shall not exceed five years. The amount drawn upon the financial guarantee shall be limited to an amount equal to the amount thus far unexpended by the applicant under the approved budget for such costs, up to the one hundred and fifty (150) percent limit.

4. In addition to the remedies provided above, DeIDOT shall monitor the attainment of trip reduction goals, based on annual reports of the independent auditor.

- a. If the trip reduction goals have not been met by the applicant within one (1) year of the issuance of the CO, despite the implementation of the primary TDM measures, the applicant is required to implement one, some, or all of the contingent TDM measures, intended to achieve equivalent

traffic mitigation, as set forth in the TM Agreement.

- b. Should either DeIDOT or New Castle County determine that the applicant has failed to achieve the trip reduction goals within three (3) years after issuance of the CO, the applicant shall appear before County Council to be heard as to why the applicant has not achieved the trip reduction goals. The applicant may work with DeIDOT and the Department to develop a revised TM Agreement to be reviewed and approved by County Council. After the third year and unless and until the trip reduction goals contained in the applicant's plan have been achieved by the applicant, County Council may mandate that the Department refuse to issue further building permits, grant rezoning changes or any other land use regulatory changes or LOS Waivers relating to the particular site which is the subject of the TM Agreement, if such permits, changes, or waivers would allow alterations or additions to the building(s) at the site, which would result in increased employment at that site. In addition, DeIDOT may refuse to grant additional exit/entrance permits for such site, unless and until the trip reduction goals have been achieved by the applicant.

5. After five (5) consecutive years of attaining the goal(s) of the TM Agreement, annual audits no longer will be required. However, DeIDOT reserves the right to perform an audit at DeIDOT's expense at any time. If a change in any public policy, or the withdrawal or discontinuation of any governmental program, or other change in circumstance beyond the control of the applicant make impossible or impractical the implementation of primary or contingent TDM measure(s), the applicant shall, with the concurrence of DeIDOT, substitute other measure(s) designed to achieve equivalent trip reductions, provided that:

- a. the total costs of implementation of such substitute TDM measures will not exceed the original budgeted amount of the TDM measures replaced; and
- b. such substitution has been approved by County Council. In considering such requests, County Council shall request that DeIDOT and the Department provide a recommendation on such requested changes, prior to action by County Council. In an instance where the creation of a new government program makes other TDM measures more desirable, an applicant may, according to the process described above, substitute TDM measures. In either instance, DeIDOT and the Department shall provide their recommendations to County Council no later than 60 days after the applicant has requested this action. Should there be a change in the use of the site which is the subject of the TDM measures or a change in the circumstances which resulted in the TM Agreement being required, County Council on the recommendations of DeIDOT and the Department may amend or terminate said TDM requirements.

Section 6. Section 33.130 (Abbreviations), Article 33 (Definitions) of Chapter 13 of the New

Castle County Code is hereby amended by adding the material that is underlined.

SECTION 33.130 DEFINITIONS

The following abbreviations are used in this Chapter:

AASHTO...

CO -----Certificate of Occupancy ...

TDM-----Transportation Demand Management ...

TM Agreement----Traffic Mitigation Agreement ...

Section 7. Consistency with Comprehensive Development Plan. New Castle County Council finds that the provisions of this Ordinance are consistent with the spirit and intent of the New Castle County Comprehensive Development Plan.

Section 8. Inconsistent Ordinances and Resolutions Repealed. All ordinances or parts of ordinances and all resolutions or parts of resolutions that may be in conflict herewith are hereby repealed except to the extent they remain applicable to land use matters reviewed under previous Code provisions as provided in Chapter 13 of the *New Castle County Code*.

Section 9. Severability. The provisions of this ordinance shall be severable. If any provision of this ordinance is found by any court of competent jurisdiction to be unconstitutional or void, the remaining provisions of this ordinance shall remain valid, unless the court finds that the valid provisions of this ordinance are so essentially and inseparably connected with, and so dependent upon, the unconstitutional or void provision that it cannot be presumed that County Council would have enacted the remaining valid provisions without the unconstitutional or void one; or unless the court finds that the remaining valid provisions, standing alone, are incomplete and incapable of being executed in accordance with County Councils intent. If any provision of this ordinance or any zoning map or portion thereof is found to be unconstitutional or void all applicable former ordinances, resolutions, zoning maps or portions thereof shall become applicable and shall be considered as continuations thereof and not as new enactments regardless if severability is possible.

Section 10. Effective Date. This ordinance shall become effective upon its adoption by county Council, approval by the County Executive, and execution of the “Delaware Department Of Transportation And New Castle County Guidelines Regarding Development Of, Compliance With, And Enforcement Of, Traffic Mitigation Agreement” by the Secretary of Transportation, the County Executive and the Council President as authorized in Resolution 00-122.

Approved on:

Adopted by County Council of
New Castle County on: 11/28/00

County Executive

President of County Council of

New Castle County

SYNOPSIS: This ordinance revises Chapter 13, Article 11 and Article 33 of the New Castle County Unified Development Code (UDC) to reflect joint agreement between the Delaware Department of Transportation and New Castle County regarding the development of, compliance with and enforcement of Traffic Mitigation Agreements and Level of Service Waivers.

FISCAL NOTE: