

Home Builders Associations of Southeastern Pennsylvania

HBA of Bucks & Montgomery Counties
721 Dresher Road #1200
Horsham, PA 19044
(215) 657-1300

HBA of Chester & Delaware Counties
1502 McDaniel Drive
West Chester, PA 19380
(610) 692-7733

MEMORANDUM

To: Glenn Rowe
BHSTE Division Chief
Pennsylvania Department of Transportation

From: Mark S. Mitman

Date: November 21, 2008

Subj: Highway Occupancy Permit Policies

On behalf of the Home Builders Association of Bucks/Montgomery Counties and the Home Builders Association of Chester/Delaware Counties (“the HBAs”), I would like to thank you for the opportunity to comment on the Department’s planned policy changes to the Highway Occupancy Permit program.

The Department has followed a commendable and pro-active path in developing these new policies. From the initial validation meetings and surveys through the outreach presentations, the Department has done an outstanding job in keeping the regulated community informed of the process and where the policies are headed.

However, there is one aspect of the policy development process that initially seems to be lacking. As the Department begins to release its respective policy documents, it is unclear whether there will be a formal comment and response period prior to their implementation.

The HBAs recommend that the Department release the new policy language in draft form, allow the regulated community the opportunity to submit comments, and then adjust the policies as appropriate based upon the comments received. As generous as the Department has been in keeping the regulated community informed of the policies’ general nature, it would seem appropriate to allow the public the chance to comment on the finalized draft language before implementation.

Based upon the information received to date, the HBAs offer the following comments on the Department’s HOP policy revisions.

1. The HBAs have serious reservations about the push to use Letters of Credit (“LOC”) over bonding to ensure the planned improvements are made by the applicant. It appears that this policy change is essentially a solution in search of a problem.

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According to the Department, there have not been any defaults by applicants in District 6-0 – and few statewide – on their planned improvements necessitating the need for the Department to access the security funds.

However, the implications for a developer to obtain a LOC versus bonding can prove to be a significant economic hardship. This hardship may even cause some projects to become financial unviable. Requiring a LOC forces the applicant to acquire a loan double that of the value for the planned improvements.

There have been some discussions about reducing the amount held in a LOC as the improvements are made by the applicant. While this does not solve the problem of double loan to value, it may make the process more manageable. A policy that would reduce the LOC as improvements are made has some logistical hurdles that need to be resolved. An enhanced schedule of improvements would need to be created at the outset of the project. Such a schedule would need to indicate at what points the LOC would be reduced. Furthermore, the Department must decide what thresholds would need to be met – by improvement, by value target, or possibly by another method. Another unknown to this approach centers on how timely partial improvements would be verified, and by whom.

Ultimately, the HBAs see a host of logistical and financial hardship issues with pursuing a path that utilizes LOCs as the primary method of securing the improvements. And, based on the Department's history of few, if any defaults, it would seem wholly unnecessary to move away from bonded security.

2. The HBAs commend the Department in its attempt to reduce and better define the anticipated review times for Transportation Impact Studies.
3. The HBAs commend the Department for implementing a process for the allowance of specialized trip generation studies. We look forward to working with the Department on developing alternative trip counts for residential communities that may not fit into the typical single-family mold.
4. The HBAs view the Department's package of policies on Level of Service ("LOS") determination as a very positive step. The use of the overall intersection versus individual movement in determining the LOS provides improved reasonableness to the process. Additionally, the incorporation of a 10-second tolerance in determining whether a degradation of LOS has occurred adds needed flexibility and recognizes that real-life traffic conditions are variable.

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5. Altering the mitigation design year to five years beyond the opening year better reflects the actual impact residential construction has on traffic conditions.
6. The HBAs have a mixed reaction to the creation of the Alternative Transportation Plan (“ATP”) in situations where an intersection is significantly degraded (defined as a LOS below C/rural or D/urban). However, the HBAs do appreciate the creative approach the Department has taken in attempting to remedy traffic congestion while allowing a challenging project to continue to move forward. However, compelling an applicant to first pursue (and fail) implementation of an ATP in all instances of significant degradation may not be a reasonable option.

In marginally degraded conditions, the proposed mitigation requires municipal input; while in significantly degraded conditions, the proposed mitigation requires municipal concurrence. Increasing municipal government’s awareness of the HOP process is certainly a desirable goal. However, there is significant concern over what role the Department envisions for municipalities in its overall approval process. Specifically, requiring municipal “concurrence” seems to indicate that the Department will be granting municipal government approval authority over an applicant’s proposed mitigation. Combined with the creation of an ATP, municipal review and approval of the proposed mitigation can open the door to a host of issues over what conditions municipalities will attach to their approval. Municipal input and coordination would be more appropriate than “concurrence”. Furthermore, a 15-day time limit for municipal input ought to be imposed upon the process.

In those situations where an applicant has created an ATP, the HBAs would like to see a system developed for the use of “fair share” contributions towards the improvements. It would seem that ATPs might be a good vehicle to approach the goal of applicants paying for their respective impact on an intersection, etc. rather than the last applicant impacting an intersection paying for the entire improvement.

7. The HBAs recommend that the triggers requiring a small residential applicant to conduct a TIS be adjusted for added flexibility. The Department’s current “Guidelines for Preparation of a Traffic Impact Study” (February 2004) stipulate a TIS is required for developments generating significant traffic (greater than 3,000 ADT or 100 new trips in any one hour) or when the Department deems it necessary. For smaller residential projects that may be impacting traffic flow and/or safety, a Traffic Impact Assessment (“TIA”) should be the norm and written into the new policy as such.

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8. The HBAs would like clarification on how the Department intends to treat Traffic Impact Studies required by municipalities. The HBAs contend that the Department should not rely on municipal-mandated TISs for the purpose of HOP issuance, if the Department would not normally have required its own TIS.
9. The HBAs question the Department's authority to require indemnification for LOS waivers. While regulation may permit the Department to require indemnification from design waivers to protect itself against potential risk with altering design criteria, poor service at an intersection is not a design issue and does not expose the Department to any real risk. However, LOS Waiver indemnifications do pose a real financial hardship for the applicant with regards to their insurance carriers.

If the Department insists on utilizing indemnification agreements for LOS waivers, criteria for acceptance or rejection of the agreement should be clearly established.

10. The HBAs have concern over the requirement for personal guarantees or covenants running with the property. This will pose a significant obstacle for most residential projects as the developer will ultimately turn portions of the property over to a home owners association and/or dedicate improvements to the municipality. Such covenants will cloud the property's title and inhibit project completion.

Thank you again for the opportunity to provide input on the Department's planned new HOP policies. The HBAs look forward to working with the Department on their implementation. If you have any questions, please feel free to reach me at mark@mitman-group.com.

About the Home Builders Associations

Combined, the Home Builders Association of Bucks/Montgomery Counties and the Home Builders Association of Chester/Delaware Counties represent approximately 1,000 local companies involved in the construction and sale of new homes in the suburban Philadelphia market. The HBAs are affiliated with the Pennsylvania Builders Association.

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