

2019  
SUSSEX COUNTY/DELAWARE DEPARTMENT OF TRANSPORTATION  
MEMORANDUM OF UNDERSTANDING  
FOR LAND DEVELOPMENT COORDINATION

WHEREAS, Title 9, Section 6962 of the *Delaware Code* “Highway Capacity” obligates Sussex County to “establish an agreement with the Department of Transportation to provide a procedure for analysis by the Department of Transportation (“DeIDOT”) of the effects on traffic of each rezoning application; and

WHEREAS, This Memorandum of Understanding is intended to comply with the foregoing requirements of Title 9, Section 6962 of the Delaware Code; and

WHEREAS, Land development has the potential to impact adjacent highways and Sussex County and DeIDOT recognize that an analysis of the effects upon traffic is important in all types of land use decisions (Residential Planned Communities, Major Subdivisions, Conditional Uses) and not just rezoning applications; and

WHEREAS, The 2018 Sussex County Comprehensive Plan promotes greater coordination between DeIDOT and Sussex County in land use decisions; and

WHEREAS, Sussex County is solely responsible for land use decisions in Sussex County; and

WHEREAS, the DeIDOT is responsible for the operation, maintenance, and construction of State-maintained roads as well as the regulation of all entrance and roadway improvements required as part of new development; and

WHEREAS, it is the desire of Sussex County and DeIDOT to coordinate land development with transportation needs.

NOW, THEREFORE,

BE IT RESOLVED that Sussex County Council and DeIDOT hereby adopt the following Memorandum of Understanding:

**DEFINITIONS**

COMMITTED OFF-SITE IMPROVEMENTS – Road improvements for the benefit of safety and/or capacity that are generally beyond the limits of the site entrance and frontage that are required to be built by an approved land development project. Such improvements do not include auxiliary lanes that serve the site entrance, but may include roadway widening along the frontage of the site.

FEE IN LIEU - DeIDOT regulations define an Area Wide Study Fee that, under certain conditions, DeIDOT may accept when it would otherwise require a TIS. The fees accepted are used by DeIDOT to subsidize the preparation of studies of larger areas than a TIS would normally address; they are not used to build improvements. Payment of the fee does not relieve a developer of responsibility to build or contribute toward transportation.

LEVEL OF SERVICE (LOS) - A quantitative stratification of a performance measure or measures representing how well a transportation facility or service operates from a traveler's perspective. For each type of facility or service there are six levels of service, ranging from A to F, with A representing the best operating condition and F the worst operating conditions. Except as may be specified by DeIDOT, LOS shall be determined in accordance with the current edition of the Highway Capacity Manual, a publication of the Transportation Research Board.

PRELIMINARY TRAFFIC ANALYSIS - An evaluation by DeIDOT, in terms of the proposed trip generation, to determine whether a Traffic Impact Study is necessary with regard to a proposed land use approval.

#### TRAFFIC IMPACTS:

DIMINUTIVE - The change in land use is expected to increase the trip generation of the subject land by fewer than 50 vehicle trips per day.

NEGLIGIBLE - The change in land use is expected to increase the trip generation of the subject land by fewer than 50 vehicle trips in any hour and fewer than 500 vehicle trips per day.

MINOR - The change in land use is expected to increase the trip generation of the subject land by at least 50 but fewer than 200 vehicle trips in any hour and at least 500 vehicle trips per day.

MAJOR - The change in land use is expected to increase the trip generation of the subject land by more than 200 vehicle trips in any hour or more than 2,000 vehicle trips per day.

TRAFFIC IMPACT STUDY (TIS) – A study conducted during the development approval process, in accordance with applicable DeIDOT regulations, to determine the impacts that traffic generated by the proposed development will have on the surrounding street network and the improvements needed to the transportation system in order to mitigate those impacts.

TRAFFIC OPERATIONAL ANALYSIS (TOA) – An evaluation, or series of evaluations, conducted during the review of subdivision, land development and entrance plans, in accordance with applicable DeIDOT regulations, primarily intended to determine site entrance location and movements to be allowed at the site entrance. These evaluations may include; Queuing Analysis, Highway Capacity Manual Analysis, and Crash Analysis.

## **LAND USE COORDINATION**

1. Sussex County will make the final decisions on all matters of land use.
2. The Sussex County Planning and Zoning Department will request a Preliminary Traffic Analysis from DelDOT for each land use application to determine if the resulting traffic impact will be negligible, minor, or major. This shall not be required where the County Planning and Zoning staff, in concurrence with DelDOT staff, finds that the proposed change in land use will have a diminutive impact upon the road system. Unless more time is required given the size or complexity of the land use application, DelDOT shall endeavor to provide a Preliminary Traffic Analysis within twenty days after receiving the Analysis request.
3. Given the seasonal nature of high-volume traffic volume in Sussex County, and since the “season” has expanded beyond just Memorial Day through Labor Day, with very high traffic volumes on seasonal weekends, it is important for DelDOT to take into account these high volumes in any analysis that it performs. To be effective, low-volume off season volumes should not be utilized where they will artificially lower average traffic volumes.
4. Unless waived as set forth in Paragraph 2 above, Sussex County will not consider an application until DelDOT supplies Sussex County with the above information.
5. When it is determined that the traffic impact would be negligible, no further traffic analysis will be necessary. DelDOT has the authority to make such a determination where (based on the full development of the property as limited by either the zoning code or other factors) the expected average daily traffic (ADT) of the site will not exceed five hundred (500) trips. When DelDOT determines negligible impact will occur, they will provide projected traffic volumes in support. Sussex County may approve land use applications with negligible impact at its discretion.
6. When DelDOT determines the traffic impact to be minor, the traffic analysis shall include the feasibility of providing safe access and the condition, pavement, and the geometry of the nearby roadways and intersections relative to the traffic the subject property could generate. Where any of these are deemed inadequate, DelDOT shall comment to this effect, and identify roadway improvements that shall be required by the Developer. An Area Wide Study Fee (AWSF) letter will be generated to document the developer’s obligations

to construct identified roadway improvements or fund road improvements as required by DelDOT. In addition, DelDOT may require further study if necessary.

7. When DelDOT determines that the traffic impact will be major, the developer will be required to conduct an in-depth Traffic Impact Study (TIS) (at the developer's expense) to DelDOT standards. In addition, Sussex County, at its own initiative, may require a developer to conduct a TIS. The TIS will also consider the effects of active or proposed transportation improvements in the adopted Six (6) Year Capital Improvements Program, Current Transportation Plans, and Committed Off-Site Improvements, and the current Sussex County Comprehensive Plan and establish staging for development as needed. DelDOT will provide a technical evaluation of the TIS. Alternatively DelDOT may allow a Traffic Operational Analysis (TOA) instead of a TIS.
8. As an alternative to the TIS or TOA process set forth above, when DelDOT has determined that the area in question has already been the subject of sufficient study, a new TIS or TOA may not be required. Instead, DelDOT may require a "Fee in Lieu" to be paid by the developer to DelDOT to recoup all or a portion of the cost of the prior studies relied upon by DelDOT in lieu of a new TIS or TOA. The "Fee in Lieu" is unrelated to the developer's subsequent obligations to construct or fund road improvements as required by DelDOT and the "Fee in Lieu" is not a waiver of those requirements. A TIS or AWSF letter will be generated to document the developer's obligations.
9. Sussex County and DelDOT shall endeavor, where possible, to maintain a Level of Service of D on roads and intersections affected by a land use application. However, Sussex County and DelDOT recognize that: (a) a Level of Service of D is not always attainable; (b) that this threshold may create an undue burden on a property owner looking to develop a property given the prior development that has occurred in an area contributing to the existing Level of Service; or (c) other relevant factors (such as the size of the property, type or importance of the development) may mitigate against maintaining a Level of Service D. If the existing Level of Service is below D prior to the impact of the proposed land use, the existing Level of Service must at least be maintained.
10. No public hearing on the land use application shall occur until: (a) Sussex County receives the approved TIS from DelDOT; (b) Sussex County receives the approved TOA from DelDOT; (c) DelDOT advises that a "Fee in Lieu" (described in Paragraph 8 above) is

appropriate instead of a TIS; or (d) the application will have a diminutive impact as described above.

11. When DelDOT determines, on the basis of a TIS or TOA or studies previously performed as part of the “Fee in Lieu” process, that a land use decision could cause the threshold level of service to be exceeded, the County will not approve the land use application unless the developer takes appropriate measures to maintain operations at the threshold level or unless Sussex County finds that there are sufficient reasons why the developer should not be responsible for all or part of the measures necessary to maintain the threshold level of service. Sussex County, in the latter case, shall set forth in writing their reasons for approving the land use application.
12. Sussex County does not have the ability to determine what, if any, conditions of approval related to roadway improvements or traffic would be appropriate in a given land use application. Therefore, if, in DelDOT’s opinion, there are appropriate conditions of approval that should be imposed upon a land use decision, DelDOT shall offer those conditions as part of its TIS or as part of its Technical Advisory Committee review for consideration by Sussex County. Any such proposed conditions shall be clearly summarized by DelDOT in its Preliminary Traffic Analysis. After considering all relevant information regarding the land use application, Sussex County shall consider the proposed conditions but shall not be obligated to include them as part of any approval.
13. Phasing of land development with highway capacity and safety improvements to restore and maintain a level of service “D” may be required by DelDOT. To accomplish this, DelDOT should state what phasing is appropriate for the subject land use application and clearly state that phasing requirement to Sussex County so that Sussex County can clearly incorporate it into its various approvals as appropriate. Sussex County may then impose that phasing requirement as part of its approval of a land use application. Phasing of the project can include (but is not limited to) a consideration the following:
  - a. A delay of all or part of the development until specific highway improvements are made by DelDOT or others:
  - b. Whether the required highway improvements are being funded or constructed at the developer’s own expense;

- c. Whether the developer is participating in, and/or funding, transit or traffic mitigation strategies.

The phasing requirements shall be included as a Plan Sheet at the time of Final Site Plan approval. However, whenever possible, DelDOT shall endeavor to state whether a phasing recommendation is likely (with specific details to follow) as part of the TIS process prior to the Preliminary Site Plan or other public hearing process so that Sussex County, the developer and the public can have an expectation that phasing may be considered as part of the project development. Phasing tied to other types of site plan approval is addressed in a following Section of this MOU regarding Site Plan Coordination.

14. Where measures to maintain operations are agreed upon by a developer, both DelDOT and Sussex County shall assure that these measures are carried out.
15. When Sussex County believes that expert testimony regarding transportation issues is required to make a land use decision (such as a rezoning, major subdivision, conditional use or Residential Planned Community), DelDOT will provide a suitable representative to attend meetings of the Planning and Zoning Commission and/or County Council. The representative should be someone with specific technical knowledge of the project in particular and also ongoing projects in the area of Sussex County where the project is to occur.
16. In addition to the project-specific information referenced in the preceding paragraph, DelDOT shall provide regular updates to Sussex County about the status of ongoing and future roadway and transportation projects in the County, so that County Council and the Planning & Zoning Commission have an up-to-date understanding of their status. This shall include both developer-funded and DelDOT-initiated and -funded projects. During these updates, Sussex County will also have an opportunity to discuss other transportation improvements that may be needed in the future.
17. Whenever possible during the implementation of the foregoing items, Sussex County and DelDOT should encourage master planning for large scale developments on large parcels or groups of parcels in the Town Center, Coastal Area, Developing Area and commercial areas as set forth in the Comprehensive Land Use Plan to provide greater flexibility in design and/or the installation of additional roadways and interconnectivity.

18. The Sussex County Planning and Zoning Department is responsible for coordinating all required information with Sussex County Council and the Planning and Zoning Commission.
19. Sussex County shall be entitled to participate in any negotiations between a developer and DelDOT as to roadway improvements. Sussex County may provide input into those negotiations, but DelDOT shall be entitled to make the final determination as to all required roadway improvements and negotiated agreements with a developer. Any agreement reached between a developer and DelDOT as to roadway improvements, phasing of a development, funding of roadway improvements, etc. shall be immediately forwarded to Sussex County for its records with regard to the development. Any subsequent changes or amendments to a DelDOT/developer agreement shall likewise be immediately forwarded to Sussex County. Provided, however, that DelDOT recognizes that if a specific requirement (such as phasing) is incorporated into a land use decision (such as a major subdivision, conditional use or Residential Planned Community), this may not be enforceable by Sussex County without an amendment to the subdivision approval or the ordinance that approved a Residential Planned Community, Conditional Use or certain other rezonings where conditions can be imposed.

#### **REZONINGS (WITHOUT SITE PLANS OR CONDITIONS OF APPROVAL)**

1. Sussex County and DelDOT acknowledge that on a rezoning to a new zoning district where a specific site plan is not under consideration, and where the County cannot impose conditions as part of the rezoning approval, a TIS may not be possible (with the exception of rezonings to Residential Planned Communities and C-4, where specific site plans are considered and conditions can be imposed). This is because the various zoning districts have several permitted uses that are allowed once a rezoning occurs; as a result DelDOT cannot determine, at the time of rezoning, what the actual use will be nor what the traffic and possible roadway improvements will be as a result of it. This requires greater coordination on the part of both Sussex County and DelDOT.
2. Whenever possible, DelDOT shall endeavor to provide as much information about the general impacts of the rezoning upon area traffic and roadways as required in the preceding

Section prior to the public hearing before Sussex County Council and the Planning & Zoning Commission.

3. Whenever DelDOT is approached by a developer with a specific project in mind, DelDOT and that developer may enter into an agreement to obtain a TIS for the project as part of the rezoning process so that the information required as part of the TIS may be included in the record of the public hearings of the rezoning application. Because other possible uses of the property may be permitted under the proposed new zoning, Sussex County is not bound by this information in making its decision on the rezoning. However, if the use that the TIS is based upon changes after the rezoning occurs, another TIS shall be required and Sussex County shall not approve any Preliminary or Final Site Plan for the property until the new TIS is completed with all necessary traffic and roadway improvements determined by DelDOT. Alternatively, if no TIS is performed on a specific project, DelDOT or Sussex County shall have the ability to request a TIS based upon the most impactful permitted use available under the new zoning classification that is sought.

### **SITE PLAN COORDINATION**

1. Section 115-220D of the Sussex County Zoning Code allows Sussex County to approve certain site plans “subject to conditions”. In any site plan reviewed pursuant to Section 115-220 of the Sussex Zoning Code, Sussex County, with the assistance of DelDOT, may impose conditions regarding phasing and the timing of building permits in conjunction with completion of necessary roadway improvements.
2. In all site plan reviews, DelDOT will review the site plans in accordance with its rules and regulations for access and roadway improvements. Sussex County will withhold any site plan approval until DelDOT has approved all necessary roadway improvements and entrance design requirements. Provided, however, that this requirement may be waived by Sussex County for minor amendments to existing site plans that changes the trip generation by less than 50 trips per day.
3. Sussex County shall withhold the issuance of any building permit until DelDOT has issued the entrance construction permit associated with the project.



4. DelDOT will withhold an entrance permit until the developer has agreed to construct the access point(s) to Department standards and to provide off-site improvements as may be required to maintain acceptable traffic operation on highways.
5. Sussex County will withhold issuance of the Certificate of Compliance until DelDOT has accepted the entrance construction and issued the notice to the owner that the entrance construction permit has been satisfied.

**TRANSPORTATION IMPROVEMENT DISTRICTS**

1. In the event that a land use application falls within a Transportation Improvement District (“TID”), the requirements of the TID, as set forth in the TID Agreement, shall supersede the requirements set forth in this MOU.

IT IS FURTHER RESOLVED that the Secretary of the Delaware Department of Transportation and The County Administrator will affirm this agreement by affixing their signature to the Resolution.

Adopted by the County Council of Sussex County on \_\_\_\_\_, 2019.

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President of the County Council of Sussex County

The following signatures concurring herein:

**For Sussex County:**

\_\_\_\_\_  
Todd Lawson, Sussex County Administrator

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Robert Wheatley, Chairman, Sussex County  
Planning & Zoning Commission

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Janelle Cornwell, Director of Planning & Zoning

**For the Department of  
Transportation:**

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Jennifer Cohan, Secretary