

MEMORANDUM

TO: Government Operations and Fiscal Policy Committee
Transportation, Infrastructure, Energy, and Environment Committee

FROM: *MR* Michael Faden, Senior Legislative Attorney
Sue Sue Richards, Program Evaluator, Office of Legislative Oversight (OLO)

SUBJECT: **Worksession:** Inspector General Report – West Germantown Development District

Purpose This worksession will review the Final Interim Report of the County Inspector General (IG), submitted to the County Council and County Executive on March 11, 2001, regarding allegations of questionable payments in the West Germantown Development District (WGDD). (That report is reprinted on ©A1-A10.¹) As Council and OLO staff understands it, the purpose of this worksession is to review the facts and conclusions reported by the IG and the responses from other affected parties to see *what if any lessons can be learned from it with respect to future Council legislative or oversight actions*. We do not understand this worksession to be a trial of the facts, nor to be intended to determine conclusively whose interpretation of the facts and conclusions is more valid or useful.

Participants We expect the following persons to attend and be available to answer Committee members' questions:

County government

Jennifer Barrett, Director of Finance
Marc Hansen, County Attorney
Kathleen Boucher, Assistant Chief Administrative Officer

Inspector General

Thomas Dagley, Inspector General
Christopher Giusti, Deputy Inspector General

Washington Suburban Sanitary Commission

Tom Traber, Chief Financial Officer

¹A copy of the Final Interim Report of the County Inspector General on the West Germantown Development District can be found on the IG's website at <http://www.montgomerycountymd.gov/content/InspectorG/pdf/igactivity/FinalInterimReport-WestGermantownDevelopmentDistrict.pdf>

Developers of West Germantown Development District

John R. Orrick, Jr., Linowes and Blocher LLP

Initial Questions In organizing this worksession, Council and OLO staff believe your Committees would be well served by attempting to derive answers, from the participants and your own staff, to the following central questions:

1) In implementing the West Germantown Development District, did the actions of County government or WSSC result in any double payments made by or to any party? We would define “double payment” as unnecessarily paying one person or entity more than once for the same product or service, with or without legal justification.

2) If any double payments were made, who benefited? Who was disadvantaged?

3) Was any action taken with respect to the WGDD not in accord with applicable state and County laws, regulations, and policies?

4) What legislative or oversight actions should the Council take in response to the facts and conclusions before your Committees?

Process We recommend that, rather than taking opening statements from the parties, you begin with Question 1 and ask each party to briefly answer the question and summarize the facts that lead to that party’s answer. However, before you do so, Council and OLO staff would briefly explain the flow of funds and chronology of events that are the basis of this report, as shown in the diagram and chart which follows this memo. By doing so, we hope to provide background and context for the ensuing discussion without getting bogged down in minor details of process and timing.

Documents The list at the end of this memo shows the documents that we have attached to this packet. The primary documents that you should read for a basic understanding of this controversy are the IG report on ©A1-A10, the WSSC response on ©A11-A12, the Executive branch response on ©D1-D10 (including the overview on ©B1-B2), Exhibits D and E to Council Resolution 13-1135 (the so-called “A” and “B” lists for the development district) on ©E9-E10, the bond counsel letter on ©G1-G4, and the Systems Development Charge (SDC) fact sheet from WSSC on ©J1. The other documents are included for background or reference, and are occasionally referred to in the primary documents, but need not be read in their entirety.

Second-level or followup questions Council and OLO staff believe that the description and discussion of events presented in this worksession may result in the following second-level or followup questions, among others:

Pass-through of SDC credits What evidence is there that the homebuilders passed their SDC credits through to the eventual homebuyers? If this situation ever recurs, is there any way to guarantee that these credits are passed through to the eventual buyers, given that the housing market will determine the price each homebuyer pays for their unit? This question is similar to

the broader pricing issue surrounding development districts. A policy reflected in the 1994 development district law (and reemphasized in the 2008 amendments which strengthened the law's pre-sale notice requirements) was that adequate advance notice of the added property taxes that homebuyers in the district will pay should assure that home prices are reduced to reflect that added long-term burden; however, experience suggests that the home-buying market does not work that way.

Assignment of SDC credits Should the County Finance Department have accepted WSSC's offer to assign water and sewer credits to the development district rather than the developers? If the Finance Department was correct in concluding that County law provided "no legal basis for signing such an assignment", should they have presented this issue to the Council Committee overseeing the implementation of the districts and sought a legislative remedy? Would assigning these credits to the County have lowered the cost of bond repayments and provided more certain relief to taxpayers in the district? On the other hand, would doing so have deprived developers of credits that they deserved, based on their payment of the SDC charges and/or their building the infrastructure items?

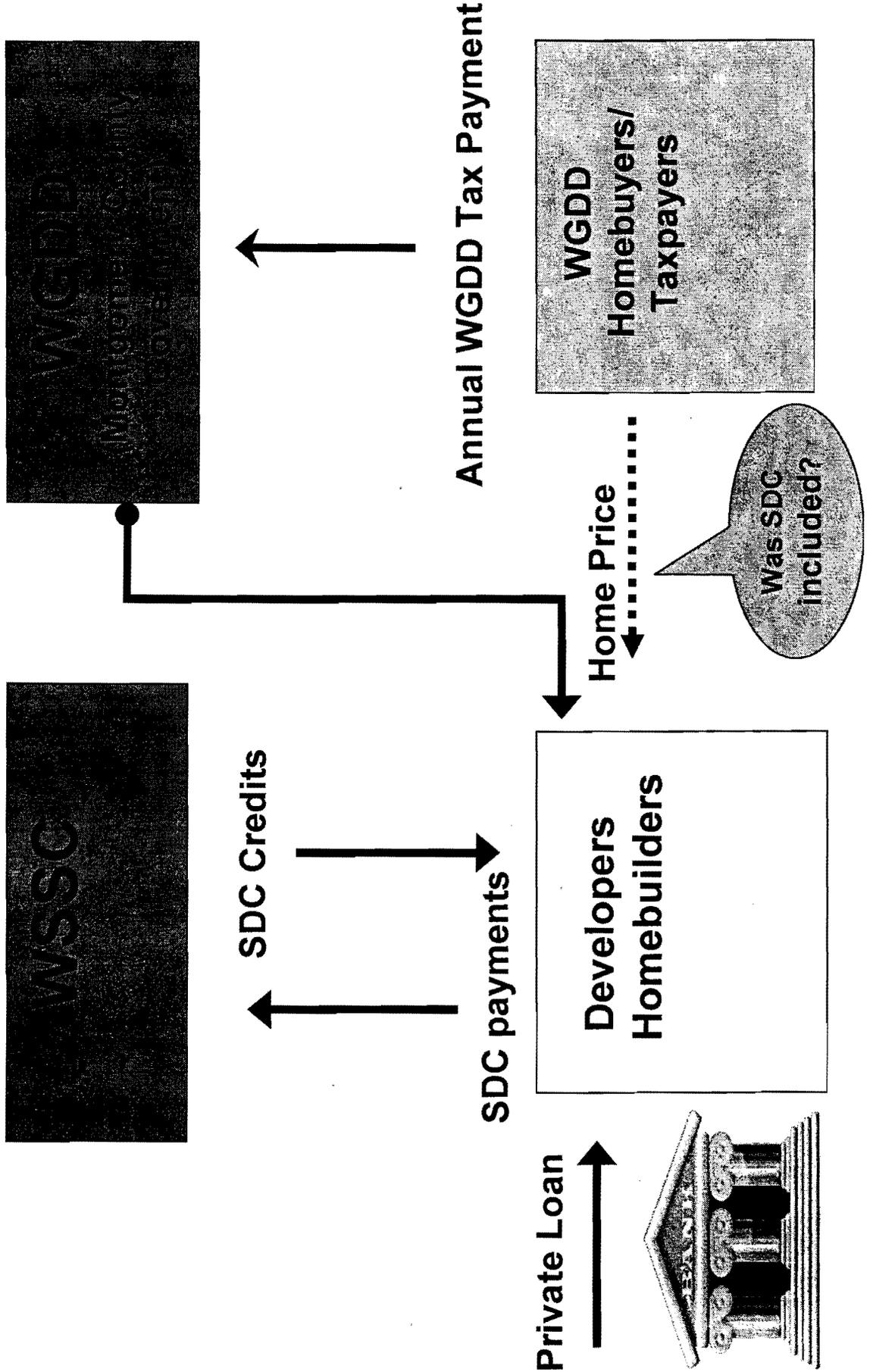
Funding of water and sewer projects Should any future development district finance a water or sewer infrastructure item for which (a) the developer would owe SDC charges to the WSSC, and (b) WSSC would issue SDC credits to the developer if the developer builds the infrastructure item? In this case the developer would still bear the cost of the item and could reasonably argue that, to expedite and coordinate the development, the development district should finance that item (assuming a development district is created for that geographic area). However, Council staff concludes, based on the kinds of questions raised here, that development districts are generally not suited for funding water and sewer infrastructure items. WSSC essentially agrees, as shown by the 2004 amendment to their SDC policy in §3.9 on ©M5 which prohibits WSSC from paying applicants (developers) "for costs reimbursed to the Applicant from other sources".

Funding of other creditable infrastructure items Should any future development district be precluded from financing any infrastructure item for which another government payment or credit is available? Bear in mind that, as with the SDC, these credits would only offset other taxes, such as the transportation impact tax, that the developer bears. In the 2008 development district law amendments, the Council repealed the provision that automatically credited the development district tax against other County taxes, such as the transportation impact tax, but not against SDC charges. (That provision is shown in paragraph 2 on ©D3 of the Executive's memo.) Precluding development district funding of any creditable items would go a step further.

<u>This packet contains</u>	<u>Circle</u>
Inspector General Final Interim Report re WGDD	A1
Washington Suburban Sanitary Commission response to IG	A11
County Executive response – overview	B1
Chief Administrative Officer memo to Council President	C1
Executive response to Inspector General	D1
Council resolutions creating WGDD	E1
Glossary of WSSC development terms	F1
County bond counsel letter re WGDD	G1
Developer’s attorney’s response to IG report	H1
Typical West Germantown Development District property tax bill	I1
SDC fact sheet from WSSC	J1
State law authorizing SDC	K1
Former WSSC standard procedure governing SDC	L1
Current WSSC standard procedure governing SDC	M1
WGDD Implementation Agreement	N1
Developers MOU with WSSC	O1
Amendment to developers MOU with WSSC	P1

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How did the money flow?



Hoyles Mill Wastewater Pumping Station (WWPS) and Force Main Chronology (Office of Legislative Oversight, March 25, 2011)

January 1998 – Montgomery County Council Resolution 13-1135 to create the West Germantown Development District (WGDD) included funding for the Hoyles Mill Wastewater Pumping Station (WWPS) and Force Main. Paragraph I of the Resolution authorized execution of an Implementation Agreement that addressed, among other items, the handling of System Development Charge (SDC) credits. (©E7)

June 1998 - WSSC and Montgomery County Government (Finance) meet and agree to coordinate their respective processes to prevent double payments to the developers. (IG report, ©A4)

May 2000 – WSSC and Arcola sign a Memorandum of Understanding (94CR9880A) with an SDC Credit Agreement (Attachment A) for the Hoyles Mill WWPS. Arcola agrees to construct the project at no cost to WSSC, subject to the grant of SDC credits, and to receive SDC credits in accordance with WSSC's approved policy (CUS 94-03). At the request of Finance, the MOU states that WSSC will allocate the project's SDC credits, valued at \$2,297.73/house, on a pro-rata basis to each house in the development. (©O1) Two later amendments to the MOU (in July 2001 and October 2004) removed this language and allowed Arcola (and later Artery) to receive SDC credits under WSSC's approved policy. (IG report, ©A8)

No Date - The developers construct the Hoyles Mill WWPS and Force Main with private financing and sell lots to homebuilders. WSSC establishes an account to collect SDC fees, and grants to the developers an SDC credit equal to half of each project's total eligible costs. The developers use these SDC credits when they apply for plumbing permits for homes that will be served by the pumping station and force main. (At the end of the project, after WSSC conducts an audit to finalize the project's total eligible costs, the developer will be entitled to receive from WSSC the difference between the audited total eligible costs and the amount of SDC credits previously used in their permit applications.) (WSSC, ©A12)

April 2002 – Finance and the developers (Arcola, Artery, and Woodcliffe) sign the WGDD Implementation Agreement. Article VI addresses the developers' SDC credits by requiring, in part, that the SDC credits be allocated by the developers on a pro-rata basis across all of the units developed by Artery and Arcola. (CE response, ©B1) (At the developers' request, WSSC amended its MOU to delete similar language in July 2001.) (IG report, ©A8)

April 2002 to April 2003 – Finance makes four payments totaling \$3.7 million from WGDD bond proceeds to pay the developers for the Hoyles Mill WWPS and Force Main. (IG report – Exhibit 1, ©A10)

March 2004 – WSSC amends its Standard Operating Procedure for the administration of the SDC. Section 3.9 of SP ENG 04-01 now provides that an "SDC Credit Agreement will not provide payment to the Applicant for costs the Applicant did not incur or for costs reimbursed to the Applicant from other sources." (©M5)

October 2005 – During its audit of the Hoyles Mill WWPS’ project costs, WSSC officials contact Finance to: 1) confirm that developers had already been reimbursed for costs they incurred; and 2) discuss options that WSSC and Finance could pursue to avoid a double payment to the developers. WSSC suggests assigning the project’s SDC credits to MCG; however, Finance is unwilling to pursue this approach. (IG report, ©A5)

To document that Finance is aware that WSSC is going to continue to treat the developers as the entity to receive the SDC credits, WSSC requests that Finance provide an assignment letter stating that it would agree to assign the SDC credits to the developers. (WSSC response, ©A11) Finance concludes this is neither legal nor necessary. (CE response, ©D7) WSSC makes four cash payments (totaling \$1.9M) and issues two SDC credit vouchers (totaling \$1.1M) to reimburse the developers for the projects’ total eligible costs. (IG report – Exhibit 1, ©A10)

August 2007 – Council staff’s investigation of the Clarksburg Town Center (CTC) Development District identifies that authorization of the Water Main for Development District financing raises the potential for double reimbursement. Council staff briefs the CAO and Finance of concerns about an apparent double payment in the WGDD. (IG report, ©A5)



OFFICE OF INSPECTOR GENERAL

Thomas J. Dagley
Inspector General

MEMORANDUM
March 11, 2011

TO: Hon. Valerie Ervin, President, County Council
Hon. Isiah Leggett, County Executive

FROM: Thomas J. Dagley
Inspector General

SUBJECT: *Final* Interim Report: Review of Allegations of Questionable Payments to Developers for the Hoyles Mill Wastewater Pumping Station and Force Main CIP Projects (West Germantown Development District)

Attached please find the Office of Inspector General's (OIG) February 14, 2011 *final* interim report prepared by Christopher Giusti, Deputy Inspector General, and the March 9, 2011 management response of Jerry N. Johnson, General Manager, Washington Suburban Sanitary Commission (WSSC). This report and response will be released by the OIG no earlier than March 14, 2011. A response to our report from the Chief Administrative Officer (CAO), Montgomery County Government (MCG), has not been received. A management request was received to extend the original due date of March 2 to March 9 and again to March 18. Upon receipt, we will provide you with a copy.

The Hoyles Mill Wastewater Pumping Station (HMWPS) and Force Main (FM) capital improvements program (CIP) projects were part of Council Resolution No. 13-1135 dated January 13, 1998 that created the West Germantown Development District (WGDD). The OIG's ongoing examination of these projects is an outgrowth of a planned review to examine WSSC policies, procedures, and payment practices for selected CIP projects including a 20" water main project (No. 964860) included in Resolution No. 15-87 that created the Clarksburg Town Center Development District (CTCDD) on March 4, 2003. The objectives, scope and methodology of the planned review were communicated to Mr. Johnson in a letter dated October 7, 2010.

However, on October 27, 2010, the day after the Council adopted Resolution No. 16-1544 that terminated the CTCDD, the OIG began receiving allegations of questionable payments to the HMWPS/FM developers. Specifically, we received multiple reports that



developers were reimbursed by both WSSC and MCG for the same or similar design and construction costs for these projects. In addition, there were concerns reported to us that senior MCG officials were aware that developers were paid twice and a lack of transparency and disclosure prevented these matters from being properly examined for several years.

Our examination to date has found that the HMWPS/FM developers or their representative were reimbursed a total of \$6,655,600.50, with \$3,715,602.50 paid by MCG's Executive Branch and \$2,939,998 paid by WSSC. MCG's reimbursements were paid in 2002 and 2003 to the Woodcliffe Development District and WSSC's reimbursements, a combination of cash payments and system development charge (SDC) credits, were paid in 2005 and 2006 to Arcola Investment Associates and Artery Hoyles Mill, LLC.

Our fieldwork to date has not been able to determine the reason(s) for payments by both government agencies to the developers or their representative for the same or similar HMWPS/FM projects costs. Our ongoing fieldwork includes the referral of certain matters to law enforcement and other officials to help determine if any criminal violations, conflicts of interest, or professional misconduct exist in the implementation of the WGDD. I believe attention by the Council and/or Executive will be necessary to ensure the public interest is served in this and other development district matters.

With regard to Mr. Johnson's March 9 response, I agree that developers did not submit subcontractor invoices to WSSC for direct reimbursement of specific eligible costs. I want to clarify that the first four examples included in our report on pages 4 and 5 represent cost components that were included in larger payments by MCG and WSSC on April 11, 2002 and March 7, 2006, respectively. The larger payments are outlined in Exhibit 1 on page 8 of our report. These examples were included in our report to show that our analysis of the documents provided to us by WSSC and MCG found that the same subcontractor costs were reimbursed by both WSSC and MCG.

Attachments

cc: County Council Members

Jerry N. Johnson, General Manager, WSSC

Maxene Bardwell, Manager, Office of Internal Audit, WSSC

Timothy L. Firestine, Chief Administrative Officer, MCG

Kathleen Boucher, ACAO, MCG



OFFICE OF INSPECTOR GENERAL

Thomas J. Dagley
Inspector General

MEMORANDUM

February 14, 2011

(CORRECTED)

TO: Thomas J. Dagley
Inspector General

FROM: Christopher Giusti *CGiusti*
Deputy Inspector General

SUBJECT: *Final Interim Report: Review of Allegations of Questionable Payments to Developers for the Hoyles Mill Wastewater Pumping Station and Force Main CIP Projects (West Germantown Development District)*

Background

On March 9, 2010, the Montgomery County Government (MCG) Office of Inspector General (OIG) sent a letter to Mr. Jerry N. Johnson, General Manager, Washington Suburban Sanitary Commission (WSSC), requesting an introductory meeting to discuss the "WSSC – Financial Oversight Act, MC/PG 101-09," as signed into law by the Governor of Maryland Martin J. O'Malley on May 7, 2009. This law gives the Montgomery County Council (MCC) authorization to audit and examine the books and records of WSSC under certain circumstances, and generally relates to audits and financial statements of the WSSC. Since that time, the OIG has had several productive meetings with Mr. Johnson and his staff.

In a letter to Mr. Johnson dated October 7, 2010, the OIG identified the objectives, scope and methodology of a planned OIG review to examine WSSC policies, procedures and payment practices for selected capital improvements program (CIP) projects including the "Clarksburg Town Center Development District (CTCDD) Water Main Project" (WSSC Number W-46.13)¹. On October 8, 2010, Mr. Johnson designated WSSC's Internal Audit Manager as the OIG point of contact for the review.

¹ The CTCDD was created by the MCC on March 4, 2003 with the adoption of Resolution 15-87. Resolution 15-87 authorized the MCC to impose on all properties located within the CTCDD special assessments and taxes sufficient to pay the principal of, interest on, and any redemption premium on, bonds issued by or for the CTCDD by MCG. In August 2007, the OIG issued an audit report, "Review of Selected Capital Improvements Program (CIP) Projects with Development District Funding," which examined selected CTCDD road construction projects included in the MCG FY07-12 CIP budget. The audit report, the Executive Branch management response, and a related County Attorney memorandum dated September 7, 2007 can be found at <http://montgomerycountymd.gov/ig> under "IG Activity."



Allegations of Questionable Payments - West Germantown Development District

On October 26, 2010, the MCC passed Resolution No. 16-1544 that terminated the CTCDD. The next day, October 27, 2010, prior to beginning the fieldwork for the review of the CTCDD Water Main Project, the OIG began receiving allegations regarding questionable payments to the developers who designed and constructed the Hoyles Mill Wastewater Pumping Station/Force Main (HMWPS/FM) CIP projects that were part of the MCG West Germantown Development District (WGDD) and the WSSC infrastructure projects approved for reimbursement to the developers by WSSC². There was concern that senior officials from both MCG and WSSC were aware that developers were improperly reimbursed by MCG and WSSC for similar design and construction costs and that there was a lack of transparency and disclosure by MCG officials.

The concerns regarding questionable payments were reinforced when documents related to the CTCDD were provided to the OIG in November 2010. These documents disclosed that the CTCDD developer advised the MCC and the Executive Branch in December 2007 to remove \$827,000 in developer district funds from a 20" water main CIP project because the developer "is being reimbursed for the construction cost by WSSC. There is no reason to include this in other financing programs."

Expanded Objectives, Scope and Methodology of OIG Review

Based on the allegations received, the OIG expanded the objectives, scope and methodology of the planned review, to include acquisition/procurement policies and procedures, and management practices used to make payments for the HMWPS/FM CIP projects. In addition to the information requested in the October 7, 2010 letter to Mr. Johnson, the OIG requested WSSC internal audit work papers and financial records related to the WGDD and related infrastructure projects. On November 19, 2010, the OIG also requested specific development district information from the MCG Department of Finance regarding the WGDD HMWPS/FM projects.

MCG/WSSC Documentation

A review of documentation by the OIG disclosed the following:

- In June 1998, there were discussions and a verbal agreement between the MCG Department of Finance representative and WSSC operations personnel that "neither the

² The MCC adopted Resolution No. 13-1135 on January 13, 1998 that created the WGDD in an area of 670.71 acres in Germantown that included properties owned by Artery Hoyles Mill, LLC, Bethesda, MD and Arcola Investment Associates, Hyattsville, MD. The Resolution identified certain infrastructure improvements (e.g. roads, water, and sewer) including the HMWPS/FM projects that were to be funded through bonds to be issued through MCG Department of Finance as part of the MCC approved CIP budget. The Resolution also authorized the imposition on all properties in the WGDD special assessments and taxes to pay the principal of, interest on, and any redemption premium on, bonds issued under a separate resolution.

During the same period that the MCC passed Resolution No. 13-1135, the WSSC had standard procedure CUS 94-03, System Development Charge (SDC) Developer Credits and Reimbursements, in place. A SDC is a fee paid to WSSC at the time of application for a plumbing permit intended to cover the cost of building a CIP project needed to accommodate growth. WSSC's standard procedure allowed a developer to be eligible for SDC credits after WSSC authorized the design and construction of a qualified project. The WGDD HMWPS/FM projects were approved as separate qualified projects by WSSC and eligible for SDC credits. WSSC policies allowed developers to submit a request to WSSC's Office of Internal Audit to audit developers design and construction costs prior to WSSC reimbursing developers for costs.

County nor WSSC wish to double pay the developers. Thus, both agencies will collaborate to coordinate their respective agreement with the developers”;

- In October 2005, WSSC's Office of Internal Audit was advised that WSSC's former General Counsel agreed at the very beginning of the WGDD project that WSSC would reimburse the two developers the SDC credits even though the project was going to be paid by the bond proceeds from Montgomery County;
- In October 2005, WSSC officials confirmed with a MCG Department of Finance representative that MCG had already reimbursed the developers with development district bond proceeds for the cost of the HMWPS project, and that the same or a similar set of costs had been submitted by the developers to WSSC for reimbursement; and
- In October 2005, WSSC officials discussed with the MCG Department of Finance representative that the developers of the HMWPS project would be improperly paid twice (once by MCG and again by WSSC) for the same costs unless WSSC and MCG officials worked to prevent a double payment. In addition, the Department of Finance's representative was not willing to provide documentation to WSSC that assigned the SDC credits to either MCG or the developers.

WSSC documents furnished to the OIG indicated in 2005, prior to any WSSC payments, WSSC officials believed that since MCG had already reimbursed the developers, MCG should receive the SDC credits and, thereby, prevent payments by both WSSC and MCG to the developers. According to the documents, the MCG Department of Finance representative disagreed, stating the developers incurred the costs twice and, therefore, should be paid twice. The documentation revealed the MCG Department of Finance representative was unwilling to provide an assignment letter from MCG Department of Finance to WSSC stating MCG would agree to assign the SDC credits to the developers. WSSC was familiar with the use of the letter because in November 2004 the Prince George's County Executive provided such a letter to WSSC for an unrelated CIP development district project. As a result of this disagreement, the WSSC internal auditor performed the required review and approval of the HMWPS/FM CIP costs. WSSC Permit Services Unit authorized a combination of cash payments and SCD credits to the developers totaling almost \$3 million for the HMWPS/FM projects.

A review of documents maintained by MCC staff identified MCC concerns in August 2007 about double payments to developers for development district infrastructure improvements, one month prior to the MCC Office of Legislative Oversight (OLO) release of its report titled, *An Analysis of Issues Raised by the Clarksburg Town Center Advisory Committee*. The OIG was advised that when MCC staff learned that the developers of the HMWPS submitted the same or a similar set of costs for reimbursement to MCG and WSSC, MCC staff briefed the MCG Chief Administrative Officer (CAO) (former Director of Finance) and Director of Finance (former Finance manager responsible for administering the WGDD and CTCDD) on August 23, 2007 about the project and double payment concerns. In addition, the OIG was advised that MCC staff were sufficiently concerned about the risk of double payments to developers for development district CIP projects that the following statement was included in Chapter 9 of the OLO report released on September 11, 2007: "In particular, the Council should consider amending the development district law to expressly preclude the possibility of development district funding of any water or sewer infrastructure item if that item could also be funded through WSSC's System

Development Charge (SDC), including developer credits against the SDC, as it appears that the Clarksburg Town Center 20" water main could be."

Payments – HMWPS/FM CIP Projects

OIG analysis of records provided by the MCG Department of Finance found that the Department of Finance approved four cash payments totaling \$3,715,602.50 that were made between April 11, 2002 and April 21, 2003 to Woodcliffe Development District, c/o (name omitted by OIG), Linowes and Blocher (escrow agent) for the HMWPS/FM projects.

An analysis of records provided by WSSC found that WSSC approved four cash payments totaling \$1,869,691.78 that were made between December 9, 2005 and March 7, 2006 for the HMWPS/FM projects. In addition, WSSC issued SDC credits totaling \$1,070,306.22 to one of the developers between December 9, 2005 and March 7, 2006.

Exhibit I of this report, prepared by the OIG using information provided by both MCG and WSSC, shows that the combined MCG/WSSC cash payments and SDC credits to the developers and their representative for the HMWPS/FM projects totaled \$6,655,600.50.

The OIG found that the developers' design and construction costs submitted to WSSC for reimbursement for the HMWPS/FM projects were reviewed and approved by the WSSC internal auditor, as required by WSSC laws and policies, prior to any payments. MCG payments made to the HMWPS/FM developers or their representative were approved by the Department of Finance representative who was responsible for administering the WGDD³. OIG was not provided any purchase orders, invoices, or other detailed financial records by MCG Department of Finance that supported the developers' requests for reimbursement as required by MCG procedures.⁴

A review of the limited supporting documentation provided by the MCG Department of Finance and a review of WSSC's internal audit files disclosed the following examples of the developer's costs for the HMWPS (WSSC Contract No. 94CR9880A) that were reimbursed twice (once by MCG and again by WSSC):

Various Construction Costs

MCG payment on April 11, 2002 to Woodcliffe Development District for Subcontractor A	\$ 980,000.00
WSSC payment on March 7, 2006 to Arcola for Subcontractor A	\$ 980,000.00

³ MCG policies and procedures used to reimburse developers for development district infrastructure improvements were discussed in the OIG August 2007 audit report regarding the CTCDD, and a related September 7, 2007 memorandum issued by the County Attorney to the MCG CAO. The County Attorney identified the need for the Executive Branch to enter into an implementation agreement with a developer, and stated such an agreement should set the amount of reimbursement which should not exceed the lesser of: 1) the appropriation; 2) the actual cost of the construction; or 3) a fair and reasonable price for the infrastructure.

⁴ The terms and conditions of the payment requests to MCG Department of Finance for WGDD contained the following language: "Attached AIA form G702, together with all purchase orders, invoices, and other appropriate documentation supporting the payments or reimbursements herein requested must be delivered to the County representative (name omitted by OIG) with this payment request."

(CORRECTED PAGE)

Paving Costs

MCG payment on April 11, 2002
to Woodcliffe for Subcontractor B \$ 53,852.50

WSSC payment on March 7, 2006
to Arcola for Subcontractor B \$ 53,852.50

Parking Lot Costs

MCG payment on April 11, 2002
to Woodcliffe for Subcontractor C \$ 37,176.23

WSSC payment on March 7, 2006
to Arcola for Subcontractor C \$ 37,176.23

Water/Fire Hydrants Costs

MCG payment on April 11, 2002
to Woodcliffe for Subcontractor D \$ 55,115.00

WSSC payment on March 7, 2006
to Arcola for Subcontractor D \$ 55,115.00

WSSC MOU Fee⁵

MCG payment on April 11, 2002
to Woodcliffe for WSSC MOU Fee \$ 218,136.00

WSSC payment on March 7, 2006
to Arcola for WSSC MOU Fee \$ 218,136.00

WSSC - Memorandum of Understanding and Amendments

On May 17, 2000, a Memorandum of Understanding (MOU) between WSSC and Arcola was signed that authorized Arcola to construct the HMWPS (a separate MOU was signed between WSSC and Arcola to build the Force Main). According to WSSC, the MCG Department of Finance was working with Arcola on WGDD and requested that WSSC grant each house an equal SDC credit. The MOU stated SDC credits shall be allocated on a pro-rata basis across all units developed by Arcola. The SDC credit was determined to be \$2,297.73 for each single family house. The allocation of SDC credits on a pro-rata basis across all units was not a standard practice for WSSC, and after interviews with WSSC and MCG officials involved in the process, the OIG found that this practice was not well understood by MCG personnel.

From July 17, 2001 through October 4, 2004, the following three amendments were made to the original May 17, 2000 WSSC MOU:

⁵ According to the WSSC MOU dated May 17, 2000, WSSC estimated its direct costs and overhead associated with the HMWPS to be \$218,136. Prior to construction of the HMWPS, Arcola was required to deposit \$218,136, in cash, to cover WSSC's estimated direct and overhead costs for the construction. The WSSC Office of Internal Audit concluded in its internal audit report dated November 22, 2005 that the \$218,136 was an eligible qualified project cost for the HMWPS and reimbursable to Arcola.

- (a) On July 17, 2001, Arcola and WSSC amended the existing MOU in order that Arcola could receive SDC credits in accordance with WSSC's approved SDC credit policy (CUS 94-03) rather than provide the \$2,297.73 SDC credit allocation for each single family house.
- (b) On May 23, 2003, Arcola and WSSC amended the existing MOU for a second time and increased the design and construction costs from \$1,640,581 to \$2,184,544;
- (c) On October 4, 2004, the MOU was amended by Arcola and WSSC for a third time, and Artery Hoyles Mill, LLC was added to the MOU so Arcola and Artery could receive SDC credits in accordance with WSSC's approved SDC policy. The total design and construction costs of the HMWPS remained at \$2,184,544.

The original WSSC MOU and amendments can be found on the OIG webpage under "IG Activity" at <http://inontgomerycountymd.gov/ig>.

MCG - Implementation Agreement

On April 1, 2002, the WGDD Implementation Agreement was signed between MCG and the developers (Woodcliffe, Arcola, and Artery). MCG estimated the infrastructure improvements (roads, water, and sewer) would cost approximately \$12,831,177 of which \$3,838,020 (approximately 30 percent of the total cost) was for the HMWPS/FM CIP projects. MCG financed these infrastructure improvements through the issuance of tax-exempt bonds.⁶

On page 14 of the WGDD Implementation Agreement, Article VI, WSSC System Development Charge Credits, Section 6.01, *Agreement Regarding Allocation of System Development Charge Credits*, Artery and Arcola agreed with WSSC through separate agreements relating to the construction of the HMWPS/FM infrastructure that: "any credits on the WSSC SDC accruing to Artery and Arcola or any builders or developers purchasing properties located within the district from Artery and Arcola will be allocated in accordance with the following percentages: 30.10% to the units within the Artery development until the Artery units receive \$1,000,000 in the aggregate and, 69.90% to the units within the Arcola development and all of the SDC credits after the Artery units receive \$1,000,000 in the aggregate. The SDC credits shall be allocated by the developers on a pro-rata basis across all of the units developed by Artery and Arcola. Each unit will receive an SDC credit allocation, irrespective of the date when the application for such allocation of SDC credit is made, provided that the allocation does not cause the actual amount of the SDC credit to be exceeded."

The language regarding the allocation of SDC credits on page 14 of the Implementation Agreement was contained in the original WSSC MOU signed May 17, 2000. However, it was deleted in its entirety from the MOU on July 17, 2001 when WSSC and Arcola amended the MOU. As a result, the SDC credit language contained in the MCG Implementation Agreement signed on April 1, 2002 was different than the process WSSC used to reimburse the developers.

⁶ Montgomery County issued an aggregate of \$15,915,000 in Special Obligation Bonds, \$11,600,000 principal amount of 2002 Series A Bonds and \$4,315,000 principal amount of 2002 Series B Bonds. The Bonds are payable solely from special taxes and special assessments levied by the County on taxable property within the WGDD.

The MCG WGDD Implementation Agreement described above can be found on the OIG webpage under "IG Activity" at <http://montgomerycountymd.gov/ig>.

Interviews of WSSC/MCG Officials

The OIG conducted interviews with numerous WSSC and Montgomery County officials and the developers or their attorney who were involved in WSSC and Montgomery County activities related to the HMWPS/FM CIP projects. Our interviews included:

- WSSC: General Manager, operations personnel, internal auditors, former general counsel staff;
- MCG: CAO, Assistant Chief Administrative Officer, County Attorney and Department of Finance personnel to include the Director of Finance;
- MCC: Legislative attorneys, legislative analysts, and other MCC staff.

These interviews, which were designed to clarify the WSSC and MCG policies, procedures and payment practices applied to the HMWPS/FM CIP projects, have not to date clarified why the developers were reimbursed the same or similar costs by both WSSC and MCG.

County Taxpayer's Liability

Property owners and WSSC customers who reside in the WGDD are levied a special development district tax by Montgomery County as part of the financing mechanism used to repay the County for the issuance of bonds that were used to reimburse the developers for the infrastructure improvements (roads, water and sewer) in the development district. There are approximately 1,300 property owners who are responsible for paying the annual development district tax. For example, a property owner's Real Property Consolidated Tax Bill for July 1, 2010 – June 30, 2011, listed the WGDD Special Tax at \$825.27. Beginning in tax levy year 2002, for individuals who owned property in WGDD, the special tax was charged and is scheduled to continue to be charged for approximately 23 more years.

Recommendation: It is recommended that the WSSC General Manager and the MCG CAO use the information in this report to conduct a thorough review of all fiscal, ethical, and legal accountability issues associated with the WGDD HMWPS/FM CIP projects to ensure accountability in government and developer actions, and to ensure that County taxpayers who reside in the WGDD and pay the annual special tax are protected from any unnecessary or unreasonable payments. It is also recommended that WSSC and MCG jointly assess and seek recovery of the full amount of all questionable payments or reimbursements made to the developers or their representative.

Exhibit 1 – HMWPS/FM Payments

<u>Date of Payment</u>	<u>Payee</u>	<u>Payment From</u>	<u>Dollar Amount</u>	<u>SDC Credits</u>	<u>Purpose</u>
4/11/2002	Woodcliffe Development District c/o (name omitted by OIG) Linowes and Blocher (escrow agent)	MCG	\$2,684,033.70		HMWPS/FM
4/11/2002	Woodcliffe Development District c/o (name omitted by OIG) Linowes and Blocher (escrow agent)	MCG	\$ 893,607.08		FM
4/21/2003	Woodcliffe Development District c/o (name omitted by OIG) Linowes and Blocher (escrow agent)	MCG	\$ 126,877.14		HMWPS/FM
4/21/2003	Woodcliffe Development District c/o (name omitted by OIG) Linowes and Blocher (escrow agent)	MCG	\$ 11,084.58		FM
	Total MCG Payments*		\$3,715,602.50		
12/9/2005	Artery Hoyles Mill, LLC Bethesda, MD	WSSC	\$ 32,102.00		FM
12/9/2005	Arcola Investment Associates Hyattsville, MD (\$948,543 less \$343,017 SDC Credits)	WSSC	\$ 605,526.00	\$ 343,017.00	FM
3/7/2006	Arcola Investment Associates Hyattsville, MD (\$1,916,636 less \$727,289.22 SDC Credits)	WSSC	\$ 1,189,346.78	\$ 727,289.22	HMWPS
3/7/2006	Artery Hoyles Mill, LLC Bethesda, MD	WSSC	\$ 42,717.00		HMWPS
	Total WSSC Payments/SDC Credits**		\$1,869,691.78	\$1,070,306.22	
	Total HMWPS/FM Costs:		\$3,715,602.50	(MCG Payments)	
			\$1,869,691.78	(WSSC Payments)	
			\$1,070,306.22	(WSSC SDC Credits)	
			\$6,655,600.50⁷		

*Source: MCG Department of Finance

** Source: Washington Suburban Sanitary Commission

⁷In the MCG Implementation Agreement, the cost estimate for the design and construction of the pumping station and force main by the developers was \$3,838,020. In the WSSC MOU amendments, the final cost estimate for design and construction of the HMWPS by the developers was \$2,184,544 and \$1,064,949 for the FM for a total of \$3,249,493.



Washington Suburban Sanitary Commission

14501 Sweitzer Lane • Laurel, Maryland 20707-5901

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GENERAL MANAGER
Jerry N. Johnson

March 9, 2011

Mr. Thomas J. Dagley
Inspector General
Montgomery County Government
51 Monroe Street, Suite 802
Rockville, MD 20850

Re: West Germantown Development District draft interim report – WSSC Management Response

Dear Mr. Dagley,

The Hoyles Mill Wastewater Pumping Station and Force Main are but one component of the entire West Germantown Development District. That District was established by Montgomery County, and WSSC has no in-depth knowledge of the other components, nor of the totality of the value the District provided to the citizens of Montgomery County. As such, we are confining our response to the items associated with the WSSC facilities. Our silence on the other issues should not be construed as agreement or consent as to their validity. Based on our review of the above mentioned report we have the following comments and observations:

- On page 3, the report appears to place a significant relevance to the fact that the County was unwilling to provide an assignment letter stating that the County would agree to assign the System Development Charge (SDC) credits to the developers. The agreements between WSSC and the developers were required by State law (Section 25-405 of the Public Utilities Article, WSSD Laws, Annotated Code of Maryland; previously Section 6-113 of Article 29, Annotated Code of Maryland). In accordance with the law, those agreements addressed, among other things, how SDC credits were to be granted. In this case, the agreements specified that the developers were entitled to the SDC credits. WSSC's request for the assignment letter was to document for our files that the County was aware that the Commission was going to continue to treat the developers as the entity to receive the credits. The WSSC documentation provided to your office stated outright that from conversations with County personnel, WSSC knew the County was aware that the SDC credits were granted to the developers. Not obtaining an assignment letter did not modify the terms of the agreements with the developers, nor did its absence change WSSC's obligations to the developers with regards to the SDC credits.
- On pages 4 and 5, the report erroneously identifies the SDC credit reimbursement payments made by WSSC to the developers as being directly associated with payments made by the developers to their subcontractors. This identification is incorrect and could lead a reader to misinterpret how WSSC reimburses any developer for SDC credits. In fact, that misinterpretation has apparently already occurred based on the Washington Examiner editorial of February 28, 2011. In accordance with the (then) approved Commission policy on SDC Developer Credits and Reimbursements (CUS 94-03), the credits are determined based on total eligible costs, and are returned to the developer as they apply for eligible plumbing permits (for that served area's SDC fee), or are paid to the developer from SDC collections WSSC obtains from other applicants in the area served by the WSSC facilities. At no time

Mr. Thomas J. Dagley
March 9, 2011
Page 2

does any developer submit an invoice from a subcontractor to the WSSC for direct reimbursement of specific eligible costs. The developer identifies the cost components and presents all invoices in support of their total costs at the completion of the project, when WSSC audits those costs. As you are aware, the developer submits their initial estimate of total eligible costs, WSSC reviews the costs for conformance to CUS 94-03 (or ENG 04-01 for agreements entered into after March 10, 2004), and, once included in the agreement between WSSC and the developer, the WSSC grants to the developer an amount equal to 50% of the total eligible costs as a credit which may be used for the SDC portion of their plumbing permits until such time as the project is completed and the developer's total costs are audited by WSSC's Internal Audit Office. Once the audit is complete, the total eligible costs are finalized. At that time, and no time prior, is the developer entitled to receive from WSSC the difference between the audited total eligible costs and the amount of SDC credits previously used (if any) in their permit applications via a properly executed credit voucher. The payments made by WSSC to the developers in 2005 and 2006 represented those differences. Therefore, to avoid further misinterpretation, we request that the WSSC "payments" identified on pages 4 and 5 be removed. Your Exhibit 1 correctly identifies the WSSC SDC credits and payments, and should be sufficient for the reader to properly understand the SDC activity between WSSC and the developers.

I would like to thank you for the extension of time for us to review and comment on the draft report and look forward to seeing our concerns addressed in the final report.

Sincerely,



Jerry N. Johnson
General Manager/CEO

cc: Maxene Bardwell, WSSC Internal Auditor

(A12)

**OVERVIEW OF COUNTY EXECUTIVE'S RESPONSE TO
IG FINAL INTERIM REPORT ON
WEST GERMANTOWN DEVELOPMENT DISTRICT –
HOYLES MILL INFRASTRUCTURE**

March 23, 2011

All Actions by the County and WSSC Were Legal and Proper

- County payments for infrastructure from bond proceeds were in accordance with Development District Law and Council Resolutions.
- WSSC's credits against the System Development Charge (SDC) and refunds of SDC charges paid were in accordance with State Law and WSSC Standard Procedures.
- SDC credits were envisioned in Council Resolution on WGDD.

Planning Board, Executive, and Council supported WGDD Financing in 1990s to Encourage Growth

- The Development District provides an alternative mechanism to finance infrastructure required for growth.
- WGDD approved by Council in January 1998.
- Resolution included Hoyles Mill Pumping Station and Force Main, and provision on "the handling of SDC credits accruing to properties located in the District"
- County's Implementation Agreement with developers required that all properties in the WGDD benefit equally from SDC credits.

County and WSSC Carried Out Required Actions

- County Council inclusion of Hoyle's Mill infrastructure in the WGDD necessitated the County payments for infrastructure from bond proceeds.
- WSSC was required by State Law and its own Operating Procedures to provide credits and refunds of SDC charges.
- Executive Branch took all reasonable steps to allocate benefit of SDC credits equally throughout the WGDD.

County Implemented WGDD Financing in Accordance with County Law and Policy.

- Payments for infrastructure made in 2002 and 2003 for substantially complete and finally accepted pumping station and force main.
- Implementation Agreement sought to ensure home buyers benefitted from SDC credits, thereby paying only once for infrastructure.
- Without credits, home buyers would have paid twice for infrastructure.
- Any cost savings would have been paid out for projects on the "B" List – developers were to receive a fixed amount of financing - \$12.8 million.

The Implementation of the Hoyles Mill Pumping Station and Force Main involved two separate and distinct Policy Choices:

Choice One – Who provides the infrastructure?

- EITHER - WSSC provides infrastructure and imposes SDC charge on development served by the infrastructure;
- OR - Developers build the infrastructure and the SDC is not charged to the development served by the infrastructure
 - Note: these choices result in the same financial outcome to WSSC and to the Developers and home buyers.
 - Credits do not cause an additional benefit to Developers, since they only occur when the Developers has provided the infrastructure.

Choice Two – How will the infrastructure be financed?

- EITHER – Developer uses traditional bank financing to borrow funds and passes the costs for repayment on to the builders and home buyers in the price of the home
- OR – Developer obtains County financing via the Development District – the County borrows funds (bond issuance) and passes the costs for repayment (debt service) on to the builders and home buyers in taxes
 - Note: Both result in the same financial outcome to home buyers repaid in their mortgage payments.

The complexity over how these two separate choices work together – who initially funds the infrastructure, and under what mechanism the home buyers eventually pay for it – has led to confusion, but not misconduct.

Additional confusion exists because WSSC's actions have been mis-characterized as paying for infrastructure, when they were really offsets to SDC charges because WSSC was not providing or funding the infrastructure.

Because WSSC uses actual costs to determine how much offset or credit should be allowed, the credits and refunds can be easily misconstrued as payments for those costs.

The use of “eligible costs” to determine a credit amount is also used in determining transportation impact tax credits.

- Refund checks from WSSC were not payments for infrastructure, they were refunds of SDC charges paid.
- When WSSC is provided infrastructure by developers, the properties served by it don't pay the SDC charge.
- Not paying the charge is accomplished through credits and refunds.

Not only were all actions by the County and WSSC legal and proper, they were contemplated in and done in accordance with the Development District Law and Resolution.



OFFICE OF THE COUNTY EXECUTIVE

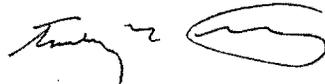
Isiah Leggett
County Executive

Timothy L. Firestine
Chief Administrative Officer

MEMORANDUM

March 15, 2011

TO: Valerie Ervin, President
Montgomery County Council

FROM: Timothy L. Firestine
Chief Administrative Officer 

RE: Inspector General's Report regarding the Hoyles Mill Wastewater Pumping Station and Force Main (West Germantown Development District)

On March 11, 2011 the Inspector General released the above referenced report to you without the County's management response. That was an unfortunate and unprofessional step on the part of the Inspector General, who is required by §2-151 (k)(2) of the County Code to: (1) provide the County with a reasonable opportunity to respond to the report; and (2) include the County's management response in the report.

The County had requested until March 18 to provide its management response to the Inspector General because key County staff have been deeply involved in preparing the County Executive's Recommended FY12 Operating Budget, which is required, under the County Charter, to be submitted to the County Council by March 15. Because the Inspector General chose to arbitrarily issue his report to Council and the public without the County's management response, I am now forwarding that management response directly to you.

c: Thomas Dagley, Inspector General



OFFICES OF THE COUNTY EXECUTIVE

Isiah Leggett
County Executive

Timothy L. Firestine
Chief Administrative Officer

MEMORANDUM

March 15, 2011

TO: Thomas J. Dagley, Inspector General

FROM: Timothy L. Firestine, Chief Administrative Officer 

SUBJECT: **Interim Report – Hoyles Mill Wastewater Pumping Station and Force Main CIP Projects (West Germantown Development District)**

Overview

The purpose of this memorandum is to respond to the report referenced above which was issued by the Inspector General (IG) on March 11, 2011.¹ The report makes the unsupported allegation that developers who constructed the Hoyles Mill Wastewater Pumping Station and Force Main in the West Germantown Development District (WGDD) received “double payments” for that completed infrastructure from the County and the Washington Suburban Sanitary Commission (WSSC). Without setting out any legal basis for this assertion, the IG demands that the County institute legal action to recover these “questionable” payments.

¹ The Inspector General released this report without giving the Executive Branch a reasonable opportunity to respond as is required under §2-151 (k)(2) of the County Code. The Inspector General asked for Executive Branch comment on this report on February 11—i.e. in the midst of preparing the County Executive’s Recommended FY12 Operating Budget which must be submitted, under the County Charter, to Council by March 15. The Executive Branch asked for 25 working days in which to respond. This reasonable request was denied *de facto* by the Inspector General when he released his report to Council on March 11, 2011 and then to the public on March 14, 2011. Mysteriously, the full report was also leaked to the Washington Examiner in February and was the subject of an editorial on February 28, 2011.

Thomas J. Dagley, Inspector General

March 15, 2011

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What the IG asserts as “double payments” were in fact the result of a statutory foundation designed to reduce the cost of housing to residents of the WGDD. The County made payments in accordance with County Law and County Council Resolutions, from bond proceeds to developers for infrastructure financed by taxes imposed on property owners in the WGDD. WSSC granted credits against and reimbursements of SDC charges in accordance with State law and its published policies.

In making his report, the IG failed to fairly represent the underlying legal, procedural, and policy basis for the actions of the Montgomery County Government (MCG) and WSSC. A clear understanding and explanation of that legal and policy basis for actions would have been an appropriate starting point for the IG’s investigation. The IG failed to note in his report that documentation was provided showing that all actions by MCG and WSSC were thoroughly discussed, coordinated, and vetted well in advance, including the involvement of both County and WSSC legal counsel, as far back as 1996 -- fully 15 years ago. The IG failed to note that MCG and WSSC actions were contemplated by and were in accordance with the Development District Law and the County Council’s Resolutions. A 2007 report issued by Council Staff and the Office of Legislative Oversight (OLO) relating to “Implementation of the Development District Act” noted that County law did not preclude financing of water and sewer infrastructure items with development district bonds even though the items were eligible for SDC credits and reimbursements. The report expressly raised this as a policy issue for Council to consider.² Although Council subsequently amended the Development District Law, it did not make any changes relating to infrastructure items that are eligible for SDC credits and reimbursements.

Without establishing any actual misconduct or improper actions, the IG recommends a review by the agencies involved, and recommends recovery of questionable payments or reimbursements made to the developers. Given the actual factual and legal basis for the actions by MCG and WSSC, we believe there is no basis for additional review, and any attempt at recovery would be inappropriate and fruitless.

Clear Legal Foundation for Actions by MCG and WSSC

To provide a more understandable overview of the events leading up to the actions by the Department of Finance and WSSC that are the subject of the IG’s investigation, I am providing

² See page 91 of the 2007 report entitled “Implementation of the Development District Act, An Analysis of Issues Raised by the Clarksburg Town Center Advisory Committee”.

the following outline of the key County Council actions, and legal and policy documents supporting the subject disbursements³:

1. Seeking ways to address the increasing costs of infrastructure associated with development, and desiring to encourage growth and economic activity in the County, the County Council in June 1994 enacted Bill No. 44/46-92 creating Chapter 14 of the County Code to provide an alternative financing mechanism for infrastructure to support growth. This mechanism requires the County to issue bonds to pay for infrastructure, and to levy taxes on benefitting development to pay the debt service on the bonds.
2. Section 14-10 (e) of the County Code provides that "The total amount of any development district special tax, special assessment, fee, or charge paid under this Chapter must be credited against: (1) the development impact tax and construction excise tax imposed under Chapter 52, as applicable; and (2) any other charge, fee or tax listed in the resolution adopted under Section 14-9 (including any front foot benefit charge, assessment, or tax imposed on construction) which is imposed by the County expressly to finance the costs of infrastructure improvements necessary to allow development." (See Attachment 1 - Chapter 14 prior to changes by Bill 36-07.) This provision indicated Council's intent that infrastructure charges such as the SDC be credited in Development Districts.
3. On July 30, 1996 the County Council, in Resolution No. 13-636 after holding a public hearing on a petition to create the Germantown West Development District, determined that "Intensive development of and public investment in that area during the term of the district will benefit the public interest because certain public facilities and development will be provided in a more timely and coordinated fashion within the district." (See Attachment 2 - County Council Resolution No. 13-636.)
4. On January 13, 1998 in Resolution No. 13-1135, after a public hearing, the County Council created the West Germantown Development District, approved a list of infrastructure to be financed by the District totaling \$12,831,177. The Resolution provided that any cost savings from that list of infrastructure be applied to a second list of additional improvements totaling \$3,516,923,⁴ and authorized the imposition of benefit assessments and ad valorem taxes on the real property located in the District. (See Attachment 3 - County Council Resolution No. 13-1135.)

³ In its response to the IG report dated March 9, 2011, WSSC sets out the legal basis for its granting of credits against and payments in reimbursement of the System Development Charges.

⁴ The IG fails to acknowledge much less explain how his theory of inappropriate "double payments" to developers can be reconciled with the requirement in Resolution No. 13-1135 that the County must use any cost savings to fund other infrastructure improvements from the second or "B" list.

Thomas J. Dagley, Inspector General

March 15, 2011

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5. Resolution No. 13-1135 authorized the County to enter into an Implementation Agreement with the owner or developer of any property located in the District to address . . . “the handling of System Development Charge (SDC) credits accruing to properties located in the District” This provision clearly contemplated that properties in the development district would receive SDC credits.
6. In a third resolution (No. 13-1398) on August 4, 1998 the County Council authorized the issuance of the development district bonds and ratified and confirmed the terms of the prior resolutions except where modified to enable the issuance of the bonds.

In summary, the County’s payments for the infrastructure were authorized by Chapter 14 of the County Code, and by County Council Resolution No. 13-1135 which created the Development District and specified the infrastructure to be financed. Similarly, WSSC’s granting of System Development Charge (SDC) Credits and reimbursement of SDC charges paid up to the credit amount approved, which were anticipated by the County, were authorized by State law and WSSC published policies.

County and WSSC Followed County Council Policy on Credits of SDC Charges

The IG repeatedly characterizes the WSSC’s issuance of System Development Charge credits and reimbursements as “payments” to support his characterization of double payments for infrastructure. This is despite the fact that the IG was clearly informed that WSSC’s actions were envisioned in the Development District Law and resolution and constituted County policy, which the County Council did not change several years ago when this same appearance issue was brought to the Council’s attention by the 2007 Council Staff/OLO report referenced above.

The County Council’s policy on crediting infrastructure fees and charges against Development District taxes dates back to the original formation of the County’s Development District Law, Chapter 14 of the County Code, and was in place long before the WGDD was formed and before WSSC entered into agreements with the developers on the Hoyles Mill Wastewater Pumping Station and Force Main.

Rationale for SDC Credits in Conjunction with Development District Financing of Infrastructure

A key point of confusion for the IG is his belief that the developers’ receipt of SDC credits and reimbursements as well as payments from bond proceeds for infrastructure constitutes a double payment for the infrastructure. This is not the case. The two infrastructure financing mechanisms are indeed complex, especially when both are present. But the actions by both County agencies were appropriate.

The County's Development District Law and the resolutions implementing the WGDD are predicated on a basic premise that the costs of development are passed on to the eventual buyers of a home, first through the contractual price of finished building lots sold to builders, and then to the eventual buyer in the price of the home. We are not aware of any study that examines this concept, but it is an accepted premise in all of the County's discussions of the amount of various taxes and charges related to development – a general acceptance that such costs will eventually be passed on to home buyers.

The WSSC System Development Charge is one such charge, like the transportation impact tax, the schools impact tax and various other exactions on development. These exactions are typically charged at time of permit, collected by the government to pay for the costs of infrastructure that the government provides. The collections typically are segregated in a separate account, and programmed as a funding source on capital projects that the government is building. In cases when the needed infrastructure is provided by a developer, a credit is given against the charge or tax, because the developer is incurring those costs of the infrastructure, and presumably passing those costs along to home buyers as described above. If the charge or tax is also collected, and also presumably passed along to a home buyer, then the home buyer would pay twice for the infrastructure. This is the basic rationale for credits against infrastructure exactions when the infrastructure is provided by means other than the government paying for it and funding the costs with a collected pool of exactions.

It should be noted that the financing of infrastructure through such government exactions represent an either/or approach: EITHER the developer provides the infrastructure through its own financing sources, typically by borrowing from a bank⁵, OR the government pays for the infrastructure from the collected exactions.

In the case of the Hoyles Mill Wastewater Pumping Station and Force Main, the developers proposed to provide the infrastructure, and entered into a Memorandum of Understanding with WSSC to do so in accordance with WSSC procedures. Because the infrastructure was provided by the developers, e.g. not built and paid for by WSSC from collected System Development Charges, then the properties that would otherwise have paid those charges instead received credits. The credits represented the fact that WSSC did not have to pay for the infrastructure from its funds, but the infrastructure was provided by the developers and the costs passed along to the properties benefitting from the infrastructure. If the properties had not received credits, a double burden would have been placed on the properties, with both

⁵ In the case of the WGDD, the developers borrowed funds through County issued bonds instead of financing the development costs associated with providing public infrastructure with private financing.

Thomas J. Dagley, Inspector General

March 15, 2011

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the costs incurred by the developer building the infrastructure and the costs of the WSSC exaction (SDC) passed along to the home buyers.

Pursuant to WSSC's procedures regarding SDC credits, credits were granted initially only up to an amount that is 50% of the initial estimated costs of the infrastructure. Following its approved policy, after the 50% threshold was reached, WSSC resumed collecting SDC charges at the time of plumbing permit, and after the final audit of costs, refunded those collected SDC charges back to the builders or developers, in accordance with their own internal contractual arrangements. These reimbursements were not payments for infrastructure in the sense that WSSC was using collected SDC charges to build and pay for infrastructure that it was providing, but simply reimbursements of SDC charges collected.

It is a wholly separate matter, and a separate policy decision made ultimately by the County Council, to finance the costs of the infrastructure through a development district. The development district financing is in lieu of the aforementioned bank financing. It is a financing mechanism introduced in the early 1990's to assist developers with the costs of financing infrastructure. Rather than borrowing from a bank, the developer petitions the County for a development district. Instead of the developer passing the costs of the bank financing to the builder and home buyer through the lot and home prices, the costs of financing are passed to the home buyer by the government, through the issuance of bonds to raise capital, and the taxation of properties to pay the debt service on the bonds. The development district process does involve payments to developers for infrastructure due to the very nature of the government providing the financing for that infrastructure. And those payments are passed along to home buyers in the form of taxes on their properties. The alternative would be that the costs of this infrastructure, if paid through private financing, would typically show up in the buyers' mortgage payments, because the cost of the infrastructure would be reflected in the price of the homes.

There is no dispute that the properties and homebuyers are paying for the development district financed infrastructure via the development district taxes. Had the developers/builders not received the SDC credits, or reimbursements for SDC charges paid after the 50% cost threshold, then we believe the home buyers would have been charged twice for the same infrastructure. Thus, the payments for infrastructure by the County were proper due to the development district, and the reimbursements of SDC credits by WSSC were proper due to the infrastructure costs not being incurred by WSSC. The Inspector General's basic premise of double payments is simply incorrect.

WSSC Issued Credits - Not Payments for Infrastructure

The IG repeatedly mischaracterizes WSSC as making payments for infrastructure. This is not the case, and WSSC's issuance of credits and reimbursements was legal and proper in accordance with WSSC's Standard Procedure CUS 94-03 which states:

If WSSC authorizes the Developer to design and construct a Qualified Project, or requires eligible private funding from the developer of WSSC's design and construction costs, the properties identified as served by the Project will receive credit and/or be subject to SDC Payments which may be reimbursed to the Developer up to the total eligible amount.

SDC credits against the ledger amount may be granted following WSSC receipt of eligible private funding or after construction of the Qualified Project by the Developer has commenced. However, in the latter case until such time as the actual total eligible amount is determined, SDC credits against the ledger amount shall not exceed 50% of the estimated total eligible costs, as cited in the MOU.

The actions of WSSC to grant credits against SDC charges up to the 50% threshold, and then reimburse for SDC payments made after the final audit determining the eligible amount of credits, was fully consistent with the WSSC procedures in place at that time, and were not payments for infrastructure (See Attachment 4 - Standard Procedures of the Washington

Suburban Sanitary Commission CUS 94-03). The concept of WSSC System Development Charge credits and reimbursements is not complex, nor is it hidden from view or found only in complicated procedures or MOUs. The proper characterization of WSSC credits and reimbursements of the System Development Charge can be found on the WSSC's website under its Glossary of Terms. (See Attachment 5 - WSSC Web Site Glossary.) A clear representation of the WSSC disbursements as credits and reimbursements would have brought considerable clarity to the IG's report, properly focused the issue on the County's policies, and avoided wasted use of scarce County resources in developing this response.

The IG proceeds in his report to raise numerous ancillary issues which do not pertain directly to the basic issue of legal and proper actions by WSSC and MCG. Nevertheless, we will address those issues below.

Finance Representative Unwilling to Provide Assignment

The IG notes in his report on page 3 that the documentation "revealed" that the County Representative was unwilling to provide an assignment letter assigning the SDC credits to the developers. We contend that the County had no legal basis for signing such an assignment, nor

was one necessary, as the Development District Law and the Council Resolution for the Development District acknowledged that the SDC credits properly accrue to the “properties located in the District.” (See Attachment 6 - Bond Counsel letter dated March 14, 2011.) The IG also implied that the WSSC audit and payment activities occurred “as a result of this disagreement . . .” However, there is no factual basis for this statement by the IG. WSSC’s audit procedures, credits, and cash payments are a usual part of WSSC procedures as noted above. WSSC also addressed this point in its response.

Issue Already Reviewed by OLO and Council

The IG notes on page 3 that the relationship between development district financing and WSSC’s issuance of SDC credits was reviewed by Council and OLO Staff in a 2007 report on the implementation of the Development District Law. After a thorough public review of that report, the County Council did not take up this issue, or choose to make any change to current law relating to this issue when it amended the Development District Law (Chapter 14) in 2008.

Documentation Supporting County Payments for Infrastructure

In 2002, the County’s Department of Finance proceeded to issue development district bonds in accordance with the Council Resolutions, and in 2002 and 2003 made payments from bond proceeds for the Hoyles Mill Wastewater Pumping Station and Force Main after the infrastructure was deemed to be substantially complete and then subsequently when the infrastructure was approved by WSSC for final acceptance.

On page 4 of his report, the Inspector General notes that the OIG was not provided various detailed financial records that supported the reimbursements for infrastructure. While the Department of Finance did not provide purchase orders and invoices for the payments which occurred in 2002 and 2003 – nine and eight years ago respectively, the Department did provide all available summary supporting documentation for the payments requested that had been retained in Department of Finance records, including the AIA form G702, detailed spreadsheets listing the invoices and charges by line item, **and approval sign offs for each payment by WSSC staff** confirming that the items met the test of either “substantial completion” or “final acceptance” in accordance with the terms of the Implementation Agreement. The IG’s failure to acknowledge the detailed records provided by the Department of Finance provides a misleading impression that no records were kept, and is an inappropriate omission.

Additional relevant information about the County’s payments for the Hoyles Mill Wastewater Pumping Station and Force Main were provided to the IG but were not included in his report. These are: 1) the County provided very detailed itemized preliminary cost estimates (bid estimates) for the infrastructure prepared by an engineering firm in June 1996 and updated

in February and April of 1997; 2) these same cost estimates were reviewed by WSSC in September 1997 and found to be "reasonable and consistent with the preliminary estimates developed by WSSC"; 3) each payment request was reviewed and signed by a WSSC representative to confirm either "substantial completion" or "final acceptance" in accordance with the terms of the Implementation Agreement; 4) the County was acquiring completed infrastructure, not contracting out for the building of infrastructure; and 5) any savings related to the infrastructure items (costs less than the amount specified in the Council's Resolution) would be reapplied to items on the "B List" of infrastructure items (also included in the Council Resolution) thus resulting in the same dollar amount of infrastructure being financed and paid for with bond proceeds.

Allocation of SDC Credits on a pro-rata Basis

The IG draws attention on pages 5 and 6 of his report regarding the Department of Finance's request that WSSC grant SDC credits allocated on a pro-rata basis across all units developed by Arcola and notes that he found that this practice was not well understood by MCG personnel. In fact, it appears that it is the IG's failure to understand the purpose of the allocation request that is consistent with the report's failure to clearly represent the basis of the SDC credits granted by WSSC. The Department of Finance sought to have the credits allocated across all units on a pro-rata basis for the simple purpose of achieving an equal benefit from the SDC credits for all properties in the District, given that the infrastructure costs were being financed through taxes levied on all properties in the District. Achieving a pro-rata sharing of SDC credits was sought by Finance in order to ensure that the SDC credits were not used up by the first properties that went through the permit process, causing later properties to pay SDC charges which would then be passed along to homeowners in the price of their homes. Finance sought equal and fair treatment of all properties in the district in regard to SDC charges because all properties were sharing in the costs of the infrastructure provided. After some experience with the even allocation approach, the Developer proposed an alternative method of achieving the same objective by amending agreements with the builders. Finance concurred with the 2001 amendment to WSSC's MOU with Arcola to allow SDC credits to follow WSSC's normal policy.

Finance's requirement of pro-rata sharing of SDC credits across all units developed by Artery and Arcola was included in the County's Implementation Agreement with the Developers, thus binding the Developers to the approach. The developers used vouchers and modified contracts with builders to comply with this requirement.

Developers Not Reimbursed Costs by Both WSSC and MCG

On page 7 of his report, the IG states that his extensive interviews with WSSC, MCG, and Montgomery County Council staff have not clarified why the developers were reimbursed the same or similar costs by both WSSC and MCG. In fact, MCG staff were unable to clarify the rationale behind a double reimbursement because it simply did not occur. In various meetings and interviews, Executive staff made numerous attempts to explain to the IG that SDC credits and reimbursements were not payments to developers for infrastructure. Despite these efforts, and the extensive documentation supporting the credits in County Law, County Council Resolutions, and WSSC Standard Procedures, the IG's report does not reflect a clear grasp of this basic concept.

IG Recommendation

In his final statement of the report, the IG makes two recommendations. These recommendations are without logic or factual support. First, the IG recommends that WSSC and MCG "conduct a thorough review of all fiscal, ethical, and legal accountability issues associated with the . . . projects, to ensure accountability in government and developer actions, and to ensure that County taxpayer's (sic) who reside in the WGDD and pay the annual special tax are protected from any unnecessary or unreasonable payments." MCG and WSSC personnel, including various available current and former legal counsels of the respective agencies, have conducted such a review, and found no basis for concluding that "questionable" or "double payments" had occurred.

Secondly, the IG recommends "that WSSC and MCG jointly assess and seek recovery of the full amount of all questionable payments or reimbursements made to the developers or their representative." This recommendation is of great concern, because it implies wrongdoing and potential financial loss without any actual findings or basis in his report for such an assertion. **The County and WSSC have found that all payments and reimbursements made to the developers or their representative were legal and proper, as outlined above.** Therefore, no attempt at recovery is appropriate.

Attachments:

- Attachment 1 - Chapter 14 prior to changes by Bill 36-07
- Attachment 2 - County Council Resolution No. 13-636
- Attachment 3 - County Council Resolution No. 13-1135
- Attachment 4 - Standard Procedures of the Washington Suburban Sanitary Commission
- Attachment 5 - WSSC Web Site Glossary
- Attachment 6 - Bond Counsel letter dated March 14, 2011

Attachment 2

Resolution No. 13-636
Introduced June 25, 1996
Adopted July 30, 1996

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

By: County Council

Subject: Germantown West Development District

Background

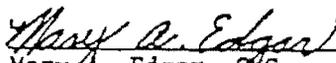
1. Chapter 14 of the County Code, which is the development district law the County Council enacted in 1994, establishes a procedure by which the Council by resolution may create a development district.
2. Under §14-6 a petition to create a development district must be signed by at least 80% of the property owners in the proposed district and the owners of 80% of the property in the proposed district by value.
3. On June 21, 1996, a group of property owners in Germantown West filed with the Council a petition to establish a development district in that area as provided in County Code §14-6. This is the first petition filed under the law.
4. As required by §14-6(a), the Council held a public hearing on this petition, after due notice, on July 23, 1996.

Action

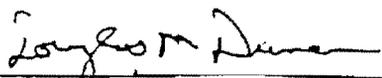
The County Council for Montgomery County, Maryland, approves the following resolution:

As authorized by County Code §14-6(b), the County Council intends to create a development district in the area of Germantown West specified in the petition filed with the Council on June 21, 1996. Intensive development of and public investment in that area during the term of the district will benefit the public interest because certain public facilities and development will be provided in a more timely and coordinated fashion within the district. As authorized by County Code § 14-7 through 14-9, the Council intends that a significant evaluation of the proposed district be initiated culminating in a second resolution that will determine how or whether the district will be created.

This is a correct copy of Council action.


Mary A. Edgar, SAC
Secretary of the Council

APPROVED:


Douglas M. Duncan
County Executive

(E1)

Resolution No.: 13-1135
Introduced: October 21, 1997
Adopted: January 13, 1998

COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND

By: County Council

Subject: West Germantown Development District

Background

1. Chapter 14 of the Montgomery County Code, which is the development district law the County Council enacted in 1994 (the "Act"), establishes a procedure by which the Council by resolution may create a development district.
2. Under §14-6 of the Act, a petition to create a development district must be signed by at least 80% of the property owners in the proposed district and the owners of 80% of the property in the proposed district by value.
3. On June 21, 1996, a group of property owners in West Germantown filed with the Council a petition containing sufficient signatures to establish a development district in that area as provided in § 14-6 of the Act. The petition was amended on July 30, 1997.
4. As required by §14-6(a) of the Act, the Council held a public hearing on this petition, after due notice, on July 23, 1996. On July 30, 1996, as required by §14-6(b) of the Act, the Council adopted Resolution No. 13-636 stating its intent to create a development district in the West Germantown area, finding that intensive development of and public investment in that area during the term of the proposed district will benefit the public interest. This resolution was approved by the County Executive.
5. As required by §14-7 of the Act, on October 25, 1996, as amended on July 31, 1997, the Montgomery County Planning Board reviewed and approved the application filed by the Petitioners for the West Germantown Development District, finding that the proposed development district complies with all applicable zoning and subdivision requirements under Section 50-35(k) and that the proposed district satisfies the Adequate Public Facilities requirements of the Annual Growth Policy for a development district, subject to certain conditions.

Exhibit B-1

6. As required by §14-8 of the Act, on September 29, 1997, the County Executive issued a fiscal report evaluating the proposed West Germantown Development District, in which the County Executive estimated the cost of each infrastructure improvement listed by the Planning Board under §14-7(c) of the Act, and the amount of revenue needed to cover the District's share of all infrastructure improvements and the estimated tax rate for each form of taxation available to the District that would produce the necessary revenue. The Executive's fiscal report recommended the creation of a development district, with certain modifications to the proposed infrastructure items to those which had originally been submitted in the petition filed by the property owners, and certain funding and revenue-raising measures to fund those improvements.
7. As required by §14-9 of the Act, the Council held a public hearing on the final resolution to create a development district, after [due] public notice, on November 6, 1997. After further notice to the public and the petitioners, as required by §14-9 of the Act, the Council held a second public hearing on January 13, 1998.
8. After the November 6 public hearing, Petitioner GFS Realty, Inc., indicated its intention to delay the creation of the development district for its property and the properties of Clopper Realty Joint Venture and John N. & Mary S. Deoudes, other Petitioners for which it acts as development agent, which properties had been proposed to be included in the Development District. Accordingly, the Development District created by this resolution will include only those properties owned by Arcola Investment Associates, Artery Hoyles Mill, L.L.C. and Mr. and Mrs. Robert Sisson (the owners of the property formerly owned by Petitioner Adrienne Wear).

Action

The County Council for Montgomery County, Maryland, approves the following resolution:

- A. The West Germantown Development District (the "District") is hereby created in an unincorporated area of Montgomery County, encompassing approximately [699] 670.7 acres more specifically described in attached Exhibit "A". [The District consists of two improvement areas, designated as West Germantown Development District Improvement Area I and West Germantown Development District Improvement Area II. Exhibit "A" also describes each of these Improvement Areas. In order to create West Germantown Development District Improvement Area II, portions of property owned by petitioners John N. & Mary S. Deoudes, Clopper Realty Joint Venture, and GFS Realty, Inc. (as fee owner for one parcel and beneficiary under a recorded Deed of Trust for a second parcel), must be exchanged with portions of property owned by Montgomery County and the Maryland National Park and Planning Commission, with the final

ownership of the properties as indicated on Exhibit "B". After these land exchanges, the properties owned by Montgomery County and the Maryland National Park and Planning Commission are not included in the District. If these land exchanges do not occur, West Germantown Development District Improvement Area II is not included in the District, and the District boundaries must be adjusted accordingly.] The description of each property included in the District is attached at Exhibit "B". A list of the current tax account number of each property [(including the properties now owned by Montgomery County and the Maryland National Park and Planning Commission) which will be] located in the District is enclosed on attached Exhibit "C".

- B. The specific infrastructure improvements that will be financed by the [West Germantown Development] District [Improvement Area I are listed in attached Exhibit "D -1" and the specific infrastructure improvements that will be financed by the West Germantown Development District Improvement Area II] are listed in attached Exhibit "D [-2]", [in each case] including the estimated cost related to each improvement, the estimated completion date of each improvement, and the share of that cost which will be financed through the District. All of these improvements are either located in the District, or are outside the geographic boundaries of the District but are reasonably related to the development or use of land in the District. To the extent that any cost savings are realized in the construction of any infrastructure improvement listed on Exhibit "D [-1]", those cost savings may be applied to the construction of additional infrastructure improvements listed on Exhibit "E", [as determined by the owners of the properties located in West Germantown Development District Improvement Area I in their discretion] in the order listed on Exhibit "E". Each additional infrastructure improvement [potentially to be financed by the District] listed on Exhibit "E" is either located in the District or is outside of the geographic boundaries of the District but is reasonably related to the development or use of land in the District. [To the extent that any cost savings are realized in the construction of any infrastructure improvement listed on Exhibit "D - 2", those cost savings must be applied to reduce the special benefit assessments on the properties located in West Germantown Development District Improvement Area II.]
- C. The estimated cost of the infrastructure to be financed by the District includes a contingency for unexpected cost overruns, which amounts to 10% of the estimated aggregate cost of the infrastructure.
- [D. The construction of the improvements to the local parks in West Germantown indicated on Exhibit "D - 1" by the District is conditioned on the receipt by the County and remission to the District, or receipt by property owners in the District, of contributions to the Route A-297

(Richter Farm Road) improvements by a developer, Pleasants Investments Limited Partnership, the owner of the Kingsview Village subdivision adjoining West Germantown Development District Improvement Area I, as evidenced by a Site Plan Enforcement Agreement entered into by Pleasants Investments Limited Partnership with the Montgomery County Planning Board as of July 17, 1995.]

[E] D. Under §14-11 of the Act, a special fund is hereby created for the District and designated the "West Germantown Development District Special Fund." Any special assessments, special taxes, fees, or charges levied under §14-10 of the Act for properties located in the District are pledged to the West Germantown Development District Special Fund, and the proceeds from any such special tax, special assessment, fee, or charge must be paid into the West Germantown Development District Special Fund. Any bonds which the County Council authorizes to be issued by or for the District must be repaid [through the proceeds of] from funds in the West Germantown Development District Special Fund, together with any other assets or revenues of the District pledged to secure their repayment, and those funds and other assets or revenues [may] must also be used to replenish any debt service reserve fund established for those bonds. [When sufficient funds are available in the West Germantown Development District Special Fund to repay the amount of any bonds issued by or for the District, when due or payable, either at maturity, or at some earlier date set by resolution of the County Council, the funds in the West Germantown Development District Special Fund must be applied to pay off the outstanding principal and interest owing on the bonds, and any balance remaining may be used as a credit against any future County tax obligations of any owner of any property located in the District.]

[F] E. The County Council may by resolution impose on all properties located in [each of the Improvement Areas in] the District the following special assessments and taxes sufficient to pay the principal of, interest on, and any redemption premium on the bonds to be issued under separate resolution of the Council, and to replenish the debt service reserve fund for the bonds:

1. a benefit assessment on undeveloped property, in [an] a rate or amount set by the Council], sufficient to satisfy an appropriate portion of the debt service requirements for the bonds to be issued under separate resolution of the Council]; and
2. an [increased] ad valorem tax on all real property located in the District [at a tax rate not to exceed 82 cents per \$100 of assessed value of property located in West Germantown Development District Improvement Area I and cents per \$100 of assessed

value of property located in West Germantown Development District Improvement Area II], with the specific rate [to be] set by the Council [after it adopts a resolution authorizing the issuance of bonds to finance the District improvements] annually, which will be in addition to [the normal] existing County ad valorem [property tax for] taxes on properties located in the West Germantown area[; and].

- [3. a benefit assessment on commercial property, whether developed or undeveloped, in an amount set by the Council in the resolution authorizing the issuance of bonds for the District.]

[G] E. The County Council may increase the rate of any tax or rate or amount of any assessment imposed in this resolution to the extent an increase is needed to [satisfy the annual debt service requirements] pay the principal of, interest on, and any redemption premium on the bonds to be issued [by or] for the District and to replenish the debt service reserve fund for the bonds. The original and any later resolution setting the rate of a tax or rate or amount of any assessment must limit the maximum special tax or assessment applicable to each individual property in the District and must prohibit any increase in or extension of the term of the maximum special tax or assessment applicable to any individual property because of delinquency or default by any other taxpayer. The Council may also decrease the rate of any such tax or rate or amount of any assessment to the extent that debt service requirements for the bonds are reduced in later years. The [exact] maximum tax rates set by the Council must be listed in a declaration filed in the Land Records of Montgomery County, which declaration must encumber all real property located in the District and designate that this property is subject to a development district. This declaration and the obligation of the property owners [in each Improvement Area] in the District to pay all benefit assessments, special taxes, and [increased] ad valorem taxes takes effect when the County issues the bonds with respect to the improvements located in [each respective Improvement Area] the District as authorized by §14-12 of the Act, and terminates when the Director of Finance records a release stating that all such bonds have been fully repaid.

G. The total amount of the development district special taxes and assessments paid by the owners of the properties located in the District must be credited against any Development Approval Payment charges assessed against the property owners.

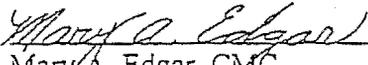
H. Any property which is fully developed before the District is created is exempt from any special assessment, special tax, fee or charge imposed by this and any later resolution, and the owner of any property exempt from

payment under this paragraph which is later developed more intensively and benefits from any development capacity attributable to infrastructure improvements financed by the District must pay any special assessment, tax, fee or charge that it would otherwise have paid [hereunder].

- I. The County may enter into an Implementation Agreement with the owner or developer of any property located in the District to address the [withdrawal] disbursement of funds from the West Germantown Development District Special Fund, the mechanics for reimbursements from other sources for infrastructure costs, the handling of System Development Charge (SDC) credits accruing to properties located in the District, and other matters as each owner or developer and the County may agree.

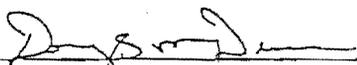
- J. Before any bonds are issued to finance infrastructure improvement related to the District, the County Council must adopt one or more bond resolutions as provided in §14-13 of the Act.

This is a correct copy of Council action.



Mary A. Edgar, CMC
Secretary of the Council

APPROVED:



Douglas M. Duncan
County Executive

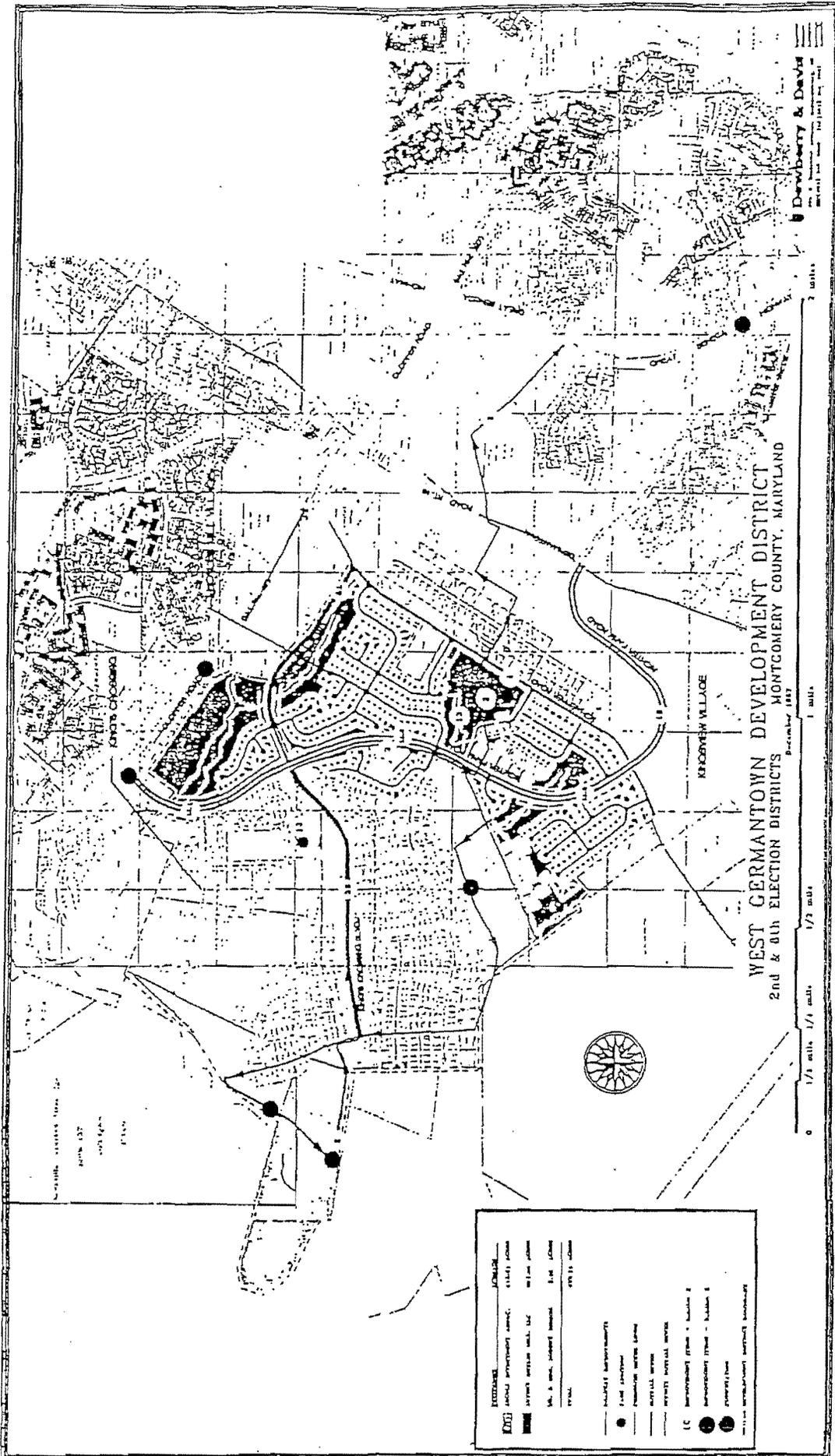


EXHIBIT "D"WEST GERMANTOWN DEVELOPMENT DISTRICT
DISTRICT FUNDED IMPROVEMENTS

	(Numbers Refer to Item Numbers in Petition)	Estimated Cost	Estimated Completion Date	% Funded by District
TRANSPORTATION IMPROVEMENTS				
1	Richter Farm Rd. A-297 MD 117 to Schaeffer (2 lanes)	\$4,124,866	12/99	100%
	Additional 2 lanes MD117 to Schaeffer	1,100,000	12/99	100%
	Richter Farm Rd A-297 Schaeffer to MD118 (2 lanes)	1,791,098	12/01	100%
	Additional 2 lanes Schaeffer to MD118	364,949	12/01	100%
4	Schaeffer Road	992,244	11/98	100%
	Subtotal Transportation Improvements	\$8,373,157		
OTHER IMPROVEMENTS AND COSTS				
13	Local Parks	\$620,000	12/03	100%
WATER AND SEWER				
2	Hoyles Mill Wastewater Pumping Station/ Force Main	\$3,838,020	12/98	100%
	TOTAL CONSTRUCTION FUNDS REQUIRED	\$12,831,177		

EXHIBIT "E"

DISTRICT FUNDED IMPROVEMENTS IF COST SAVINGS RESULT (IN ORDER OF PRIORITY)

DESCRIPTION	ESTIMATED COST	ESTIMATED COMPLETION DATE (IF FUNDED BY DISTRICT)	PERCENT FUNDED BY DISTRICT (IF FUNDED)
12" Outfall Sewer	\$ 488,526	Nov-98	100%
15" Outfall Sewer	\$ 530,480	Nov-98	100%
18" Outfall Sewer	\$ 376,104	Nov-98	100%
Clearing, Grading for Force Main Installation	\$ 615,445	Nov-98	100%
<u>Hoyle's Mill Road</u> - Richter Farm Road to Schaeffer Road	\$ 283,012	Aug-99	100%
<u>Clopper Road</u> - Acceleration, Deceleration and Left Turn Lane onto A-297	\$ 121,161	Aug-99	100%
<u>Clopper Road</u> - Left Turn and Bypass Lane at Hopkins Road	\$ 49,818	Aug-99	100%
<u>Great Seneca Highway (S)</u> - Right Turn Lane to West Clopper Road	\$ 100,000	Jun-02	100%
<u>Great Seneca Highway (S)</u> - Acceleration Lane from Eastbound A-297	\$ 32,715	Jun-02	100%
<u>Great Seneca Highway (N)</u> - Second Left Turn Lane to West A-297	\$ 79,626	Jun-02	70%
<u>Great Seneca Highway (S)</u> - Second Right Turn Lane to West A-297	\$ 74,731	Jun-02	70%
<u>Kings Crossing Boulevard</u> - A-297 to Park Property	\$ 675,305	Aug-99	100%
<u>Kings Crossing Boulevard</u> Blasting - A-297 to Park Property	\$ 90,000	Aug-99	100%
TOTAL	\$ 3,516,923		

Glossary of Development Services Process Terms and Abbreviations

TERM	DEFINITION
Applicant	A firm, corporation, municipality, agency, person(s) who owns or develops property and who seeks water or sewer service provided by systems or facilities within the Sanitary District.
Capital Improvements Program (CIP)	WSSC's Capital Improvements Program is a 6 year projected program of capital improvements for all major water and sewer systems and facilities as defined in Article 29§ 7-101 of the Maryland Annotated Code.
Construction Services Fee	A fee to recover WSSC costs to provide construction inspection services, final project testing, and the processing of the release for service.
Contamination Data Base Search Fee	A fee to recover WSSC costs of providing a Contamination data base search for an Applicant.
Delegation of Authority	Delegation of authority to perform various functions from the Commission to the General Manager and sub-delegated to staff, as set forth in a document and modified from time to time as appropriate.
Development Services Process (DSP)	The new process of extending the WSSC water or sewer system. The old process was called DAP (Development Authorization Process).
Engineering Agreement	A bilateral agreement between the Applicant of a Non-SEP project and WSSC, when WSSC is to provide design services. The agreement enables WSSC to recover any costs incurred if the Applicant decides to not proceed with the construction of the project.
Extra Review Fee for Additional Reviews of Unsigned Drawings	To recover WSSC costs of reviewing design drawings more than two times. These are a result of inadequate submissions or changes in the drawings. The fee would not be charged if the changes are made as a result of a WSSC requested modification to the drawings.
Extra Review Fee for Minor Revisions	A fee to recover WSSC costs of reviewing changes to approved design drawings.
Extra Review Fee for Splitting Signed Drawings	A fee to recover WSSC costs of reviewing and processing the splitting of signed drawings into two or more separate projects.
Facilities	Water and sewage pumping stations, storage structures, and treatment facilities and their appurtenances.
Feasibility Review Fee	For certain SEP projects, WSSC will review a Feasibility Study prior to the initiation of the design phase. The fee will recover WSSC costs for the review.
Feasibility Study Preparation Fee	For Non-SEP projects, this fee will cover the cost of WSSC's preparation of the Feasibility Review Study, which is similar to the Authorization Report previously prepared under the DAP.

Glossary of Development Services Process Terms and Abbreviations

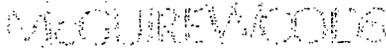
TERM	DEFINITION
Hydraulics Modeling Fee	A fee to recover the costs of WSSC modeling the water and sewer systems for a development. There will not be a revision fee. If the Applicant changes what was originally sized, the new modeling would be subject to the entire fee. If the resizing is for a multipart development and several parts have already been completed, the completed parts would be considered existing for the calculation of the new fee.
Letter of Findings	This correspondence will state all pertinent information for the proposed development and specifies WSSC contact's name, phone number and job number, and will set forth any conditions that must be met prior to service being provided. Information will include the availability of Water and Sewer, the need for a "Feasibility Review" for SEP projects, and the need to obtain a "Planning Assistance Package" required prior to Phase 2.
Maintenance Bond	A security payable to WSSC as a guarantee of funds for the correction of any construction and material deficiencies found during the life of the bond. The security shall be in an amount equal to one half the amount of the Performance Security. The security may be provided in the form of a certified check, a cash deposit, a certificate of deposit, an irrevocable letter of credit from a financial institution acceptable to WSSC and in a form acceptable to WSSC, a bond executed by a surety company authorized to do business in the State of Maryland, or any other form of security acceptable to WSSC.
Major Project	Projects for the construction of larger diameter water and/or sewer mains, force mains, and/or facilities included in the CIP as defined in Article 29§ 7-101 of the Maryland Annotated Code.
Memorandum of Understanding (MOU)	A bilateral agreement between the Applicant and WSSC for the design and construction of water and/or sewer facilities. The MOU is required for the applicant to construct facilities that WSSC will, upon satisfactory completion, take over for maintenance and operation.
Modifications Booklet	A booklet compiling all changes to the <u>General Conditions and Standard Specifications</u> , <u>Standard Detail</u> , and applicable Special Provisions that pertain to the construction of SEP projects.
Non-SEP Job	A WSSC designed and constructed extension, usually to alleviate residential health hazards, or to provide service to a single-family residence, or to construct a major project.
Offsite Extensions	Water or sewer mains constructed beyond the limits of the Applicant's property.
Partial Release for Service Fee	A fee to recover WSSC costs of processing a release of a portion of a project prior to final Release for Service.
Payment Security	A security payable to WSSC to guarantee payment to the utility contractor, subcontractors, and suppliers that provide labor, materials, or construction equipment for the construction of the subdivision lines. This security shall be in an amount equal to the amount of the performance security. The security may be provided in the form of a certified check, a cash deposit, a certificate of deposit, an irrevocable letter of credit from a financial institution acceptable to WSSC and in a form acceptable to WSSC, a bond executed by a surety company authorized to do business in the State of Maryland, or any other form of security acceptable to WSSC.

Glossary of Development Services Process Terms and Abbreviations

TERM	DEFINITION
Performance Security	A security payable to WSSC to guarantee completion of construction of subdivision lines. This security shall be payable to WSSC in an amount designated by WSSC, taking into account potential cost escalation. The security may be provided in the form of a certified check, a cash deposit, a certificate of deposit, an irrevocable letter of credit from a financial institution acceptable to WSSC and in a form acceptable to WSSC, a bond executed by a surety company authorized to do business in the State of Maryland, or any other form of security acceptable to WSSC.
Physical Acceptance Date	In instances where Substantial Completion is issued with outstanding punch list items, WSSC will establish the Physical Acceptance Date once all items have been completed. This date will signify that all contractual requirements at the site have been met.
Planning Assistance Package Fee	A fee for the preparation of an information package on all existing WSSC water and sewer systems in the vicinity of the project.
Release of Liens	A form acceptable to WSSC, signed by the utility contractor and the Applicant and notarized, stating that the utility contractor, and all subcontractors and suppliers, have been paid.
Re-Test Fee	A fee to recover WSSC costs when additional project testing is needed as a result of initial testing failures.
Review for System Integrity Fee	A fee to recover WSSC costs incurred for the preliminary and final review and approval of the Applicant's design submission.
Substantial Completion	The point in the construction phase when a project is ready to be used for its intended purpose. All testing is complete and the system or facility is ready to be placed into service.
System Development Charge (SDC) Credit	Costs paid by the Applicant to construct WSSC systems or facilities may entitle the Applicant to a credit or reimbursement of the System Development Charges imposed by WSSC for properties served by the project. The System Development Charge Credit Agreement (SDCCA) or the MOU shall indicate how such credits towards SDC will be determined. See Standard Procedure CUS 94-03.
System Extension Permit (SEP)	A WSSC-issued permit for extensions to WSSC System. Replaces the MOU for systems projects. The permit is required for the applicant to build water and sewer systems that WSSC will, upon satisfactory completion, take over for maintenance and operation.
Systems	Water and sewer pipes.
Transfer of Ownership Fee	A fee to recover WSSC costs of processing a change in ownership of a project prior to the issuance of the SEP.
Turnkey Project	A project where the Applicant will design and construct all systems, facilities, or connections in accordance with WSSC standards and technical criteria, and will transfer the same to WSSC for operation and maintenance when the construction and testing has been completed to the satisfaction of WSSC and all conditions set forth in the SEP or MOU are met.

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March 14, 2011

Ms. Jennifer Barrett
Director of Finance
Montgomery County, Maryland
101 Monroe Street, 15th Floor
Rockville, Maryland 20850

Dear Ms. Barrett:

You have asked me to respond to several questions in connection with the Inspector General's Report issued on March 11, 2011 regarding the Hoyles Mill Wastewater Pumping Station and Force Main (the "IG Report"). As you know, I have acted as bond counsel to the County in several capacities since 1985. Specifically, I advised the County in connection with the adoption of the State and County laws authorizing the creation of development districts and acted as bond counsel in connection with the creation of the West Germantown Development District (the "District") and the issuance of special obligation bonds which financed infrastructure to be constructed in the District, including the Hoyles Mill Wastewater Pumping Station and Force Main (the "Improvements").

County Payments

First, you have asked that I address the legal authority for the payments made by the County for the Improvements. Section 14-2 of the County Code¹ provides that the one of the purposes of Chapter 14 is to "authorize the County to provide financing, refinancing or reimbursement for the cost of infrastructure improvements necessary for the development of land" in the County. The process set forth in Chapter 14 provides the mechanism by which the infrastructure to be financed by the issuance of special obligation bonds is identified and the costs to be financed are determined. Once the County Council declares its intent to establish a development district (Section 14-6(b)) and the developers complete the application process for provisional adequate public facilities approval with the Planning Board (Section 14-7), the County Executive must complete the fiscal report described in Section 14-8 which, among other things, must estimate the cost of each infrastructure improvement listed by the Planning Board and recommend which infrastructure improvements the district should fully or partly fund. The County Council then may by resolution, create a district and such resolution must

¹ References to sections of Chapter 14 are to those sections as were in effect when the District was created and the West Germantown bonds were issued.

list each infrastructure improvement that will be financed by the district, the estimated completion date and cost of that improvement and the share of that cost which the County or another governmental agency will pay. In order to issue bonds, the County Council must adopt another resolution under Section 14-13 describing the proposed infrastructure improvements, the maximum amount of bonds to be issued and other details of the bonds. Section 14-12 provides that all proceeds received from any bonds issued must be applied towards "the costs of the infrastructure improvements listed in the resolution adopted under Section 14-9(d)(2)" and bond issuance costs.

Pursuant to the authority of Chapter 14, the County Council adopted Resolution 13-636 on July 30, 1996, declaring its intent to create the District. Thereafter, the County Executive issued his fiscal report dated September 29, 1997 (the "Fiscal Report"), wherein he recommended that several infrastructure improvements be financed, including the Improvements. Specifically, he recommended that a bond issue of approximately \$19.9 million be undertaken to fund \$15.5 million in infrastructure improvements. The Improvements were included on the list of recommended infrastructure. The Fiscal Report also recommended that the majority of the proceeds of the bonds should be used to acquire substantially completed improvements that are advance-funded and constructed by the developers.

Upon receipt of the Fiscal Report, the County Council adopted Resolution No. 13-1135 on January 13, 1998 (the "Second Resolution"). The Second Resolution created the District and listed in Exhibit D the infrastructure improvements to be financed, including the estimated cost of each improvement and the share of that cost which would be financed through the District. To the extent that any cost savings were realized in the construction of the infrastructure improvements listed on Exhibit D, the Second Resolution authorized those cost savings to be applied to the construction of additional infrastructure improvements listed on Exhibit E. The Second Resolution also authorized the County to enter into an Implementation Agreement with the owner or developer of any property located in the District to address the disbursement of funds and the mechanics for reimbursements from other sources for infrastructure costs. The Improvements are listed on Exhibit D of the Second Resolution, with an estimated cost of \$3,838,020 and 100% of such costs to be funded by the District. Subsequently, the County Council adopted Resolution 13-1398 on August 4, 1998 (the "Bond Resolution"). The Bond Resolution authorized up to \$20,000,000 of bonds to be issued to finance infrastructure improvements in the District, including the Improvements.

Pursuant to the authority of the Second Resolution, the County entered into an Implementation Agreement dated April 1, 2002 with Arcola Investment Associates, Artery Hoyles Mill, LLD and Woodcliffe Development District, LLC (collectively, the "Developers"). Article III set forth the procedures whereby the County would purchase the Improvements from the Developers. The purchase price was to be paid to the Developers after substantial completion and final acceptance. The total maximum purchase price for the Improvements was \$3,838,020, the amount that was authorized by the Second Resolution and the Bond Resolution. I understand that, pursuant to the

Implementation Agreement, the County paid a total of \$3,715,602.50 for the Improvements.

As set forth above, the County's payment of bond proceeds to the Developers pursuant to the Implementation Agreement to pay for the Improvements was authorized by Chapter 14 and the Council resolutions. The financing of the costs of the Improvements was recommended in the Fiscal Report and subsequently authorized by the County Council in the Second Resolution and the Bond Resolution. In accordance with the Second Resolution, the County entered into the Implementation Agreement, whereby the County agreed to purchase the completed Improvements. The payments made under the Implementation Agreement represented the purchase price for completed improvements and were made within the maximum amounts authorized by the County Council. As such, those payments were legal and proper in all respects.

WSSC Payments

Second, you asked me to address the legal authority for the WSSC payments referenced in the IG Report. While we did not (and do not) represent WSSC in connection with the District or otherwise, throughout the course of the District financing, we discussed the relationship between the District financing and existing WSSC charges, credits and reimbursements and included provisions in several documents to address these issues.

Specifically, the Second Resolution authorized the County to include in the Implementation Agreement "the handling of System Development Charge (SDC) credits accruing to properties located in the District." Pursuant to the Second Resolution, the Implementation Agreement included provisions regarding the allocation of SDC Credits. We understood at the time we did the District financing that the Developers (or their builders) would be eligible for SDC Credits and/or reimbursements for SDC's that were paid relating to lots within the District. We included these provisions in the Implementation Agreement to ensure that the SDC Credits were allocated pro-rata across all of the units in the District, in order to ensure that all residents in the District would get the benefit of the credits.² We further understood that the SDC credits would be available to the Developers (or their builders) because they were providing the Improvements and financing the Improvements through the District, thereby alleviating the need for WSSC to collect SDC's to fund the Improvements. We did not see the credits or reimbursements as payments for the Improvements, but as offsets to ensure that the Developers (and ultimately the homeowners) would not pay for the Improvements twice; first through the SDC's and later through the special taxes levied in the District to repay the bonds.

² The IG Report notes that the Implementation Agreement included the pro-rata concept even after the WSSC MOU was amended to remove the pro-rata concept. My recollection is that this was intentional. We were aware of the amendment to the MOU, but wanted to require the Developers to use the pro-rata method to ensure fairness to all District residents. We felt that the Implementation Agreement was an appropriate document to memorialize the Developers agreement to do this.

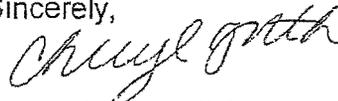
March 14, 2011

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The IG Report also suggests that the County should have provided an assignment letter to WSSC, which letter would have assigned the County's rights in the SDC credits to the Developers. We are not aware of any legal basis for the County to claim "ownership" of the credits or reimbursements of SDC charges paid by the Developers (or their homebuilders), County law, the Second Resolution and WSSC procedures clearly provide that the property owner has the right to receive the credits. The reimbursements arise because a portion of the SDC was paid when the plumbing permit was issued. Clearly the County did not pay the SDC, so it is not eligible for the reimbursement. Therefore, the County did not have any rights in the credits or the reimbursements that could be assigned to the Developers or any third party.

Please contact me if you need any additional information or have any other questions.

Sincerely,



Cheryl O'Donnell Guth

COG:clj

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GOVT

LINOWES
AND BLOCHER LLP
ATTORNEYS AT LAW

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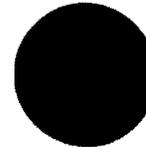
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March 23, 2011

John R. Orrick, Jr.
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301.961.5213

061453



Valerie Ervin, President
Montgomery County Council
100 Maryland Avenue
Rockville, Maryland 20850

Re: Inspector General's Final Interim Report: Review of Allegations of Questionable Payments to Developers for the Hoyles Mill Waste Water Pumping Station and Force Main CIP Projects (West Germantown Development District)

Dear President Ervin:

This Firm served as counsel to Artery Hoyles Mill, LLC and Arcola Investment Associates, the developers for the communities located in the West Germantown Development District, in connection with the establishment of the West Germantown Development District. We are submitting this letter in response to a request from Mike Faden, staff counsel to the County Council, relating to a hearing on the above-referenced report issued on March 11, 2011 by Thomas J. Dagley, Inspector General.

We find the allegations contained in the Inspector General's report to be erroneous in many respects and not supported by the law or the events that transpired. We agree with the response provided by Timothy L. Firestine, Chief Administrative Officer, dated March 15, 2011, that the Inspector General's report failed to fairly represent the underlying legal, procedural and policy basis for the actions of Montgomery County Government and the WSSC.

In particular, we note the following:

- The West Germantown Development District was a financing device whereby funds were advanced by the County to finance a portion of the construction of public infrastructure (i.e., roads, water and sewer, parks) through special purpose bonds issued by the County, which bonds, in turn, were repaid through the payment of special taxes levied on the affected properties. The policy of utilizing development district financing is to encourage growth in areas of the County that have been identified by the Council to be in the public interest, as West Germantown had been so identified. In this respect, the transaction effected through the West Germantown Development District is no different from a conventional loan where draws from a bank for work completed have to be repaid by a

Valerie Ervin, President,
Montgomery County Council
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borrower. In the case of a development district, the repayment is made through the special taxes which are incurred by the benefitted property owners over a period of time. These property owners included the developers and the homebuilders during the period of time that they owned the benefitted properties.

- The Washington Suburban Sanitary Commission (“WSSC”) system development charge (“SDC”) program was established as a means for reimbursement by private developers of the cost of installation of larger components of water and sewer infrastructure which serve a larger community than a single development, such as regional sewer pumping stations and CIP sized force mains and water lines (“WSSC Infrastructure”). The system development charges, which are paid by homebuilders at the time they apply for plumbing permits for houses they construct, are collected by the WSSC and are used as a means of contributing to the cost of construction of the WSSC infrastructure. Developers who agree to undertake the cost of construction of the WSSC infrastructure are entitled to receive credits against the system development charges, up to an agreed amount, with the ability to receive reimbursements of system development charges above the credited amount up to the actual documented cost of the construction following completion of the WSSC infrastructure. The policies and purposes behind the WSSC SDC system are entirely separate from the policies and purposes behind the County’s development district policies and relate to the need to equitably allocate the cost of providing such WSSC infrastructure among builders of benefitted communities.
- There were extensive negotiations over a period of years among the County, the WSSC, the developers and their respective counsel prior to the execution of the agreements cited in the Inspector General’s report. At the outset of negotiations with the County and the WSSC with respect to the West Germantown Development District, the developers disclosed their intention to apply for SDC credits for eligible WSSC infrastructure and the agreements entered into with the County and the WSSC reflected the understanding of the County and the WSSC of this fact. The Inspector General’s report implies that the SDC credit language contained in the Implementation Agreement signed by the developers with Montgomery County differed from the language in the agreement signed with the WSSC, but in actuality, the procedures outlined by the Montgomery County Implementation Agreement were adhered to by the developers in their agreements with the homebuilders, *i.e.*, that homebuilders would receive an allocation of SDC credits on a pro-rata basis across the lots developed by the developers.
- The Inspector General’s report indicates that the interviews conducted by the Inspector General with representatives of the County, WSSC, and the developers or their attorney have not to date clarified why the developers were reimbursed the same or similar costs

Valerie Ervin, President,
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by both WSSC and MCG. To set the record straight, I personally met with Mr. Dagley on two separate occasions, provided documentation to him regarding the Implementation Agreement with the County and the Memorandum of Understanding signed with the WSSC by my clients, and explained the differing purposes for the WSSC SDC program and the County development district program. I am not aware of what information Mr. Dagley feels was not provided to him or why his report did not discuss or attempt to distinguish between the differing purposes for development district financing and WSSC SDC credit programs.

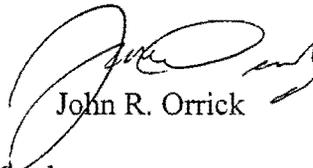
- As referenced in the response of Mr. Firestine, the reference in the Inspector General's report to a 2007 report of the Office of Legislative Oversight to the Council stating that the Council should consider amending the development district law to expressly preclude the possibility of development district funding of water or sewer infrastructure if that item could also be funded through WSSC's system development charge program was in fact considered by the Council and its staff during the most recent amendment process to Chapter 14 of the Montgomery County Code, the County's development district law, which culminated in 2008. Although there were extensive revisions made to Chapter 14 at that time, the Council declined to add such a provision to the law. During such amendments, the Council did amend Chapter 14 to remove a credit previously contained therein against the County's transportation impact tax payments, but the staff report explaining such amendment clearly recognized the fact that developers utilizing development districts are still entitled to claim transportation impact tax credits conventionally to the extent they fund such infrastructure through the procedures established in Chapter 52 of the Montgomery County Code. Similar to the WSSC system development charge program, the County's transportation impact tax credit policy serves an entirely different policy and function from development district financing.
- The Inspector General's report references the referral of certain matters to law enforcement and other officials to determine if "criminal violations, conflicts of interest, or professional misconduct" existed in the implementation of the West Germantown Development District but fails to allege any basis for such referral. There is in fact no reference in the report to any of the laws in question. As documented by Mr. Firestine's response, the actions taken by the WSSC, the County and the developers were in accordance with County and State law and established policies.

Valerie Ervin, President,
Montgomery County Council
March 23, 2011
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Please feel free to contact me if you need any additional information.

Very truly yours,

LINOWES AND BLOCHER LLP



John R. Orrick

CC: County Council Members
Timothy L. Firestine, Chief Administrative Officer, MCG
Thomas J. Dagley, Inspector General

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System Development Charge

- ❖ The System Development Charge (SDC) is a charge to applicants for new WSSC service, which is intended to recover the growth costs of building major treatment, transmission, and collection facilities (projects appearing in the Commission's Water and Sewer Capital Improvements Program). The amount of the charge varies depending on either the number of toilets (residential) or the number and type of plumbing fixtures (commercial) in a home or building.
- ❖ SDC was established during the 1993 session of the Maryland General Assembly. The amount of the SDC is set annually by the Prince George's and Montgomery County Councils. The law also permits annual increases in the maximum allowable charge based on the consumer price index. Full or partial exemptions from the charge are allowed for public sponsored or affordable housing as jointly defined and agreed upon by the County Councils, as well as revitalization projects, mixed retirement development; other elderly housing; and properties used for biotechnology research and development, or manufacturing.
- ❖ All versions of the law required that the use of SDC funds be restricted and held in a special fund, which may not revert to the general funds of the WSSC. Use of the funds is limited to paying for new treatment, transmission, and collection facilities, the need for which is directly attributable to the addition of new service or to amortize any bond that is issued in connection with the construction of those new facilities.
- ❖ The law allows developers to construct growth facilities and receive SDC credits for the design, construction, and associated eligible costs.
 - The project must be in WSSC's Approved Capital Improvements Program. The law allows minor exceptions to this requirement for short, local service needs.
 - The SDC credits can only be used in the area served by the constructed facilities. These areas are referred to as "qualified properties."
 - SDC credits can only be used for the System Development Charge portion of a qualified property's plumbing permit.
 - A Memorandum of Understanding (MOU) is entered into between the developer and WSSC which identifies the agreed-upon estimate of the project's costs, which become the SDC credit amount.
 - At signing of the MOU, the developer is entitled to use (or to transfer to others) up to 50% of the SDC credit amount for qualified properties. Generally, if the developer uses the 50% portion of the credit before the project is completed, the developer is required to pay SDC fees for their additional qualified properties at the time of permit application, until such time as the project is completed and the costs are audited.
 - At completion of the project, the developer's costs are audited by the WSSC Internal Auditor. The audit report identifies the total SDC eligible credit amount, and the developer is then eligible to use (or to transfer to others) the balance of the SDC credits (i.e. the total audited SDC eligible costs minus SDC credits used to date).
 - Until such time as the balance of the SDC credits are exhausted, on a quarterly basis WSSC pays any SDC collections from qualified properties to the developer. This can include SDC payments made by the developer after utilizing the initial 50% allocation.
 - In accordance with WSSC's Standard Procedure, any unused SDC credits expire after twenty years.

SUBTITLE 4. SYSTEM DEVELOPMENT CHARGE.

§ 25-401. Definitions.

(a) *In general.*- In this subtitle the following words have the meanings indicated.

Revisor's Note.

This subsection formerly was Art. 29, § 6-113(a)(1).

The only change is in style.

(b) *Fixture unit.*- "Fixture unit" means the assigned value for a plumbing fixture or group of plumbing fixtures, as set forth in the Commission's plumbing and gas fitting regulations, that is standardized with a common lavatory having an assigned value of one based on its probable discharge into the drainage system or hydraulic demand on the water supply.

Revisor's Note.

This subsection formerly was Art. 29, § 6-113(a)(2).

The former reference to a "particular" plumbing fixture is deleted as unnecessary.

The only other changes are in style.

Defined Terms.

(c) *New service.*- "New service" means:

(1) a first time connection of a property to the Commission water or sewer system; or

(2) a new connection or increased water meter size for a property previously or currently served by the Commission if the new connection or increased meter size is needed because of a change in the use of the property or an increase in demand for service at the property.

Revisor's Note.

This subsection formerly was Art. 29, § 6-113(a)(3).

The only changes are in style.

Defined Terms.

(d) *Toilet*.- "Toilet" means a water closet, as set forth in the Commission's plumbing and gas fitting regulations.

Revisor's Note.

This subsection formerly was Art. 29, § 6-113(a)(4).

The only changes are in style.

Defined Terms.

[An. Code 1957, art. 29, § 6-113(a)(1)-(4); 2010, ch. 37, § 3.]

§ 25-402. Imposition of system development charge.

(a) *In general*.- In addition to any other charges authorized under this division, the Commission may impose a system development charge that shall be paid by an applicant for new service.

(b) *Method of payment*.- The system development charge shall be paid as follows:

(1) for residential properties:

(i) 50% at the time the plumbing permit application is filed; and

(ii) 50% within 12 months after the earlier of the date on which a plumbing permit application is filed or on transfer of title to the property; and

(2) for other properties, 100% at the time the plumbing permit application is filed.

(c) *Security.*- When the applicant files the plumbing permit application, the applicant shall deposit with the Commission security:

- (1) in the form of an irrevocable letter of credit;
- (2) in the form of a financial guaranty bond; or
- (3) in a form the Commission establishes and approves under its regulations.

[An. Code 1957, art. 29, § 6-113(b); 2010, ch. 37, § 3.]

§ 25-403. Amount of system development charge.

(a) *Procedures for setting system development charge.*-

(1) Each year the Montgomery County Council and the Prince George's County Council shall meet to determine the amount of the system development charge.

(2) The amount of the system development charge for a particular property:

(i) shall be based on the number of plumbing fixtures and the assigned values for those fixtures as set forth in the Commission's plumbing and gas fitting regulations;

(ii) except as provided in item (iii) of this paragraph and subsection (c) of this section, may not exceed \$200 per fixture unit; and

(iii) for residential properties with five or fewer toilets, shall be based on the number of toilets per dwelling unit and:

1. for each apartment unit, may not exceed \$2,000;
2. for dwellings with one or two toilets, may not exceed \$3,000;
3. for dwellings with three or four toilets, may not exceed \$5,000;
4. for dwellings with five toilets, may not exceed \$7,000; and
5. for dwellings with more than five toilets, shall be calculated on a fixture unit basis.

(3) When determining the system development charge, the county councils shall consider the actual cost of construction of Commission facilities.

(b) *Exemptions.*- When determining the system development charge, under criteria established jointly and agreed on by the county councils, the county councils:

(1) shall grant a full or partial exemption from the charge for public sponsored or affordable housing as jointly defined and agreed on by the county councils;

(2) may grant a full or partial exemption from the charge for revitalization projects; and

(3) may grant a full or partial exemption from the system development charge, under conditions set forth

by the county councils, for:

(i) residential property located in a mixed retirement development as defined in the zoning ordinance of Prince George's County;

(ii) residential property located in a planned retirement community as defined in the zoning ordinance of Montgomery County;

(iii) elderly housing other than that included in item (i) or (ii) of this item; or

(iv) properties used for manufacturing or biotechnology research and development.

(c) *Maximum charge.*- On July 1, 1999, and July 1 of each succeeding year, the maximum charge, as established in subsection (a)(2) of this section, may be changed by an amount equal to the prior calendar year's change in the Consumer Price Index published by the Bureau of Labor Statistics of the United States Department of Labor for urban wage earners and clerical workers for all items for the Washington, D.C. metropolitan area, or the successor index.

(d) *Failure to agree.*- If the county councils do not agree on the amount of the system development charge, the system development charge imposed during the previous year shall continue in effect for the following fiscal year.

(e) *If amount of charge is less than necessary.*- If the system development charge established by the county councils is less than the amount necessary to recover the full cost of constructing growth related facilities, the Commission shall identify the part of the cost of that growth that will be paid by current ratepayers as:

(1) a percentage of any rate increase; and

(2) the annual monetary amount on a typical residential customer's annual water and sewer bill.

[An. Code 1957, art. 29, § 6-113(c)(1)-(3); 2010, ch. 37, §§ 3, 4; ch. 72, § 5.]

§ 25-404. System development charge fund.

(a) *In general.*-

(1) The Commission shall deposit all funds collected under the system development charge into a system development charge fund.

(2) The system development charge fund is a special fund that may not revert to general funds of the Commission.

(b) *Use of funds.*- The Commission may use the funds collected from the system development charge only to:

(1) pay for new treatment, transmission, and collection facilities, the need for which is directly attributable to the addition of new service and the construction of which began after July 1, 1993; or

(2) amortize any bond that is issued in connection with the construction of those new facilities.

(c) *Other costs.*- Other costs of enhancement, maintenance, or environmental regulation on existing or new systems shall be borne equally by all ratepayers.

[An. Code 1957, art. 29, § 6-113(d); 2010, ch. 37, § 3.]

§ 25-405. Construction of facilities.

(a) *Authorized.*- The Commission may allow a developer to design and construct any on-site or off-site facility necessary for the developer's project if the facility is:

(1) in the Commission Capital Improvement Program and the 10-year Comprehensive Water Supply and Sewerage System Plan adopted by one of the county councils;

(2) a major project included in the Commission Capital Improvement Program; or

(3) a project that includes a sewer main or water main that:

(i) provides only local service;

(ii) is 2,000 feet or less;

(iii) has a diameter of:

1. 15 inches or more if it is a sewer main; or

2. 16 inches or more if it is a water main; and

(iv) is built to avoid unnecessary and uneconomical duplication when a major project is constructed.

(b) *Standards for facilities.*- A facility constructed under this section shall be designed, constructed, and inspected in accordance with:

(1) the standards used by the Commission; and

(2) all applicable laws, regulations, and written policies of the Commission.

(c) *Acceptance of facility; credit against charge.*- After the Commission approves a facility constructed by a developer under this section, the Commission shall:

(1) accept the facility as part of the Commission system; and

(2) subject to subsection (d) of this section, grant the developer a credit against any charge imposed under this subtitle in an amount equal to the cost of constructing the facility.

(d) *Audit review and approval.*- The Commission's internal auditor shall review and approve the costs incurred by the developer.

(e) *Agreement.*- The Commission and the developer shall enter into an agreement that incorporates the provisions of this section.

(f) *Rejection.*- If the Commission rejects a developer's request to design and construct facilities under

this section, the Commission shall explain in writing to the developer the reasons for the rejection.

(g) *Report.*-

(1) The Commission shall submit a report at the end of each fiscal year to the Montgomery County and Prince George's County Delegations to the General Assembly and to the county councils of Montgomery County and Prince George's County.

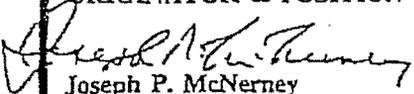
(2) The report shall state the number of requests made by developers under this section, including:

(i) the number of acceptances and rejections by the Commission; and

(ii) the justification for any rejections.

[An. Code 1957, art. 29, § 6-113(e); 2010, ch. 37, § 3.]

STANDARD PROCEDURES OF THE WASHINGTON SUBURBAN SANITARY COMMISSION

ORIGINATOR & POSITION	SP NUMBER	APPROVE BY/DATE	EFFECTIVE DATE	PAGE	
 Joseph P. McNerney Director Customer Affairs Bureau	CUS 94-03	 Commission December 14, 1994	February 1, 1995	1	OF 6

SUBJECT

SDC DEVELOPER CREDITS AND REIMBURSEMENTS

PURPOSE

- 1.0 Define procedures for the issuance of a System Development Charge (SDC) Credit earned either through private design and construction of an approved Capital Improvement Program (CIP) Project or through eligible private funding of WSSC's costs to design and construct a CIP Project.
 - 1.1 Describe how the SDC Credit due a Developer will be determined.
 - 1.2 Describe when SDC credit and reimbursement will occur.

DEFINITIONS

- 2.0 Systems Development Charge (SDC) - A fee paid to the WSSC at the time of application for a plumbing permit intended to cover the cost of building CIP Projects needed to accommodate growth.
- 2.1 Developer - Any firm, corporation, partnership, joint venture, municipality, agency, person or persons whom WSSC has authorized to design and construct a Project eligible for SDC credit or whom WSSC has required to provide eligible private funding of the Commission's costs to design and construct such a Project.
- 2.2 Memorandum of Understanding (MOU) - An agreement made pursuant to provisions of Standard Procedure # PD-93-06 entitled "Procedure for Developing a Memorandum of Understanding for the Construction of WSSC Systems by Others" between the WSSC and a Developer which covers the Developer's design and construction of a CIP Project and which identifies the estimated total Developer costs eligible for SDC credit and/or reimbursement.
- 2.3 Qualified Project - Any CIP facility, or CIP line necessary to serve the Developer's property, which is designed and constructed by and at the sole expense of a Developer pursuant to an MOU or other agreement, or which is constructed by WSSC, but the Developer is required to provide eligible private funding of WSSC design and construction costs.

WSSC STANDARD PROCEDURES

- 2.4 Qualified Properties - The specific properties which WSSC identifies as served by a Qualified Project, as defined in Section 3.1.
- 2.5 Eligible Private Funding - Payment required by and made to WSSC by a Developer to cover certain WSSC costs to design and construct a CIP Project needed to accommodate growth.
- 2.6 SDC Credit - A dollar value which is credited to a Developer against SDC payable in connection with Qualified Properties and which equals either the total eligible costs as defined in Section 3.5 incurred by the Developer in the Developer's design and construction of a Qualified Project or the amount of eligible private funding made by the Developer to cover WSSC costs to design and construct a Qualified Project.
- 2.7 SDC Ledger - The record of SDC credit authorized for a Developer and the amount(s) of SDC credit issued or reimbursed to the Developer for fixtures covered by plumbing permits obtained in the course of developing Qualified Properties associated with a Qualified Project.
- 2.8 Credit Voucher - The document (Attachment "A"), executed by the Developer, which serves as the instrument to obtain SDC credit associated with an application for permit to install plumbing fixtures. Each Credit Voucher may apply only to a single application for plumbing permit and shall
- identify the Qualified Project from which credit is derived; and
 - specify the Qualified Property for which the credit is requested; and
 - be signed by the Developer or its authorized agent, be duly notarized; and
 - show the amount to be credited in lieu of SDC payment

PROCEDURES

- 3.0 A Developer shall declare a desire to design and construct a CIP Project eligible for SDC credit as an element of its written application for WSSC service filed with the Water and Sewer Reports Section. For projects that are already authorized, the Developer may request an authorization amendment to allow the Developer to design and construct a CIP Project eligible for SDC credit.
- 3.1 When a Developer has requested that it be permitted to design and construct a CIP Project, the Water & Sewer Reports Section shall prepare a map as part of its engineering report or its authorization amendment. The map will identify the Qualified Properties to be served by the CIP Project which the Developer has requested to design and construct. A similar map will be prepared when the service requested will require the construction of a CIP Project by WSSC.
- 3.2 If WSSC authorizes the Developer to design and construct a Qualified Project, or requires eligible private funding from the Developer of WSSC's design and construction costs, the properties identified as served by the Project will receive credit and/or be subject to SDC Payments which may be reimbursed to the Developer up to the total eligible amount. The Service Applications & Records

Section will also establish a Developer's SDC Ledger following execution of a MOU covering Developer design and construction of the Qualified Project or WSSC receipt of eligible private funding of the Qualified Project from the Developer.

- 3.3 The SDC Ledger will reflect the total amount of eligible private funding received from the Developer. If the Developer is designing and constructing the Qualified Project, the Ledger will initially reflect the Developer's SDC credit based upon the estimated total eligible costs agreed upon in the MOU. The Developer's initial Ledger credit amount will be adjusted to reflect the actual total eligible costs for the Qualified Project, as determined by the WSSC's Internal Audit Manager (as discussed in Sections 3.5, 3.6 and 3.7), after the Qualified Project has been accepted and placed in service by WSSC.
- 3.4 SDC credits against the ledger amount may be granted following WSSC receipt of eligible private funding or after construction of the Qualified Project by the Developer has commenced. However, in the latter case until such time as the actual total eligible amount is determined, SDC credits against the ledger amount shall not exceed 50% of the estimated total eligible costs, as cited in the MOU.
- 3.5 When a Developer is designing and constructing a Qualified Project, SDC Credit is the total eligible Project cost incurred and paid by the Developer, subject to the general guidelines that (1) eligible costs will be the types of costs that WSSC would have incurred had WSSC designed and constructed the Qualified Project, and (2) the SDC Credit will not exceed the maximum amount mutually agreed upon in the original or amended MOU. Eligible costs must be allocable to the Qualified Project. Examples include, but are not limited to
- Direct labor and indirect costs;
 - Professional and consultant services;
 - Construction costs; and,
 - Interest costs for funds used during design and construction, at an average interest rate not to exceed the rate paid by WSSC on short-term construction (currently ALEX) notes outstanding during the period beginning with the start of design and ending when the Qualified Project is placed in service.

Examples of costs that are not eligible costs unless mutually agreed upon in the original or amended MOU include, but are not limited to

- Area wide planning not directly related to the Qualified Project;
- Bonus payments for completion of construction;
- Costs outside the scope of the Qualified Project;
- Site acquisition costs (WSSC will acquire any needed off-site rights-of-way);
- Facilities capital cost of money;
- Fines and penalties;
- Federal and state income taxes; and
- Personal injury compensation or damages.

WSSC STANDARD PROCEDURES

- 3.6 The Developer will submit a written request for audit to WSSC's Internal Audit Manager, after the Qualified Project built by the Developer has been placed in service. Along with the request, the Developer must submit an itemized listing of eligible Qualified Project costs, incurred and paid, supporting the total amount of SDC Credit claimed.
- 3.7 In compliance with Article 29 § 6-113(f)(3), of the Annotated Code of Maryland, WSSC's Internal Audit Manager shall review and approve the costs incurred by the Developer. The Internal Audit Manager will strive to initiate the audit within 90 days of the Developer's request, if the request includes the required itemized cost listing. The Internal Audit Report will be the formal document that communicates the final results of the audit to WSSC and the Developer. When an audit is complete, prior to the final Internal Audit Report, the Internal Audit Manager will issue to the Developer an unsigned DISCUSSION DRAFT to allow the Developer an opportunity to discuss with Internal Audit any concerns the Developer has with the proposed SDC Credit. Subsequently, the Internal Audit Manager will issue to the Developer its final Report on the SDC Credit to be provided the Developer.
- 3.8 SDC credits against a Developer's SDC Credit balance will be issued by WSSC upon presentation of a complete and fully executed Credit Voucher presented at the time of plumbing permit application. The application must be made in connection with a Qualified Property served by the Qualified Project (being) built by the Developer, or funded by the Developer as described in Section 2.5. Also, the amount specified in the Credit Voucher shall not exceed the calculated SDC for plumbing fixtures covered by the permit application. Credit Vouchers reflecting and specifying an amount in excess of calculated SDC for the requested permit will not be accepted. Pending verification that a sufficient credit balance remains to cover the Credit Voucher Amount, issuance of the requested plumbing permit will held in abeyance. Insofar as possible, Credit Vouchers will be considered on a "first come-first served" basis. For applications for plumbing permit accompanied by a Credit Voucher for which a Developer's credit balance has been exhausted, the credit voucher and the associated application will be returned to the applicant.
- 3.9 In conformance with Section 3.12, SDC payments received in association with applications for plumbing permits for Qualified Properties will be identified as eligible for reimbursement to the Developer who has constructed or funded (as described in Section 2.5) the Qualified Projects serving those Qualified Properties.
- 3.10 For those situations where more than one Qualified Project serves a Qualified Property, SDC reimbursement payments shall be made in proportional shares to the Developers who have built or funded the Qualified Projects. A proportional share is calculated based upon a Qualified Project's actual (estimated) eligible costs or funding expressed as a percentage of the sum of all actual (estimated) eligible costs and/or funding of Qualified Projects serving the Qualified Property.

- 3.11 At the conclusion of each calendar quarter, the Service Applications & Records Section will determine the total SDC receipts eligible for reimbursement made for each previously identified Qualified Property. Only those SDC payments filed in association with plumbing permits under which all covered work has received an approved final inspection are eligible for reimbursement.
- 3.12 Based upon the quarterly reconciliation, the Service Applications & Records Section will prepare and forward to the General Accounting Section a Payment Request to be made to the appropriate Developer in an amount equal to the sum of qualifying SDC payments not yet reimbursed, and a memorandum recommending reimbursement of SDC payments and identifying the maximum amount recoverable. The memorandum shall be accompanied by a statement detailing eligible plumbing permits.
- 3.13 Following review of the recommended reimbursement, the General Accounting Section will forward the Payment Request and supporting documentation to the Disbursements Accounting Section which will issue payment to the Developer.
- 3.14 When a Developer has designed and constructed a Qualified Project, the sum of SDC Credits and Reimbursements pursuant to this procedure will be made only to the maximum determined by Internal Audit and agreed to by the Developer, subject to the maximum amount established in the MOU and only to the Developer identified in the MOU.
- 3.15 If the Developer wishes to transfer its right and title to any remaining SDC credit from a Qualified Project, the Developer shall notify the Service Applications & Records Section of the requested transfer. Such notification shall be in writing and shall identify the single entity to receive the entire remaining balance of SDC credit from a Qualified Project. The Service Applications and Records Section will acknowledge the credit transfer and forward the written request for inclusion in the Qualified Project's MOU as an amendment. Thereafter, all Qualified Project SDC credits or reimbursements will be issued to the last designated entity in the MOU as amended.
- 3.16 Notwithstanding any other provision of this Procedure, SDC Credit or reimbursements for costs identified in Section 3.3 of this Procedure are limited to SDC transactions for Qualified Properties served by the Qualified Project within a twenty year period, or until the sum of credits and reimbursements equals the total approved SDC Credit. The twenty year period will commence the day WSSC receives private eligible funding from the Developer or the Commission's Internal Audit Manager makes its final Report to a Developer under Section 3.7 of this Procedure. At the conclusion of the twenty year period, the Service Applications & Records Section will close the SDC Reimbursement Ledger and will provide written notification of exhaustion or termination of the SDC Credit to the last designated recipient.
- 3.17 In the event an issued Plumbing Permit expires or is cancelled by the owner or plumber, no SDC reimbursement to the Developer will be approved for that permit. In such cases, any Credit Voucher will be voided and the credit amount added to the Developer's outstanding Ledger balance.

Distribution List:

MASTER VOLUME LIST:

General Manager's Office
Internal Audit Office
Secretary's Office
Human Resources Division

Other Distribution:

Commissioner's Office
Administration Branch
Planning, Programs and Policy Branch
Operations Branch
General Counsel's Office
Budget & Financial Planning Office
Communications Office
Construction Bureau
Customer Affairs Bureau
Finance Bureau
Planning & Design Bureau
Accounting Division
Customer Services Division
Financial Operations Division
Project Development Division
Code Enforcement Section
General Accounting Section
Service Applications & Records Section
Water & Sewer Reports Section

STANDARD PROCEDURES OF THE WASHINGTON SUBURBAN SANITARY COMMISSION

ORIGINATOR & POSITION	SP NUMBER	APPROVE BY/DATE	EFFECTIVE DATE	PAGE 1 OF 8
Richard Shagogue, Team Chief Engineering & Construction Team	ENG 04-01 Supercedes CUS 94-03	Commissioners March 10, 2004	March 24, 2004	

SUBJECT:
SDC APPLICANT CREDITS AND REIMBURSEMENTS

PURPOSE

- 1.0 Define procedures for the issuance of a System Development Charge (SDC) Credit earned through private design and construction to serve the Applicant's property. These procedures pertain only to either an approved Capital Improvement Program (CIP) Project or a project that provides only local service, is 2,000 feet or less in length, is either a sewer main 15 inches or greater in diameter, or water main 16 inches or greater in diameter and is built to avoid unnecessary and uneconomical duplication when a major project is constructed.
- 1.1 Describe how the SDC Credit due an Applicant will be determined.
- 1.2 Describe when SDC credit and reimbursement will occur.

DEFINITIONS

- 2.0 Systems Development Charge (SDC) - A fee paid to the WSSC at the time of application for a plumbing permit intended to cover the cost of building CIP Projects needed to accommodate growth.
- 2.1 Applicant - Any firm, corporation, partnership, joint venture, municipality, agency, person or persons whom WSSC has authorized to design and construct a Qualified Project eligible for SDC credit or whom WSSC has required to provide eligible private funding of the Commission's costs to design and construct such a Project.
- 2.2 System Extension Permit (SEP) - A permit/agreement made between the WSSC and an Applicant pursuant to the "Development Services Process Manual" adopted by the Commission, effective July 1, 2000, and subsequent adopted revisions. **A qualified project built under a System Extension Permit issued without a signed accompanying SDC Credit Agreement is not eligible for SDC applicant credits or reimbursement.**
- 2.3 Memorandum of Understanding (MOU) - An agreement made pursuant to provisions of Standard Procedure # PD-93-06 entitled "Procedure for Developing a Memorandum of

Understanding for the Construction of WSSC Systems by Others" between the WSSC and an Applicant which covers the Applicant's design and construction of a CIP Project and which identifies the estimated total Applicant costs eligible for SDC credit and/or reimbursement. **A qualified project built without a signed MOU is not eligible for SDC applicant credits or reimbursement.**

- 2.4 **Qualified Project** - Any CIP facility, CIP line, sewer main 15 inches or greater, or water main 16 inches or greater in diameter necessary to serve the Applicant's property, which is designed and constructed by and at the sole expense of an Applicant pursuant to an MOU or SEP or other agreement. Also, any CIP project which is constructed by WSSC that the Applicant is required to provide eligible private funding of WSSC design and construction costs.
- 2.5 **Qualified Properties** - The specific properties located within the geographic area which WSSC identifies as served by the Qualified Project, as defined in Section 3.2.
- 2.6 **Eligible Private Funding** - Payment required by and made to WSSC by an Applicant to cover WSSC costs to design and construct a CIP Project needed to accommodate growth.
- 2.7 **SDC Credit** - A dollar value which is credited to an Applicant against SDC payable in connection with Qualified Properties and which equals the total eligible costs as defined in Section 3.6 incurred by the Applicant in the Applicant's design and construction of a Qualified Project or the amount of eligible private funding made by the Applicant to cover WSSC costs to design and construct a Qualified Project. An Applicant who designs a Qualified Project must also construct that Project in order to be eligible to receive SDC Credits.
- 2.8 **SDC Credit Agreement** - An agreement that summarizes the eligible costs considered for SDC Credit (as described in Section 3.6). The SDC Credit Agreement is appended to an SEP. The credit agreement is included in the MOU as Attachment A.
- 2.9 **SDC Ledger** - The record of SDC credit authorized for an Applicant and the amount(s) of SDC credit issued or reimbursed to the Applicant for fixtures covered by plumbing permits obtained in the course of developing Qualified Properties associated with a Qualified Project.
- 2.10 **Credit Voucher** - The document (Attachment "B"), executed by the Applicant, which serves as the instrument to obtain SDC credit associated with an application for permit to install plumbing fixtures. Each Credit Voucher may apply only to a single application for plumbing permit and shall:
- identify the Qualified Project from which credit is derived; and
 - specify the Qualified Property for which the credit is requested; and
 - be signed by the Applicant or its authorized agent, be duly notarized; and
 - show the amount to be credited in lieu of SDC payment
- 2.11 **Qualified Project Scope** - The specific scope of the qualified project. For pipelines built under an SEP, the specific scope will be included with the SDC Credit Agreement, and

will include pipeline lengths and diameters, valves, vaults and any other appurtenant structures. For facility projects, the specific scope of work will be included with the MOU.

PROCEDURES

- 3.0 An Applicant shall declare a desire to design and construct a Qualified Project eligible for SDC credit either as an element of its request for a Hydraulic Planning Analysis filed with the Development Services Group or in a written response to the Letter of Findings prepared by the Development Services Group. For projects that were previously authorized, but have not yet been issued an SEP or MOU, the Applicant may request an authorization amendment to allow the Applicant to design and construct a Qualified Project eligible for SDC credit.
- 3.1 The Applicant agrees to pay WSSC all review fees normally due WSSC. Letters of credit are not acceptable in lieu of fees.
- 3.2 When an Applicant has requested that it be permitted to design and construct a CIP Project, the Development Services Group shall prepare a map during its hydraulic planning analysis that identifies the Qualified Properties to be served by the CIP Project which the Applicant has requested to design and construct. SDC Credit will only be issued to properties within the geographic boundaries identified in the map as Qualified Properties. A copy of the prepared map will be sent to the Applicant.
- 3.3 If WSSC either authorizes the Applicant to design and construct a Qualified Project or requires eligible private funding from the Applicant of WSSC's design and construction costs, then the properties identified as served by the Project will receive credit and/or be subject to SDC Payments which may be reimbursed to the Applicant up to the total eligible amount. The Permit Services Unit will establish an Applicant's SDC Ledger following either 1) execution of a MOU or SEP covering Applicant design and construction of the Qualified Project or 2) WSSC receipt of eligible private funding of the Qualified Project from the Applicant. Prior to establishing the Applicant's SDC Ledger, the Permit Services Unit requires a map identifying all Qualified Properties to be served by the Qualified Project from the Development Services Group. **Please note that for pipeline jobs, the Applicant will not receive SDC credit or reimbursement unless the SDC credit agreement is signed before the SEP is issued.**
- 3.4 The SDC Ledger will reflect the total amount of SDC credit/reimbursement that the Applicant is eligible to receive. If the Applicant is designing and constructing the Qualified Project, the Ledger will initially reflect the Applicant's SDC credit based upon the estimated total eligible costs agreed upon in the MOU or SEP. The Applicant's initial Ledger credit amount will be adjusted to reflect the actual total eligible costs for the Qualified Project, as determined by the WSSC's Internal Audit Manager (as discussed in Sections 3.5, 3.6, 3.7, 3.8 and 3.12), after the Qualified Project has been accepted and placed in service by WSSC. If WSSC is designing and constructing a Qualified Project, the Ledger will reflect the total amount of eligible private funding received from the Applicant.
- 3.5 SDC credits may not exceed 50% of the estimated total eligible project cost (not to

include contingency for increase in scope items (see Section 3.8)) until such time as final audit is completed and the actual total eligible project cost is determined. Once the actual total eligible project cost is determined, SDC credits are available up to the eligible project cost and quarterly refunds (based upon SDC collected for qualified properties) will commence. Prior to the final audit, the Credit Voucher is the only method of reimbursement to the Applicant.

Following WSSC receipt of eligible private funding, SDC credits against the ledger amount may be granted. However in the SDC credits toward the private funding may not exceed 50% of the total estimated project cost.

- 3.6 When an Applicant is designing and constructing a Qualified Project, SDC Credit is the total eligible Project cost incurred and paid by the Applicant. The SDC Credit is subject to the general guidelines that (1) eligible costs will be the types of costs that WSSC would have incurred had WSSC designed and constructed the Qualified Project, and (2) the SDC Credit will not exceed the maximum amount mutually agreed upon in the SDC Credit Agreement. Eligible costs must be directly allocable to the Qualified Project. Examples include, but are not limited to

Engineering Costs: design, reprographics, survey (topo), soil borings, As-built drawing preparation, and bonding fees.

Permits Costs: Costs for permits that WSSC would have had to acquire had WSSC built the project.

WSSC Fees for Pipelines: Fees for extra WSSC reviews or re-testing will be considered only if non-eligible portions of the job do not require extra reviews or re-testing. Unless mentioned otherwise, fees will be allocated to the Qualified Project based on estimated costs and overall water and sewer project cost for the project number.

WSSC Fees for Facilities: All WSSC direct costs and overhead associated with the qualified project as stated in the MOU.

Construction Costs: Contractors bid price, survey (stake out), Geotech (compaction testing), off-site restoration, and construction management.

Interest Costs: Interest costs for funds used during design and construction, at an average interest rate not to exceed the rate paid by WSSC on short-term construction notes outstanding during the period beginning with the date of WSSC signature on the SEP or MOU agreement and ending when the Qualified Project is substantially complete.

Off-Property Rights of Way: Acquisition costs are eligible up to amount appraised by WSSC for purchase of off-Applicant's property right-of-way and construction strips, plus up to 25 percent of the appraised amount for direct costs associated with purchase of off-site rights-of-way and construction strips.

- 3.7 Examples of costs that are not eligible include, but are not limited to

Area wide planning not directly related to the Qualified Project;

Attorneys fees

WSSC STANDARD PROCEDURES

The WSSC Hydraulic Review Fee

Costs for negotiation of SDC Credit Agreement or MOU;

Bonus payments or acceleration costs paid to the contractor for completion of construction;

Third party inspection costs for facility projects;

Applicant's overhead costs not directly attributable to the Qualified Project;

Costs outside the scope of the Qualified Project;

Permit costs associated with a development rather than the Qualified Project;

Site acquisition costs beyond what WSSC would have paid;

Facilities capital cost of money;

Fines and penalties;

Maintenance Costs;

Maintenance Bond Costs that are beyond both two years after substantial completion and beyond one year after release of service or final acceptance.

Grading of rights of way;

Sediment control for grading;

Clearing and grubbing for public rights-of-way in which the Qualified Project will be installed;

Federal and state income taxes;

Administrative or Management Fees not directly associated with the Qualified Project;
and

Personal injury compensation or damages.

- 3.8 The maximum SDC reimbursement shall not exceed 110 percent of the contractor bid price plus other eligible costs.
- 3.9 The SDC Credit Agreement will not provide payment to the Applicant for costs the Applicant did not incur or for costs reimbursed to the Applicant from other sources. The SDC Credit Agreement will not provide any premiums for expedited work.
- 3.10 Prior to SDC Credit Agreement or MOU approval, the WSSC project manager for the project is responsible to have components of the SDC Credit Agreement or MOU

- reviewed by other offices. The Contract Technical Services Unit should review the Applicant's construction costs using a copy of the signed plans. Internal Audit is to review any item that the WSSC project manager proposes which is contrary to items 3.6 or 3.7. Other appropriate WSSC offices should be consulted such as the Land Acquisition Unit for additional land acquisition costs and the Planning Group for planning costs.
- 3.11 For Qualified Projects, the SEP or MOU agreements should indicate that the Maintenance Bond should remain in effect at least two years beyond the date of substantial completion for SEP projects or at least one year beyond the date of final acceptance for MOU projects. The Applicant will submit a written request for audit to WSSC's Internal Audit Manager, after the Qualified Project built by the Applicant has been released for service (pipelines) or finally accepted (facilities). Along with the request, the Applicant must submit an itemized listing of eligible Qualified Project costs, incurred and paid, supporting the total amount of SDC Credit claimed. **It should be emphasized that the Applicant should retain all the contracts, invoices and payments for WSSC Internal Audit to inspect and review to determine the SDC credits.**
- 3.12 In compliance with Article 29 § 6-113(e)(4), of the Annotated Code of Maryland, WSSC's Internal Audit Manager shall review and approve the costs incurred by the Applicant. The Internal Audit Manager will strive to initiate the audit within 90 days of the Applicant's request, if the request includes the required itemized cost listing. The Internal Audit Report will be the formal document that communicates the final results of the audit to WSSC and the Applicant. When an audit is complete, prior to the final Internal Audit Report, the Internal Audit Manager will issue to the Applicant an unsigned DISCUSSION DRAFT to allow the Applicant an opportunity to discuss with Internal Audit any concerns the Applicant has with the proposed SDC Credit. Subsequently, the Internal Audit Manager will issue to the Applicant its final Report on the SDC Credit to be provided the Applicant.
- 3.13 SDC credits against an Applicant's SDC Credit balance will be issued by WSSC upon receipt of a complete and fully executed Credit Voucher submitted at the time of plumbing permit application. The application must be made in connection with a Qualified Property served by the Qualified Project (being) built by the Applicant. Also, the amount specified in the Credit Voucher shall not exceed the calculated SDC for plumbing fixtures covered by the permit application. Credit Vouchers reflecting and specifying an amount in excess of calculated SDC for the requested permit will not be accepted. The plumbing permit will be issued after verification that a sufficient credit balance remains to cover the Credit Voucher Amount. Insofar as possible, Credit Vouchers will be considered on a "first come-first served" basis. For a plumbing permit application accompanied by a Credit Voucher for which an Applicant's credit balance has been exhausted, the credit voucher and the associated application will be returned to the applicant. WSSC is not responsible for managing or assisting the Applicant in managing the issuance of Credit Vouchers. Managing the issuance of Credit Vouchers is not an eligible cost for reimbursement.
- 3.14 In the event an issued Plumbing Permit expires or is cancelled by the owner or

- plumber, no SDC reimbursement to the Applicant will be approved for that permit. In such cases, any Credit Voucher will be voided and the credit amount added to the Applicant's outstanding Ledger balance.
- 3.15 In conformance with Section 3.18, SDC payments received in association with applications for plumbing permits for Qualified Properties will be identified as eligible for reimbursement (after the Internal Audit Report has been completed - see Section 3.12) to the Applicant who has constructed the Qualified Projects serving those Qualified Properties.
 - 3.16 For those situations where more than one Qualified Project serves a Qualified Property, SDC reimbursement payments shall be made in proportional shares to the Applicants who have built or funded the Qualified Projects. A proportional share is calculated based upon a Qualified Project's actual eligible costs or funding expressed as a percentage of the sum of all actual eligible costs and/or funding of Qualified Projects serving the Qualified Property.
 - 3.17 At the conclusion of each calendar quarter, the Permit Services Unit will determine the total SDC receipts eligible for reimbursement made for each previously identified Qualified Property. Only those SDC receipts filed in association with plumbing permits under which all covered work has received an approved final inspection are eligible for reimbursement.
 - 3.18 Based upon the quarterly reconciliation, the Permit Services Unit will prepare and forward to the Accounting Group a Payment Request to be made to the appropriate Applicant in an amount equal to the sum of qualifying SDC receipts not yet reimbursed, and a memorandum recommending reimbursement of SDC receipts and identifying the maximum amount recoverable. The memorandum shall be accompanied by a statement detailing eligible plumbing permits.
 - 3.19 Following review of the recommended reimbursement, the Accounting Group will forward the Payment Request and supporting documentation to the Disbursements Group which will issue payment to the Applicant.
 - 3.20 When an Applicant has designed and constructed a Qualified Project, the sum of SDC Credits and Reimbursements pursuant to this procedure will be made only to the maximum determined by the Internal Audit Report and only to the Applicant identified in the MOU or SEP.
 - 3.21 The Applicant may issue credit vouchers to multiple builders to facilitate construction of residential or non-residential structures within the Qualified Property and reimbursement of Qualified Project costs. If the Applicant wishes to transfer its right and title to any remaining SDC credit from a Qualified Project, the Applicant shall notify the Permit Services Unit of the requested transfer. Such notification shall be in writing and shall identify the single entity to receive the entire remaining balance of SDC credit from a Qualified Project. The Permit Services Unit will acknowledge the credit transfer and forward the written request for inclusion in the Qualified Project's MOU or SEP as an amendment. Thereafter, all Qualified Property SDC credits or reimbursements will be issued to the last designated entity in the MOU or SEP as amended.
 - 3.22 Notwithstanding any other provision of this Procedure, SDC Credit or reimbursements

WSSC STANDARD PROCEDURES

for costs identified in Section 3.3 of this Procedure are limited to SDC transactions for Qualified Properties served by the Qualified Project within a twenty-year period, or until the sum of credits and reimbursements equals the total approved SDC Credit. The twenty-year period will commence for SEP, MOU, or eligible funding projects on the day of release for service. At the conclusion of the twenty-year period, the Permit Services Unit will close the SDC Reimbursement Ledger and will provide written notification of exhaustion or termination of the SDC Credit to the last designated recipient.

AUTHORITY

The General Counsel certifies that this Standard Procedure was adopted pursuant to the authority of Sections 6-113 and 9-101 of Article 29 of the Annotated Code of Maryland.

Distribution List:**MASTER VOLUME LIST:**

General Manager's Office
Internal Audit Office
Secretary's Office
Human Resources Group

Other Distribution:

Commissioner's Office
Engineering and Construction Team
Public Communications
Internal Audit
Customer Care Team
Rate Stabilization and Debt Reduction Team
General Counsel's Office
Development Services Group
Project Delivery Group
Regulatory Services Group
Planning Group
Systems Inspection Group
Customer Relations Group
Permit Services Unit
Accounting Group
Budget Group
Disbursements Group

ATTACHMENT A

SDC CREDITS ESTIMATE

ESTIMATED AMOUNT

Design

Permits

Administration

Interest

WSSC's Fees

Construction Costs

TOTAL ESTIMATED ELIGIBLE COSTS

ATTACHMENT B
WASHINGTON SUBURBAN
SANITARY COMMISSION

System Development Charge
Credit Voucher

I, _____ hereby affirm under penalty of perjury that I am the Developer
(name printed)
or its authorized agent, entitled to an SDC credit pursuant to an approved System Extension
Permit or Memorandum of Understanding for _____, a Qualified
Project. Pursuant to the current

(WSSC Contract No. & C.I.P No.)

WSSC Standard Operating Procedure, I hereby request that \$ _____ be charged against the
remaining eligible SDC credit balance for the specified Qualified Project. The above credit
amount shall be applied against SDC due in connection with an application for plumbing permit
to install fixtures in an improvement on property described as: _____
_____ which is a "Qualified Property" served by the above named
"Qualified Project."

I agree to indemnify and hold harmless the Washington Suburban Sanitary Commission to whom
this request is presented and its agents and employees, from and against all claims, damages,
losses and expenses, including reasonable attorneys' fees, arising out of or by reason of
complying with this request.

(Developer's Signature)

Subscribed and sworn to before me this _____ day of _____, 20____.

(Notary Public)

(Name Printed)

My Commission Expires _____

**WEST GERMANTOWN DEVELOPMENT DISTRICT
IMPLEMENTATION AGREEMENT**

This Implementation Agreement dated as of April 1, 2002, by and between MONTGOMERY COUNTY, MARYLAND, a body corporate and politic and a political subdivision of the State of Maryland (the "County"), ARCOLA INVESTMENT ASSOCIATES, a Virginia general partnership ("Arcola"), ARTERY HOYLES MILL, LLC, a Maryland limited liability company ("Artery") and WOODCLIFFE DEVELOPMENT DISTRICT, LLC, a Maryland limited liability company ("Woodcliffe").

RECITALS

R-1. On June 21, 1996, a group of property owners in west Germantown, including Arcola, filed with the Montgomery County Council a petition (the "Petition") containing the necessary percentage of signatures required to establish a development district under the provisions of Chapter 14 and Chapter 20A, Section 20A-1, of the Montgomery County Code (collectively, the "Act"). The Petition was amended on July 30, 1997 to include Artery as a Petitioner since Artery had succeeded to the interests in certain real property proposed to be included in the development district formerly owned by West Germantown L.P., a Petitioner. Woodcliffe was formed by Arcola and Artery on March 6, 2001, to facilitate the management of the construction of the improvements contemplated to be funded through the development district as well as other privately funded improvements by Arcola and Artery. Arcola, Artery and Woodcliffe are hereinafter sometimes referred to collectively as the "Developers".

R-2. On July 23, 1996, pursuant to the provisions of the Act, the Montgomery County Council held a public hearing on the Petition, after due notice, and on July 30, 1996, the County Council adopted Resolution No. 13-636 stating its intent to create a development district in the West Germantown area, finding that intensive development of and public investment in that area during the term of the proposed district will benefit the public interest. This Resolution was approved by the County Executive.

R-3. On October 25, 1996, pursuant to the provisions of the Act, the Montgomery County Planning Board (the "Planning Board") reviewed and approved the application filed by the property owners, finding that the proposed development district complied with all applicable zoning and subdivision requirements under Section 50-30(k) of the Montgomery County Code and that the proposed district satisfied the Adequate Public Facilities Requirements of the Annual Growth Policy for a development district, subject to certain conditions. On July 31, 1997, the Planning Board amended its prior finding to remove the condition that a new elementary school was required to satisfy the Adequate Public Facilities analysis. Furthermore, on December 3, 1997, the Staff of the Planning Board issued a letter indicating that one of the roadway improvements required in the original Planning Board's approval of the proposed development district was no longer necessary with the deletion of the Kingsview Village Center project from the district.

R-4. On September 29, 1997, pursuant to the provisions of the Act, the County Executive issued a fiscal report evaluating the proposed "West Germantown Development District," in which the County Executive estimated the cost of each infrastructure improvement listed by the

Planning Board, and the amount of revenue needed to cover the proposed development district's share of all infrastructure improvements and the estimated tax rate for each form of taxation available in the proposed development district that would produce the necessary revenue. The County Executive's fiscal report recommended the creation of a development district, with certain modifications to the proposed infrastructure items to those which had been originally submitted in the Petition filed by the property owners, and certain funding and revenue raising measures to fund these improvements.

R-5. On November 6, 1997, the Montgomery County Council held a public hearing on the final resolution to create a development district, after public notice. After the November 6, 1997, public hearing, one of the property owners, GFS Realty, Inc., indicated its intention to delay the creation of the development district for its property and the properties of two other property owners, Clopper Realty Joint Venture and John N. and Mary S. Deoudes, collectively planned as the Kingsview Village Center. After further public notice, and notice to the property owners, the Montgomery County Council held a second public hearing pursuant to the Act on January 13, 1998, at which time the Montgomery County Council adopted Resolution No. 13-1135 to create the West Germantown Development District (the "District") in an area encompassing 670.71 acres in Germantown and including the properties owned by Artery and Arcola and Mr. and Mrs. Robert Sisson. Resolution No. 13-1135 identified certain infrastructure improvements to be funded through tax-exempt bonds to be issued by the County and authorized the creation of a special fund, the West Germantown Development District Special Fund, to which special assessments, special taxes, fees or charges levied under the provisions of the Act for properties located in the District were pledged. Resolution No. 13-1135 also authorized the imposition on all properties located in the District of special assessments and taxes sufficient to pay the principal of, interest on, and any redemption premium on bonds to be issued under a separate resolution of the County Council and to replenish the debt service reserve fund for the bonds, and the authority to increase the rate or amount of such taxes and assessments subject to a maximum special tax or assessment applicable to each property in the District. Resolution 13-1135 further authorized the County to enter into an Implementation Agreement with the owner or developer of any property located in the District to govern the disbursement of funds for the construction of infrastructure improvements, the mechanics for reimbursement from other sources of infrastructure costs, the handling of System Development Charge (SDC) credits that accrue for the properties located in the District, and other matters as each owner or developer and the County may agree. The County Executive approved this Resolution. Resolution 13-1135 was amended by Resolution No. 14-957, adopted by the Montgomery County Council on July 17, 2001 (Resolution No. 13-1135, as amended by Resolution No. 14-957, hereinafter referred to as the "Resolution of Formation").

R-6. On February 24, 1998, following a public hearing, the Montgomery County Council adopted a resolution amending the County's Capital Improvements Program ("CIP") and capital budget to authorize the expenditure of the proceeds of the municipal bonds to be issued by the County for infrastructure improvements which were designated by Resolution No. 13-1135. The County Executive approved this Resolution.

R-7. On August 4, 1998, pursuant to the Act, the Montgomery County Council adopted Resolution No. 13-1398 authorizing the issuance of its Special Obligation Bonds (West Germantown Development District), in the aggregate principal amount not to exceed \$20,000,000 (the

"Bonds") to finance the infrastructure improvements referenced therein and specifying the basis and methodology upon which the Special Assessments and Taxes will be levied on properties located within the District, among other matters. Resolution 13-1398 was amended by Resolution No. 14-957, adopted by the Montgomery County Council on July 17, 2001 (Resolution No. 13-1398, as amended by Resolution No. 14-957, hereinafter referred to as the "Bond Resolution").

NOW THEREFORE, in consideration of the recitals set forth above, each of which is incorporated herein by reference, and the mutual covenants of the parties set forth below, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto hereby agree as follows:

ARTICLE I

FUNDING OF DISTRICT COSTS; INDENTURE

Section 1.01. *County Proceedings to Issue Bonds.* The County shall conduct all necessary proceedings under the Act for the issuance, sale and delivery of the Bonds; provided, however, that nothing herein shall be construed as requiring the County to issue the Bonds. From time to time, Developers, Bond Counsel and the County staff may confer regarding the amount, timing and other material aspects of the Bonds, but the legal proceedings and the principal amounts, rates, terms and conditions and the timing of the sale of the Bonds shall be at all respects subject to the approval of the County Executive, as set forth in the Resolution of Formation and the Bond Resolution.

Section 1.02. *Bond Proceeds; Indenture.* The Developers acknowledge that a significant portion of the proceeds of the Bonds will be deposited in the Acquisition Account established under the Indenture. These proceeds shall be deposited, held, invested and reinvested and disbursed as provided in the Indenture. Moneys in the Acquisition Account shall be withdrawn therefrom in accordance with the provisions of the Indenture, and any applicable provisions of this Implementation Agreement, for payment of all or a portion of the cost of acquisition of the Improvements, as provided herein. The Developers acknowledge and agree that the funds on deposit in the funds and accounts established by or pursuant to the Indenture shall be invested as directed under the Indenture and that the Developers have no right whatsoever to direct the investments under the Indenture. The County shall have no responsibility whatsoever to the Developers with respect to any investments of funds made by the Trustee under the Indenture, including any loss of all or a portion of the principal invested or any penalty for liquidation of an investment. Any such loss may diminish the amounts available in the Acquisition Account to pay the Purchase Price of the Improvements hereunder. The Developers further acknowledge that the obligation of any owner of real property in the District, including the Developers to the extent they own any real property in the District, and their successors and assigns, to pay Special Assessments and Taxes levied in the District is not in any way dependent on (i) the availability of amounts in the Acquisition Account to pay for all or any portion of the Improvements thereunder or hereunder or (ii) the alleged or actual misconduct of the County in the performance of its obligations under this Implementation Agreement, the Indenture, or any other agreement to which the Developers and the County are signatories.

Section 1.03. *No Impact on Obligation of Developers.* The Developers acknowledge that any lack of availability of amounts in the Acquisition Account to pay the Purchase Price of Improvements hereunder shall in no way diminish any obligation of the Developers with respect to the construction of, or contributions for, the public facilities required by this Implementation Agreement, or any development or other agreement to which the Developers are a party to, or any governmental approval to which the Developers or any properties located within the District are subject.

Section 1.04. *Additional Source of Funding - Richter Farm Road.* (a) Pleasants Investment Limited Partnership and Kingsview I, LLC, the owners of certain property located outside of the District (collectively, "Pleasants"), in order to satisfy conditions required by the Montgomery County Planning Board on Pleasants for development of such property, is required to pay to the County a portion of the cost of construction of portions of the roadway known as Richter Farm Road (Route A-297), including that segment of Richter Farm Road which runs between Clopper Road and Schaeffer Road (Phases 1 through 5 of Richter Farm Road, as indicated on Exhibit "A;" hereinafter, the "Artery/Arcola Richter Farm Road Segment"). The County agrees that it will pay to the Developers any funds received by the County from Pleasants which represents his share, 5% of the cost of construction of the Artery/Arcola Richter Farm Road Segment, and subject to the limitations set forth therein, the County will reimburse the Developers in accordance with the procedures set forth in Article III hereof for 95% of the Purchase Price of the Artery/Arcola Richter Farm Road Segment.

(b) By agreement with the County, dated June 2, 2000, Pleasants agreed to construct the segment of Richter Farm Road (Route A-297) between Schaeffer Road and Md. Rte. 118 (Phase 6, as indicated on Exhibit "A;" hereinafter, the "Kingsview Richter Farm Road Segment"). Pleasants has completed the construction of the Kingsview Richter Farm Road Segment, and the County has paid all amounts due to Pleasants under such Agreement pursuant to M.C. Purchase Order PO0504001011. Arcola has subsequently reimbursed the County for the amounts expended by the County thereunder. The County has agreed to disburse to Arcola out of the proceeds of issuance of the Bonds, when and if issued, \$1,721,470.00, representing the amounts paid by Arcola to the County for the Kingsview Richter Farm Road Segment. The County acknowledges that the conditions set forth in Section 3.03 of this Agreement for approval of a Payment Request submitted by the Developers for such amount paid by Arcola to the County for the Kingsview Richter Farm Road Segment have been satisfied.

ARTICLE II

CONSTRUCTION OF IMPROVEMENTS

Section 2.01. *Improvements.* The Developers and the County acknowledge that each of the Improvements which are listed on Exhibit "A" and Exhibit "B" hereto shall be constructed by the Developer indicated on Exhibit "A" and Exhibit "B" as having development responsibility for such Improvement. Each of the Developers has delivered to the County detailed cost estimates for those Improvements which it is responsible for, and with respect to such Improvements, such Developer warrants such estimates to be accurate and complete to the best of its knowledge. To the extent that the cost of any Improvement exceeds the estimated Purchase Price set forth in Exhibit "A" (and, to the extent cost savings result, Exhibit "B") hereto for that

Improvement, the responsible Developer, in order to satisfy its respective obligations to permit development of its property, shall be obligated to fund such costs with its own source of funds.

Section 2.02. *Cost Savings Realized on Improvements.* To the extent that upon the approval of each Payment Request for each Improvement by the County Representative pursuant to Section 3.03, the determination of Actual Cost (after having set aside the Retainage and the amount estimated to complete construction of the Improvement as provided in Section 3.05(d) in the case of an Improvement which has reached Substantial Completion) of such Improvement is less than the estimated Purchase Price as set forth on Exhibit "A" hereto, Woodcliffe shall be entitled to direct the County to use the amount of such cost savings to pay the Purchase Price of all or a portion of other Improvements in the priority set forth on Exhibit "B" hereto, or in the case where the Improvements represent distinct phases of a larger item of infrastructure, to apply such cost savings to pay the Purchase Price of future phases of the infrastructure as listed on Exhibit "A." The construction of any such additional Improvements shall be in accordance with the conditions of this Article and the payment of the Purchase Price of such Improvement shall be as provided in Article III hereof.

Section 2.03. *Duty of Developers to Construct.* Improvements to be acquired hereunder specified in Exhibit "A" and Exhibit "B" hereto, as amended from time to time in a manner consistent with the Resolution of Formation and the Bond Resolution; shall be constructed by or caused to be constructed by the responsible Developer in accordance with the approved Plans and Specifications and in accordance with this Implementation Agreement. Nothing in this Implementation Agreement shall alter, in any respect, any of the requirements contained in such Developer's governmental approvals with respect to the construction of the Improvements, and each of the Developers shall observe the requirements of the applicable governmental agency with respect to the construction of the Improvements for which it is responsible. Each of the Developers shall perform or cause the performance of all of its obligations hereunder and shall conduct all operations with respect to the construction of Improvements for which it is responsible in a good, workmanlike and commercially reasonable manner, with the standard of diligence and care normally employed by a duly qualified person utilizing its best efforts in the performance of comparable work and in accordance with generally accepted practices appropriate to the activities undertaken. Each of the Developers shall employ at all times adequate staff or consultants with the requisite experience necessary to administer and coordinate all work related to the design, engineering, acquisition, construction and installation of the Improvements for which it is responsible to be acquired by the County from each such Developer hereunder. The obligation of each of the Developers with respect to the construction of the Improvements hereunder shall be several and not joint.

No Developer shall be relieved of its obligation to construct each Improvement for which it is responsible listed in Exhibit "A" and Exhibit "B" hereto and to convey each such Improvement to the County (or other applicable public agency that will own such Improvement) in accordance with the terms hereof, even if there are insufficient funds in the Acquisition Account to pay the Actual Cost thereof, and, in any event, this Implementation Agreement shall not affect any obligation of any Developer under any other agreement to which such Developer is a party or any governmental approval to which such Developer or any land within the District owned by such Developer is subject, with respect to the public improvements required in connection with the development of the land within the District. Such obligation of each Developer to construct

and convey the Improvements for which it is responsible, and pay the costs thereof in excess of available moneys in the Acquisition Account, shall be the obligation of such Developer in its capacity as owner or developer of its portion of the lands within the District, and not as party to this Implementation Agreement.

Section 2.04. *Relationship to Public Works.* This Implementation Agreement is for the acquisition by the County of the Improvements listed in Exhibits "A" and "B" hereto, as amended from time to time in a manner consistent with the Resolution of Formation and the Bond Resolution, from moneys in the Acquisition Account and is not intended to be a public works contract. The County and the Developers agree that each of the Developers shall be solely responsible for awarding and administering all contracts for the construction of the Improvements for which it is responsible listed in Exhibits "A" and "B" hereto.

Section 2.05. *Independent Contractor.* In performing this Implementation Agreement, each of the Developers is an independent contractor and not the agent or employee of the County. The County shall not be responsible for making any payments to any contractor, sub-contractor, agent, consultant, employee or supplier of any of the Developers.

Section 2.06. *Performance Bonds.* The County acknowledges and agrees that all funds held in the Acquisition shall act as security for the performance of the road and parks Improvements and shall be substituted, when and to the extent available, for any requirement for Performance Bonds with respect to such facilities. With respect to the construction of water and sewer facilities, the requirements for performance bonds shall be separately agreed to by the WSSC and the Developers. The County agrees that any Performance Bonds issued for the benefit of the County with respect to the Improvements prior to the date of issuance of the Bonds shall be released to the respective Developer which posted same when the Bonds are issued.

Section 2.07. *Permitting and Inspection Fees.* Each of the Developers shall be responsible for obtaining all required County and State, if required, permits for road construction and park construction, and all required WSSC permits for water and sewer and pump station and force main construction with respect to the Improvements for which it is responsible. The County acknowledges that, as part of the acquisition of the Improvements, it will use a portion of the proceeds of the Bonds to reimburse the Developers for all permitting and inspection fees paid to County or State agencies, and to the WSSC, with respect to the Improvements for which the Developers have heretofore advanced, or may in the future advance, their own funds. The County shall use a portion of the proceeds of the Bonds deposited in the Acquisition Account under the Indenture to reimburse the Developers for such advances, as incurred, upon the submission of a Payment Request by the Developers specifying the amount of such advance and the portion of the infrastructure to which it applies.

Section 2.08. *Time for Completion.* The Developers agree that this Implementation Agreement is for the benefit of the County and the Developers and, therefore, each of the Developers represents that it expects to achieve Substantial Completion of the Improvements for which it is responsible and to have requested payment for the Improvements under this Implementation Agreement within twenty-four (24) calendar months from the date of the closing of the Bonds. Any failure of any Developer to complete the Improvements for which it is responsible within

said time period shall not, however, in itself, constitute a breach by such Developer of the terms of this Implementation Agreement.

ARTICLE III

ACQUISITION OF AND PAYMENT FOR IMPROVEMENTS

Section 3.01. *Payment Stages; Inspection.* (a) Payment for each Improvement listed on Exhibit "A" and Exhibit "B" will be made by the County in up to three (3) stages following the approval by the County Representative of a Payment Request submitted by the Developers as provided in Section 3.03. The Developers shall be entitled to submit a Payment Request for all permitting and inspection fees described in Section 2.07 with respect to an Improvement at the time such fees are due, or if incurred prior to the date of issuance of the Bonds, at the Closing Date. No further payment hereunder shall be made by the County to the Developers for an Improvement until the Improvement has been inspected and found to satisfy the conditions for either (i) Substantial Completion, or (ii) Final Acceptance, as defined herein.

(b) The determination of whether the conditions for Substantial Completion or Final Acceptance of an Improvement have been satisfied will be made by the County Representative, in reliance on the inspection by the inspector indicated below, depending upon the type of Improvement involved. In the case of road and transportation Improvements, inspections shall be made by the Department of Permitting Services, or such other County agency that is tasked with inspection of public roads and thoroughfares funded through the District; in the case of park Improvements, inspection shall be made by the Department of Parks, or such other public agency as is tasked with the development of park and recreational facilities in the County; and with respect to sewer and water Improvements, inspection shall be made by the WSSC. The Developers will contact each of the County agencies involved in the inspection of road and park Improvements, and the WSSC in the inspection of water and sewer Improvements, and coordinate the procedures for administering such inspections.

Section 3.02. *Agreement to Sell and Purchase Improvements.* Each of the Developers hereby agrees to sell the Improvements at the respective Purchase Price (or portion thereof in the case of Improvements listed on Exhibit "B") to the County (or other applicable public agency that will own an Improvement), and the County hereby agrees to use amounts in the Acquisition Account to pay the Purchase Prices (or portions thereof) to Woodcliffe, on behalf of the Developers, subject to the terms and conditions hereof.

Section 3.03. *Payment Requests.* Payments for the Improvements shall be made by the County in up to three installments, the first for the payment of permitting and inspection fees, the second upon satisfaction of the conditions for Substantial Completion, and the third upon satisfaction of the conditions for Final Acceptance, each as defined herein. Each Payment Request submitted by the Developers shall be in the form of Exhibit "C" hereto, shall be accompanied by (i) a detailed preliminary cost estimate which indicates the source and expected price of the major components of the Improvement, which cost estimate shall, to the extent practicable, be substantially consistent for each segment of the Improvements and for similar types of Improvements, (ii) the invoices from the contractors which constructed the Improvement indicating the "as built" cost, and (iii) where the "as built" cost deviates from the preliminary cost esti-

mate by more than 5% with respect to any component, a detailed narrative of the bases for such deviation, and shall be submitted as follows:

(a) *Payment for Permitting and Inspection Fees.* In order to receive payment for permitting and inspection fees, the Developers must submit a Payment Request to the County detailing the amount of the payment. To substantiate these Payment Requests, the Developers shall present invoices from the WSSC or the County or State agency requiring the permit or inspection or other evidence of the amount of such fee.

(b) *Payment for Improvement which is Substantially Complete.* In order to receive the Purchase Price for an Improvement which has been Substantially Completed, inspection thereof under Section 3.01(b) shall have been completed, and the Developers shall deliver to the County Representative a Payment Request for the installment due upon Substantial Completion, and together therewith, the Developers shall deliver a statement indicating the estimated cost to fully complete the Improvement, together with a projected completion date (the "Substantial Completion Cost Estimate").

(c) *Payment for Improvement which is Finally Accepted.* In order to receive the Purchase Price for an Improvement which has been Finally Accepted, inspection thereof under Section 3.01(b) shall have been completed, and the Developers shall deliver to the County Representative a Payment Request for the installment due upon Final Acceptance for such Improvement, together with the written evidence indicating Final Acceptance.

(d) *Procedures for County and Developers upon Submission of a Payment Request.* Upon receipt of a Payment Request (and all accompanying documentation), the County Representative shall conduct a review in order to confirm that such request satisfies the conditions required in Subsections 3.03(a), (b), or (c) above, as applicable, to verify if the "as built" cost conforms to the preliminary cost estimate, and if greater than a 5% deviation with respect to any major component of an Improvement, whether the narrative submitted by the Developers adequately explains the reasons for such deviation, and to verify and prove the Actual Cost of such Improvement specified in such Payment Request. The County Representative shall also conduct such review as is required in its discretion to confirm the matters certified in the Payment Request. The Developers agree to cooperate with County Representative in conducting each such review and to provide the County Representative with such additional information and documentation as is reasonably necessary for the County Representative to conclude each such review. Within thirty (30) days of receipt of the initial Payment Request pursuant to this Section 3.03, the County Representative shall either (i) approve and execute the Payment Request (including in the case of a submission of a Payment Request for Substantial Completion of an Improvement, the approval of the Substantial Completion Cost Estimate) or (ii) in the event the County Representative disapproves the Payment Request, give written notification to Developers of the County Representative's disapproval, in whole or in part, as applicable, of such Payment Request, specifying the reasons for such disapproval and the additional requirements to be satisfied for approval of such Payment Request. The Developers shall thereafter be entitled to resubmit the Payment Request to the County Representative together with such corrective items as they deem necessary to address the requirements noted for approval. Within fifteen (15) days following the receipt of the submission by the Developers of a revised Payment Request which includes such additional items as noted to the County Representative pursuant to this Section

3.03, the County Representative shall either (i) approve and execute the revised Payment Request or (ii) in the event the County Representative disapproves the revised Payment Request, give written notification to the Developers of the County Representative's disapproval, in whole or in part, as applicable, of such Payment Request, specifying the reasons for such disapproval and any further additional requirements to be satisfied for approval of such Payment Request. If a Payment Request seeking reimbursement for more than one Improvement is approved only in part, the County Representative shall specify the extent to which the Payment Request is approved and complete for any one or more Improvements described therein, and any such Improvements shall be processed for payment under Section 3.04 notwithstanding such partial denial. To the extent that the County Representative has not approved or disapproved any Payment Request within such thirty (30) day period (in the case of an initial Payment Request) or fifteen (15) day period (in the case of a revised Payment Request), the Payment Request shall be deemed approved.

Section 3.04. Payment. Upon the approval of a Payment Request pursuant to Section 3.03, the County shall promptly direct the Trustee in accordance with the terms of the Indenture to make payment to Woodcliffe, on behalf of the Developers, of any approved Payment Request under the applicable provisions of the Indenture, to the extent of available monies then on deposit in the Acquisition Account.

Section 3.05. Restrictions on Payments. Notwithstanding any other provisions of this Implementation Agreement, the following restrictions shall apply to any payments made to Woodcliffe under this Article III:

(a) *Joint or Third Party Payments.* The Trustee may make any payment jointly to Woodcliffe and to any mortgagee or deed of trust beneficiary, contractor or supplier of materials, as their interests may appear, or solely to any such third party, if Woodcliffe so requests the same in writing, or as the County Representative otherwise determines such joint or third-party payment is necessary to obtain lien releases.

(b) *Lien Release.* The County Representative on behalf of the County shall be entitled to cause the Trustee to withhold any payment hereunder for an Improvement (other than payment for permitting and inspection fees as described in Section 3.03(a)), if at the time of such Payment Request there remains any claims for labor and material from a contractor hired directly by the Developers with respect to such Improvement, the provision for payment of which has been previously approved and for which no lien releases have been provided by the Developers. The forms of lien release that the Developers will provide to the County are attached hereto as Exhibit "D". The County Representative shall waive this limitation upon the provision by the Developers of sureties, undertakings, securities and/or the posting of performance or payment bonds in accordance with the provisions of the Montgomery County Code.

Nothing in this Implementation Agreement shall be deemed to prohibit the Developers from contesting in good faith the validity or amount of any mechanic's or materialman's lien and/or judgment nor limit the remedies available to the Developers with respect thereto so long as such delay in performance shall not subject the Improvements to foreclosure, forfeiture, or sale. In the event that any such lien and/or judgment is contested, the Developers shall be required to post or cause the delivery of a bond in an amount determined by the County.

(c) *Insufficient funds in Acquisition Account.* To the extent that the Payment Request has been approved for any Improvement, in whole or in part, at a time when there are insufficient funds in the Acquisition Account held by the Trustee under the Indenture, the County shall direct the Trustee in accordance with the terms of the Indenture to make payment to Woodcliffe on behalf of the Developers the amount available in the Acquisition Account. The County shall subsequently direct the Trustee at such time as sufficient funds are available in the Acquisition Account to promptly make payment to Woodcliffe of the unpaid amount of any such Payment Request at such time.

(d) *Final Acceptance; Retainage.* At the time of the approval of the Payment Request for the Substantial Completion of an Improvement, the County Representative shall cause the Trustee to withhold as Retainage in the Acquisition Account an amount equal to 5% of the Actual Cost of the Improvement (which shall be computed on the basis of the Actual Cost as shown on the approved Payment Request, plus the funds needed to complete the construction of Improvement from the point of Substantial Completion to the point of Final Acceptance, as indicated on the approved Substantial Completion Cost Estimate), unless otherwise reduced upon approval of the County Representative. Such Retainage will be paid by the Trustee out of funds available in the Acquisition Account to Woodcliffe at the time of Final Acceptance of the Improvement promptly following the receipt of an approved Payment Request from the County for the related Improvement.

Section 3.06 [Intentionally deleted]

Section 3.07. *Defective or Nonconforming Work.* If any of the work done or materials furnished for an Improvement are found by the inspector identified in Section 3.01 to be defective or not in accordance with the Montgomery County Code, applicable County standards, and/or applicable laws and standards of the entities that will own, operate or maintain the Improvements when completed or acquired and applicable Plans and Specifications, and such finding is made any time within ninety (90) days following Final Acceptance of such Improvement, the Developers hereby agree to correct such defect or nonconformance. In such event, the County shall set aside the amount needed to correct such defect or nonconformance and such amount shall not be available to pay the Purchase Price of other Improvements until such defect or nonconformance is corrected to the satisfaction of the inspector as directed by the County Representative.

Section 3.08. *Modification of Improvements.* Upon written request of the Developers and the satisfaction of all other applicable governmental approvals relating to the Improvements, the County Representative may permit modification of the description of any Improvements in a manner consistent with the Resolution of Formation, the Bond Resolution and the Indenture. Any such modification shall not diminish the overall Improvements to be provided by the Developers hereunder (in a material way such that the change invalidates any of the assumptions used in the appraisal conducted to sell the Bonds) or in any way increase the total Purchase Price identified in Exhibit "A" and Exhibit "B".

ARTICLE IV

OWNERSHIP AND TRANSFER OF IMPROVEMENTS

Section 4.01. *Improvements To Be Owned by the County—Conveyance of Land and Easements to County.* To the extent title to property on, in or over which each Improvement to be acquired by the County will be located, is to be deeded over to the County by way of grant deed, quitclaim or dedication of such property, or easement thereon, other than through the subdivision process as set forth in the Montgomery County Code, the Developers agree to provide to the Authorized Officer or the Authorized Officer's designee whatever assistance is necessary in obtaining such documents as are required to obtain such title.

Section 4.02. *Improvements Constructed on County Land.* If the Improvements to be acquired are on land owned by the County, the County hereby grants to each of the Developers, and its respective contractors, subcontractors, and materialmen, an easement and a license to enter upon such land for purposes related to the construction (and maintenance pending acquisition) of the Improvements for which it is responsible. The provisions for inspection and acceptance of such Improvements otherwise provided herein shall apply.

Section 4.03. *Improvements To Be Owned by Other Public Agencies.* With respect to any Improvement to be owned by a public entity other than the County, each of the Developers shall comply with any applicable laws, rules and regulations regarding the construction of such Improvement for which it is responsible and, upon request, shall provide the County Representative and the Authorized Officer with evidence of such compliance.

Section 4.04. *Maintenance and Warranties.* Each of the Developers shall maintain each Improvement for which it is responsible in good and safe condition until the Acceptance Date of the Improvement, or in the case of water and sewer Improvements, the connection of the Improvement to the operating water and sanitary system, if earlier. Prior to such date, each of the Developers shall be responsible for performing any required maintenance on any completed Improvement for which it is responsible. On or before such date, each of the Developers shall assign to the County all of such Developer's rights in any applicable legally required warranties, guarantees, maintenance obligations or other evidence of contingent obligations of third persons with respect to such Improvement for which it is responsible, and its rights (to the extent legally assignable) in the Plans and Specifications with respect to such Improvement. Each of the Developers agree to collaterally assign its rights to such Plans and Specifications (to the extent assignable) to the County on the Closing Date in the case of an Event of Default under this Agreement.

ARTICLE V

LETTERS OF CREDIT FOR SPECIAL ASSESSMENTS AND TAXES

Section 5.01. *Irrevocable Letters of Credit for Special Assessments and Taxes.* Arcola covenants to maintain a Letter of Credit (as defined below) meeting the requirements of this Section (or cash deposit in the full Stated Amount (as defined below) of the Letter of Credit in the Special Assessments Escrow Fund as provided in Section 5.03 in lieu thereof) until such

obligation terminates under Section 5.04. Pursuant to the terms of the loan agreement dated November 6, 2000 with Arcola, Ohio Savings Bank has agreed to establish an Irrevocable Letter of Credit in the form attached hereto as Exhibit "G" in the amount provided below, to be available to pay the Special Assessments and Taxes projected on properties located in the District owned by Arcola for a period of one year, rolling forward from year-to-year. Toll MD II, Limited Partnership, a limited purpose entity controlled by Toll Brothers, Inc. ("Toll Brothers"), the purchaser of 223 lots located in the District from Artery, has agreed to provide a Letter of Credit with substantially the same terms in the form set forth in Exhibit "H" from a Bank with respect to its properties (hereafter, the letters of credit issued on behalf of Arcola and Toll Brothers in the forms attached hereto as Exhibits "G" and "H" are referred to individually herein as a "Letter of Credit" and collectively as the "Letters of Credit"). The obligation of each of Arcola and Toll Brothers to renew their respective Letters of Credit shall continue until the earlier of (i) the respective date provided under Section 5.04 hereunder for each of such parties when the obligation to maintain such Letter of Credit shall terminate, (ii) the date the Stated Amount (as defined below) of its respective Letter of Credit is reduced to zero, or (iii) until its respective Letter of Credit is drawn upon by the County. Each Letter of Credit will be issued with Arcola and Toll Brothers, respectively, as the account party ("Account Party") and the County as the beneficiary. Each of the Letters of Credit will be in an amount, subject to adjustment each year (the "Stated Amount"), equal to the following: (i) during the period of time following the issuance of the Bonds until such time as it is reduced, as provided below, the Stated Amount shall be an amount equal to the projected maximum annual Special Assessments and Taxes due from the respective Account Party in order to meet debt service for the Bonds in the following taxable year, which amount shall be \$374,344.00 for Arcola and \$157,600.00 for Toll Brothers, and (ii) thereafter, the Stated Amount will be automatically and permanently reduced to (I) the amount shown on the Certificate of Reduction of Stated Amount as submitted to the issuing Bank by the County, as provided in Paragraph 5 of the Letters of Credit, or (II) commencing with the taxable year commencing July 1, 2003, if a Certificate of Reduction of Stated Amount (attached as Exhibit D to the Letter of Credit) has not been submitted to the issuing Bank by the County prior to November 1 of such taxable year, the amount of the Special Assessments and Taxes actually paid by the Account Party for the preceding tax year, provided that (a) the Account Party is current in the payment of all Special Assessments and Taxes then due and owing to the County, as reflected on the tax bill submitted to the Account Party by the County and (b) the Account Party sends a copy of such tax bill to the issuing Bank, which copy shall be certified as correct by the County.

Section 5.02. *Draw by County under Letters of Credit.* Each of the Letters of Credit shall provide the County with the right to draw upon presentation of a sight draft to the issuing Bank in an amount not exceeding the Stated Amount as follows: (a) in the case of a drawing upon any failure by the Account Party to pay all or a portion of any Special Assessments or Taxes on any properties located within the District owned by such Account Party on or before September 30 of any year, upon submission to the issuing Bank of a Certificate of Unpaid Tax Liability (attached as Exhibit B to the Letter of Credit), the County shall be entitled to draw the amount of the Special Assessment and Taxes owed by the Account Party with respect to that taxable year (*i.e.*, the taxable year ending on June 30, for which payment in full is due by September 30); and (b) in the case of a drawing for any other circumstance, as provided in Paragraph 3(b)(ii) of the Letters of Credit, upon the submission to the issuing bank of a Certificate of Final

Drawing (attached as Exhibit C to the Letter of Credit), the County shall be entitled to draw the Stated Amount.

Section 5.03. *Application of Amounts Drawn by County pursuant to Letters of Credit.* The County covenants and agrees with each of the Account Party and the issuing Banks that upon any drawing by it pursuant to any Letters of Credit due to the failure of an Account Party to pay Special Assessments and Taxes, provided the following conditions of this paragraph are satisfied, it will promptly apply the amounts so drawn against the liability of the Account Party for unpaid Special Assessments and Taxes and interest or late payment penalties owing to the County on properties owned by such Account Party in the District, and will consider such Special Assessments and Taxes as have been paid on a timely basis, with no further interest or late payment penalties thereon owing. Such Account Party (or successor party, including the issuing Bank) shall, on or before the date on which the County first advertises the property to which the delinquent Special Assessments and Taxes relate for tax sale in accordance with County and State law and duly adopted County procedures, either (i) post a substitute letter of credit with the County in an amount equal to the Special Assessments and Taxes as are projected by the County to be owing by the Account Party for the ensuing taxable year commencing on the next July 1 (the "Projected Tax Liability"), or (ii) pay to the County the full amount of the Projected Tax Liability, and thereafter, on a monthly basis, in installments calculated by dividing the Projected Tax Liability by the number of months remaining from the commencement of such payments to the next ensuing July 1, pay an amount equal to the Projected Tax Liability into a Special Assessments and Taxes escrow fund ("Special Assessment Escrow Fund") to be established by the County from time to time. Amounts paid into such Special Assessment Escrow Fund shall be held by the County and applied to the payment of such Account Party's Special Assessments and Taxes in future taxable years, to the extent not otherwise timely paid; provided that if the amount on deposit in the Special Assessment Escrow Fund is less than the Special Taxes and Assessments owed by the Account Party, such Account Party will remain liable for such deficiency. In the event that an Account Party fails to comply with either (i) or (ii) above, the County shall have the right to exercise all remedies as are available under the Montgomery County Code and this Agreement with respect to the Account Party's failure to pay Special Taxes and Assessments. In the case of a draw on a Letter of Credit made at a time when there is no liability for Special Assessments and Taxes owing by the Account Party, the County shall promptly deposit such proceeds into the Special Assessment Escrow Fund, to be applied in the same manner under this Agreement as amounts drawn under that Letter of Credit may be applied.

Section 5.04. *Termination of Obligation of Account Parties under this Article V.* The obligation of each Account Party to maintain a Letter of Credit, and meet the obligations set forth in Section 5.03 to pay amounts into the Special Assessment Escrow Fund, will terminate at such time that the amount of Special Assessments and Taxes paid by such Account Party in any taxable year is less than 10% of the annual debt service on the Bonds. In the event that this obligation terminates with respect to an Account Party at a time when such Account Party's Letter of Credit remains outstanding, or when amounts deposited with respect to such Account Party remain in the Special Assessment Escrow Fund, the County shall promptly return such Letter of Credit, or such amounts on deposit in the Special Assessment Escrow Fund (together with all earnings thereon), to the issuing Bank, or if the issuing Bank has been paid in full, to the Account Party or to any other mortgagee or trust deed beneficiary, in each case as specified in

writing by the Account Party to the County, which shall apply such amounts to the account of such Account Party.

Section 5.05. *Letter of Credit Provisions Govern.* To the extent that there is any conflict between the description of the Letters of Credit in this Article V and the terms of such Letters of Credit, the terms of such Letters of Credit shall govern.

ARTICLE VI

WSSC SYSTEM DEVELOPMENT CHARGE CREDITS

Section 6.01. *Agreement Regarding Allocation of System Development Charge Credits.* Artery and Arcola have agreed with the Washington Suburban Sanitary Commission ("WSSC") through separate agreements relating to the construction of the Hoyles Mill Wastewater Pumping Station and Hoyles Mill Force Main Improvements, that any credits on the WSSC System Development Charge ("SDC") accruing to Artery and Arcola or any builders or developers purchasing properties located within the District from Artery and Arcola, will be allocated in accordance with the following percentages: 30.10% to the units within the Artery development until the Artery units receive \$1,000,000 in the aggregate, and 69.90% to the units within the Arcola development and all of the SDC credits after the Artery units receive \$1,000,000 in the aggregate. The SDC credits shall be allocated by the Developers on a pro rata basis across all of the units developed by Artery and Arcola. Each unit will receive an SDC credit allocation, irrespective of the date when application for such allocation of SDC credit is made, provided that the allocation does not cause the actual amount of SDC credit to be exceeded.

ARTICLE VII

CONDITIONS OF ISSUANCE OF BONDS

Section 7.01. *Conditions to Issuance of Bonds.* The County and the Developers agree that the satisfaction of each of the following shall be a condition precedent to the issuance of the Bonds by the County; provided that notwithstanding the satisfaction of these conditions, the County shall not be obligated to issue the Bonds:

- (i) Artery and Arcola have consented to the declaration of Special Assessments and Taxes as required by the Bond Resolution;
- (ii) The representations and warranties made by the Developers herein shall be true and correct as of the Closing Date; and
- (iii) Such other conditions as the County shall specify in writing to the Developers.

ARTICLE VIII

REPRESENTATIONS, WARRANTIES AND COVENANTS

Section 8.01. *Representations, Covenants and Warranties of the Developers.* Each Developer, as to itself, represents and warrants for the benefit of the County as follows:

(a) *Organization.* Each Developer is duly organized and validly existing under the laws of the jurisdiction of its formation, is in compliance with the laws of the State, and has the power and authority to own its properties and assets and to carry on its business in the State as now being conducted and as hereby contemplated.

(b) *Authority.* Each Developer has the power and authority to enter into this Implementation Agreement, and has taken all action necessary to cause this Implementation Agreement to be executed and delivered, and this Implementation Agreement has been duly and validly executed and delivered by each Developer.

(c) *Binding Obligation.* This Implementation Agreement is a legal, valid and binding obligation of each Developer, enforceable against each Developer in accordance with its terms, subject to bankruptcy and other equitable principles.

(d) *Compliance with Laws.* Each Developer shall not with knowledge commit, suffer or permit any act to be done in, upon or to the lands of the Developer in the District or the Improvements in violation of any law, ordinance, rule, regulation or order of any governmental authority or any covenant, condition or restriction now or hereafter affecting the lands in the District or the Improvements.

(e) *Requests for Payment.* Each Developer represents and warrants as to itself that (i) it will not request payment from the County for (A) the acquisition of any improvements that are not part of the Improvements or (B) the costs that are not Actual Costs of an Improvement, and (ii) it will diligently follow all procedures set forth in this Implementation Agreement with respect to the Payment Requests.

(f) *Financial Records.* Until the Final Acceptance of the Improvements and for thirty-six months thereafter, each Developer covenants to maintain proper books of record and account for the construction of the Improvements and all costs related thereto. Such accounting books shall be maintained in accordance with generally accepted accounting principles, and shall be available for inspection by the County or its agent at any reasonable time during regular business hours on reasonable notice.

(g) *Plans and Specifications.* Each Developer represents that it has or will use its best efforts to obtain approval of the Plans and Specifications for the Improvements to be acquired from each Developer hereunder from all appropriate departments of the County and from any other public entity or public utility from which such approval must be obtained. Each Developer further agrees that the Improvements to be acquired from such Developer hereunder have been, or will be, constructed in full compliance with such approved Plans and Specifications and any supplemental agreements thereto (change orders) consistent with the Resolution of Formation and the Bond Resolution, as approved in the same manner.

(h) *Land Sales.* Each of the Developers agree that it will not transfer title to any property owned by it within the District unless, on or before the date of transfer, either (I) the County receives a letter of credit satisfactory to the County in its sole discretion (it being agreed that a letter of credit containing the same terms and conditions as the Letter of Credit from a financial institution which is "well capitalized" and which has net assets in an amount at least equal to those of Ohio Savings Bank shall be satisfactory) in a stated amount equal to the maximum liability of the transferee for Special Assessments and Taxes on the properties transferred to it in the District, or (II) the County has consented to the transfer. The foregoing covenant shall not apply to any transfer made in connection with a Developer's sale of lots in the District to home builders in the ordinary course of business. For purposes of this paragraph, any sale or sales made within a period of twelve months which do not exceed one hundred and seventy-five (175) lots by a Developer to any single home builder, which builder has indicated, to the best knowledge of the Developer, an intent to construct houses on such lots, shall be considered a sale in the ordinary course of business. Each Developer agrees that in the event it sells any property located in the District, such Developer will provide the purchaser with all information required by law and, in the case of any sale which is not in the ordinary course of business, will notify the County Representative in writing of the sale, indicating the legal description(s) and tax account number(s) of the property sold and the identity of the purchaser of the property. Artery has sold, and the County has approved the sale of, 223 lots in the Artery development to Toll Brothers, and Toll Brothers has agreed to post a Letter of Credit with the County in the form set forth in Exhibit "H" as referenced in Article V.

(i) *Litigation.* There are no pending or, to the best of such Developer's knowledge, threatened actions, suits, or proceedings before any court, arbitrator or governmental or administrative body or agency which may materially adversely affect the properties, business or condition, financial or otherwise, of the Developer.

Section 8.02. *Indemnification and Hold Harmless.* Each of the Developers shall assume the defense of, indemnify and save harmless the County, the County Representative, the County Executive, members of the County Council, officers, employees and agents of the County, the County Executive, and the County Council, and each of them (each an "Indemnified Party"); from and against all actions, damages, claims, losses or expense of every type and description to which they may be subjected or put, by reason of, or resulting from the breach of any provision of this Implementation Agreement by such Developer, the Developer's or any other entity's negligent design, engineering and/or construction of any of the Improvements acquired from such Developer hereunder, the Developer's nonpayment under contracts between such Developer and its consultants, engineers, advisors, contractors, subcontractors and suppliers in the provision of the Improvements, or any claims of persons employed by such Developer or its agents to construct the Improvements for which it is responsible, except that the Developer's obligations for negligent design, engineering and construction of the Improvements shall be as provided under Section 3.07 hereunder. Notwithstanding the foregoing, no indemnification is given hereunder by any Developer with respect to any breach of any provision hereunder which is solely the responsibility of another Developer, nor for any action, damage, claim, loss or expense directly attributable to the intentional acts or gross negligence of any Indemnified Party.

No provision of this Implementation Agreement shall in any way limit any Developer's responsibility for payment of damages resulting from the operations of such Developer, its agents, employees or its contractors.

Section 8.03. *Enforcement of Remedies.* So long as it owns any property in the District, each of the Developers agree as follows:

(a) The County may in its discretion provide in the Indenture for the collection of any Special Assessments and Taxes on any properties owned, optioned or controlled by any of the Developers or any Affiliate by direct billing by the County to the Developer or such Affiliate, as owner of the property (or to the applicable owner with a copy to the Developer to the extent of parcels optioned or controlled, but not owned, by the Developer); and

(b) Each of the Developers acknowledge that the County Treasury shall commence proceedings for the collection of delinquent Special Assessments and Taxes as provided in the Indenture.

(c) In order to reduce the likelihood of any prolonged collection actions, each of the Developers will provide for facilitated service of process with respect to any collection action in respect of delinquent Special Assessment and Taxes levied on properties owned by it in the District, and will waive affirmative defenses to any such collection action pertaining to the formation of the District and its financing structure, including the methodology for determining the Special Assessments and Taxes as set forth in the Bond Resolution, the validity of the Bonds and the priority of the District liens to collect delinquent Special Assessments and Taxes; provided, however, that each of the Developers may challenge any levy not made in accordance with the terms of the Bond Resolution.

ARTICLE IX

TERMINATION

Section 9.01. *No Bonds.* If, for any reason, the County does not issue any of the Bonds for the District by December 31, 2002, this Implementation Agreement shall terminate and be null and void and of no further effect.

Section 9.02. *Mutual Consent.* This Implementation Agreement may be terminated by the mutual, written consent of the County and the Developers (with the consent of the Bank to the extent that the Bank has a Letter of Credit or other loan proceeds outstanding to any Developer), in which event the County may either execute contracts for or perform any remaining work related to the transportation and parks Improvements not accepted by the County (in the case of Improvements which are to be accepted by the County) or provide written notice to the WSSC and cooperate with the WSSC in the execution by WSSC of contracts for or to perform any remaining work related to the Improvements not accepted by the WSSC (in the case of Improvements which are to be accepted by the WSSC) and use all or any portion of funds in the Acquisition Account or other amounts transferred to the Acquisition Account under the terms of the Indenture to pay for same, and the Developers shall have no claim or right to any further pay-

ments for the Purchase Price of Improvements hereunder, and shall have no further responsibility to the County for construction of the Improvements, except as otherwise may be provided in such written consent.

Section 9.03. *County Election to Terminate for Cause.* The following events shall constitute an event of default under this Implementation Agreement:

(a) Any of the Developers shall voluntarily file for reorganization or other relief under any federal or State bankruptcy or insolvency law.

(b) Any of the Developers shall have any involuntary bankruptcy or insolvency action filed against it, or shall suffer a trustee in bankruptcy or insolvency or receiver to take possession of its assets, or shall suffer an attachment or levy of execution to be made against the property it owns within the District unless, in any of such cases, such circumstance shall have been terminated or released within 90 days thereafter.

(c) Any of the Developers shall abandon construction of the Improvements in the aggregate. Failure for a period of six consecutive months to undertake substantial work related to the construction of the Improvements in the aggregate at a time when such construction is scheduled to occur, other than for a reason specified in Section 9.04 hereof, shall constitute a nonexclusive example of such abandonment.

(d) Any of the Developers shall breach any material covenant or default in the performance of any material obligation hereunder.

(e) Any of the Developers shall have made any material misrepresentation or omission in any written materials furnished in connection with any offering document or bond purchase contract used in connection with the sale of the Bonds.

(f) Any of the Developers or any of their respective Affiliates shall at any time challenge the validity of the District or any of the Bonds or the levy of the Special Assessments and Taxes within the District, other than on grounds that such levy was not made in accordance with the terms of the Bond Resolution.

If any such event of default occurs, the County shall give written notice of its knowledge thereof to the Developers (with a copy to (i) the Bank to the extent that the Bank has a Letter of Credit or other loan proceeds outstanding to finance the cost of the Improvements to any Developer, and (ii) to Toll Brothers, or any other builder which has posted a letter of credit with the County pursuant to Section 8.01(h) which is still outstanding, and provided the County Representative with a notice address), specifying the event which is deemed to be a breach by the County, and the Developers agree to meet and confer with the County Representative and other appropriate County staff and County Representatives as to options available to assure timely completion of the Improvements (with such meeting open to the Bank and to Toll Brothers, Inc., or any other builder which has posted a letter of credit with the County pursuant to Section 8.01(h) which is still outstanding). Such options may include, but not be limited to, the termination of this Implementation Agreement by the County. If the County elects to terminate this Implementation Agreement, the County shall first notify the Developers (and Ohio Savings Bank or, if Ohio Savings Bank has been paid in full, any other mortgagee or trust deed beneficiary

specified in writing by the Developers to the County to receive such notice, and Toll Brothers, Inc., or any other builder which has posted a letter of credit with the County pursuant to Section 8.01(h) which is still outstanding and provided the County Representative with a notice address) of the grounds for such termination and allow the Developers a minimum of 30 days to eliminate or mitigate to the satisfaction of the County the grounds for such termination (with such additional time to cure with respect to Ohio Savings Bank as may be permitted under the provisions of Section 11.10). Such period may be extended, at the sole discretion of the County, if the Developers or the Bank, to the satisfaction of the County, are proceeding with diligence to eliminate or mitigate such grounds for termination. If at the end of such period (and any extension thereof), as determined solely by the County, the Developers or the Bank have not eliminated or completely mitigated such grounds to the satisfaction of the County, the County may then terminate this Implementation Agreement and cease making payments for the Purchase Price of the Improvements hereunder.

In the event that this Implementation Agreement is terminated by the County for cause, in addition to other remedies available to it, including the redemption of the Bonds under the Indenture, the County may execute contracts for or perform any remaining work related to the transportation and parks Improvements not accepted by the County (in the case of Improvements which are to be accepted by the County) or provide written notice to the WSSC and cooperate with the WSSC in the execution of contracts for or to perform any remaining work related to the Improvements not accepted by the WSSC (in the case of Improvements which are to be accepted by the WSSC) and use all or any portion of the funds in the Acquisition Account or other amounts transferred to the Acquisition Account for such purposes, and the Developers shall have no claim or right to any further payments for the Purchase Price of Improvements hereunder, except as otherwise may be provided upon the mutual written consent of the County and the Developers, it being agreed that after the County and/or the WSSC completes the remaining work relating to the unfinished Improvements with amounts in the Acquisition Account, to the extent that there are funds remaining in the Acquisition Account, the County shall reimburse Woodcliffe for all amounts actually expended which have not been reimbursed, subject to the delivery by the Developers of evidence similar to that described in Section 3.03 hereof of the amount of such costs.

Section 9.04. *Force Majeure.* Whenever performance is required of a party hereunder, that party shall use all due diligence and take all necessary measures in good faith to perform, but if completion of performance is delayed by reasons of floods, earthquakes or other acts of God, war, civil commotion, riots, strikes, picketing or other labor disputes, damage to work in progress by casualty, labor and materials shortages which affect the Washington D.C. metropolitan region, governmental action or inaction which renders performance impossible in the case of performance by a private party (provided that the private party has in fact complied with all requirements that are a precondition to such governmental action) or by other cause beyond the reasonable control of the party (financial inability excepted), then the specified time for performance shall be extended by the amount of the delay actually so caused.

ARTICLE X

DEFINITIONS

The following terms shall have the meanings ascribed to them in this Article X for purposes of this Implementation Agreement. Unless otherwise indicated, any other terms, capitalized or not, when used herein shall have the meanings ascribed to them in the Indenture (as hereinafter defined).

"Acceptance Date" means the date the County (or other public entity which is to own a Improvement) takes final action to accept dedication of or transfer of title to an Improvement.

"Actual Cost" means the substantiated costs with respect to the Improvements, which costs generally include:

- (i) the actual cost of all materials and labor to grade and clear the site and to construct the Improvements;
- (ii) costs of rental of leased machinery and equipment needed to construct the Improvements;
- (iii) field engineering, geotechnical services, field inspections, and design amendments required by County agencies or field conditions after permit issuance;
- (iv) all permitting, inspection and reforestation fees;
- (v) the cost of a construction supervisor hired by the Developers in overseeing the construction or acquisition of the Improvements; and
- (vi) other expenses as may be reasonably necessary or incident to the construction and acquisition of the Improvement, subject to the approval of the County Representative.

"Affiliate" means any entity owned, controlled or under common ownership or control by or with, as applicable, any of the Developers and includes all general partners of any entity which is a partnership or members of any entity which is a limited liability company. Control shall mean ownership of 50% or more of the voting power of or ownership interest in the respective entity.

"Authorized Officer" means such officer as shall be designated by the County for the purposes of reviewing, approving, accepting and executing, as applicable, any conveyancing or other documents delivered in connection with the acceptance of the dedication of or the transfer of title to the County of any land or Improvement acquired by the County pursuant to this Implementation Agreement.

"Bank" means any commercial bank or other financial institution from which any Developer borrows funds to finance the cost of construction of the Improvements, including Ohio

Savings Bank, or which issues a Letter of Credit on behalf of an Account Party as provided in Article V hereof and which is well capitalized and which meets the reasonable approval of the County.

"Bond(s)" means the Montgomery County, Maryland Special Obligation Bonds (West Germantown Development District) \$11,600,000 Senior Series 2002A and \$4,315,000 Junior Series 2002B, at any time Outstanding under the Indenture or any Supplemental Indenture, except where preceded by the term "Performance" or the term "Payment" in which case "Bond(s)" shall refer to Performance Bond(s) or Payment Bond(s), respectively as defined in the Montgomery County Code.

"County Conditions" shall have the meaning set forth in the Indenture.

"County Representative" means the County Director of Finance, the person or persons appointed by the County Director of Finance to perform the tasks of County Representative under this Implementation Agreement or a designee of such person.

"Developers" shall have the meaning set forth in Recital R-1.

"Final Acceptance" means with respect to each Improvement, that such Improvement has been completed in accordance with the approved Plans and Specifications submitted to the applicable County agency or the WSSC and that the County (or other public agency which owns the Improvement) has taken final action to accept such Improvement, as evidenced by a written statement to that effect.

"Improvements" means the public Improvements and related costs described in Exhibit "A" and Exhibit "B" hereto which are eligible be financed by the District. The Improvements may consist of designated portions of a larger item of infrastructure, with each portion treated as a separate Improvement.

"Indenture" means the Indenture of Trust by and among Montgomery County, Maryland and Wachovia Bank, National Association, as Trustee dated as of April 1, 2002, and any Supplemental Indenture adopted pursuant to the provisions of the Indenture relating to the Bonds.

"Letter of Credit" or *"Letters of Credit"* shall have the meaning set forth in Section 5.01 hereof.

"Payment Request" means a document, substantially in the form of Exhibit "C" hereto, to be used by the Developers in requesting payment of a Purchase Price.

"Plans and Specifications" means the plans, specifications, schedules and related construction contracts for the Improvements approved pursuant to the Montgomery County Code and applicable standards and directives of the County, the General Conditions and Standard Specifications of the WSSC or the applicable laws, standards and directives of the other entity that will own, operate or maintain the Improvements when completed and acquired.

"Purchase Price" means the amount paid by the County for an Improvement determined in accordance with Article III hereof, being an amount equal to the Actual Cost of such Improvement, which amount shall not exceed in any event the estimated cost for such Improvement, indicated on Exhibit "A" and Exhibit "B", but subject to the limitations and reductions provided for in Article III. The amount of the Purchase Price may be amended from time to time in a manner consistent with the Resolution of Formation, and the Bond Resolution, and as further provided in this Agreement.

"Retainage" means moneys withheld at the time of Substantial Completion of each Improvement in an amount equal to 5% of the total direct construction costs related to the Purchase Price of each Improvement to be paid hereunder, plus the estimated cost to complete said Improvement, unless otherwise reduced upon approval of the County pursuant to Section 3.05(d) of this Implementation Agreement.

"Special Assessments and Taxes" means those special assessments and special taxes that shall be levied by the County on the properties located in the District to the extent provided in the Resolution of Formation and the Bond Resolution.

"Substantial Completion" means with respect to each Improvement, that such Improvement has been completed to a point of being operable (if connected to a working system) or having general usage for the purposes to which it is designed, which shall mean the following with respect to the particular type of Improvement:

- (i) With respect to roads and transportation Improvements, the work shall be completed to a base course, with curbs and gutters installed, adjacent sidewalks poured or paved, and interim stormwater management facilities in functioning condition; with the following items excluded: the final landscaping, including seeding, street lights and street trees, traffic signals, the final stormwater management facilities and the final top coat shall not be required to be installed; and
- (ii) for the park facilities, for the initial phase of completion, all rough grading shall have occurred and for the final stage of completion, all paving for paths and the tennis courts shall have been completed, all park equipment shall have been installed, all signage and fencing shall be in place and all fields shall have been seeded (grass need not be actually growing or decorative planting completed); and
- (iii) for sewer and water facilities, the segment of the facility shall have been completed in accordance with the approved Plans and Specifications.

"Substantial Completion Cost Estimate" shall have the meaning set forth in Section 3.03 hereof.

"Supplement" means a written document agreed upon by the Developers and the County amending, supplementing or otherwise modifying this Implementation Agreement and any Exhibit hereto, including any amendments to the list of Improvements in Exhibit "A" and Exhibit "B" in a manner consistent with the Resolution of Formation and the Bond Resolution.

Artery Hoyles Mill, LLC
7200 Wisconsin Avenue
Suite 1000
Bethesda, Maryland 20814-5228
Attn: Mr. B. Hayes McCarty

Woodcliffe Development District, LLC
c/o Arcola Investment Associates
c/o Cylburn, Inc.
Prince George's Metro Center, Inc.
6525 Belcrest Road, Suite 300
Hyattsville, Maryland 20782
Attn: Mr. Chris Hanessian

and

c/o Artery Hoyles Mill, LLC
7200 Wisconsin Avenue
Suite 1000
Bethesda, Maryland 20814-5228
Attn: Mr. B. Hayes McCarty

With copies to:

Stephen Z. Kaufman, Esquire
John R. Orrick, Jr., Esquire
Linowes and Blocher LLP
1010 Wayne Avenue, Suite 1000
Silver Spring, Maryland 20910

Each party may change its address or addresses for delivery of notice by delivering written notice of such change of address to the other party.

Section 11.04. *Severability.* If any part of this Implementation Agreement is held to be illegal or unenforceable by a court of competent jurisdiction, the remainder of this Implementation Agreement shall be given effect to the fullest extent possible.

Section 11.05. *Successors and Assigns.* This Implementation Agreement shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto. This Implementation Agreement shall not be assigned by any of the Developers, except in whole to an Affiliate, or collaterally assigned to a Bank, without the prior written consent of the County, which consent shall not be unreasonably withheld or delayed. In connection with any such consent of the County, the County may condition its consent upon the acceptability of the financial condition of the proposed assignee, upon the assignee's express assumption of all obligations of the assignor Developer hereunder and/or upon any other reasonable factor which the County deems relevant in the circumstances. In any event, any such assignment shall be in writing, shall clearly identify the scope of the rights and/or obligations assigned and shall not be effective until approved by the County. Any assignment of this Implementation Agreement shall not relieve the assignor of

its obligations hereunder and such assignor shall remain liable for all of the respective Developer's obligations under this Implementation Agreement.

Section 11.06. *Other Agreements.* The obligations of the Developers hereunder shall be those of a party hereto and not as an owner of property in the District. Nothing herein shall be construed as affecting the County's or the Developers' rights or duties to perform their respective obligations under other agreements, use regulations or subdivision requirements relating to the development of the lands in the District. This Implementation Agreement shall not confer any additional rights, or waive any rights given, by either party hereto under any development or other agreement to which they are a party.

Section 11.07. *Waiver.* Failure by a party to insist upon the strict performance of any of the provisions of this Implementation Agreement by the other party, or the failure by a party to exercise its rights upon the default of the other party, shall not constitute a waiver of such party's right to insist and demand strict compliance by the other party with the terms of this Implementation Agreement thereafter.

Section 11.08. *Merger.* No other agreement, statement or promise made by any party or any employee, officer or agent of any party with respect to any matters covered hereby that is not in writing and signed by all the parties to this Implementation Agreement shall be binding.

Section 11.09. *Parties in Interest.* Nothing in this Implementation Agreement, expressed or implied, is intended to or shall be construed to confer upon or to give to any person or entity other than the County, the Developers, Toll Brothers, and Ohio Savings Bank (but solely to the extent set forth in the Joinder of Toll Brothers and Ohio Savings Bank, attached hereto) any rights, remedies or claims under or by reason of this Implementation Agreement or any covenants, conditions or stipulations hereof, and all covenants, conditions, promises and agreements in this Implementation Agreement contained by or on behalf of the County or the Developers shall be for the sole and exclusive benefit of the County and the Developers.

Section 11.10. *Intercreditor Agreement.* The County (a) agrees to give written notice to Ohio Savings Bank of any default by Arcola which would entitle the County to suspend payment from the Acquisition Account or to terminate this Agreement, grant Ohio Savings Bank the opportunity to cure Arcola's default (to the extent curable by that Bank) under Section 9.03 hereof (provided that in the case of a nonmonetary default by Arcola, such Bank shall have an additional 15-day period beyond the period provided therein to cure) and accept such cure in lieu of cure by Arcola, (b) agrees that it will forebear from exercising its remedies under this Agreement, including its right to terminate this Agreement, for a period of 150 days from the date which it would otherwise be entitled to do so in the event of a default by Arcola provided that such Bank is diligently pursuing foreclosure proceedings against Arcola or is otherwise diligently taking action to substitute itself or its successors and assigns, and/or any foreclosure purchaser (collectively, a "Successor"), as a successor-in-interest to the rights of Arcola hereunder under the loan documents entered into between Arcola and the Bank, and (c) agrees to recognize the Successor in the event of a default by Arcola such that the Successor shall be entitled thereafter to succeed to the rights of Arcola including, without limitation, the right to payment from the Acquisition Account with respect to completion of Improvements as contemplated herein. It is agreed that during the time period that a Developer default remains uncured under this Agree-

ment the County shall not be required to make any payments from the Acquisition Account with respect to submitted Payment Requests. Furthermore, the County is in no way precluded from exercising other remedies that it has at law in the event of any delinquencies in Special Assessments and Taxes owing to the extent that the provisions of Article V hereof are not satisfied. A memorandum setting forth the foregoing agreements may be recorded in the Land Records of the County if Ohio Savings Bank so requests.

Section 11.11. *Amendment.* This Implementation Agreement may be amended, from time to time in a manner consistent with the Resolution of Formation and the Bond Resolution, by written Supplement hereto and executed by both the County and the Developers; provided, however, that in the event an amendment only has an impact on the rights or obligations of one of the Developers, and the other Developer does not object thereto after receipt of prior written notice by the County which notice reasonably details the scope and nature of the proposed amendment, such Supplement may be entered into by the County and the affected Developer only, and provided further that so long as Ohio Savings Bank has a Letter of Credit outstanding and has not failed to honor a draw thereunder made strictly in accordance with the terms thereof or has loan proceeds outstanding to finance the cost of the Improvements to any Developer, no amendment may be made to Sections 5.01, 5.02, 5.03, 5.04, 5.05, 9.03, 11.09, or 11.10 which would materially adversely change the rights or obligations of Ohio Savings Bank under this Implementation Agreement or any outstanding Letter of Credit without the prior written consent of Ohio Savings Bank.

Section 11.12. *Assistance with Application for Development Impact Tax Credits.* The County agrees that Development Impact Tax Credits will be granted for the Special Assessments and Taxes which are levied on the West Germantown Development District properties to the extent available under the Act and other County law. The County Representative will use diligent efforts to assist the Developers in applying for such development impact tax credits and in processing refunds of development impact taxes previously paid with the Department of Permitting Services of the County.

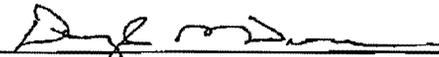
Section 11.13. *Obligation of Developers.* The obligation of the Developers hereunder shall be several and not joint and several. The County agrees to give notice of any default hereunder by any Developer to all Developers and to allow any Developer to cure such default, subject to receiving reasonable assurances of future ability to perform by such Developer.

Section 11.14. *Counterparts.* This Implementation Agreement may be executed in any number of counterparts, each of which shall be deemed an original.

[SIGNATURES APPEAR ON NEXT PAGE]

IN WITNESS WHEREOF, the parties have executed this Implementation Agreement as of the day and year first above written.

MONTGOMERY COUNTY, MARYLAND

By: 
Name: Douglas M. Duncan
Title: County Executive

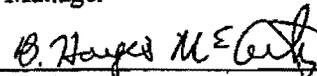
ARCOLA INVESTMENT ASSOCIATES

By: Cylburn, Inc., General Partner

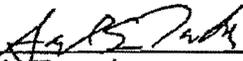
By: 
Name: Herschel Blumberg
Title: President

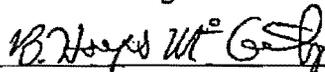
ARTERY HOYLES MILL, LLC

By: Artery Group, LLC,
Manager

By: 
Name: B. Hayes McCarty
Title: Authorized Person

WOODCLIFFE DEVELOPMENT
DISTRICT, LLC

By: 
Name: Chris Hanesian
Title: General Manager

By: 
Name: B. Hayes McCarty
Title: General Manager

WEST GERMANTOWN DEVELOPMENT DISTRICT
IMPLEMENTATION AGREEMENT

LIST OF EXHIBITS

- Exhibit "A" - Development District Improvements and Developer Responsibility
- Exhibit "B" - District Funded Improvements and Developer Responsibility if Cost Savings Result on an Exhibit "A" Line Item
- Exhibit "C" - Form of Payment Request
- Exhibit "D" - Forms of Partial and Final Release of Liens
- Exhibit "E" - Intentionally Deleted
- Exhibit "F" - Intentionally Deleted
- Exhibit "G" - Form of Ohio Savings Bank Letter of Credit
- Exhibit "H" - Form of Toll Brothers Letter of Credit

EXHIBIT "A"

Development District Improvements and Developer Responsibility

Richter Farm Road (A-297) - COST BREAKDOWN BY PHASE		Responsible Developer
PHASE 1 (Clopper to Autumn Crest Road)	\$ 1,354,260	Arcola
PHASE 2 (Autumn Crest Road to Kings Crossing Blvd.)	\$ 729,217	Arcola
PHASE 3 (Kings Crossing Blvd. to Ashleigh Greene Rd.)	\$ 1,387,777	Arcola
PHASE 4 (Ashleigh Greene Rd. to Avatar Lane)	\$ 1,227,528	Artery
PHASE 5 (Avatar Lane to Schaeffer Rd.)	\$ 526,084	Artery
PHASE 6 (Schaeffer Rd. to Rte. 118)	\$ 2,156,047	Arcola
TOTAL Richter Farm Road (A-297)	\$ 7,380,913	
Hoyles Mill Wastewater Pumping Station/Force Main - COST BREAKDOWN BY PHASE		Responsible Developer
PHASE 1 (Sewer Force Main - pump station to A-297)	\$ 800,000	Arcola
PHASE 2 (Sewer Force Main - within A-297 right-of-way)	\$ 370,000	Arcola
PHASE 3 (Sewer Force Main - A-297 to Pleasants property)	\$ 305,020	Artery
PHASE 4 (Sewer Force Main - through Pleasants property)	\$ 683,000	Both
PHASE 5 (Pump Station - 2 pumps)	\$ 350,000	Arcola
PHASE 6 (Pump Station - generator and electric service)	\$ 150,000	Arcola
PHASE 7 (Pump Station - water line service)	\$ 130,000	Arcola
PHASE 8 (Pump Station - construction)	\$ 975,000	Arcola
PHASE 9 (Pump Station - access road, gate and parking lot)	\$ 75,000	Arcola
TOTAL - Hoyles Mill Wastewater Pumping Station/Force Main	\$ 3,838,020	
Schaeffer Road	\$ 992,244	Artery
Local park (Arcola Property)	\$ 310,000	Arcola
Local Park (Artery Property)	\$ 310,000	Artery
TOTAL EXHIBIT "A"	\$ 12,831,177	

Note: Each Phase and line item above includes permitting and inspection fees, geotechnical and survey work and other related work, such as grading, water, sewer, storm drain, curb, sidewalk, seed, sod, street trees, street lights, street signals, construction supervisor and other miscellaneous construction expenses.

EXHIBIT "B"

District Funded Improvements and Developer Responsibility if Cost Savings Result on an Exhibit "A" Line Item

<u>IMPROVEMENT</u>	<u>COST</u>	<u>RESPONSIBLE DEVELOPER</u>
Clearing, Grading for Force Main Installation	\$ 615,445	Arcola
18" Outfall Sewer	\$ 376,104	Arcola
15" Outfall Sewer	\$ 530,480	Arcola
12" Outfall Sewer	\$ 488,526	Artery
Clopper Road-Acceleration, Deceleration and Left Turn Lane onto A-297	\$ 121,161	Arcola
Clopper Road-Left Turn and Bypass Lane at Hopkins Road	\$ 49,818	Arcola
Great Seneca Highway (S)-Right Turn Lane to West Clopper Road	\$ 100,000	Arcola
Great Seneca Highway (S)-Acceleration Lane from Eastbound A-297	\$ 32,715	Arcola
Great Seneca Highway (N)-Second Left Turn Lane to West A-297	\$ 79,626	Arcola
Great Seneca Highway (S)-Second right Turn Lane to West A-297	\$ 74,731	Arcola
Hoyles Mill Road - Richter Farm Road to Schaeffer Road	\$ 283,012	Artery
Kings Crossing Boulevard - A-297 to Park Property	\$ 675,305	Arcola
Kings Crossing Boulevard Blasting - A-297 to Park Property	\$ 90,000	Arcola
TOTAL EXHIBIT "B"	<u>\$ 3,516,923</u>	

Note: Each line item above includes permitting and inspection fees, geotechnical and survey work and other related work, such as grading, water, sewer, storm drain, curb, sidewalk, seed, sod, street trees, street lights, street signals, construction supervisor and other miscellaneous construction expenses.

EXHIBIT "C"

PAYMENT REQUEST

WEST GERMANTOWN DEVELOPMENT DISTRICT

TO: Debt Manager
Montgomery County
101 Monroe Street, 15th Floor
Rockville, Maryland 20850

Date: _____

Pursuant to the Implementation Agreement dated as of April 1, 2002 (the "Implementation Agreement") by and between Montgomery County, Maryland, a body politic and corporate and a charter county organized and existing under the Constitution and laws of the State of Maryland (the "County"), and Arcola Investment Associates, a Virginia general partnership ("Arcola"), Artery Hoyles Mill, LLC, a Maryland limited liability company ("Artery") and Woodcliffe Development District, LLC, a Maryland limited liability company ("Woodcliffe"), we request that you approve the disbursement of funds held by Trustee under the Indenture with respect to this Payment Request, to the following payee in the following amount:

Payee: Woodcliffe Development District, LLC
Payee's Address: Woodcliffe Development District, LLC
c/o John R. Orrick, Jr.
Linowes and Blocher LLP (escrow agent)
1010 Wayne Avenue, Suite 1000
Silver Spring, Maryland 20910

Cost of Improvement(s) listed under Exhibit "A" or "B": \$ _____
Amount of prior reimbursements: \$ _____
Amount held for Final Acceptance: \$ _____
5% Retainage (if applicable): \$ _____
Amount of this Payment Request: \$ _____

Description of Exhibit "A" or Exhibit "B" item(s):

We hereby certify that:

(a) none of the items for which funds are being requested has formed the basis for any disbursement heretofore made pursuant to an approved Payment Request by the County;

(b) each item for which funds are being requested is an Improvement and the amount of funds which are being requested are Actual Costs of an Improvement as set forth in the Implementation Agreement; and

(c) no written notice of any lien, right to lien or attachment upon, or claim affecting the right to receive payment of, any of the moneys payable under this requisition to any of the persons named herein has been received, or if any notice of any such lien, attachment or claim has been received, such lien, attachment or claim has been bonded off, released or discharged, or will be released or discharged upon the payment of this requisition as evidenced by the attached Release of Liens in the form required by the Implementation Agreement.

By: Woodcliffe Development District, LLC

General Manager

This Payment Reimbursement Request is for:

Substantial Completion ___ Permit Number(s) _____

Final Acceptance ___ Contract Number(s) _____

Approved: _____ Date: _____

By: MCDPS, M-NCPPC, or WSSC representative

Name: _____ Phone Number: _____

Note: The approval of this Payment Request by the representative referenced under Section 3.01 of the Implementation Agreement is required for all Substantial Completion and Final Acceptance payments under the Implementation Agreement.

Note: Attached AIA Form G702, together with all purchase orders, invoices and other appropriate documentation supporting the payments or reimbursements herein requested must be delivered to the County Representative (initially, Jennifer E. Barrett) with this Payment Request. If Payment Request is for Substantial Completion of Improvement or other infrastructure included as Additional County Costs, Substantial Completion Cost Estimate must be attached. If Payment Request is for Final Acceptance of Improvement or other infrastructure included as Additional County Costs, evidence of written acceptance of such Improvement or other infrastructure item must be attached.

MOU
May 17, 2000

WASHINGTON SUBURBAN SANITARY COMMISSION

Interoffice Memorandum

TO: RICHARD R. SHAGOGUE, P.E., CHIEF ENGINEER
ENGINEERING AND CONSTRUCTION TEAM

FROM: DOMINIC M. TIBURZI, P.E., DIVISION MANAGER
PLANNING AND ENGINEERING DIVISION *DMT*

DATE: MAY 18, 2000

SUBJECT: APPROVAL OF MEMORANDUM OF UNDERSTANDING
CONTRACT NO. 94CR9880A

Attached for approval by the General Manager is the Memorandum of Understanding (MOU) for the subject contract. The facility to be constructed is the Hoyles Mill Wastewater Pumping Station (WWPS), CIP Project #S-84.21. This WWPS will serve the Kings Crossing subdivision that is being developed by the applicant, Arcola Investment Associates, as well as the adjacent Hoyles Mill Village subdivision. This is a 1.7 mgd submersible WWPS designed and to be constructed by Arcola. The estimated construction cost is \$995,899, with total project costs, as shown on Exhibit A, estimated at \$1,640,581.

The applicant has submitted a check for \$218,136 (copy attached), to reimburse WSSC for its staff time to review, inspect and administrate this project, in accordance with article 20.

The Acting General Counsel has reviewed this document and his comments are attached. As noted, he made only three comments. My response to these comments is also attached.

The SDC credit language in this MOU is different than our normal practice. As noted on page 1, the applicant has petitioned the Montgomery County Council to form a development district, which includes the parcel owned by Arcola. The County would issue tax-exempt bonds to finance certain items of infrastructure in the development district, including the Hoyles Mill WWPS. The County Finance Office, which is working with Arcola on the development district, requested that WSSC grant each house an equal SDC credit. This language is included in Article 1, page 2. Granting each house a partial SDC credit rather than the usual practice of a full credit until the credit balance expires, is financially beneficial to WSSC. Accordingly, I recommend approval of this change. Please forward to the Deputy General Manager, and then the General Manager for approval.

*Amended to standard SDC reimbursement
per P.M. Thais*

DMT/jl

Attachments

RICHARD R. SHAGOGUE, P.E., CHIEF ENGINEER
ENGINEERING AND CONSTRUCTION TEAM
APPROVAL OF MEMORANDUM OF UNDERSTANDING
CONTRACT NO. 94CR9880A
MAY 18, 2000
PAGE 2

Endorsed and transmitted to the Deputy General Manager:



Endorsed and transmitted to the General Manager:



cc: Chief Engineer
Secretary/Internal Audit Manager
Accounting Division
Regulatory Compliance Division
Facility Construction Division
Capital Assets Accounting Section
Service Applications and Records Section (SDC)
Project Management Section

MEMORANDUM OF UNDERSTANDING - PUMP STATION

Made this 17th day of May, 2000, by and between the WASHINGTON SUBURBAN SANITARY COMMISSION, a public agency of the State of Maryland, hereinafter referred to as "WSSC" and ARCOLA INVESTMENT ASSOCIATES, hereinafter referred to as "Arcola".

WITNESSETH:

WSSC is empowered and authorized to construct, maintain, and operate systems for water supply and sewerage conveyance and treatment in an area designated as the Washington Suburban Sanitary District, encompassing portions of Montgomery and Prince George's Counties, Maryland; and

Arcola, along with certain other parties, have filed a Petition with the Montgomery County Council to form a development district which would include certain land owned by Arcola in the Germantown West area of Montgomery County. Such development district was approved by the Montgomery County Council on January 13, 1998 (~~approval enclosed~~), and allows for the financing of a wastewater pumping station, through the issuance of tax-exempt bonds to be issued by Montgomery County, pursuant to the provisions of Chapter 14 of the Montgomery County Code and the Bond resolution adopted by Montgomery County Council on August 4, 1998, and

[Handwritten initials]
[Handwritten signature]

Arcola is developing a site referred to as King's Crossing, which requires the construction of a submersible pumping station, hereinafter referred to as the Hoyles Mill Waste Water Pumping Station; and

Arcola is authorized by WSSC to construct a 1.7 MGD Wastewater Pumping Station (WWPS), Contract Number 94CR9880-A, CIP Project No. S-84.21, located in the King's Crossing subdivision, in Montgomery County, Maryland, in accordance with plans entitled: Hoyles Mill Wastewater Pumping Station, and pursuant to Water and Sewer Extension/Expansion Authorization No. 96-1517A; and

Arcola has agreed to design and construct the permanent Hoyles Mill WWPS at no cost to WSSC, subject however, to the grant of System Development Charge ("SDC") credits,

NOW, THEREFORE, in consideration of the promises and the benefits to be received by the parties hereto which are hereby acknowledged, the parties do hereby agree as follows:

1. WSSC and Arcola agree that design and construction of the Hoyles Mill WWPS is to be completed by or at the direction of Arcola. Cost responsibility for design and construction of these facilities, including those costs incurred by WSSC, for design review, construction inspection and any or all other related expenses will be that of Arcola. Arcola shall receive System Development Charge (SDC) credits in accordance with WSSC's approved SDC credit policy (CUS 94-03). As requested by Arcola, WSSC will not issue quarterly checks of qualifying SDC receipts, but will continue to maintain SDC credits against the Arcola's SDC credit balance. The SDC credits shall be allocated on a pro rata basis across all of the units developed by Arcola. Each unit will receive an SDC credit allocation, irrespective of the date when application for such allocation of SDC credit is made, provided that the allocation does not cause the actual amount of SDC credit (as determined under clause 27 of this Memorandum of Understanding) to be exceeded. The SDC credit allocation will be Two Thousand Two Hundred Ninety-seven and 73/100 Dollars (\$2,297.73) for each single family home.

* and ZE
DMT
MS

2. Arcola shall prepare engineering drawings in conformance with the latest edition of the WSSC Design Manual, Design Guidelines, and the attached scope of work (SOW). These plans must be sealed by a Professional Engineer licensed to practice in the State of Maryland, and become the property of WSSC upon approval. Arcola shall provide WSSC's Project Administrator with seven (7) copies of the plans and specifications for WSSC's use. Arcola shall construct said system pursuant to these plans and in conformance with the latest edition of the WSSC General Conditions and Standard Specifications, Standard Details and the Contract Specifications Book prepared for this project by Arcola, and submitted to and approved by WSSC.
3. Arcola will secure all necessary Federal, State, and Local permits required to construct the submersible pumping station.
4. The WSSC encourages Arcola to voluntarily maximize subcontracting opportunities for certified minority business enterprises. In the spirit of cooperation, the WSSC encourages Arcola to communicate its efforts to the WSSC.
5. Arcola will provide to WSSC, no later than 30 days before the planned construction start the name of the contractor proposed to construct the pumping station. The contractor must have previous pumping station construction experience and be approved by WSSC. When requested by WSSC, Arcola's contractor will submit a completed Contractor's Information Report, certifying to the contractor's organization's financial resources, performance record, integrity, experience, other

qualifications and equipment and facilities pertinent to the proposed contract. The WSSC, at its discretion, may make such investigations it deems necessary to determine the ability of the contractor to perform the work, and Arcola's contractor shall furnish the WSSC all such information and data for this purpose as the WSSC may request. The WSSC may visit any prospective contractor's place of business, contracts in progress, or contact persons knowledgeable of the contractor's background to determine his ability, capability, reliability, financial stability or other factors necessary to perform the work. The WSSC reserves the right to reject, within fifteen (15) working days of receipt of the contractor's name and all other information requested from Arcola, any contractor who has failed to perform properly or to complete work in a timely manner, contracts of similar nature, or if the investigation shows the contractor unable to perform the requirements of the wastewater pumping station plans and engineering specifications or if Arcola fail to complete and submit the Contractor's Information Report in its entirety. Arcola must contact the Project Administrator two weeks in advance of beginning construction to arrange for inspection.

6. Arcola will not proceed with the pump station construction under Contract No. 94CR 9880-A until the following has been completed:
 - a) The WWPS plans and specifications book contract have been approved by WSSC.
 - b) Soil information has been submitted as per Appendix J of the Water and Sewer Design Chapter of the WSSC Design Manual.
 - c) Copies of all applicable permits have been submitted to WSSC.
 - d) The Contract Specifications Book for the Hoyles Mill WWPS has been prepared by Arcola in conjunction with its engineer and approved by the Commission.
 - e) WSSC has approved the contractor.
 - f) WSSC has received the Performance Bond or an approved letter of credit in the amount equal to 100 percent of the contract bid price (If a total project bond is to be offered in lieu of a WSSC water and sewer bond, WSSC must be designated as a beneficiary of its portion of the bond.)

- g) A labor and material payment bond in the amount equal to 100 percent of the contract price, to protect WSSC from any nonpayment claims from subcontractors/suppliers has been posted.
 - h) WSSC has received the Contractor's Certificate of Insurance.
 - i) All other conditions specified in the authorization have been met.
 - j) Approved deed and right-of-way documents.
 - k) All requirements included on the attached Scope of Work and Design Guidelines for Waste Water Pumping Stations using Submersible Pumps DG-06, have been fulfilled.
 - l) WSSC has issued a Notice to Proceed.
 - m) Arcola's engineer has submitted Certificates of Compliance from the selected manufacturers approved in the Contract Specifications Book, stating that the equipment specified can be provided.
7. The following General Conditions, as included in the latest edition of the WSSC General Conditions and Standard Specifications, shall apply to all work under this Memorandum of Understanding involving the construction of, or the connection to WSSC facilities: Article 1, Article 2, Article 4, Article 5, Article 6, Article 7, Article 8, Article 9, Article 10, Article 11, Article 12, Article 13, Article 16, Article 20, Article 24, Article 25, Article 26, Article 27, Article 28, Article 29, Article 30, Article 31, Article 32, Article 33, Article 34, and Article 35.
8. Arcola shall provide all stakeout including line, grade, cut sheets, and the like, necessary for the construction of WSSC facilities. Copies shall be submitted to the WSSC Contract Manager.
9. Arcola will provide all materials required for the construction of the pumping station, unless expressly stated otherwise in the approved design documents (plans and specifications). Those materials are to be provided in accordance with the WSSC General Conditions and Standard Specifications, the Contract Specifications Book, and Standard Details and will be inspected and approved by the WSSC prior to use. When applicable, materials procured by Arcola shall have submittals provided to WSSC for approval prior to fabrication. In the event that WSSC provides any materials, Arcola will reimburse WSSC for all supplied materials, including WSSC's overhead and administrative costs to supply such

materials. WSSC-supplied materials will be available for contractor pick-up at the Commission's Anacostia warehouse.

10. Any materials which are damaged by Arcola shall be repaired or replaced by Arcola as determined by the WSSC. Repairs shall be made in accordance with manufacturers specifications, unless otherwise permitted, as per the WSSC General Conditions and Standard Specifications and Contract Specifications Book, and are to be made by personnel trained and experienced in making such repairs. Such repairs will be inspected and approved by the WSSC prior to use. All repair procedures shall be on file with the WSSC or be submitted and approved prior to any repair activity commencing.
11. All construction shall be inspected and approved by the designated WSSC Contract Manager during the work hours and days specified in the General Conditions, and construction shall be approved by the designated WSSC Contract Manager in writing prior to Arcola and/or its representative approving and/or releasing the work on WSSC facilities, or before monies for said work are paid to Arcola's subcontractors. **If requested by Arcola, the WSSC Contract Manager will forward any such approvals to the County Representative in accordance with the inspection procedures set forth in Article III of the Implementation Agreement between Montgomery County, Arcola and the other "Developers" relating to the reimbursement of development district infrastructure costs.** If the WSSC Contract Manager notes any defective or non-conforming work or materials, he or she shall so specify in writing to Arcola. Thereafter, Arcola may release to the contractor the payment due for work and materials inspected and approved by the WSSC Contract Manager, but shall withhold from payment a reasonable sum to insure completion or correction of the items noted by the WSSC Contract Manager (such sum to be released as those items are completed or corrected to the satisfaction of WSSC).
12. Arcola will provide compaction tests performed by a Geotechnical Engineer licensed to practice in the State of Maryland. The locations and depths are to be designated by the WSSC Contract Manager. Arcola will provide WSSC with copies of all tests performed. WSSC may perform additional compaction tests at random intervals as part of the inspection process, at Arcola's expense.
13. In the event of certain additions/deletions, requiring modifications to the approved construction of WSSC facilities, Arcola will provide plans and specifications, detailing the proposed changes, as expeditiously as possible for WSSC's approval, prior to executing such modifications. WSSC shall approve or disapprove the plans and specifications as expeditiously as possible after their submission to

WSSC, and promptly notify Arcola of its decision.. The revised plans shall be resubmitted to WSSC and the approval process should be repeated until WSSC is satisfied with the plans and approves the plans in writing.

14. Whenever there are changes in road grade or road surface or Arcola makes any excavations or fills that require a change in the elevation or location of any man-holes, valve boxes, meter vaults, sewer or water mains or lines or appurtenances thereto, or any other WSSC owned facilities or public utilities, or the work interferes with existing facilities or other utility installations, Arcola shall make the required changes at Arcola's cost subject to inspection by, and prior approval of, the WSSC.
15. Upon completion of the pumping station, the WSSC will inspect, in concert with Arcola's inspector, the completed project and, if deficiencies are present, so inform Arcola, who will have all deficiencies corrected. Arcola will provide written certification that the streets and rights of way are on grade. Arcola will prepare the as-built plans for the pumping station for WSSC approval, in accordance with WSSC standards.
16. Arcola will prepare appropriate descriptions for the conveyance of rights-of-way/ deed to the WSSC for the construction, reconstruction, maintenance and operation of the facilities constructed by Arcola pursuant to this Memorandum of Understanding. WSSC will prepare the on-site right-of-way/deed documents will be submitted to Arcola for execution.
17. WSSC shall issue a "Release for Service " for the project when the following has been provided:
 - a) Maintenance Bond provided by Paragraph 18 hereof.
 - b) A Waiver of Liens from the Contractor, signed and notarized, stating they have been paid.
 - c) WSSC has received ownership of the property on which the pumping station will be constructed.
 - d) Approved Operation and Maintenance Manuals.
 - e) Arcola has paid all taxes on deeds being transferred to WSSC.
 - f) All tests are performed and accepted.

- g) Arcola has paid all utilities' bills, including bills from WSSC, up-through the estimated date of final acceptance.
- h) Arcola has provided WSSC with the name of the electrical utility company and the account number for the transfer of service.

Upon the issuance of the "Release for Service", the WSSC shall assume ownership along with operation and maintenance responsibility for the pumping station; and, Arcola can hook up to the pumping station.

The WSSC will issue a "Certificate of Final Acceptance" when the following has been completed and/or provided:

- a) Final punch list has been completed.
- b) Payment in full of all amounts due to WSSC under this Memorandum of Understanding.
- c) A list of all sub contractors, manufacturers, and suppliers used, including the portion and dollar amount of the work performed.
- d) Approved reproducible as-built record drawings.

Upon issuance of the "Certificate of Final Acceptance," Arcola can request SDC audit from Internal Audit.

- 18. Arcola shall, upon issuance of the "Release for Service" as set forth in paragraph 17, furnish a Maintenance Bond to the WSSC. The bond shall cover a period of one year dating from the time of issuance of the "Release for Service". The bond shall be in an amount equal to 50 percent of the bid price. It shall be Arcola's obligation to respond and take corrective action within ten working days on any rework or corrective actions brought to Arcola's attention by the WSSC during the maintenance period as defined herein. If Arcola does not initiate corrective actions as required, the WSSC may take reasonable and appropriate actions necessary to correct construction deficiencies and damage to installations attributed to Arcola which may occur during the maintenance period, and the cost of same shall be recovered from Arcola or Arcola's surety.
- 19. Arcola will be responsible for reimbursing all direct WSSC costs and overhead associated with this project. Direct costs will include, but not be limited to:

- a) Design review and associated costs for review of the engineering specification book and submittal review.
- b) Full-time inspection - one inspector per Arcola's work crew.
- c) Part-time inspection personnel.
- d) On-site soils inspection, sediment control.
- e) Quality Assurance inspection.
- f) Materials obtained from WSSC (including sales tax and WSSC handling charges).
- g) Maintenance services (i.e., chlorination, shut downs, etc.).
- h) As-built review.
- i) Costs incurred when acquiring rights-of-way/deeds.
- j) Outside consultant fees.

Overhead shall be determined in accordance with WSSC's Accounting Systems, but, in no case, shall the ratio of overhead to direct costs be greater than a factor of two. The responsibility and liability of Arcola to pay WSSC's direct and overhead costs associated with this Memorandum of Understanding shall be joint and several.

20. WSSC estimates its direct costs and overhead associated with the Project to be \$218,136. Prior to commencement of construction of the Pump Station, Arcola will be required to deposit \$218,136, in cash, to cover WSSC's estimated direct and overhead costs for construction of the Pump Station. If during the construction of this project, should WSSC's expenses exceed the amount deposited, WSSC shall provide Arcola with an accounting of the total costs, plus overhead, incurred by WSSC and an additional deposit equaling the anticipated remaining direct costs to be incurred by WSSC, plus overhead at a factor of two times direct costs, will be required. After WSSC issues a MOU Certificate of Final Acceptance, WSSC will prepare a final accounting of its total costs associated with this project and issue a refund for the excess of deposit(s) over actual total costs, or will prepare an invoice to Arcola for the excess of actual costs over deposit(s). Payment of the invoice will be due within 30 days. Arcola shall have the right to

audit the final accounting of total costs, but the request to audit will not change the date for required payments to WSSC. Any agreed upon adjustments to the final accounting will require payment by WSSC or Arcola within 30 days of acceptance of the adjustments by both parties. Interest on payments not made within 30 days will accrue at a rate of eight percent per annum calculated from the due date. In addition to any other remedies provided by law, WSSC shall have the right to withhold issuance of any SDC credits due the Arcola under this agreement until payment is made as required by this paragraph.

21. It is further understood and agreed by Arcola and the WSSC that the WSSC shall not be responsible or liable to Arcola for any of the following events:

- a) The WSSC is not liable for monetary damage for the failure to provide service if the WSSC is unable to acquire rights-of-way necessary for the construction of supporting water or wastewater capital projects;
- b) The WSSC is not responsible for any Federal or State (that is, State agency other than WSSC) action, including operational moratoria, that temporarily suspends, delays, or otherwise affects the water and/or sewer capacity allocation;
- c) The WSSC is not responsible for any other contingency that affects the timing or ability to connect which is beyond the control of the WSSC.

22. Notwithstanding any other provisions of this Agreement, Arcola agrees:

- a) To conduct all construction operations in accordance with the terms and all approved plans and contract specifications book of this Agreement and within all applicable County, State and Federal laws and regulations;
- b) That any failure of Arcola to fully comply with any part of this Agreement may cause the issuance of a stop work order by the WSSC;
- c) Any written stop work order, whether hand-delivered to Arcola or mailed to Arcola, shall constitute notice of such stop work order for the purpose of this Agreement; and Arcola shall stop work upon receipt of such order and not resume any work thereafter until so authorized by the WSSC.

23. A stop work order will not be unreasonably issued nor will a resume work order be unreasonably withheld.

24. Arcola must comply with any and all WSSC requirements as well as securing all necessary plumbing and gas permits for the on-site water and/or sewer systems.
25. Arcola hereby agree that each improvement shown on the approved construction plans or specifications made part of this agreement is necessary to provide the service requested. The WSSC shall have the final authority to decide what improvements must be constructed in order to provide the service requested.
26. The subdivision (King's Crossing) is subject to the payment of any SDC, sub-district fees, and/or other WSSC fees and charges the WSSC deems applicable. Any SDC credits due Arcola will be made in accordance with Paragraph 1 of this MOU and WSSC's approved SDC credit policy and in accordance with the allocations shown on Attachment A hereto.
27. As this project is eligible for SDC credits under the WSSC's SDC credit policy, Arcola and the WSSC will jointly identify, compute, and tabulate the estimated total eligible costs for these credits. The estimated eligible costs are included as Attachment A of this agreement. The eligible costs shall be in conformance with the latest SDC Credit Policy. The final amount will be adjusted to reflect the actual total eligible costs, as determined by the WSSC's Internal Audit Manager. The final audit will take place after the project has been accepted and a Certificate of Final Acceptance has been issued as per Item 17. Arcola shall submit a written request for audit to WSSC's Internal Audit Manager, along with an itemized listing of eligible project costs, incurred and paid, which supports the total amount of SDC credit claimed. The Internal Audit manager shall process the request as per the SDC credit policy.
28. Arcola may be granted SDC credits after construction of the project by Arcola has commenced. Until such time as the actual total eligible amount is determined SDC credit issued shall not exceed 50 percent of the estimated total eligible costs as noted in Attachment A.
29. When the scope or estimated cost of the work has changed, Arcola may request an amendment. This request shall be submitted to the Project Administrator for processing on the form found in Attachment B.
30. Arcola represents that the individual(s) executing this Memorandum of Understanding do so as agents of its (their) respective entity(ies) and warrant that they have complete authority to enter into this Memorandum of Understanding.

31. This Memorandum of Understanding shall be construed in accordance with the laws of the State of Maryland.
32. No provision of this Memorandum of Understanding may be changed, amended, modified, waived, or discharged except in writing signed by each of the parties hereto.
33. All terms, provisions, and covenants herein shall be binding and shall inure to the benefit of the respective successors and assigns of the parties hereto.
34. This Memorandum of Understanding constitutes the entire agreement between the parties hereto and supersedes any prior oral or written agreement between them respecting the subject matter hereof. There are no representations, understandings, or agreements between the parties relating to the subject of this Memorandum of Understanding which are not expressed herein.
35. This Memorandum of Understanding may not be assigned or transferred by Arcola without the prior written permission of the WSSC. If the bonds to finance the Waste Water Pumping Station on behalf of the development district are not issued by Montgomery County, Arcola may request an amendment to this Memorandum of Understanding to alter the obligations of Arcola hereunder, or may terminate this Memorandum of Understanding altogether upon payment to WSSC of all outstanding WSSC direct and overhead costs.
36. The parties acknowledge and agree that any violation of any provision of this Memorandum of Understanding may, in the discretion of the WSSC, result in the rejection of Arcola or its successor's and assign's requests to enter into future Memoranda of Understanding of this nature.
37. WSSC and Arcola acknowledge that this Memorandum constitutes a binding agreement, supported by good and valuable consideration, the receipt and sufficiency of which each acknowledges.

ATTACHMENT A

SDC CREDITS MAXIMUM ESTIMATE

CONTRACT NO. 94 CR 9880-A

[REQUESTOR]

	ESTIMATED COST
Design	\$ 208,140
Applicant's Administrative Cost and Interest	\$ 218,406
WSSC's Costs	\$ 218,136
Construction Costs	\$ 995,899
TOTAL	\$1,640,581

Amendment #1
July 17, 2001
Accounting
Group

WASHINGTON SUBURBAN SANITARY C

Interoffice Memorandum

TO: DOMINIC TIBURZI, GROUP LEADER
PROJECT DELIVERY GROUP

FROM: THAIS B. VITAGLAINO, PROJECT MANAGER
PROJECT DELIVERY GROUP

DATE: JULY 17, 2001

SUBJECT: AMENDMENT TO MEMORANDUM OF UNDERSTANDING (MOU)
HOYLES MILL WASTEWATER PUMPING STATION; CONTRACT
NO. 94CR9880-A; CIP S-84.21

Attached for approval are three original amendments to the MOU for the referenced project. The developer, Arcola Investment Associates, has requested to amend the existing MOU to allow builders to receive the full amount of System Development Charge (SDC) as stated in SDC credit policy CUS 94-03, instead of allocating the SDC credits in a pro-rata basis across all units as initially agreed to. It is recommended that this change be approved.

TBV/

Attachments

Endorsed and Transmitted to the Chief Engineering and Construction:

I concur. D. Tiburzi 7-17
Deputy

Endorsed and Transmitted to the General Manager:

R. P. Magagnoli 7-18-01

To JRB

LOOKS OKAY. THEY MUST HAVE
SOT THIS UP FOR YOUR SIGNATURE
SINCE YOU MUST HAVE SIGNED MOU.
SIGNATURE RECOMMENDED (REVISION HAVE
HANS FROM REVISED DOCUMENT) (3 COPIES TO SDC)

[Signature]
7/14/01

(PI)

FIRST AMENDMENT TO
MEMORANDUM OF UNDERSTANDING
(Contract Number 94CR9880-A, CIP Project No. S-84.21)
Hoyles Mill Wastewater Pumping Station

Made this 12th day of July, 2001, by and between the WASHINGTON SUBURBAN SANITARY COMMISSION, a public agency of the State of Maryland, hereinafter referred as ("WSSC") and ARCOLA INVESTMENT ASSOCIATES, hereinafter referred to as ("Arcola").

WHEREAS, Arcola and WSSC entered into a Memorandum of Understanding - Pump Station effective May 17, 2000 ("Memorandum of Understanding"), relating to the construction of Hoyles Mill Wastewater Pumping Station, a 1.7 MGD wastewater pumping station located in the King's Crossing subdivision in Montgomery County, Maryland, which pumping station has been substantially completed by Arcola; and

WHEREAS, The parties desire to amend the provision of said Memorandum of Understanding with respect to the computation of the amount of System Development Charge (SDC) credits which may be available with respect to the construction of the pumping station.

NOW THEREFORE, in consideration of the mutual promises and benefits to be received by the parties hereto which are hereby acknowledged, the parties do hereby agree as follows:

Section 1 is deleted in its entirety and replaced with the following:

"1. WSSC and Arcola agree that design and construction of the Hoyles Mill WWPS is to be completed by or at the direction of Arcola. Cost responsibility for design and construction of these facilities, including those costs incurred by WSSC, for design review, construction inspection and any or all other related expenses will be that of Arcola. **Arcola shall receive System Development Charge (SDC) credits in accordance with WSSC's approved SDC credit policy (CUS 94-03).**"

In all other respects, the Memorandum of Understanding shall continue in full force and effect as provided therein.

IN WITNESS WHEREOF, the parties hereto have executed this First Amendment to Memorandum of Understanding as of the date first written above.

[SIGNATURES APPEAR ON NEXT PAGE]