

MEMORANDUM

TO: Government Operations and Fiscal Policy Committee

FROM: *MF* Michael Faden, Senior Legislative Attorney

SUBJECT: **Worksession:** Bill 23-11, Development Districts, Special Taxing Districts – Duplication of Funding

Bill 23-11, Development Districts, Special Taxing Districts – Duplication of Funding, sponsored by Councilmember Elrich, Council President Ervin, and Councilmembers Berliner and Navarro, was introduced on June 21, 2011. A public hearing was held on July 12 (see testimony, ©4-9).

Bill 23-11 would prohibit any development district from financing any infrastructure improvement that is or may be financed or credited by any other government agency, and similarly prohibit the White Flint Special Taxing District from imposing a tax to pay for any infrastructure improvement that is or may be financed or credited by any other government agency.

This Bill results from concerns expressed by Councilmembers about potential double-funding of infrastructure items by development districts or special taxing districts and other government agencies at the March 28 joint worksession by the Government Operations and Fiscal Policy Committee and Transportation, Infrastructure, Energy, and Environment Committee, held to review the Inspector General's report regarding the West Germantown development district's funding of certain water and sewer items for which the Washington Suburban Sanitary Commission had also issued Systems Development Charge credits.

Issues

1) Should the law restrict multiple payments for infrastructure items?

At the July 12 public hearing, all speakers except the Maryland-National Capital Building Industry Association (BIA) supported the intent of this Bill, although several proposed amendments to avoid restricting funding for infrastructure elements of the White Flint sector plan (see next issue). The BIA (see testimony, ©9) opposed the Bill entirely because, in their

view, it is “a Solution in search of a Problem”. Essentially, the BIA saw nothing wrong with the funding of certain water and sewer projects in the West Germantown Development District – the issue which led the sponsors to propose this Bill. In fact, the BIA concluded that this Bill, if enacted, would “place a severe penalty on use of development districts.”

Regardless of whether the water and sewer projects in the West Germantown Development District were funded consistent with law or with the intent of the Councilmembers who drafted County Code Chapter 14 (the development district enabling law), Council staff concurs with the Bill’s sponsors that a development district or special taxing district should not spend scarce funds on infrastructure items for which a developer can be reimbursed or credited by another government agency. In our view as drafters of Chapter 14, contrary to the BIA’s conclusions, a development district was never intended to pay for creditable items, and we were quite surprised that one had done so. As the West Germantown chronology showed, the result of this kind of “duplicate” funding, without further controls or oversight, is likely to be that the ultimate taxpayers – the property owners in the development district or special taxing district – effectively may not benefit from these credits or reimbursements. **Council staff recommendation:** preclude development districts or special taxing districts from funding infrastructure items that another government agency has funded or is likely to fund, as this Bill does.

2) What exceptions to the “no duplicate funding” rule should be allowed? How should those exceptions be triggered?

The County Planning Board, representatives of the White Flint Partnership, and the Bethesda-Chevy Chase Chamber of Commerce (see testimony, ©3-8) all urged that some exception or “escape clause” be inserted into at least the White Flint special taxing district part of this Bill (©2, lines 14-17) in order to preclude any restriction on the special taxing district’s authority to contribute to infrastructure items, such as state roads or rapid transit projects, that another government agency may also fund.

Council staff concurs that the Bill was not intended to preclude special taxing district funding of improvements to state roads, such as Rockville Pike and Old Georgetown Road. In fact, the implementation resolution for the White Flint special taxing district (Resolution 16-1570), which the Council adopted last November 30, expressly commits the special taxing district to fund significant improvements to both roads. Nor, as far as staff understands, was this Bill intended to preclude any special taxing district from contributing in the future to funding of a bus rapid transit system that the state and federal governments would also contribute to.

To confirm this intent and harmonize this Bill with the public/private approach taken in the White Flint special taxing district, **Council staff recommends** that language be inserted in the Bill authorizing the Council, in selected cases, to allow a development district or special taxing district to finance an infrastructure improvement that another government agency also finances or credits. Both the Planning Board (see ©5) and the White Flint Partnership (see ©7) drafted amendments to do this. In our view, both drafts are a bit too specific and fail to anticipate the possible range of issues that could arise. Instead, **Council staff recommends** a

broader “escape clause”: insert on ©2, lines 6 and 14, at the beginning of each sentence: Except as expressly provided in a Council resolution.

This simpler proviso would let the Council, in the future, tailor the funding structure of each development district or special taxing district to its specific the facts and circumstances without weakening the general “no-duplication” rule that this Bill lays down. With respect to the White Flint special taxing district, in our view this amendment would not require the Council to reopen the already-adopted implementation resolution because, as already mentioned, even assuming that this later-enacted Bill could affect that pre-existing funding structure, the implementation resolution expressly authorized and committed the district, irrespective of any other funding, to pay for improvements to two state roads, Rockville Pike and Old Georgetown Road.

This packet contains:	<u>Circle #</u>
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Bill No. 23-11
Concerning: Development Districts,
Special Taxing Districts – Duplication
of Funding
Revised: 6-16-11 Draft No. 1
Introduced: June 21, 2011
Expires: December 21, 2012
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

By: Councilmember Elrich, Council President Ervin, and Councilmembers Berliner and Navarro

AN ACT to:

- (1) prohibit any development district from financing any infrastructure improvement financed or credited by any other government agency;
- (2) prohibit the White Flint Special Taxing District from imposing a tax to pay for any infrastructure improvement financed or credited by any other government agency; and
- (3) generally amend County law regarding the financing of infrastructure improvements.

By amending

Montgomery County Code
Chapter 14, Development Districts
Section 14-9

Chapter 68C, White Flint Special Taxing District
Section 68C-4

Boldface	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

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

Sections 14-9 and 68C-4 are amended as follows:

14-9. Second Council Resolution.

* * *

(h) An infrastructure improvement financed by a development district may include any infrastructure required by the Planning Board as a condition of project, preliminary, or site plan approval. A development district must not finance any infrastructure improvement that has been or is likely to be financed by any other government agency, or for which any government agency may issue any credit toward the payment of any tax, fee, or charge.

* * *

68C-4. Transportation Infrastructure Improvement Resolution.

* * *

(f) A tax imposed under Section 68C-3 must not pay for any infrastructure improvement that has been or is likely to be financed by any other government agency, or for which any government agency may issue any credit toward the payment of any tax, fee, or charge.

Approved:

Valerie Ervin, President, County Council

Date

Approved:

Isiah Leggett, County Executive

Date

This is a correct copy of Council action.

Linda M. Lauer, Clerk of the Council

Date

LEGISLATIVE REQUEST REPORT

Bill 23-11

Development Districts, Special Taxing Districts - Duplication of Funding

DESCRIPTION:	Prohibits any development district from financing any infrastructure improvement that is or may be financed or credited by any other government agency, and similarly prohibits the White Flint Special Taxing District from imposing a tax to pay for any infrastructure improvement that is or may be financed or credited by any other government agency.
PROBLEM:	Councilmembers expressed concerns about potential double-funding of infrastructure items by development districts or special taxing districts and other government agencies.
GOALS AND OBJECTIVES:	To preclude double funding of infrastructure items by government agencies.
COORDINATION:	Department of Finance
FISCAL IMPACT:	To be requested.
ECONOMIC IMPACT:	To be requested.
EVALUATION:	To be requested.
EXPERIENCE ELSEWHERE:	To be researched.
SOURCE OF INFORMATION:	Michael Faden, Senior Legislative Attorney, 240-777-7905
APPLICATION WITHIN MUNICIPALITIES:	Applies only to County government funding mechanisms.
PENALTIES:	Not applicable.



MONTGOMERY COUNTY PLANNING BOARD

THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

July 11, 2011

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

Dear Council President Ervin:

On behalf of the Planning Board, I would like to express my concerns regarding the potential effect of Bill 23-11 on the implementation of the White Flint Sector Plan. While the Planning Board supports the goal of eliminating double payment and double crediting in infrastructure finance districts, the Planning Board believes that the broad sweep of this bill is unnecessary and that the portion of the bill which amends Chapter 68C could create uncertainty for both the private sector and the public sector with respect to financing the improvements related to the White Flint Special Taxing District.

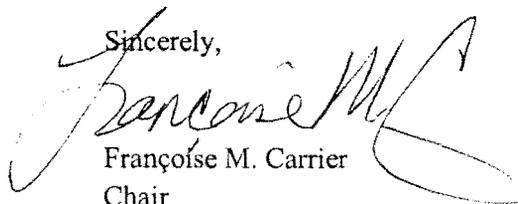
First, we are concerned that the bill prohibits taxing district funds from being used to pay for any infrastructure improvement that "is likely to be financed by any other government agency," though the bill does not establish standards and criteria that describe how such improvements would be identified.

Second, we are concerned that the bill could be read to prohibit taxing district funds from being used to pay for infrastructure that is to be partly paid for or financed by the public sector. Implementation of the White Flint Sector Plan will necessarily involve multiple public sector sources of funds and financing; any language that creates uncertainty regarding the legality of joint participation unnecessarily puts at risk the future implementation of the White Flint Sector Plan.

Third, we are concerned that the bill could be read to prohibit taxing district funds from being used to pay for any transportation improvement that could generate impact tax credits. This could include not only improvements inside the taxing district that would be creditable to an applicant who is not within the district, but also improvements outside the taxing district that could be paid for using district funds.

The Planning Board urges you to consider these concerns as you continue considering amendments to Chapter 68C. We believe that the approach we are suggesting on the following page addresses the issue of double payment and double crediting without creating any uncertainty that could affect successful implementation of the White Flint Sector Plan.

Sincerely,



Françoise M. Carrier
Chair

Attachment

To: The Honorable Valerie Ervin, President, Montgomery County Council
From: Françoise M. Carrier, Chair Montgomery County Planning Board
July 11, 2011

68C-4. Transportation Infrastructure Improvement Resolution.

* * *

(f) [[A tax imposed under Section 68C-3 must not pay for any infrastructure improvement that has been or is likely to be financed by any other government agency, or for which any government agency may issue any credit toward the payment of any tax, fee, or charge.]]

A tax imposed under Section 68C-3 must not pay for that portion of the cost of any infrastructure improvement that has been paid for by any government agency, except where the Council has established a repayment plan under this Section.

(g) Unless otherwise specified in a resolution under this Section, a tax imposed under Section 68C-3 must not pay for any infrastructure improvement which would be eligible for any credit against the impact tax for transportation improvements imposed under Section 52-49.

Testimony Before the Montgomery County Council on Bill 23-11, Development
Districts, Special Taxing Districts – Duplication of Funding
July 12, 2011 Public hearing
By David L. Winstead, Esq., Ballard Spahr LLP
on behalf of the White Flint Partnership

On behalf of the White Flint Partnership, we appreciate the opportunity to provide comments and convey our concerns over the current text of Bill 23-11, Development Districts, Special Taxing Districts - - Duplication of Funding. The intent of the Sponsors of Bill 23-11 is to prevent the duplication of funding which arose over the West Germantown development district's funding of certain water and sewer items for which the Washington Suburban Sanitary Commission had also issued Systems Development Charge credits. This Bill will do just that, but in the process, the overly-broad language will also prevent primary funding for a number of infrastructure projects.

Bill 23-11, as introduced, will have the unintended consequence of undermining the public/private partnership approach to infrastructure funding embodied in the Approved and Adopted White Flint Sector Plan. As part of the White Flint Sector Plan, Montgomery County, White Flint property owners, and the Special Development District committed to provide over \$600 million of infrastructure funding. These commitments include \$280 million from the private sector developers, \$152 million from Montgomery County, and \$169 million raised through the established development district.

HB 23-11 raises concerns in several areas with respect to the implementation of this public-private partnership. Paramount among these is the inclusion of the wording "***or is likely to be financed***" in Section 68C-4 (f). This provision would preclude the White Flint Development District from allocating funding into the planned improvements for the White Flint section of Md. 355, because at some unspecified point, another source of government funding commitment ***may*** be obtained. Clearly, this was not the intent; therefore, we would proposed deleting this wording, and have provided amendments to that effect.

In addition, there is a new vision for a County-wide Rapid Transit System, which has gained a lot of support over the past year; a recent Parsons' study highlights the potential for over 30,000 daily riders in the White Flint section of such a proposed transit system. The funding for such a system has not yet been established, and the Council should insure that Bill 23-11 does not limit the options in this regard.

In order to clearly articulate the Council's intent that developers not receive credits from two different agencies for the same infrastructure project, the White Flint Partnership proposes clarifying language to Bill 23-11. The proposed language will address the narrow focus of the bill, while allowing public/private partnerships and the other infrastructure financing mechanisms that currently exist.

To this end, we would ask that the Council amend Bill 23-11 in the following manner:

On Page 2 – 68C-4, in existing Paragraph (f) delete “*or is likely to be*”

- Add (2) “ In the event that such an infrastructure improvement is eligible to be financed, in whole or in part, by a government entity, then any financing in excess of the remaining cost to complete, shall not be used for that improvement.”
- Add (3) “ In the event that credits are available from a government agency to support the cost of an infrastructure improvement, no property owner located within the special tax district may apply or be given such credit, if any funds collected under Section 68C-3 are used for such improvement,”

Lastly, in Preamble (2), we propose deleting the reference to “ White Flint” so that this Code section will not have to be amended when other Special Taxing Districts are being established.

We thank you for your consideration of the above amendments to Bill 23-11. The White Flint Partnership appreciates your continued support for the vision established by the White Flint Sector Plan and its Special Taxing District.

We look forward to participating in the Council’s work session on the Bill.



THE GREATER
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Your Business Is
Our Only Business

July 12, 2011

The Honorable Valerie Ervin, President
and Members of the County Council
Montgomery County Council
100 Maryland Avenue, Sixth Floor
Rockville, Maryland 20850

Re: County Council Bill No. 23-11 – Development Districts, Special Taxing Districts-Duplication of Funding

Dear Council President Ervin and Members of the County Council:

On behalf of more than 600 members of The Greater Bethesda Chevy-Chase Chamber of Commerce (the “B-CC Chamber”), we are writing in support of County Council Bill No. 23-11 – Development Districts, Special Taxing Districts-Duplication of Funding (the “Proposed Bill”), provided that the Proposed Bill is revised to address the concerns raised by the White Flint Partnership in its testimony on the Proposed Bill to the Montgomery County Council (the “County Council”) and incorporates the changes proposed by the White Flint Partnership.

Implementation of the vision contained in the White Flint Sector Plan and, in particular, development of a stable infrastructure funding mechanism(s) has been a central piece of the B-CC Chamber’s Advocacy Agenda for the past several years. This includes support for the major landowners who comprise the White Flint Partnership and who are instrumental to the implementation of the White Flint Sector Plan’s vision for the area.

The B-CC Chamber’s primary concern is with regard to Section 68C-4(f), which provides that a tax imposed in a development district must not pay for any infrastructure that “is likely to be financed” by any other government agency. This provision is problematic because it would preclude any development district (specifically, the White Flint Development District) from allocating any funding to a given improvement if at some point in the uncertain future another source of government funding *may* be obtained. In theory, this would preclude the development district funding of the White Flint section of Maryland Route 355 (Rockville Pike).

The inclusion of this language works against the purpose of the White Flint Development District in the first place, which is to provide greater certainty and predictability to the provision of needed infrastructure and public amenity improvements in the area. The White Flint Partnership’s proposed language would eliminate the “is likely to be financed” phraseology and inherent uncertainty in such language, and instead would provide that certain safeguards be included whereby Development District funds and alternative sources of funding could not be utilized on the same improvement except when a gap exists between Development District fund expenditure and total cost of completion of the improvement.

For these reasons, we urge the County Council to approve the Proposed Bill with the revisions proposed by the White Flint Partnership, and we thank you for your consideration of these comments.

Sincerely,

Leslie Ford Weber, Chairman
(Suburban Hospital)

Heather Dlhopsky, VP, Economic Development
(Linowes and Blocher LLP)



Testimony for Bill Number 23-11 Development Districts, Special taxing District – Duplication of Funding
 From: S. Robert Kaufman, MNCBIA
 July 12, 2011

The MNCBIA opposes the above bill in its entirety and urges your rejection of the proposed bill. The bill attempts to correct for a problem that does not exist and results in homeowners or tenants paying twice for certain infrastructure improvements within a development district thereby defeating any advantage to create a Development District.

A Solution in search of a Problem

Under the current system, the Development District finances the infrastructure of a new community, including the water and sewer system through use of a bond. The homeowner ultimately pays off the bond through tax payments. WSSC reimburses the builder of the infrastructure with System Development Charge credits for the water and sewer system so that the community does not pay twice for the improvement, once when financing the improvement and the second time when the builder pays the System Development Charge at building permit. It may appear that two agencies “pay” for the same thing. That is not the case. The Development District funding is a loan, the WSSC payment is a reimbursement based on SDC charges. The developer prices the homesites based on the actual cost less any credits.

Unintended Consequences

The proposed bill places a severe penalty on use of Development Districts. Rather than providing a source for reduced interest rates and a source of funds for financing major infrastructure improvements, under this bill the use of a Development District places a burden on the developer and a penalty on the development. Passage of this bill defeats any advantage to use of the Development District and effectively kills the use of Development Districts where credits may accrue.

The use of a tax advantaged Development District concept is widely used throughout the country to minimize the cost of making major infrastructure improvements and in some cases may well be the only source for funding major infrastructure improvements. The county benefits, communities benefit and homeowners benefit. Please reject Bill 23-11

Thank You
 S. Robert Kaufman
 Associate Director, Government Affairs
 Maryland National Capitol Building Industry Association
 1738 Elton Road
 Suite 200
 Silver Spring, Maryland 20903