


MEMORANDUM

TO: Management and Fiscal Policy Committee

FROM: Robert H. Drummer, Legislative Attorney 

SUBJECT: **Worksession** – Expedited Bill 28-07, Personnel – Other Post Employment Benefits Trust (OPEB) - Establishment

Expedited Bill 28-07, Personnel – Other Post Employment Benefits Trust (OPEB) - Establishment, sponsored by the Council President at the request of the County Executive, was introduced on November 13, 2007. See ©1-20.

Bill Summary

Bill 28-07 would establish a trust to fund all or a portion of certain County benefit plans providing retiree health and life insurance benefits. The Bill would also establish a Board of Trustees to manage the trust.

Background

This Bill results from the implementation of Governmental Accounting Standards Board (GASB) Statement 45, *Accounting and Financial Reporting by Employers for Post-employment Benefits Other than Pensions*. Prior to the issuance of Statement No. 45 by GASB (GASB 45), government financial statements reported the effect of these other retiree benefits when they were paid. Since these retiree benefits are consideration for employee services rendered, GASB 45 directs state and local governments to recognize the cost of these benefits when the related employee services are received instead of when they are paid. GASB 45 became effective for jurisdictions with more than \$100 million in revenue in FY08. See Summary of Statement No. 45 on ©27-31.

GASB 45 does not require funding the accrued expense, but credit rating agencies are expecting state and local governments to do so. The Council adopted Resolution 16-87 on April 10, 2007, committing to fund the difference between the OPEB pay-as-you-go contributions and the annual required contribution on an amortized even basis over a five-year period beginning in FY08. Resolution 16-87 also anticipated the creation of a separate trust to hold the funds

designated to pay for these benefits. A copy of Resolution 16-87 is at ©32-33. This Bill would create an OPEB Board of Trustees to manage the investments in the same manner as the Board of Investment Trustees manages investments for the retirement plans. The funds placed into the trust fund would be held for the exclusive benefit of the participants in the retiree benefit plans, but the Bill would not create an obligation by the County to provide the retiree benefit plans.

The OPEB Trust established by this Bill would be similar to the trust created by Code Section 33-58 to hold the funds for the payment of retirement pensions. The major difference is the composition of the Board of Trustees. The Bill would create a Board consisting of three members appointed by the County Executive and confirmed by the Council. The Bill would require the County Executive to appoint, subject to Council confirmation, *ex officio* members who “should be” the Director of Finance, the Director of Human Resources, and the Council Staff Director. The current Board of Investment Trustees (BIT) for the trust created for the retirement pensions consists of 13 members, including the three *ex officio* members designated in the Bill for the OPEB Board of Trustees.

The OPEB Board of Trustees established in the Bill would have broad authority to manage the investments of the trust fund through the use of investment managers consistent with both the Uniform Management of Public Employee Retirement Systems Act (UMPERSA) and the authority granted to the BIT in December 2007 in Expedited Bill 27-07.

The Public Hearing

The Council held a public hearing on this Bill on November 27, 2007. Karen Hawkins, Chief Operating Officer for the County Department of Finance, testified in favor of the Bill. A copy of her written testimony is at ©34. Linda Herman, the Executive Director of the Board of Investment Trustees (BIT), also testified at the hearing in response to a question from the Council.

The Prohibited Practice Charges

The day after the public hearing on this Bill, the Municipal and County Government Employees Organization, UFCW Local 1994 (MCGEO), filed a prohibited practice charge under Code §33-109(c) against the Executive for an alleged failure to bargain over a mandatory topic of collective bargaining. See ©35-36. The charge followed a related decision of the County Labor Relations Administrator (LRA) dated November 6, 2007. See ©37-49. The prior dispute presented to the LRA arose out of a proposal by MCGEO during collective bargaining that the Executive agree to submit legislation to the Council modifying the composition of the Board of Investment Trustees and establishing a pension fund protection and asset recovery program. The Executive refused to bargain on these two proposals, contending they were non-negotiable traditional management functions outside the scope of bargaining. The LRA decided that the phrase “pension and other retirement benefits for active employees only” in Code §33-107 (a) (2) was broad enough to include these MCGEO proposals within the mandatory scope of collective bargaining. The LRA held that the County Executive was required to negotiate with MCGEO over proposals to submit legislation to the Council to modify the composition of the BIT and

create the asset protection plan. The LRA did not decide that MCGEO was entitled to have additional members of the BIT.

MCGEO argued in its November 28, 2007 prohibited practice charge that Bill 28-07 would change employee benefits by establishing the OPEB trust and the OPEB Board of Trustees. MCGEO argued that the failure of the Executive to bargain over the submission of the proposed Bill to the Council was a failure to negotiate over a mandatory topic of collective bargaining. The submission of Bill 28-07 without negotiations with MCGEO or other unions representing County employees reflected the Executive's position that these organizational issues are non-negotiable traditional management functions described in Code §33-107 (c).

It is important to note that the LRA, in his November 6, 2007 decision, recognized that the Council has the final authority to determine the scope of collective bargaining and the composition of the BIT. Specifically, the Council has authority to amend the County's collective bargaining law to specify that the composition of the BIT or the OPEB Board is outside the scope of collective bargaining. That type of amendment would render MCGEO's prohibited practice charge moot. Even if the composition of the BIT or OPEB Board is within the scope of collective bargaining, the Council has final authority to accept or reject a negotiated agreement or an arbitrator's decision on the composition of either Board.

The Montgomery County Career Fire Fighters Association, International Association of Fire Fighters, Local 1664 (IAFF) filed a similar prohibited practice charge against the Executive for submitting Bill 28-07 to the Council without bargaining with the IAFF on December 18, 2007. See ©50-55. The IAFF filed a second prohibited practice charge against the Executive on the same day alleging a refusal to bargain with the IAFF over the plan to fund future liabilities for retirement benefit plans. See ©56-61.

The LRA has never acted on the MCGEO prohibited practice charge. The IAFF withdrew the two prohibited practice charges in January 2008.

The Executive's Proposed Amendments

On February 28, 2008, the Executive sent the Council proposed amendments to Bill 28-07. See ©62-83. The amendments contain two major components:

1. The investment of the funds contained in the OPEB Trust would be managed by the Board of Investment Trustees, along with the funds established for the Employees' Retirement System, the Retirement Savings Plan, and the Deferred Compensation Plan. The BIT would be required to keep separate records for the OPEB Trust and handle the funds separately.
2. The amended Bill contains new language subjecting the Chief Administrative Officer's authority to amend or terminate a retiree benefit plan to the County's duty to bargain with the union over such changes.

Issues

1. Should the County establish an OPEB trust? What are other local governments doing?

The County is participating in a Multi-Agency OPEB Work Group with the Montgomery County Public Schools (MCPS), Montgomery College (College), the Montgomery County portion of the Maryland-National Capital Park & Planning Commission (M-NCPPC), and the WSSC. MCPS, M-NCPPC, and WSSC have all established OPEB trusts. The College is still working on establishing an OPEB trust. The Work Group gathered some information concerning the progress of 20 other jurisdictions and reported to the MFP Committee on November 26, 2007 that 7 of these governments have already created, or are planning to create, an OPEB trust. Six of these 20 jurisdictions have trusts under consideration and only 2 jurisdictions do not plan to create a trust. Other jurisdictions have responded differently to the critical issues concerning the level and rate of funding and the limitation of liability for these retiree benefits, but the establishment of a trust as a vehicle to manage the funds allocated for this purpose appears to be a common choice.

The Council already endorsed the establishment of an OPEB trust in Resolution No. 16-87. Responsible fiscal management requires funds to be set aside to satisfy the County's obligation to continue these retiree benefits. The OPEB trust vehicle will assure that the funds set aside will be used exclusively for this purpose. An independent Board of Trustees with broad power to manage the funds should maximize the County's return on investments because it can make long term investments in different types of securities that have historically produced greater returns. In the absence of a trust, funds for payment of these retiree benefits will be invested as part of the County's short term cash investments of its operating funds, which historically result in lower returns. GASB 45 requires the County to set the discount rate to be used to determine funding requirements for retiree benefit plans based on expected returns. The County will be able to use a more favorable discount rate due to the larger expected rate of return on its investments if there is a separate trust. The County's recent experience with its short term cash investments is a 4% return instead of the 8% assumed rate of return for the County retirement plan.

Council staff recommends that the County create an OPEB trust.

2. Who should be appointed to the Board of Trustees?

The BIT established in Code §33-58 is composed of 13 members. There are 4 *ex officio* members, 1 active County employee in a position not included in any bargaining unit, 3 active County employees holding a position covered by one of the County's three bargaining units (or 3 individuals nominated by a labor organization representing the employees in one of the bargaining units), 1 retired County employee, and 4 members of the general public who are not County employees. The Bill as introduced would establish an independent OPEB Board consisting of three *ex officio* members who are appointed by the County Executive subject to confirmation by the Council. The Bill states that the members "should be" the Director of

Finance, the Director of Human Resources, and the Council Staff Director.¹ Therefore, the Bill would encourage, but not require the County Executive to appoint the persons holding these offices. If the Committee does not want to give the County Executive the discretion to appoint different *ex officio* members, the Bill would have to be amended.

MCPS amended its pension trust to create a master trust containing two separate components – one for the pension plan and one for the OPEB trust. The trust funds are separately accounted for, but they are managed by the same Board of Trustees and may make side-by-side or co-investments. M-NCPPC and WSSC each chose to create a separate OPEB trust with an independent Board consisting of *ex officio* members. A smaller Board of *ex officio members* is appropriate to manage the OPEB trust funds since the value of the assets is significantly less than the value of the assets in the agency's pension trust fund. The OPEB trust will initially be funded with approximately \$14 million. The ERS trust currently contains approximately \$2.7 billion. The significant difference in size of these funds may require the use of different types of investment vehicles. For example, it is likely that the smaller OPEB trust will rely more on commingled funds rather than actively managed separate accounts to insure an appropriate asset allocation. The overwhelming size of the ERS trust will command most of the attention of the BIT to the possible detriment of the smaller OPEB trust.

In addition, all of the assets in the OPEB trust come from employer contributions. The composition of the BIT includes employee representatives in part because the ERS contains both employer and employee contributions. All of the pension benefits paid to ERS retirees must be paid out of the ERS. While all of the funds in the OPEB trust must be used for retiree benefit plans, the OPEB trust is not the exclusive funding source for these benefits. In fact, it is anticipated that none of the OPEB trust funds will be used for retiree benefit plan payments in the immediate future in order to build up the fund to cover existing liabilities. Therefore, the investment timetable for the two funds may be different.

The argument for assigning the management of the OPEB trust to the BIT is that it is an existing Board with a long and successful track record of managing retirement fund investments. The County provides the BIT with a professional staff that assists and implements the decisions of the BIT. However, the BIT professional staff would also be able to assist a newly created OPEB Board of *ex officio* members. The significant differences between the ERS fund and the OPEB fund support a recommendation that the OPEB trust be managed by a smaller, independent Board that can better focus on the needs of the OPEB trust.

Council staff recommends the creation of an independent OPEB Board of 3 *ex officio* members established in the Bill as introduced.

¹ All of these *ex officio* members are also members of the BIT.

3. Should the language in the amended Bill limiting the right of the CAO to modify or terminate a retiree benefit plan be retained?

Section 33-159(a) of the Bill generally permits the Chief Administrative Officer to modify or terminate a retiree benefit plan. The Executive's proposed amendments modify this language to subject this right to the obligations contained in a collective bargaining agreement or a duty to bargain over these matters under the collective bargaining laws. See ©64-65. The operative language defining the scope of bargaining over this topic in the three County bargaining laws is "*pension and other retirement benefits for active employees only.*" The duty to bargain over retiree benefit plans may include an obligation to bargain over retiree benefit plans for *active employees*, but it does not include benefit plans for *current retirees*. A collective bargaining agreement establishing a retiree benefit plan for active employees is subject to an annual appropriation of funds by the Council pursuant to §311 of the Charter. In Council staff's view, the scope of mandatory bargaining should be addressed in the applicable collective bargaining law, not in a law creating an OPEB trust as a funding mechanism for retiree benefit plans.²

Bill 28-07, as introduced, would not amend the scope of bargaining under any of the collective bargaining laws. The Executive's proposed amendments to §33-159(a) either clarify the existing scope of the duty to bargain or modify it. In either case, this Bill is not the proper vehicle for this kind of change in law.

Council staff recommends that the Bill not include the Executive's proposed amendments to §33-159(a).

<u>This packet contains:</u>	<u>Circle #</u>
Expedited Bill 28-07	1
Memo from County Executive	21
Legislative Request Report	22
Fiscal Impact Statement	24
GASB 45 Summary	27
Resolution No.16-87	32
Department of Finance Testimony	34
MC GEO prohibited practice charge over Bill 28-07	35
LRA Decision and Order dated 11/6/08	37
IAFF prohibited practice charge over Bill 28-07	50
IAFF prohibited practice charge over funding	56
Executive Memo of 2/28/08 with proposed amendments	62

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² The insertion of these amendments to clarify or modify the duty to bargain in this Bill may be beyond the scope of the advertisement for the public hearing held on November 27, 2007.

Expedited Bill No. 28-07
Concerning: Personnel - Other Post
Employment Benefits Trust -
Establishment
Revised: 11/9/07 Draft No. 1
Introduced: November 13, 2007
Expires: May 13, 2009
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. , Laws of Mont. Co.

**COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND**

By: Council President at the Request of the County Executive

An Expedited Act to:

- (1) establish a certain trust to fund certain County retiree benefit plans; and
- (2) establish a Board to manage the trust.

By adding

Montgomery County Code
Chapter 33, Personnel and Human Resources
Article XI, Other Post Employment Benefits Trust

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

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

1 **Sec. 1 Chapter 33 is amended by adding Article XI as follows:**

2 **Article XI Other Post Employment Benefits Trust**

3 **33-158: Definitions.**

4 In this Article, the following words and phrases have the following meanings:

- 5 (a) Contribution: payment made to the Trust Fund by the County.
- 6 (b) Custodian: the Director of Finance.
- 7 (c) Investment manager: a person or entity who exercises discretion to manage
8 all or part of the assets of an institutional investor.
- 9 (d) OPEB Board or Board: the Board of Trustees established under this Article
10 to manage and invest Trust Fund assets.
- 11 (e) Participating Agency: an agency eligible to participate in County benefit
12 plans under Section 20-37(b) which elects to participate in any County
13 retiree benefit plan.
- 14 (f) Retiree benefit plan: any retiree medical plan, dental plan, vision plan, or life
15 insurance plan administered by the Chief Administrative Officer.
- 16 (g) Trust Fund: the Other Post Employment Benefits (OPEB) Trust Fund
17 established to pay all or part of the benefits provided under any retiree
18 benefit plan.

19 **33-159: Establishment of Trust.**

- 20 (a) County Retiree Benefit Plans. The Chief Administrative Officer must
21 include the terms of any retiree benefit plan, including eligibility and
22 benefits, in a plan document. All benefits must meet any applicable Federal
23 or State requirement. The Chief Administrative Officer may amend a plan
24 document at any time. Any retiree benefit plan may be terminated at any
25 time for any reason. No retiree benefit is guaranteed, except as expressly
26 provided by a contract entered into by the County and the beneficiary.

(b) Establishment of Trust. A trust, known as the Other Post Employment Benefits (OPEB) Trust, effective July 1, 2007, is established to fund all or a portion of benefits provided under the County retiree benefit plans. The Trust is intended solely as a funding mechanism to pay for County retiree benefits provided under the terms of any retiree benefit plan, and does not create any obligation by the County to provide any benefit listed in any County retiree benefit plan. Any participant in a retiree benefit plan, any current or former County employee, or any current or former participating agency employee, has no right to any asset in the Trust Fund. The Trust Fund may be, but is not required to be, the sole source of funding for any County retiree benefit plan.

(c) Type of Trust. The County intends that the Trust Fund:

(1) be used to perform its essential government function of providing benefits, including health and life insurance benefits, to participants and eligible dependents; and

(2) qualify as a tax exempt trust under Internal Revenue Code Section 115.

(d) Assets of Trust Fund. All contributions and all earnings and other additions, less payments, constitute the assets of the Trust Fund.

(e) Exclusive Benefit. The Trust Fund must be held for the exclusive benefit of participants in retiree benefit plans and eligible dependents, and used only to provide benefits and defray reasonable expenses of administering retiree benefit plans. Trust Fund assets must not revert to the County unless the County terminates all retiree benefit plans. Some funds may partially revert to the County if at least one benefit plan is terminated under Section 33-166.

33-160 Board of Trustees.

- 53 (a) Management. An OPEB Board of Trustees must manage the Trust Fund.
 54 The OPEB Board must hold legal title to all assets of the Trust Fund, but
 55 may transfer some incidents of ownership to the OPEB Board's agents as
 56 provided in this Article.
- 57 (b) Membership.
- 58 (1) The OPEB Board has 3 members.
- 59 (2) The County Executive must appoint 3 voting, ex officio members of
 60 the OPEB Board, subject to County Council confirmation. Each
 61 member must serve indefinitely while holding the respective office.
 62 These members should be:
- 63 (A) the Director of Finance;
- 64 (B) the Director of Human Resources; and
- 65 (C) the County Council Staff Director.
- 66 (c) Temporary Vacancy. If there is a temporary vacancy on the OPEB Board
 67 because of an unfilled position or an extended absence of an OPEB Board
 68 member, the County Executive may appoint, subject to Council
 69 confirmation, a temporary OPEB Board member to serve until the position is
 70 filled or the absent member returns to service.
- 71 (d) Compensation. Each Board member serves on the OPEB Board without
 72 additional compensation from the County and without compensation from
 73 any other source. The OPEB Board must reimburse any Board member for
 74 any expense approved by the OPEB Board. An OPEB Board member must
 75 not receive reimbursement for any expense from any other source.
- 76 (e) Acceptance of Trust. Within 10 days after the Council confirms an OPEB
 77 Board member, the member must certify in writing to the Chief
 78 Administrative Officer that the member accepts the Trust and will
 79 administer its affairs with care, skill, prudence, and diligence.

(f) Written policies. The OPEB Board must establish written policies to administer and invest funds under this Article and transact the Trust's business.

(g) Officers. The OPEB Board must select a chair, vice chair, and secretary from its members.

(1) The chair must preside at Board meetings and may take administrative action, including executing an instrument, on behalf of the Board. A person may rely in good faith on an act of the chair as legally valid.

(2) The vice chair must perform the duties and exercise the powers of the chair when:

(A) the chair is unavailable to perform those duties; or

(B) the OPEB Board determines that the chair is otherwise unable to perform those duties.

(3) The secretary must record the proceedings and actions of the OPEB Board and may certify a document or action of the OPEB Board. A person may rely in good faith on the secretary's certification as proof of a document or action.

(h) Meetings and actions.

(1) The OPEB Board must meet at least once during each calendar quarter. The chair, or 2 members of the OPEB Board, may call a meeting in the manner and at times and places provided under the Board's policies. The OPEB Board is a public body under the State Open Meetings Act.

(2) Each OPEB Board member has one vote. Two OPEB Board members constitute a quorum. Two OPEB Board members must agree for the OPEB Board to take any action.

(3) The OPEB Board may act without a meeting. All Board members must concur in writing for the Board to approve any action without a meeting.

(4) The OPEB Board may adopt operating procedures consistent with this Section and other applicable law.

(5) The OPEB Board may authorize a Board member to execute instruments on behalf of the Board. The authority must be in writing and specifically describe each instrument and how the member must execute the instrument.

(i) Records.

(1) The OPEB Board must keep investment accounts and records, including separate accounts for participating agencies, necessary to calculate the Trust Fund's value.

(2) The Board may designate a person to maintain those records.

(3) All Trust Fund accounts and records are subject to State laws on public records.

33-161: Contributions and Payments.

(a) County Contributions. The County may contribute to the Trust Fund those amounts that the Council appropriates. The County is not required to make any contribution to the Trust Fund unless a written contract with one or more beneficiaries so requires.

(b) Acceptance of Contributions. The OPEB Board must accept all contributions deposited in the Trust Fund and held by the custodian as Trust Fund property. The OPEB Board is not responsible for calculating or collecting any contribution, but is only responsible for contributions deposited to the Trust Fund and amounts held in the Trust Fund.

(c) Payments. Payments may be made from the Trust Fund in those amounts directed by the Chief Administrative Officer only to pay for all or part of the benefits provided by any County retiree benefit plan, administrative expenses relating to a retiree benefit plan and expenses of the Trust Fund. The OPEB Board is not liable for any payment directed by the Chief Administrative Officer and is not required to confirm compliance with any retiree benefit plan.

(d) Expenses. The OPEB Board must be reimbursed for expenses solely incurred in the administration of the Trust Fund and must pay from the Trust Fund expenses reasonably incurred by the Chief Administrative Officer to administer any County retiree benefit plan to the extent that those expenses have not been paid by the County. The OPEB Board may pay expenses incurred under Section 33-162(h)(11) without direction of the Chief Administrative Officer.

33-162: Trust Fund Management.

(a) General. The OPEB Board has the exclusive authority to manage the Trust Fund's assets. All powers and duties required to manage the Trust Fund are vested in the OPEB Board by this Article.

(b) Procurement. Chapter 11B does not apply to the procurement of goods and services by the OPEB Board for the Trust Fund.

(c) Transfer agents.

(1) The OPEB Board may register any assets in its own name or in the name of a nominee. The OPEB Board or its agent must keep records that show that the investments are part of the Trust Fund.

(2) The OPEB Board may form a partnership under State law to hold or transfer assets as the Board's nominee.

- 158 (3) The OPEB Board may designate in writing a trustee to hold or transfer
 159 assets as the Board's nominee.
- 160 (4) The OPEB Board must provide that any trustee or partnership that the
 161 Board designates must act only as agent of the Board. The Board may
 162 set other conditions that the Board finds prudent.
- 163 (5) Any trustee or partnership that the OPEB Board designates may retain
 164 the services of a bank or other financial institution to conduct
 165 business.
- 166 (6) The OPEB Board must maintain the indicia of ownership of the Trust
 167 Fund's assets within the jurisdiction of the United States federal
 168 courts, except as authorized in regulations that the Executive adopts
 169 under method (2). Those regulations must be substantially equivalent
 170 to federal regulations under the Employee Retirement Income
 171 Security Act (ERISA) regarding indicia of ownership of plan assets.

172 (d) Authorized investments.

- 173 (1) The OPEB Board may invest or permit an investment manager to
 174 invest the assets of the Trust Fund in any investment it considers
 175 prudent within the Board's policies, except as otherwise prohibited in
 176 this Section. The Board must use an investment manager except when
 177 making an investment in any type of pooled investment vehicle,
 178 including any combined, common, or commingled trust fund,
 179 retirement or annuity contract, mutual fund, investment company,
 180 association or business trust. The Board also may authorize the Board
 181 of Trustees staff to make investments in pooled investment vehicles
 182 and transition assets from one investment manager to another
 183 investment manager.

(2) The OPEB Board or any investment manager must not invest in real property, including securities based on ownership or other interests in real property, unless the investment is a pooled investment in which the Board has no power to manage the real property. A pooled investment must not invest more than 10 percent of its assets in real property located in the County. This 10 percent limit applies to the market value of the total assets on the preceding June 30. If the market value of investments in real property in the County exceeds the 10-percent limit as a result of market forces, the Board or the investment manager need not sell an existing equity investment. The Board may obtain valuations and take appropriate steps to comply with this 10-percent limit.

(3) If an investment through any combined, common, or commingled trust fund exists, the declaration of trust of that fund is a part of the Trust Fund.

(4) The OPEB Board and any investment manager must not invest any Trust Fund asset in any bond, note, or debt instrument issued by:

(A) the County;

(B) a political subdivision in the County; or

(C) an agency supported by bond issues underwritten by the County.

However, the Board or any investment manager may invest plan assets in bonds, notes, and debt instruments of any of these entities if the investment is held indirectly through a mutual fund or other pooled investment vehicle and complies with any limit in the Internal Revenue Code.

(e) Investment Policy. The OPEB Board must establish an investment policy and guidelines appropriate for the Trust Fund, and may review and change the policy and guidelines as necessary.

(f) Investment Manager.

(1) Except as provided in subsection (d)(1), the OPEB Board must appoint one or more investment managers to invest all or part of the OPEB trust fund assets consistent with applicable guidelines. If the Board has properly appointed an investment manager, the Board is not liable for any act or omission of the manager and is not otherwise responsible for the investment of funds allocated to the investment manager.

(2) Any investment management contract must provide that when the investment manager is making individual investment selections, the investment manager must make individual investment selections subject to applicable Board policies. In any contract, the Board may limit the investment of a specified portion of the Trust Fund to a certain type of property. In any contract, the Board may delegate to the investment manager any power or discretion conferred on the Board under this Article and may assign to the investment manager custody and control of certain Trust Fund assets. The fees charged by any manager are expenses of the Trust Fund.

(3) The OPEB Board must monitor the performance of each investment manager and may terminate any appointment. Monitoring may include any tests or analyses that the Board finds prudent in the circumstances to assure the Trust Fund's stability and growth.

(g) Available Cash. The OPEB Board may keep cash available in an amount it finds prudent to pay benefits and expenses. The Board may keep cash on

deposit in one or more banks or trust companies organized under the laws of
any state or the United States, but the amount on deposit in any bank or trust
company must not exceed 25% of the paid-in capital and surplus of that
bank or trust company.

(h) OPEB Board Powers. Except as otherwise provided in this Article, the
OPEB Board may:

(1) buy or subscribe for any investment with any cash, at a premium or
discount, and retain the investment;

(2) sell, exchange, convey, transfer, lease for any period, pledge,
mortgage, grant options, contract with respect to, or otherwise
encumber or dispose, at public or private sale, for cash or credit or
both, any part of the Trust Fund;

(3) subject to Section 33-165(h)(2), sue, defend, compromise, arbitrate,
compound, and settle any debt, obligation, claim, suit, or legal
proceeding involving the Trust Fund, and reduce the rate of interest
on, extend or otherwise modify, foreclose upon default, or otherwise
enforce any debt, obligation, or claim;

(4) retain a part of the Trust Fund assets uninvested in preparation for
distributions;

(5) exercise any option on any investment for conversion into another
investment, exercise any right to subscribe for additional investments,
and make all necessary payments;

(6) join in, consent to, dissent from, oppose, or deposit in connection with
the reorganization, recapitalization, consolidation, sale, merger,
foreclosure, or readjustment of the finances of any corporation or
property in which the assets of the Trust Fund are invested, or the
sale, mortgage, pledge or lease of that property or the property of any

such corporation on any terms that the Board finds prudent; exercise any options, make any agreements or subscriptions, pay any expenses, assessments, or subscriptions, and take any other action in connection with these transactions that the OPEB Board finds prudent; and accept and hold any investment issued in or as a result of any such proceeding;

(7) vote, in person or by proxy, at any election of any corporation in whose stock the assets of the Trust Fund are invested, and exercise, personally or by any power of attorney, any right appurtenant to any investment held in the Trust Fund, and give general or specific proxies or powers of attorney with or without power of substitution;

(8) sell at a public or private sale, enter into an option to sell, mortgage, lease, partition, or exchange any real property at prices and for terms that the Board finds prudent. The Board may execute and deliver deeds of conveyance and all assignments, transfers, and other legal instruments to pass ownership to a buyer, free and discharged of all liens;

(9) renew or extend any mortgage, on any terms that the Board finds prudent, and increase or reduce the rate of interest on any mortgage or modify the terms of any mortgage or of any guarantee as the Board finds prudent to protect the Trust Fund or preserve the value of the investment; waive any default or enforce any default in a manner that the Board finds prudent; exercise and enforce any right of foreclosure, bid on property in foreclosure, take a deed in lieu of foreclosure with or without paying a consideration, and release the obligation on the bond secured by the mortgage; and exercise and enforce in any legal action any right or remedy regarding any mortgage or guarantee;

- (10) form a corporation or partnership under the laws of any jurisdiction, or acquire an interest in or otherwise make use of any corporation or partnership already formed to invest in and hold title to any property;
- (11) incur and pay expenses for agents, financial advisors, actuaries, accountants, and legal counsel, if those expenses are incurred solely to perform the Board's duties under the Trust;
- (12) borrow, raise or lend money for the purpose of the Trust Fund, in any amounts and on any terms and conditions as the Board in its discretion finds prudent; for any money borrowed, issue a promissory note and secure the repayment of this note by pledging or mortgaging all or part of the Trust Fund;
- (13) hold, buy, transfer, surrender, and exercise all other incidents of ownership of any insurance or annuity contract; and
- (14) do any act that the Board finds necessary and exercise the powers of this Article to manage the Trust Fund. The Board may exercise all powers to manage the assets that an individual could exercise to manage property owned by that individual.
- (i) *Prohibited Transactions.* The OPEB Board must not engage in any transaction between the Trust and the County or any entity controlled by the County or a participating agency in which the Board:
- (1) lends any part of its income or corpus without receiving adequate security and a reasonable rate of interest;
- (2) pays any compensation more than a reasonable allowance for salaries or other compensation or services actually rendered;
- (3) makes any service available on a preferential basis;
- (4) makes any substantial purchase of securities or other property for more than adequate consideration;

- (5) sells any substantial part of its securities or other property for less than adequate consideration; or
- (6) engages in any transaction which results in a substantial diversion of its income or corpus.

33-163: Board Duties and Responsibilities.

(a) Duty of Care. The OPEB Board must discharge its duties with respect to the Trust Fund:

- (1) only in the interest of the participants in retiree benefit plans and eligible dependents;
- (2) only to provide benefits to participants in retiree benefits plans and to defray reasonable expenses of administering and operating the Trust Fund;
- (3) with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
- (4) by diversifying the investments of the Trust Fund to minimize the risk of large losses, unless it is clearly not prudent to diversify under the circumstances; and
- (5) in accordance with the laws, policies, and instruments governing the Trust.

(b) Records. The OPEB Board must maintain accurate and detailed accounts of each investment, receipt, disbursement, and other transaction, including any specific record required by law and any additional record it finds necessary. All accounts, books and records are subject to applicable State laws governing maintenance and disclosure of public records.

(c) Annual Accounting. The Trust Fund fiscal year is the same as the County fiscal year. On or before January 1 of each year, the OPEB Board must file with the Chief Administrative Officer a written account, listing each investment, receipt, disbursement, and other transaction during the preceding fiscal year or during the period from the close of the last preceding fiscal year to any interim date that the Board selects. The account must include a list of the Trust Fund assets and the current fair market value of each asset at the end of that period. The account must include the separate accounts of the participating agencies. If a current fair market value is not available for or does not apply to a particular investment, the Board must assign a value to that investment. The Board must apply the investment valuation method on a consistent basis. If the Board changes the investment valuation method, the Board must notify the Executive and Council of the change.

(d) Ethics. The OPEB Board is subject to Chapter 19A. An OPEB Board member must not:

- (1) be a party to any transaction engaged in by the Board or an investment manager involving the assets of the Trust Fund;
- (2) use the gains or profits of the Trust Fund for any purpose except to make investments or payments authorized by the Board;
- (3) deal with the assets of the Trust Fund for the member's own interest or account;
- (4) act in any transaction involving the Trust Fund on behalf of a party whose interests are adverse to the interests of the Trust Fund or the interests of participants or beneficiaries of the Trust Fund; or
- (5) become an endorser or surety, or in any manner an obligor, for money loaned to or borrowed from the Board.

33-164 Custodian.

(a) General. The Director of Finance is the custodian of the Trust Fund assets.
The Director must give bond with a surety and for a period and in an amount
as the OPEB Board determines. Each payment from the Trust Fund must be
made by the Director, the Director's designee, or 2 persons designated by
the Board acting jointly. The Board must file a copy of its resolution
designating the 2 persons, with specimen signatures of those persons, with
the Director to confirm their authority to make payments.

(b) Contracts. If the OPEB Board approves, the Director of Finance may make
written contracts with banks, trust companies, insurance companies or
investment companies authorized to do business in any state for the safe
custody of investments, banking services, the payment of benefits and
expenses, and any other function necessary to manage and safeguard the
assets of the Trust Fund.

(c) Procurement. Chapter 11B does not apply to the procurement of goods and
services for the Trust Fund by the Director of Finance.

33-165: Indemnification of OPEB Board Members.

(a) General. The County must indemnify each member of the OPEB Board
who is or may become a party to any legal action, including any
administrative or investigative proceeding, because of service as a Board
member, subject to the conditions in this Section.

(b) Standards; payments.

(1) The County must indemnify a Board member:

(A) with respect to civil matters, if the member acted in good faith
and in a manner that the member reasonably believed to be in
the best interest of the Trust Fund; and

(B) with respect to criminal matters, if the member had no reasonable cause to believe that the member's conduct was unlawful.

(2) If the County indemnifies a Board member under this Section, the County must indemnify the member for any expense when the member incurs the expense, including:

(A) reasonable attorney fees;

(B) judgments;

(C) damages;

(D) fines; and

(E) settlements.

(c) Effect of Terminating any legal action. The termination of any legal action does not, by itself, create a presumption that a Board member did not act in good faith and in a manner reasonably believed to be in the best interest of the Trust Fund. The termination of a criminal proceeding does not, by itself, create a presumption that a Board member had reasonable cause to believe that any conduct was unlawful.

(d) Exceptions. The County must not indemnify a Board member if:

(1) the member is found by a court or other tribunal to be liable for gross negligence or willful and wanton misconduct in the performance of a duty to the Trust Fund; or

(2) liability arises from an action that occurred before the date when all Board members accepted the Trust Fund in writing.

(e) Recovery of Payments. If the County Attorney finds that any indemnification payment was made that was outside the scope of the indemnification allowed under this Section, the County Attorney must take appropriate action on behalf of the County to recover that payment.

(f) Insurance Provided. The County must provide insurance for each Board member against any liability asserted against or incurred by the member with respect to service on the Board. Assets of the Trust Fund must not be used to pay any premium. The County may self-insure, wholly or partly, for this purpose. If the County does not provide adequate insurance coverage or indemnification under this Section, a Board member need not pay any amount attributable to liability incurred by serving on the Board and the County must pay any amount due.

(g) Defenses. The County may assert the defense of governmental immunity, and any other available defense, in any legal action arising out of the actions of the Board.

(h) County Attorney.

(1) The County Attorney must determine whether a Board member is eligible for indemnification with respect to any matter and the reasonableness of any fee, expense, or settlement.

(2) Unless the County Attorney approves the settlement, a Board member cannot settle a claim against another Board member using:

(A) County funds;

(B) funds of a Participating agency;

(C) funds provided by a self-insurance program of the County; or

(D) funds provided under a policy the County has with an insurance company.

33-166: Amendment and Termination.

(a) Termination. Except on termination, no part of the Trust Fund may revert to the County or a participating agency or be used for any purpose other than the exclusive benefit of participants of a retiree benefit plan. If all County retiree benefit plans are terminated and all benefit claims and expenses are

450 paid, any remaining assets in the Trust Fund relating to contributions made
 451 by the County and participating agencies must revert to the County and the
 452 participating agencies. The Trust Fund must terminate in its entirety on the
 453 earlier of the termination of all County retiree benefit plans or the depletion
 454 of the Trust Fund. Funds may partially revert to the County or participating
 455 agencies if one or more retiree benefit plans is terminated. When a County
 456 retiree benefit plan is terminated, the assets in the Trust Fund attributable to
 457 that plan after expenses and benefits have been paid must revert to the
 458 County and the participating agencies as provided in the adoption
 459 agreement.

460 (b) Amendments. Any provision of this Article may be amended at any time.
 461 No amendment may:

462 (1) authorize any part of the Trust Fund to be used for any purpose other
 463 than the exclusive benefit of participants of retiree benefit plans and
 464 eligible dependents; or

465 (2) cause or allow any part of the Trust Fund to revert to or become the
 466 property of the County, except as provided in Sections 33-166(a) or
 467 33-167.

468 (c) Compliance with Applicable Law. The Council may amend the Trust at any
 469 time, retroactively if required, if found necessary to conform to any
 470 requirement of State law, the Internal Revenue Code or any similar act or
 471 any amendments or corresponding regulations or applicable guidance.

472 **33-167: Participating Agencies.**

473 (a) Participating Agencies. An agency permitted to participate in County
 474 benefit plans under Section 20-37(b) which chooses to participate in a retiree
 475 benefit plan must participate in the Trust Fund. However, a participating
 476 agency must be eligible to participate under Internal Revenue Code Section

115. Each participating agency in the Trust Fund must execute an adoption agreement in a form satisfactory to the Chief Administrative Officer and must submit any information the Chief Administrative Officer requires. Except for any obligation to refund assets under subsection (b), legal liability must not accrue to the County by including any participating agency in the Trust Fund. Each participating agency must be fully responsible for its pro rata cost of coverage, including any required annual contribution to the County and its share of administrative expenses.

(b) Termination of Participating Agency. If a participating agency decides to terminate participation in a retiree benefit plan and the Trust Fund, the agency must notify the Chief Administrative Officer in writing. The Chief Administrative Officer and the participating agency must agree on a date to end the agency's participation. Any transfer of assets from the Trust Fund resulting from the termination of an agency's participation must comply with the Internal Revenue Code and the adoption agreement between the County and the participating agency.

33-168: Protection from Creditors.

Any asset held by the Trust Fund is not subject to any creditor of the County and is exempt from execution, attachment, prior assignment, or any other judicial relief or order for the benefit of any creditor or third person.

Sec. 2. Expedited Effective Date.

The Council declares that this legislation is necessary for the immediate protection of the public interest. This Act takes effect on the date when it becomes law.

Approved:

Marilyn J. Praisner, President, County Council

Date




OFFICE OF THE COUNTY EXECUTIVE
ROCKVILLE, MARYLAND 20850

Isiah Leggett
County Executive

MEMORANDUM

November 8, 2007

TO: Marilyn J. Praisner, Council President

FROM: Isiah Leggett, County Executive 

SUBJECT: Expedited Legislation to Amend Chapter 33, Personnel and Human Resources, by Creating a New Article XI

Attached is a bill which creates a trust to fund all or a portion of certain post retirement benefits. The bill also establishes the OPEB Board of Trustees to manage the assets of the trust.

Creation of the trust results from the implementation of GASB Statement No. 45 Accounting and Financial Reporting by Employers for Postemployment Benefits Other Than Pensions. Beginning in fiscal year 2008, GASB requires the County to disclose its liability for post employment benefits other than pensions in its financial statements. While GASB does not require the County to fund the liability, it does require the County to report expenses in its financial statements, and therefore reduce fund balance (or net assets), by the amount of annually required contributions. GASB permits the use of a favorable discount rate, resulting in a reduced liability, if the County funds these benefits in a separate trust. The County Council included the first year of funding in the approved fiscal year 2008 budget.

The Trust and the OPEB Board of Trustees are modeled after the retirement plan trusts and the Board of Investment Trustees for the Employee Retirement Plans found in Articles III, VII and IX of Chapter 33 of the County Code. However, the bill differs slightly on investment authority. The Board of Investment Trustees for the Employee Retirement Plans has submitted legislation to amend the current language in the County Code to conform to the language included in the attached bill.

Thank you for your consideration of this matter.

Attachments

**LEGISLATIVE REQUEST REPORT
EXPEDITED BILL 28-07**

Personnel – Other Post Employment Benefits Trust (OPEB) - Establishment

DESCRIPTION: The requested legislation creates a new Article XI, of Chapter 33 of the County Code to create a Trust for Other Post Employment Benefits (OPEB). The legislation also creates a new OPEB Board of Trustees which will manage the assets of the Trust.

PROBLEM: The creation of the Trust results from the implementation of Governmental Accounting Standards Board's (GASB) Statement No. 45 Accounting and Financial Reporting by Employers for Postemployment Benefits Other Than Pensions. Beginning in fiscal year 2008, GASB requires the County to disclose its liability on its financial statements for post employment benefits other than pensions. While GASB does not require the County to fund the liability, it does require the County to report expenses in its financial statements, and therefore reduce fund balance (or net assets), by the amount of annually required contributions. GASB permits the use of a favorable discount rate, resulting in a reduced liability, if the County funds these benefits in a separate trust. The County Council included the first year of funding in the approved fiscal year 2008 budget.

The Trust and the OPEB Board of Trustees are modeled after the retirement plan trusts and the Board of Investment Trustees for the Employee Retirement Plans found in Articles III, VII and IX of Chapter 33 of the County Code. However, the bill differs slightly on investment authority. The Board of Investment Trustees for the Employee Retirement Plans has submitted legislation to amend the current language in the County Code to conform to the language included in the attached bill.

GOALS AND OBJECTIVES: To create a Trust to fund all or a portion of certain post retirement benefits and create an OPEB Board of Trustees to manage the assets of the Trust.

COORDINATION: Office of Human Resources and the Department of Finance

FISCAL IMPACT: Office of Management and Budget

**ECONOMIC
IMPACT:** Office of Management and Budget.

EVALUATION: Subject to general oversight of the County Executive and the County Council.

**EXPERIENCE
ELSEWHERE** A large number of governments required to implement OPEB accounting and reporting for FY08 are creating a trust to hold OPEB assets.

**SOURCE OF
INFORMATION:** Karen Hawkins, Department of Finance; Linda Herman, Board of Investment Trustees; Eric Wallmark, Office of Human Resources; Alex Espinosa, Office of Management and Budget; and Amy Moskowitz, Office of the County Attorney.

**APPLICATION
WITHIN
MUNICIPALITIES:** Municipalities which have adopted the County's post employment retiree benefit plans will be required to contribute to the OPEB Trust Fund in order to continue to participate.

PENALTIES: n/a



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OFFICE OF MANAGEMENT AND BUDGET

Isiah Leggett
County Executive

Joseph F. Beach
Director

MEMORANDUM

November 6, 2007

TO: Marilyn J. Praisner, Council President

FROM: Joseph F. Beach, Director
Office of Management and Budget

SUBJECT: Expedited Bill -07, Other Post Employment Benefit (OPEB) Trust Fund

RECEIVED
MONTGOMERY COUNTY
COUNCIL
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The purpose of this memorandum is to transmit a fiscal impact statement to the Council on the subject legislation.

LEGISLATION SUMMARY

The proposed legislation establishes a Trust to fund all or a portion of benefits provided under the County retiree benefit plans. The legislation also establishes the OPEB Board of Trustees to manage the assets of the Trust.

FISCAL SUMMARY

Creation of the Trust results from the implementation of Governmental Accounting Standards Board (GASB) Statement No. 45 Accounting and Financial Reporting by Employers for Postemployment Benefits Other Than Pensions. Beginning in fiscal year 2008, GASB requires the County to disclose its liability for post employment benefits other than pensions in its financial statements. While GASB does not require the County to fund the liability, it does require the County to report expenses in its financial statements, and therefore reduce fund balance (or net assets), by the amount of annually required contributions. GASB permits the use of a favorable discount rate, resulting in a reduced liability, if the County funds these benefits in a separate trust. The County Council included the first year of funding in the approved fiscal year 2008 budget.

Office of the Director

The fiscal impact of the legislation is detailed in the chart below. In FY09, the Department of Finance anticipates an additional workload of one-quarter workyear and related operating expenses associated with complete implementation of GASB45, including coordinating routine transactions during the year and year-end financial statement analysis and preparation, which cannot be absorbed within the existing budget. Staff from the Board of Investment Trustees, which currently administers the investment programs for the County's retirement plans and will administer the OPEB trust program as well, expects additional costs for custodian bank fees, investment management fees, audit expenses, and board meeting support expenses including a small increase in part-time staff work hours. The Office of Human Resources estimates the annual OPEB actuarial valuation to cost \$50,000. Total incremental costs, shown below, are \$76,500 in FY08 and \$144,660 in FY09. Except for fiduciary insurance coverage and CAFR audit costs, all OPEB-related administrative costs will be funded from the proceeds in the OPEB Trust.

OPEB Board of Trustees Administrative Costs

	<u>FY08</u>	<u>FY09</u>
<u>Department of Finance</u>		
Accountant/Auditor III	\$0	\$22,910
Operating expenses	0	1,250
<u>Risk Management Non-Departmental Account</u>		
OPEB Board fiduciary insurance	0	10,000
<u>Independent Audit Non-Departmental Account</u>		
Audit costs (CAFR)	0	15,000
<u>Board Staff</u>		
Board staff support	5,000	5,000
Office expenses	3,500	5,500
Custodian bank fees	10,000	10,000
Investment management fees	8,000	12,000
Annual audit	0	13,000
<u>Office of Human Resources</u>		
Annual OPEB Valuation	<u>50,000</u>	<u>50,000</u>
Total	\$76,500	\$144,660

Marilyn J. Praisner
November 6, 2007
Page 3

The following contributed to and concurred with this analysis: Linda Herman, Board of Investment Trustees; Eric Wallmark and George Addae-Mintah, Office of Human Resources; David Rowland and Jay Narang, Department of Finance; Amy Moskowitz, Office of the County Attorney; and Craig Howard, Audit Contract Administrator, Office of Legislative Oversight.

JFB:aae

cc: Timothy L. Firestine, Chief Administrative Officer
Linda Herman, Executive Director, Board of Investment Trustees
Joseph Adler, Director, Office of Human Resources
Jennifer E. Barrett, Director, Department of Finance
Amy Moskowitz, Office of the County Attorney
Lori O'Brien, Office of Management and Budget
Craig Howard, Office of Legislative Oversight



Governmental Accounting Standards Board

Summaries / Status

Summary of Statement No. 45

Accounting and Financial Reporting by Employers for Postemployment Benefits Other Than Pensions **(Issued 6/04)**

In addition to pensions, many state and local governmental employers provide *other postemployment benefits* (OPEB) as part of the total compensation offered to attract and retain the services of qualified employees. OPEB includes *postemployment healthcare*, as well as other forms of postemployment benefits (for example, life insurance) when provided separately from a pension plan. This Statement establishes standards for the measurement, recognition, and display of OPEB expense/expenditures and related liabilities (assets), note disclosures, and, if applicable, required supplementary information (RSI) in the financial reports of state and local governmental employers.

The approach followed in this Statement generally is consistent with the approach adopted in Statement No. 27, *Accounting for Pensions by State and Local Governmental Employers*, with modifications to reflect differences between pension benefits and OPEB. Statement No. 43, *Financial Reporting for Postemployment Benefit Plans Other Than Pension Plans*, addresses financial statement and disclosure requirements for reporting by administrators or trustees of OPEB plan assets or by employers or sponsors that include OPEB plan assets as trust or agency funds in their financial reports.

How This Statement Improves Financial Reporting

Postemployment benefits (OPEB as well as pensions) are part of an exchange of salaries and benefits for employee services rendered. Of the total benefits offered by employers to attract and retain qualified employees, some benefits, including salaries and active-employee healthcare, are taken while the employees are in active service, whereas other benefits, including postemployment healthcare and other OPEB, are taken after the employees' services have ended. Nevertheless, both types of benefits constitute compensation for employee services.

From an accrual accounting perspective, the cost of OPEB, like the cost of pension benefits, generally should be associated with the periods in which the exchange occurs, rather than with the periods (often many years later) when benefits are paid or provided. However, in current practice, most OPEB plans are financed on a pay-as-you-go basis, and financial statements generally do not report the financial effects of OPEB until the promised benefits are paid. As a result, current financial reporting generally fails to:

- Recognize the cost of benefits in periods when the related services are received by the employer
- Provide information about the *actuarial accrued liabilities* for promised benefits associated with past services and whether and to what extent those benefits have been funded
- Provide information useful in assessing potential demands on the employer's future cash flows.

This Statement improves the relevance and usefulness of financial reporting by (a) requiring systematic, accrual-basis measurement and recognition of OPEB cost (expense) over a period that approximates employees' years of service and (b) providing information about actuarial accrued liabilities associated with OPEB and whether and to what extent progress is being made in funding the plan.

Summary of Standards

Measurement (the Parameters)

Employers that participate in *single-employer* or *agent multiple-employer defined benefit* OPEB plans (sole and agent employers) are required to measure and disclose an amount for annual OPEB cost on the accrual basis of accounting. Annual OPEB cost is equal to the employer's annual required contribution to the plan (ARC), with certain adjustments if the employer has a net OPEB obligation for past under- or overcontributions.

The ARC is defined as the employer's required contributions for the year, calculated in accordance with certain parameters, and includes (a) the normal cost for the year and (b) a component for amortization of the total unfunded actuarial accrued liabilities (or funding excess) of the plan over a period not to exceed thirty years. The parameters include requirements for the frequency and timing of actuarial valuations as well as for the actuarial methods and assumptions that are acceptable for financial reporting. If the methods and assumptions used in determining a plan's funding requirements meet the parameters, the same methods and assumptions are required for financial reporting by both a plan and its participating employer(s). However, if a plan's method of financing does not meet the parameters (for example, the plan is financed on a pay-as-you-go basis), the parameters nevertheless apply for financial reporting purposes.

For financial reporting purposes, an actuarial valuation is required at least biennially for OPEB plans with a total membership (including employees in active service, terminated employees who have accumulated benefits but are not yet receiving them, and retired employees and beneficiaries currently receiving benefits) of 200 or more, or at least triennially for plans with a total membership of fewer than 200. The projection of benefits should include all benefits covered by the current *substantive plan* (the plan as understood by the employer and plan members) at the time of each valuation and should take into consideration the pattern of sharing of benefit costs between the employer and plan members to that point, as well as certain legal or contractual caps on benefits to be provided. The

parameters require that the selection of actuarial assumptions, including the *healthcare cost trend rate* for postemployment healthcare plans, be guided by applicable actuarial standards.

Alternative Measurement Method

A sole employer in a plan with fewer than one hundred total plan members (including employees in active service, terminated employees who have accumulated benefits but are not yet receiving them, and retirees and beneficiaries currently receiving benefits) has the option to apply a simplified *alternative measurement method* instead of obtaining actuarial valuations. The option also is available to an agent employer with fewer than one hundred plan members, in circumstances in which the *employer's* use of the alternative measurement method would not conflict with a requirement that the *agent multiple-employer plan* obtain an actuarial valuation for plan reporting purposes. Those circumstances are:

- The plan issues a financial report prepared in conformity with the requirements of Statement 43 but is not required to obtain an actuarial valuation because (a) the plan has fewer than one hundred total plan members (all employers) and is eligible to use the alternative measurement method, or (b) the plan is not administered as a qualifying trust, or equivalent arrangement, for which Statement 43 requires the presentation of actuarial information.
- The plan does not issue a financial report prepared in conformity with the requirements of Statement 43.

This alternative method includes the same broad measurement steps as an actuarial valuation (projecting future cash outlays for benefits, discounting projected benefits to present value, and allocating the present value of benefits to periods using an actuarial cost method). However, it permits simplification of certain assumptions to make the method potentially usable by nonspecialists.

Net OPEB Obligation—Measurement

An employer's net OPEB obligation is defined as the cumulative difference between annual OPEB cost and the employer's contributions to a plan, including the OPEB liability or asset at transition, if any. (Because retroactive application of the measurement requirements of this Statement is not required, for most employers the OPEB liability at the beginning of the transition year will be zero.) An employer with a net OPEB obligation is required to measure annual OPEB cost equal to (a) the ARC, (b) one year's interest on the net OPEB obligation, and (c) an adjustment to the ARC to offset the effect of actuarial amortization of past under- or overcontributions.

Financial Statement Recognition and Disclosure

Sole and agent employers should recognize OPEB expense in an amount equal to annual OPEB cost in government-wide financial statements and in the financial statements of proprietary funds and

fiduciary funds from which OPEB contributions are made. OPEB expenditures should be recognized on a modified accrual basis in governmental fund financial statements. Net OPEB obligations, if any, including amounts associated with under- or overcontributions from governmental funds, should be displayed as liabilities (or assets) in government-wide financial statements. Similarly, net OPEB obligations associated with proprietary or fiduciary funds from which contributions are made should be displayed as liabilities (or assets) in the financial statements of those funds.

Employers are required to disclose descriptive information about each defined benefit OPEB plan in which they participate, including the funding policy followed. In addition, sole and agent employers are required to disclose information about contributions made in comparison to annual OPEB cost, changes in the net OPEB obligation, the funded status of each plan as of the most recent actuarial valuation date, and the nature of the actuarial valuation process and significant methods and assumptions used. Sole and agent employers also are required to present as *RSI* a schedule of funding progress for the most recent valuation and the two preceding valuations, accompanied by notes regarding factors that significantly affect the identification of trends in the amounts reported.

Cost-Sharing Employers

Employers participating in *cost-sharing multiple-employer* plans that are administered as trusts, or equivalent arrangements, in which (a) employer contributions to the plan are irrevocable, (b) plan assets are dedicated to providing benefits to retirees and their beneficiaries in accordance with the terms of the plan, and (c) plan assets are legally protected from creditors of the employers or plan administrator, should report as cost-sharing employers. Employers participating in multiple-employer plans that do not meet those criteria instead are required to apply the requirements of this Statement that are applicable to agent employers.

Cost-sharing employers are required to recognize OPEB expense/expenditures for their *contractually required contributions* to the plan on the accrual or modified accrual basis, as applicable. Required disclosures include identification of the way that the contractually required contribution rate is determined (for example, by statute or contract or on an actuarially determined basis). Employers participating in a cost-sharing plan are required to present as *RSI* schedules of funding progress and employer contributions for the plan as a whole if a plan financial report, prepared in accordance with Statement 43, is not issued and made publicly available and the plan is not included in the financial report of a public employee retirement system or another entity.

Other Guidance

Employers that participate in *defined contribution* OPEB plans are required to recognize OPEB expense/expenditures for their required contributions to the plan and a liability for unpaid required contributions on the accrual or modified accrual basis, as applicable.

This Statement also includes guidance for employers that finance

OPEB as insured benefits (as defined by this Statement) and for special funding situations.

Effective Dates and Transition

This Statement generally provides for prospective implementation—that is, that employers set the beginning net OPEB obligation at zero as of the beginning of the initial year. Implementation is required in three phases based on a government's total annual revenues in the first fiscal year ending after June 15, 1999. The definitions and cutoff points for that purpose are the same as those in Statement No. 34, *Basic Financial Statements—and Management's Discussion and Analysis—for State and Local Governments*. This Statement is effective for periods beginning after December 15, 2006, for *phase 1 governments* (those with total annual revenues of \$100 million or more); after December 15, 2007, for *phase 2 governments* (those with total annual revenues of \$10 million or more but less than \$100 million); and after December 15, 2008, for *phase 3 governments* (those with total annual revenues of less than \$10 million). Earlier implementation is encouraged.

Unless otherwise specified, pronouncements of the GASB apply to financial reports of all state and local governmental entities, including general purpose governments; public benefit corporations and authorities; public employee retirement systems; and public utilities, hospitals and other healthcare providers, and colleges and universities. Paragraphs 4 and 6 discuss the applicability of this Statement.

Resolution No.:	<u>16-87</u>
Introduced:	<u>March 27, 2007</u>
Adopted:	<u>April 10, 2007</u>

**COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND**

By: County Council

SUBJECT: Five-Year Funding Schedule for County Agencies' Annual Required Contribution for Other Post Employment Benefits (OPEB)

Background

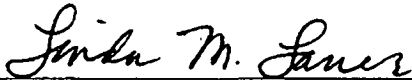
1. The Governmental Accounting Standards Board (GASB) has issued Statement No. 45, *Accounting and Financial Reporting by Employers for Post Employment Benefits Other Than Pensions*, which addresses how state and local governments should account for and report their costs and obligations related to Other Post Employment Benefits (OPEB).
2. County agencies (the County Government, Montgomery County Public Schools, Montgomery College, the Washington Suburban Sanitary Commission [WSSC], and the Maryland-National Capital Park and Planning Commission [M-NCPPC]) are required to disclose their OPEB liabilities in their financial statements, starting with the fiscal year beginning July 1, 2007 (FY 2008).
3. In November 2006 the County obtained actuarial valuation information addressing the extent of the County's liability to its retirees for Other Post Employment Benefits as of July 1, 2006. Other County agencies have also obtained, or are in the process of obtaining, similar actuarial valuations. The OPEB reports are subject to a number of actuarial and economic assumptions; these assumptions were generally similar to the assumptions used in evaluating the County agencies' pension fund liabilities.
4. Based on the assumptions and qualifications stated therein, the OPEB reports concluded that, assuming full prefunding, the FY 2008 annual required contribution (ARC) for the County, its tax supported agencies, and the Montgomery County portion of the M-NCPPC is \$240.0 million, and the related actuarial accrued liability (AAL) is \$2.6 billion. The most recent ARC for WSSC is \$19.1 million, and the related AAL is \$200 million.
5. The County has determined that a five-year phase in of the difference between the current pay-as-you-go amount and the ARC would be a responsible approach to pre-funding, and believes that such an approach is acceptable to the rating agencies, which will be evaluating the County's response to the GASB disclosure requirements and its approach to any obligations to current and future retirees for post-employment health and other non-pension benefits.
6. Should the County establish a separate OPEB trust, and should the County adopt a written policy of its intent to phase-in full funding of the difference between the pay-as-you-go contributions and the ARC on an amortized even basis over a five-year period, it would be appropriate for the County agencies to use, in their actuarial valuations, a discount rate higher than their operating investment rate for accounting and budgeting purposes. Absent such a policy, County agencies would be required to record OPEB liabilities in their financial statement of almost twice as much as liabilities required with such a policy.

Action

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

1. The Council is committed to the responsible fiscal management of the County agencies' Other Post Employment Benefit obligations and acknowledges that County agencies intend to establish one or more Trusts, on or before July 1, 2007 if possible, for such purposes.
2. It is the Council's policy intent to fund the difference between the OPEB pay-as-you-go contributions and the annual required contribution, for the tax supported agencies, on an amortized even basis over a five-year period beginning with Fiscal Year 2008.
3. For WSSC and M-NCPPC, it is the Council's policy intent to support WSSC's and M-NCPPC's plans to implement a five-year phase in of the difference between the OPEB pay-as-you-go contributions and the ARC beginning with Fiscal Year 2008, in coordination with the Prince George's County Council.

This is a correct copy of Council action.



Linda M. Lauer, Clerk of the Council

IT 7-20-16.
F1

TESTIMONY FOR EXPEDITED BILL 28-07, PERSONNEL – OTHER POST EMPLOYMENT BENEFITS TRUST (OPEB) – ESTABLISHMENT

Good afternoon, for the record, I am Karen Hawkins, Chief Operating Officer for the Department of Finance for Montgomery County. I am here today on behalf of the County Executive to testify in support of Bill 28-07, Personnel – Other Post Employment Benefits Trust (OPEB) – Establishment.

The proposed Bill will create a trust to fund all or a portion of certain post employment benefits, primarily health and life insurance. The bill also establishes an OPEB Board of Trustees to manage the trust.

Creation of the trust results from the implementation of Governmental Accounting Standards Board (GASB) Statement No. 45, Accounting and Financial Reporting by Employers for Postemployment Benefits Other than Pensions. Beginning in FY08, GASB45 requires the County to disclose its liability for post employment benefits other than pensions in the footnotes to the County's financial statements. While the GASB Statement does not require the County to fund the liability, it does require the County to report expenses in its financial statements, and therefore reduce fund balance, or net assets, by the amount of annual required contributions.

The annual required contribution is determined as a result of an actuarial valuation. GASB permits the use of a favorable discount rate in that valuation, resulting in a reduced annual required contribution and a reduced liability, if the County funds these benefits in a separate trust. The favorable discount rate would generally be the 8% assumed rate of return on long-term investments used for the actuarial valuation for the County's pension plan. In the absence of a trust, GASB requires the use of a discount rate similar to investment returns on the County's operating funds, which is closer to 4%. The impact on the annual required contribution and liability of having a Trust arrangement in place is generally to cut these amounts in half.

The County Council included the first year of OPEB funding in the approved FY08 budget, in anticipation of creation of this Trust. Since this first year phase-in amount was based on the expectation of an OPEB Trust being created, it is approximately one half of what the amount would be if a Trust was not established.

It is also the expectations of the rating agencies, based on our discussions with them over the last several years, that an OPEB Trust would be established.

The language used to create the Trust Fund and the OPEB Board of Trustees, which will oversee the investment of the assets, is modeled after the retirement plan trusts found in Articles III, VIII, and IX of Chapter 33 of the County Code.

We look forward to working with the Council in its deliberations on this legislation.

BUTSAVAGE & ASSOCIATES, P.C.

ATTORNEYS AT LAW
1920 L STREET, N.W., SUITE 301
WASHINGTON, D.C. 20036
202/861-9700
FAX: 202/861-9711



Carey R. Butsavage
Marc A. Stefan
Mark H. Reynolds*
Dianna M. Louis*

November 28, 2007

*Admitted in Maryland Only

Via Facsimile (without attachment) and First Class Mail (with attachment)

Andrew M. Strongin
Labor Relations Administrator
for Montgomery County, Maryland
P.O. Box 5779
Takoma Park, Maryland 20913

Re: Charge of Prohibited Practice
Proposed legislation changing administration of employee benefits.

Dear Mr. Strongin:

The Municipal & County Government Employees Organization, UFCW Local 1994 (MCGEO) hereby files a prohibited practice charge under Section 33-109(c) of the Montgomery County Code against Employer Montgomery County, Maryland. Within the previous six months and in violation of Section 33-109(a)(5) of Code, the County has failed and refused to bargain a proposed change in employee benefits.

MCGEO has learned that Montgomery County has submitted to the County Council proposed legislation that would make changes in the benefits of bargaining unit employees. (A copy of the bill is attached hereto). This legislation was apparently introduced on November 13, 2007 at the request of the County Executive. Upon information and belief, the proposed legislation seeks, among other things, to create a new trust fund for certain employee benefits a new governing board to oversee and direct the administration the fund. The County submitted the legislation without any notification to or negotiation with MCGEO. Upon learning of the proposed legislation, MCGEO has demanded to bargain over the matter. To date, the County has not responded to this request.

Employee benefits is a negotiable subject under Section 33-107(a)(4) of the Code. By introducing legislation that would change employee benefits, County has failed to bargain a negotiable subject. The County should be ordered to bargain with MCGEO over the proposed legislation, including, if necessary, submission of the matter to the impasse procedures under the Code, and to withdraw the proposed legislation from the County Council until the bargaining process is complete. Furthermore, without assurances that the County Council will not act on the

proposed legislation until the bargaining process is complete, MCGEO requests that this Charge be processed on an expedited basis. Such a procedure is necessary due to the difficulty, if not impossibility, of obtaining an adequate remedy if the Council enacts the proposed legislation.

As you know, the County normally assigns these matters to David Stevenson, Assistant County Attorney. His phone number is (240) 777-6737. MCGEO is serving a copy of this charge upon Joseph Adler as representative of the Charged Party. His contact information is:

Joseph Adler
Director
Office of Human Resources
101 Monroe Street
Rockville, Maryland 20850
(240) 777-5114

The Charging Party's contact information is

Gino Renne
President, MCGEO, Local 1994
600 S. Frederick Avenue
Gaithersburg, MD 20877
(301) 977-2447

This office will act as representative of record for Charging Party with the contact information listed above.

The Union anticipates submitting supporting testimony and documents at any hearing between the parties. The prohibited practice is not a dispute that should be submitted under a negotiated grievance procedure or a matter governed by the Law Enforcement Officers' Bill of Rights, Article 27, Sections 727-734D, Annotated Code of Maryland.

Thank you for your attention to this matter.

Very truly yours,


Mark Reynolds

c: Gino Renne (via fax only)
Joseph Adler, Director OHR (via mail only)
David Stevenson (via fax only)

**BEFORE THE LABOR RELATIONS ADMINISTRATOR
MONTGOMERY COUNTY, MARYLAND**

<hr/>	:	
In the Matter of:	:	
	:	LRA Case No. 07-108-01
MCGEO-UFCW LOCAL 1994,	:	
	:	
-and-	:	(Negotiability of Retirement
	:	Benefit Administration)
MONTGOMERY COUNTY, MARYLAND,	:	
<hr/>		

DECISION AND ORDER

Andrew M. Strongin
Labor Relations Administrator
Montgomery County, Maryland

APPEARANCES:

For the Union:	Carey R. Butsavage, Esq. Mark H. Reynolds, Esq. Butsavage & Associates, P.C.
For the County:	Sharon V. Burrell, Esq. Associate County Attorney

STATEMENT OF THE CASE

This proceeding, convened pursuant to Montgomery County Code, Part II, Article VII, Chapter 33, Sec. 33-108(e)(1) and Secs. 33-103(a)(3) and (8), concerns a dispute between Municipal & County Government Employees Organization, UFCW Local 1994 ("Union"), and Montgomery County, Maryland

(“County”), over the negotiability of two Union proposals made during the course of the parties’ ongoing collective bargaining pursuant to the Re-Opener provision of their current contract, which has a term of July 1, 2007 through June 30, 2010.

The two disputed proposals are as follows:

[1] 41.3 Retirement Committee [(“BIT Composition”)]

Proposal Pending

Add as new (c):

AThe [sic] parties shall submit legislation to the County Council to amend the Montgomery County Code; Part 11. Local Laws, Ordinances, Resolutions, Etc./Chapter 33. Personnel and Human Resources/Article III. Employee’s Retirement System to provide for the following revisions affecting bargaining unit members to change the composition of The Investment Board of Trustees :

The new composition shall consist of 18 members, to include the Directors of the Departments of; Finance, OHR & OMB, the Council Staff Director; the Presidents of UFCW Local 1994, FOP Lodge 35 & IAFF Local 1664; active employees from each of the participating bargaining units to be recommended by their respective employee organization; one employee who is not represented by an employee organization; a retired member of ERS; two representatives of the County Council; and two members of the public.

[2] Add as new 41.7 [(“Asset Recovery Program”)]

In order to safeguard the retirement fund’s assets and seek recovery when possible there shall be established a “Pension Fund Protection and Asset-recovery Program” that will monitor and pursue asset losses if those losses resulted from violations of federal or state securities to [sic] laws.

By agreement of the parties and under the direction of the Labor Relations Administrator ("LRA"), an expedited hearing was held on October 12, 2007. Following receipt of the parties' post-hearing briefs, the matter is now ripe for decision.

CONTENTIONS OF THE PARTIES

The Union principally contends that both proposals concern "pension and other retirement benefits for active employees," matters which expressly are negotiable pursuant to Sec. 33-107(a)(2) of the County Code. The Union agrees with the County's characterization of the proposals as relating to administration of retirement benefits, but urges the LRA to reject as a false dichotomy the County's proffered distinction between benefits and the administration of those benefits, contending that the proposals are negotiable under the plain meaning of the Code.

To the extent relevant, the Union also contends that the parties' bargaining history demonstrates that they routinely have bargained over matters related to pensions, including administration of various pension funds and the County's Board of Investment Trustees ("BIT"). The Union cites numerous examples of such bargaining dating back to the parties' 1993 Agreement, in which, as the Union characterizes the facts, the parties agreed to submit legislation to the County Council to effect changes in the County pension law, including the law governing pension administration. Principal examples cited by the Union include their agreement in 1993 to propose legislative change that would amend the law to replace an administrator with a medical review panel, and their agreement in 2004

to add seats to the BIT by, again, proposing necessary implementing legislation to the County Council.

The County first contends that neither the composition of the BIT, nor the establishment of a Pension Fund Protection and Asset-Recovery Program are included within the meaning of the phrase, "pension and other retirement benefits," as used in Sec. 33-107(a)(2). Rather, the County argues, both fall within the scope of non-negotiable traditional management functions, citing cases from the Commonwealth of Pennsylvania arising under its collective bargaining law. As the County argues, responsibility for administration of the funds rests, by County law, solely with the BIT. The County acknowledges that it has bargained over matters directly related to pension and other retirement benefits, but insists that none of those instances involved the administration of such benefits.

Building on this argument, the County also contends that County law establishing the BIT, Secs. 33-59 and 33-60, preempts the two proposals, as nothing in the BIT law permits delegation of Board composition or function to the Union through collective bargaining or otherwise. Relatedly, the County argues that the BIT is not a party to the collective bargaining process, and the County cannot bargain away or delegate its rights.

Responding to the Union's contention that bargaining history supports the negotiability of the disputed proposals, the County points out that it never accepted during collective bargaining the Union's proposal to alter the composition of the BIT, and that even if it had agreed earlier that such proposals were negotiable, that would not affect its right and obligation to object to their negotiability now. In any case, the County also points out that it did question the

negotiability of the Asset Recovery Program during negotiations over the current Agreement.

Specifically regarding the 2004 alteration of the composition of the BIT, the County denies that this change occurred as a result of collective bargaining, but rather resulted from discussion of legislative options that were in the joint interest of the parties, which the LRA notes is permissible under Sec. 33-107(d). In this regard, the County points to documents taken from the legislative packet which, the County contends, indicate that enlarging the Board was not a subject of collective bargaining.

The County also contends that the disputed proposals would give seats on the BIT to other County unions not party to these negotiations, and clearly is beyond the scope of the Union's right to bargain.

Finally, and specifically regarding the Asset Recovery Program proposal, the County contends that the proposal would usurp the role of the BIT, contrary to the BIT law. Moreover, although not part of the written proposal, the County contends that this proposal, as explained by the Union across the bargaining table, would require retaining a law firm on a contingency basis, which would conflict with Section 213 of the County Charter, which delegates such work exclusively to the County Attorney's office and is not subject to collective bargaining.

Returning briefly to the Union's position, the Union replies that the administration of retirement benefits directly relates to bargainable matters, and that to the extent changes would be required in County law to avoid any preemption problem, the Union properly is seeking the County's agreement to seek

appropriate changes in that law, just as the parties have done on numerous occasions.

DISCUSSION

The starting point for an analysis of the negotiability of these two proposals must be the language of the Code itself. Sec. 33-107(a) provides that, “the employer and the certified representative have the duty to bargain collectively with respect to the following subjects: ... (2) Pension and other retirement benefits shall be negotiable, for active employees only.” For the reasons that follow, the LRA concludes that the disputed proposals, both of which address administration of the retirement benefits, fall within the bargainable aegis of “pension and other retirement benefits.”

Technically speaking, a distinction doubtlessly can be drawn between a benefit fund and its administration, but the LRA is persuaded that the technical distinction should carry no legal effect in the context of this negotiability dispute, based on the language of the Code and the parties’ practices thereunder.

Turning first to the language of the Code, the phrase “pension and other retirement benefits” is not defined. Historically, however, the bargainable subjects listed in Sec. 33-107(a) have been defined broadly, except as clearly and unequivocally limited by the list of Employer Rights under Sec. 33-107(c). *See*, Case No. 99-1(B), in which LRA Sickles noted the Council’s “strong statement favoring collective bargaining, [from which] one must presume that any element of the employment relationship is subject to negotiation unless the law clearly and unequivocally exempts it from bargaining or public policy concerns outweigh

employees' interests." *Case No. 99-1(B)*, Slip Op. at 10-11 (1999) (Sickles, LRA), *quoted in Wage Compression*, Slip Op. at 17.

Additionally, where questions have arisen over the definition of the list of bargainable subjects set forth in Sec. 33-107(a), under circumstances where the subjects conflict with the Employer Rights set forth at 33-107(c), those bargainable subjects have been defined to include matters of "direct fundamental concern to employees," and have been viewed as bargainable unless they predominantly concern management's rights. *See, e.g., Wage Compression*, LRA Case No. 04-109-01 (2005), Slip Op. at 14.

Union President Gino Renne persuasively testifies, without contradiction, that administration of the pension funds directly relates to the underlying benefit. As he testifies, the BIT "is a 13-member group that is responsible for the administration, the custody, receipt and investment of the retirement assets." Tr. at 24. *See also*, Tr. at 26-30; Union Exhibit 2 (Bylaws of Board of Investment Trustees). Even without that testimony, the LRA would have no difficulty in concluding that the administration of a pension fund—including matters relating to the individuals making investment decisions and those who will be responsible for preserving the assets—critically relates to the underlying benefit, and indeed not only is an "element" of a bargainable subject, but also, under the stricter *Wage Compression* standard, are of direct fundamental concern to employees. Absent conflict with some other statutory provision, the LRA would find such administrative matters to be bargainable under Sec. 33-107(a)(2).

The County does not contend that the administration of retirement benefits conflicts with any Employer Right set forth at Sec. 33-107(c). Rather, the County argues that administration of the retirement benefits falls under the heading

of non-bargainable “traditional management functions,” citing decisions from the Commonwealth of Pennsylvania. Given the available evidence of the framework and history of bargaining under Sec. 33-107, the LRA concludes that, apart from those subjects listed in Sec. 33-107(c), there is no general, catch-all limitation on bargaining over the subjects listed in Sec. 33-107(a), even if the subjects can be said to touch upon traditional management functions. Regarding the cases from the Commonwealth of Pennsylvania, the LRA notes that the two laws differ with regard to the bargaining obligation, and also notes that whereas the leading Pennsylvania case holds that, “The choice of a pension plan manager is clearly within the managerial policy exception to collective bargaining,” *Frackville Borough Police Department v. PLRB*, 701 A.2d 632, 635 (Pa. 1997), these parties earlier agreed that the choice of a pension plan manager is negotiable, as evidenced by their 1993 agreement to seek legislation to replace the Disability Retirement administrator with a medical review panel, which appears to be precisely the type of matter forbidden from negotiation by the *Frackville* decision. Accordingly, it seems clear that the Pennsylvania bargaining law is not, at least in this respect, a model for interpreting the County’s bargaining obligation under Sec. 33-107.

As for the parties’ practices, several relevant facts emerge from the record of this case. First, the parties commonly negotiate agreements that require them to join forces in submitting to the Council proposed legislative changes to implement negotiated benefits. Just as one example, the current Article 41.1 of the parties’ Agreement provides, in relevant part, “The parties have submitted legislation to the County Council that amends Montgomery County Code 33-43A to provide for the following revisions affecting bargaining unit employees.” Those

revisions, set forth at Article 41.1(a), alter the administration of the Disability Review Panel.

Second, the parties historically have negotiated matters relating to the administration of retirement benefits. As already noted, in addition to the negotiated changes to the Disability Review Panel included in the current Article 41.1, the parties' 1993 Agreement contained an agreement to submit to the Council proposed legislation that would amend Secs. 33-43(b) and 33-87 of the Code by replacing the then-administrator of the disability retirement benefit with a medical review panel, the operation and administration of which the parties described at length in Article 41.1(c) through (k). As the 1995 Agreement makes clear, the parties in fact did so.

Third, and even more directly related to the instant dispute, the record strongly suggests that the parties negotiated changes to the composition of the BIT in 2004. The un rebutted testimony of Union President Renne is that seats were added to the BIT following negotiations between the County and its three unions, including MCGEO. The County characterizes that legislative result as the product of "discussions," rather than negotiations, and offers two documents from the legislative packet that accompanied the proposed legislation to demonstrate that the matters were not bargained. As the LRA reads those documents, however, it is not clear whether they mean that the composition issue was not bargained, or whether the product of that bargaining did not obviate the need for the proposed legislation. Undoubtedly, negotiation alone could not have added seats to the BIT; at most, negotiation could lead to an agreement to seek necessary legislative changes. In that case, the documents might mean no more than that the parties bargained over the desired changes, and the proposed legislation was necessary to

implement those changes. Stated differently, introduction of the two documents, without more, does not persuade the LRA that President Renne is inaccurate in characterizing the legislation as the product of bargaining, rather than mere discussion.

As the LRA stated at the hearing, and as the County now argues, the fact that the Union historically has sought changes to the composition of the BIT and that the County may not affirmatively have objected to the negotiability of such proposals would not preclude the County from contesting the negotiability of these two proposals at this time. Thus, the foregoing discussion of the parties' history is viewed not as determinative of the negotiability of the disputed proposals, but rather as instructive of the parties' understanding of the breadth of the bargaining obligation as it relates to pension and other retirement benefits. When the parties' bargaining history is considered in context of the fact that the Council has not altered the relevant provisions of the Code, the record strongly suggests that the parties' historic practices under the prevailing language of the Code is acceptable to the Council.

In the final analysis, to hold that the Union's bargaining rights under Sec. 33-107(a)(2) do not extend to administrative matters that establish, operate, and preserve the benefits strikes the LRA as unnecessarily cramped, and not in keeping with the unqualified grant of bargaining rights over "pension and other retirement benefits." The funds operate for the benefit of the employees; it stands to reason that the employees have a direct, fundamental, and obvious concern over their administration. Thus, the LRA concludes that the language of Sec. 33-107(a), the framework of the bargaining law in general, and the parties' bargaining history all support the view that the two proposals fall within the bargainable aegis of 33-

107(a)(2), and therefore are negotiable. Having so concluded, it remains to determine whether the matters otherwise are preempted by County law, as the County contends.

The LRA is not persuaded that County law regarding the establishment, composition, and operation of the BIT preempts the negotiability of the two disputed proposals. It may well be that the two proposals conflict with current law, set forth at Secs. 33-59 and 33-60, but the Union acknowledges that conflict and, in both cases, conditions its proposals on an agreement that the parties will seek legislation necessary to effect any negotiated change.¹ As noted, such agreements are common in the parties' bargaining history under Sec. 33-107, and the LRA can find no reason why this occasion should be treated any differently from any of the other occasions on which the parties bargained over such proposals. The fact that current law provides for a manner of administration that differs from that which the Union is proposing is not disputed, but nothing in the law precludes the County from negotiating with the Union over changes to retirement benefit administration.

Neither is the LRA persuaded that these proposals improperly would affect the rights of the BIT. It is true that the BIT is governed by a separate provision of County law, but both the BIT and the bargaining law have a common parent, the County Council. Both provisions of the law derive from the County Council, and the County Council can amend either if it so chooses. Nothing in the

¹ Although the BIT Composition proposal expressly references the submission of legislation to the Council to amend the law, the Asset Recovery Program proposal does not. The Union, however, makes clear that both proposals would be conditioned on an agreement to submit any necessary proposed legislation to the Council, and the LRA accepts that statement of position as a binding element of the proposal for purposes of this negotiability determination.

law suggests that it would be unlawful to petition the Council to change the BIT law to accommodate changes negotiated pursuant to the collective bargaining law. In any event, the County's position is incorrect operationally speaking. The Union is not proposing that the parties bargain changes to the BIT law; rather, the Union is proposing that the parties agree to negotiate proposed changes, which would require Council approval through proposed legislation. This is a technical distinction, of course, but one of fundamental import to the issue. For the same reason, the proposal would not require any improper delegation of BIT duties, as the proposals necessarily would be subject to County approval, and, again, the County is the common parent of both.

With regard to the County's argument that the Union improperly is seeking to bargain on behalf of other County unions by giving them seats on the BIT, the LRA is not persuaded by that characterization of the Union's efforts. Apparently, the Union views it as in the interests of its members to seek to add seats to the BIT for representatives of other employee groups. The LRA has no basis on this record for gainsaying that belief, and there is no basis on the record for rejecting it as unlawful.

Finally, with regard to the Asset Recovery Program, the County raises the question whether the proposal, as the County understands it, would conflict with Section 213 of the County Charter by delegating to an outside law firm work that is within the exclusive province of the County Attorney. The County's concern, however, is not reflective of any express terms of the proposal, and the record is not sufficiently developed to permit the LRA to conclude that the proposal necessarily is unlawful. As written, the proposal is negotiable; if in the

course of bargaining it appears that the proposal is unlawful, the parties of course are free to return the matter to the LRA.

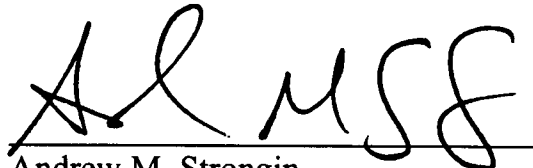
ORDER

IT IS HEREBY ORDERED THAT:

The two disputed proposals are negotiable, with the proviso that the Asset Recovery Program proposal will be conditioned, as is the BIT Composition proviso, on an agreement to submit any necessary and appropriate proposed legislation to the County Council.

**BY ORDER OF THE LABOR RELATIONS ADMINISTRATOR
Montgomery County, Maryland**

November 6, 2007



Andrew M. Strongin
Labor Relations Administrator

LAW OFFICES

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JAMES M. LARKIN
MEGAN K. MECHAK*
RICHARD J. BIALCZAK*
SARA L. FAULMAN

*ADMITTED IN MD ONLY
*ADMITTED IN NY ONLY

December 18, 2007

**BY CERTIFIED MAIL,
RETURN RECEIPT REQUESTED
AND ELECTRONIC MAIL**

Mr. Andrew M. Strongin
Labor Relations Administrator
Montgomery County
P.O. Box 5779
Takoma Park, Maryland 20913

**Re: Prohibited Practice Charge by the Montgomery County Career Fire
Fighters Association, International Association of Fire Fighters, Local
1664, AFL-CIO, CLC Relating to the County's Submission of Proposed
Legislation Creating the OPEB Trust**

Dear Administrator Strongin:

Pursuant to Section 33-154(d) of the Montgomery County Government Fire and Rescue Collective Bargaining Law, the Montgomery County Career Fire Fighters Association, International Association of Fire Fighters, Local 1664, AFL-CIO, CLC ("Union") respectfully submits for your review and consideration the enclosed documents:

- 1) Prohibited Practice Charge against Montgomery County Executive Isiah Leggett and Labor Relations Manager Sarah A. Miller alleging that Respondent County failed and refused to negotiate with the Union over proposed legislation affecting retirement benefits of bargaining unit employees that Respondent submitted to the Montgomery County Council in violation of Section 33-154(a)(5) of the Montgomery County Government Fire and Rescue Collective Bargaining Law;
- 2) Statement of Facts Constituting Prohibited Practice Charge. See Attachment A.

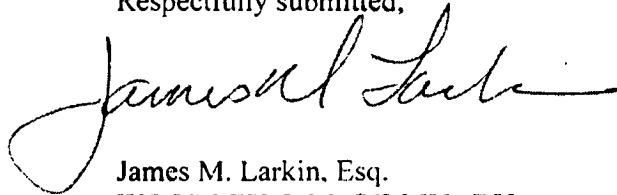
Andrew M. Strongin
Labor Relations Administrator
December 18, 2007
Page 2

- 3) Montgomery County Government Fire and Rescue Collective Bargaining Law;
- 4) Agreement between the Montgomery County Career Fire Fighters Association, International Association of Fire Fighters, Local 1664, AFL-CIO, CLC and the Montgomery County Government, Montgomery County, Maryland (July 1, 2005 through June 30, 2008); and
- 5) Expedited Bill No. 28-07.

The Union respectfully requests that Mr. Administrator commence an investigation of the above Prohibited Practice Charge, and that the Union be afforded an opportunity to present its case at a hearing. The Union further requests that the charge be processed expeditiously, as the current collective bargaining agreement between the Union and the County is scheduled to expire on June 30, 2008, and the parties are currently in negotiations towards a successor agreement.

If you have any questions or comments, or if you require additional information, please do not hesitate to contact me either by telephone at (202) 824-1508, facsimile at (202) 783-4570, or electronic mail at jml@wmlaborlaw.com.

Respectfully submitted,



James M. Larkin, Esq.
WOODLEY & MCGILLIVARY

Enclosures

cc: The Honorable Isiah Leggett, Montgomery County Executive
Ms. Sarah A. Miller, Labor Relations Manager, Montgomery County Government

**CHARGE OF PROHIBITED PRACTICE
TO THE
LABOR RELATIONS ADMINISTRATOR
MONTGOMERY COUNTY, MARYLAND**

NOTE

A written Charge of a prohibited practice by an individual must be filed with the Labor Relations Administrator within six (6) months of the incident giving rise to the charge, or within six (6) months of the date upon which the charging party knew or should have known of the matter that is the subject of the charge. (Article 33-154(f) of the Montgomery County Government Fire and Rescue Collective Bargaining Law).

1. **CHARGING PARTY**

Montgomery County Career Fire Fighters Association, International Association of Fire Fighters Local 1664, AFL-CIO, CLC

932 Hungerford Drive, Suite 33A
Rockville, Maryland 20850-1713
(301) 762-6611 (telephone)

2. **CHARGED PARTIES**

The Honorable Isiah Leggett
Montgomery County Executive
Executive Office Building
101 Monroe Street, 2nd Floor
Rockville, Maryland 20850
(240) 777-2500 (telephone)

Ms. Sarah A. Miller
Labor Relations Manager
Executive Office Building
101 Monroe Street, 7th Floor
Rockville, Maryland 20850
(240) 777-5050 (telephone)

3. **STATEMENT OF THE CHARGES**

Section of the Montgomery County Government Fire and Rescue Collective Bargaining Law violated:

Section 33-154(a)(5)

Statement of Facts Constituting Prohibited Practice:

See Attachment A.

4. RELIEF REQUESTED

The Union seeks an Order:

- 1) declaring that Respondents have committed a prohibited practice by failing and refusing to bargain in good faith, in violation of applicable provisions of the Montgomery County Fire and Rescue Collective Bargaining Law;
- 2) directing Respondents to cease and desist their unlawful conduct immediately;
- 3) directing Respondents to begin bargaining collectively immediately with the Union over the matters identified in this charge; and
- 4) awarding appropriate affirmative relief, including payment of all legal fees and costs incurred as a result of Respondents' prohibited practice.

5. SUPPORTING DOCUMENTS

The Union will provide supporting documents upon request and during your investigation of this matter.

ATTACHMENT A

PROHIBITED PRACTICE CHARGE (Cont.)

Charging Party: Montgomery County Career Fire Fighters Association, International Association of Fire Fighters, Local 1664, AFL-CIO, CLC

Section 3 — Statement of Facts Constituting Prohibited Practice Charge

Montgomery County Career Fire Fighters Association, International Association of Fire Fighters, Local 1664, AFL-CIO, CLC ("Union") and the Montgomery County Government, Montgomery County, Maryland are parties to an existing collective bargaining agreement, effective July 1, 2005 through June 30, 2008. In November 2007, the parties commenced negotiations towards a successor agreement. During the course of those negotiations, the County violated Section 33-154(a)(5) of the Montgomery County Fire and Rescue Collective Bargaining Law when, on or about November 9, 2007, the County submitted proposed legislation affecting retirement benefits of bargaining unit employees to the Montgomery County Council. The proposed legislation, identified as Expedited Bill No. 28-07 (a copy of which is attached hereto), would: (1) establish a trust fund known as the Other Post Employment Benefits Trust ("OPEB Trust" or "Trust") and (2) establish a Board to manage the Trust. Pursuant to the proposed legislation, the OPEB Trust will be used "as a funding mechanism to pay for County retiree benefits provided under the terms of any retiree benefit plan" (Expedited Bill No. 28-07, Section 33-159(b)). The County submitted the proposed legislation without first providing notice to the Union or negotiating the subject with the Union.

"[P]ension and other retirement benefits for active employees" is a mandatory subject of bargaining under Section 33-152(a)(2) of the Montgomery County Fire and Rescue Collective Bargaining Law. It is the Union's position that any decision the County makes regarding funding retirement plans through the OPEB Trust will necessarily alter the retirement benefits of active County employees. Therefore, the OPEB Trust legislation, as well as the formation of the Trust or any similar funding mechanism, is a mandatory subject of bargaining. During a bargaining session held on December 5, 2007, the Union demanded that the County bargain collectively over the OPEB Trust, and the County refused to do so. The County's refusal to bargain over a mandatory subject of bargaining constitutes a prohibited practice under § 33-152(a)(2) of the County's Collective Bargaining Law.

The Union requests that this Charge be processed on an expedited basis so as to ensure that the Montgomery County Council will not act on the proposed legislation prior to the completion of the bargaining process.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this prohibited practice charge has been served by certified mail, return receipt requested, on the following individuals:

Mr. Andrew M. Strongin
Labor Relations Administrator
Montgomery County
P.O. Box 5779
Takoma, Maryland 20913

The Honorable Isiah Leggett
Montgomery County Executive
Executive Office Building
101 Monroe Street, 2nd Floor
Rockville, Maryland 20850
(240) 777-2500

Ms. Sarah A. Miller
Labor Relations Manager
Executive Office Building
101 Monroe Street, 7th Floor
Rockville, Maryland 20850
(240) 777-5050

By: 

James M. Larkin

Woodley & McGillivray
1125 15th Street, N.W.
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Counsel for the Charging Party

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JAMES M. LARKIN
MEGAN K. MECHAK*
RICHARD J. BIALCZAK*
SARA L. FAULMAN

*ADMITTED IN MD ONLY
*ADMITTED IN NY ONLY

December 18, 2007

**BY CERTIFIED MAIL,
RETURN RECEIPT REQUESTED
AND ELECTRONIC MAIL**

Mr. Andrew M. Strongin
Labor Relations Administrator
Montgomery County
P.O. Box 5779
Takoma Park, Maryland 20913

**Re: Prohibited Practice Charge by the Montgomery County Career Fire
Fighters Association, International Association of Fire Fighters, Local
1664, AFL-CIO, CLC Relating to the County's Plan for Funding
Future Health Care Liabilities (GASB 45)**

Dear Administrator Strongin:

Pursuant to Section 33-154(d) of the Montgomery County Government Fire and Rescue Collective Bargaining Law, the Montgomery County Career Fire Fighters Association, International Association of Fire Fighters, Local 1664, AFL-CIO, CLC ("Union") respectfully submits for your review and consideration the enclosed documents:

- 1) Prohibited Practice Charge against Montgomery County Executive Isiah Leggett and Labor Relations Manager Sarah A. Miller alleging that Respondent County failed and refused to negotiate with the Union over the County's proposal to fund bargaining unit employees' future health care liabilities in violation of Section 33-154(a)(5) of the Montgomery County Government Fire and Rescue Collective Bargaining Law;
- 2) Statement of Facts Constituting Prohibited Practice Charge. See Attachment A.

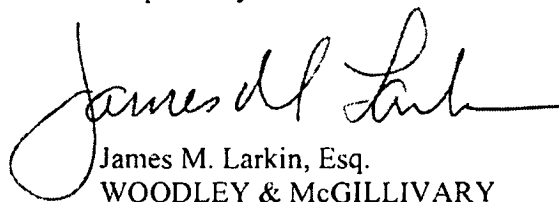
Andrew M. Strongin
Labor Relations Administrator
December 18, 2007
Page 2

- 3) Montgomery County Government Fire and Rescue Collective Bargaining Law;
and
- 4) Agreement between the Montgomery County Career Fire Fighters Association, International Association of Fire Fighters, Local 1664, AFL-CIO, CLC and the Montgomery County Government, Montgomery County, Maryland (July 1, 2005 through June 30, 2008).

The Union respectfully requests that Mr. Administrator commence an investigation of the above Prohibited Practice Charge, and that the Union be afforded an opportunity to present its case at a hearing. The Union further requests that the charge be processed expeditiously, as the current collective bargaining agreement between the Union and the County is scheduled to expire on June 30, 2008, and the parties are currently in negotiations towards a successor agreement.

If you have any questions or comments, or if you require additional information, please do not hesitate to contact me either by telephone at (202) 824-1508, facsimile at (202) 783-4570, or electronic mail at jml@wmlaborlaw.com.

Respectfully submitted,



James M. Larkin, Esq.
WOODLEY & MCGILLIVARY

Enclosures

cc: The Honorable Isiah Leggett, Montgomery County Executive
Ms. Sarah A. Miller, Labor Relations Manager, Montgomery County Government

**CHARGE OF PROHIBITED PRACTICE
TO THE
LABOR RELATIONS ADMINISTRATOR
MONTGOMERY COUNTY, MARYLAND**

NOTE

A written Charge of a prohibited practice by an individual must be filed with the Labor Relations Administrator within six (6) months of the incident giving rise to the charge, or within six (6) months of the date upon which the charging party knew or should have known of the matter that is the subject of the charge. (Article 33-154(f) of the Montgomery County Government Fire and Rescue Collective Bargaining Law).

1. **CHARGING PARTY**

Montgomery County Career Fire Fighters Association, International Association of Fire Fighters Local 1664, AFL-CIO, CLC

932 Hungerford Drive, Suite 33A
Rockville, Maryland 20850-1713
(301) 762-6611 (telephone)

2. **CHARGED PARTIES**

The Honorable Isiah Leggett
Montgomery County Executive
Executive Office Building
101 Monroe Street, 2nd Floor
Rockville, Maryland 20850
(240) 777-2500 (telephone)

Ms. Sarah A. Miller
Labor Relations Manager
Executive Office Building
101 Monroe Street, 7th Floor
Rockville, Maryland 20850
(240) 777-5050 (telephone)

3. **STATEMENT OF THE CHARGES**

Section of the Montgomery County Government Fire and Rescue Collective Bargaining Law violated:

Section 33-154(a)(5)

Statement of Facts Constituting Prohibited Practice:

See Attachment A.

4. RELIEF REQUESTED

The Union seeks an Order:

- 1) declaring that Respondents have committed a prohibited practice by failing and refusing to bargain in good faith, in violation of applicable provisions of the Montgomery County Fire and Rescue Collective Bargaining Law;
- 2) directing Respondents to cease and desist their unlawful conduct immediately;
- 3) directing Respondents to begin bargaining collectively immediately with the Union over the matters identified in this charge; and
- 4) awarding appropriate affirmative relief, including payment of all legal fees and costs incurred as a result of Respondents' prohibited practice.

5. SUPPORTING DOCUMENTS

The Union will provide supporting documents upon request and during your investigation of this matter.

ATTACHMENT A

PROHIBITED PRACTICE CHARGE (Cont.)

Charging Party: Montgomery County Career Fire Fighters Association, International Association of Fire Fighters, Local 1664, AFL-CIO, CLC

Section 3 — Statement of Facts Constituting Prohibited Practice Charge

Montgomery County Career Fire Fighters Association, International Association of Fire Fighters, Local 1664, AFL-CIO, CLC ("Union") and the Montgomery County Government, Montgomery County, Maryland are parties to an existing collective bargaining agreement, effective July 1, 2005 through June 30, 2008. In November 2007, the parties commenced negotiations towards a successor agreement. During the course of those negotiations, the County violated Section 33-154(a)(5) of the Montgomery County Fire and Rescue Collective Bargaining Law when the County refused to bargain with the Union over the County's plan to begin funding future liabilities that the County will incur providing current employees with health care and other non-pension retirement benefits.

In June 2004, the Governmental Accounting Standards Board ("GASB") issued Statement No. 45 ("GASB 45") in which GASB established standards for state and local governmental employers to identify in their financial reports the amount of future unfunded liabilities the employers might expect to incur as a result of providing health care and other non-pension benefits to current employees who enter retirement status. GASB 45 also established standards for creating a funding procedure for these future liabilities. Upon information and belief, the County has adopted a funding procedure in response to the GASB 45 standards. The County established the funding procedure without giving notice to the Union or negotiating the subject with the Union. "[P]ension and other retirement benefits for active employees" and "employee benefits such as . . . insurance" are both mandatory subjects of bargaining under Sections 33-152(a)(2) and (3) of the Montgomery County Fire and Rescue Collective Bargaining Law. It is the Union's position that any decision the County makes regarding funding current bargaining unit employees' post-retirement benefits will necessarily alter the level of benefits provided to bargaining unit employees while they are working. Therefore, the County's funding plan established in response to GASB 45 is a mandatory subject of bargaining. During a bargaining session held on December 5, 2007, the Union demanded that the County bargain collectively over the funding plan, and the County refused to do so. The County's refusal to bargain over a mandatory subject of bargaining constitutes a prohibited practice under § 33-152(a)(2) of the County's Collective Bargaining Law.

The Union requests that this Charge be processed on an expedited basis so as to ensure that the Montgomery County Council will not act on the proposed legislation prior to the completion of the bargaining process.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this prohibited practice charge has been served by certified mail, return receipt requested, on the following individuals:

Mr. Andrew M. Strongin
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By: 

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Washington, D.C. 20005
(202) 833-8855

Counsel for the Charging Party




OFFICE OF THE COUNTY EXECUTIVE
ROCKVILLE, MARYLAND 20850

Isiah Leggett
County Executive

MEMORANDUM

February 28, 2008

TO: Michael Knapp, President
Montgomery County Council

FROM: Isiah Leggett, County Executive 

SUBJECT: Bill 28-07, Other Post Employment Benefits Trust Establishment (OPEB)

In November 2007, I submitted legislation, Bill 28-07, to establish a special OPEB Trust to invest and administer funds being set aside to pay for retiree health benefits, and to create a Board of Trustees to administer the trust. Under the requirements established by the Government Accounting Standards Board, local governments must report on their financial statements the cost of retiree health benefits and other post-employment benefits OPEB. By establishing a trust, the County is able to begin to pre-fund this liability in long term investment vehicles, thereby reducing the size of the unfunded liability and the cost required to be recognized in the County's financial statements.

After further consideration, I am submitting amendments to Bill 28-07 that authorize the County's existing Board of Investment Trustees (BIT) to manage and invest the funds appropriated to the trust. The BIT currently is responsible for over \$2.7 billion under investment for the Employees' Retirement System, Retirement Savings Plan, and Deferred Compensation Plan, and employs professional money managers and consultants to fulfill its fiduciary duties. I believe the BIT is well-suited to manage and invest the new OPEB Trust, and I understand the BIT is prepared to assume these additional responsibilities.

I encourage the Council to take up this matter as expeditiously as possible so that the County may take advantage of the range of long term investment options, and to avoid any unintended financial statement impacts. If you have any questions about these amendments, please contact Kathleen Boucher at 240-777-2593.

IL:jgs

Attachment

2008 FEB 28 PM 2:25

MONTGOMERY COUNTY
COUNCIL

62

COUNTY EXECUTIVE'S PROPOSED AMENDMENTS TO Bill 28-07

Expedited Bill No. 28-07
Concerning: Personnel – Other Post
Employment Benefits Trust –
Establishment
Revised: 2/4/08 Draft No. 2
Introduced: November 13, 2007
Expires: May 13, 2009
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

**COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND**

By: Council President at the Request of the County Executive

An Expedited Act to:

- [[(1)] establish a certain trust to fund certain County retiree benefit plans[; and
- (2) establish a Board to manage the trust]].

By adding

Montgomery County Code
Chapter 33, Personnel and Human Resources
Article XI, Other Post Employment Benefits Trust

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

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

1 **Sec. 1 Chapter 33 is amended by adding Article XI as follows:**

2 **Article XI Other Post Employment Benefits Trust**

3 **33-158: Definitions.**

4 In this Article, the following words and phrases have the following meanings:

5 (a) Board: The Board of Investment Trustees established under Article III.

6 [(a)](b) Contribution: payment made to the Trust Fund by the County.

7 [(b)](c) Custodian: the Director of Finance.

8 [(c)](d) Investment manager: a person or entity who exercises discretion to
 9 manage all or part of the assets of an institutional investor.

10 [(d) OPEB Board or Board: the Board of Trustees established under this Article
 11 to manage and invest Trust Fund assets.]]

12 (e) Participating Agency: an agency eligible to participate in County benefit
 13 plans under Section 20-37(b) which elects to participate in any County
 14 retiree benefit plan.

15 (f) Retiree benefit plan: any retiree medical plan, dental plan, vision plan, or life
 16 insurance plan administered by the Chief Administrative Officer.

17 (g) Trust Fund: the Other Post Employment Benefits (OPEB) Trust Fund
 18 established to pay all or part of the benefits provided under any retiree
 19 benefit plan.

20 **33-159: Establishment of Trust.**

21 (a) County Retiree Benefit Plans. The Chief Administrative Officer must
 22 include the terms of any retiree benefit plan, including eligibility and
 23 benefits, including those benefits collectively bargained, in a plan document.
 24 All benefits must meet any applicable Federal or State requirement. Subject
 25 to the County's obligations under collective bargaining agreements and the
 26 collective bargaining laws, the [[The]] Chief Administrative Officer may
 27 amend a plan document at any time. Subject to the County's obligations

under collective bargaining agreements and the collective bargaining laws, any [[Any]] retiree benefit plan may be terminated at any time for any reason. No retiree benefit is guaranteed, except as expressly provided by a contract entered into by the County [[and the beneficiary]].

(b) Establishment of Trust. A trust, known as the Other Post Employment Benefits (OPEB) Trust, effective July 1, 2007, is established to fund all or a portion of benefits provided under the County retiree benefit plans. The Trust is intended solely as a funding mechanism to pay for County retiree benefits provided under the terms of any retiree benefit plan, and does not create any obligation by the County to provide any benefit listed in any County retiree benefit plan. Any participant in a retiree benefit plan, any current or former County employee, or any current or former participating agency employee, has no right to any asset in the Trust Fund. The Trust Fund may be, but is not required to be, the sole source of funding for any County retiree benefit plan.

(c) Type of Trust. The County intends that the Trust Fund:

(1) be used to perform its essential government function of providing benefits, including health and life insurance benefits, to participants and eligible dependents; and

(2) qualify as a tax exempt trust under Internal Revenue Code Section 115.

(d) Assets of Trust Fund. All contributions and all earnings and other additions, less payments, constitute the assets of the Trust Fund.

(e) Exclusive Benefit. The Trust Fund must be held for the exclusive benefit of participants in retiree benefit plans and eligible dependents, and used only to provide benefits and defray reasonable expenses of administering retiree benefit plans. Trust Fund assets must not revert to the County unless the

County terminates all retiree benefit plans. Some funds may partially revert to the County if at least one benefit plan is terminated under Section 33-166.

33-160 Board of Trustees.

[(a)] Management. [An OPEB Board of Trustees must manage the Trust Fund.]

The Board of Investment Trustees established under Section 33-59 is responsible for managing the Trust Fund. The [[OPEB]] Board must hold legal title to all assets of the Trust Fund, but may transfer some incidents of ownership to the [[OPEB]] Board's agents as provided in this Article. The powers and duties of the Board under this Article are not effective until the Board members have accepted the Trust Fund in writing. Within 10 days after the Council confirms a Board member, the member must certify in writing to the Chief Administrative Officer that the member accepts the Trust Fund and will administer its affairs with care, skill, prudence, and diligence.

[(b)] Membership.

(1) The OPEB Board has 3 members.

(2) The County Executive must appoint 3 voting, ex officio members of the OPEB Board, subject to County Council confirmation. Each member must serve indefinitely while holding the respective office.

These members should be:

(A) the Director of Finance;

(B) the Director of Human Resources; and

(C) the County Council Staff Director.

(c) *Temporary Vacancy.* If there is a temporary vacancy on the OPEB Board because of an unfilled position or an extended absence of an OPEB Board member, the County Executive may appoint, subject to Council

confirmation, a temporary OPEB Board member to serve until the position is filled or the absent member returns to service.

(d) Compensation. Each Board member serves on the OPEB Board without additional compensation from the County and without compensation from any other source. The OPEB Board must reimburse any Board member for any expense approved by the OPEB Board. An OPEB Board member must not receive reimbursement for any expense from any other source.

(e) Acceptance of Trust. Within 10 days after the Council confirms an OPEB Board member, the member must certify in writing to the Chief Administrative Officer that the member accepts the Trust and will administer its affairs with care, skill, prudence, and diligence.

(f) Written policies. The OPEB Board must establish written policies to administer and invest funds under this Article and transact the Trust's business.

(g) Officers. The OPEB Board must select a chair, vice chair, and secretary from its members.

(1) The chair must preside at Board meetings and may take administrative action, including executing an instrument, on behalf of the Board. A person may rely in good faith on an act of the chair as legally valid.

(2) The vice chair must perform the duties and exercise the powers of the chair when:

(A) the chair is unavailable to perform those duties; or

(B) the OPEB Board determines that the chair is otherwise unable to perform those duties.

(3) The secretary must record the proceedings and actions of the OPEB Board and may certify a document or action of the OPEB Board. A

107 person may rely in good faith on the secretary's certification as proof
 108 of a document or action.

109 (h) Meetings and actions.

110 (1) The OPEB Board must meet at least once during each calendar
 111 quarter. The chair, or 2 members of the OPEB Board, may call a
 112 meeting in the manner and at times and places provided under the
 113 Board's policies. The OPEB Board is a public body under the State
 114 Open Meetings Act.

115 (2) Each OPEB Board member has one vote. Two OPEB Board members
 116 constitute a quorum. Two OPEB Board members must agree for the
 117 OPEB Board to take any action.

118 (3) The OPEB Board may act without a meeting. All Board members
 119 must concur in writing for the Board to approve any action without a
 120 meeting.

121 (4) The OPEB Board may adopt operating procedures consistent with this
 122 Section and other applicable law.

123 (5) The OPEB Board may authorize a Board member to execute
 124 instruments on behalf of the Board. The authority must be in writing
 125 and specifically describe each instrument and how the member must
 126 execute the instrument.

127 (i) Records.

128 (1) The OPEB Board must keep investment accounts and records,
 129 including separate accounts for participating agencies, necessary to
 130 calculate the Trust Fund's value.

131 (2) The Board may designate a person to maintain those records.

132 (3) All Trust Fund accounts and records are subject to State laws on
 133 public records.]]

33-161: Contributions and Payments.

- (a) County Contributions. The County may contribute to the Trust Fund those amounts that the Council appropriates. The County is not required to make any contribution to the Trust Fund unless a written contract with one or more beneficiaries so requires.
- (b) Acceptance of Contributions. The [[IOPEB]] Board must accept all contributions deposited in the Trust Fund and held by the custodian as Trust Fund property. The [[IOPEB]] Board is not responsible for calculating or collecting any contribution, but is only responsible for contributions deposited to the Trust Fund and amounts held in the Trust Fund.
- (c) Payments. Payments may be made from the Trust Fund in those amounts directed by the Chief Administrative Officer only to pay for all or part of the benefits provided by any County retiree benefit plan, administrative expenses relating to a retiree benefit plan and expenses of the Trust Fund. The [[IOPEB]] Board is not liable for any payment directed by the Chief Administrative Officer and is not required to confirm compliance with any retiree benefit plan.
- (d) Expenses. The [[IOPEB]] Board must be reimbursed for expenses solely incurred in the administration of the Trust Fund and must pay from the Trust Fund expenses reasonably incurred by the Chief Administrative Officer to administer any County retiree benefit plan to the extent that those expenses have not been paid by the County. The [[IOPEB]] Board may pay expenses incurred under Section 33-162(h)(11) without direction of the Chief Administrative Officer.

33-162: Trust Fund Management.

- 159 (a) General. The [[OPEB]] Board has the exclusive authority to manage the
 160 Trust Fund's assets. All powers and duties required to manage the Trust
 161 Fund are vested in the [[OPEB]] Board by this Article.
- 162 (b) Procurement. Chapter 11B does not apply to the procurement of goods and
 163 services by the [[OPEB]] Board for the Trust Fund.
- 164 (c) Transfer agents.
- 165 (1) The [[OPEB]] Board may register any assets in its own name or in the
 166 name of a nominee. The [[OPEB]] Board or its agent must keep
 167 records that show that the investments are part of the Trust Fund.
- 168 (2) The [[OPEB]] Board may form a partnership under State law to hold
 169 or transfer assets as the Board's nominee.
- 170 (3) The [[OPEB]] Board may designate in writing a trustee to hold or
 171 transfer assets as the Board's nominee.
- 172 (4) The [[OPEB]] Board must provide that any trustee or partnership that
 173 the Board designates must act only as agent of the Board. The Board
 174 may set other conditions that the Board finds prudent.
- 175 (5) Any trustee or partnership that the [[OPEB]] Board designates may
 176 retain the services of a bank or other financial institution to conduct
 177 business.
- 178 (6) The [[OPEB]] Board must maintain the indicia of ownership of the
 179 Trust Fund's assets within the jurisdiction of the United States federal
 180 courts, except as authorized in regulations that the Executive adopts
 181 under method (2). Those regulations must be substantially equivalent
 182 to federal regulations under the Employee Retirement Income
 183 Security Act (ERISA) regarding indicia of ownership of plan assets.
- 184 (d) Authorized investments.

- (1) The [[OPEB]] Board may invest or permit an investment manager to invest the assets of the Trust Fund in any investment it considers prudent within the Board's policies, except as otherwise prohibited in this Section. The Board must use an investment manager except when making an investment in any type of pooled investment vehicle, including any combined, common, or commingled trust fund, retirement or annuity contract, mutual fund, investment company, association or business trust. The Board also may authorize the Board [[of Trustees]] staff to make investments in pooled investment vehicles and transition assets from one investment manager to another investment manager.
- (2) The [[OPEB]] Board or any investment manager must not invest in real property, including securities based on ownership or other interests in real property, unless the investment is a pooled investment in which the Board has no power to manage the real property. A pooled investment must not invest more than 10 percent of its assets in real property located in the County. This 10 percent limit applies to the market value of the total assets on the preceding June 30. If the market value of investments in real property in the County exceeds the 10-percent limit as a result of market forces, the Board or the investment manager need not sell an existing equity investment. The Board may obtain valuations and take appropriate steps to comply with this 10-percent limit.
- (3) If an investment through any combined, common, or commingled trust fund exists, the declaration of trust of that fund is a part of the Trust Fund.

(4) The [[OPEB]] Board and any investment manager must not invest any Trust Fund asset in any bond, note, or debt instrument issued by:

(A) the County;

(B) a political subdivision in the County; or

(C) an agency supported by bond issues underwritten by the County.

However, the Board or any investment manager may invest plan assets in bonds, notes, and debt instruments of any of these entities if the investment is held indirectly through a mutual fund or other pooled investment vehicle and complies with any limit in the Internal Revenue Code.

(e) [[Investment Policy]] Written Policies. The [[OPEB]] Board must establish an investment policy and guidelines appropriate for the Trust Fund, and may review and change the policy and guidelines as necessary. The [[OPEB]] Board must establish such other written policies to administer and invest funds under this Article and transact the Trust's business.

(f) Investment Manager.

(1) Except as provided in subsection (d)(1), the [[OPEB]] Board must appoint one or more investment managers to invest all or part of the OPEB trust fund assets consistent with applicable guidelines. If the Board has properly appointed an investment manager, the Board is not liable for any act or omission of the manager and is not otherwise responsible for the investment of funds allocated to the investment manager.

(2) Any investment management contract must provide that when the investment manager is making individual investment selections, the investment manager must make individual investment selections

subject to applicable Board policies. In any contract, the Board may limit the investment of a specified portion of the Trust Fund to a certain type of property. In any contract, the Board may delegate to the investment manager any power or discretion conferred on the Board under this Article and may assign to the investment manager custody and control of certain Trust Fund assets. The fees charged by any manager are expenses of the Trust Fund.

(3) The [[OPEB]] Board must monitor the performance of each investment manager and may terminate any appointment. Monitoring may include any tests or analyses that the Board finds prudent in the circumstances to assure the Trust Fund's stability and growth.

(g) *Available Cash.* The [[OPEB]] Board may keep cash available in an amount it finds prudent to pay benefits and expenses. The Board may keep cash on deposit in one or more banks or trust companies organized under the laws of any state or the United States, but the amount on deposit in any bank or trust company must not exceed 25% of the paid-in capital and surplus of that bank or trust company.

(h) *[[OPEB]] Board Powers.* Except as otherwise provided in this Article, the [[OPEB]] Board may:

- (1) buy or subscribe for any investment with any cash, at a premium or discount, and retain the investment;
- (2) sell, exchange, convey, transfer, lease for any period, pledge, mortgage, grant options, contract with respect to, or otherwise encumber or dispose, at public or private sale, for cash or credit or both, any part of the Trust Fund;
- (3) subject to Section 33-165(h)(2), sue, defend, compromise, arbitrate, compound, and settle any debt, obligation, claim, suit, or legal

proceeding involving the Trust Fund, and reduce the rate of interest on, extend or otherwise modify, foreclose upon default, or otherwise enforce any debt, obligation, or claim;

(4) retain a part of the Trust Fund assets uninvested in preparation for distributions;

(5) exercise any option on any investment for conversion into another investment, exercise any right to subscribe for additional investments, and make all necessary payments;

(6) join in, consent to, dissent from, oppose, or deposit in connection with the reorganization, recapitalization, consolidation, sale, merger, foreclosure, or readjustment of the finances of any corporation or property in which the assets of the Trust Fund are invested, or the sale, mortgage, pledge or lease of that property or the property of any such corporation on any terms that the Board finds prudent; exercise any options, make any agreements or subscriptions, pay any expenses, assessments, or subscriptions, and take any other action in connection with these transactions that the [[OPEB]] Board finds prudent; and accept and hold any investment issued in or as a result of any such proceeding;

(7) vote, in person or by proxy, at any election of any corporation in whose stock the assets of the Trust Fund are invested, and exercise, personally or by any power of attorney, any right appurtenant to any investment held in the Trust Fund, and give general or specific proxies or powers of attorney with or without power of substitution;

(8) sell at a public or private sale, enter into an option to sell, mortgage, lease, partition, or exchange any real property at prices and for terms that the Board finds prudent. The Board may execute and deliver

deeds of conveyance and all assignments, transfers, and other legal instruments to pass ownership to a buyer, free and discharged of all liens;

- (9) renew or extend any mortgage, on any terms that the Board finds prudent, and increase or reduce the rate of interest on any mortgage or modify the terms of any mortgage or of any guarantee as the Board finds prudent to protect the Trust Fund or preserve the value of the investment; waive any default or enforce any default in a manner that the Board finds prudent; exercise and enforce any right of foreclosure, bid on property in foreclosure, take a deed in lieu of foreclosure with or without paying a consideration, and release the obligation on the bond secured by the mortgage; and exercise and enforce in any legal action any right or remedy regarding any mortgage or guarantee;
- (10) form a corporation or partnership under the laws of any jurisdiction, or acquire an interest in or otherwise make use of any corporation or partnership already formed to invest in and hold title to any property;
- (11) incur and pay expenses for agents, financial advisors, actuaries, accountants, and legal counsel, if those expenses are incurred solely to perform the Board's duties under the Trust;
- (12) borrow, raise or lend money for the purpose of the Trust Fund, in any amounts and on any terms and conditions as the Board in its discretion finds prudent; for any money borrowed, issue a promissory note and secure the repayment of this note by pledging or mortgaging all or part of the Trust Fund;
- (13) hold, buy, transfer, surrender, and exercise all other incidents of ownership of any insurance or annuity contract; and

(14) do any act that the Board finds necessary and exercise the powers of this Article to manage the Trust Fund. The Board may exercise all powers to manage the assets that an individual could exercise to manage property owned by that individual.

(i) *Prohibited Transactions.* The [[OPEB]] Board must not engage in any transaction between the Trust and the County or any entity controlled by the County or a participating agency in which the Board:

- (1) lends any part of its income or corpus without receiving adequate security and a reasonable rate of interest;
- (2) pays any compensation more than a reasonable allowance for salaries or other compensation or services actually rendered;
- (3) makes any service available on a preferential basis;
- (4) makes any substantial purchase of securities or other property for more than adequate consideration;
- (5) sells any substantial part of its securities or other property for less than adequate consideration; or
- (6) engages in any transaction which results in a substantial diversion of its income or corpus.

33-163: Board Duties and Responsibilities.

(a) *Duty of Care.* The [[OPEB]] Board must discharge its duties with respect to the Trust Fund:

- (1) only in the interest of the participants in retiree benefit plans and eligible dependents;
- (2) only to provide benefits to participants in retiree benefits plans and to defray reasonable expenses of administering and operating the Trust Fund;

(3) with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(4) by diversifying the investments of the Trust Fund to minimize the risk of large losses, unless it is clearly not prudent to diversify under the circumstances; and

(5) in accordance with the laws, policies, and instruments governing the Trust.

(b) Records. The [[OPEB]] Board must maintain accurate and detailed accounts of each investment, receipt, disbursement, and other transaction, including any specific record required by law, separate accounting for participating agencies and any additional record it finds necessary. All accounts, books and records are subject to applicable State laws governing maintenance and disclosure of public records.

(c) Annual Accounting. The Trust Fund fiscal year is the same as the County fiscal year. On or before January 1 of each year, the [[OPEB]] Board must file with the Chief Administrative Officer a written account, listing each investment, receipt, disbursement, and other transaction during the preceding fiscal year or during the period from the close of the last preceding fiscal year to any interim date that the Board selects. The account must include a list of the Trust Fund assets and the current fair market value of each asset at the end of that period. The account must include the separate accounts of the participating agencies. If a current fair market value is not available for or does not apply to a particular investment, the Board must assign a value to that investment. The Board must apply the investment valuation method on

a consistent basis. If the Board changes the investment valuation method, the Board must notify the Executive and Council of the change.

(d) Ethics. The [[OPEB]] Board is subject to Chapter 19A. An OPEB Board member must not:

- (1) be a party to any transaction engaged in by the Board or an investment manager involving the assets of the Trust Fund;
- (2) use the gains or profits of the Trust Fund for any purpose except to make investments or payments authorized by the Board;
- (3) deal with the assets of the Trust Fund for the member's own interest or account;
- (4) act in any transaction involving the Trust Fund on behalf of a party whose interests are adverse to the interests of the Trust Fund or the interests of participants or beneficiaries of the Trust Fund; or
- (5) become an endorser or surety, or in any manner an obligor, for money loaned to or borrowed from the Board.

33-164 Custodian.

(a) General. The Director of Finance is the custodian of the Trust Fund assets. The Director must give bond with a surety and for a period and in an amount as the [[OPEB]] Board determines. Each payment from the Trust Fund must be made by the Director, the Director's designee, or 2 persons designated by the Board acting jointly. The Board must file a copy of its resolution designating the 2 persons, with specimen signatures of those persons, with the Director to confirm their authority to make payments.

(b) Contracts. If the [[OPEB]] Board approves, the Director of Finance may make written contracts with banks, trust companies, insurance companies or investment companies authorized to do business in any state for the safe custody of investments, banking services, the payment of benefits and

expenses, and any other function necessary to manage and safeguard the assets of the Trust Fund.

- (c) Procurement. Chapter 11B does not apply to the procurement of goods and services for the Trust Fund by the Director of Finance.

33-165: Indemnification of [[OPEB]] Board Members.

- (a) General. The County must indemnify each member of the [[OPEB]] Board who is or may become a party to any legal action, including any administrative or investigative proceeding, because of service as a Board member, subject to the conditions in this Section.

- (b) Standards; payments.

- (1) The County must indemnify a Board member:

(A) with respect to civil matters, if the member acted in good faith and in a manner that the member reasonably believed to be in the best interest of the Trust Fund; and

(B) with respect to criminal matters, if the member had no reasonable cause to believe that the member's conduct was unlawful.

- (2) If the County indemnifies a Board member under this Section, the County must indemnify the member for any expense when the member incurs the expense, including:

(A) reasonable attorney fees;

(B) judgments;

(C) damages;

(D) fines; and

(E) settlements.

- (c) Effect of Terminating any legal action. The termination of any legal action does not, by itself, create a presumption that a Board member did not act in

good faith and in a manner reasonably believed to be in the best interest of the Trust Fund. The termination of a criminal proceeding does not, by itself, create a presumption that a Board member had reasonable cause to believe that any conduct was unlawful.

(d) Exceptions. The County must not indemnify a Board member if:

(1) the member is found by a court or other tribunal to be liable for gross negligence or willful and wanton misconduct in the performance of a duty to the Trust Fund; or

(2) liability arises from an action that occurred before the date when all Board members accepted the Trust Fund in writing.

(e) Recovery of Payments. If the County Attorney finds that any indemnification payment was made that was outside the scope of the indemnification allowed under this Section, the County Attorney must take appropriate action on behalf of the County to recover that payment.

(f) Insurance Provided. The County must provide insurance for each Board member against any liability asserted against or incurred by the member with respect to service on the Board. Assets of the Trust Fund must not be used to pay any premium. The County may self-insure, wholly or partly, for this purpose. If the County does not provide adequate insurance coverage or indemnification under this Section, a Board member need not pay any amount attributable to liability incurred by serving on the Board and the County must pay any amount due.

(g) Defenses. The County may assert the defense of governmental immunity, and any other available defense, in any legal action arising out of the actions of the Board.

(h) County Attorney.

(1) The County Attorney must determine whether a Board member is eligible for indemnification with respect to any matter and the reasonableness of any fee, expense, or settlement.

(2) Unless the County Attorney approves the settlement, a Board member cannot settle a claim against another Board member using:

(A) County funds;

(B) funds of a Participating agency;

(C) funds provided by a self-insurance program of the County; or

(D) funds provided under a policy the County has with an insurance company.

33-166: Amendment and Termination.

(a) Termination. Except on termination, no part of the Trust Fund may revert to the County or a participating agency or be used for any purpose other than the exclusive benefit of participants of a retiree benefit plan. If all County retiree benefit plans are terminated and all benefit claims and expenses are paid, any remaining assets in the Trust Fund relating to contributions made by the County and participating agencies must revert to the County and the participating agencies. The Trust Fund must terminate in its entirety on the earlier of the termination of all County retiree benefit plans or the depletion of the Trust Fund. Funds may partially revert to the County or participating agencies if one or more retiree benefit plans is terminated. When a County retiree benefit plan is terminated, the assets in the Trust Fund attributable to that plan after expenses and benefits have been paid must revert to the County and the participating agencies as provided in the adoption agreement.

(b) Amendments. Any provision of this Article may be amended at any time. No amendment may:

(1) authorize any part of the Trust Fund to be used for any purpose other than the exclusive benefit of participants of retiree benefit plans and eligible dependents; or

(2) cause or allow any part of the Trust Fund to revert to or become the property of the County, except as provided in Sections 33-166(a) or 33-167.

(c) Compliance with Applicable Law. The Council may amend the Trust at any time, retroactively if required, if found necessary to conform to any requirement of State law, the Internal Revenue Code or any similar act or any amendments or corresponding regulations or applicable guidance.

33-167: Participating Agencies.

(a) Participating Agencies. An agency permitted to participate in County benefit plans under Section 20-37(b) which chooses to participate in a retiree benefit plan must participate in the Trust Fund. However, a participating agency must be eligible to participate under Internal Revenue Code Section 115. Each participating agency in the Trust Fund must execute an adoption agreement in a form satisfactory to the Chief Administrative Officer and must submit any information the Chief Administrative Officer requires. Except for any obligation to refund assets under subsection (b), legal liability must not accrue to the County by including any participating agency in the Trust Fund. Each participating agency must be fully responsible for its pro rata cost of coverage, including any required annual contribution to the County and its share of administrative expenses.

(b) Termination of Participating Agency. If a participating agency decides to terminate participation in a retiree benefit plan and the Trust Fund, the agency must notify the Chief Administrative Officer in writing. The Chief Administrative Officer and the participating agency must agree on a date to

end the agency's participation. Any transfer of assets from the Trust Fund
resulting from the termination of an agency's participation must comply
with the Internal Revenue Code and the adoption agreement between the
County and the participating agency.

33-168: Protection from Creditors.

Any asset held by the Trust Fund is not subject to any creditor of the County and is
exempt from execution, attachment, prior assignment, or any other judicial relief or order
for the benefit of any creditor or third person.

Sec. 2. Expedited Effective Date.

The Council declares that this legislation is necessary for the immediate protection
of the public interest. This Act takes effect on the date when it becomes law.

Approved:

[[Marilyn J. Praisner, President, County Council]]

Date

Michael J. Knapp, President, County Council

Approved:

Isiah Leggett, County Executive

Date

This is a correct copy of Council action.

Linda M. Lauer, Clerk of the Council

Date

APPROVED AS TO FORM AND LEGALITY.

OFFICE OF THE COUNTY ATTORNEY

BY Jeff A. Mankatz

DATE 3/28/08