

**MEMORANDUM**

TO: Planning, Housing and Economic Development Committee

FROM:  Michael Faden, Senior Legislative Attorney<sup>1</sup>

SUBJECT: **Worksession:** Bill 33-11, Urban Renewal and Community Development –  
Community Benefits Agreements – Large Retail Stores

Bill 33-11, Urban Renewal and Community Development – Community Benefits Agreements – Large Retail Stores, sponsored by Council President Ervin and Councilmembers Navarro, Rice, Riemer, and Elrich, was introduced on October 11, 2011. A public hearing was held on November 1 at which 39 speakers testified. See selected testimony, ©xx-xx.

**Summary of Bill**

Bill 33-11 would require the owner or operator of each large retail store (“big box” store, as defined in the Bill) located in the County to enter into a community benefits agreement (CBA) with 3 or more recognized civic organizations or demonstrate to the County Executive or the Executive’s designee that it has made a good faith effort to negotiate such an agreement.

**Misconceptions** From various testimony at the hearing and other comments, it appears that many advocates (both for and against this Bill) are not clear on what it does and does not do, and sometimes (in our view) have exaggerated its benefits and detriments. So that the discussion of issues below and in Committee is based on what the Bill actually does, rather than what someone hopes or is afraid it does, we offer the following specific points.

- This Bill would not require any owner or operator of a proposed store to sign any agreement. It only would require them to negotiate in good faith with a small number of civic organizations. (We discuss below what we understand “good faith” to mean and how it can be shown.)
- This Bill would not supersede or interfere with the County’s current land use process. Its requirements operate separately from that process (unlike in some other jurisdictions, as described in the law review article noted in footnote 2). Just as an applicant for a zoning change or subdivision plan now can negotiate an out-of-court settlement with opponents of the project, so could the applicant negotiate a CBA.

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<sup>1</sup>The economic analysis and land use sections of this memo were written respectively by Jacob Sesker, Council Senior Legislative Analyst, and Jeff Zyontz, Council Legislative Attorney. They are not responsible for the rest of this memo.

This negotiation can take place before, during, or after the current land use process is completed (although if it is done after, it could require some modification of an approved subdivision or site plan).

- This Bill would not require a CBA to include any specific provision. It contains a broad list of provisions that a CBA *could* include. That was done so as not to limit the scope of negotiations by the parties, who would decide what issues to bring up or not bring up.
- This Bill would not by itself block any store from opening. No civic organization or individual has a “veto power”. This process is not “zoning by plebiscite”. Any planned store can go forward (subject to otherwise applicable land use requirements) unless an official of County government finds that the developer or operator of the store did not negotiate in good faith with local civic organizations.

## **Background**

### ***Community Benefits Agreements/Economic Analysis***

#### **What is the history of community benefits agreements (CBA’s)?**

The community benefits agreement that is often cited as the first significant community benefits agreement was signed in connection with the development of the Staples Center in Los Angeles in 2001. The project included a significant expansion of the convention center, a 7,000 square foot theater, retail uses, a housing component, and a 45-story hotel. The project was supported by \$150 million in public subsidies and the by the use of eminent domain. In that instance, the developer agreed to fund an assessment of the community’s park needs, make reasonable efforts to see that 70% of the new jobs pay living wages, adopt certain hiring preferences, construct workforce housing, provide interest-free loans to non-profit housing developers, provide funding for a residential permit parking program, and other benefits.

#### **What community benefits are typically bargained for in negotiating a CBA?**

In a typical community benefits agreement, the developer agrees to provide certain benefits to the community (e.g. higher wages, affordable housing) in consideration for community support or acquiescence during the development approval process. The benefits that are the subject of the agreement vary depending on the needs and desires of the local community, and the extent to which those benefits are obtainable through other existing processes. A 2010 law review article<sup>2</sup> described the benefits as follows:

*The benefits developers offer through a CBA vary with the particular development and community. Common promises include commitments to use local residents or businesses for the labor and material needed for the project; assurances that a certain number or*

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<sup>2</sup>*Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exaction Theme?* Been, Vicki. 77 U. Chi. L. R 7, Winter 2010 [http://lawreview.uchicago.edu/issues/backissues/v77/77\\_1/77-1-Vicki%20Been-CommunityBenefitsAgreements.pdf](http://lawreview.uchicago.edu/issues/backissues/v77/77_1/77-1-Vicki%20Been-CommunityBenefitsAgreements.pdf): This article contains a very helpful basic summary and history of CBA’s around the country, as well as several relevant policy recommendations.

*percentage of housing units will be affordable to low- or moderate income workers; agreements to pay living wages (or other benefits) to workers employed on the project; stipulations that the development be designed and constructed in an environmentally friendly fashion; and promises to correct existing environmental problems. In return coalitions of community groups promise the cooperation or forbearance necessary to allow the developer to get through the government approval processes as expeditiously as possible.*

### **What requirements would Bill 33-11 impose?**

Bill 33-11 addresses effects of big box retail development by requiring certain large retail stores to enter into good faith negotiations with recognized civic organizations in an effort to achieve a community benefits agreement that addresses any of the following subjects:

- 1) Hiring practices and training programs for County residents, including potential preferences or incentives to hire residents within a certain distance of the store;
- 2) Design, operating hours, deliveries, security, traffic mitigation, environmental impacts, use of open spaces, noise and lighting, and other operating effects;
- 3) Assistance to community organizations and programs;
- 4) Affordable and workforce housing; and
- 5) Any other issue that is relevant to the operation of a large retail store or the community near that store.

### **What economic impacts of big box retail might be remedied by a CBA negotiated under Bill 33-11?**

Bill 33-11 is not limited to developments receiving public support.<sup>3</sup> Instead, Bill 33-11 would apply to all retailer stores that would exceed a specified size. Public sentiment in favor of regulating “big-box” retail is typically tied to both the land use impacts and the actual or perceived economic harms caused by large footprint, chain retailers. Discussions of the economic harms tend to focus on two issues: first, local versus non-local businesses, and second, impacts on employment and wages.

In discussing the regulation of big-box retail, it is not uncommon to touch on the perceived benefits of locally-owned retail. For example:

- A greater portion of the money spent at local retail establishments will remain in the local economy. This is both because profits do not leave the community and because more of the inputs are local.<sup>4</sup>

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<sup>3</sup>Id at 16. “Communities complain that they have even less input into the land use approval process when their local government’s normal processes are preempted because the project involves the county, state, or federal government or special authorities. In those situations, the processes for approval often do not provide the local community an opportunity to participate that the community finds satisfying.”

<sup>4</sup>See, e.g., “Thinking Outside the Box,” Civic Economics, 2009. This study compared one 4-block stretch of a traditional business district in New Orleans with one Super Target in New Orleans, both of which had 179,000 square feet of retail space. The traditional business district consisted of about 100 individual businesses, and generated \$105 million in sales. Of that amount \$34 million remained in the local economy. The Super Target, in contrast, generated only \$50 million in annual sales, only \$8 million of which remained in the local economy. [http://staylocal.org/pdf/info/ThinkingOutsidetheBox\\_1.pdf](http://staylocal.org/pdf/info/ThinkingOutsidetheBox_1.pdf)

- A shift in spending from national chain retailers to local retailers results in increases in employment and wages.<sup>5</sup>

As was the case in the Staples Center CBA already mentioned, wage levels and local workforce development are issues that often arise in CBAs. Big box retail establishments are rarely unionized, and are often associated with low pay and poor employment/post-employment benefits. Studies have tended to focus on specific retailers, such as Wal-Mart, rather than focusing on retail establishments of a particular size. Examples of these arguments include:

- Low wage Wal-Mart employees increase strain on social safety net programs.<sup>6</sup>
- New Wal-Mart employees lead to reductions in overall retail employment and wages.<sup>7</sup>

While the studies already cited paint a very negative picture of the economic impact of big box retail, not all studies reached the same conclusions. For example, the Federal Reserve Bank of Minneapolis concluded in 2008 that the presence of a Wal-Mart had little overall effect on a local economy.<sup>8</sup> Among the conclusions of that study were:

- Firm growth, employment and total earnings were somewhat stronger in counties with a Wal-Mart. In some cases this was even true in the retail sector. While retail earnings *per job* fell in virtually every county studied, they actually fell by less in counties that had experienced the introduction of a Wal-Mart.
- Poverty rates improved (declined) in most counties during the period studied, but the rates improved by less (declined less) in Wal-Mart counties. By other measures, Wal-Mart had no noticeable effect.
- Wal-Mart's presence (or lack thereof) has little or no predictive power regarding the economic success or failure of a county.

### ***Land Use implications and alternatives***

#### **How does Bill 33-11 relate to current County zoning?**

Under Article 28 §8-101(b)(2) of the Maryland Code, County zoning laws may regulate:

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<sup>5</sup>See, e.g., "San Francisco Retail Diversity Study," Civic Economics, 2007. That study concluded that every \$1 million spent at local bookstores created \$321,000 in additional economic activity in the area, including \$119,000 in local wages. In contrast, \$1 million spent at chain bookstores generated \$188,000 in local economic activity, including only \$71,000 in local wages. Similarly, \$1 million in sales by independent local toy stores create 2.22 local jobs, while the same \$1 million in sales by chain toy stores create just 1.31 jobs. [http://www.civiceconomics.com/SF/SFRDS\\_May07.pdf](http://www.civiceconomics.com/SF/SFRDS_May07.pdf)

<sup>6</sup>"Hidden Cost of Wal-Mart Jobs: Use of Safety Net Programs by Wal-Mart Workers in California," Dube and Jacobs, 2004. One conclusion of the study was that if other large retailers adopted Wal-Mart's wage and benefits standards the annual cost to California taxpayers would be an additional \$410 million. <http://laborcenter.berkeley.edu/retail/walmart.pdf>

<sup>7</sup>"The Effect of Wal-Mart on Local Labor Markets," Neumark, 2007. The study concluded that each new Wal-Mart employee replaced 1.4 existing retail employees, and that the opening of a new retail store led to a reduction of 1.3% in wages earned by retail workers countywide. <http://www.nber.org/papers/w11782>

<sup>8</sup>"The Wal-Mart effect: Poison or antidote for local communities," Fitzgerald and Wirtz. *Fedgazette*, January 2008. [http://www.minneapolisfed.org/publications\\_papers/pub\\_display.cfm?id=3033](http://www.minneapolisfed.org/publications_papers/pub_display.cfm?id=3033)

- (1) the location, height, bulk, and size of buildings, other structures, and units therein, building lines, minimum frontages, depths and areas of lots, and percentages of lots which may be occupied;
- (2) the size of lots, yards, courts, and other open spaces;
- (3) the erection of temporary stands and structures;
- (4) the density and distribution of population;
- (5) the location and uses of buildings and structures and units therein for trade, industry, residence, recreation, agriculture, public activities, and other purposes; and
- (6) the uses of land, including surface, subsurface, and air rights therein, for building, trade, industry, residence, recreation, agriculture, forestry, or other purposes.

This list identifies zoning powers. It is by no means a list of all the County's powers to regulate in the interest of protecting the health, safety, and general welfare of County residents, as the General Assembly acknowledged in Article 28 §7-109(e)<sup>9</sup>.

Bill 33-11 is appropriately outside of zoning because some subjects within the scope of the community benefits agreement, as well as its approval process, are outside the County's zoning powers. Building design, operating hours, use of open spaces, lighting, affordable housing, and landscaped buffers can be the subject of zoning; however, zoning powers can only be effective when the Council adopts specific zoning regulations. Hiring practices, training programs, and assistance to community programs are not within the scope of the County's zoning powers. Fear of competition, an issue raised by some speakers in the public hearing, is not a problem that can be addressed by zoning.<sup>10</sup>

### **How do other local jurisdictions regulate big box retail stores?**

Several nearby jurisdictions regulate large retail establishments, commonly known as big box stores, in a variety of ways that are different from other commercial uses. The most

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<sup>9</sup>Article 28 §7-109(e)

Construction of Commission powers. -- The powers granted to the Commission and district councils pursuant to this section shall not be construed:

\* \* \*

- (2) To restrict the Commission and district councils from exercising any power granted to the Commission and district councils by other public general or public local law or otherwise;

<sup>10</sup>Article 28 §7-109 (c) acknowledges that zoning can have an anti competitive effect if the legislation has a legitimate public purpose:

*Effect on economic competition.* -- To achieve the public purposes of this regulatory scheme, the General Assembly recognizes that local government action will displace or limit economic competition by owners and users of property.

The Maryland Court of Appeals has found that the prevention of competition is not a legitimate public purpose of zoning. See *Lucky Stores, Inc. v. Board of Appeals*, 270 Md. 513 (1973); *Kreatchman v. Ramsburg*, 224 Md. 209 (1961); *Bryniarski v. Montgomery County Board of Appeals*, 247 Md. 137 (1967); *Aspen Hill Venture v. Montgomery County Council*, 265 Md. 303 (1972).

common regulation is to require the approval of a special exception. Big box stores are distinguished from other uses because they produce more vehicle trips, more truck trips, and more trips from further distances than other uses. Their large floor plates create uninviting places for pedestrians that form a barrier to extending the urban character of some communities. Communities regulate large retail stores on the basis of their gross floor areas or the footprint of their buildings, in addition to regulations that govern the density allowed in the zone.

The following table of regulations in nearby jurisdictions goes from the most restrictive to the least restrictive.

Anne Arundel County	Retail establishments in some zones are limited to 25,000 square feet (SF) of gross floor area (GFA); in other zones, the store's gross floor area is only limited by the maximum floor area ratio.
Alexandria	Any retail establishment with 20,000 SF or more GFA must be approved by special exception.
Arlington County	Any retail establishment with 50,000 SF or more of floor area on any 1 level, or that requires 200 or more parking spaces, must be approved by special exception.
Rockville	No retail establishment may be more than 65,000 SF of GFA on any level. No absolute limit on the size of a retail establishment.
Loudoun County	Any retail establishment with 75,000 SF or more GFA must be approved by special exception.
Fairfax	Any retail establishment with 80,000 SF or more GFA must be approved by special exception.
Prince George's County	Combination retail stores (department, grocery, and drug stores) with 125,000 SF or more GFA must be approved by special exception.
Howard County	No specific big box store restriction

The special exception process is designed to produce development that is compatible with neighboring property. The process can control hours of operation, setbacks, screening, use limits, pedestrian and bicycle circulation, the location of passenger vehicle access and truck docks, lighting, and noise. The special exception process allows neighbor and community input. An application can be denied when the attributes of a particular location make the non-inherent attributes of the use a detriment to surrounding properties.

### **How does this County now regulate big box stores?**

Unlike all nearby jurisdictions except Prince George's County, this County does not regulate all large retail establishments.<sup>11</sup> Currently, any combination retail establishment<sup>12</sup> larger

<sup>11</sup>This was a significant issue when the restrictions on combined retail establishments were adopted in 2004. The Planning, Housing, and Economic Development Committee recommended a broader definition of covered retail stores. The Council found, based on data from the Institute of Traffic Engineers, that combination retail stores have increased traffic impacts to neighboring communities and should be regulated differently than other retail uses. The Council also found that membership stores which sold bulk goods did not have the same impacts as other combination stores.

than 120,000 square feet of GFA is only allowed in the C-2 and C-3 zones with special exception approval. Any combination retail store that is 120,000 square feet or more is not allowed in any other zone.<sup>13</sup> Special exception approval is not required for any other big-box retailer that is not a combination retail store.

The County zoning law currently includes specific standards in the special exception process for combination retail stores.

**§59-G-2.15. Combination Retail Store.**

A special exception for a combination retail store may be granted, subject to the following requirements:

- (a) The building must be designed in a way that reduces the buildings massive scale and contributes to its visual interest. Long building walls should be broken-up with projections or recessions or other effective treatments that improve building design.
- (b) Parking areas must provide safe, convenient, and efficient access, and landscaped to define vehicular drives and pedestrian areas.
- (c) The site must have direct vehicular access to an existing arterial or major highway and the streets and roads adjoining the site must be adequate to accommodate the increased traffic generated. The applicant must provide a traffic impact study to demonstrate that acceptable peak hour levels of service will result after taking into account existing and programmed roads, and any improvements to be provided by the applicant.
- (d) The site must be screened from any abutting residentially zoned property by the natural terrain or by a solid wall or fence, not less than five feet in height, together with a three-foot wide planting strip on the outside of the wall or fence, planted in shrubs and evergreens three feet high at the time of the original planting.
- (e) Product displays, parked vehicles and other obstructions that reduce visibility at intersections or at entrances and exits to and from the site are not permitted.
- (f) Lighting must not reflect, or cause glare, on any property located in a residential zone.

In some commercial zones, large retail uses might require site plan approval. For example, in the C-4 zone, site plan approval is required above .25 floor area ratio; in CR, CRT, and CRN zones, site plan is required for the addition of 10,000 square feet of gross floor area.<sup>14</sup>

**What possible County zoning alternatives would be similar to the big box store zoning in surrounding jurisdictions?**

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<sup>12</sup>Defined as “a department or retail store that exceeds 120,000 square feet and that includes a pharmacy and a full line grocery store. A club or membership store that charges a membership or access fee and sells primarily bulk merchandise is not a combination retail store.”

<sup>13</sup>A store with less than 120,000 square feet of gross floor area does not meet the definition of a “combination retail store” and is allowed in other zones without a special exception if the specific retail use is allowed in the zone.

<sup>14</sup>The Planning Board generally prefers that design details be determined at site plan even if a special exception is required.

- 1) Reduce the minimum size of a combination retail store that requires a special exception, now 120,000 SF, to a size similar to surrounding jurisdictions.
- 2) Apply the requirements and restrictions currently imposed on combination retail stores to every large retail store.
- 3) Set an absolute limit on the footprint of a large store or combination store.
- 4) Set an absolute limit on the gross floor area of a combination store or large store in some zones.

Any zoning solution must be tailored to a description of the problem. Large retail stores generate car and truck traffic, require large parking areas, and impede pedestrian traffic. Large stores may not be compatible at every location where the use is permitted. Most jurisdictions have required special exception approval to resolve community concerns for stores much smaller than 120,000 square feet.

Under County Code §59-G-1.22 (b) a special exception may trigger a requirement for site plan approval if the Planning Board finds that it is necessary to “regulate the impact of the special exception on surrounding uses because of disparity in bulk or scale, the nature of the use, or other significant factors.” Site plan approval could be required instead of a special exception. This could resolve some design concerns. Design concerns may vary with the location of the site; for example, a site along a highway may not have compatibility concerns while a site within a half mile of a Metro station may be envisioned as a walkable area. Zoning requirements can vary with those concerns. This notion is consistent with the recent changes in the CR zones that allowed for limited uses that trigger site plan approval under certain circumstances.

### **Major issues for Committee discussion**

In this section we outline the major policy issues the Committee should consider before deciding whether to go forward with this Bill in concept. Various parties have proposed detailed amendments to this Bill; we reserved those for a later discussion at the Committee’s direction.

#### **1) Should the County require developers/operators of big box stores to attempt to negotiate CBA’s?**

This discussion might be started by asking: Do big box stores pose sufficiently different problems, or have sufficiently different impacts on the surrounding community, to warrant special legal requirements? The County zoning law has already answered this question yes, at least for a limited category of big box stores, as already noted. (This Bill would cover a broader set of stores, as discussed below.)

While further tightening the zoning standards for large stores (as we discussed earlier) is certainly an option, proponents of this Bill argue correctly that specific concerns that are important to them are outside the reach of County zoning (e.g. wages and hiring practices, needed affordable housing, certain aspects of store operations). Rather than directly regulate those issues, this Bill would open them up to negotiations between the store operator and civic organizations.

The question then becomes: Is that negotiation process likely to result in tangible or intangible benefits, and if so to whom? What benefits would this requirement bring to the County? To the community near a big box store? To the store's developer or operator?

One option, which we believe is used elsewhere, is to require the developer of a proposed large store to fund a community impact assessment, done by a consultant approved by County government or the Planning Board. That assessment would yield an independent view of the store's potential negative effects on the community, which the Planning Board and other decision-makers could use in the land use process and in considering any County financial or land assembly assistance.

**2) If negotiations are required, what kinds of stores should the requirement apply to?**

As introduced, this Bill would cover any store that is the primary occupant of a building with a footprint of at least 75,000 square feet. (Council staff drafted it that way to avoid quibbles about what is included or not included in a given store – for example, are the bank, pharmacy, tire center all separate stores?) It may be advisable to use gross floor area, as the zoning law does, rather than footprint, for clarity, to be more inclusive, and not to favor 2-story buildings.

As already mentioned, the zoning law's definition of combination retail stores is larger but narrower than this Bill's scope. The zoning law provision is limited to stores that include a pharmacy and a "full line grocery store", but does not cover membership stores that sell in bulk (e.g. Sam's Club, Costco, BJ's). This Bill simply covers all stores over a given size.

Representatives of Westfield and White Flint mall proposed amendments to exempt any store in a regional mall, arguing that those are governed by site plan requirements and do not present the same issues as free-standing stores. At the least, existing regional malls could be exempted because whatever impacts those developments will have on the community arguably have largely happened already (although residents near Westfield Wheaton mall might dispute that conclusion).

Beyond the regional malls, other stores that are well along in the development process could be exempted ("grandfathered"). For example, any store with a site plan already approved or a building permit already issued, while not necessarily vested under County land use law, would seem to be at a point where certainty is needed.

**3) Which civic organizations should be given seats at the table?**

This Bill broadly defines the organizations that are eligible to negotiate with the developer or operator of a big box store. This was drafted so as not to exclude any legitimate civic group in the vicinity of the proposed store. Eligible groups could include homeowners' associations, PTA's at local schools, neighborhood organizations (which may or may not be registered on the list the Planning Board keeps), and virtually any other group that is composed of residents and businesses located within a 5-mile radius of the proposed store as long as the

group is not controlled or funded by, or otherwise affiliated with, any large retail store (not limited to the proposed store). (Council staff concurs with the Kensington Heights Civic Association testimony on ©12 that this radius should be reduced to 2 miles.)

Critics argue that this definition is so overbroad that virtually any group could qualify, and the developer would not know who it had to deal with. Council staff agrees with the first conclusion, but not the second; the breadth of this definition allows the developer/operator to pick and choose among qualified organizations – which itself is good or bad, depending on one’s viewpoint.

In other jurisdictions community groups that have negotiated CBA’s have been criticized as unrepresentative, unaccountable, not free from conflicts of interest, or all of them.<sup>15</sup> As everyone knows, some civic or neighborhood organizations in this County meet often and effectively represent their members and geographic areas; others are organizations in name only. Beyond requiring that the group must have already existed for, say, a year before the store files for any necessary government approval (an amendment that Council staff recommends), we are not sure what further qualifications are guaranteed to achieve those goals.

We would not recommend that the law authorize anyone in County government to select which groups are eligible to negotiate. Among other reasons, that might involve the County to the degree that any obligation a developer agrees to could be considered an exaction that is subject to the Supreme Court’s nexus and proportionality tests.<sup>16</sup>

#### **4) Which topics should be subject to negotiation?**

The list of possible CBA topics on ©2, lines 9-18, as already noted, was drafted to be deliberately broad so as not to exclude any relevant issue. We do not interpret this to mean that any particular developer has to negotiate with any group on all these issues. Like any other negotiation, the parties first decide which are the issues to negotiate about. Here, as in the rest of the negotiation, the “good faith” standard would apply.

#### **5) How is “good faith effort to negotiate” defined and assessed? Who should decide whether someone negotiated in good faith?**

While this could be spelled out further in the law, we suggest that, as in other contexts, “good faith” would be measured by assessing the totality of the circumstances. The elements to analyze could include who negotiated with whom, how the developer/operator selected its negotiating partner, what offers and counteroffers were made, what process and timing was followed, and any other pertinent facts.

Under the Bill, the County Executive or his designee is assigned to review, in any dispute, whether an operator made a “good faith effort to negotiate”. While Council staff

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<sup>15</sup>See the Been University of Chicago law review article cited in footnote 2, at pp. 21-24.

<sup>16</sup>Council staff believes those tests would not apply under this Bill as introduced because the government does not require any particular exaction, or even that the developer must agree to any exaction. We realize this conclusion is not free from doubt.

understands that the Executive does not desire that authority, there is no other likely decision-maker and in our view an administrative, non-quasi-judicial process is preferable to having to resolve this issue in a court of law.

This packet contains:	<u>Circle #</u>
Bill 33-11	1
Legislative Request Report	5
Memo from Council President Ervin	6
Fiscal impact statement	8
Selected testimony:	
State Senator Roger Manno	9
City of Rockville	10
Kensington Heights Civic Association	12
CASA de Maryland	14
Interfaith Works	16
UFCW Local 400	17
Danila Sheveiko	18
Attorney Michael Kroopnick	20
Joseph Horgan	21
Montgomery County Chamber of Commerce	24
Greater Silver Spring Chamber of Commerce	26
Attorney Robert Brewer for White Flint Mall	32
Attorney Patricia Harris	36
Attorney William Kominers for Lee Development Group	38
Aspen Hill Civic Association	40
Westfield Wheaton and Montgomery	42
<i>New York Times</i> article re CBA's in land use process	43

Bill No. 33-11  
Concerning: Urban Renewal and  
Community Development --  
Community Benefits Agreements --  
Large Retail Stores  
Revised: 10-6-11 Draft No. 4  
Introduced: October 11, 2011  
Expires: April 11, 2013  
Enacted: \_\_\_\_\_  
Executive: \_\_\_\_\_  
Effective: \_\_\_\_\_  
Sunset Date: None  
Ch. \_\_\_\_\_, Laws of Mont. Co. \_\_\_\_\_

## COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

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By: Council President Ervin and Councilmembers Navarro, Rice, Riemer, and Elrich

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**AN ACT** to:

- (1) require certain retail businesses to enter into, or negotiate in good faith with certain organizations for, community benefits agreements;
- (2) prohibit the operators of certain retail stores from opening the stores to the public under certain circumstances;
- (3) direct certain departments of County government to furnish assistance to certain organizations regarding community benefits agreements;
- (4) prohibit County financial assistance to certain businesses under certain circumstances; and
- (5) generally provide for the formation and enforcement of community benefits agreements.

By adding

Montgomery County Code  
Chapter 56. Urban Renewal and Community Development  
Article VIII, Community Benefits Agreements

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

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

1           **Sec. 1. Chapter 56 is amended by adding Article VIII, Community**  
 2 **Benefits Agreements:**

3                           **Article VIII, Community Benefits Agreements.**

4 **56-35           Definitions.**

5           As used in this Article:

6           **Community benefits agreement** means a document that binds a party to take  
 7 one or more actions for the mutual benefit of the parties regarding any of the  
 8 following subjects:

- 9                   (1) hiring practices and training programs for County residents,  
 10 including potential preferences or incentives to hire residents  
 11 within a certain distance of the store;
- 12                   (2) design, operating hours, deliveries, security, traffic mitigation,  
 13 environmental impacts, use of open spaces, noise and lighting;  
 14 and other operating effects;
- 15                   (3) assistance to community organizations and programs;
- 16                   (4) affordable and workforce housing; and
- 17                   (5) any other issue that is relevant to the operation of a large retail  
 18 store or the community near that store.

19           **Large retail store** means any single site of a business that:

- 20                   (1) derives more than 50% of its revenue from the sale of goods  
 21 directly to the public; and
- 22                   (2) is the primary occupant of a building with a footprint of at least  
 23 75,000 square feet.

24           **Recognized civic organization** means an organization, including an  
 25 unincorporated association, that:

- 26                   (1) is composed of residents of and businesses located within 5 miles  
 27 of a large retail store, or other organizations that represent those

28 residents or businesses; and  
 29 (2) is not controlled or funded by, or otherwise affiliated with, the  
 30 operator or owner of any large retail store.

31 **56-36 Requirement.**

32 (a) The operator of each large retail store that is located in the County must,  
 33 before the store is open to the public, either:

34 (1) enter into a community benefits agreement with 3 or more  
 35 recognized civic organizations; or

36 (2) demonstrate to the County Executive, or the head of a County  
 37 Department designated by the Executive, that it has made a good  
 38 faith effort to negotiate a community benefits agreement with at  
 39 least 3 recognized civic organizations.

40 (b) If the Executive or the Executive's designee finds that the operator has  
 41 not made a good faith effort to negotiate a community benefits  
 42 agreement, the Executive or the Executive's designee must:

43 (1) so notify the County Council and the Directors of the  
 44 Departments of Housing and Community Affairs and Economic  
 45 Development; and

46 (2) order the operator of the store to delay opening the store to the  
 47 public until the operator has met either requirement of subsection  
 48 (a).

49 (c) The Directors of the Departments of Economic Development and  
 50 Housing and Community Affairs must provide, on request, advice or  
 51 support to any recognized civic organization that will facilitate the  
 52 negotiation and implementation of a community benefits agreement.

53 (d) Each community benefits agreement must be treated by all parties as a  
 54 binding contract, for which consideration has been rendered, that is

55 enforceable in any court with jurisdiction. Each agreement is binding  
 56 on any successor in interest of any party. Each agreement is a public  
 57 document which is disclosable under the state Public Information Act.

58 (e) Each community benefits agreement must have an initial term of at least  
 59 5 years, and must be renewable for an additional 5 years.

60 (f) Each community benefits agreement must require the operator of the  
 61 large retail store to report annually to all other parties and to the  
 62 Directors of Economic Development and Housing and Community  
 63 Affairs on the implementation of the agreement.

64 **56-37. Financial Assistance.**

65 If the operator of a large retail store has not entered into a community benefits  
 66 agreement with 3 or more recognized civic organizations; the Department of  
 67 Economic Development and any other Department of County government must not:

68 (a) offer the operator any financial assistance from the Economic  
 69 Development Fund or any other applicable program; or

70 (b) continue any financial assistance from the Fund or other program to that  
 71 operator, or any other entity involved in the operation of the store,  
 72 unless the County is contractually obligated to continue that assistance.

73 **Section. 2. Effective date.** This Act takes effect 91 days after it becomes law,  
 74 and applies to any large retail store, as defined in County Code Section 56-35, added  
 75 by Section 1 of this Act, which first opens to the public on or after that date.

76 *Approved:*

77

---

Valerie Ervin, President, County Council

Date

# LEGISLATIVE REQUEST REPORT

Bill 33-11

*Urban Renewal and Community Development --  
Community Benefits Agreements --  
Large Retail Stores*

- DESCRIPTION:** Require the operator of a large retail store to make a good faith effort to enter into a community benefits agreement with 3 or more recognized civic organizations.
- PROBLEM:** Large stores generally have large community impacts, some of which may be negative, on residents and businesses in the surrounding area.
- GOALS AND OBJECTIVES:** To require the operators of new large retail stores to make a good faith effort to negotiate community benefits agreements that will lessen negative impacts, and promote positive impacts, on the surrounding community.
- COORDINATION:** Department of Economic Development, Department of Housing and Community Affairs
- FISCAL IMPACT:** To be requested.
- ECONOMIC IMPACT:** To be requested.
- EVALUATION:** To be requested.
- EXPERIENCE ELSEWHERE:** To be researched.
- SOURCE OF INFORMATION:** Michael Faden, Senior Legislative Attorney, 240-777-7905
- APPLICATION WITHIN MUNICIPALITIES:** To be researched.
- PENALTIES:** Not applicable.



**MONTGOMERY COUNTY COUNCIL  
ROCKVILLE, MARYLAND**

**OFFICE OF THE COUNCIL PRESIDENT**

**Memorandum**

To: Councilmembers  
From: Council President Valerie Ervin *VEE*  
Date: September 30, 2011  
Subject: Community Benefits Legislation

I am requesting your cosponsorship of the attached bill that would require community benefits agreements for retailers locating in Montgomery County that have indoor retail space of 75,000 square feet or larger. This bill would also codify community benefits coalitions, which are broad-based community groups made up of individuals and entities that reflect the interests of the neighboring communities where "big box" retail stores are seeking to locate.

As you may know, a community benefits agreement is a legally binding contact between a community benefits coalition and a developer or a specific retail store that establishes the benefits that the community will receive from the development. Benefits can include provisions covering living wages, local hiring and training programs, affordable housing, environmental remediation, funds for community programs, open space designations, operating hours, security, deliveries, traffic mitigation and other items.

Community benefit agreements ensure that development is equitable and benefits the community, which eventually contributes to stronger local economies, livable neighborhoods and an increase in public participation in the planning process. Once an agreement is reached, community benefits coalitions often agree to support a project through public hearing attendance and testimony and releasing any administrative claims regarding a project.

Stella B. Werner Council Office Building 100 Maryland Avenue, Rockville, MD 20850

240-777-7960 or 240-777-7900 TTY 240-777-7914

[www.montgomerycountymd.gov](http://www.montgomerycountymd.gov)

Michael Siegel from Public and Environmental Finance Associates in Washington, DC recently completed an evaluation of “big box” retailers in Montgomery and Prince George’s County. He identifies 35 “big box” retail stores currently located in the County.

Siegel details how “big box” retailers, such as Walmart, attempt to be the preeminent retailers in specific areas, and how this impacts surrounding businesses and communities. “While this strategy may be directed primarily at other large competitors, any retailer in the area, large or small, offering similar goods can be forced away from offering similar merchandise, to downsize or close, and/or shift their focus.” In discussing the impact on mid-sized and local small businesses, Siegel notes, “Such stores have little ability to compete against far larger companies with the resources and ability to saturate a particular market area or distribution center territory.”

Community benefit agreements are not a new concept. The first community benefits agreements were negotiated in California in the early 2000s. Successful models have been developed in Seattle, Pittsburgh and San Francisco. Closer to home, a similar bill to the one I am proposing is currently before the Council of the District of Columbia.

In addition, I have explored the option of including community benefit agreements in the zoning ordinance as part of the CR Zone discussion and zoning ordinance rewrite. Legal staff has informed me that these types of agreements must be done through legislation and not through the zoning ordinance.

The goal of this bill is to create a broadly inclusive and focused process that involves key stakeholder groups, creates quality jobs and generates community benefits in areas where “big box” retailers are looking to locate. Please note, that requiring community benefits agreements would not prevent any company from locating in the County but would instead ensure that such “big box” operations are compatible with the needs of the surrounding neighborhoods.

I hope you will cosponsor this important piece of legislation. I welcome your suggestions on the attached draft bill, which is scheduled to be introduced on October 11.

Attachments:

Draft Bill

Selected Issues Affecting the Potential Impact of “Big Box” Retail Stores on Montgomery and Prince George’s County, Maryland, Michael Siegel, Public and Environmental Finance Associates, Washington DC.

c: Mike Faden, Council Senior Legislative Attorney  
Jeff Zyontz, Council Legislative Attorney



ROCKVILLE, MARYLAND

MEMORANDUM

October 28, 2011

TO: Valerie Ervin, President, County Council

FROM: Jennifer A. Hughes, Director, Office of Management and Budget  
Joseph F. Beach, Director, Department of Finance

SUBJECT: Bill 33-11, Urban Renewal and Community Development – Community Benefits Agreements – Large Retail Stores

As required by Section 2-81A of the County Code, I am informing you that transmittal of the fiscal and economic impact statements for the above referenced legislation will be delayed because more time is needed to coordinate with the affected departments, collect information, and complete our analysis. We will transmit the statements no later than November 15, 2011.

JAH:dff

c: Kathleen Boucher, Assistant Chief Administrative Officer  
Lisa Austin, Offices of the County Executive  
Joy Nurmi, Special Assistant to the County Executive  
Patrick Lacefield, Director, Public Information Office  
Joseph F. Beach, Director, Department of Finance  
Michael Coveyou, Department of Finance  
Amy Wilson, Office of Management and Budget  
John Cuff, Office of Management and Budget  
Alex Espinosa, Office of Management and Budget

ROGER MANNO  
19<sup>th</sup> Legislative District  
Montgomery County

Budget and Taxation Committee  
Health and Human Services Subcommittee

Joint Committee on Federal Relations  
Joint Committee on Health Care  
Delivery and Financing



THE SENATE OF MARYLAND  
ANNAPOLIS, MARYLAND 21401

Annapolis Office  
Miller Senate Office Building  
11 Bladen Street, Suite 3 West  
Annapolis, Maryland 21401  
410-841-3151 • 301-858-3151  
800-492-7122 Ext. 3151  
Fax 410-841-3740 • 301-858-3740  
Roger.Manno@senate.state.md.us

District Office  
2138 Merrifields Drive  
Silver Spring, Maryland 20906

November 1, 2011

Honorable Valerie Ervin, President  
Montgomery County Council  
100 Maryland Ave  
Rockville, MD 20850

Dear President Ervin:

I hope this letter finds you well.

I write today to express my strong support for Council Bill 33-11, Urban Renewal and Community Development - Community Benefits Agreements - Large Retail Stores (the "Big Box Community Empowerment Bill"), as it has recently come to my attention that plans may be in the works to authorize a large big-box retail establishment in or around the Aspen Hill Shopping Center in the 19<sup>th</sup> Legislative District, which I represent in the State Senate.

While I understand and appreciate the need for increased economic development in the Aspen Hill area, I strongly believe that community residents should have a greater voice in these critical development decisions, as would be established under this important legislation. In addition, I wish to express my strong opposition to any big-box establishment at this site that could in any way destabilize our fragile economic and workforce success in Aspen Hill.

As you are aware, the Aspen Hill Shopping Center serves as a greatly-needed and long-anticipated retail and community anchor in our County. It is a point of enormous community pride that the Aspen Hill Shopping Center has become home to dozens of small and medium shops, many whom are family and minority owned, and has benefited from the sizable capital, community and political investments that have led to their success.

The dozens of family and small business owners and workers who occupy the Aspen Hill Shopping Center have become members of our community family. I know these people personally -- they are hard working individuals with a deep sense of service and community that is irreplaceable in terms of the character and the soul of the new Aspen Hill.

As their Senator, I am immensely proud of their success, the diversification of establishments that have flourished, and their collaborative contribution to our economy. Their success, however, could be decimated by a large retail big-box establishment located in the immediate vicinity, given the level of competition, proximity and probability that it would destabilize our fragile yet vibrant local workforce and small business base.

While Council Bill 33-11 would not prevent such an establishment from locating in the vicinity of the new Aspen Hill, it would, however, create the necessary community checks and balances to ensure that the voices of our residents, workers, and small businesses are heard for years to come.

For these reasons, and many others, I thank you for introducing this important legislation, and I respectfully request a favorable report.

Very sincerely at your service,

A handwritten signature in black ink that reads "Roger Manno".

Roger Manno  
Maryland State Senator  
19<sup>th</sup> Legislative District



City of  
**Rockville**  
Get Into It

111 Maryland Avenue | Rockville, Maryland 20850-2364 | 240-314-5000  
www.rockvillemd.gov

Good evening. I am Councilmember John Britton, and I am here on behalf of the City of Rockville to submit the following comments on proposed Bill 33-11 for your consideration.

In general, Rockville supports the intent of proposed Bill 33-11. Large retail stores do have significant impacts on the surrounding communities, particularly in already developed neighborhoods, and we agree that additional regulation is warranted.

Rockville’s concern with inter-jurisdictional reviews of development is the tendency to draw an artificial limit at municipal boundaries -- a virtual Hadrian’s Wall separating the County from the municipalities. This is particularly true with respect to traffic studies.

With this in mind, we recommend that the definition of “recognized civic organization” in the bill expressly include any and all such organizations and unincorporated associations within a five mile radius of the large retail store, regardless of the jurisdiction within which they are located. Any large retail store located adjacent to or nearby Rockville’s boundary, or any municipality’s boundary, will have an impact on the

residents of the municipality, not just those outside its borders, and, at times, greater and more adverse impacts than those on residents outside the municipality's borders.

We also recommend that Bill 33-11 provide for an inclusion of a municipality's Planning Commission, where there is one, in the review and comment process on the community benefits agreement. This would ensure that the local communities' quality of life issues -- traffic, noise, public safety, storm water run-off and air quality -- are fully identified and addressed.

Rockville will continue to monitor the progress of Bill 33-11, and may wish to submit further comments when it comes before the PHED Committee.

Thank-you.



# Kensington Heights Civic Association

15

Your Neighborhood Association!

[www.KensingtonHeightsMD.org](http://www.KensingtonHeightsMD.org)

## Current Officers

### **President**

W. Erl Houston  
301-949-4530

### **Vice President**

Adam Rosenbaum  
301-946-7416

### **Secretary**

Abigail Adelman  
301-942-6893

### **Treasurer**

Karen Cordry  
301-933-3640

### **Parliamentarian**

currently vacant

### **Immed. Past President**

Donna R. Savage  
301-942-2447

△ △ △ △ △ △ △ △

### **Beautification**

Abigail Adelman  
301-942-6893

Jane Folsom  
301-942-6918

### **Bylaws/Communication**

April Gassler  
301-942-8599

### **Crime Statistician**

Thomas Stanton  
301-929-0757

### **Education**

Laura Kervitsky  
301-949-1429

### **Land Use**

Donna R. Savage  
301-942-2447

### **Online Newsletter**

Barbara Ruben  
301-946-4192

[barbararuben@verizon.net](mailto:barbararuben@verizon.net)

### **Traffic and Safety**

Andy Fraser  
301-962-0787

Jane Harding  
301-933-0513

### **Web site Coordinator**

Jean Dowd  
301-669-8184

[jdowd@KensingtonHeightsMD.org](mailto:jdowd@KensingtonHeightsMD.org)

### *KHCA is affiliated with:*

Allied Civic Group  
Coalition of Kensington  
Communities  
MC Civic Federation  
Wheaton Citizens Coalition

*KHCA received the 1998 Wheaton-Kensington Civic Association Award*

\*\*\*\*\*

KHCA represents  
711 single-family homes  
in Kensington, Maryland.

November 1, 2011

## **Comments of the Kensington Heights Civic Association with Regard to Bill 33-11, Community Benefits Agreements**

The Kensington Heights Civic Association (KHCA) represents 711 single-family homes. My name is Karen Cordry and I am the KHCA treasurer.

KHCA supports Bill 33-11, Urban Renewal and Community Development – Community Benefits Agreements – Large Retail Stores. We commend the intent of the legislation, and we commend Council President Ervin and Councilmembers Navarro, Rice, and Riemer for sponsoring it.

Our concerns arise in large part from the history of the Costco development now proceeding at the Westfield Wheaton mall. The community received no advance notice before a public announcement was made that 1) the Costco warehouse would be built with County funding, 2) the store would be accompanied by a 16 nozzle filling station (the largest in this area of the County), and 3) Costco would refuse to proceed unless a zoning text amendment was passed to exempt the gas station from the normal special exception process. Thankfully, after the community was heard, the Council did not allow the ZTA to proceed.

It is only now, 18 months later, that Costco and Westfield (at the Council's direction) are engaged in any detailed discussions with the community about the proposal. But, what is clear is that those discussions are coming far too late to ensure a meaningful effect on the overall design and structure of the new facility. To be worthwhile, these discussions must be mandated to occur early in the process, not after all of the critical decisions have been made. Moreover, they must be made under a decision structure that places real consequences on the outcome of those discussions. We believe the proposed legislation is a good step in the right direction but have suggestions that we believe will improve the final product.

KHCA recommends tweaking the legislation as follows:

- Lines 24-28: Reduce to 2 miles the 5-mile area from which the three Civic Associations would be chosen, and add the word "radius" to indicate a straight-line measurement. Add wording similar to "Priority will be given to recognized civic organizations in closest proximity to the new large retail store."

*Rationale:* A 5-mile area would encompass too many groups with disparate concerns, diluting potential benefits. For example, some civic associations within 5 miles of the Costco store now being constructed in Wheaton might see only the benefits from the construction without being affected by the issues that impact those located in close proximity to the store. Indeed, some would likely prefer that, if a mega gas station is to be built such as that proposed by Costco, that it should be located away from their neighborhood. Civic associations within 1-2 miles of the proposed site would generally be the most affected, and particular care should be taken to ensure that their views are considered at a meaningful time. We recognize, though, that some points, such as who will be employed at the facility, are important to a wider area and warrant additional participation. In general, though, 5 miles covers an overly broad area, especially in the densely populated Downcounty and could allow the proposed entrant to "cherry pick" the associations with which it deals.

- Lines 9-18: Broaden the definition of a community benefits agreement in some fashion to deal with issues arising from a large retail store proposing inclusion of facilities that are subject to the Special Exception process such as the gas station proposed by Costco at Westfield Wheaton.

*Rationale:* Special Exception facilities, by definition, are those that can have burdensome effects on the surrounding communities. When added to the impacts created by these large retail stores, the combination can create even greater concerns. These issues should be taken into account at the early stages of the development and with the burden

placed on the *applicant* to make good-faith efforts to resolve issues with the neighboring communities. Leaving the community to deal with these issues in the Special Exception process in opposition to the proposals of some of the largest corporations in the world creates an uneven playing field. We do not have specific wording to suggest at this time, but trust that Council and staff can create appropriate language and will be happy to discuss this with them further.

- Lines 73-75: Ensure that Costco is included in this legislation.

*Rationale:* While lines 73 to 75 appear to be clear that the new Wheaton Costco would be included under this legislation, we ask the Council to ensure that Costco will be included. Costco should not be "grandfathered." This is particularly important in view of the fact that the demolition of the existing structure began at 4:30 am the day after the community held its meeting with Costco regarding the gas station, started without notice to the community, and was undertaken without compliance with the requirements for a Noise Suppression Plan. These are precisely the unilateral actions that the legislation is intended to preclude.

Thank you for the opportunity to comment on this proposed legislation.

*Submitted in Person*

November 1, 2011

Valerie Ervin, President  
And Members  
Montgomery County Council  
100 Maryland Ave.  
Rockville, MD

Dear President Ervin and Members, Montgomery County Council

CASA writes to provide its strong support and urge passage of Bill 33-11, Urban Renewal and Community Development – Community Benefits Agreements – Large Retail Stores. We provide this supportive testimony on our own behalf as well as on behalf of the Fair Development Coalition – a statewide coalition of advocates who support measures that create quality jobs and sustainable healthy communities from government investments.

First, we write to provide a description of our work. CASA has organized residents, small businesses, and institutions in both Counties of the International Corridor to ensure that current residents surrounding development are the beneficiaries of the public investments made in communities. Good jobs and training for local workers, expansion of community assets such as access to healthcare, and protections to ensure that existing residents and small businesses are protected from displacement are necessary elements to ensure that our communities remain or even better grow more diverse – both racially and economically. Across the past several years, we have brought community residents and small business to scores of community meetings, public hearings, and more to participate in discussions of development. Together with the Fair Development Coalition, we support the passage of statewide measures to insure, in particular, that government money creates good jobs for diverse workers.

Government spending has the capacity to create long-term positive change in communities or exacerbate existing inequities in development, jobs, and infrastructure spending. Maryland must develop models for engaging low-skill, minority and disadvantaged workers on local projects, and frame development policy in a way that values the preservation and growth of healthy communities.

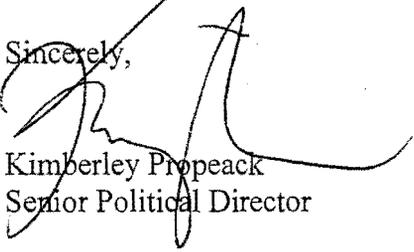
When CASA and its partners discuss development requirements with entities that do business in multiple states, the commitment is clear. A developer and large-scale operator will only build and operate to the legal standard imposed on them by government. One multistate operator in discussions with a coalition partner described directly that they put protections in place in other states because those states require them to do so. Maryland, unfortunately, does not. A



proactive requirement that a developer negotiate a CBA is a big step forward in insuring that the community is brought to the table early on, that development serves what can be varying local needs, and, most importantly from our viewpoint, that the workers both constructing those projects and ultimately working in them can afford to live in the community in which the development sits.

As you know, some startling new information has emerged from the 2000 Census. Montgomery County is, for the first time in history, majority minority (calling into permanent question the very use of the term minority). Montgomery County is also poorer than it was a decade earlier. Bill 33-11 is a step forward in ensuring that Montgomery County can be a place where its residents can afford to both work and live.

Sincerely,



Kimberley Propeack  
Senior Political Director



**TESTIMONY OF MARIE HENDERSON, EXECUTIVE DIRECTOR, INTERFAITH WORKS**

**In Favor of Bill 33-11, Urban Renewal and Community Development - Community Benefits Agreements**

Good evening. Thank you Council President Ervin and members of the Council for your time. I am Marie Henderson, Executive Director of Interfaith Works. As you may know, we provide social services to 35,000 low-income individuals every year. We address the immediate needs that arise from poverty, but we also work towards ending the cycle of poverty through economic and personal empowerment.

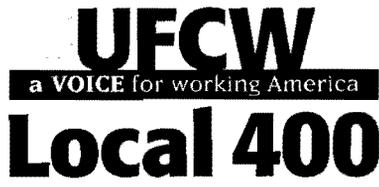
That is why I am here tonight to testify in favor of Bill 33-11. This bill will help some of Montgomery County's most vulnerable get that second lease on life, with a greater potential to gain employment through local hiring guidelines in a community benefit agreement. In today's economy, a job is a more than just a paycheck. It provides a sense of satisfaction and pride from an honest day's work. For the clients we serve, a job can mean a second chance.

According to the 2010 Basic Economic Security report data put together by Wider Opportunities for Women, an individual needs to make an annual income of more than \$47,000 in order to meet his or her basic needs living here in the county. That means, for our clients looking for employment, hiring locally is sound policy and a good first step to ending the cycle of poverty. It is also good for taxpayers, as it would help individuals transition off of social services and become contributing taxpayers themselves.

Our clients who complete the Vocational Training program go through 30 hours of job readiness and financial literacy classes and work intensively one-on-one with a vocational counselor at least once a week to help them secure employment. Once on the job, our clients have the people and problem solving skills necessary to do well in the workplace and advance in a company or organization.

These employees can be found in local businesses and organizations throughout the county, whether in hospitals or nursing homes, the neighborhood Rite Aid or Giant grocery store or at a Marriott or Hilton Hotel. We are proud of each of our clients who get hired and excel in their jobs. Their success is a reflection not just on our training, but also the businesses who hire them. It speaks to their values as a company and a collective sense of social responsibility that Interfaith Works shares.

In conclusion, I believe community benefit agreements are just another way we can promote partnerships that foster a greater bond between our government, businesses, non-profits and our residents. That way, we can continue to keep Montgomery County a great place to live and work – for all its residents. I ask you to support Bill 33-11. Thank you for your time.



# United Food & Commercial Workers Union 5

Thomas P. McNutt,  
*President*

*Chartered by:*  
UFCW International Union

Mark P. Federici,  
*Secretary-Treasurer*

Serving Members in MD, VA, DC, WV, TN, NC, KY, OH

## **Testimony of L. Anthony Perez, Director of Legislative Growth Strategies United Food and Commercial Workers, Local 400**

### **CB 33-11: Big Box Community Empowerment Bill Offered to: County Council for Montgomery County November 1, 2011**

Good Evening Madam President and members of the council my name is Tony Perez I am the Director of Legislative Growth Strategies for the United Food and Commercial Workers Union Local 400. In order to preserve time I will keep my comments brief. UFCW Local 400 is in total support of this legislation because we strongly believe that communities should have a voice in the development of Big Boxes in their communities. Our organization has witnessed hand shake deals between Large Corporations and Communities fall by the waist side not mention the loss of other businesses in the community. We've watched other jurisdictions in the Metropolitan area pass legislation to give local legislators more input in the process as it pertains to Big Box Stores and Montgomery County has Taken a strong step in the right direction by allowing communities to have input in the process as well and on behalf of President Tom McNutt and the 40,000 members of United Food and Commercial Workers Local 400 we commend you President Ervin Councilmember's Elrich, Navarro, Rice and Riemer for pursuing such progressive legislation. Thank You

# TESTIMONY OF DANILA SHEVEIKO

From The Institute for Local Self Reliance

<http://www.newrules.org/retail/key-studies-walmart-and-bigbox-retail>

Key Studies on Wal-Mart and Big-Box Retail

Below are summaries and links to key studies that examine the impact of Wal-Mart and other large retail chains and, in some cases, the benefits of locally owned businesses. For ease of use, we've organized these studies into the following categories, although they do not all fit neatly into one category. (Also see the Research section of the News Archive for more detailed stories on some of these studies).

- Economic Impact of Local Businesses vs. Chains  
Studies have found that locally owned stores generate much greater benefits for the local economy than national chains.
- Retail Employment  
These studies examine whether the arrival of a superstore increases or decreases the number of retail jobs in the region.
- Wages & Benefits  
Studies have found that big-box retailers, particularly Wal-Mart, are depressing wages and benefits for retail employees.
- Existing Businesses  
These studies look at how the arrival of a big-box retailer displaces sales at existing businesses, which must then downsize or close. This results in job losses and declining tax revenue, which some of these studies quantify.
- Poverty Rates  
Counties that have gained Wal-Mart stores have fared worse in terms of family poverty rates, according to this study.
- Social and Civic Well-Being  
This study found that Wal-Mart reduces a community's level of social capital, as measured by voter turnout and the number of active community organizations.
- City Costs  
These studies compare the municipal tax benefits of big-box development with the cost of providing these stores with city services, such as road maintenance, police and fire—finding that cities do not always come out ahead.
- State Costs  
Because many of their employees do not earn enough to make ends meet, states are reporting high costs associated with providing healthcare (Medicaid) and other public assistance to big-box employees.

- Subsidies  
The expansion of big-box retailers has been financed in part by massive development subsidies and tax advantages provided by local and state governments. These studies document those subsidies and their failure to produce real economic benefits for communities.
- Consumers & Prices  
Are chains better for consumers?
- Traffic  
How do vehicle miles traveled and trips increase as a result of big box developments?
- Charitable Contributions  
Small businesses donate about twice as much per employee to charitable organizations as large businesses, according to this study

My name is Michael Kroopnick and I am an attorney who practices land-use law throughout the state of Maryland and the District of Columbia. I'd like to thank President Ervin and the Members of the Montgomery County Council for giving me an opportunity to testify. I am here this evening to speak in favor of Bill 33-11.

Big-box stores enter the market with a significant advantage over its competitors, particularly local businesses, because it can sell similar products at much lower prices. Local businesses are forced to downsize or close as a consequence. Often, the jobs local businesses create do not return to the community. To the extent that big-box stores do create jobs, they are at lower wages, fewer hours, and reduced benefits because of diminished competition. Due to their size, big-box stores further pose unique traffic and environmental challenges to the community.

The virtue of Bill 33-11 is that it strikes a sensible balance by, on the one hand, not prohibiting big-box development, and on the other, seeking to equalize the playing field by requiring big-box developers to work with the community such that they do not have an unfair advantage over local businesses. In turn, there is a much greater likelihood that the excesses that stem from big-box developments will be addressed. This bill gives voice to community concerns that arise after a development's approval and which may not otherwise be addressed effectively at the neighborhood level. They include, but are not limited to, the loss of local businesses, reduced wages and benefits, and the burdens imposed on the environment, traffic, and public services.

This Bill represents sound public policy and will serve as a template for similar legislation being considered by municipalities throughout the country. Like in other areas of legislation, such as inclusionary zoning, Montgomery County will be a leader in the area of responsible big-box development by enacting this bill.

Thank you.

**Testimony of Joseph Horgan on Bill 33-11, A Bill Relating to Community Benefit Agreements for Big-Box Retailers in Montgomery County, Maryland.**

November 1, 2011

My name is Joseph Horgan. I am a resident of Kensington, MD and a small business owner. I live in the Homewood Neighborhood, close to Wheaton, Westfield Mall and the Costco site, as well as the Kensington Safeway. I've paid close attention to the Westfield taxpayer giveaway and the proposed Costco gas station, and I've learned that even when there is an active civic group, accountability and full community participation is more often than not absent.

It's time to retire the term "Railroaded," to mean "the community got bilked." Today, the term "Big-Boxed" more accurately describes that sentiment.

I am here to offer qualified support for the Community Benefits Agreement Bill, 33-11. Qualified, because the bill as now written sets up a piecemeal process in which corporate big boxes could pick communities which are weakest, or have the least expertise, or the lowest participation. The bill should be revised to set a Countywide Benefit Agreement that's in the best interests of the residents and small businesses of Montgomery County.

What's best for Montgomery is minimal countywide standards for large retailers that include:

1. **Project Labor Agreements** for the construction phase – The Big-Box Retailer is required to pay the prevailing union wage to all of its workers.

2. **Card Check for the operational phase** – Require union recognition as soon as a majority of workers have signed a card requesting union representation.

We are told by Big Box promoters that they worship at the altar of job creation. We know this is a pretend game. Montgomery County needs to insist that these jobs pay better than the current poverty minimum wage. We want quality union construction and good-paying jobs that won't require taxpayers to supplement the failure of these big boxes to pay fair wages.

3. **Environmental requirements:**

a) **Environmental Site Design compliance:** on-site retention of stormwater using green roofs; rain gardens, permeable pavement, and similar practices, with no waivers and no grandfathering sweetheart deals; and

b) **Shade tree plantings with soil volumes** that ensure the trees will last 50, not 13 years.

c) **Air Quality requirements**

d) **Noise abatement** requirements – going beyond compliance with our noise ordinance, and without waivers or exemptions from our noise ordinance.

4. **Combined Reporting of State corporate income taxes.** Using states like Delaware and Nevada as local tax havens, corporados hide their profits from Maryland taxes, pretending that the money they earned in Maryland was made in Nevada and Delaware. It's a corporate shell game played with shell companies. For example, let's say big box retailer MegaLoweMart, headquartered in Texas, wants to open a big box in Montgomery County. First, the set up a subsidiary in Delaware (usually no more than a Post Office Box), which doesn't tax intangibles. They give this subsidiary the rights over its trademarks. Now they set up in Montgomery

County. The store in Maryland has to pay the shell subsidiary for the use of trademarks. Coincidentally, the cost to the Maryland store for using the trademarks is equal to what would otherwise be taxable profits. We need to insist that corporate retailers' earnings made in Maryland are taxed so that they pay their fair share. Maryland taxpayers and small businesses shouldn't have to pick up the slack of their playing pretend shell games with shell subsidiaries.

#### **5. Full compliance with the zoning, environmental, and other laws and regulations on the books**

I support the concept behind [33-11] because in my experience, too often communities have been steamrolled and disenfranchised by corporate retailers' claims and promises that turned out to be hollow. But, precisely because of this "David and Goliath" situation, we cannot assume that civic groups have the transparency, expertise, and democratic representation that would be needed to negotiate effectively on behalf of their communities. That's why we need minimal countywide standards; then if a competent and accountable community group exists in a given proposed big-box neighborhood, they could negotiate for additional community mitigation measures on top of the countywide minimum big-box mitigation standards.

**Compliance with all laws is currently not the norm for Big Boxes in Montgomery.** For example, the morning after the October 25, 2011 community meeting with Costco on their proposed 16-bay gas station in Wheaton, at 4AM of October 26, the demolition of the old Hechts space began. Citizens have not found evidence of a noise suppression plan, or a noise ordinance exemption for this project.

Frankly, I'm wondering where the need is for another Montgomery big box. Big boxes have proven to be net negatives to the communities in which they have already located. We already have 35 big boxes here in Montgomery County. What is the community need for a new WalMart or Target? What is the need for the proposed Costco gas station in the Transit-Oriented Development zoned Wheaton? My answer: there is no need for either the Costco gas station, or more generally for big-boxes. That's why Bill 33-11 must require countywide mitigation standards – to mitigate the economic and environmental harm that these retailers normally wreak upon local communities.

There are 7 Principles of Accountability. If a Big-Box happens to meet one of them, it's probably by accident. These are from the December 2005 Statement of the Montgomery County Accountability Project. As an outgrowth of the planning debacle in Clarksburg, Montgomery residents of all political stripes signed a Call for Accountability with these Principles:

- 1) **Consistency and Accountability**
- 2) **Transparency**
- 3) **Fairness**
- 4) **Due Process:**
  - a. degree of documented community support;
  - b. Master and Sector Plans with clear, unambiguous terms;
  - c. compliance with and furtherance of environmental law, regulation and policy;
  - d. compliance with and furtherance of open space, farmland, parkland, and historic preservation law, regulation and policy.
- 5) **Full Citizen Participation**
- 6) **Tough, Swift Enforcement of Violations**
- 7) **Open Acknowledgment and Correction of mistakes and systemic problems.**

If you want to be a big box, you have to be a big boy and stop pretending that you have no impact on the community. John Maynard Keynes once wrote that *we must pretend that foul is fair and fair is foul, for foul is useful and fair is not*. It's time to stop pretending. Foul is foul and not fair or useful, unless you're trying to externalize the negative impacts --and expenses-- onto the community.

Thank you for the time to be heard before you. I look forward to working with each of you on this and other issues.

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The Voice of Montgomery County Business

4

**TOM MCELROY, CHAIRMAN**

**ORI REISS, CHAIR-ELECT**

**GEORGETTE "GIGI" GODWIN, PRESIDENT & CEO**

MONTGOMERY COUNTY COUNCIL

NOVEMBER 1, 2011

TESTIMONY BY JUDY STEPHENSON

MONTGOMERY COUNTY CHAMBER OF COMMERCE

ON COMMUNITY BENEFITS AGREEMENTS BILL

Good Evening.

My name is Judy Stephenson; I chair the Small Business Committee for the Montgomery County Chamber of Commerce and am speaking on behalf of the Chamber in opposition to Bill 33-11. It is our position that this legislation is **fundamentally flawed** because it targets one category of retailer by mandating a universal set of unnecessary and unclear requirements for all large retail businesses.

Many of the retailers we look to attract to the County fall under this definition of a large retailer, which according to this bill is 75,000 sq/ft and above. For example, the new Whole Foods in White Flint, Nordstrom in Montgomery Mall and Macy's in Wheaton Plaza all occupy space that is much larger than this. Forcing retailers to engage in the proposed legally binding agreements with civic organizations will be a disincentive for them to locate in our County.

Additionally, the **existing planning and zoning process** provides innumerable safeguards to insure the community's voice is heard with regard to uses and density in our neighborhoods. This bill would give civic organizations veto power over businesses looking to locate to the County.

The bill is also unclear on essential points. For example, the "good faith effort" alternative described in the bill is undefined and ripe for abuse. What constitutes a business negotiating in

good faith? Is there a defined standard for good faith? Where else does this standard apply and how is it determined? Furthermore, how do businesses determine a “recognized” civic organization? How can a business that is new to the area, make this determination if it is not even clear to us?

You might ask why small business would be taking a position on this bill... simple – in general, **big businesses represent many opportunities for small businesses and proximity is key** for small businesses.

Also, small businesses have a vital interest in the County creating an **economic and regulatory climate that is business friendly**. This bill does not support that objective.

Finally, we encourage County Council to consider unintended consequences that might result from this bill. When you start legislating corporate community involvement, the result is very likely to be less rather than more.

The Montgomery County Chamber of Commerce opposes the Community Benefits Agreements bill in principle as it requires a set of unnecessary and unclear requirements of all large retail businesses based on feelings toward a specific business. This bill runs counter to the fundamentals of due process of law and representative government.



**Testimony of**  
**The Greater Silver Spring Chamber of Commerce**  
**Public Hearing – Bill 33-11, Community Benefits – Large Retail Stores**  
**Montgomery County Council**  
**Tuesday, November 1, 2011**

Council President Ervin, members of the Council, good afternoon. For the record, my name is Jane Redicker and I am President of the Greater Silver Spring Chamber of Commerce. I am here today to express the Chamber's strong opposition to Bill 33-11, which would require new retail businesses occupying more than 75,000 square feet to negotiate a Community Benefits Agreement with at least three community groups on a range of issues including these:

- Hiring practices and training programs
- Design, operating hours, use of open space, traffic mitigation, noise, and so on.
- Assistance to community organizations and programs
- Affordable and workforce housing.
- And, of course, any other issue relevant to the operation of the store or the community near the store

Really?

The first question this Bill brings to mind is: what is the problem you are trying to solve? Is the Council really trying to limit the number of large employers in the County? Does the Council really think the current planning process is insufficient to assure that the community has a voice in development in the County? Is the Council really trying to encourage greater philanthropy among County businesses, or only those over 75,000 square feet? Should County government really dictate whom a business should hire, and where its employees should live?

The Greater Silver Spring Chamber of Commerce believes this Bill is beyond objectionable, politicizing as it does development and economic development issues that should rightly remain under the purview of the County's established, if imperfect, planning and development process.

Time does not allow me to delineate all of our objections and criticisms. I'll leave most of those to my written testimony and offer instead our perspective on the Bill's most ill-conceived requirements. But I appreciate the opportunity to highlight a few of this Bill's many lowlights.

First of all, this Bill expects private business to do things that even the County doesn't do. In the area of hiring practices and training programs, the Council should have no jurisdiction over whom a private employer should hire, how an employee should be trained, or where an employee should live. Yet that's exactly what the Council wants to do with this Bill.

The County doesn't give hiring preference to residents living within a certain distance from County offices. The County doesn't even give preference to County residents. How many of the Council staff live within a certain distance from COB or in their districts? How many teachers, police, firefighters live within the certain distance from their employer? If the County doesn't place such mandates on its own employees, how or why should it legislate such requirements on private businesses – and not even all businesses, at that?

On the issue of design and use of open spaces, and on environmental impact, all of which would be restricted under this Bill: isn't that the Planning Board's job? Under current regulations and policies, the community already enjoys more than ample input through the established planning process.

The community is already able to voice its opinion on the County master plan and its amendments, and it will have the opportunity to provide input on any new site plan. So why does this proposed Bill mandate further community input? Where is the need? And if this Bill is enacted, where will we go next? Will businesses with a footprint of 50,000 square feet, or 20,000 square feet, suddenly find themselves included among those the County does not want?

Finally, regarding this Bill's unprecedented requirement that private businesses negotiate a binding community benefits agreement with what it calls "recognized civic organizations." Does the Council really want to get in the business of picking winners and losers?

There are more than 7,000 non-profit organizations in the County. Which of these would be considered "recognized," under this Bill? Who gets to choose which are recognized? What are the criteria for legitimacy? The Bill does not say anything about the creation of new non-profits. What if a group were formed with the express purpose of keeping a retailer out – or ensuring a retailer is permitted to locate in the County? Would these new groups constitute recognized organizations under this Bill?

On the issue of the community benefits agreements called for by this Bill: how much is enough? Who decides what a sufficient agreement is? Can a large retailer give \$1K to three organizations and be done? \$5K? Who decides?

The Bill calls for an "agreement" between parties, but it appears that agreement binds only one of the parties. Do the organizations have no obligations? If, for example, the Bill calls for financial support of an organization that makes it possible for that organization to provide a specific service, is that organization bound to provide that service, or could the organization use the funds for whatever it chooses?

My time is up, so I'll allow my written testimony to explain our many other objections to this Bill. But please know that the Greater Silver Spring Chamber of Commerce, whose membership predominantly comprises small retailers and businesses, strongly opposes this Bill as unwarranted, unnecessary, unworkable, anti-business, and frankly, unbelievable.

Thank you.

# **Greater Silver Spring Chamber of Commerce Opposition Points County Council Bill #33-11 Community Benefits – Large Retail Stores**

## **OVERVIEW OF THE BILL**

This Bill basically requires new retail businesses over 75,000sf to negotiate a Community Benefits Agreement with at least three community groups on issues including:

- Hiring practices and training programs
- Design, operating hours, use of open space, traffic mitigation, noise, etc
- Assistance to community organizations and programs
- Affordable and workforce housing
- Any other issue relevant to the operation of the store or the community near the store.

The Bill also requires Department of Economic Development and the Housing and Community Affairs offices to support the community groups in negotiating the Community Benefits Agreement.

## **OVERVIEW of GSSCC OPPOSITION**

The Greater Silver Spring Chamber of Commerce opposes Bill 33-11 for many reasons.

- This bill is anti-business and sends a clear message that Montgomery County continues to be a difficult place to do business.
- This Bill makes it harder to business in the County by requiring another unnecessary step for employers prior to creating jobs.
- It is unclear what problem this Bill is trying to solve.
- This bill expects private business to do things that even the County doesn't do.
- The County Council currently does not have the authority to legislate hiring and training practices of a private employer.
- The County Council currently does not have the authority to require private employers to provide or subsidize housing.
- The Bill further politicizes the development process.
- Portions of this Bill are redundant with the formal planning process in the County or existing regulations.
- The Bill creates the potential to pit various community groups against one another resulting in clear winners and losers.
- The Bill places an undue burden on DED to support the community in negotiations between a large employer and community groups, when the role of DED should be to support business.

## **SPECIFIC POINTS of OPPOSITION or CONCERN**

**What is the problem the Council is attempting to solve?**

- Is the problem too many "big box" stores in Montgomery County? Is this bill aimed at keeping "big box" stores out of Montgomery County? All "big box" stores, or just certain ones? Why? Don't these retailers provide jobs County residents? Don't they provide economical shopping alternatives for County residents strapped by the current economy? Has the County considered that

some “big box stores” become destination stores, bringing more shoppers to the area, much the same as anchor stores bring shoppers to the smaller stores in a mall or shopping center?

- Is the concern the level of wages offered to employees? This Bill does not address that concern.
- Is the concern that certain large retailers do not meet some standard for retail? Does that mean that the Council will now screen all businesses to see if they “fits” with what the County stands for?
- Is the concern about the dislocation of small businesses? This Bill does nothing to address issues of dislocation.
- Is the concern regarding philanthropy or community engagement by our large employers? If so, that concern is unwarranted. Montgomery County already enjoys a very engaged business community that supports many non-profit and civic organizations. Does the County Council really want to get into regulating philanthropy? If so, who decides which philanthropies are worthy and which are not?
- Is the concern that the community will have no voice when a large business comes into a neighborhood? Is the current Planning Process not sufficient to assure that the community has a voice in development projects?

### **What gives the County Council the authority to legislate hiring and training practices of a private employer?**

- GSSCC believes it is far beyond the jurisdiction of the County Council to tell a private employer who they can hire. Federal laws govern hiring practices.
- If the County is concerned about making sure any jobs created go to residents near a large retail store, then who decides the size what is an acceptable “distance of the store.” Just because one county resident lives near a retail store and another does not, should the individual living closer be given preference just because of geography?
- The County does not give hiring preference to residents living near County facilities. How many teachers, police, firefighters live within the certain distance from their place of employment? The County doesn’t even give hiring preference to County residents.

### **Why isn’t the Council focusing on measures that make it more attractive to do business in Montgomery County, measures that will create jobs?**

- Montgomery County has a reputation for being a difficult place to do business. Prior to the recession, there was a strong slow-growth/no-growth contingent in the County. After the recession most people realized that we need economic development to maintain the level of services and quality of life in the County. Just last week, the Montgomery County Business Development Corporation presented a status report to the Council in which it reiterated the need for a business friendly environment in the County. Most Councilmembers are on record as agreeing with the need to bring jobs to the County. However, in this event, actions speak louder than words. This Bill sends the message that the County Council is more interested in creating roadblocks to business than creating jobs.

### **Why does Council seek to add yet another layer to the already burdensome planning process in Montgomery County?**

- Businesses coming into Montgomery County face an expensive and time consuming development processes that provides for community input time and time again at various stages. There is the Master Plan, preliminary plan, site plan, permitting, environmental restrictions, APFO, PAMR,

impact taxes, developer amenities, existing ordinances for noise, lighting and the like. Do we really need ANOTHER obstacle to doing business in the County?

- This bill is redundant with the current planning process and regulations regarding design, use of open space, traffic mitigation, environmental impact, noise, lighting.
- What if the desires and wants of the selected community organization or organizations are in direct opposition to the Planning Board's regulations concerning, for example, use of open space? What if the community organizations selected have differing views on these matters? Who picks the winner?

**What is an eligible civic organization? How are the civic organizations selected? How can three groups possibly represent the entire community?**

- The Bill includes a definition, but the only limiting factor is that the "organization" be composed of residents of and businesses located within five miles of the business. Does it include all homeowners associations? All non-profits? All citizens' groups? Citizens' Groups? All the ad hoc groups that form to fight or support specific issues, in specific neighborhoods? This could include hundreds of organizations that have competing agendas. What about County-wide civic organizations that are not located within the five mile radius?
- What if there are several homeowners associations with differing, perhaps competing, agendas? What if there is a business group, a citizens' group and a homeowners association, all with differing agendas? What about the other groups in the neighborhood? Who decides which of these groups "wins" and becomes one of the lucky three?

**Who decides whether a Community Benefits Agreement is sufficient?**

- Is it sufficient for the incoming business to simply agree to give money to three organizations? How much money? What if the business provides literacy training for workers and nothing else? Is that sufficient? What if the community organizations with whom the agreement has been signed are not satisfied? Does that mean the store doesn't open? The Bill includes no process, no timeline. Under the Bill, negotiations could go on for years. Who says enough is enough?
- The Bill calls for an "agreement" between parties, but that as it is written, that agreement binds only one of the parties. Do the organizations have no obligations? If, for example, the bill calls for financial support of an organization that makes it possible for that organization to provide a specific service, is that organization bound to provide that service, or could the organization use the funds for whatever it chooses? Who regulates this?

**The role of the County Department of Economic Development should be to attract and retain business and create jobs in the County. This Bill runs counter to that mission.**

- The Bill required the Department of Economic Development (along with the Department of Housing and Community Affairs) to "provide, on request, advice or support to any recognized civic organization that will facilitate the negotiation and implementation of a community benefits agreement." This is not the role of the Department of Economic Development. DED needs to have a positive relationship with the business community. DED should be an advocate for business, not an advocate of the civic and community organizations. The reporting requirements create a potentially adversarial relationship with the very businesses they are trying to attract and retain.
- The Bill requires the retailer to report annually to DED on implementation of the community benefits agreement. Does the Council really want to give DED another task to take away from its

primary mission of building the commercial tax base in the County? Isn't the latter more important?

**How can each agreement be “binding on any successor in interest of any party”?**

- If a community benefits agreement is in place and the original store goes bankrupt, does the new tenant have to abide by the terms of the agreement? What if the community organization goes out of existence? Does the agreement transfer to another organization? Is the retailer relieved of the obligation?

**Why should the community of the County have the authority to become involved in “any other issue that is relevant to the operation of a large retail store”?**

- The Bill includes in the definition community benefits agreement “any other issue that is relevant to the operation of a large retail store or the community near that store.” This is way too broad. It goes way too far. Will the store's choice of wholesale vendors be subject to negotiation? How about the color of employees' uniforms? How about where those uniforms are cleaned? How about which bank a store chooses to use? Which telephone service provider? All of these are relevant to the operation of a large retail store. The language is far too vague, and allows the community and government to meddle in the way business does business.



12

ATTORNEYS

ROBERT G. BREWER, JR.  
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November 1, 2011

**By Hand Delivery**

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

Re: Bill 33-11  
Community Benefits Agreements

Dear Ms. Ervin and Council Members,

Our firm represents White Flint Mall, owned by the Lerner and Abramson families. We write in opposition to Bill 33-11 for a myriad of reasons. We urge the Council to withdraw or reject the Bill as written.

In summary, the Council should reject this Bill for at least the following reasons:

- This Bill will add yet another unnecessary layer of expense and time onto an already overburdened land use regulatory process;
- This Bill will deter retailers from entering our market and/or expanding here;
- This Bill surely will cement the business community's view of the County as inhospitable and not business friendly;
- The Bill is redundant to existing land use regulations and processes; any problem sites easily can be addressed by the Council under long established land use mechanisms;
- The Bill does not promote transparency, consistency or certainty in the development process;
- The Bill assumes that large retailers represent inherently evil land uses, and that contracts with civic organizations ameliorate that evil; and,
- The Bill has a multitude of drafting anomalies, nuances and vagaries that must be addressed before it can be seriously considered.



ATTORNEYS

Honorable Valerie Ervin, President  
Members of the Montgomery County Council  
November 1, 2011  
Page 2 of 4

As all of you know, White Flint Mall was an active participant in the White Flint Sector Plan process. With its mixed-use zoning, it is poised for the long term redevelopment of its property with 5.2 million square feet of mixed-use development, including multi-family residential, office, hotel and retail uses. It has been working for more than eighteen months with architects, engineers and planners to create a Sketch Plan for consideration by the Planning Board. The community meeting to unveil the Sketch Plan is scheduled for the evening of November 16, 2011, with a projected filing date a few weeks thereafter.

This Bill could well jeopardize the planned redevelopment of White Flint Mall. Although the current footprints of Bloomingdales and Lord & Taylors are less than 75,000 square feet, there are modest additions planned for both buildings that could exceed this threshold. Further, there are opportunities at the Mall to develop buildings partially below grade which may well exceed the 75,000 square foot threshold. The Mall cannot and will not invest hundreds of millions of dollars for redevelopment of this site if its ability to plan for the redevelopment is adversely affected by this Bill.

The summary of reasons why this Bill should be defeated is long and broad. As compelling as all of these reasons is the absence of any reason why this Bill adds value to the County's land use regulatory process. Instead of adding value, this Bill adds complexity, time, expense, uncertainty, opaqueness and a fair degree of subjectivity into a well established process. In so doing, this Bill runs entirely counter to a more progressive, transparent and constructive land use regulatory process that has been emerging in recent years, e.g. the White Flint Sector Plan process, the CR zone process, required pre-application community meetings, timely electronic dissemination of relevant information, etc.

Moreover, with the County's commitment to growing quality jobs and its economic base in an increasingly competitive regional, national and international economy, this Bill sends the entirely wrong message. It represents the epitome of an anti-business attitude that distrusts the integrity, value and function of large retailers in our economy. Singling out one particular segment of our economy is unfair and unjustified. If the County does not wish to bestow economic incentives or promotional funds on such businesses, that certainly is its prerogative—but it need not consign all large retailers into the maelstrom of contract negotiations with widely varying civic organizations as the price for doing business here.

Honorable Valerie Ervin, President  
Members of the Montgomery County Council  
November 1, 2011  
Page 3 of 4

Should the Council nevertheless be determined to enact legislation like this Bill, it must consider a variety of amendments to restrict the scope of the Bill and to clarify its intent. A summary of amendments follows:

1. The Bill should exempt large retail stores located in mixed-use developments in Metro Station Policy Areas. This would enable the redevelopment of the Mall to proceed, and would recognize that such stores would be designed in a development and through a process designed to assure their compatibility in the communities in which they are located.
2. The definition of large retail stores should be amended to increase the footprint size to at least 100,000 square feet, to more accurately reflect the size of department stores, the growing size of traditional grocery stores, and other similar factors.
3. The Council should establish qualifying criteria for civic organizations eligible to negotiate with large retail stores. The criteria should include minimum sizes, recognized organizational structures, representativeness of membership/participation, and other similar criteria. The Council should certify conforming civic organizations as a prerequisite for their eligibility to participate in community benefits agreements.
4. The criteria for civic organizations should be amended in section 56-35 to allow civic organizations to be recipients of funds from large retail stores, as long as the funding is not substantial or represent a material part of the civic organization's budget. An example of this would be a PTA organization, which regularly receives donations from retailers (in fact, those donations are frequently solicited by such organizations); the PTA should not be disqualified from serving as an eligible civic organization simply because it solicited/received funds annually from large retail stores.
5. The range of remedies for non-compliance with the Bill by large retail stores should be expanded to include alternatives to denial of occupancy permits. Alternatives may include binding arbitration before a qualified arbitrator between the store and the affected civic organizations, monetary penalties, etc.
6. Adjustments should be made to section 56-36 (e) to contemplate performance by a large retail store of a one time action, such as a monetary payment. The current

Honorable Valerie Ervin, President  
Members of the Montgomery County Council  
November 1, 2011  
Page 4 of 4

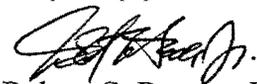
language requiring a minimum five year agreement, renewable for five years, does not contemplate that possible performance.

7. An exemption should be added to the Bill for large retail stores that are either successors to or retrofits of existing large retail stores (whether or not the existing store was required to enter into a community benefits agreement).
8. An exemption should be added to the Bill for large retail stores approved as part of a Sketch Plan or Site Plan prior to the effective date of the Bill.

The Council should not rush its deliberations on Bill 33-11. As drafted, the Bill raises a plethora of legal, regulatory and practical issues. To spare everyone the time and expense of these time consuming deliberations, we respectfully suggest that the Bill be withdrawn by its sponsors now. Failing that, the Council's Planning, Housing & Economic Development Committee must carefully and not hastily consider the purposes of the Bill, its language deficiencies, the suggested amendments, and the long term implications that its adoption will have.

For all of these reasons, we urge the Council to withdraw or defeat this Bill. If despite all of the reasons advanced against it, the Council is determined to enact the Bill, we request its favorable consideration of the amendments outlined above. Thank you very much.

Very truly yours,



Robert G. Brewer, Jr.

cc: Mike Faden, Esq.  
Ms. Sonia Healy  
Mr. Gary Abramson  
Mr. Alan Gottlieb  
Arnold Kohn, Esq.

**TESTIMONY OF PATRICIA HARRIS  
MONTGOMERY COUNTY COUNCIL BILL 33-11  
COMMUNITY BENEFITS AGREEMENTS—LARGE RETAIL STORES  
PUBLIC HEARING TESTIMONY  
November 1, 2011**

Good evening. Pat Harris with Lerch Early and Brewer, speaking tonight in opposition to proposed Bill 33-11. As a land use and zoning attorney with more than twenty years of experience in Montgomery County, I am familiar with the myriad of issues that must be addressed when a use – any use -- seeks establishment within the County. These issues include compatibility of the proposed use with the surrounding community, the adequacy of public facilities and traffic impact.

The Montgomery County Land Use approval process – be it a Preliminary Plan, Site Plan, Sketch Plan, Development Plan, Project Plan, Schematic Development Plan – is a comprehensive and thorough process which requires community outreach. The process provides ample opportunities for civic organizations to comment and participate.

As structured, the process ensures that the County’s decisionmakers have considered the community’s perspectives, deliberated the merits, and balanced their concerns with the public interest in reaching final outcomes. The County’s existing processes are, by design, engaged, attentive, non-arbitrary, and fair. The result is that the concerns and issues of the community are taken into account in the conditions of approval imposed by the governing authorities.

Bill 33-11 threatens to undermine the important procedural rights, obligations and safeguards that are afforded by the existing regulatory processes (which benefit the public as well as the applicant). In essence, the proposed Bill would impermissibly delegate the authority of accountable decisionmakers over matters involving land use and the public welfare to unaccountable groups representing varying interests. These groups would then be free to impose limitations, restrictions, and conditions on the use of private property without Due Process obligations or constraints, such as the public notice and comment and evidentiary requirements that are involved in the existing regulatory processes. This is “zoning by plebescite,” which—as a fundamental principle of land use and zoning jurisprudence—is unconstitutional.

The legislation tests the boundaries of constitutional jurisprudence in other ways as well. For example, land use regulations must possess an “essential nexus” between perceived harms and proposed remedies. However, mandating agreements or good faith negotiations with civic organizations does not guarantee the advancement of a legitimate state interest. Rather, such agreements may benefit individual groups rather than the broader public, resulting in outcomes that are arbitrary or even undesirable.

Land use regulations must also be roughly proportional to the local impacts that such regulations are intended to address. Regardless, the proposed Bill has no mechanism to ensue that any obligations pursuant to a Community Benefits Agreement will be proportional to the particular impacts of any given project. This is especially true in situations where benefits are derived from a particular use, which offset any impacts.

If adopted, various unintentional consequences are foreseeable. Because the timing of mandatory negotiations would frequently overlap with the County's approval processes, it is likely that the County's processes would be beholden to the progress and outcomes of such private negotiations. This may ultimately interfere with the County ability to obtain benefits for the general public from such private projects, as the concessions made in connection with such agreements may limit an applicant's resources. Furthermore, despite the County's well-documented interest in attracting new businesses and employers, it is foreseeable that mandating private negotiations with civic organizations may discourage appropriate or desirable businesses from locating in the County. Such a result could be detrimental to County residents, who might otherwise benefit from the range of employment opportunities and consumer choices that such business would bring.

For all of the reasons stated in my testimony, I strongly urge you to not adopt Bill 33-11. Thank you for the opportunity to speak this evening.



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Bill No. 33-11-Community Benefits Agreements

Testimony of William Kominers for Lee Development Group

(November 1, 2011)

Good evening President Ervin and members of the Council. My name is Bill Kominers, with Lerch, Early and Brewer in Bethesda. I am here tonight on behalf of Lee Development Group to testify in opposition to Bill No. 33-11.

There has been much discussion recently about a ten (10) acre property owned by Lee Development Group in Aspen Hill. The site is currently improved with an office building of approximately 265,000 square feet. The building was built in 1964 for a single user, Vitro Corporation, now BAE Systems, who occupied it for all 47 years. BAE vacated the site in 2010.

Lee Development Group has vigorously marketed the property for office use for the past four years with no success. There is no office market today for sites like this one – no Metro, no transit-oriented development, no other office uses in sight. Instead, the area has proven to be a retail destination. Given its size and location, the site lends itself to house a retail use that will exceed 75,000 square feet. (After all, the existing office building is almost four times that size). The owner has received interest in the property from retail users, principally large scale, broad-based merchandise retailers. But, regardless of which retail user eventually builds, doing so will likely require a master plan amendment and a rezoning. These are very public processes that also provide opportunities for organized public debate about how a use fits into the community, and what else can, or should, occur in conjunction with that use.

This site, and others like it in the County, should be allowed to shift to alternative uses and users. Many members of communities such as Aspen Hill want to see redevelopment and revitalization in their neighborhoods that have suffered significant economic decline in past years. The proposed Bill No. 33-11 will be yet another impediment to this effort and will encourage stagnation, or worse cause deterioration, in certain areas of the County.

Discussing the Planning Board's Semi-Annual Report in October, the Council noted the need to make the minor master plan process more readily available -- in order to allow properties in the County to be considered for more appropriate land uses and so

November 1, 2011

Page 2

as to be able to respond to changing times and economic development opportunities. Councilmember Berliner wrote a Memorandum requesting that the Planning Board develop a means to address this issue. Such is the dilemma that Lee Development faces with its Aspen Hill property.

Yet this Bill moves in the opposite direction. Bill No. 33-11 will add yet another level of "process" in order to redevelop sites, like the Aspen Hill property. I suggest that a master plan amendment, a rezoning, and later site plan review, probably provide enough "process" already.

The Bill itself is very vague as drafted and thereby open to abuse. Requiring negotiated agreements with three "recognized civic organizations" (whatever those are and whenever they were formed), and without any governmental participation or oversight, appears to be an abrogation of the County's role. While environmental impacts, traffic mitigation, open space, noise, and lighting may be legitimately a part of the land use process, there should be no place for imposing rules on hiring practices, training programs, design, and the like. Especially when left to totally unaccountable groups.

Large retail businesses will avoid this County if hiring practices and training policies may be subject to modification by the whims of "three recognized civic organizations." Many of the other items contained in the Bill, ranging from site design to lighting, are already regulated, with extensive public participation, through the existing multi-layered process for review and approval of development in the County.

To redevelop, the Aspen Hill site would have to be reviewed through very public processes of a minor master plan amendment, then in a rezoning, and then in the preliminary plan and site plan reviews. Each with public hearings. There would be review of traffic by two County departments. There would be review of environmental issues by two County departments. The public, including individuals as well as civic organizations, are already included in these processes. Approval processes are open and conducted as public hearings. Even if private agreements under Bill No. 33-11 are reached, there is no certainty that such a negotiated agreement would be accepted by the government in the course of regulatory review. This is not only inappropriate, but unworkable for an applicant.

We urge you to vote against Bill No. 33-11. Just say "No." Don't try to fix it. Don't try to salvage it. Just reject it. Support the review processes we already have. They have a pretty good measure of public involvement and consideration of community needs.

November 1, 2011

Montgomery County Council  
100 Maryland Ave  
Rockville, MD 20850

**Re: COUNTY COUNCIL BILL 33-11  
URBAN RENEWAL AND COMMUNITY DEVELOPMENT  
COMMUNITY BENEFITS AGREEMENT – LARGE RETAIL STORES**

Dear Councilmembers:

The Aspen Hill Civic Association, Inc. is firmly opposed to Bill 33-11, requiring large retailers (75,000 sq.ft. and larger) to enter into agreements with community organizations before they may operate as a business in a given location. The proposed legislation will build yet another restrictive layer into the approval process. A layer managed and driven by recognized civic groups and unknown entities which may form ad hoc, most likely with limited experience for the process or special interest agendas. This unwieldy procedure may derail the positive momentum of any project, and makes for an unattractive environment for nurturing business prospects and growth. The legislation as drafted carries no proposed guidelines for negotiations, no time limits to achieve mutual goals, and could be harmful and fracturing to neighborhood coalitions. In essence, a retail store project may suffer years on the table before its doors can open. ***That scenario does not sound like a community benefit.***

Montgomery County already has a process in place for development review through the M-NCP&PC, and the County Council. The development process in Montgomery County is well defined and provides ample opportunity for residents of a community to participate in the approval process and articulate concerns. We expect a responsible developer and large retailer would work to ingratiate themselves with the surrounding community if only to ensure a successful transition and long-term positive relationship.

If we continue to prevent retail establishments from expanding and creating jobs in our area, then our community will suffer even more of the debilitating effects of a job-less recession. More regulations and more restrictions are not needed. Big box retail is here, whether we like it or not. Perhaps small store operators can readdress the meaning of specialty store retailing, and offer goods and services benefiting broader choices for the consumer. Blocking targeted large retailers is not going to save the small stores in the neighborhood. Residents will travel to surrounding areas to shop the cheaper prices and selections of the large stores, costing us more in gas and gridlock. And, we lose the tax receipts and employment that will ultimately come from large retail operations.

Bill 33-11 is the type of legislation which gives Montgomery County a reputation for being a difficult place to conduct business. If this bill passes a significant property in our neighborhood may remain vacant for the foreseeable future. ***That scenario does not sound like a community benefit.***

Sincerely,

A handwritten signature in cursive script, appearing to read "Alexandra Minckler". The signature is written in black ink and is positioned above the typed name.

Alexandra Minckler, President  
Aspen Hill Civic Association, Inc.

Cc: Ike Leggett, County Executive  
Members of the Board of Directors, AHCA, Inc.

Westfield as the owner/operator of Westfield Wheaton and Westfield Montgomery, both regional shopping centers in the County, opposes the adoption of this bill.

There are four "regional shopping centers" in Montgomery County. The County defines a "regional shopping center" as a center with a minimum of 600,000 square feet and at least 50 stores. Nordstrom, Macys, and Sears at Montgomery and Target, JCPenney, Macy's and Costco at Wheaton all exceed the 75,000 square foot anchor store threshold in the bill. In the event an anchor store leaves a mall, any replacement or reconfiguration of the anchor store or any potential expansion of the centers with additional anchor stores could trigger the requirements of this bill. This bill would add many unintended impediments to any potential redevelopment of our centers and impact the economic stability of these regional centers and their future growth. In addition, this bill would, if adopted make it very difficult to attract national anchors stores to Montgomery County. This bill would create uncertainty for tenants and lenders as to whether, when and how a store might open. The requirement to negotiate with community groups for which no redress may be available is, in our view, an unworkable and unwise policy, one subject to legal challenge.

We urge this body to reject this proposal so as to communicate your recognition that this bill sends the wrong message at a time of great economic uncertainty - in an economy struggling to recover.

If the Council moves this bill forward, we respectfully urge that you adopt amendments making it clear that "regional shopping centers" are exempt from any proposal adopted by the Council.

Finally, an update on the status of the Costco project: as you know, all construction on the Costco facility was suspended last week as a result of the uncertainty created by this proposed bill. After discussions with many Council members during which we made our concerns on the bill clear, Westfield has ordered construction to proceed.

Thank you for consideration of our views.

## The New York Times

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April 27, 2010  
SQUARE FEET

# Community Pacts Questioned in the Zoning Process

By TERRY PRISTIN

Mayor Michael R. Bloomberg suffered an embarrassment last December when the City Council rejected a major developer's plan to spend hundreds of millions of dollars transforming an unused armory in the Bronx, the city's poorest borough, into a shopping mall.

The Kingsbridge Armory project collapsed — and the Bronx lost the prospect of hundreds of jobs — after the developer, the Related Companies, declined to require its tenants to pay a so-called living wage of at least \$10 an hour and benefits.

The wage minimum was one of several concessions sought by a coalition of 19 community, religious and labor organizations in exchange for supporting the project — to be formalized in a pact known as a community benefits agreement, or C.B.A.

The coalition argued that since the mall would get public subsidies, the workers should be able to earn enough to support their families. But Related said dictating to retailers what they must pay workers would make it impossible to find tenants or financing.

Over the years the Bloomberg administration's view of community benefits agreements has evolved from warm support in connection with a number of projects, including Yankee Stadium, to adamant opposition. In the case of the armory, the city said that community groups had been given ample opportunity to shape the document soliciting redevelopment proposals and that no benefits agreement was warranted.

Now, in a report that is likely to have considerable influence on policy makers, the New York City Bar Association has urged the city to stop allowing community benefits agreements to be part of the zoning approval process. The report warns, among other things, that the agreements could create an opportunity for corruption.

"It is our recommendation that the city announce that it will not consider C.B.A.'s in making its determinations in the land-use process," the bar association said in the report last month. The report, which was in the works long before the armory proposal was defeated, also urged the city to declare that it would no longer play a role in "encouraging, monitoring or enforcing the

agreements.” The report acknowledged that there was no way to prevent developers from making deals with community groups. But it said the city should get involved, if at all, only when the developer was seeking a public subsidy.

John C. Liu, the city comptroller, has formed a task force to examine community benefit agreements and other issues related to subsidized economic development projects. He said he understood why the bar association wanted to rid the zoning process of the agreements, but he said its approach was idealistic rather than practical. “My emphasis is on what kind of mechanisms exist to make sure that the promised benefits are delivered,” he said.

Community benefits agreements have proliferated around the country in the last decade, easing the way for development projects. Many, like the one proposed for the armory, have emphasized wage minimums and local hiring.

As one member of Mr. Liu’s task force, Julia Vitullo-Martin, put it, a “new weird principle” had been grafted onto the “perfectly legitimate” idea that a developer should try to mitigate the effects of gentrification.

“The original concept got lost,” said Ms. Vitullo-Martin, a senior fellow at the Regional Plan Association, an independent research group. “Why should the developer be responsible for the wages paid by retailers? That has nothing to do with the land-use process.”

In recent years, city officials have opposed these private agreements on the ground that the city review process provides ample opportunity for community groups to seek concessions from developers. But previously, the Bloomberg administration championed or helped foster the agreements for projects like the Atlantic Yards development in Brooklyn; the Gateway Center at Bronx Terminal Market, a Related Companies project; and the expansion of Columbia University.

While acknowledging that many residents believe that the city’s formal zoning process, known as the Uniform Land Use Review Procedure, or Ulurp, “fails to adequately consider or protect their interests,” the bar association report raised these and other questions about the private agreements:

¶ Do the groups involved in the C.B.A. truly represent the community or are they simply seeking advantages for themselves?

¶ Are they experienced enough to strike a good bargain with the developer, or will they sell out too cheaply?

¶ Could benefits that require public subsidy — like affordable housing, for example — be awarded to a particular neighborhood to win acceptance of a project rather than on the basis of where these benefits are needed most?

“Our feeling was that the process wasn’t satisfactory from anybody’s point of view,” said Kenneth K. Fisher, a partner at Cozen O’Connor and chairman of the bar association’s land-use committee. Mr. Fisher said the bar association was particularly concerned about the potential for corruption. Creating affordable housing might be a worthy goal, he said. “But it’s another thing for a council member to tell you which affordable housing group should be developing it,” said Mr. Fisher, a former city councilman.

In February, City Councilman Larry B. Seabrook was charged, among things, with helping a close associate win a contract to install boilers at Yankee Stadium. A Yankees spokeswoman said at the time that the boiler contract was “of a type that had been encouraged by the community benefits agreement.” Mr. Seabrook has pleaded not guilty to the charges.

The city has not responded formally to the report. But in an e-mail message, Janel Patterson, spokeswoman for its Economic Development Corporation, endorsed the principal recommendation, saying: “The city should not be a party to community benefits agreements. The city works with the developer and the community board, as the recognized and appropriate community representative, through the public review process (Ulurp) to ensure that a project delivers benefits for the community directly related to the project.”

But the Related Companies’ lawyer Jesse Masyr said the agreements were ingrained in the land-use process and were not likely to be eliminated. “I don’t think it’s reasonable to assume that this genie goes quietly back in the bottle,” he said. “A better approach would be to have rules and policies as to what are the appropriate ways to handle this.”

Mr. Masyr said he did not object to agreements that required developers to plant trees, for example, or limit their hours of operation or try to hire local residents. A bigger problem — and the potential for abuse — occurs when the developer is asked to write a check, he said. In 2006, for example, the city asked Mr. Masyr to help the West Harlem Local Development Corporation negotiate a community benefits agreement for the Columbia expansion. He got the university to agree to give the community \$76 million in cash.

Vicki L. Been, a professor of land-use law at the New York University School of Law, and the prime author of the bar association report, agreed that community benefits agreements were inevitable, but she said the government did not have to participate. “I agree that developers will do everything they possibly can not to have the uncertainty and unpredictability of community opposition,” she said. “What can be stopped is the government’s role in that, to the extent that developers felt like they were being told, ‘You had better reach a C.B.A. before you come to the City Council.’”

Another of the report’s authors, Ross F. Moskowitz, a land-use lawyer at Stroock & Stroock & Lavan, said the city needed to address this problem to let developers know in advance what they would be expected to provide and to prevent the failure of another major project. “Hopefully,

what will come out of this debate is a process that will provide standards and certainty,” he said.

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46