

MEMORANDUM

June 18, 2018

TO: Councilmembers

FROM: *MM*
Marlene Michaelson, Executive Director

SUBJECT: The Executive's Veto of Line Items in the FY19 Capital Budget

Attached is a memorandum from Council Legal Staff explaining the reasons why they recommend that the Council override the Executive's June 1 veto of 3 line-items in the FY19 Capital Budget and the Council's options. Staff is recommending that the override occur in conjunction with the introduction of amendments to the Capital Improvements Program and a Special Appropriation for a new Design, Build, Maintain (DBM) program for Stormwater Management (SM). These Amendments would recognize the intent to initiate a DBM program, but would limit the appropriation and include conditions that ensure that the projects achieve certain environmental goals associated with these efforts. The Executive would need to return to the Council with a later request for a supplemental to complete the projected scope of work for this effort, providing the Council with a meaningful role in evaluating the implementation of the work. (Since the State has not yet detailed additional requirements, it is possible that the scope of requirements will be different than currently contemplated.)

Staff believes it is important for the Council to override the Executive's veto both because its impact is unclear and to preserve the integrity of the Council's institutional role in the budget process to prevent the Executive from spending money in ways not contemplated or authorized by the Council. Consideration of an override is not currently on the Council agenda. Should a Councilmember wish to move an override, they can do so at the Council session tomorrow.

MEMORANDUM

June 18, 2018

TO: Councilmembers

FROM: Robert H. Drummer, Senior Legislative Attorney
Joseph Hamlin, Legislative Attorney *JH*
Amanda Mihill, Legislative Attorney *Amihill*

SUBJECT: The Executive's Veto of Line Items in the FY19 Capital Budget

Executive Director Marlene Michaelson asked us for a legal opinion on the effect of the Executive's June 1 veto of 3 line-items in the FY19 Capital Budget and the Council's options. Charter §305 requires the Council to adopt a capital budget and appropriate funds for the approved budget no later than June 1 before the beginning of each fiscal year. The Council adopted Resolution No. 18-1135 approving the FY2019-2014 Capital Improvements Program and the FY2019 Capital Budget on May 24, 2018. The Executive, in a memorandum dated June 1, 2018 stated:

In accordance with the provisions of the County Charter, I am exercising my veto of the line-item appropriations for Montgomery County's Clean Water and Permit Compliance Program. I am vetoing the FY19 appropriations for Projects P807359 (Misc Stream Valley Improvements), P801300 (SM Retrofit – Roads), and P808726 (SM Retrofit Countywide) on which Council took action as part of its rejection of my proposed Design/Build/Maintain (DBM) approach to future stormwater management projects.

Charter§305 states:

Upon approval of the budget, it shall be delivered within three days to the County Executive who within ten days thereafter may disapprove or reduce any item contained in it. If the County Executive disapproves or reduces any item in the budget, it shall be returned to the Council with the reasons for the disapproval or reduction in writing. The Council may, not later than June 30 of that year, reapprove any item over the disapproval or reduction of the County Executive by the affirmative vote of six members, except that the affirmative vote of five members shall be required in the case of the budgets of the Council, the Fire and Rescue Commission, the Fire Departments and Rescue Squads, the Housing Opportunities Commission and Montgomery College. (Emphasis added.)

Part I of the approved FY19 Capital Budget contains a chart showing the following FY19 capital budget for these 3 items:

Project Name (Project Number)	FY19 Appropriation	Cumulative Appropriation	Total Appropriation
Misc Stream Valley Improvements (P807359)	(6,733,000)	37,947,000	31,214,000
SM Retrofit – Roads (P801300)	(24,545,000)	43,954,000	19,409,000
SM Retrofit: Countywide (P808726)	(15,359,000)	91,586,000	76,227,000

Each of these projects had a prior total appropriation that authorized the Executive to spend up to the total appropriation over the life of the project. Resolution No. 18-1135 contains the following action statement:

2. *The Council reappropriates the appropriations made in prior years for all capital projects:*
 - (a) *except as specifically reflected elsewhere in this resolution;*
 - (b) *in the amounts and for the purposes specified in the Approved CIP for FY 2019-2024; and*
 - (c) *to the extent that those appropriations are not expended or encumbered.*

The FY19 Appropriation column shows the *change* in the total appropriation for each project made by the Council for FY19. The negative number shown in this column is not the Executive’s spending authority in the FY19 capital budget for the project. The actual appropriation for each project in FY19 is shown in the Total Appropriation column. Pursuant to action paragraph 2(c) of Resolution quoted above, the actual spending authority for each project in the approved FY19 Capital Budget is the total appropriation less any amount that has been expended or encumbered. Although the column labelled as the FY19 Appropriation shows a negative number, the label is misleading because a negative appropriation for FY19 would mean that the Executive cannot spend any money on the project in FY19 and the project must result in positive revenue rather than spending. The FY19 Appropriation column has always been interpreted to mean the change in the total appropriation for the year.

The Executive’s original veto message is unclear. He stated that he vetoed the FY19 appropriations for these 3 projects. The Executive’s recommended capital budget reduced the total appropriation for each of these projects by a larger amount than the Council’s action. In other words, the Council added funding to the Executive’s recommended funding for each of these projects. The Executive could have reduced the total appropriation for each project by the amount added by the Council to the Executive’s March 15 recommended budget. However, he did not do that, and Executive staff indicated that he did not intend to do that. In his June 14 memorandum to Council President Riemer, the Executive confirmed that, in his view, his veto effectuated an increase in appropriation, noting that “some on the Council are concerned that, as a result of my veto of the Council FY19 appropriation, there remains a larger appropriation level in the remaining projects.”

Although Executive asserts that the veto eliminates the entire negative change approved by the Council, this interpretation would conflict with the authority granted the Executive by Charter §305. Absent a Council override, the result of this interpretation would be a total appropriation for each project that is greater than the total appropriation approved by the Council in the FY19 capital budget. The unencumbered balance of the total appropriation for all 3 projects after the Council's adoption of Resolution No. 18-1135 as of June 8 is \$75,357,000 (rounded to the nearest \$1,000). Under the Executive staff interpretation, the unencumbered balance of the total appropriation for these 3 projects would jump by \$46,637,000 to \$121,994,000. This cannot happen. The Executive does not have authority to add to the approved budget through his veto power. The Charter only permits the Executive to "disapprove or reduce any item." All appropriations must be made by the Council.

The most logical interpretation of the Executive's veto (but one with which Executive and his staff do not concur) is that he vetoed the total appropriation shown in the third column because that is the amount that can be spent on this project in FY19 and beyond less the amount already spent or encumbered. This interpretation of the veto message results in a zero appropriation for FY19 except for the funds that have already been spent or encumbered. This would prevent the Executive from spending any new money on each project in FY19 unless it is already encumbered. Existing contracts could be completed, but no new contracts could be executed for work on these projects. This option may eliminate FY19 funding for some staff supported by the appropriations for these projects.

This interpretation is consistent with prior guidance provided by the County Attorney. In a memorandum to County Executive Isiah Leggett dated May 5, 2009, then-Deputy County Attorney (now County Attorney) Marc Hansen concluded that "a negative appropriation is not consistent with the Charter because it fails to propose an expenditure plan for the ensuing fiscal year." The negative numbers that are the subject of this discussion are thus not appropriation items at all, but rather are reductions of the reappropriation made in action #2 of Resolution 18-1135 shown above. Put another way, the negative numbers cannot, consistent with the Charter, exist in isolation from the reappropriation. As described above, the appropriation "item" subject to veto under this interpretation is the sum of the reappropriation plus any adjustment shown in the "FY19 Appropriation" column.

The Executive's veto message included an argument that the Council's actions on these projects violated the separation of powers contained in the Charter because the Executive is responsible for determining the type of contract vehicle to use to accomplish a project. While it may be true that the Executive is responsible for determining the type of contract vehicle, the Charter gives the Council the authority to set an appropriation for any budget as it sees fit.

Recommendations

The Council can override the Executive's veto with 6 votes before June 30. This action would leave each of these projects with the same total appropriations shown in Resolution 18-1135. Council staff recommends this action for the following reasons.

1. *Integrity of the Council's institutional role in the budget process.* Under the Charter, all appropriations must be made by the Council. Charter Section 305 provides that "the Council shall approve each budget, as amended, and appropriate the funds therefor . . ."

(emphasis supplied). Charter Section 306 provides that the Executive, within ten days of receipt of the approved budget, “may disapprove or reduce an item contained in it.” The Charter clearly does not contemplate that the Executive may use the veto to increase appropriations, though that is the claimed effect of the veto. If the Council does not override the Executive’s veto, the Executive has made clear that he believes he has an additional \$46,637,000 to spend on these projects over the amount appropriated by the Council. The Executive may spend this money in ways not contemplated or authorized by the Council. It would also increase the amount of funds that the Executive could transfer to another CIP project under Charter §309. This would be a significant intrusion into the Council’s role in the budget process.

In his June 14 memorandum to Council President Riemer, the Executive acknowledged that “some on the Council are concerned that, as a result of my veto of the Council FY19 appropriation, there remains a larger appropriation level in the remaining projects.” By clearly stating this position, he has put the Council in the position of accepting the view, contrary to that of Council staff, and more importantly, contrary to the Charter, that the Executive does in fact have the authority to appropriate funds without Council approval.

2. *Remaining uncertainty about the effect of the veto.* Despite the Executive’s assertion that he has effectively increased appropriations in three projects through his veto, there will remain uncertainty about the validity of this position. If the Council does not override the veto, and the expenditure of funds on these projects in FY19 is challenged, the veto could be interpreted to mean an elimination of all new spending authority on the projects in FY19, as Council staff believes. In this event, a special appropriation or supplemental appropriation would be necessary to avoid potential disruption in the projects, including the loss of funding for staff supported by the appropriations for these three projects.

Overriding the veto is the only way to remove any uncertainty of what funds are actually appropriated for the projects in FY19. It will also foreclose any potential disruption in the projects and remove the substantial amount of overappropriation that the Executive claims exists as a result of his veto. A veto override will not preclude a compromise to resolve the disagreement via CIP amendments and a special appropriation.

Please let us know if you have any questions concerning this matter.

cc. Confidential Aides
Marlene Michaelson
Glenn Orlin
Keith Levchenko
Megan Davey Limarzi