

Chapter 1. Introduction

A. Assignment

In a letter dated March 20, 2007, the Clarksburg Town Center Advisory Committee (CTCAC) transmitted to the Council a 98-page report entitled “Clarksburg Development Districts – The Illegitimate Transfer of Private Financial Obligations to the Public” (“CTCAC report”). (See **Document 1** in the Document Supplement.)

Council President Praisner directed Council staff and the Office of Legislative Oversight (OLO) to prepare a comprehensive analysis of the issues raised by CTCAC, including a review of the history of development districts in the County. Council Vice-President Knapp asked that the final staff report include:

- A summary of the policy goals of development districts;
- A generic list of the steps necessary to create and implement a development district, including the roles of the Executive, Council, and Planning Board;
- A review of the actions taken in the creation and implementation of the Germantown development districts;
- A review of the actions taken to date for any development district in Clarksburg; and
- A specific discussion of how the list of infrastructure items to be funded with any development district had been developed.

B. CTCAC Report

The CTCAC report discussed alleged violations of State and County law regarding the creation of the Clarksburg Town Center Development District (CTCDD). Although the report’s title referred to all of the Clarksburg development districts, the report focused almost exclusively on facts relating to the CTCDD. Except for a few comments about the current status of the Clarksburg Skylark Development District (CSDD) and Clarksburg Village Development District (CVDD), the report did not discuss those districts.¹

The attorney representing CTCAC summarized the legal issues raised in the CTCAC report in a letter to Chief Administrative Officer Timothy Firestine dated March 16, 2007 (“CTCAC Attorney’s First Letter”), and further elaborated on those issues in letters to other County officials dated June 5, 2007 (“CTCAC Attorney’s Second Letter”) and August 3, 2007 (“CTCAC Attorney’s Third Letter”).² (See **Documents 3, 6, and 7** in the Document

¹ CTCAC Report, pp.52 and 94.

² June 5, 2007 letter from David Brown to County Attorney Leon Rodriguez, et. al.; and August 3, 2007 letter from David Brown to Council President Marilyn Praisner.

Supplement.) Although each of those letters described the issues somewhat differently, Council staff believes that they can fairly be summarized as follows:

1. Did the Clarksburg Master Plan require the CTCDD to be created before the Planning Board approved the Clarksburg Town Center's subdivision plan?
2. Did the Development District Act require the CTCDD to be created before the Planning Board approved the Clarksburg Town Center's subdivision plan?
3. Is using the CTCDD to finance infrastructure items that the Planning Board required as a condition of subdivision or site plan approval consistent with the Regional District Act, the County subdivision law, and the County zoning law?
4. Will the CTCDD finance any infrastructure item that is not an eligible "infrastructure improvement" under the Development District Act?
5. Was the Executive authorized to recommend that the CTCDD finance additional infrastructure items beyond those the Planning Board listed as necessary to comply with adequate public facilities and Growth Policy requirements?
6. Is the Council resolution creating the CTCDD invalid because all residents of Clarksburg Town Center were not properly notified of the Council hearing on that resolution?
7. Did the property owner approval process for the CTCDD comply with State law governing development districts?

The CTCAC report expressly noted that CTCAC did not question "the Council's underlying policy decision" to use a development district to finance infrastructure items in Clarksburg Town Center.³

As a remedy for alleged illegalities in the Clarksburg development district process, the CTCAC report requested:

- Dissolution of all Council resolutions for Clarksburg development districts and removal of Clarksburg development district funding from the CIP;
- A thorough, independent investigation and fact finding to verify and publicly report on development district implementation;
- The County's commitment to enforcing existing infrastructure improvement obligations previously approved by the Planning Board; and
- Full review and amendment to, if not repeal of, Chapter 14.⁴

³ CTCAC report, p.4.

⁴ *Id.* at 98.

C. Scope

In response to Council President Praisner's and Council Vice-President Knapp's requests, this report: (1) discusses the origins and policy goals of development districts; (2) reviews the State and local law governing creation of development districts; (3) reviews the facts relating to each step in the creation of the CTCDD; (4) summarizes the status of the CSDD and CVDD; (5) reviews relevant facts regarding the County's practice with the West Germantown Development District (WGDD) and Kingsview Village Center Development District (KVCDD); (6) analyzes the legal issues raised by CTCAC; and (7) identifies issues that merit further discussion.

With regard to the WGDD and KVCDD, this report focuses on facts illustrating the County's practices regarding 3 legal issues raised by CTCAC (see issues 2, 3, and 4 on page 2 of this report). Specifically, it addresses the following 3 questions:

- (1) Did the Council create the WGDD and KVCDD before or after the Planning Board approved the subdivision plans for projects located in those districts?
- (2) Did the WGDD or KVCDD finance any infrastructure item that the Planning Board required as a condition of subdivision or site plan approval for projects located in each district?
- (3) Did the Planning Board, Executive, or Council conclude that any infrastructure item proposed to be funded by the WGDD or KVCDD was ineligible because it: (1) primarily served the residents or occupants of only one development or subdivision; or (2) was the responsibility of a single developer under the Planning Board's site plan and adequate public facilities requirements?

In June 2006, County Executive Duncan appointed the Clarksburg Development District Advisory Committee (CDDAC) and directed that group to prepare recommendations regarding next steps in implementing development districts in the Clarksburg area. On March 21, 2007, CDDAC submitted a report entitled "Clarksburg Development Districts: An Advisory Report" ("CDDAC report") to County Executive Leggett. (See **Document 2** in the Document Supplement.) Some issues raised in the CDDAC report overlap with those raised in the CTCAC report. However, the CDDAC report also raised additional legal questions, including:

- (1) Did all sales contracts for homes purchased in the existing and proposed Clarksburg development districts (CTCDD, CVDD, and CSDD) comply with the notice requirements of the Development District Act?
- (2) Who should receive the credit authorized under the County's transportation impact tax law (Chapter 52, Article VII) against any transportation impact tax paid for property located in the CTCDD, CVDD, or CSDD (developers, home builders, or homeowners)?
- (3) Are the private development districts created in settlement documents signed by homebuyers in the proposed CSDD and CVDD legally enforceable?

The CDDAC report also questioned, as a policy matter, whether it is fair to require: (1) Clarksburg residents to pay for general benefit infrastructure items through a development district; and (2) only some Clarksburg residents to pay a development district tax. This report does not address the additional legal and policy questions raised by the CDDAC report because they do not relate to the authority and roles of the Planning Board, Executive, and Council in creating development districts, which are the focus of this report.

In a letter to Council President Praisner dated March 27, 2007, Inspector General Thomas Dagley informed the Council that he had initiated an audit of cost data and related information for selected projects from the County's Capital Improvements Program (CIP), including all road projects to be financed by the CTCDD. (See **Appendix 19**.) The Inspector General identified 2 objectives for that audit: (1) evaluate the reliability of cost data, financial statements, and underlying support documentation provided to the Executive, Council, and staff in support of selected projects in the fiscal year 2007 CIP; and (2) determine if County policies and procedures are in place to provide adequate internal controls. This report does not address those issues.

D. Methodology

This report is the product of collaborative effort between Council and OLO staff. With 2 exceptions, the body of the report was written primarily by Council Senior Legislative Attorney Kathleen Boucher. Chapter 9, Section A was written primarily by Deputy Council Staff Director Glenn Orlin. Chapter 9, Section B, was written primarily by Council Senior Legislative Attorney Michael Faden. The fact finding reports that are included as **Appendices 1 through 3** and the discussion of development exactions that is included as **Appendix 4** were written primarily by OLO Senior Legislative Analyst Sue Richards. The following Council and OLO staff provided invaluable assistance with both components: Steve Farber, Karen Orlansky, Glenn Orlin, Michael Faden, Jeff Zyontz, Amanda Mihill, Karen Pecoraro, and Teri Busch.

In order to obtain the legal and factual background necessary to analyze the issues raised by CTCAC, Council staff conducted a document review of: (1) State and County laws relating to development districts; (2) the legislative history of those laws; and (3) the legislative history of the CTCDD, CSDD, CVDD, WGDD, and KVCDD. In addition, OLO staff conducted a document review of the Planning Board's regulatory records relating to development projects located in the CTCDD, WGDD, and KVCDD. Council and OLO staff supplemented their document reviews with discussions with current and former Executive, Planning, and WSSC staff. Council staff also reviewed documents submitted by the County Attorney, the Planning Board, CTCAC representatives, and attorneys representing the Clarksburg developers.

State and County laws

Council staff reviewed State and County laws relating to development districts, including the Regional District Act (Article 28 of the Maryland Code) and Chapter 14 (Development Districts), Chapter 20A (Special Obligation Debt), Chapter 33A (Growth Policy), Chapter 50 (Subdivision of Land), and Chapter 59 (Zoning Ordinance) of the County Code.

Legislative history of State and County laws

Council staff reviewed the legislative history of Chapter 14 (Development Districts) and Chapter 20A (Special Obligation Debt) of the County Code. For Chapter 14, the legislative history included all documents in the Council's files relating to Bill 44/46-92 (1994 L.M.C. ch. 12) and Bill 35-95 (1996 L.M.C. ch. 1). For Chapter 20A, the legislative history included all documents maintained by the Department of Legislative Services in Annapolis relating to House Bill 895 of 1994 (Laws of Maryland, Ch. 612) and House Bill 537 of 1996 (Laws of Maryland, Ch. 625).

Legislative history of development districts

Council staff reviewed the legislative history of all Council resolutions relating to the CTCDD, CSDD, CVDD, WGDD, and KVCDD, including:

CTCDD

First Resolution	Resolution 14-648 (September 26, 2000)
Second Resolution	Resolution 15-87 (March 4, 2003)

CSDD and CVDD

First Resolution	Resolution 14-1009 (October 2, 2001)
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WGDD

First Resolution	Resolution 13-636 (July 30, 1996)
Second Resolution	Resolution 13-1135 (January 13, 1998)
Bond Resolution,	Resolution 13-1398 (August 4, 1998)
First annual tax resolution	Resolution 14-1279 (May 23, 2002)

KVCDD

Second Resolution	Resolution 13-1377 (July 28, 1998)
Bond Resolution	Resolution 13-1476 (October 27, 1998)
First annual tax resolution	Resolution 14-562 (June 20, 2000)

The legislative history of each district includes the action taken at each step in the development district creation process discussed in Chapter 3, Section B. Council staff reviewed all available documents in the Council's files, as well as available documents provided by the Executive and Planning Board.

OLO fact finding reports

The facts regarding creation of the CTCDD, WGDD, and KVCDD and the subdivision or site plan approvals for property located in those districts are intricate and complex. OLO staff conducted fact finding of specific issues to support Council staff's legal analysis of issues raised by CTCAC.

At the outset of the project, Council and OLO staff met with Planning staff to get answers to the following questions: (1) Which infrastructure items funded by the CTCDD, WGDD, and KVCDD did the Planning Board require as a condition of subdivision or site plan approval for projects located in those districts? (2) What was the legal basis for requiring each item as a condition of approval? When Planning staff indicated they were unable to provide answers to those questions, OLO staff turned to determining, for each district, whether each infrastructure item approved for development district funding had also been required by the Planning Board as a condition of subdivision or site plan approval and, if so, the legal basis for requiring the item as a condition of approval.

To accomplish that task, OLO staff first identified the development projects located in the CTCDD, WGDD and KVCDD, and then compiled the official regulatory documents relating to subdivision and site plan approval for each project. The regulatory record that OLO staff assembled consisted of Planning Board Opinions, Planning staff reports, memoranda specifically referenced in the Board's Opinions, and select memoranda provided by other agencies (e.g., State Highway Administration) or identified by Planning staff. OLO staff supplemented its review of regulatory documents with other development district decision documents, information from Project Description Forms in the CIP, and discussions with current and former Executive, Planning, and WSSC staff. OLO staff did not review plan drawings, signature set documents, or minutes of Development Review Committee meetings.

The results of OLO fact finding are compiled in **Appendices 1 through 4** of this report. The first 3 appendices present a comprehensive analysis of the facts relating to the creation of the CTCDD, WGDD and KVCDD, and the subdivision or site plan approvals for projects located in those districts. **Appendices 1A, 2A, and 3A** contain chronologies of the creation of each development district and the subdivision or site plan approvals for projects located in those districts. **Appendices 1B, 2B, and 3B** discuss how the list of infrastructure items funded by each development district evolved after a petition to create the district was filed with the Council. **Appendices 1C, 2C, and 3C** explore whether the Planning Board required any infrastructure items funded as a condition of subdivision or site plan approval and, if so, the legal basis for requiring each item as a condition.

Appendix 4 contains a discussion of development exactions and their history in the County. It also examines the coordination of development district taxes with WSSC's system development charge, using a chronology of the Clarksburg Town Center Water Main project, and presents information about the County's transportation impact tax collections and potential development district refunds in Clarksburg.

Comments received from the Planning Board

On March 22, 2007, Council President Praisner sent a copy of the CTCAC report to Planning Department staff ("Planning staff") and requested comments on the accuracy of the report and any other aspect of the report on which Planning staff wished to comment. In place of comments from Planning staff, Planning Board Chair Royce Hanson provided comments on the CTCAC report in a letter to Council President Praisner dated May 18, 2007. (See **Appendix 20.**)

Comments received from attorneys representing the Clarksburg developers

On May 24, 2007, Council staff received extensive comments on the CTCAC report from attorneys representing the developers of property located in the CTCDD, CSDD, and CVDD. Stephen Kaufman and John Orrick, Jr. submitted a 32-page memorandum and sixteen attachments on behalf of the developers (“Developers’ Memorandum”). (See **Document 4** in the Document Supplement.) Kurt Fischer submitted an additional 21-page memorandum on behalf of the developer of Clarksburg Town Center (“Newland’s Memorandum”). (See **Document 5** in the Document Supplement.)

County Attorney’s opinion

The County Attorney’s conclusions on the issues raised by CTCAC are contained in a letter to County Executive Leggett and Council President Praisner dated July 26, 2007 (“County Attorney’s opinion”). (See **Appendix 21**.)

Comments received from the County Executive

After considering the County Attorney’s conclusions on the CTCAC issues, County Executive Leggett forwarded a letter dated July 26, 2007 to Council President Praisner containing recommendations for next steps in the Clarksburg development district process. (See **Appendix 22**.)

E. Organization of Report

This report consists of 9 chapters. The following is a brief description of the 8 chapters that follow this introductory chapter:

Chapter 2, Origins and Policy Goals of Development Districts, identifies factors that fueled the County’s desire to create development districts, discusses the policy goals of development districts, and describes the legislative proposals that led to enactment of the County’s development district law.

Chapter 3, Legal Framework, reviews State and County law governing development districts.

Chapter 4, Clarksburg Town Center Development District, contains detailed factual background on the CTCDD. It describes the boundaries and uses of property located in the district, provides a chronology for creation of the district, discusses each step leading to creation of the district and the current status of the district, analyzes whether any infrastructure item to be funded by the district was required by the Planning Board as a condition of subdivision or site plan approval; and discusses whether the Planning Board, Executive, or Council

concluded that any infrastructure item proposed to be funded by the district was ineligible because it: (1) primarily served the residents or occupants of only one development or subdivision; or (2) was the responsibility of a single developer under the Planning Board's site plan and adequate public facilities requirements.

Chapter 5, Clarksburg Skylark and Clarksburg Village Development Districts, contains a brief factual background on the CSDD and CVDD. It describes the boundaries and uses of property located in the proposed development districts and briefly discusses the steps taken thus far to create those districts and the current status of those districts.

Chapter 6, West Germantown Development District, contains factual background on the WGDD, focusing on facts illustrating the County's practices regarding 3 legal issues raised by CTCAC. It describes the boundaries and uses of property located in the development district, provides a chronology for creation of the district, briefly summarizes the steps leading to creation of the district, and whether any infrastructure item funded by the district was required by the Planning Board as a condition of subdivision or site plan approval, and discusses whether the Planning Board, Executive, or Council concluded that any infrastructure item proposed to be funded by the district was ineligible because it: (1) primarily served the residents or occupants of only one development or subdivision; or (2) was the responsibility of a single developer under the Planning Board's site plan and adequate public facilities requirements.

Chapter 7, Kingsview Village Center Development Districts, contains factual background on the KVCDD, focusing on facts illustrating the County's past practices regarding 3 legal issues raised by CTCAC. It describes the boundaries and uses of property located in the development district, provides a chronology for creation of the district, briefly summarizes the steps leading to creation of the district, analyzes whether any infrastructure item funded by the district was required by the Planning Board as a condition of subdivision or site plan approval, and discusses whether the Planning Board, Executive, or Council concluded that any infrastructure item proposed to be funded by the district was ineligible because it: (1) primarily served the residents or occupants of only one development or subdivision; or (2) was the responsibility of a single developer under the Planning Board's site plan and adequate public facilities requirements.

Chapter 8, Analysis of Legal Issues Raised by CTCAC, presents Council staff's analysis of the 7 legal issues raised by CTCAC.

Chapter 9, Issues for further Discussion, identifies issues that have arisen in the course of preparing this report that do not directly relate to the legal issues raised by CTCAC.

F. Abbreviations and Key Terms

The following abbreviations and key terms are used in this report:

Abbreviation/Term	Meaning
APF	Adequate public facilities required to comply with the APFO.
APFO	The Adequate Public Facilities Ordinance codified in §50-35(k) of the County Code.
CDDAC	Clarksburg Development District Advisory Committee.
CDDAC report	The report submitted by CDDAC to the County Executive on March 21, 2007 (see Document 2 in the Document Supplement).
CIP	The County's Capital Improvements Program.
CTC	Clarksburg Town Center.
CTCAC	Clarksburg Town Center Advisory Committee.
CTCAC Attorney's First Letter	May 16, 2007 letter from David Brown to Chief Administrative Officer Timothy Firestine (see Document 3 in the Document Supplement).
CTCAC Attorney's Second Letter	June 5, 2007 letter from David Brown to County Attorney Leon Rodriguez et. al. (see Document 6 in the Document Supplement).
CTCAC Attorney's Third Letter	August 3, 2007 letter from David Brown to Council President Praisner (see Document 7 in the Document Supplement).
CTCAC report	The 98-page report submitted by CTCAC to the Council on March 20, 2007 (see Document 1 in the Document Supplement).
CTCDD	Clarksburg Town Center Development District.
CSDD	Clarksburg Skylark Development District.
CVDD	Clarksburg Village Development District.

Developer	The developer of Clarksburg Town Center. When the petition to create the CTCDD was filed with the Council on July 5, 2000, Terrabrook Clarksburg, L.L.C (“Terrabrook”) owned the Clarksburg Town Center project. In October 2003, Terrabrook transferred ownership to NNPPH-Clarksburg, LLC (“Newland”).
Development District Act	The Development District Act codified in Chapter 14 of the County Code (see Appendix 5).
Developers’ Memorandum	May 24, 2007 memorandum and attachments sent to the Council by the attorneys representing developers in Clarksburg (see Document 4 in the Document Supplement).
Executive’s Fiscal Report	Development district report submitted by the Executive to the Council (see County Code §14-8).
First Resolution	A resolution adopted by the Council declaring the Council’s intent to create a development district (see County Code §14-6).
Growth Policy	The County Growth Policy adopted under Chapter 33A of the Code.
KVCDD	Kingsview Village Center Development District.
MFP Committee	Management and Fiscal Policy Committee.
Newland’s Memorandum	May 24, 2007 memorandum sent to the Council by the attorney representing NNPPH-Clarksburg, L.L.C. (“Newland”), the developer of the Clarksburg Town Center project (see Document 5 in the Document Supplement).
OLO	Office of Legislative Oversight.
OLO Exactions Analysis	Appendix 4.
OLO Fact Finding Report on the CTCDD	Appendix 1 (1A through 1C).
OLO Fact Finding Report on the WGDD	Appendix 2 (2A through 2C).

OLO Fact Finding Report on the KVCDD	Appendix 3 (3A through 3C).
PAPF approval	The Planning Board's provisional adequate public facilities approval for a development district (see County Code §14-7).
Planning Board	Montgomery County Planning Board.
Planning Staff	Montgomery County Planning Department Staff.
Preliminary plan	Preliminary plan of subdivision approved by the Planning Board under the County's subdivision law (Chapter 50 of the County Code). In this report, "preliminary plan" has the same meaning as "subdivision plan".
Second Resolution	A resolution adopted by the Council that creates a development district (see County Code §14-9).
Site plan	A site plan for a development project approved by the Planning Board under the County's zoning law (Chapter 59 of the County Code).
Subdivision plan	A preliminary plan of subdivision approved by the Planning Board under the County's subdivision law (Chapter 50 of the County Code). In this report, "subdivision plan" has the same meaning as "preliminary plan".
WGDD	West Germantown Development District.

G. Acknowledgements

Council and OLO staff gratefully acknowledge the following individuals who provided background information for this report.

County Government	Planning Department
<p><i>Department of Permitting Services</i> Joe Cheung Reginald T. Jetter Tom Laycock Alicia Thomas Yung-Tsung Kang</p>	<p><i>Acting Director</i> Gwen Wright</p> <p><i>Development Review</i> Rose Krasnow Carolyn Pugh</p>
<p><i>Department of Public Works & Transportation</i> Bruce Johnston David Moss</p>	<p><i>Transportation Planning</i> Richard Hawthorne Ki Kim</p>
<p><i>Department of Finance</i> Jennifer Barrett Michael Coveyou Edward Daniel Stephen O'Malley John Swaney</p>	<p><i>Community Planning</i> Sue Edwards</p> <p><i>Legal Department</i> Debra Daniel David Lieb</p>
<p><i>Office of Management & Budget</i> John Greiner</p>	<p><i>Former Planning Staff</i> Joe Davis Ron Welke</p>
<p><i>Department of Environmental Protection</i> David Lake Alan Soukup</p>	<p>State Highway Administration Ray Burns</p>
<p><i>Office of the County Attorney</i> Scott Foncannon Marc Hansen Clifford Royalty</p>	<p>Developers and Attorneys Kurt Fischer Stephen Kaufman John Orrick, Jr.</p>
<p>WSSC</p>	
<p><i>Development Services Program Group</i> Paul Bonaccorsi Pete Domaruk Julie Gingrich Tom Gingrich Kathy Maholtz Peg Robinson</p>	<p>CTCAC Representatives David Brown Amy Presley</p>
<p><i>Budget Group</i> Mark Brackett Sheila Cohen</p>	
<p><i>Internal Audit Office</i> Janice Hicks Rong Zhao</p>	

Chapter 2. Origins and Policy Goals of Development Districts

This Chapter discusses the origins and policy goals of development districts in the County. Because enactment of the County's development district law in 1994 was fueled in part by Germantown developers who wanted to find alternative financing mechanisms for major infrastructure items required to meet adequate public facilities requirements, this Chapter begins by briefly discussing those requirements. It then discusses 2 major factors leading to enactment of the County's Development District Act (the Germantown West Road Club and the County's fiscal situation in the early 1990s), 2 legislative proposals that led to enactment of the County's development district law, and the County's decision to seek a specific State enabling law.

A. Exactions

Since 1961, the County has required new subdivisions to include certain infrastructure items that are integral to each subdivision. Starting in the early 1970s, the County expanded its regulation of new subdivisions to require that they include "adequate public facilities". The term "adequate public facilities" is commonly used to refer to all infrastructure items required to support new subdivisions. However, under the County's subdivision law, that term refers only to 6 types of infrastructure items that the Planning Board is authorized to require as a condition of subdivision approval. Over the years, the County has used its zoning authority to require certain types of development to include open space, parks, and other infrastructure items for public use and enjoyment. Those types of infrastructure items (commonly called "amenities") are imposed under the County's zoning law as a condition of project and site plan approval. This section briefly discusses the law governing traditional infrastructure requirements, adequate public facilities, and amenities.

Infrastructure items that the Planning Board requires as a condition of regulatory approval, including those that are imposed at either the subdivision or site plan approval stages are sometimes called "in-kind exactions". In contrast, financial contributions that a developer must make to cover the cost of infrastructure items needed to support development (e.g., impact taxes) are sometimes called "financial exactions". Exactions are one way of responding to concerns about the infrastructure burdens associated with new development. Alternative ways to address those concerns include: (1) rejecting new development and diverting growth to other jurisdictions; (2) seeking assistance from other levels of government; (3) increasing taxes and/or fees; and (4) experiencing a decline in services when development occurs without a parallel investment in infrastructure. For a more detailed discussion of exactions in general and the County's use of exactions in particular, see **Appendix 4**.

Traditional infrastructure requirements

Since 1961, the County's subdivision law has required new subdivisions to include roads, alleys, crosswalks, and other "integral facilities", including "such reasonable improvement to [any State, County, or municipal] road in front of [the subdivision] necessary to serve the needs

of [the] subdivision for access and traffic”.⁵ Today, all subdivisions must comply with additional requirements governing storm drainage, markers, monuments, water, sewer, sidewalks, street trees, and street lights.⁶

Adequate Public Facilities Ordinance

In 1973, the County adopted an Adequate Public Facilities Ordinance (APFO) as a part of the County’s subdivision law. The APFO, which is codified in §50-35(k) of the County Code, prohibits the Planning Board from approving a subdivision plan unless the Board finds that 6 types of public facilities are adequate to support and service the proposed subdivision, including (1) roads and public transportation; (2) water and sewer; (3) schools; (4) police stations; (5) firehouses; and (6) health clinics. The APFO requires the Council to adopt guidelines to determine the adequacy of those 6 types of public facilities and specifies that a growth policy periodically approved by the Council can serve that purpose.

Growth Policy

In 1986, the County enacted legislation outlining procedures that the Council can use to adopt a Growth Policy.⁷ The Growth Policy is the Council’s mechanism for making policy decisions to guide the Planning Board’s implementation of the APFO. County law initially required the Council to adopt an Annual Growth Policy (AGP) each year. Since 2003, it has required the Council to adopt a Growth Policy every 2 years.⁸

Since its inception, the Growth Policy has focused on coordinating the timing (i.e., staging) of new subdivisions with the capacity of public facilities. The County’s general plans, master plans, and sector plans determine the amount, type, and location of new development. The Growth Policy identifies administrative procedures and criteria that the Planning Board must use to determine the adequacy of the 6 types of public facilities governed by the APFO when new subdivision projects are proposed. Those procedures and criteria are intended to assure that overall supply and demand are kept in balance. As stated in the current Growth Policy:

This involves predicting future demand from private development and comparing it to the capacity of existing and programmed public facilities. The following guidelines describe the methods and criteria that the Planning Board and its staff must use in determining adequacy of public facilities.

* * *

These guidelines are not intended to be used as a means for government to avoid its responsibility to provide adequate public facilities. Biennial review and oversight allows the Council to identify problems and initiate solutions that will

⁵ County Code §50-24(a), (b), and (c).

⁶ County Code §50-24(a), (d), (e), (f), (i), and (j).

⁷ County Code §33A-13.

⁸ For the current Growth Policy, see Resolution 15-375 (adopted October 28, 2003). Because the Council did not revise its Growth Policy in 2005, the 2003 Growth Policy is still in effect.

serve to avoid or limit the duration of any moratorium on new subdivision approvals in a specific policy area. Further, alternatives may be available for developers who wish to proceed in advance of the adopted public facilities program, through the provision of adequate public facilities capacity beyond that contained in the approved Capital Improvements Program, or through other measures which accomplish an equivalent effect.⁹

The first test for transportation adequacy required an acceptable level of service at nearby intersections when traffic from a proposed subdivision was added to existing traffic, after accounting for intersection improvements programmed in the County's Capital Improvements Program (CIP). That test is sometimes called "Local Area Transportation Review" or "LATR". In the early 1980s, the Growth Policy added "thresholds" that limited the number of jobs and housing units that could be approved in policy areas based on roads programmed in the CIP. Beginning in 1986, the Council set those thresholds each year. "Thresholds" were later renamed "staging ceilings" and the test became known as the "Policy Area Transportation Review" or "PATR". The Council eliminated Policy Area Transportation Review in 2004.

The Council created the first school capacity test in 1987 to impose moratoriums in areas where public school capacities were exceeded in elementary, middle, or high schools. School adequacy was based on an annual comparison of projected enrollment and school capacity programmed in the CIP. If projected enrollment exceeded capacity at any level within a high school cluster area and the adjacent cluster did not have sufficient surplus capacity to cover the deficit, the Growth Policy prohibits the Planning Board from approving any subdivision in that cluster area in the following year. Due to the nature of the test and the Council's CIP decisions, the test did not result in the denial of any subdivision applications.

The Growth Policy has always required the Planning Board to rely on the Washington Suburban Sanitary Commission (WSSC) to determine the adequacy of water and sewer capacity. Today, all subdivisions using public water and sewer must be within an area that WSSC serves or is programmed to serve within 3 years. The Council decides water and sewer categories through the Ten Year Water and Sewer Plan, a State-required long range planning document that is administered by the Department of Environmental Protection (DEP). The absence of sewer pipe and treatment capacity created development moratoriums in the mid-1970s. Those constraints were eliminated with capacity additions and the use of water saving devices.

The Growth Policy has never identified any quantitative tests for determining the adequacy of police stations, firehouses, and health clinics. For police and firehouses, it has required Planning staff to evaluate adequacy after obtaining current response times from police and fire officials.

Parks, Open Space, and Other Amenities

The Planning Board's authority to require parks, open space, and other amenities as a condition of certain types of development derives from the County's zoning law. In 1965, the

⁹ Resolution 15-375, Section AP2, Guidelines for the Administration of the Adequate Public Facilities Ordinance.

County created the Planned Neighborhood and Town Center zones, which require projects to include land for schools, playgrounds, local parks, and conservation areas. The County now has 7 Planned Unit Development Zones with similar requirements.¹⁰

In 1973, the County created the Central Business District (CBD) zones, which include an option for higher density development in exchange for project amenities.¹¹ The public sculptures, high quality street trees and lighting, and well designed public spaces in the central business areas of Bethesda, Friendship Heights, Silver Spring, and Wheaton were provided through a combination of project amenities and public funds.

In 1989, the County created the Residential Mixed Use-2 (RMX-2) zone, which is the zone in which Clarksburg Town Center is located.¹² Mirroring the approach taken with the CBD zones, the RMX-2 zone included an option for higher density development in exchange for project amenities.¹³ In 2005, the County created the Transit Oriented, Mixed Use zones, which reflect a similar approach.¹⁴

B. Road Clubs

During the 1980s, builders and developers of undeveloped land in the Germantown area joined together to form private “road clubs” to finance major off-site road improvements that the Planning Board required as a condition of subdivision approval. Two of the first road clubs were created to finance the construction of Germantown Road (MD Route 118) through what is now Germantown Town Center. The road clubs financed the construction of Germantown Road with private loans that were repaid with an annual assessment of about \$300 on new home owners.

In 1991, the Germantown West Road Club (“Road Club”) asked the County to create a special taxing district to finance road construction in the West Germantown area because conventional financing for major infrastructure improvements was unavailable.¹⁵ The Road Club noted that no transportation ceiling capacity was then available under the Annual Growth Policy

¹⁰ County Code, Division 59-C-7 (Planned Unit Development Zones).

¹¹ County Code, Division 59-C-6 (Central Business District Zones).

¹² County Code, Division 59-C-10 (Residential Mixed Use Zones).

¹³ Section 59-C-10.2 allows “general commercial uses and higher density residential uses . . . provided that they are in accordance with the provisions of 59-C-10.3.1, as well as the density, numerical limitations, and other guidelines contained in the applicable master plan”. Section 59-C-10-3.1 provides that the optional method of development “accommodates mixed use development comprised of planned retail centers and residential uses, at appropriate locations in the County. This method of development is a means to encourage development in accordance with the recommendations and guidelines of applicable master plans.” Section 59-C-10-3.1 specifies that approval of an optional method of development in the RMX-2 zone is “dependent upon the provision of certain public facilities and amenities by the developer . . . essential to support the mixture of uses at the increased densities of development allowed in this zone”. Section 59-D-2.11 provides: “In order to ensure that the development will include the public facilities, amenities, and other design features that will create an environment capable of supporting the greater densities and intensities permitted by the optional method of development, the developer is required to submit a project plan as a part of the application for the use of the optional method; and a site plan must be approved in accordance with the requirements of division 59-D-3 prior to the issuance of any building permit”.

¹⁴ County Code, Division 59-C-13 (Transit Oriented, Mixed Use Zones).

¹⁵ April 10, 1991 letter from Stephen Z. Kaufman to County Attorney Joyce Stern, et. al. (“the Road Club letter”).

for jobs or households in the West Germantown area. The Road Club explained its perspective on special taxing districts as follows:

Special taxing districts have several advantages over the traditional road club and impact fee approaches. Conventional financing for large scale infrastructure improvements is now and may for the foreseeable future be difficult to obtain. Bond financing is more readily available and, moreover, bears interest at lower, tax exempt rates. In addition, the use of special taxes allows for the repayment, in small annual installments, of the costs of infrastructure improvements over the life of an income-producing asset, while road clubs and impact fees require up-front expenditure of significant sums. Like road clubs and impact fees, special tax financing of infrastructure improvements will facilitate desired growth in Montgomery County while allocating costs to only the immediately benefited properties, not to the entire County.¹⁶

That perspective is reflected in a briefing document presented to the Council's Management and Fiscal Policy (MFP) Committee by the law firm of Miles & Stockbridge in June 1991, which discussed 3 advantages of special tax district financing:

1. Promotion of Growth/Development. Special taxing district financ[ing] facilitates growth and development while assuring the simultaneous availability of adequate public facilities.
2. Fair Cost Allocation. Special taxing district financ[ing] allocates costs to the purchasers of new commercial and residential properties that most immediately and directly benefit from growth. This allocation is fair, defuses antigrowth/antitax opposition, and relieves developers of the demand on cash, a balance sheet debt liability limiting future borrowings and an expense that is only partially recovered upon sale of the fully developed property.
3. Cheaper Funds. Infrastructure financing costs are passed through to the end user, traditionally through an increased property cost and larger mortgage. Tax-exempt financing is less costly to the end user because bond rates are lower than mortgage rates and because the ad valorem tax is entirely deductible for federal income tax purposes.¹⁷

C. The County's Fiscal Situation

In 1991, as the Road Club was urging the County to create a special taxing district to finance road construction in the West Germantown area, the County was in the midst of a fiscal crisis. A memorandum prepared by the County's Office of Planning Policies (OPP) for a July 25, 1991 Council briefing on development districts noted that the County had closed a \$185

¹⁶ Memorandum attached to the Road Club letter, p.5.

¹⁷ *Financing Land Development Infrastructure Improvements Through Tax-Exempt Special Tax Bonds*, prepared by the law firm of Miles & Stockbridge for the Management and Fiscal Policy Committee, June 1991, pp.1-2.

million budget deficit in FY1991 by increasing taxes, canceling annual salary increases for employees, and reducing County expenditures.¹⁸ OPP explained that:

A charter amendment was passed last year that limited the ability of the County to raise money through increases in the property tax. In this environment of limited revenues, the County must still meet the need for additional schools and roads, as well as human services requirements. The County is beginning to look at new revenue sources as a way to provide needed infrastructure in an environment of stable or shrinking conventional revenue sources.

As the County begins to look at how to provide the facilities and services needed to serve the existing community, as well as future growth, there is a growing debate about how the burden should be shared to support these costs. A development district is a type of special taxing district that can be tailored to have those who benefit from public improvements bear the cost.¹⁹

OPP advised the Council that it was exploring the possibility of creating development districts in the Shady Grove and Germantown areas.

A memorandum prepared by OPP for a November 26, 1991 Council briefing on development districts explained that the following factors were fueling concerns about infrastructure financing in the County:

The adoption of Question F and the restraints it places on the property tax;²⁰

The withdrawal of the Federal government and more recently the State of Maryland from infrastructure financing;

Recession leading to further aggravated problems in funding infrastructure at the State and local government level;

Collapse of the real estate industry and financial institutions nationwide as well as in the Washington region; and

The administration's concerns about the character of growth and development as well as our difficulty in implementing our adopted plans.²¹

¹⁸ July 23, 1991 memorandum from OPP Acting Director Hal Phipps to Senior Legislative Attorney Michael Faden, p.1.

¹⁹ *Id.*

²⁰ "Question F" refers to the 1990 amendment to Section 305 of the County Charter that required an affirmative vote of 7 Councilmembers to levy an ad valorem tax on real property that will produce total revenue that exceeds the total revenue produced by the tax on real property in the preceding fiscal year plus a percentage of the previous year's real property tax revenues that equals any increase in the Consumer Price Index.

²¹ *Addressing Infrastructure Financing Issues – A Discussion Paper*, prepared by the Montgomery County Office of Planning Policies, November 1991, p.1.

OPP noted that the following specific efforts to develop new infrastructure financing methods were underway in the County:

County Wide: The general need to derive a new way of funding much needed infrastructure across the county generated an effort to promote a Construction Excise Tax (CET).

Shady Grove: Concern about the implementation of the Shady Grove Master Plan led to direction from the County Council to determine a mechanism to pay for infrastructure in that area so that development could go forward.

Germantown: A concern from property owners and local residents to get the Germantown Town Center underway led to examination of the potential for a development district for that area.²²

OPP also noted that the County was evaluating proposed charges to pay for infrastructure that was needed to address water, sewer, and stormwater management needs.²³

D. Development District Legislation - County

Throughout 1992, the MFP Committee held worksessions and public forums to explore issues relating to infrastructure financing in general and development districts in particular.²⁴ A memorandum prepared by the County's Office of Planning Implementation (OPI) for a July 27, 1992 worksession on infrastructure financing and development districts summarized the pros and cons of development districts as follows:

Pros:

- Targets funds to specific areas
- Used successfully elsewhere
- Strong link between who benefits and who pays

Cons:

- Narrow base
- High tax rates if only revenue source
- New County legislation/rules needed
- If rates too high, development not feasible²⁵

²² *Id.*

²³ *Id.*

²⁴ The MFP Committee held worksessions on infrastructure financing on February 24, July 27, and October 27, 1992. It held 2 public forums on March 25 and April 2, 1992.

²⁵ July 23, 1992 memorandum from OPI Director Elizabeth Davison to the County Council.

That memorandum urged the MFP Committee to support development districts as one of several new infrastructure financing mechanisms.

During that period, the MFP Committee began to consider 2 legislative proposals to establish procedures to create development districts. The first proposal was prepared by attorneys for the Road Club ("Road Club's proposal"). The second proposal was prepared by County Executive Neal Potter ("Executive's proposal"). The MFP Committee reviewed drafts of both proposals throughout 1992. They were eventually introduced as separate bills on December 1, 1992. The Road Club's proposal was reflected in Bill 44-92; the County Executive's proposal was reflected in Bill 46-92.

The Legislative Request Report (LRR) prepared by Council staff for Bill 44-92 described the bill as authorizing the creation of development districts in which special assessments and special taxes could be levied to pay for infrastructure items. It indicated that Bill 44-92 was intended to solve the following problem: "County funds for infrastructure improvements are limited, and development in areas with inadequate public facilities is being delayed". It described the bill's goals and objectives as follows: "Provide funds for infrastructure improvements needed to permit development that is being delayed because of inadequate public facilities in the area planned for development".

The Executive's transmittal memorandum for Bill 46-92 explained that the bill "had been drafted in response to the need for new sources of revenue to support new development and implement master plans".²⁶ The LRR prepared by Executive staff for Bill 46-92 indicated that the bill would allow development districts in areas that the County determined to be priority areas for development. It noted that Bill 46-92 was intended to solve the following problem: "There are several areas in the County that are in moratoria as a result of inadequate public facilities, including areas that are recommended for development in the respective master plans". It described the bill's goals and objectives as follows: "Development districts are intended to foster a public/private partnership in providing public infrastructure, taking into account the long-term infrastructure needs [of the district and] reducing the level of risk for both the County and the developer". It noted that the Executive had studied development district laws in several other jurisdictions, including Florida, California, Pennsylvania, and Texas, before drafting the bill.

Although both bills established procedures to create development districts, they were substantially different in many ways. One of the most significant differences related to the type and number of infrastructure items that could be financed by a development district. The Executive's proposal was much broader than the Road Club's proposal. As described by Council staff, Bill 46-92 envisioned that a development district would finance "the infrastructure necessary to build out all master-planned development in a given district . . . except for those items specifically reserved for the County to finance".²⁷ Council staff noted that Bill 44-92 envisioned that a development district would finance only "those infrastructure items necessary for the participating landowners to meet their adequate public facilities ordinance (APFO)

²⁶ November 20, 1992 memorandum from County Executive Neal Potter to Council President Bruce Adams.

²⁷ March 1, 1993 memorandum from Senior Legislative Attorney Michael Faden to the MFP Committee, p.2.

requirements”.²⁸ Although any type of infrastructure item required by the APFO could be funded by a development district under Bill 44-92 (i.e., roads, schools, water and sewer, fire stations, police stations, and health clinics), that type of development district was nicknamed a “bond-financed road club”.²⁹

The MFP Committee held 6 worksessions on Bill 44-92 and Bill 46-92 before making final recommendations to the Council on June 21, 1994.³⁰ The Committee’s final recommendation was a “combined redraft which followed the general direction taken by Bill 44-92 while adding some elements of Bill 46-92”.³¹ The bill was given a new bill number – Bill 44/46-92 – to reflect its combined nature. Council staff explained to the Council that:

The central purpose of this legislation is to create a mechanism for funding necessary infrastructure improvements in parts of the County that are expected or encouraged to undergo intensive development. That mechanism is the development district. It is a particular form of special taxing district, for which the County can issue debt that will not be an obligation of the County itself. Rather, the responsibility to pay that debt will fall on the owners of properties in the district, who will fund its repayment through special taxes, special assessments, or other fees or charges that attach to the property.³²

With regard to the pros and cons of development districts, Council staff observed that:

For property owners in a proposed development district, the major advantages of this approach are pre-approved compliance with the County’s adequate public facilities (APF) requirements and lower-cost funding through tax-exempt debt. The primary benefit to the County is the funding, on a predictable schedule, of major infrastructure improvements by the property owners who will benefit from the capacity those improvements create.³³

In describing Bill 44/46-92, Council staff emphasized several things the bill did not do. Specifically, Council staff explained that the bill did not:

[C]reate any specific development district. Bill 44/46-92 is only enabling legislation; it does not set up a development district in any particular part of the County. Rather it establishes the processes and some criteria under which the County Council, by adopting a set of resolutions, can create one or more development districts where needed.

²⁸ *Id.*

²⁹ *Id.* See also January 25, 1993 memorandum from Carol Dickey, Community Planning staff (via Charles Loehr, Deputy Planning Director) to Montgomery County Planning Board, p.3.

³⁰ Those 6 worksessions were held on March 1, March 22, April 2, October 22, and December 6, 1993, and February 10, 1994.

³¹ June 21, 1994 Memorandum from Senior Legislative Attorney Michael Faden to the County Council, p.1.

³² *Id.*

³³ *Id.*

[A]dopt an infrastructure program. Whether and when the County will build any given infrastructure item, how much it will cost, how much development capacity it will release, whether the County will take responsibility for things the state should fund, and what share of the cost the private sector should assume (either through a development district or otherwise) are left to the Capital Improvements Program, the Annual Growth Policy, and the implementing resolution for each development district.

[D]istribute burdens between population groups – that is, decide for any development district what share of the capital or operating costs of new infrastructure will be borne by new development in the district, all taxpayers in the district, or all taxpayers in the entire County. The amount and timing of these cost allocations would be settled district-by-district.

[S]pecify which taxes will be used in any development district. The types of special taxes, assessments, charges, or fees to be levied, the rate of each, the mix among them, and the revenue yields to be achieved, would all be set in the Council resolution creating each development district. This bill does not authorize any new or different taxes; if the Council wants to add to the County's revenue options, that must be done in separate legislation. Instead, it assumes that development districts will select among the revenue-raising devices now available to County government.

Council staff observed that the MFP Committee had concluded that all of those decisions were more suitable for district-by-district consideration than Countywide rules or standards.

In essence, Bill 44/46-92 established a procedural framework to create development districts. That framework is now codified in Chapter 14 of the County Code. The components of Chapter 14 that are relevant to this report are discussed in Chapter 3, Section B.

E. Development District Legislation – State

In 1992, the County's bond counsel opined that the County did not have clear authority under State Express Powers Act to issue development district bonds because they were not revenue bonds.³⁴ Bond counsel advised the County to seek specific enabling authority from the Maryland General Assembly.³⁵ The County followed bond counsel's advice and the result was House Bill 895, a public local law enacted in 1994. That State law is now codified in Chapter 20A of the County Code.³⁶ The components of Chapter 20A that are relevant to this report are discussed in Chapter 3, Section A.

³⁴ October 2, 1992 letter from Smith, Somerville, and Case to County Attorney Joyce Stern.

³⁵ For further discussion of this issue, see Chapter 8, Section G.

³⁶ 1994 Md. Laws Ch. 612.

Chapter 3. Legal Framework for Development Districts

A. State Law – Special Obligation Debt

County Code Chapter 20A is a State law that authorizes the County to enact a local law to provide for the issuance of bonds to finance the cost of infrastructure for a development district for which the principal and interest is paid from special taxes or assessments collected by the County in the development district.³⁷ It defines the term “development district” to mean a special taxing district that is created to facilitate financing for public infrastructure to serve new development (or redevelopment of commercial or industrial properties).³⁸ A copy of Chapter 20A is included as **Appendix 6**.

Section 20A-1(f) is particularly relevant to the issues raised by CTCAC. That section prohibits the creation of a development district unless the proposed district is approved by: (1) at least 80% of the owners of the real property located within the proposed development district, treating multiple owners of a single parcel as one owner and treating a single owner of multiple parcels as one owner; and (2) the owners of at least 80% of the assessed valuation of the real property located in the proposed development district.

B. County Law – Development District Act

Chapter 14 of the County Code is also known as the Development District Act. It outlines procedures to create a development district and impose special taxes and assessments to cover the cost of bonds issued to finance infrastructure that serves the district.³⁹ A copy of Chapter 14 is included as **Appendix 5**. This section discusses the components of the Development District Act that are relevant to the issues raised by CTCAC.

Purpose

The Development District Act expressly authorizes the County “to provide financing, refinancing, or reimbursement for the cost of infrastructure improvements necessary for the development of land in areas of the County of high priority for new development or redevelopment by creating development districts in which special assessments, special taxes, or both, may be levied”.⁴⁰ It expressly notes that a development district would be especially useful in achieving those purposes where: (1) an approved master plan recommends significant development in a specific area of the County; (2) the infrastructure needs necessary to serve that development include extensive and long-term facilities; and (3) the real estate market and the

³⁷ County Code §20A-1(b).

³⁸ County Code §20A-1(a)(3).

³⁹ 1994 L.M.C. ch. 12.

⁴⁰ County Code §14-2(a).

availability of land will permit significant development within the life of a development district.⁴¹

A development district: (1) must be located entirely in the County, but may include land in any municipality; (2) need not consist of a contiguous geographic area unless otherwise required by State law; (3) should largely, if not entirely, consist of undeveloped or underdeveloped land; and (4) may be used to finance an infrastructure improvement located outside the district if the improvement is located in the County and related to the development or use of land in that development district.⁴²

Eligible infrastructure

Under §14-3(g), a development district may be used to fund a school, police station, fire station, library, civic or government center, storm drainage system, sewer, water system, road, bridge, culvert, tunnel, street, transit facility or system, sidewalk, lighting, park, recreational facility, or any similar public facility.⁴³ However, §14-3(g)(1) and (2) specify that a development district must not be used to fund an infrastructure improvement that: (1) primarily serves the residents or occupants of only one development or subdivision; or (2) is the responsibility of a single developer under the Planning Board's site plan and adequate public facilities requirements.⁴⁴

Creating a development district

A development district can be initiated by property owners located in the proposed district or by the Council at the request of the Executive or on its own initiative. The 3 development districts that already have been created in the County (WGDD, KVCDD, and CTCDD), as well as those that are in the process of being created (CSDD and CVDD), were all initiated by property owners. **Exhibit 3-1** shows the 10 major steps involved in creating a development district initiated by property owners. Each of step is discussed in more detail below.

⁴¹ County Code §14-2(b).

⁴² County Code §14-5.

⁴³ County Code §14-3(g).

⁴⁴ County Code §14-3(g)(1) and (2).

Exhibit 3-1. Creation of a Development District Initiated by Property Owner

Step	Description
Step 1	Property owner files a petition to create a development district with the Council.
Step 2	Council holds a public hearing on the petition.
Step 3	Council adopts a resolution declaring its intent to create a development district ("First Resolution").
Step 4	Property owner files an application for provisional adequate public facilities (PAPF) approval with the Planning Board.
Step 5	Planning Board approves the PAPF application.
Step 6	Executive submits Fiscal Report to the Council.
Step 7	Council holds a public hearing on a resolution to create a development district ("Second Resolution").
Step 8	Council adopts the Second Resolution.
Step 9	Council adopts a resolution authorizing development district bonds.
Step 10	Council adopts the first annual resolution levying special taxes and assessments.

Step 1 - Petition to create a development district

If a development district is initiated by one or more property owners, the district creation process begins when the owners file a petition to create a district with the Council.⁴⁵ The petition must be signed by at least 80% of the real property owners in the proposed district and the owners of at least 80% of the value of real property located in the district.⁴⁶ The petition must list the maximum number of housing units and amount of non-residential space that the signing property owners intend to build in the district (i.e., development ceilings).⁴⁷

⁴⁵ If a district is initiated by the Council, the district creation process begins when the Council holds a public hearing at least 15 days after advertising the hearing in 2 newspapers of general circulation in the County. The notice must: (1) specify the boundaries of the proposed district; and (2) list the maximum number of housing units and the maximum nonresidential space expected to be built in the district. County Code §14-9(c).

⁴⁶ County Code §14-6(a).

⁴⁷ County Code §14-6(e) provides that multiple owners of a single parcel of real property must be treated as one owner and a single owner of multiple parcels must be treated as one owner.

Step 2 - Public hearing on the petition to create a development district

The Council must hold a public hearing on a petition to create a development district after advertising the hearing in 2 newspapers of general circulation in the County at least 15 days before the hearing.⁴⁸

Step 3 - Resolution declaring the Council's intent to create a development district (First Resolution)

After the public hearing on a proposed district, the Council may adopt a resolution declaring the Council's intent to establish a development district consisting of a specified geographic area ("First Resolution").⁴⁹ The First Resolution must explain why intensive development of, and public investment in, that area during the term of the district will benefit the public interest.⁵⁰ The First Resolution takes effect: (1) when signed by the Executive; (2) if the Executive disapproves the resolution, when readopted by the Council with a vote of 6 Councilmembers; or (3) if the Executive does not act within 10 days after the Council adopts the resolution.⁵¹

Step 4 - Application for PAPF approval

After the Council adopts the First Resolution, one or more property owners may submit an application for PAPF approval to the Planning Board. The application must: (1) explain how each development located in the proposed district will comply with all applicable zoning and subdivision requirements, including any APFO requirements; (2) identify any infrastructure improvements necessary to satisfy the Growth Policy's adequate public facilities requirements for a development district; and (3) estimate the cost to provide each improvement.⁵²

Step 5 - Planning Board's PAPF approval

The Planning Board must review a PAPF application to determine whether it complies with the APFO (see Chapter 2, Section A for a discussion of the APFO) and any added requirements that apply to the development district under the Growth Policy (see Chapter 2, Section A for a discussion of the Growth Policy as it relates to subdivisions and Section C of this Chapter for a discussion of the Growth Policy as it relates to development districts). The Board can conditionally approve the PAPF if the Board believes that, taken as a whole, the infrastructure items to be funded by the proposed development district will meet APFO and

⁴⁸ County Code §14-6(a).

⁴⁹ County Code §14-6(f) specifies that adoption of the First Resolution does not obligate the Council to create a development district or limit a district to the area described in the resolution.

⁵⁰ County Code §14-6(c).

⁵¹ County Code §14-6(d).

⁵² County Code §14-7(a).

Growth Policy requirements. The Board can condition its approval on creation and funding of the development district and compliance with the development ceilings proposed in the developer's petition to create the district.⁵³

A PAPF application must commit the applicant or applicants to produce "through the funding of the proposed development district or otherwise" the infrastructure improvements needed to meet APFO requirements and any other requirements that apply to the development district under the Growth Policy. In its written approval, the Planning Board must list the infrastructure items needed to meet APFO and Growth Policy requirements.⁵⁴

Step 6 - Executive's Fiscal Report

After the Planning Board has acted on an a PAPF application, the Executive, after consulting with the Superintendent of Schools and the Washington Suburban Sanitary Commission (WSSC), must submit a report to the Council estimating: (1) the cost of each infrastructure item listed by the Planning Board as necessary to meet APFO and Growth Policy requirements; (2) the amount of revenue needed to cover the district's share of all infrastructure improvements funded by the district; and (3) the estimated tax rate for each form of taxation available to the district to produce revenue. The Development District Act urges the Executive to: (1) compare the Executive's cost estimates to those provided by the developer in the original development district petition; and (2) recommend whether the Council should create a district, its boundaries if one is created, which infrastructure items listed by the Planning Board should be funded by the district, and alternative financing or revenue-raising measures.⁵⁵

Step 7 - Public hearing on a resolution to create a development district (Second Resolution)

After receiving the Executive's Fiscal Report, the Council must hold a hearing on the resolution to create a development district. The Council must give notice of the hearing by: (1) advertisement in at least 2 newspapers of general circulation in the County at least 21 days before the hearing; and (2) notifying by mail the record owner of each property located in the proposed district at the address shown on the latest tax assessment roll. Each notice mailed to a record owner of property must include: (1) a copy of the proposed resolution to establish the district; and (2) an estimated rate for any tax, assessment, fee, or charge proposed to fund infrastructure improvements for the district.⁵⁶

⁵³ County Code §14-9(b).

⁵⁴ County Code §14-7(c).

⁵⁵ County Code §14-8.

⁵⁶ County Code §14-9(a) and (b).

Step 8 - Adoption of the Second Resolution

If one or more property owners initiated the creation of a district, the Council may adopt the Second Resolution anytime after holding a public hearing on the resolution.⁵⁷ If the Council initiated the creation of a district, before the Council adopts the Second Resolution, it must receive a petition signed by: (1) at least at 80% of real property owners in the proposed district; and (2) the owners of at least 80% of the value of real property in the proposed district.⁵⁸

The Second Resolution must: (1) define the development district by specifying its boundaries and listing the tax account number of each property; (2) list each infrastructure item that will be financed by the development district, the estimated completion date and the cost of that improvement, and the share of that cost which the County or another government agency will pay; (3) create, and specify the amount or percentage of, a contingency account for unexpected cost overruns; (4) create a special fund for the development district; and (5) authorize the imposition of special taxes and assessments at a rate designed to provide adequate revenues to pay the principal of and interest on the development district bonds.⁵⁹

The Second Resolution takes effect: (1) when signed by the Executive; (2) if the Executive disapproves the resolution, when readopted by the Council with a vote of 6 Councilmembers; or (3) if the Executive does not act within 10 days after the Council adopts the resolution.⁶⁰

Step 9 - Adoption of a Resolution authorizing the issuance of bonds (Third Resolution)

To issue development district bonds, the Council must adopt a resolution that describes the proposed infrastructure improvements, specifies the maximum principal amount of bonds to be issued, covenants to levy special taxes and assessments at a rate and amount sufficient in each year to cover the cost of the bonds, and specifies the basis of any special tax or assessment.⁶¹

Step 10 - Adoption of a Resolution levying special taxes and assessments (Annual Resolution)

After bonds are issued for a development district, the Council must adopt a resolution each year during the life of the bonds to levy any applicable special tax or assessment. That has sometimes been done as a separate resolution and sometimes as part of the Council's annual property tax rate resolution.

⁵⁷ County Code §14-19(a) calls the Second Resolution the "final resolution to create a development district".

⁵⁸ County Code §14-9(c).

⁵⁹ County Code §14-9(e) and §14-10(a).

⁶⁰ County Code §14-9(d).

⁶¹ County Code §14-13(a).

Notice to buyers

A contract to sell real property located in a development district must disclose to the initial buyer, and any later buyer during the life of any special assessment or tax, the amount of any special assessment or tax that the buyer must pay.⁶² A contract that does not disclose that information is voidable at the option of the buyer before the date of settlement.⁶³ The notice must substantially conform to the following text:

Each year the buyer of this property must pay a special assessment or special tax that is imposed under Chapter 14 of the Montgomery County Code. As of (date of contract of sale), the special assessment or special tax on this property amounts to (dollar amount in arabic numbers) each year. As of (date of each scheduled increase), the assessment or tax is scheduled to increase to (amount of each scheduled increase). For further information on this assessment or tax, the buyer can contact the County Department of Finance at (current telephone number).⁶⁴

If an increase in an assessment or tax is likely to occur in the foreseeable future but the timing or amount of the increase is not certain when the contract is signed, the notice must also expressly disclose that fact. Before any bonds can be issued for a development district, the Director of Finance must record among the County land records a declaration encumbering all real property located in the district and identify that property as being in a development district.⁶⁵

Satisfaction of APFO requirements

Once a development district is created and financing of all required infrastructure is arranged, development in the district is considered to have satisfied all APFO requirements, any additional requirements that apply to the development district under the Growth Policy, and any other infrastructure requirements that the County adopts within 12 years after the district is created.⁶⁶ This is up to 7 years longer than the normal 5-12 year APFO applicability period for subdivision approvals.⁶⁷

Credit against the impact tax

Section 14-10(e) specifies that the total amount of any development district tax must be credited against development impact taxes imposed on new development in the district.

⁶² County Code §14-17(a).

⁶³ *Id.*

⁶⁴ County Code §14-17(b).

⁶⁵ County Code §14-17(c).

⁶⁶ County Code §14-17(e)(1).

⁶⁷ County Code §50-20(c)(3).

C. County Law – Growth Policy – Development Districts

Chapter 1, Section A of this report discussed the Growth Policy as it relates to subdivisions. This section discusses the Growth Policy as it relates to development districts.

After the Development District Act was enacted in 1994, the Council amended the Growth Policy to add guidelines for evaluating the adequacy of public facilities in a proposed development district.⁶⁸ Those guidelines require the Planning Board to use similar tests to determine adequacy of roads, schools, water and sewer, and police, fire, and health facilities in a development district as those that are used to determine adequacy for individual subdivision projects.⁶⁹

The current Growth Policy requires the Planning Board to identify the public facilities needed to support buildout of the development district after considering the results of the following adequacy tests:

Transportation tests for development districts are identical to those for Local Area Transportation Review. Planning Department staff must prepare a list of transportation infrastructure needed to maintain public facility adequacy.

The PAPF application must be referred to the Montgomery County Public Schools staff for recommendations for each stage of development in the proposed district. MCPS staff must calculate the extent to which the development district will add to MCPS's current enrollment projections. MCPS must apply the existing school adequacy test to the projections with the additional enrollment and prepare a list of public school infrastructure needed to maintain the public facility adequacy.

The PAPF application must be referred to the Washington Suburban Sanitary Commission for recommendations for each stage of development in the proposed district. Wastewater conveyance and water transmission facilities must be considered adequate if existing or programmed (fully-funded within the first five years of the approved WSSC capital improvements program) facilities can accommodate (as defined by WSSC) all existing authorizations plus the growth in the development district. Adequacy of water and wastewater treatment facilities must be evaluated using the intermediate or "most probable" forecasts of future growth plus development district growth, but only to the extent that development district growth exceeds the forecast for any period of time. If a test is not met, WSSC must prepare a list of water and sewer system infrastructure needed to maintain public facility adequacy.

The PAPF application must be referred to the County Executive for recommendations for each stage of development in the proposed district regarding

⁶⁸ Resolution 13-216 (adopted July 11, 1995), pp.21-24.

⁶⁹ Resolution 15-375, Section TP4, Development District Participation.

police, fire, and health facilities. Adequacy of police, fire, and health facilities must be evaluated using the intermediate or most probable forecasts of future growth plus development district growth, but only to the extent that development district growth exceeds the forecast for any time period. Any facility capacity that remains is available to be used by the development district. If any facility capacity deficits exist, the County Executive must prepare a list of infrastructure needed to maintain public facility adequacy.⁷⁰

With one exception, the current Growth Policy is substantially similar to the FY96 Annual Growth Policy that was in effect when the Planning Board approved the initial subdivision plan for Clarksburg Town Center in March 1996. The substantial difference is that the FY96 Annual Growth Policy included a ceiling capacity test under Policy Area Transportation Review. However, that test did not apply to the Clarksburg Town Center project because Clarksburg was not a policy area at that time.⁷¹

The Growth Policy includes language that mirrors the components of the Development District Act that relate to PAPF applications and the Planning Board's review of those applications. However, it also includes additional language that expressly authorizes the Executive and Planning Board to recommend to the Council that the development district finance additional facilities to support development in the district beyond the 6 types of facilities covered by the APFO. The Growth Policy specifies that "[t]hese facilities may include but are not limited to libraries, health centers, local parks, social services, greenways, and major recreational facilities".⁷²

⁷⁰ Resolution 15-375, 2003-5 Annual Growth Policy, Section TP4.2, Development District Participation – Planning Board Review.

⁷¹ Resolution 13-216, FY96 Annual Growth Policy.

⁷² Resolution 15-375, 2003-5 Annual Growth Policy, Section TP4.4, Development District Participation – Additional Facilities for Funding.

Chapter 4. Clarksburg Town Center Development District

Chapter 3 outlined the legal framework for creating a development district and listed the 10 major steps leading to the creation of a district. This chapter covers each of those steps for the CTCDD. It also: (1) discusses relevant components of the Clarksburg Master Plan; (2) analyzes whether each infrastructure item to be funded by the CTCDD was a condition of subdivision or site plan approval; (3) analyzes whether the Planning Board, Executive, or Council concluded that any infrastructure item proposed to be funded by the CTCDD was ineligible because it: (i) primarily served the residents or occupants of only one development or subdivision; or (ii) was the responsibility of a single developer under the Planning Board's site plan and adequate public facilities requirements; and (4) describes the cost share allocations for infrastructure items to be funded by the CTCDD.

Exhibit B-3 on page 1B-11 of the OLO Fact Finding Report on the CTCDD and **Appendices 12-14** are helpful visual guides for this section's narrative discussion of infrastructure items funded by the CTCDD. **Exhibit B-3** shows how the final list of infrastructure items funded by the CTCDD evolved after the Developer filed the petition to create the CTCDD. **Appendix 12** is the CTCDD map that was attached to the Second Resolution for the CTCDD. **Appendices 13 and 14** are maps that depict the Council's final decision regarding the infrastructure items to be funded by the CTCDD.

A. Clarksburg Master Plan

The starting point for discussing the CTCDD is the Clarksburg Master Plan ("Plan"), which expressly contemplated using development districts as a funding mechanism for infrastructure items necessary to support development outlined in the Plan.⁷³

Vision

The Plan, which was approved by the Council in June 1994, established a long-range vision for Clarksburg as a new town along the I-270 Corridor. It noted that implementing that vision would take many years and require "substantial commitments by both the public and private sectors".⁷⁴ The Plan addressed the development potential of 8 geographic areas within the Clarksburg study area. (For a map of those 8 areas, see **Appendix 9**.⁷⁵) Two of those areas were the Town Center District and the Newcut Road Neighborhood. The CTCDD was created out of property located in the Town Center District. The CSDD and CVDD would be created out of property located in the Newcut Road Neighborhood.

⁷³ Clarksburg Master Plan and Hyattstown Special Study Area ("Plan").

⁷⁴ Plan at 1.

⁷⁵ The map included as **Appendix 9** is Figure 18 from page 41 of the Plan.

Roads – Generally

The Plan proposed a system of roads, transit routes, and bikeway/pathways to support future development. The Plan noted that the recommended transportation system would serve both local and through traffic moving between areas in the larger region. It recommended a street network that differentiated between highways that would accommodate regional through traffic and roads that would provide subregional and local access.⁷⁶ (For maps showing the Plan's hierarchy of roads and streets, see **Appendices 10 and 11.**⁷⁷) In discussing its recommended hierarchy of roads and streets, the Plan offered the following explanation:

Generally, freeways (I-270), major highways and the transitway are intended to serve the movement of longer distance through traffic while local neighborhood streets and neighborhood bus loops, bikeways, and walkways tend to only provide access to the residential and business areas through which they pass. Arterial highways fall between these extremes, serving a combination of through movement and local access.⁷⁸

Roads – Clarksburg Town Center

The Plan identified a need for 3 arterial roads that now circumscribe Clarksburg Town Center: (1) Stringtown Road, (2) MidCounty Highway/Snowden Farm Parkway (previously called Piedmont Road), and (3) Clarksburg Road.⁷⁹ The CTCDD would be used to fund parts of each of those roads.

Staging principles

The Plan recommended that development occur in stages, and identified 7 guiding principles for future timing of private development. One of those principles directly addressed fiscal concerns. Specifically, it provided:

The timing and sequence of development in Clarksburg should be responsive to the likelihood that funding for capital improvements required by new growth in the area will come from a variety of sources, including the County and private development.⁸⁰

In support of that principle, the Plan cited a separate fiscal analysis which concluded that the County would not be able to fund all of the Plan's recommended capital improvements. The

⁷⁶ The Street and Highway Plan from pages 112-125 of the Plan is attached as **Appendix 11**.

⁷⁷ The maps included as **Appendices 10 and 11** are Figures 11 and 40 from pages 25 and 113 of the Plan.

⁷⁸ Plan at 107.

⁷⁹ *Id.* at 114-115, 119, 122, and 123.

⁸⁰ *Id.* at 188.

fiscal analysis identified a projected shortfall of \$75 million to \$100 million over a 20-year period.⁸¹

The Plan stressed that County revenues would need to be supplemented by other sources of revenue, including funds from private sources such as “land dedication, developer contributions (in-kind or in-cash), construction excise taxes, *development district payments*, or other development fees”.⁸² On the subject of alternative financing mechanisms, the Plan noted:

This Plan recognizes, that while the specific details and implementation mechanism related to alternative funding mechanisms are not well known at this time, in all likelihood, more than one source of private funds will be needed and used in the Clarksburg Area. *In particular, it is possible that more than one development district could be used.* The County should carefully evaluate the use of all alternative financing mechanisms to ensure that they do indeed make significant contributions towards the facilities called for in the Plan.⁸³

Staging sequence

The Plan recommended that development in Clarksburg be divided into 4 geographic “stages” and identified “triggers” and “implementing mechanisms” for each stage. The Plan placed Clarksburg Town Center in Stage 2. One trigger for Stage 2 was the existence of State and County “enabling legislation for development districts” or other “alternative financing mechanisms”.⁸⁴ One implementing mechanism for Stage 2 was “[o]ne or more development districts (or alternative financing mechanisms)”.⁸⁵ The Plan provided that “[a]ll staging triggers must be met to initiate” Stage 2 and that individual developments within that stage “can proceed once public agencies and the developer complied with all the implementing mechanisms”.⁸⁶

B. Description

The CTCDD encompasses about 247 acres located in northern Montgomery County. The development district lies 1 mile east of I-270 between Clarksburg Road and Stringtown Road. It is bounded by Snowden Farm Parkway (formerly known as Piedmont Road) to the east and Clarksburg’s historic district to the west. The development district consists of 1 subdivision known as Clarksburg Town Center, which is being developed as a neo-traditional community consisting of 1,255 residential units (228 single-family detached, 497 townhouses, and 530

⁸¹ *Id.* at 186.

⁸² *Id.* at 188 (emphasis added).

⁸³ *Id.* (emphasis added).

⁸⁴ *Id.* at 195.

⁸⁵ *Id.*

⁸⁶ *Id.*

multi-family units), 150,000 square feet of retail space, and 100,000 square feet of office space.⁸⁷ (For maps of the CTCDD, see **Appendices 12-14.**)⁸⁸

C. Chronology

Exhibit 4-1 shows the chronology of steps leading to the creation of the CTCDD. Each step is discussed in detail below.

Exhibit 4-1. Chronology for the CTCDD

Step	Description	Date
Step 1	Developer files a petition to create the CTCDD.	July 5, 2000
Step 2	Council holds a public hearing on the petition.	August 1, 2000
Step 3	Council adopts Resolution 14-648 declaring the Council's intent to create the CTCDD ("First Resolution").	September 26, 2000
Step 4	Developer submits an application for provisional adequate public facilities (PAPF) approval to the Planning Board.	November 14, 2000
Step 5	Planning Board approves the PAPF application.	March 22, 2001
Step 6	Executive submits a Fiscal Report to Council.	October 17, 2002
Step 7	Council holds a public hearing on a resolution to create the CTCDD.	December 10, 2002
Step 8	Council adopts Resolution 15-87 creating the CTCDD ("Second Resolution").	March 4, 2003
Step 9	Council adopts a resolution authorizing CTCDD bonds.	To be determined
Step 10	Council adopts the first annual resolution levying special taxes and assessments.	To be determined

As **Exhibit 4-1** shows, the Council adopted the CTCDD's First Resolution (i.e., the resolution indicating its intent to create the CTCDD) on September 26, 2000 and the CTCDD's Second Resolution (i.e., the resolution creating the CTCDD) on March 4, 2003. Those actions

⁸⁷ OLO Fact Finding Report on the CTCDD, **Appendix 1A**, p. 1A-1.

⁸⁸ The map included as **Appendix 12** was attached to Resolution 15-87, which created the CTCDD. The maps included as **Appendices 13 and 14** were prepared by the Department of Permitting Services.

occurred 7 years and 4½ years, respectively, after the Planning Board adopted the original subdivision plan for Clarksburg Town Center in March 1996.⁸⁹

D. Creation of the CTCDD

Step 1 - Petition to create a development district

On July 5, 2000, the Clarksburg Town Center developer (“the Developer”) filed with the Council a petition to create a development district consisting of 263 acres located in Clarksburg Town Center.⁹⁰ At that time, the Developer was the sole owner of all property located in the proposed district.

The petition explained that the Developer intended to build 1,300 residential units (200 single-family detached, 600 single-family attached, and 500 multi-family units), approximately 100,000 square feet of commercial office space, and approximately 150,000 square feet of retail space. It proposed that the CTCDD be used to fund 17 infrastructure items estimated to cost \$17,539,357, including:

1. Main Street
2. F Street
3. H Street
4. K Street
5. Stringtown Road improvements
6. Piedmont Road improvements
7. Lowering MD 355 at Stringtown Road
8. MD 355 Intersection improvements
9. Clarksburg Road improvements
10. Redgrave Road
11. Comus Road re-striping

⁸⁹ OLO Fact Finding Report on CTCDD, **Appendix 1A**, p.1A-3.

⁹⁰ July 5, 2000 letter from John Orrick, Jr., Linowes & Blocher to Council Secretary Mary Edgar, attaching Exhibits A through H. When the petition to create the CTCDD was filed with the Council on July 5, 2000, Terrabrook Clarksburg, LLC (“Terrabrook”) owned the Clarksburg Town Center project. In October 2003, Terrabrook transferred ownership to NNPII-Clarksburg, LLC (“Newland”).

12. Acquisition of rights-of-way for off-site road improvements
13. Civic Center
14. School Ball Field Site grading
15. Trails/Hiker Biker Paths
16. Public Local Parks
17. 20" Water Main⁹¹

For more information about each item listed above, see the OLO Fact Finding Report on the CTCDD, **Appendix 1B**, pages 1B-2 to 1B-4.

Step 2 – Public hearing on the petition to create a development district

The Council scheduled a hearing on the petition to create the CTCDD on August 1, 2000. That hearing was advertised in The Gazette Newspaper and the Montgomery Journal on July 14, 2000.⁹²

Step 3 – Adoption of the First Resolution

On September 26, 2000, the Council adopted Resolution 14-648, which declared the Council's intent to establish a development district consisting of the property specified in the petition to create the CTCDD ("First Resolution").⁹³ The resolution noted that intensive development of and public investment in that area during the term of the district would benefit the public interest because certain public facilities and development would be provided in a more timely and coordinated fashion within the district. County Executive Duncan approved the resolution.

Step 4 – Application for PAPF approval

On November 14, 2000, the Developer submitted a PAPF application for the CTCDD to the Planning Board. That application proposed that the development district be used to fund the same infrastructure items that were listed in the petition to create the district.⁹⁴

⁹¹ *Id.*, Exhibits C and D.

⁹² The Council's hearing file includes a Proof of Publication from The Gazette dated July 14, 2000 and a Proof of Publication from the Montgomery Journal dated July 24, 2000.

⁹³ The CTCAC Attorney's First Letter suggests on page 15 that the CTCDD was a Council-initiated development district. However, paragraphs 2, 3, and 4 of Resolution 14-648 clearly indicate that the CTCDD was initiated by the property owner. The reference to §14-6(b) (rather than §14-6(c)) in that resolution is clearly a typographical error.

⁹⁴ OLO Fact Finding Report on the CTCDD, **Appendix 1B**, p.1B-4.

Step 5 – Planning Board’s PAF approval

In a letter dated March 22, 2001 (“PAF approval letter”), the Planning Board notified County Executive Duncan that it had unanimously approved the PAF application after concluding that the Developer’s proposal met all zoning and subdivision requirements, including all APF requirements for the underlying subdivision – Clarksburg Town Center.⁹⁵ The Planning Board attached a Planning staff memorandum which stated that “[t]he proposed infrastructure conforms to the required APF improvements required by the approved Project Plan 9-94004 and Preliminary Plan 1-95042”.⁹⁶

The PAF approval letter recommended that any infrastructure item funded by the CTCDD “serve the regional area, not just the residents of a single development”.⁹⁷ The Planning Board concluded that the following infrastructure items would provide a regional benefit:

1. Main Street (modified scope)
2. K Street
3. Stringtown Road improvements
4. Piedmont Road improvements
5. Lowering MD 355 at Stringtown Road
6. MD 355 Intersection improvements
7. Clarksburg Road improvements
8. Redgrave Road
9. Acquisition of rights-of-way for off-site road improvements
10. Civic Center
11. Trails/Hiker Biker Paths (modified scope)
12. 20” Water Main (modified scope)

The Planning Board concluded that the following 5 infrastructure items would not provide a regional benefit:

⁹⁵ March 22, 2001 letter from Planning Board Chair William Hussman to County Executive Douglas Duncan (“PAF approval letter”), pp.1-2.

⁹⁶ March 2, 2001 memorandum from Clarksburg Planner Karen Kumm Morris to the Planning Board regarding the PAF application (“Planning staff’s PAF memorandum”), p.4.

⁹⁷ PAF approval letter, p.1-2.

1. F Street
2. H Street
3. Comus Road re-striping
4. School/Ball Field site grading
5. Public Local Parks

As noted in the first list, the Planning Board recommended that the development district fund 3 infrastructure items with a modified scope. For Main Street, the Planning Board recommended that the district fund only the part of the street that served as access for the commercial center and proposed town hall.⁹⁸ For the 20" water main, the Planning Board recommended that the district fund only the off-site portion.⁹⁹ For the Trails/Hiker Biker Paths, the Planning Board recommended that the district fund only the regional Greenway trails,¹⁰⁰ and not the internal trails that would connect to the regional Greenway trails.¹⁰¹

Step 6 – Executive’s Fiscal Report

The Council received the Executive’s Fiscal Report on the CTCDD on October 17, 2002. The Executive’s transmittal memorandum indicated that the Executive’s goal was “to find a way to allow [Clarksburg Town Center] to move forward as contemplated in the 1994 adopted master plan, while assuring an appropriate balance of benefits and risk”.¹⁰² More specifically, the Executive’s goal was to recommend a “program that meets the tests of reasonableness and fairness, and that represents a prudent financial transaction for the County without undue risk to the bondholders or undue benefit to the developer”.¹⁰³ The Executive noted that the 3 Clarksburg development districts then under review were projected to fund only \$74 million of the total \$500 million estimated cost of all master-planned infrastructure improvements in the Clarksburg area.¹⁰⁴ Given that context, the Executive stressed that it was “paramount” that development districts be used to further the object of growth “paying for itself”.¹⁰⁵

⁹⁸ Planning staff’s PAPF memorandum, p.4.

⁹⁹ PAPF approval letter, p.1.

¹⁰⁰ *Id.*

¹⁰¹ Planning staff’s PAPF memorandum, p.4.

¹⁰² October 17, 2002 memorandum from County Executive Douglas Duncan to County Council President Steven Silverman (“Executive’s transmittal memorandum”), p.1.

¹⁰³ *Id.* at 3.

¹⁰⁴ For a list of all of the master-planned infrastructure improvements, see Table C in the Executive’s Fiscal Report for the CTCDD (“Executive’s Fiscal Report”).

¹⁰⁵ Executive’s transmittal memorandum, p.2.

Acceptable Tax Burden

The Executive projected that the total cost of infrastructure items proposed by the Developer would require an initial special tax on residential property that equaled 40% of the current property taxes paid by a homeowner, plus an additional special assessment on commercial and undeveloped property.¹⁰⁶ For a home with an assessed value of \$350,000, that would amount to an additional tax burden of \$1,528. The Executive recommended that the initial special tax burden on residential property be limited to 30% of the current property taxes paid by a homeowner. For a home with an assessed value of \$350,000, that would amount to an additional tax burden of \$1,200.¹⁰⁷

Value-to-lien ratio

The Executive projected that the infrastructure items proposed by the Developer would cost \$21,872,000, requiring a bond issue of \$26,091,000. Since the estimated value of property in the district at the time of financing was \$75,970,000, the value-to-lien ratio for development district bonds would be 2.9 to 1. According to the Executive, that ratio was too low and represented an unacceptable risk to bondholders.¹⁰⁸ The Executive recommended that the development district be used to fund \$17 million in infrastructure items, with a bond issue of approximately \$20.3 million and a value-to-lien ratio of 3.7 to 1.¹⁰⁹

Infrastructure improvements recommended for development district funding

The Executive recommended a primary list of 9 infrastructure items to be funded within the \$17 million recommended limit, and a secondary list of 6 infrastructure items that could be funded by the development district with cost savings from items on the primary list.¹¹⁰ The primary and secondary lists were developed by "Executive staff [who] worked with the developer to prioritize improvements that would fit within the \$17 million limit".¹¹¹

The following infrastructure items were included on the primary list:

1. Stringtown Road 800' gap
2. Stringtown Road extended
3. Stringtown Road improvements
4. Piedmont Road improvements

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 2-3.

¹⁰⁸ *Id.* at 3.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

5. Lowering MD 355 at Stringtown Road
6. Clarksburg Road (town center boundary to MD 355) improvements
7. Clarksburg Road (town center boundary to Piedmont Road) improvements
8. Civic Center/Library
9. 20" Water Main (original scope)

The following infrastructure items were included on the secondary list:

1. Main Street (original scope)
2. F Street
3. H Street
4. K Street
5. MD 355 Intersection improvements
6. Greenway trails (original scope)

The Executive's primary list included 2 infrastructure items that the Developer had not proposed for development district funding and, according to the Executive, was not required to provide as a condition of subdivision or site plan approval.¹¹² The first item was construction of 1 lane of a 2-lane segment of Stringtown Road between MD 355 and Piedmont Road ("Stringtown Road 800' gap"). The second item was a 25% share of Stringtown Road between MD 355 and I-270 ("Stringtown Road extended"). The Executive described those items as "general benefit improvements" because they would "benefit not only residents of Town Center, but also residents outside the district".¹¹³

The Executive's primary list also included 3 infrastructure items that the Developer had proposed for inclusion in the development district but, according to the Executive, was not required to provide as a condition of subdivision or site plan approval: (1) the Civic Center/Library; (2) the 20" water main; and (3) a segment of Clarksburg Road between the Clarksburg Town Center boundary and MD 355. The Executive noted that those items provided a "general benefit to the Clarksburg Community at large".¹¹⁴

In explaining the Executive's support for the 5 recommended "general benefit" improvements, the Executive's Fiscal Report noted that the legislative history of the

¹¹¹ Executive's Fiscal Report, Part II.E.

¹¹² *Id.*, Part II.D.

¹¹³ *Id.*

¹¹⁴ Executive's transmittal letter, pp.3-4.

Development District Act indicated that the Council intended that the amount and type of infrastructure improvement to be funded by development districts would be decided on a district-by-district basis. Specifically, the Executive's Fiscal Report noted that the Council had contemplated "a substantial broadening of the scope of the APFO review to cover longer term school needs and such items not now covered by [APFO] as libraries, recreations facilities, and parks, as well as closer scrutiny of water and sewer needs. Ultimately, all coverage decisions will be made by the Council on a case-by-case basis in the resolution creating each particular district".¹¹⁵

One of the Executive's reasons for recommending that the CTCDD fund infrastructure items that the Developer was not required to provide as a condition of subdivision or site plan approval was a desire to offset the transportation impact tax credit that the Developer would receive for infrastructure items funded by the CTCDD.¹¹⁶ That desire is reflected in the following excerpt from the Executive's Fiscal Report:

The Development District Act provides a clear benefit to petitioners of development districts in the form of a credit against the Development Impact Tax . . . After accounting for costs of providing new capacity on Impact Tax roads (Stringtown Road, Piedmont Road, and MD 355), this credit is estimated at \$2.2 million (at current impact tax rates). As proposed by the developer, the initial list of infrastructure projects included "non-required" improvements that exceeded this credit, thus providing benefit to the other taxpayers in the Clarksburg impact tax area. However, in the context of growth "paying for itself," the Executive believes that the Town Center District should fund general benefit improvements at a level higher than proposed by the developer. The Clarksburg Master Plan recognizes that the policy area cannot be developed without significant funding of infrastructure from "non-typical" sources, such as development districts. The . . . total amount of infrastructure needed to build-out of the Clarksburg area east of I-270 will cost \$500 million (unescalated), only \$74 million of which is now under construction for financing through development districts currently under review.

The Executive recommends, that improvements funded through a Town Center District should include a contribution to some additional projects that will benefit not only residents of Town Center, but also residents outside the district.¹¹⁷

¹¹⁵ Executive's Fiscal Report, Part II.D, citing a June 21, 1994 memorandum from Senior Legislative Attorney Michael Faden to the County Council.

¹¹⁶ Executive's Fiscal Report, Part II.D.

¹¹⁷ *Id.*

Step 7 – Public hearing on the Second Resolution

The Council scheduled a hearing on a resolution to create the CTCDD (“CTCDD’s Second Resolution”) on December 3, 2002 at 7:30 p.m. That hearing was advertised in The Gazette Newspaper and the Montgomery Journal on November 8, 2002.¹¹⁸

In addition to those newspaper advertisements, on November 6, 2002, Council staff mailed written notice of the December 3 hearing to all property owners in the proposed district, as identified in a list provided by the attorneys for the Developer.¹¹⁹ The Council’s file on the CTCDD’s Second Resolution includes a copy of that list, which indicated that there were 74 privately-owned residential units located in the proposed district as of September 30, 2002. That file also contains a copy of the hearing notice that was sent to each property owner and the mailing labels that were used to mail each notice.

The hearing notice that was sent to property owners included the time, date, and location of the December 3 hearing and a copy of the proposed resolution to create the development district. It also included the following estimated special tax and assessment rates:

A special tax based on ad valorem value is proposed to be levied on all taxable property located in the district at an estimated rate of \$0.34 per \$100 of assessed value. For developed single-family residential property, this special tax is expected to equal approximately \$1198 per dwelling unit for the 2003-2004 taxable year (based on an assumed average single family house value of \$350,000).

Additionally, a special assessment is proposed to be levied on commercial property (whether developed or undeveloped) and on undeveloped residential property. The special assessment proposed to be levied on commercial property will be in an amount that, when combined with the special tax, would equal, for the 2003-2004 taxable year, an estimated annual levy of \$1169 per 1000 square feet of gross potential building area for retail property and \$995 per 1,000 square feet of gross potential building area for office property, based on the expected development of the property.

The special assessment proposed to be levied on undeveloped residential property will be an amount that, when combined with the special tax, would equal an estimated annual levy of \$1198 per proposed single-family dwelling unit for the 2003-2004 taxable year. This special assessment will apply to residential property only until it is developed.

¹¹⁸ The Council’s hearing file includes a Proof of Publication from The Gazette Newspaper, dated November 9, 2002 and Proof of Publication from the Montgomery Journal dated November 8, 2002.

¹¹⁹ The written notice that Council staff mailed to property owners is undated. However, in an email to Finance Department staff on November 7, 2002, Senior Legislative Attorney Michael Faden attached a copy of the notice and noted that he had sent it out “yesterday”.

The special tax and special assessments described here are expected to increase by 2% per year for each taxable year after 2003-2004.

The notice also indicated that a copy of the Executive's Fiscal Report, which included details on the infrastructure to be funded by the proposed development district and the tax rates that would apply in the district, could be obtained by calling the Council Office.

According to the Developer's attorneys, the Developer also mailed a written notice of the December 3 public hearing to all property owners in the proposed CTCDD on November 4, 2002, attaching a copy of a disclosure statement that the Developer had required property owners to sign before buying their homes. The Council's files include a copy of the notice and the attached disclosure statement, which noted that the homes were located within the proposed CTCDD and subject to a special "Tax District Assessment" that would be determined at a future date. The disclosure statement also noted that the average estimated Tax District Assessment for the first year of the district would be between: (1) \$1,000 and \$1,500 for each single-family detached unit; (2) \$750 to \$1000 for each single-family attached unit; and (3) \$450 and \$800 for each multi-family unit.

When only 3 speakers signed up to testify at the December 3 evening hearing, the Council continued the hearing to December 10 at 11:00 a.m. That action was consistent with the Council's standard procedure of rescheduling any evening hearing if only a few speakers sign up to testify. The Council included notice of the continuation on its December 3 Council agenda. Also, as required by Council Rule 9(h),¹²⁰ a Council representative was present at the time and location advertised for the December 3 hearing and read an oral statement for the record indicating that the hearing had been continued to December 10 at 11 a.m.¹²¹ The 3 speakers who originally signed up to testify on December 3 were the only speakers who testified at the December 10 hearing.¹²²

Step 8 – Adoption of the Second Resolution

On March 4, 2003, the Council adopted the CTCDD's Second Resolution.¹²³ That resolution, which was approved by County Executive Duncan, specified that the development district encompassed 262.8 acres and listed the current tax account number for each property in the district. It indicated that the development district would fund all of the infrastructure items on the Executive's primary list, as well as 1 item (Greenway trails) from the Executive's secondary list. It explained that any savings achieved in the construction of those infrastructure items could be used to fund the remaining items on the Executive's secondary list.

¹²⁰ Council Rule 9(h) authorized the Council to continue a hearing without further published notice if at the time and place for which the notice originally was given the presiding officer specified the time and place where the hearing would reconvene.

¹²¹ Approved Minutes for the Council's December 3, 2002 Session, p.10.

¹²² Speakers List for the December 10, 2002 public hearing. The three speakers were John Orrick, Jr., Steve Kaufman, and Lih Young.

¹²³ Resolution 15-87.

The total projected cost of all items on the Council's primary list was \$16,979,000. The Council added the Greenway trails item to the Executive's primary list without bumping other items because the projected costs of 4 items (Piedmont Road, Clarksburg Road, Lowering of MD 355, and 20" water main) at the time of the Second Resolution were less than the projected costs for those items in the Executive's Fiscal Report. The Second Resolution noted that all of the infrastructure items on the primary and secondary lists were either located in the development district or reasonably related to the development or use of land in the district. For each infrastructure item, the resolution included its estimated completion date, cost, and cost share funded by the development district.¹²⁴ That information is shown in **Exhibit 4-2**.

Exhibit 4-2. Infrastructure Funded by the CTCDD

Infrastructure Improvement	Total Estimated Cost	Cost funded by CTCDD	Share of Total Cost Funded by CTCDD	Estimated Completion Date
1. Civic Center/Library	\$10-\$12 million	\$4,640,000	To be determined	To be determined
2. Stringtown Road 800' Gap	\$1.1 million	\$550,000	50%	June 2005
3. Stringtown Road Extended (MD 355 to I-270)	\$6.4 million	\$1,600,000	25%	June 2007
4. Stringtown Road (MD 355 to Piedmont Road)	\$4,435,000	\$4,435,000	100%	June 2004
5. Piedmont Road	\$2,270,000	\$2,270,000	100%	November 2003
6. Lowering MD 355 at Stringtown Road	\$905,000	\$905,000	100%	June 2004
7. Clarksburg Road (MD 355 to Piedmont Road) -MD 355 to CTC boundary -CTC boundary to Piedmont Road	\$1,340,000 (\$290,000) (\$1,050,000)	\$1,340,000	100%	November 2004
8. 20" Water Main	\$779,000	\$779,000	100%	December 2004
9. Greenway Trails	\$460,000	\$460,000	100%	December 2005
Total Cost funded by the CTCDD		\$16,979,000		

¹²⁴ *Id.*, Exhibits C and D.

The estimated cost of the listed items included a contingency for unexpected cost overruns, which ranged from 20% to 30% of the estimated aggregate cost of each item. The resolution authorized the imposition of special taxes and assessments at rates sufficient to pay the principal of and interest on development district bonds. The resolution also created a special fund for the revenues from those taxes and assessments.

E. Current Status

No bonds have been issued and no special taxes or assessments have been levied in the CTCDD. The Council cannot adopt a resolution authorizing the issuance of bonds until the Executive recommends how the bonds should be structured (e.g., the amount, term, and revenue sources for the bonds). The Executive cannot develop recommendations regarding how the bonds should be structured until the Planning Board resolves issues relating to Clarksburg Town Center's site plan. The Executive needs to know the number and types of housing units (e.g., single-family detached, single-family attached, or multi-family) and the square footage of all commercial property that will be located in the CTCDD when it is fully built out.¹²⁵

On August 17, 2006, the Planning Board approved a compliance program for Clarksburg Town Center that required interim site plan amendments and final project, subdivision, and site plan amendments. On April 25, 2007, the developer filed applications for the required interim and final plan amendments. Planning staff expects the Planning Board to act on the interim site plan amendments by November 2007. Planning staff do not know when the Planning Board will act on the final project, subdivision, and site plan amendments. However, they estimate that the Planning Board will not act on the plans before January 2008.

F. Infrastructure Analysis – Subdivision and Site Plan Approvals

This section discusses the results of Council and OLO staff's analysis of the following 2 questions: Was any infrastructure item to be funded by the CTCDD required as a condition of subdivision or site plan approval for the Clarksburg Town Center? If so, what was the legal basis for requiring any infrastructure item as a condition.

Council and OLO staff did not find any document or resource, or combination of them, in files maintained by the Planning Board, Executive, or Council that clearly and accurately provided that information. OLO staff derived the information, to the extent possible, from: (1) Planning Board opinions and Planning staff memoranda relating to subdivision and site plan approvals for the Clarksburg Town Center; (2) Planning Board and Planning staff memoranda relating to the Planning Board's PAPF approvals for the CTCDD; (3) the Executive's Fiscal Report for the CTCDD; (4) the Council's files on the First and Second Resolutions for the CTCDD; (5) information provided in the Capital Improvement Programs for the County and

¹²⁵ April 17, 2006 memorandum from Chief Administrative Officer Bruce Romer to Councilmember Marilyn Praisner, Chair, MFP Committee, p.2. Mr. Romer noted that it was also possible that the Executive and Council would need to revisit: (1) previous assumptions about "required and not required" infrastructure; and (2) affordability of the infrastructure improvements funded by the development district.

WSSC; and (6) meetings with Executive, Planning, and WSSC staff. This section summarizes OLO staff's findings.¹²⁶

Of the 9 items included in the primary list of infrastructure items to be funded by the CTCDD, OLO staff concluded that the following 4 items were required as conditions of plan approvals for Clarksburg Town Center: (1) Stringtown Road (MD 355 to Piedmont Road), (2) Piedmont Road, (3) the Greenway Trails, and (4) part of Clarksburg Road (CTC boundary to Piedmont Road). Exhibit 4-3 summarizes OLO staff's findings for each those items.

Exhibit 4-3. Infrastructure Items Required as a Condition of Subdivision or Site Plan Approval¹²⁷

CTC Development District Infrastructure Items Identified as Conditions of Approval	Was construction of this item identified as a condition of approval at:			Regulatory Basis for Item as a Condition of Approval
	Project Plan	Prelim Plan	Site Plan Phase I	
1. Stringtown Road (MD 355 to Piedmont Road)	No	Yes	Yes	Master Plan
2. Piedmont Road	No	Yes	Yes	Subdivision Access
3. Clarksburg Road (CTC boundary to Piedmont Road)	No	No	Yes	Other transportation issues associated with the site plan
4. Greenway Trails	Yes	Yes	Yes	Site Plan Requirement Optional Method Zoning Amenity Package

Except for the Greenway Trails (discussed below), OLO staff found it difficult to identify the legal basis for the Planning Board's decision to require a listed infrastructure item as a condition of subdivision or site plan approval because the applicable regulatory documents did not clearly identify the specific statutory authority.

The Planning Board required Stringtown Road (MD 355 to Piedmont Road) as a condition of subdivision plan approval after conducting a "fair share" master plan analysis. The regulatory record did not cite specific statutory authority for the Planning Board's fair share analysis. However, Planning staff memoranda and audio tapes of Board meetings indicate that

¹²⁶ This section does not analyze the 2 infrastructure items included on the CTCDD's secondary list because it is extremely unlikely that those items would be funded by the CTCDD. The Developer's attorney recently stated that "as a result of the passage of time and the resultant escalation of costs, there is no possibility that these secondary improvements will be financed by the [CTCD]". See Newland's Memorandum. p.11.

¹²⁷ Exhibit 4-3 is derived from Exhibit C-2 in Appendix 1C.

the Planning Board relied on County Code §50-35(1).¹²⁸ That provision requires a subdivision plan to “substantially conform” to the applicable master plan.

The Planning Board required the Piedmont Road improvements as a condition of subdivision plan approval “in accordance with the general requirement that developers construct roads that extend through their sites” but did not cite specific statutory authority.¹²⁹ Current Planning staff advised OLO staff that the relevant statutory authority was probably the part of County Code §50-24(a) that requires a subdivision to include roads that are integral to the subdivision, including necessary improvements to roads that front the subdivision.¹³⁰

The Clarksburg Road improvements between MD 355 and the CTC boundary were not a condition of subdivision or site plan approval. However, the Planning Board required the Clarksburg Road improvements between the CTC boundary and Piedmont Road as a condition of site plan approval to “address transportation issues associated with the site plan”.¹³¹ Although that condition was imposed at the site plan stage (rather than the subdivision stage), current Planning Staff advised OLO that the statutory authority for the condition was probably the part of §50-24(a) that requires a subdivision to include roads that are integral to the subdivision, including necessary improvements to roads that front the subdivision.¹³²

The Planning Board required the Greenway trail system as a condition of project and site plan approval as an amenity provided in exchange for higher density development under optional method development in the RMX-2 zone.¹³³

OLO staff noted that the Planning Board’s file on the Clarksburg Town Center project included a recommendation from the State Highway Administration to include the Lowering of MD 355 at Stringtown Road as a condition of site plan approval.¹³⁴ However, the Planning Board’s Site Plan Opinion did not expressly require that improvement as a condition of approval. The Planning Board’s opinion did require the Developer to construct a northbound right turn lane along MD 355 to comply with the APFO (Local Area Transportation Review). With regard to that turn lane, the Planning Board’s site plan opinion noted:

The applicant is required to provide a northbound right turn lane at this intersection. If at the time of this construction the SHA has taken an action to reduce the vertical curve or otherwise remedy the sight distance problem at the subject intersection, the applicant shall coordinate construction of the required northbound right turn lane at the intersection with the SHA’s construction project.¹³⁵

¹²⁸ OLO Fact Finding Report on CTCDD, Appendix 1C, p.1C-20.

¹²⁹ *Id.* at 1C-23.

¹³⁰ *Id.* at 1C-26.

¹³¹ *Id.* at 1C-36 to 1C-37.

¹³² *Id.* at 1C-37.

¹³³ *Id.* at 1C-39 to 1C-43.

¹³⁴ *Id.* at 1C-26 to 1C-32.

¹³⁵ *Id.*

Based on that language, OLO staff concluded that the Planning Board did not require the Lowering of MD 355 at Stringtown Road as a condition of subdivision or site plan approval for Clarksburg Town Center. However, OLO staff also concluded that the developer of a different subdivision, Highlands at Clarksburg, was required to provide the Lowering of MD 355 at Stringtown Road as a condition of subdivision plan approval.

G. Infrastructure Analysis – Eligible Infrastructure Improvements

This section discusses the results of Council staff's analysis of whether the Planning Board, Executive, or Council concluded that any infrastructure item proposed to be funded by the CTCDD was ineligible because it: (1) primarily served the residents or occupants of only one development or subdivision; or (2) was the responsibility of a single developer under the Planning Board's site plan and adequate public facilities requirements?

Planning Board

As discussed in Section F, the Planning Board's PAPF approval letter and Planning staff's PAPF memorandum for the CTCDD acknowledged that some of the infrastructure items proposed by the Developer to be funded by the CTCDD were required as a condition of subdivision or site plan approval. Neither document clearly identified which proposed infrastructure items were required as a condition of plan approval or the legal basis for requiring any item as a condition. Neither document discussed whether any proposed infrastructure item: (1) primarily served the residents or occupants of only one development or subdivision; or (2) was the responsibility of a single developer under the Planning Board's site plan and adequate public facilities requirements.

The PAPF approval letter recommended that the Council amend County Code §14-3(g)(2) "*if necessary*, to allow for items to be the responsibility of a single developer so long as the proposed items serve a greater public benefit than a single development."¹³⁶ However, it did not identify any specific infrastructure item that was the responsibility of a single developer.

Planning staff's PAPF memorandum noted that Planning staff had originally envisioned that "all mixed use, residential east of MD 355 could be incorporated into one district with future developers joining the district as their projects came forward" but explained that:

. . . this type of comprehensive district with future developer involvement cannot be established under the County's bonding guidelines and requirements of financial lenders. Bonds must be a set amount based upon a specified set of infrastructure improvements with a resulting set tax rate, as security for the bonds. New development cannot be "added to" the previous bonds.¹³⁷

¹³⁶ Planning staff's PAPF memorandum, p.1 (emphasis added).

¹³⁷ Planning staff's PAPF memorandum, p.5.

Nonetheless, Planning staff observed that “[t]he opportunity to coordinate needed infrastructure and timely construction of public facilities within Clarksburg can still be achieved by staff’s continued comprehensive infrastructure review of every proposed preliminary plan.”¹³⁸

Executive

As discussed in Section F, the Executive’s Fiscal Report concluded that 4 items on the Executive’s primary list and all 3 items on the Executive’s secondary list were required as a condition of subdivision or site plan approval. The report did not discuss whether any proposed infrastructure item: (1) primarily served the residents or occupants of only one development or subdivision; or (2) was the responsibility of a single developer under the Planning Board’s site plan and adequate public facilities requirements.

The Executive’s Fiscal Report included guidelines developed by the Department of Public Works and Transportation (DPWT) to assess whether a road should be funded by a development district. DPWT’s guidelines recommended that a development district be used to fund a road only if it met two off the following criteria: (1) was required under “AGP threshold provisions” of the APFO; (2) provided a regional benefit; (3) was identified in a master plan; and (4) was a project for which the “ultimate cross section will be provided by the development district developer or by a combination of developers (whether in or out of a district)”¹³⁹ DPWT’s guidelines recommended that a development district not be used to fund any road that provided “primarily internal circulation” or was required under “Local Area Review”.

Council

As discussed in Section F, the Council’s files for the CTCDD’s Second Resolution included the PAPF approval letter, Planning staff’s PAPF memorandum, and the Executive’s Fiscal Report for the CTCDD. There is no indication that the Council evaluated whether any infrastructure item that would be funded by the CTCDD: (1) primarily served the residents or occupants of only one development or subdivision; or (2) was the responsibility of a single developer under the Planning Board’s site plan and adequate public facilities requirements.

H. Infrastructure Analysis – Cost Share

Exhibit 4-2 on page 14 shows that the CTCDD would fund all costs of 6 infrastructure items and part of the costs of 3 infrastructure items. This section reviews the rationale for those cost shares.

¹³⁸ *Id.*

¹³⁹ Executive’s Fiscal Report, Appendix B.

Stringtown Road, Piedmont Road, and Clarksburg Road

The CTCDD was projected to fund 100% of the following 3 items because they were required as a condition of subdivision or site plan approval for Clarksburg Town Center: (1) Stringtown Road improvements (\$4.435 million), (2) Piedmont Road improvements (\$2,270,000), and (3) the Clarksburg Road improvements between the CTC boundary to Piedmont Road (\$1,050,000).

The CTCDD was projected to fund 100% of the \$290,000 cost of the Clarksburg Road improvements between MD 355 and the Clarksburg Town Center boundary, which were not required as a condition of subdivision or site plan approval. The rationale for that cost share is unclear. The Executive's Fiscal Report stated:

For Clarksburg Road, planned as an undivided 24 to 36-foot wide roadway, the developer has included improvements of approximately 800 feet on the south half of the road (in the Historic District) which is not along the frontage of the developer's property and which is not a condition of site plan approval. The developer believes that the cost of this segment (\$340,000) should be allocated to other parties, but the Executive proposes that it be accomplished by Town Center and be funded by that District.¹⁴⁰

Stringtown Road 800' gap

The CTCDD was projected to fund 50% of the total \$1.1 million cost of the Stringtown Road 800' gap. The rationale for that cost share is explained in the Executive's Fiscal Report, which recommended that the cost be split between Clarksburg Town Center and Clarksburg Village, the 2 developments located on either side of the 800' gap. More specifically, the Executive's Fiscal Report recommended that the total cost be split between the CTCDD and CVDD.

Stringtown Road Extended

The CTCDD was projected to fund up to 25% (not to exceed \$1.6 million) of the projected \$6.4 million general obligation (GO) bond allocation for Stringtown Road Extended.¹⁴¹ The rationale for that cost share is explained in the Executive's Fiscal Report, which noted that "the Town Center is projected to account for 25% of the traffic on this new road link".¹⁴² OLO noted that the 25% cost share did not account for the total projected cost of the project. When the Council created the CTCDD, the projected cost of the project in the County's Capital Improvement Program (CIP) was \$8.30 million. The CIP indicated that the other sources of

¹⁴⁰ Executive's Fiscal Report, Appendix B, p.2.

¹⁴¹ *Id.*

¹⁴² Executive's Fiscal Report, Part II.D. and Appendix B, p.3.

funds for the project were GO bonds (\$4.7 million), impact tax revenues (\$1.9 million), development approval payments (\$0.5 million), and WSSC (\$0.1 million).¹⁴³

Lowering of MD 355 at Stringtown Road

For the Lowering of MD 355 at Stringtown Road, the CTCDD was projected to fund 100% of the total \$905,000 cost. The rationale for that cost share is explained in the Executive's Fiscal Report, which noted:

In accordance with State Highway requirements, any improvement of Stringtown Road east or west of MD 355 will necessitate lowering of the vertical curve on MD 355 just south of the [Stringtown] Road intersection to improve stopping sight distance. The cost of this lowering is estimated at \$970,000. If, as projected, Town Center's part of Stringtown Road precedes the Highlands project, the lowering will be implemented as a part of the Town Center's Stringtown Road project, funding for which is proposed by the Executive to be covered by the Town Center District. An alternative, preferred by the Town Center developer, would be to allocate the cost of lowering among the respective developers.¹⁴⁴

The Executive's Fiscal Report did not mention that the developer of Highlands at Clarksburg was required to provide this item as a condition of that project's subdivision or site plan approval.

Civic Center/Library

The CTCDD was projected to fund up to \$4.6 million of the total \$10-12 million cost of the Civic Center/Library. The rationale for that cost share is explained in the Executive's Fiscal Report, which noted that \$4.64 million was Clarksburg Town Center's "proportionate share" of the project.¹⁴⁵ The Executive's Fiscal Report did not explain how Executive staff calculated Clarksburg Town Center's proportionate share. OLO staff noted that the 2004-2007 Strategic Facilities Plan for the Department of Public Libraries assumed that the primary service radius for each library is 1.5 to 3 miles (with an average of 2.5 miles), and that 80% of each library's customers came from within that radius. However, there is no indication in the Executive's Fiscal Report that the CTCDD's cost share for the Civic Center/Library is based on the ratio of housing units in Clarksburg Town Center to housing units located in the library's primary service area.

¹⁴³ FY03-08 Capital Improvements Program, Volume 2 of the FY04 Approved Capital Budget, pp.7-227 (PDF No. 500403).

¹⁴⁴ Executive's Fiscal Report, Appendix B, p.3.

¹⁴⁵ *Id.*, Part II.D.

20" Water Main

The CTCDD was projected to fund 100% of the \$827,000 cost of the 20" water main. The Executive's Fiscal Report contains the following rationale for that cost share:

A 20-inch WSSC water main line extending 1.4 miles from MD 355 through Town Center to a point east of the Piedmont/Stringtown Road intersection is currently under construction by the developer (estimated cost \$827,000). In the original petition, the scope of this improvement was only for segments outside the district; costs of internal segments were included in individual road projects, several of which are no longer being considered for district funding. Over 50% of this water main has already been installed by the developer under permit from WSSC. This improvement will serve not only Town Center but will also provide areas outside of the District with water supply and pressure. The Executive recommends this project for District funding. All other water and sewer lines in Town Center will be funded by the developer.¹⁴⁶

The Executive's Fiscal Report did not discuss how the water main related to WSSC's system development charge.

¹⁴⁶ *Id.*, Appendix B, p.5.

Chapter 5. Clarksburg Skylark and Clarksburg Village Development Districts

On July 17, 2001, the owners of 2 large undeveloped parcels in the Clarksburg area filed petitions to create the CSDD and CVDD in the Newcut Road Neighborhood of Clarksburg. For the most part, those proposed development districts have proceeded together through the development district creation process. Although the Council resolution declaring its intent to create them was adopted more than 5 years ago, both districts have paused at the Executive Fiscal Report stage. This Chapter provides a brief overview of the CSDD and CVDD.

A. Description

As proposed by the developer, the CSDD would encompass about 374 acres of undeveloped land. The development district consists of 1 subdivision known initially as Greenway Village and now called Arora Hills. The development district would include 1,330 residential units (598 single-family detached, 487 single-family attached, and 245 multi-family units) and 89,000 square feet of retail space when fully built-out.¹⁴⁷ (For a map of the proposed development district, see **Appendix 15**.¹⁴⁸)

As proposed by the developer, the CVDD would encompass about 718.5 acres of undeveloped land lying directly southwest of the proposed CSDD. The development district consists of 1 subdivision known as Clarksburg Village. The development district would include 2,563 residential units (1,180 single-family detached, 883 single-family attached, and 500 multi-family units) and about 20,000 square feet of retail/commercial space when fully built-out.¹⁴⁹ (For a map of the proposed development district, see **Appendix 15**.)

B. Chronology

Exhibit 5-1 shows the steps taken to create the CSDD and CVDD.

¹⁴⁷ July 17, 2001 petition to create the CSDD, p.3.

¹⁴⁸ The map attached as **Appendix 15** was attached as Exhibit D to the July 17, 2001 petition to create the CSDD.

¹⁴⁹ July 17, 2001 petition to create the CVDD, p.3.

Exhibit 5-1. Chronology for the CSDD and CVDD

Step	Description	Date
Step 1	Developers file petitions to create the CSDD and CVDD.	July 17, 2001
Step 2	Council holds a public hearing on the petitions.	September 25, 2001
Step 3	Council adopts Resolution 14-1009, which declared the Council's intent to create the CSDD and CVDD ("First Resolution").	October 2, 2001
Step 4	Developers file PAPF applications with the Planning Board.	October 31, 2001
Step 5	Planning Board approves the PAPF applications.	February 14, 2002
Step 6	Developers file amendments to the original petitions to create the CSDD and CVDD.	July 1, 2004
Step 7	Developers file restated amendments to the original petitions to create the CSDD and CVDD.	November 3, 2005

C. Creation of the CSDD and CVDD

Infrastructure to be funded by the CSDD and CVDD

As proposed by the developer, the CSDD would fund 11 infrastructure improvements, including 7 road projects and a park, community center, school site, and greenway.¹⁵⁰ The developer estimated that the cost of the infrastructure items to be funded by the CSDD was \$20,043,800.¹⁵¹ As proposed by the developer, the CVDD would fund 10 infrastructure improvements, including 6 road projects, 2 school sites, a park, and a greenway.¹⁵² The developer estimated that the cost of the infrastructure items to be funded by the CVDD was \$23,606,200.¹⁵³

¹⁵⁰ July 17, 2001 petition to create the CSDD, Exhibit C.

¹⁵¹ October 31, 2001 PAPF application for the CSDD, Exhibit G.

¹⁵² July 17, 2001 petition to create the CSDD, Exhibit B.

¹⁵³ October 31, 2001 PAPF application for the CVDD, Exhibit G.

Proposed amendments to the original development district petitions

As **Exhibit 5-1** shows, the developers filed 2 amendments to the original petitions to create the CSDD and CVDD.¹⁵⁴ The first amendment, which was filed with the Council on July 1, 2004, proposed to add 134 acres to the CVDD and remove 13.22 acres from the CSDD.¹⁵⁵ The second amendment, filed on November 3, 2005 as a substitute for the first amendment, proposed to add 43 acres to the CVDD and remove 13.22 acres from the CSDD.¹⁵⁶ That amendment also proposed a change in the unit count for the CVDD to include an additional 194 residential units (9 single-family detached, 120 senior multi-family, 48 townhouse, and 17 single-family attached MPDUs), about 109,000 square feet of retail space, and about 5,000 square feet for a day care center.¹⁵⁷ For a map of the amended proposal for both development districts, see **Appendix 16**.¹⁵⁸

D. Current status

As already noted, the Council has not received an Executive Fiscal Report for either development district and it is not known when the current Executive plans to issue those reports. In April 2006, Chief Administrative Officer Bruce Romer advised the Council's MFP Committee that Executive staff had been negotiating with the developers since 2002 and concluding those negotiations had been delayed in part because of the proposed amendments to the original development district petitions.¹⁵⁹ He also noted that the Executive had created a Clarksburg Development District Advisory Committee (CDDAC) on April 4, 2006 to obtain additional input from residents before issuing a Fiscal Report for either development district. CDDAC did not submit its report until March 21, 2007.

Private infrastructure charge

In 2004, the developers of property located in both proposed development districts implemented a private infrastructure charge on property located in the development districts as a way to obtain reimbursement for the cost of infrastructure improvements.¹⁶⁰ According to the developers, all home buyers in the Clarksburg Village and Clarksburg Skylark developments have been required to sign acceptance documents for the alternative private infrastructure charge

¹⁵⁴ The Development District Act does not specify a formal process to amend a petition to create a development district. The developers filed the proposed amendments with the Council more than 2 years (original amendment) and 3 years (restated amendment), respectively, after the Planning Board approved the applicable PAPF applications for both districts on February 14, 2002. The timing of the proposed amendments raises the issue of whether the amendments affect the validity of the Planning Board's PAPF approvals. For further discussion of that issue, see Chapter 9, Section I.

¹⁵⁵ July 1, 2004 Amendment to the petition to create the CVDD ("Amendment to CVDD"), p.3.

¹⁵⁶ November 3, 2005 Restated Amendment to the petition to create the CVDD ("Restated Amendment to CVDD") p.3.

¹⁵⁷ *Id.*

¹⁵⁸ The map included as **Appendix 16** was attached as Exhibit B to the Restated Amendment to CVDD.

¹⁵⁹ April 17, 2007 memorandum from Chief Administrative Officer Bruce Romer to Councilmember Marilyn Praisner, Chair, MFP Committee, p.3.

¹⁶⁰ Clarksburg Developers' Memorandum, Appendix C, p.C-6.

when executing sales contracts for their homes.¹⁶¹ In late 2006, the developers notified all property owners in those developments that they were not willing to negotiate with the County indefinitely to create development districts, and would decide by December 31, 2007 whether to begin assessing a private infrastructure charge.¹⁶²

¹⁶¹ *Id.*

¹⁶² *Id.*

Chapter 6. West Germantown Development District

This Chapter describes the boundaries and uses of property located in the WGDD, outlines the chronology for creation of the district, and discusses the district's current status. It also analyzes components of the WGDD creation process that evidence the County's past practice regarding 3 legal issues raised by CTCAC (see issues 2, 3, and 4 listed in Chapter 1, Section B). Specifically, it addresses the following questions: (1) Did the Council create the WGDD before or after the Planning Board approved the subdivision plans for property located in the district? (2) Did the WGDD finance any infrastructure item that the Planning Board required as a condition of subdivision or site plan approval for property located in the district and, if so, what was the legal basis for the condition? (3) Did the Planning Board, Executive, or Council conclude that any infrastructure item proposed to be funded by the WGDD was ineligible because it: (i) primarily served the residents or occupants of only one development or subdivision; or (ii) was the responsibility of a single developer under the Planning Board's site plan and adequate public facilities requirements?

A. Description

The WGDD includes about 670 acres in the southwest quadrant of the intersection of Clopper Road and Germantown Road. The development district consists of 2 subdivisions that were originally named Kings Crossing and King Hargett. Those subdivisions were later marketed jointly as Woodcliffe Park. As originally proposed, the development district included a third subdivision known as Kingsview Village Center. However, the owners of that property withdrew from the development district before the Council approved its creation. The Kingsview Village Center was later included in the KVCDD. The WGDD includes 1,393 single- and multi-family residential units.¹⁶³ (For a map of the WGDD, see **Appendix 17**.¹⁶⁴)

B. Chronology

Exhibit 6-1 shows each step leading to creation of the WGDD.

¹⁶³ OLO Fact Finding Report on the WGDD, **Appendix 2A**, p.2A-1.

¹⁶⁴ The map attached as **Appendix 17** was attached to Resolution 13-1135, which created the WGDD.

Exhibit 6-1. Chronology for the WGDD

Step	Description	Date
Step 1	Developers file a petition to create the WGDD.	June 21, 1996
Step 2	Council holds a public hearing on the petition.	July 23, 1996
Step 3	Council adopts Resolution 13-636 declaring the Council's intent to create the WGDD ("First Resolution").	July 30, 1996
Step 4	Developers submit an application for provisional adequate public facilities (PAPF) approval to the Planning Board.	October 4, 1996
Step 5	Planning Board approves the PAPF application.	November 6, 1996
Step 6	Executive submits a Fiscal Report to the Council.	September 29, 1997
Step 7	Council holds a public hearing on a resolution to create the WGDD.	November 6, 1997
Step 8	Council adopts Resolution 13-1135 creating the WGDD ("Second Resolution").	January 13, 1998
Step 9	Council adopts Resolution 13-1398 authorizing bonds for the WGDD.	August 4, 1998
Step 10	Council adopts Resolution 14-1279 levying special taxes and assessments in the WGDD.	May 23, 2002

As **Exhibit 6-1** shows, the Council adopted the First Resolution declaring the Council's intent to create the WGDD on July 30, 1996 and the Second Resolution creating the WGDD on January 13, 1998. As discussed in OLO's Fact Finding Report on the WGDD, those actions occurred: (1) 2½ years and 4 years, respectively, after the Planning Board adopted the initial subdivision plan for the King Hargett project on January 11, 1998; and (2) 1 year and almost 2½ years, respectively, after the Planning Board approved the initial subdivision plan for the Kings Crossing project on March 21, 1995.¹⁶⁵ On November 23, 1994 and July 2, 1996, the Planning Board approved revisions to the King Hargett subdivision plan to increase development limits, modify phasing requirements, and extend the plan's validity period.¹⁶⁶ Those actions also preceded the Council's adoption of the First and Second Resolutions for the WGDD.

¹⁶⁵ OLO Fact Finding Report on the WGDD, Appendix 2A, pp.2A-7 to 2A-10.

¹⁶⁶ *Id.*

C. Infrastructure Funded by the WGDD

Exhibit 6-2 shows the infrastructure items funded by the WGDD and the estimated cost of each item, as reflected in the Second Resolution.¹⁶⁷

Exhibit 6-2. Infrastructure funded by the WGDD¹⁶⁸

Item	Estimated Cost	Share of Cost Funded by WGDD
1. Richter Farm Road – MD 117 to Schaeffer Road (2 lanes)	\$4,124,866	100%
2. Richter Farm Road – MD 117 to Schaeffer Road (additional 2 lanes)	\$1,100,000	100%
3. Richter Farm Road – Schaeffer Road to MD 118 (2 lanes)	\$1,791,098	100%
4. Richter Farm Road – Schaeffer Road to MD 118 (additional 2 lanes)	\$364,949	100%
5. Schaeffer Road	\$992,244	100%
6. Local Parks	\$620,000	100%
7. Hoyles Mill Wastewater Pumping Station/Force Main	\$3,838,020	100%
Total Cost	\$12,831,177	

¹⁶⁷ Resolution 13-1135 (adopted January 13, 1998).

¹⁶⁸ The Council's final decision about which infrastructure items would be funded by the WGDD was based in part on its view of the acceptable additional tax burden created by the development district. The Executive recommended that the County fund the development district by levying an initial special tax on residential property that did not exceed 30% of the current property taxes for residential property, and an additional special assessment for undeveloped and commercial property. The Executive projected that the initial special tax for residential property with an assessed value of \$300,000 would amount to an additional tax burden of \$950. The Council followed the Executive's recommendation when making its final decision about the number and type of infrastructure items to be funded by the development district.

D. Current status

The County first levied special taxes and assessments on property located in the WGDD in July 2002. The original Special Tax Rate for residential property was 22.4¢ per \$100 of assessed value. The original Special Assessment Rate for undeveloped residential property and all commercial property was \$744.96 per equivalent dwelling unit.¹⁶⁹ The County has levied special taxes and assessments each year since 2002, and will continue to do so until the bonds are paid off in 2027. The exact rates have varied and will continue to vary from year to year depending on debt service requirements and property valuations.

E. Infrastructure Analysis – Subdivision and Site Plan Approvals

This section discusses the results of Council and OLO staff's analysis of whether any of the infrastructure items funded by the WGDD were required as a condition of subdivision or site plan approval for a project located in the WGDD and the legal basis for requiring any item as a condition. We were unable to find any document or resource, or combination of them, in the files maintained by the Planning Board, Executive, or Council that clearly and accurately provided that information. We attempted to derive the information from: (1) the legislative history of the WGDD (including Planning Board and Planning staff memoranda relating to the Planning Board's PAPF approval, the Executive's Fiscal Report, and the Council's resolution files); and (2) the Planning Board's regulatory record for subdivisions located in the WGDD (including Planning Board opinions and Planning staff memoranda).

The legislative history of the WGDD indicated that the Planning Board, Executive, and Council understood that the district would fund some infrastructure items that the Planning Board had required as a condition of subdivision or site plan approval. However, the legislative history does not clearly identify which of the 7 infrastructure items funded by the WGDD were conditions of plan approvals or the legal basis for requiring any item as a condition. The regulatory record for projects located in the WGDD revealed many references to infrastructure items that seem to overlap with those funded by the WGDD. However, because of ambiguities in that record, we were unable to determine whether the scope of any item funded by the WGDD was identical to the scope of any item required as a condition of subdivision or site plan approval.

Planning Board's PAPF approval

In a letter dated November 6, 1996, Planning Board Chair Hussman notified County Executive Duncan that the Planning Board had approved the PAPF application for the WGDD ("PAPF approval letter"), subject to conditions listed in a Planning staff memorandum ("Planning staff's PAPF memorandum"). With regard to road projects, the Planning staff's PAPF memorandum specified that one condition of approval was that "[a]ll improvements shown in the development district application" and 2 additional intersection improvements be included in the district.

¹⁶⁹ Resolution 14-1279 (adopted May 23, 2002).

Planning staff's PAPF memorandum explained the Annual Growth Policy criteria that Planning staff used to evaluate the adequacy of public facilities in the proposed district:

The transportation test is essentially the same as that used for subdivision review. However, the tests for schools, water and sewer, and police/fire/health are more stringent than those applied at subdivision because they must specifically take into account the additional growth projected for the district.¹⁷⁰

It also noted that 13 of the 14 road projects that the developers had proposed for development district funding were required as a condition of subdivision approval, and the 14th road project had been assumed as a subdivision street.¹⁷¹ Nine of those 14 projects were required as a condition of subdivision approval for the Kings Crossing and King Hargett projects.

After conducting the transportation test required by the Annual Growth Policy, Planning staff concluded that the 14 road projects proposed by the developers for development district funding, plus "two minor intersection improvements," would be adequate.¹⁷² In explaining that conclusion, the PAPF memorandum observed that:

The only difference from the previous subdivision approvals is that the analysis indicates that only two lanes of Richter Farm Road (A297) are needed between Clopper Road and Md. 188 [sic]. Previous preliminary plan approvals required four lanes. Conditions in the previous preliminary plan approvals regarding the timing of improvements will remain in effect, based on the criteria in the AGP for when a facility may be counted.

Executive's Fiscal Report

The Executive's Fiscal Report for the WGDD indicated that the Executive's list of recommended infrastructure items included some items that the Planning Board had required as a condition of subdivision or site plan approval for projects located in the WGDD. Specifically, the report noted that the Executive's rationale for recommending additional "general benefit improvements" was to offset the impact tax credit that the developers would receive for infrastructure items funded by the WGDD that the developers were already required to provide as a condition of subdivision or site plan approval.¹⁷³

¹⁷⁰ October 25, 1996 memorandum from Development Review Chief Charles Loehr to the Montgomery County Planning Board ("Planning staff's PAPF memorandum").

¹⁷¹ Summary of Roadway Improvements in Germantown West Development District Area attached to Planning staff's PAPF memorandum.

¹⁷² *Id.*

¹⁷³ County Executive Fiscal Report – West Germantown Development District (September 29, 1997).

Council's resolution files

The Council's files for the WGDD's Second Resolution include the PAPF approval letter, Planning staff's PAPF memorandum, and Executive's Fiscal Report. A Council staff memorandum to the Council expressly noted that the developers had proposed that the WGDD fund APF requirements that the Planning Board had required as conditions of subdivision approval.¹⁷⁴

Regulatory record

OLO staff examined the Planning Board's Preliminary Plan and Site Plan Opinions for the King Hargett and Kings Crossing projects and Planning staff memoranda referenced in those opinions, to determine whether the 7 infrastructure items funded by the WGDD were required as a condition of subdivision or site plan approval and, if so, the legal basis for requiring any item as a condition. OLO found many references to the following 3 items in those documents: (1) Richter Farm Road; (2) Schaeffer Road; and (3) local parks and paths.

Specifically, OLO staff found that the Planning Board required: (1) improvements to parts of Richter Farm Road and Schaeffer Road as a condition of subdivision plan approval for the King Hargett Property; (2) improvements to parts of Richter Farm Road as a condition of subdivision plan approval for the Kings Crossing project; and (3) local park improvements and new paths and play areas as a condition of site plan approval for the King Hargett and Kings Crossing projects.¹⁷⁵ However, because of ambiguities in the regulatory record, OLO staff could not determine whether the scope of any of those required infrastructure improvements included the particular Richter Farm Road improvements, Schaeffer Road improvements, or local paths and parks that were funded by the WGDD. Since OLO staff could not determine whether the infrastructure items funded by the WGDD matched the infrastructure items required as conditions of subdivision or site plan approval for the King Hargett and Kings Crossing projects, OLO staff did not attempt to reach any conclusions about the legal basis for those requirements.

F. Infrastructure Analysis – Eligible Infrastructure Improvements

This section discusses the results of Council staff's analysis of whether the Planning Board, Executive, or Council concluded that any infrastructure item proposed to be funded by the WGDD was ineligible because it: (1) primarily served the residents or occupants of only one development or subdivision; or (2) was the responsibility of a single developer under the Planning Board's site plan and adequate public facilities requirements.

¹⁷⁴ December 9, 1997 memorandum from Deputy Council Director Glenn Orlin and Senior Legislative Attorney Michael Faden to the County Council.

¹⁷⁵ OLO Fact Finding Report on the WGDD, Appendix 2C.

Planning Board

As discussed in Section E, the Planning Board's PAPF approval letter and Planning staff's PAPF memorandum explained that 13 of the 14 infrastructure items that the developers proposed to be funded by the WGDD were required as a condition of subdivision approval for projects located in the WGDD. Neither document discussed whether any proposed infrastructure item: (1) primarily served the residents or occupants of only one development or subdivision; or (2) was the responsibility of a single developer under the Planning Board's site plan and adequate public facilities requirements.

Executive

As discussed in Section E, the Executive's Fiscal Report acknowledged that some of the infrastructure items that the developers proposed to be funded by the WGDD were required as a condition of subdivision or site plan approval for projects located in the WGDD. The report did not discuss whether any proposed infrastructure item: (1) primarily served the residents or occupants of only one development or subdivision; or (2) was the responsibility of a single developer under the Planning Board's site plan and adequate public facilities requirements.

Council

As discussed in Section E, the Council's files for the WGDD's Second Resolution included the PAPF approval letter, Planning staff's memo, and the Executive's Fiscal Report for the WGDD. There is no indication that the Council evaluated whether any infrastructure item funded by the WGDD: (1) primarily served the residents or occupants of only one development or subdivision; or (2) was the responsibility of a single developer under the Planning Board's site plan and adequate public facilities requirements.

Chapter 7. Kingsview Village Center Development District

This Chapter describes the boundaries and uses of property located in the KVCDD, outlines the chronology for creation of the district, and discusses the district's current status. It also analyzes components of the KVCDD creation process that evidence the County's past practice regarding 3 legal issues raised by CTCAC (see Issues 2, 3, and 4 on page ___ of this report). Specifically, it addresses the following questions: (1) Did the Council create the KVCDD before or after the Planning Board approved the subdivision plans for property located in the district? (2) Did the KVCDD finance any infrastructure item that the Planning Board required as a condition of subdivision or site plan approval for property located in the district and, if so, what was the legal basis for requiring the item as a condition? (3) Did the Planning Board, Executive, or Council conclude that any infrastructure item proposed to be funded by the KVCDD was ineligible because it: (i) primarily served the residents or occupants of only one development or subdivision; or (ii) was the responsibility of a single developer under the Planning Board's site plan and adequate public facilities requirements?

A. Description

The KVCDD includes about 28.5 acres located in the southwest quadrant of the intersection of Clopper Road and Great Seneca Highway. The development district consists of one subdivision known as the Kingsview Village Center. The development district includes a 114,000 square feet shopping center and 236 apartment units.¹⁷⁶ (For a map of the development district, see **Appendix 18**.¹⁷⁷)

B. Chronology

Exhibit 7-1 shows each step leading to creation of the KVCDD. That chronology varies from the normal chronology for development district creation outlined in Chapter 3 because the Kingsview Village Center was originally proposed for inclusion in the WGDD. The owners of the Kingsview Village Center project withdrew from the proposed WGDD after the Executive's Fiscal Report on that district was submitted to the Council. In creating the KVCDD, the Council relied on the First Resolution, PAF approval letter, and Executive's Fiscal Report for the WGDD.

¹⁷⁶ OLO Fact Finding Report on the KVCDD, **Appendix 3A**, p.3A-1 and 3A-4.

¹⁷⁷ The map attached as **Appendix 18** was attached to Resolution 13-1137, which created the KVCDD.

Exhibit 7-1. Chronology for the KVCDD

Step	Description	Date
Step 1	Developers file a petition to create the WGDD.	June 21, 1996
Step 2	Council holds a public hearing on the WGDD petition.	July 23, 1996
Step 3	Council adopts Resolution 13-636 declaring its intent to create the WGDD ("First Resolution for the WGDD").	July 30, 1996
Step 4	Developers submit a PAPF application for the WGDD to the Planning Board.	October 4, 1996
Step 5	Planning Board approves the PAPF application for the WGDD.	November 6, 1996
Step 6	Executive submits a Fiscal Report on the WGDD to the Council.	September 29, 1997
Step 7A	Council holds a public hearing on a resolution to create the WGDD ("Second Resolution for the WGDD").	November 6, 1997
Step 7B	Developer of the Kingsview Village Center withdraws that property from the WGDD before the Council adopted the Second Resolution for the WGDD on January 13, 1998.	
Step 7C	Developer of Kingsview Village Center files a letter and draft resolution to create the KVCDD with the Council.	May 15, 1998
Step 7D	Council introduces a resolution to create the KVCDD.	May 19, 1998
Step 7E	Council holds public hearings on the resolution to create the KVCDD.	June 16, 1998 and June 23, 1998
Step 8	Council adopts Resolution 13-1377 creating the KVCDD ("Second Resolution for the KVCDD").	July 28, 1998
Step 9	Council adopts Resolution 13-1476 authorizing bonds for the KVCDD.	October 27, 1998
Step 10	Council adopts Resolution 14-562 levying special taxes and assessments in the KVCDD.	January 20, 2000

As **Exhibit 7-1** shows, the Council adopted the First Resolution declaring the Council's intent to create the WGDD on July 30, 1996 and the Second Resolution creating the KVCDD

July 28, 1998. As discussed in OLO's Fact Finding Report on the KVCDD, those actions occurred about 5 months and 2½ years, respectively, after the Planning Board adopted the initial subdivision plan for the Kingsview Center Village project on February 12, 1996.¹⁷⁸ On August 23, 1999, the Planning Board approved revisions to the Kingsview Village Center subdivision plan.¹⁷⁹ That action occurred more than 1 year after the Council adopted the Second Resolution for the KVCDD.

C. Infrastructure funded by the KVCDD

Exhibit 7-2 shows the infrastructure items funded by the KVCDD and the estimated cost of each item, as reflected in the Second Resolution.¹⁸⁰

Exhibit 7-2. Infrastructure Funded by the KVCDD¹⁸¹

Item	Estimated Cost	Share of Cost Funded by District
1. Kingsview Village Avenue	\$435,000	90.5%
2. Leaman Farm Road	\$1,775,000	90.5%
3. Clopper Road (MD 117)	\$650,000	90.5%
4. Richter Farm Road Intersection Improvements	\$100,000	100%
Total Cost	\$2,960,000	
District Share	\$2,688,300	

¹⁷⁸ OLO Fact Finding Report on the KVCDD, Appendix 3A, pp.3A-5 to 3A-6.

¹⁷⁹ *Id.*

¹⁸⁰ Resolution 13-1377 (adopted July 28, 1998).

¹⁸¹ The Council's final decision about which infrastructure items would be funded by the KVCDD was based in part on its view of the acceptable additional tax burden created by the development district. In making that decision, the Council again followed the Executive's recommendation that the County fund the development district by levying a special tax on residential property that did not exceed 30% of the current property taxes for residential property, and an additional special assessment for undeveloped and commercial property. That amounted to an additional tax burden of \$950 for residential property with an assessed value of \$300,000. As discussed in Section B of this Chapter, the petition to create the WGDD included the Kingsview Village Center subdivision. Although the developer of Kingsview Village Center eventually withdrew that subdivision from the WGDD before the Council approved its creation, the Executive's Fiscal Report for the WGDD included an analysis of the cost of funding infrastructure items required to meet a PAPF requirements for the Kingsview Village Center. The Executive did not prepare a separate Fiscal Report for the KVCDD.

D. Current status

The County first levied special taxes and assessments on property owners in the KVCDD in July 2000. The original Special Tax Rate for residential property was 28.5¢ per \$100 of assessed value. The original Special Assessment Rate for undeveloped residential property and all commercial property was \$110 per equivalent dwelling unit.¹⁸² The County has levied special taxes and assessments each year since 2000 and will continue to do until the bonds are paid off in 2021. The exact rates have varied and will continue to vary from year to year depending on debt service requirements and property valuations.

E. Infrastructure Analysis – Subdivision and Site Plan Approvals

This section discusses the results of Council and OLO staff's analysis of whether any infrastructure items funded by the KVCDD was required as a condition of subdivision or site plan approval for Kingsview Village Center and, if so, the legal basis for requiring any item as a condition. We were unable to find any document or resource, or combination of them, in the files maintained by the Council, Executive, and Planning Board that clearly and accurately provided that information. We attempted to derive the information from: (1) the legislative history of the KVCDD (including Planning Board and Planning staff memos relating to the Planning Board's PAPF approval, the Executive's Fiscal Report, and the Council's resolution files); and (2) the Planning Board's regulatory record for subdivisions located in the KVCDD (including Planning Board opinions and Planning staff memoranda).

The legislative history of the KVCDD indicated that the Planning Board, Executive, and Council understood that the district would fund some infrastructure items that the Planning Board had required as a condition of subdivision or site plan approval. However, the legislative history does not clearly identify which of the 4 infrastructure improvements funded by the KVCDD were conditions of subdivision or site plan approval or the legal basis for requiring any item as a condition. The Planning Board's regulatory record for the Kingsview Village Center project revealed many references to infrastructure items that seem to overlap with those funded by the KVCDD. However, because of ambiguities in that record, we were unable to determine whether the scope of any infrastructure item funded by the KVCDD is identical to the scope of any item required as a condition of subdivision or site plan approval.

Planning Board's PAPF approval

In a letter dated November 6, 1996, Planning Board Chair Hussman notified County Executive Duncan that the Planning Board had approved the PAPF application for the WGDD ("PAPF approval letter") subject to conditions listed in a Planning staff memorandum ("PAPF memorandum"). With regard to road projects, the PAPF memorandum specified as a condition

¹⁸² Resolution 14-562 (adopted June 20, 2000).

of approval, “[a]ll improvements shown in the development district application” and 2 additional intersection improvements be included in the district.¹⁸³

The PAPF memorandum explained the Annual Growth Policy criteria that Planning staff used to evaluate the adequacy of public facilities in the proposed district:

The transportation test is essentially the same as that used for subdivision review. However, the tests for schools, water and sewer, and police/fire/health are more stringent than those applied at subdivision because they must specifically take into account the additional growth projected for the district.¹⁸⁴

It also noted that 13 of the 14 road projects that the developers had proposed for development district funding were required as a condition of subdivision approval, and the 14th road project had been assumed as a subdivision street.¹⁸⁵ Four of those 14 road projects were required as a condition of subdivision approval for the Kingsview Village Center.¹⁸⁶

After conducting the transportation test required by the Annual Growth Policy, Planning staff concluded that the 14 road projects proposed by the developers for development district funding, plus “two minor intersection improvements,” would be adequate.¹⁸⁷ In explaining that conclusion, the PAPF memo observed that:

The only difference from the previous subdivision approvals is that the analysis indicates that only two lanes of Richter Farm Road (A297) are needed between Clopper Road and Md. 188 [sic]. Previous preliminary plan approvals required four lanes. Conditions in the previous preliminary plan approvals regarding the timing of improvements will remain in effect, based on the criteria in the AGP for when a facility may be counted.

Executive’s Fiscal Report

The Executive’s Fiscal Report for the WGDD indicated that the Executive’s list of recommended infrastructure items included items that the Planning Board had required as a condition of subdivision or site plan approval for Kingsview Village Center. Specifically, the report noted that the Executive’s rationale for recommending additional “general benefit improvements” was to offset the impact tax credit that the developers would receive for infrastructure items funded by the WGDD that the developers were already required to provide as a condition of subdivision or site plan approval.¹⁸⁸

¹⁸³ October 25, 1996 memorandum from Development Review Chief Charles Loehr to the Montgomery County Planning Board (“PAPF memorandum”).

¹⁸⁴ *Id.*

¹⁸⁵ Summary of Roadway Improvements in Germantown West Development District Area attached to the PAPF memorandum.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ County Executive Fiscal Report – West Germantown Development District (September 29, 1997).

Council's resolution files

The Council's files for the KVCDD's Second Resolution include the PAPF approval letter, PAPF memorandum, and Executive's Fiscal Report for the WGDD, including components of those documents that are discussed in this section.

Regulatory record

OLO staff examined the Planning Board's Preliminary Plan and Site Plan Opinions for the Kingsview Village Center, and Planning staff memoranda referenced in those opinions, to determine whether the 4 infrastructure items funded by the KVCDD were required as a condition of subdivision plan or site plan approval and, if so, the legal basis for requiring any item as a condition of approval. OLO staff found numerous references to the following 3 items in those documents: (1) Kingsview Village Avenue; (2) Leaman Farm Road; and (3) Clopper Road.¹⁸⁹

Specifically, OLO staff found that the Planning Board required the following infrastructure items as a condition of subdivision plan approval: (1) construction of parts of Kingsview Village Avenue; (2) construction of parts of Leaman Farm Road; and (3) improvements to Clopper Road.¹⁹⁰ However, because of ambiguities in the regulatory record and the legislative history for the KVCDD, OLO staff could not determine whether the scope of any of those required infrastructure improvements included the particular Kingsview Village Avenue, Leaman Farm Road, and Clopper Road improvements that were funded by the KVCDD. Since OLO staff could not determine whether the infrastructure items funded by the KVCDD matched the infrastructure items required as conditions of subdivision or site plan approval for Kingsview Village Center, OLO staff did not attempt to reach any conclusions about the legal basis for those requirements.

F. Infrastructure Analysis – Eligible Infrastructure Improvements

This section discusses the results of Council staff's analysis of whether the Planning Board, Executive, or Council concluded that any infrastructure item proposed to be funded by the KVCDD was ineligible because it: (1) primarily served the residents or occupants of only one development or subdivision; or (2) was the responsibility of a single developer under the Planning Board's site plan and adequate public facilities requirements.

Planning Board

As discussed in Section E, the Planning Board's PAPF approval letter and Planning staff's PAPF memo for the WGDD explained that 4 of the 14 infrastructure items that the developers later proposed to be funded by the KVCDD were required as a condition of

¹⁸⁹ OLO Fact Finding Report on the KVCDD, Appendix 3C.

¹⁹⁰ *Id.*

subdivision approval for the Kingsview Village Center. Neither document discussed whether any proposed infrastructure item: (1) primarily served the residents or occupants of only one development or subdivision; or (2) was the responsibility of a single developer under the Planning Board's site plan and adequate public facilities requirements.

Executive

As discussed in Section E, the Executive's Fiscal Report for the WGDD acknowledged that some of the infrastructure items that the developers later proposed to be funded by the KVCDD were required as a condition of subdivision or site plan approval for projects located in the KVCDD. The report did not discuss whether any proposed infrastructure item: (1) primarily served the residents or occupants of only one development or subdivision; or (2) was the responsibility of a single developer under the Planning Board's site plan and adequate public facilities requirements.

Council

As discussed in Section E, the Council's files for the KVCDD's Second Resolution included the PAPP approval letter, Planning staff's PAPP memorandum, and Executive's Fiscal Report for the WGDD. There is no indication that the Council evaluated whether any infrastructure item funded by the KVCDD: (1) primarily served the residents or occupants of only one development or subdivision; or (2) was the responsibility of a single developer under the Planning Board's site plan and adequate public facilities requirements.

Chapter 8. Legal Issues Raised by the CTCAC Report

The CTCAC report raised 7 legal issues relating to the CTCDD (“CTCAC issues”). This Chapter presents Council staff’s conclusions regarding each issue. The County Attorney’s conclusions about each issue are set out in a letter to the County Executive and Council President dated July 26, 2007 (“County Attorney’s opinion”). (See **Appendix 21.**) Where we agree with the County Attorney’s opinion, we do not duplicate that written analysis. Where we want to supplement or emphasize components of that opinion, we add comments.

Rules of statutory construction

All of the CTCAC issues involve interpretations of State and local law, to which normal rules of statutory construction apply. In construing any statute, the goal is to ascertain the intent of the legislative body that enacted it. Although that process always begins with reviewing statutory language, even the clearest language should be read in the context of its legislative history and in a manner that avoids illogical results.¹⁹¹ When statutes appear to conflict, courts adopt interpretations that allow them to exist in harmony.¹⁹² The interpretation that is given to a statute by an agency that must administer it is entitled to considerable weight.¹⁹³ Consistent administrative construction of a statute coupled with legislative acquiescence in that interpretation “gives rise to a strong presumption that the interpretation is correct”.¹⁹⁴ That rule is particularly relevant to the CTCAC issues because the Council, which is responsible for creating a development district, is also the body that enacted the Development District Act.

The Development District Act also includes its own rules of statutory construction. Section 14-18(a)(1) requires that the Act “be construed liberally to achieve [its] purposes”.¹⁹⁵ Section 14-18(b) provides that the “powers granted under [the Act] supplement any power conferred by any other law and do not restrict any other power of County government”.

A. Did the Clarksburg Master Plan require the CTCDD to be created before the Planning Board approved the Clarksburg Town Center’s subdivision plan?

No. For the reasons outlined on pages 7-8 of the County Attorney’s opinion, the Clarksburg Master Plan (“Plan”) does not control the sequence of development in Clarksburg. As discussed in Chapter 4, Section A, the Plan expressly envisioned that alternative financing mechanisms (in addition to County funds and traditional developer contributions) would be needed to finance infrastructure improvements identified in the Plan. It contained recommendations regarding development district enabling legislation and the use of development

¹⁹¹ *Kaczorowski v. Baltimore*, 309 Md. 505 (1987).

¹⁹² *University System of Maryland v. The Baltimore Sun Company*, 381 Md. 79 (2004).

¹⁹³ *McCullough v. Wittner*, 314 Md. 602, 612 (1989).

¹⁹⁴ *Sinai Hospital v. Department of Employment*, 309 Md. 289, 46 (1987).

¹⁹⁵ As discussed in Chapter 3, Section B, under §14-2(a) those purposes include “authoriz[ing] the County to provide financing, refinancing, or reimbursement for the cost of infrastructure improvements necessary for the development of land in areas of the County of high priority for new development or redevelopment by creating development districts in which special assessments, special taxes, or both, may be levied”.

districts. As recommended in the Plan, the County enacted the Development District Act and created the CTCDD. The Plan does not, and legally cannot, require a development district to precede subdivision plan approval.

Administrative practice

The Germantown Master Plan included no references to development districts. The Clarksburg Master Plan was the first master plan to include recommendations and guidelines for development districts.

B. Did the Development District Act require the CTCDD to be created before the Planning Board approved the Clarksburg Town Center's subdivision plan?

No. For the reasons outlined on pages 8-9 of the County Attorney's opinion, the Development District Act did not require the CTCDD to be created before the Planning Board approved the Clarksburg Town Center's subdivision plan. That conclusion is supported by the County's administrative practice with the WGDD and KVCDD.

Administrative practice

The County's administrative practice with the WGDD and KVCDD indicates that the Council did not intend that the Development District Act require a development district to be created before the Planning Board approves a subdivision plan. The Council adopted the Second Resolution for the WGDD 4 years after the Planning Board approved the initial subdivision plan for the King Hargett project and almost 2½ years after the Planning Board approved the initial subdivision preliminary plan for the Kings Crossing project (see Chapter 6, Section B). The Council adopted the Second Resolution for the KVCDD 2 ½ years after the Planning Board approved the initial subdivision plan for the Kingsview Village Center project (see Chapter 7, Section B).

C. Is using the CTCDD to finance infrastructure items that the Planning Board required as a condition of subdivision or site plan approval consistent with the Regional District Act, the County subdivision law, and the County zoning law?

Yes. For the reasons discussed on pages 9-14 of the County Attorney's opinion and the additional reasons discussed in this section, using the CTCDD to finance infrastructure items that the Planning Board required as a condition of subdivision or site plan approval for Clarksburg Town Center is consistent with the Regional District Act, the County subdivision law, and the County zoning law.

CTCAC argument

CTCAC seemed to argue that the Regional District Act and Chapters 50 and 59 of the County Code prohibit the Council from using a development district to fund infrastructure items that the Planning Board requires as a condition of subdivision or site plan approval. However, CTCAC never identified a clear legal basis for that argument. It simply stated repeatedly that such action was “inconsistent” with Planning Board approvals.¹⁹⁶ In support of its argument, CTCAC alleged that the Planning Board had required most if not all of the infrastructure items funded by the CTCDD as a condition of subdivision or site plan approvals. Initially, the CTCAC report alleged that all infrastructure items to be funded by the CTCDD except the “Civic Center” were conditions of plan approvals.¹⁹⁷ More recently, CTCAC’s attorney alleged that the list of infrastructure items funded by the CTCDD was “comprised entirely of infrastructure the developer was required to install as a condition of plan approvals”.¹⁹⁸ CTCAC’s claims are factually inaccurate and legally unsound.

Infrastructure items required as a condition of subdivision or site plan approval for Clarksburg Town Center

As shown in **Exhibit 4-2**, 9 infrastructure items are included on the primary list of infrastructure items to be funded by the CTCDD. As shown in **Exhibit 4-3**, 4 of those items were required as conditions of subdivision or site plan approvals for Clarksburg Town Center: (1) Stringtown Road (MD 355 to Piedmont Road); (2) Piedmont Road; (3) Clarksburg Road (CTC boundary to Piedmont Road); and (4) the Greenway trails. The total projected cost of all 9 items to be financed by the CTCDD was \$16,979,000. The total projected cost of the 4 items that were conditions of plan approvals was \$8,215,000.

State and County subdivision and zoning law

The Regional District Act is a State law that gives the County its subdivision and zoning authority.¹⁹⁹ Chapter 50 of the County Code sets out a process for subdividing property and assuring that development will not occur until it is supported by adequate infrastructure. Under Chapter 50, property cannot be subdivided until the Planning Board approves a preliminary plan of subdivision (“subdivision plan”). Chapter 59 of the County Code regulates the use of property and exercises the County’s zoning authority. Under Chapter 59, certain types of property cannot be developed until the Planning Board approves a site plan. Neither Chapter 50 nor Chapter 59 specify, or expressly authorize the Planning Board to specify, the sources of funds for any infrastructure item required as a condition of subdivision or site plan approval. In contrast, the Development District Act provides a source of infrastructure funding for selected infrastructure improvements that are required to support undeveloped or underdeveloped property Chapter 50,

¹⁹⁶ Cover memorandum attached to CTCAC Report, p.1 and CTCAC Attorney’s First Letter, p.1-2.

¹⁹⁷ CTCAC Report, pp.76 and 83.

¹⁹⁸ Preliminary Outline of CTCAC’s Response to County Attorney’s Memorandum of July 26, 2007 attached to the CTCAC Attorney’s Third Letter.

¹⁹⁹ The Regional District Act is codified at Article 28 of the Maryland Code.

Chapter 59, and the Development District Act serve different purposes and are not inconsistent with each other.

Development District Act

Section 14-3(a) and §14-7(c) expressly authorize a development district to fund infrastructure items that the Planning Board requires as a condition of subdivision plan approval in order to comply with the APFO. Section 14-3(a) defines the term “adequate public facility” to include “any infrastructure improvement required by the Planning Board as a condition of approving a preliminary plan of subdivision under [the APFO]”. Section 14-7(c) requires a property owner who seeks to create a development district to commit to produce “through the funding of the proposed development district or otherwise . . . the [property owner’s] adequate public facilities requirements (emphasis added)”. Taken together, §14-3(a) and §14-7(c) clearly indicate that a development district can be used to fund any infrastructure item required as a condition of subdivision plan approval to meet APFO requirements.

Although the Planning Board can require specific infrastructure items as a condition of subdivision or site plan approval, it has no legal authority to preclude the County from paying for any item through a development district. As the County Attorney’s opinion noted on page 13, Planning Board Chair Hanson expressly rejected that CTCAC argument in a recent letter:

The CTCAC report argues that the reimbursement of developers, through a development district tax on residents, for facilities they were required to provide as a condition of subdivision or site plan approval usurps the Board’s authority under the subdivision regulations and under the Regional District Act to administer those regulations. Because the Board does not generally consider who will fund dedications or improvements required under a preliminary or site plan – rather the Board simply requires the applicant provide the improvements without regard to the funding source – the Board disagrees.²⁰⁰

Mr. Hanson noted that there is only one exception to that general rule. Specifically, he explained that “[i]n considering a violation compliance program, the Board is well within its authority to require that a developer, and not the residents of the subdivision, assume the costs for any facilities or amenities it agrees to produce in lieu of a fine or other penalties”.²⁰¹ That exception is not relevant to CTCAC’s argument.

Legislative History of the Development District Act

The legislative history of the Development District Act shows that the Council intended that a development district could be used to finance infrastructure items that the Planning Board requires as a condition of subdivision approval. As discussed in Chapter 2, Section B, the Development District Act was enacted in part as a response to the Germantown West Road Club

²⁰⁰ May 18, 2007 letter from Planning Board Chair Royce Hanson to Council President Marilyn Praisner.

²⁰¹ *Id.*

("Road Club"). In 1991, the Road Club urged the County to create a special taxing district to finance road construction in the West Germantown Area because conventional financing for infrastructure items required to comply with APFO requirements was unavailable. The Road Club's legislative proposal for development districts provided the framework for the Development District Act. There is no evidence in the long legislative history of the Act (discussed in detail in Chapter 2) that the Council perceived a conflict between powers of development districts and the laws governing subdivision or zoning. To the contrary, that history reveals quite clearly that the Council viewed development districts as a legitimate financing tool for infrastructure items that were needed to meet APFO requirements.

Administrative practice

The County's practice with the WGDD and KVCDD, reviewed in detail in Chapter 6, Section E and Chapter 7, Section E, indicates that the Planning Board, the Executive, and the Council understood that those districts would fund some infrastructure items that the Planning Board required as a condition of subdivision or site plan approval. However, neither the legislative history of those districts or the regulatory record for the development projects located in those districts clearly identifies which infrastructure items funded by the WGDD and KVCDD were conditions of plan approvals.

D. Will the CTCDD finance any infrastructure item that is not an eligible "infrastructure improvement" under the Development District Act?

No. For the reasons discussed on pages 14 through 16 of the County Attorney's opinion and additional reasons discussed in this section, all of the infrastructure improvements to be funded by the CTCDD are eligible infrastructure improvements under the Development District Act. However, because there are disputes about the meaning of §14-(3)(g), we recommend that it be amended to more clearly reflect its intended meaning.

Definition of eligible "infrastructure improvement"

As explained in Chapter 3, Section B, §14-3(g) defines eligible "infrastructure improvement" to include any school, police station, fire station, library, civic or government center, storm drainage system, sewer, water system, road, bridge, culvert, tunnel, street, transit facility or system, sidewalk, lighting, park, recreational facility, or any similar public facility. However, §14-3(g)(1) and (2) specify that a development district must not be used to fund an infrastructure improvement that: (1) primarily serves the residents or occupants of only one development or subdivision; or (2) is the responsibility of a single developer under the Planning Board's site plan and adequate public facilities requirements.

CTCAC's argument

CTCAC initially argued that the CTCDD would finance “numerous infrastructure items that do not meet the definition of ‘infrastructure improvement’ in . . . §14-3(g)”.²⁰² CTCAC later specified that “any infrastructure improvement made the responsibility of a single developer as a site plan requirement is ineligible to be included in a development district”.²⁰³ In essence, CTCAC argued that the plain language of §14-3(g)(2) can be interpreted in only one way: to preclude using a development district to fund any item that the Planning Board requires a single developer to provide. As construed by CTCAC, §14-3(g)(2) would preclude the County from using a development district to fund an infrastructure item required to meet APFO requirements merely because the district consists of only one subdivision. It would also preclude the County from using a development district to fund an infrastructure item required to meet APFO requirements in a district that consists of multiple subdivisions if the item was required for only one subdivision. As explained in the County Attorney’s opinion on page 16, that construction subverts the purposes of the Development District Act and is inconsistent with §14-18(a), which requires that the Act be “liberally construed” to effect its purposes.

Plain language of §14-3(g)(2)

The plain language of §14-3(g)(2) precludes a development district from funding any infrastructure improvement that is “the responsibility of a single developer under the Planning Board’s site plan and adequate public facilities requirements”. What does that language mean? CTCAC attributes one meaning to it, but there are at least 2 other meanings that can reasonably be attributed to §14-3(g)(2) when viewed by itself.

Section 14-3(g)(2) can reasonably be interpreted to exclude only those infrastructure items that the Planning Board requires of a single developer to comply with APFO requirements at the subdivision plan stage and zoning requirements at the site plan stage. If §14-3(g)(2) was intended to apply to all conditions of site plan approval, including non-APFO requirements that carry over as conditions of subdivision plan approval, then the reference to “adequate public facilities requirements” is superfluous. But a statute should be interpreted “so that no word, clause, sentence, or phrase is rendered surplusage, superfluous, meaningless, or nugatory.”²⁰⁴ If interpreted to apply only to infrastructure items included on the CTCDD’s primary list that the Planning Board required to comply with APFO and zoning requirements, §14-3(g)(2) would apply only to the Greenway Trails. The Planning Board required that item as an amenity at the site plan approval stage to support development of Clarksburg Town Center as an optional method development in the RMX-2 zone. Section 14-3(g)(2) would not apply to the other 3 infrastructure items that the Planning Board required as a condition of subdivision approval: (1) Stringtown Road improvements (MD 355 to Piedmont Road); (2) Piedmont Road improvements; and (3) Clarksburg Road improvements (CTC boundary to Piedmont Road). As shown in **Exhibit 4-3**, the APFO was not the legal basis for requiring any of those 3 items as conditions of subdivision approval.

²⁰² CTCAC Attorney’s First Letter, p.1.

²⁰³ CTCAC Attorney’s Second Letter, p.9.

²⁰⁴ *Department of Health and Mental Hygiene v. Kelly*, 397 Md. 399 (2007)

The term “infrastructure improvement” in §14-3(g)(2) can reasonably be interpreted, as it is interpreted by the attorneys for the Clarksburg developers, to mean an entire facility or road.²⁰⁵ Viewed from that perspective, §14-3(g)(2) does not preclude a development district from funding an infrastructure item that is regional in nature, such as an arterial State or County road which serves both local and through traffic, when a single developer is responsible for improving or constructing only one or more parts of that item. Rather, §14-3(g)(2) would apply only to infrastructure items that are not components of larger regional infrastructure, such as an internal subdivision road. If interpreted in that manner, §14-3(g)(2) would not apply to any of the 4 items that the Planning Board required as a condition of subdivision or site plan approval for Clarksburg Town Center.

Since the meaning of §14-3(g)(2) is not as “plain” as CTCAC contended, and can reasonably be interpreted to have at least two other meanings, its intended meaning must be derived by applying the rules of statutory construction previously outlined. We should interpret §14-3(g)(2) in the context of its legislative history and in a manner that avoids illogical results. We should seek a reasonable interpretation that allows §14-3(g)(2) to exist in harmony with other provisions of the Development District Act. We should give considerable weight to the meaning that the Council attributed to §14-3(g)(2) when it implemented the Development District Act by creating development districts. And we should construe §14-3(g)(2) liberally to achieve the Act’s purposes.

Legislative history of the Development District Act

The legislative history of the Development District Act (reviewed in detail in Chapter 2) shows that the Council intended that a development district could finance infrastructure items required as a condition of subdivision plan approval to meet APFO requirements. That intent is clearly reflected in §14-3(a) and §14-7(c). A closer review of the Act’s legislative history as it relates directly to §14-3(g)(2) reveals the Council’s intended meaning for §14-3(g)(2).

As Chapter 2, Section D explained, the Development District Act is a combination of 2 bills relating to development districts – Bill 44-92 and Bill 46-92. The Council combined components of both bills in Bill 44/46-92. *The combined bill “followed the general direction taken by Bill 44-92 while adding some elements of Bill 46-92”.*²⁰⁶

The language, now codified in the first sentence of §14-3(g), was derived from the definition of infrastructure improvement in Bill 44-92. That bill defined “infrastructure improvement” as:

[A] school, police station, fire station, library, civic center, storm drainage system, sewer, water system, road, bridge, culvert, tunnel, street, transit facility or system, sidewalk, lighting, park, recreational facility or any similar public facility.²⁰⁷

²⁰⁵ Developers’ Memorandum, pp.16-18; Newland’s Memorandum, pp.5-6.

²⁰⁶ October 22, 1993 memorandum from Senior Legislative Attorney Michael Faden to the MFP Committee.

²⁰⁷ Bill 44-92 (Draft 4, November 27, 1992), p.4, lines 62-67.

The language now codified in §14-3(g)(1) and (2) was added to the first draft of the combined bill in response to Planning staff's concern about that definition.

In a memorandum to the Planning Board dated January 25, 1993 ("Planning staff memorandum"),²⁰⁸ Planning staff expressed concern about the types of infrastructure that were eligible for development district funding under both bills. The Planning staff memorandum noted that the scope of Bill 46-92, which allowed a development district to fund any infrastructure necessary to build out master-planned development, was broader than the scope of Bill 44-92, which allowed a development district to fund only those infrastructure items that were necessary to meet APFO requirements. It then explained Planning staff's concern about the definition of eligible infrastructure improvement in both bills:

[N]either of these bills is clear on what infrastructure is to be included. Although both bills list similar types of infrastructure that may be funded by a development district, neither is clear that a district will not fund construction costs that are normally the responsibility of the developer. *These could include sidewalks and secondary streets that serve the interior of a subdivision.* Planning staff recommends that these costs not be included as expenses to be paid by the development district.²⁰⁹

The Planning staff memorandum was included in numerous Council staff packets prepared for the MFP Committee, beginning with the Committee's March 22, 1993 worksession on Bill 44-92 and Bill 46-92.²¹⁰ The minutes for that worksession indicate that Deputy Planning Director Charles Loehr "clarified the position of the MCPB staff that *facilities which are traditionally funded by developers, such as sidewalks*" should not be funded by a development district.²¹¹

In response to Planning staff's concern, the first draft of Bill 44/46-92 (the combined bill) added the following language to the definition of infrastructure improvement taken from Bill 44-92:

Infrastructure Improvement does not include any improvement which: (1) primarily serves the residents or occupants of only one development or subdivision; or (2) is the responsibility of a single developer under the Planning board's site plan and adequate public facilities requirements.²¹²

In a memorandum dated October 22, 1993, Council staff explained the intent of that language to the MFP Committee:

²⁰⁸ January 25, 1993 memorandum from Community Planning Coordinator Carol Dickey (via Deputy Planning Director Charles Loehr) to the Planning Board (emphasis added), p.3.

²⁰⁹ *Id.*

²¹⁰ The Planning staff memo was attached to the Council staff packets for the March 22, August 2, October 22, and December 6, 1993 memoranda from Senior Legislative Attorney Michael Faden to the Management and Fiscal Policy Committee.

²¹¹ Approved minutes of the Management and Fiscal Policy Committee's March 22, 1993 worksession (emphasis added).

²¹² Bill 44/46-92 (Draft 6, October 20, 1993), p.5, lines 88-94.

The first category is intended to exclude such items as *internal streets or abutting sidewalks*; the second is intended to exclude, among other things, *intersection improvements that are needed by only one landowner*.²¹³

In a memorandum dated June 21, 1994, Council staff explained the intent of that language to the Council:

The definition of “infrastructure improvement” does exclude, in paragraph (1), improvements which would primarily benefit the residents or occupants of only one development or subdivision, *such as internal streets, abutting sidewalks, limited access recreational facilities, or a school which draws its student body only from a single development*. In paragraph (2), the definition excludes improvements which are the responsibility of a single developer under the Planning Board’s site plan and adequate public facilities requirements, *such as an intersection improvement which primarily handles traffic to and from one particular property*. In staff’s view, these exclusions do not mean that a single-property development district could never be created; they only require that the infrastructure items funded by that district must serve a wider area or population, *such as a part of a regional road or transit system, or a school or library which draws from a larger area*.²¹⁴

As both of those legislative history excerpts show, the language now codified in §14-3(g)(1) and (2) was intended to exclude only such items as internal streets and abutting sidewalks, secondary streets that serve the interior of a subdivision, limited access recreational facilities, a school that draws its student body only from a single development, and intersection improvements that are needed by only one property owner.

Administrative practice

As explained in Chapter 4, Section F (CTCDD), Chapter 6, Section E (WGDD), and Chapter 7, Section E (KVCDD), there is no indication in the legislative records of the CTCDD, WGDD, and KVCDD that the Planning Board, Executive, or Council ever evaluated whether any infrastructure item proposed for district funding was “the responsibility of a single developer under the Planning Board’s site plan and adequate public facilities requirements”. Like the CTCDD, the KVCDD consisted of one subdivision project (Kingsview Village Center). However, the legislative record for the KVCDD includes no reference to concerns about using development districts to fund infrastructure items needed to serve a single development.

The first discussion of any kind about the meaning of §14-3(g)(2) in any of those legislative records is the Planning Board’s recommendation in its March 22, 2001 PAPF approval letter for the CTCDD that that the Council amend §14-3(g)(2) “*if necessary, to allow*

²¹³ October 22, 1993 memorandum from Senior Legislative Attorney Michael Faden to the MFP Committee, p.1 (emphasis added).

²¹⁴ June 21, 1994 memorandum from Senior Legislative Attorney Michael Faden to the County Council, p.3 (emphasis added).

for items to be the responsibility of a single developer so long as the proposed items serve a greater public benefit than a single development.” Even then, the Planning Board did not specifically identify any infrastructure item that was “the responsibility of a single developer under the Planning Board’s site plan and adequate public facilities requirements”. The lack of subsequent attention to the Planning Board’s recommendation indicates that the Executive and Council did not believe that the amendment was necessary because they did not interpret §14-3(g)(2) to preclude the Council from creating a single developer district.

Conclusion

Although the plain language of §14-3(g)(2) allows more than one interpretation, there is nothing in the County’s administrative practice that supports CTCAC’s argument that a development district cannot be used to fund an infrastructure item: (1) that the Planning Board requires a single developer to provide; or (2) located in a single development district. In fact, the KVCDD was also a single developer district. The legislative history of §14-3(g)(1) and (2) indicates the Council intended that those provisions would exclude only such items as internal streets and abutting sidewalks, secondary streets that serve the interior of a subdivision, limited access recreational facilities, a school that draws its student body only from a single development, and intersection improvements that are needed by only one property owner. Since none of the infrastructure items to be funded by the CTCDD fall into any of those categories, all of them are eligible to be funded by the CTCDD.

To avoid continued disputes about the meaning of §14-3(g)(1) and (2), Council staff recommends that §14-3(g) be amended to more accurately reflect its intended meaning. See Chapter 9, Section C, for a further discussion of this issue.

E. Was the Executive authorized to recommend that the CTCDD finance additional infrastructure items beyond those the Planning Board listed as necessary to comply with adequate public facilities and Growth Policy requirements?

Yes. For the reasons discussed on pages 16-17 of the County Attorney’s opinion and the additional reason discussed in this section, the Executive had legal authority to recommend that the CTCDD finance infrastructure items not listed by the Planning Board as necessary to meet adequate public facilities and Growth Policy requirements for the district. We agree with the County Attorney that: (1) the Development District Act does not expressly preclude the Executive from making that type of recommendation; and (2) the County Charter gives the Executive authority to freely offer that type of recommendation.

In addition, Section TP4.4 of the current County Growth Policy expressly authorizes the Executive to recommend to the Council that additional infrastructure items be funded by a development district. That section contains the following language:

The County Executive and Planning Board may also recommend to the County Council additional facilities to be provided by the development district or by the

public sector to support development within the district. These facilities may include, but are not limited to libraries, health centers, local parks, social services, greenways, and major recreational facilities.²¹⁵

That language first appeared in the FY96 Annual Growth Policy, adopted by the Council not long after it enacted the Development District Act, along with other language that clarified the relationship of the County's Growth Policy to development districts.²¹⁶ It has been included in every succeeding version of the Growth Policy.

Administrative practice

The County's practice with the WGDD reflects an understanding that the Executive could recommend that the district finance infrastructure items other than those the Planning Board listed as necessary to meet adequate public facilities and Growth Policy requirements. The Executive recommended that the WGDD finance 3 infrastructure items that the Planning Board did not include on its list.²¹⁷ The final list of infrastructure items funded by the WGDD includes 1 of those items.²¹⁸ For the KVCDD, the Executive did not recommend that the district fund any infrastructure item that was not included on the Planning Board's list.²¹⁹

F. Is the Council resolution creating the CTCDD invalid because all residents of Clarksburg Town Center were not properly notified of the Council hearing on that resolution?

No. For the reasons discussed on page 17 of the County Attorney's opinion and the additional reasons discussed in this section, the CTCDD is not invalid due to any improper notice of the public hearing on the Second Resolution.

Notice requirement

Section 14-9(b) required the Council to give notice of the public hearing on the Second Resolution by: (1) advertising in at least 2 newspapers of general circulation in the County at least 21 days before the hearing; and (2) notifying by mail the record owner of each property located in the proposed district at the address shown on the latest tax assessment roll. Each notice mailed to a record owner of property was required to include: (1) a copy of the proposed resolution to establish the district; and (2) an estimated rate for any tax, assessment, fee, or charge proposed to fund infrastructure improvements for the district.

²¹⁵ 2003-5 Annual Growth Policy (Resolution 15-375), Section TP4.4.

²¹⁶ FY96 Annual Growth Policy (Resolution 13-216), pp.12-16.

²¹⁷ OLO Fact Finding Report on the WGDD, **Appendix 2B**, p.2B-6.

²¹⁸ *Id.* at 2B-11.

²¹⁹ OLO Fact Finding Report on the KVCDD, **Appendix 3B**, p.3B-2.

CTCAC argument

CTCAC claimed that the Second Resolution for the CTCDD is invalid because the required notice “was not sent to all (if any) record property owners as shown on the latest tax assessment”.²²⁰ However, CTCAC’s claim is not supported by the factual record of the Council’s hearing on the Second Resolution. That record is discussed in detail in Chapter 4, Section B and summarized here.

Record of the Council hearing on the Second Resolution

The Council initially scheduled a public hearing on the Second Resolution on December 3, 2002 at 7:30 p.m. That hearing was advertised in The Gazette Newspaper and the Montgomery Journal on November 8, 2002.²²¹ In addition to those newspaper advertisements, on November 6, 2002, Council staff mailed written notice of the December 3 hearing to all property owners in the proposed district, as identified in a list of record property owners provided by the attorneys for the Developer.²²² The Council’s file on the Second Resolution includes a copy of that list, which indicated that there were 74 privately-owned residential units located in the proposed district as of September 30, 2002. That file also contains a copy of the hearing notice that was sent to each property owner and the mailing labels that were used to mail each notice. The hearing notice included the time, date, and location of the December 3 hearing and a copy of the proposed resolution to create the development district. It also included estimated special tax and assessment rates and indicated that a copy of the Executive’s Fiscal Report, which included details on the infrastructure to be funded by the proposed development district and the tax rates that would apply in the district, could be obtained by calling the Council Office.

When only 3 speakers signed up to testify at the December 3 evening hearing, the Council continued the hearing to December 10 at 11:00 a.m. That action was consistent with the Council’s standard procedure of rescheduling any evening hearing if only a few speakers sign up to testify. The Council included notice of that continuation on its December 3 Council agenda. Also, as required by Council Rule 9(h),²²³ a Council representative was present at the time and location advertised for the December 3 hearing and read an oral statement for the record indicating that the hearing had been continued to December 10 at 11:00 a.m.²²⁴ The 3 speakers who originally signed up to testify on December 3 were the only speakers who testified at the December 10 hearing.²²⁵

²²⁰ CTCAC Attorney’s First Letter, p.2.

²²¹ The Council’s hearing file includes a Proof of Publication from The Gazette Newspaper dated November 9, 2002 and Proof of Publication from the Montgomery Journal dated November 8, 2002.

²²² The written notice that Council staff mailed to property owners is undated. However, in an email to Finance Department staff on November 7, 2002, Senior Legislative Attorney Michael Faden attached a copy of the notice and noted that he had sent it out “yesterday”.

²²³ Council Rule 9(h) authorized the Council to continue a hearing without further published notice if at the time and place for which the notice originally was given the presiding officer specified the time and place where the hearing would reconvene.

²²⁴ Approved Minutes for the Council’s December 3, 2002 Session, p.10.

²²⁵ Speakers List for the December 10, 2002 public hearing. The 3 speakers were Steve Kaufman, John Orrick, Jr., and Lih Young.

As that factual record shows, the Council complied with the public hearing notice requirements of §14-9(b). Although there is no record that the 74 property owners to whom the Council mailed the public hearing notice actually received that notice, §14-9(b) does not require proof of receipt. It requires only that the Council notify the property owners “by mail”. CTCAC argued that the Council should have mailed the hearing notice to all record owners on the County’s tax assessment rolls on November 1, 2002 (five days before the hearing notice was mailed to property owners).²²⁶ However, CTCAC offers no concrete proof that such a list was available. More importantly, the Development District Act does not define “latest tax assessment roll” in that way. In fact, it does not define “latest tax assessment roll” at all. Even if there had been a procedural irregularity regarding the public hearing notice, that irregularity would not necessarily give rise to a viable claim by property owners that the Second Resolution is invalid. As the County Attorney’s opinion noted on page 17, there is no evidence that any property owner was prejudiced by any lack of notice. Moreover, any claim arising from a procedural defect that allegedly occurred in 2002 is now stale.

G. Did the property owner approval process for the CTCDD comply with State law governing development districts?

Yes. For the reasons discussed on pages 17 through 19 of the County Attorney’s opinion and additional reasons discussed in this section, the procedures used by the Council to obtain property owner approval of the CTCDD complied with State law.

Chapter 20A – Special Obligation Debt

As explained in Chapter 2, Section E and Chapter 3, Section A, Chapter 20A of the County Code is a State law enacted in 1994 at the County’s request. It authorized the County to enact a local law to provide for the issuance of bonds to finance infrastructure for a development district. Section 20A-1(f)(2) which prohibits the creation of a development district unless the proposed district is approved by: (1) at least 80% of the owners of real property located in the proposed district; and (2) the owners of at least 80% of the assessed valuation of the real property located in the proposed district (“80% Approval Requirement”).

CTCAC argument

CTCAC argued that creation of the CTCDD did not comply with the 80% Approval Requirement²²⁷ In essence, CTCAC construed §20A-1(f) to require the 80% Approval Requirement to be met at the Second Resolution stage rather than the First Resolution stage, as is required by §14-6(a) of the Development District Act.²²⁸

²²⁶ CTCAC Attorney’s Second Letter, p.23.

²²⁷ CTCAC Attorney’s First Letter, p.2; CTCAC Attorney’s Second Letter, p.15-21; and CTCAC Attorney’s Third Letter, Preliminary Outline of CTCAC Response to County Attorney Memorandum of July 26, 2007, p.2.

²²⁸ CTCAC Attorney’s Second Letter, pp.16-17.

County Attorney's opinion

The County Attorney's opinion concluded that the 80% Approval Requirement is a nullity and did not apply to the CTCDD because the Express Powers Act gives the County authority to issue special obligation bonds and the Development District Act properly exercises that authority. The County Attorney's opinion also concluded that even if the 80% Approval Requirement applied to the CTCDD, that requirement was met at the First Resolution stage. The legislative history of Chapter 20A supports both of the County Attorney's conclusions.

Legislative History of Chapter 20A – Express Powers Act

As explained in Chapter 2, Section E, when the Council first considered legislation to authorize the creation of development districts in 1992, the County's bond counsel opined that the Council did not have authority to enact that legislation and recommended that the County seek express enabling authority from the State.²²⁹ The County followed bond counsel's advice, and in 1994 the General Assembly passed House Bill 895, the public local law now codified in Charter 20A.²³⁰ In a bill review letter dated May 20, 1994, the Maryland Attorney General reviewed House Bill 895 "for constitutionality and legal sufficiency".²³¹ That letter discussed whether the bill was an unconstitutional public local law for a single charter home rule county on a subject covered by the Express Powers Act.²³²

The Attorney General observed that the "special obligation bonds" described in House Bill 895 were neither pure "general obligation bonds" nor pure "revenue bonds".²³³ He also noted that the County's bond counsel had focused on parts of the Express Powers Act²³⁴ that provided enabling authority for revenue bonds, and had not considered other parts of the Express Powers Act that provided enabling authority "for borrowing of moneys on the faith and credit of the county or for the issuance of bonds or other evidence of indebtedness therefor" subject to certain conditions.²³⁵ According to the Attorney General, one of those conditions "could be construed to indicate existing charter county authority to issue bonds of the nature contemplated by House Bill 895". In particular, the Attorney General cited a provision that exempted from certain bond restrictions "bonds or other evidences of indebtedness issued or guaranteed by the county payable primarily or exclusively from taxes levied in or on, or the revenues of, special taxing areas or districts, heretofore or hereafter established by law".²³⁶

²²⁹ Letter dated October 2, 1992 from Smith, Somerville, and Case to County Attorney Joyce Stern. That letter focused on the language of Article 25A, §5(p)(2) of the Maryland Code, which authorized the issuance of bonds funded with revenues "received from or in connection with any system, project, or undertaking".

²³⁰ 1994 Md. Laws Ch. 612.

²³¹ Letter dated May 20, 1994 from Attorney General J. Joseph Curran, Jr. to Governor William Donald Schaefer ("bill review letter").

²³² Under Article XI-A, §4 of the Maryland Constitution, the General Assembly has no power to enact a public local law that relates to a matter within the scope of power granted to Charter counties under the Express Powers Act.

²³³ *Id.* at 2.

²³⁴ Article 25A, §5(p)(2) of the Maryland Code.

²³⁵ Article 25A, §5(p)(1) of the Maryland Code.

²³⁶ Article 25A, §5(p)(1)(i)(b) of the Maryland Code

After acknowledging the possibility that the County already had the specific authority that HB 895 was intended to provide, the Attorney General concluded that the bill was not a “clear” violation of the County’s home rule authority because there was “at least a reasonable doubt” as to whether the County had that authority. The following excerpt from the bill review letter describes the Attorney General’s reasoning in more detail:

Without an opinion of bond counsel that there is adequate authority, the County is effectively unable to issue such bonds. House Bill 895 is clearly an effort by Montgomery County to ensure that appropriate authority exists. For these reasons and because House Bill 895 is enabling and not restrictive of charter county home rule powers, we do not find the bill to be a clear invasion of Montgomery County’s home rule powers. *However, if the bill is signed and the bonds issued, it may be advisable for the County to rely upon its home rule powers as well as House Bill 895 as the basis for its authority.*²³⁷

As reflected in that excerpt, the Attorney General construed House Bill 895 in a manner that allowed the County to issue development district bonds, while at the same time advising the County to rely also on its home rule powers as authority to issue those bonds. That is exactly what the County Attorney’s opinion rightfully does.

Legislative History of Chapter 20A – 80% Approval Requirement

If §20A-1(f) is viewed as a valid law that applied to the CTCDD, the property owner approval that preceded the CTCDD’s First Resolution complied with that law. As the County Attorney’s opinion noted on page 20, Chapter 20A does not specify when, in the development district timeline, its 80% Approval Requirement applies. Chapter 20A simply states that the district may not be created unless that requirement is met. Section 14-6(a) of the Development District Act, which applies the 80% Approval Requirement at the First Resolution stage, is consistent with §20A-1(f). Creation of the CTCDD complied with the 80% Approval Requirement because the developer of Clarksburg Town Center (Terrabrook, L.L.C.) was the sole owner of property located in the proposed CTCDD when the Council adopted the First Resolution for the district.

The legislative history of House Bill 895 (1994), which became Chapter 20A, provides no indication that applying the 80% Approval Requirement at the First Resolution stage would conflict with Chapter 20A. House Bill 895 was a local Montgomery County bill. Like most local bills, the General Assembly enacted the bill as a “local courtesy” after it was endorsed by the County’s legislative delegation (“County delegation”). It received a favorable report from the Senate Budget and Taxation Committee (by a vote of 12-0), a favorable report from the House Appropriations Committee (by a vote of 23-0), was passed unanimously (47-0) in the Senate, and was passed by a vote of 130-1 in the House of Delegates (the sole dissenter was a Montgomery County delegate).²³⁸

²³⁷ Bill review letter, p.3 (emphasis added).

²³⁸ Official bill file for House Bill 895 (MC 410-94) maintained by the Department of Legislative Services. The sole dissenter was Delegate Leon Billings.

Before the bill was introduced in the General Assembly, it was subject to the County delegation's local bill review process, which included a public hearing and numerous worksessions. As HB 895 worked its way through that process, it was known as MC 419-94. The legislative history of MC 419-94 shows that the County delegation was aware that the bill was intended to provide specific authority for development district legislation then pending before the Council (Bill 44/46-92). The delegation requested and was provided with a copy of Bill 44/46-92.²³⁹ That bill included language that was almost identical to the language currently codified in §14-6(a), which applied the 80% Approval Requirement at the First Resolution stage.²⁴⁰ There is no evidence in the legislative history of MC 419-94 that the County delegation thought that the 80% Approval Requirement in Bill 44/46-92 conflicted with the 80% Approval Requirement in MC 419-94.

The following excerpt from the Attorney General's bill review letter for House Bill 895 also indicates that the County's delegation had reviewed a draft of Bill 44/46-92:

We are advised . . . that the Montgomery County Council is developing implementing legislation for House Bill 895, and that a draft of this companion legislation was provided to the Montgomery County Delegation in connection with its consideration of House Bill 895.²⁴¹

The Attorney General expressly noted, and voiced no objection to the fact, that the County intended to implement the 80% Approval Requirement in House Bill 895 by applying it at the First Resolution stage.²⁴²

As the County Attorney's opinion concluded on page 20, given the plain language of §20A-1(f) and §14-6(a) and the legislative history of Chapter 20A, any ambiguity regarding the 80% Approval Requirement should be resolved by applying that requirement to the First Resolution stage.

²³⁹ December 9, 1993 memorandum from Ben Bialek to the County Affairs Committee, attaching Draft 6 of Bill 44/46-92, Development Districts (revised October 20, 1993).

²⁴⁰ Draft 6 of Bill 42-46-92, Development Districts (revised October 20, 1993), p.7, lines 146-150.

²⁴¹ Bill review letter, p.5

²⁴² *Id.*

Chapter 9. Issues for Further Discussion

This Chapter discusses issues that arose in the course of preparing this report which do not relate directly to the legal issues raised by CTCAC. It also contains Council staff's initial recommendations on each issue.

A. CTCDD -- Cost Share Analysis

As explained in Chapter 4, Section F, the CTCDD would fund 4 infrastructure items that the Planning Board required as conditions of subdivision or site plan approval for Clarksburg Town Center, including: (1) Stringtown Road (MD 355 to Piedmont Road); (2) Piedmont Road; (3) Clarksburg Road (CTC boundary to Piedmont Road); and (4) the Greenway Trails. Council staff believes that the cost of those 4 items can reasonably be ascribed to the CTCDD because the Clarksburg Town Center project cannot be completed without them. This section discusses whether the applicable cost shares for the other 5 items which the CTCDD would fund can be reasonably ascribed to the CTCDD.

The principles that the County used to ascribe infrastructure costs to the CTCDD are generally similar to principles that the County Government and Planning Board have used during the past 3 decades when ascribing responsibility for infrastructure costs needed to serve new development. Those principles include:

1. If the travel demand generated by a new development (in excess of existing traffic and traffic to be generated by other development that has been approved but not yet built) can be accommodated safely by the existing and programmed transportation network, then generally few if any exactions other than the transportation impact tax are levied on the new development.
2. If any additional road capacity or safety improvement is needed as a result of travel demand generated by this development, then as much as 100% of the cost of the improvement is ascribed to the development. If the improvement adds capacity and is on a County road, its cost can be a dollar-for-dollar credit against the transportation impact tax.
3. If several developments in the same area are proceeding concurrently and each will generate new traffic which requires more road capacity, then each development participates in the cost in proportion to the degree to which it contributes to the needed capacity.

This section reviews how the 5 infrastructure items not required as a condition of regulatory approval align with those principles.

Clarksburg Road between MD 355 and the western CTC boundary

Clarksburg Road is to be widened to a 3-lane, curbed roadway with a sidewalk and bike path from MD 355 to Snowden Farm Parkway. According to OLO's fact finding, the Planning Board required the Clarksburg Town Center developer to reconstruct the southern half of Clarksburg Road along the project's frontage, but deleted language requiring reconstruction of Clarksburg Road between MD 355 and the western CTC boundary. In September 2001, the developer executed a Public Improvement Agreement with the County to make improvements to one-half of the entire section of Clarksburg Road between MD 355 and Snowden Farm Parkway; in March 2003, the Council ascribed these costs to the CTCDD.

The segment of Clarksburg Road between MD 355 and the western CTC boundary, which is part of the cost ascribed to the CTCDD, is more than the transportation improvements the Planning Board required as a condition of CTC approval. However, Council staff thinks it is reasonable to attribute to the CTCDD the cost of extending the Clarksburg Road improvements to a logical southwestern terminus, which would be MD 355.

Stringtown Road Extended (MD 355 to I-270).

The Planning Board did not identify Stringtown Road Extended as an APFO requirement for the Clarksburg Town Center. This means that the inclusion of this item in the CTCDD ascribes an infrastructure cost to the Clarksburg Town Center for transportation capacity which is beyond that required to accommodate the Clarksburg Town Center, based on the transportation service standards in effect at the time. However, the capacity created by this improvement also produces a higher level of road service for Clarksburg Town Center residents.

For the foreseeable future, Stringtown Road Extended (MD 355 to I-270) is intended to be the primary access to I-270 from the east side of Clarksburg. The only other planned access is Newcut Road Extended and its interchange, neither of which is programmed in the CIP. If bonds are not issued for the CTCDD, the County must find another revenue source to cover the \$1.6 million cost which is funded by the CTCDD under the current CIP.

Stringtown Road's 800' gap.

Unlike the extension of Stringtown Road between MD 355 and I-270, the improvement of Stringtown Road between MD 355 and Snowden Farm Parkway is needed only for the subdivisions abutting it. This can be seen as a two-part improvement. One part is upgrading the pre-existing road—a narrow rural byway with severe horizontal and vertical curves and poor sight distances—which the Planning Board required as part of the CTC's regulatory approval to cover the project's fair share of overall transportation costs for the Clarksburg Master Plan area.

The second part is providing the third and fourth lanes of this segment of Stringtown Road, which is master-planned as a 4-lane arterial. The Highlands of Clarksburg subdivision, abutting this road and located close to MD 355, is responsible for four-laning the southern

segment. The Clarksburg Village subdivision, also abutting this road but located along planned Snowden Farm Parkway, is responsible for four-laning the northern segment. An agreement among the parties requires the Clarksburg Town Center and Clarksburg Village subdivisions to share the cost of four-laning the 800' section of Stringtown Road between the northern and southern segments. This is a logical resolution: since most of the traffic generated by these developments is headed for MD 355 and I-270, residents of Clarksburg Town Center and Clarksburg Village stand to benefit from the entire road being 4 lanes, while the residents of Highlands of Clarksburg could gain no special benefit from widening the section of Stringtown Road north of them.

The Council attributed 100% of the cost for the 2-lane improvement to Stringtown Road required by the Planning Board, and 50% of the cost for the construction of the 2-lane 800 foot gap to the CTCDD. The Planning Board did not identify either item as an APFO requirement. This means that the Council's approval of these items for CTCDD funding ascribed costs to CTC for transportation capacity that were beyond what would have been required to meet transportation service standards in effect at the time. As explained earlier, however, this item is part of a larger set of improvements to Stringtown Road that will benefit multiple projects, and CTCDD's cost share of the 800-foot gap is proportionate to CTC's benefit.

Lowering MD 355 at Stringtown Road.

The Council attributed the \$905,000 cost of lowering MD 355 at its intersection with Stringtown Road entirely to the Clarksburg Town Center. According to OLO's fact finding, SHA provided comments to Planning staff requesting that this item be required as a condition of approval for both CTC and Highlands at Clarksburg projects. In the end, the Planning Board expressly required this item as a condition of approval for the Highlands at Clarksburg project, but the Board did not require it as a condition of approval for CTC. Specifically, Condition #3, in a Transportation Planning Division (TPD) memorandum required:

Construction of a northbound right-turn lane along Frederick Road (MD 355) at Stringtown Road (A-260) after the 400th building permit. As a part of this construction, the applicant must participate in a roadway improvement project to reduce the over-vertical curve that currently limits sight distance on northbound Frederick Road (MD 355) approaching Stringtown Road so as to provide sight distance acceptable to the Maryland State Highway Administration (SHA).

Six days later, a January 20th TPD memorandum proposed revisions to the earlier memorandum. The revisions required the applicant to provide a northbound right turn lane that was coordinated with an SHA construction project. The revised language stated:

The applicant is required to provide a northbound right turn lane at this intersection. If at the time of this construction the SHA has taken an action to reduce the vertical curve or otherwise remedy the sight distance problem at the subject intersection, the applicant shall coordinate construction of the required northbound right turn lane at the intersection with the SHA's construction project.

The Planning Board's Opinion incorporates by reference the TPD memorandum dated January 20, 1998. At a meeting with Council and OLO staff, current TPD staff observed that, in their opinion, this item was implied as a condition of approval because it was physically infeasible to implement a northbound turn lane, required as a separate condition of approval, without making this improvement as well. The MD 355 lowering was also the subject of a private agreement that the developers of the CTC and Highlands at Clarksburg executed shortly after the Council approved the MD 355 lowering for CTCDD funding.

However, the need to lower MD 355 is caused by Stringtown Road, both west and east of MD 355. As noted earlier, only 25% of the cost of the western segment (Stringtown Road Extended) was attributed to the CTCDD, and only 50% of the segment to the east (Stringtown Road – MD 355 to Snowden Farm Parkway) is attributed to it. Therefore, Council staff thinks it is reasonable to assess CTC in the range of 25-50% of the cost of lowering MD 355 at Stringtown Road, but not 100%.

Clarksburg Civic Center/Library

As noted in OLO staff's Fact Finding for the CTCDD, CTC was obligated to dedicate a site for a civic center/library, but constructing the building was not a condition of subdivision approval. The statement on the current CIP project description form is that the entire \$13,852,000 cost of this building will be covered by CTCDD and the 2 other potential development districts, with CTC contributing \$4,640,000 (about one-third) of the total cost. The service area for the library, however, will likely be all of Clarksburg. Thus, the percentage capital cost share from the Clarksburg Town Center Development District for this building should be no more than CTC's percentage of the total housing build-out in the Clarksburg area.

B. Development District's Relationship to Other Funding Sources

Council staff recommends that the Council consider whether the current development district law allows or even encourages either: (1) duplicate funding of projects from a development district and other public sources; or (2) transfer of costs from other funding sources to a development district.

In particular, the Council should consider amending the development district law to expressly preclude the possibility of development district funding of any water or sewer infrastructure item if that item also could be funded through the WSSC's System Development Charge (SDC), including developer credits against the SDC, as it appears that the Clarksburg Town Center's 20" water main could be.²⁴³ If the Council amends the CTCDD's Second Resolution to reflect increased costs of the included items or to reduce the CTCDD's tax burden, the remaining costs of the water main could be a strong candidate for deletion from the items to be funded.

²⁴³See OLO's explanation in Appendix 4C.

The Council should also resolve the longstanding issue of credits relating to the development district tax. Briefly, the current law in §14-10(e)²⁴⁴ requires the County to credit the amount of any development district tax or other charge that a property owner pays against certain other development-related taxes that the property owner would be liable for (i.e., to reduce the other taxes by the same amount). Those other taxes are (1) “the development impact tax . . . imposed under Chapter 52, as applicable” and (2) “any other charge, fee or tax listed in the resolution adopted under Section 14-9 (including any . . . tax imposed on construction) which is imposed by the County expressly to finance the costs of infrastructure improvements necessary to allow development”. Because §14-10(e)(1) preceded the enactment of the school impact tax and because development districts to date have not provided schools as they have transportation infrastructure, in enacting the school impact tax in 2003, the Council deferred clarifying whether development district taxes must be credited against the school impact tax as well as the transportation tax.²⁴⁵

In both the school and transportation impact tax contexts, Executive branch staff have not been comfortable with allowing development district tax credits. Their reasoning, as Council staff understands it, is that at least some of the infrastructure items that a development district funds are distinct and separate from the items that the developer is otherwise responsible for, so a credit against one tax (transportation impact tax) for paying another tax (development district tax) which funds those other items is not appropriate. Pending a change in the law, as OLO explained in **Appendix 4D**, to compensate for allowable transportation tax credits, the Executive branch has recommended that development districts finance additional infrastructure items. This is a policy issue which the Council must ultimately resolve.

As OLO noted, under current law, the applicants for all 3 Clarksburg development districts, if each district is completed, would receive a total of about \$6.5 million in impact tax refunds. Because those refunds would flow to the original impact tax taxpayers (developer and homebuilders) although those taxes effectively were paid by the homebuyers, CDDAC strenuously argued that the refunds would unfairly give the refund recipients a windfall. Council staff recommends that the Council explore whether the current refund process should be modified, assuming that the law continues to allow development district credits against the transportation impact tax.

C. Eligible Infrastructure Improvements

As explained in Chapter 8, Section D, the language now codified in §14-3(g)(1)-(2) was intended to preclude a development district from financing infrastructure items such as sidewalks, secondary streets which serve the interior of a subdivision, limited access recreational facilities, a school that draws its student body only from a single development, and intersection improvements which are needed only by one property owner. However, the intended meaning of §14-3(g)(1)-(2) is not clear from the plain language of those provisions.

²⁴⁴ Unless otherwise noted, all statutory citations in this Chapter are to the County Code.

²⁴⁵ If a developer directly provides a school or prepares a school site, as when it provides a transportation infrastructure item, the developer would receive a credit against the respective impact tax.

To avoid further disputes about the meaning of eligible “infrastructure improvement” under the Development District Act, Council staff recommends that §14-3(g)(1)-(2) be repealed or amended. As a starting point for discussion, Council staff recommends that the Council consider repealing §14-3(g)(1) and (2) outright or repealing those provisions and add the following language to the Development District Act in the appropriate place:

A development district must not be used to finance an infrastructure improvement that the Planning Board requires as a condition of subdivision plan approval to meet the requirements of Section 50-24, unless the infrastructure improvement provides a substantial benefit to the surrounding area.

As discussed in Chapter 2, Section A, §50-24 is a provision in the County’s subdivision law which preceded the APFO by 12 years. It requires any new subdivision to include roads, alleys, crosswalks, storm drainage, water and sewer, sidewalks, street trees, street lights, and other “integral facilities” (including reasonable improvements to the roads that front a subdivision which are necessary to serve the needs of the subdivision for access and traffic).

Currently, the Development District Act does not affirmatively require the Planning Board, Executive, or Council to evaluate whether an infrastructure item proposed for development district financing is an eligible infrastructure improvement under the Development District Act. Council staff recommends that the Act be amended to require the Planning Board, as a part of the PAPF approval process, the Executive, as a part of the Executive Fiscal Report, and the Council, when considering a Second Resolution, to determine whether a proposed infrastructure item is an eligible infrastructure improvement under the Act.

D. Executive’s Authority

As explained in Chapter 8, Section E, the County Growth Policy expressly authorizes the Executive to recommend to the Council that additional infrastructure items not listed by the Planning Board as necessary to meet APFO requirements be funded by a development district. However, the Development District Act is silent on this issue. Council staff recommends that the Council amend §14-8 to make it consistent with the Growth Policy.

E. Public Hearing Notice Requirements

Section 14-9(b) requires the Council to hold a hearing on a Second Resolution after giving notice of the hearing by: (1) advertisement in at least 2 newspapers of general circulation in the County at least 21 days before the hearing; and (2) notifying by mail the record owner of each property located in the proposed district at the address shown on the latest tax assessment roll. Each notice mailed to a record owner of property must include: (1) a copy of the proposed resolution to establish the district; and (2) an estimated rate for any tax, assessment, fee, or charge proposed to fund infrastructure improvements for the district.

As explained in Chapter 8, Section F, the Development District Act does not define the term “latest assessment roll” or require proof that a public hearing notice was mailed to each property owner. Council staff recommends that §14-3 be amended to define the term “latest assessment roll” after consulting with the State Department of Assessments and Taxation about the availability of property ownership data. Council staff also recommends that the §14-9(b) be amended to require that the Council retain proof of mailing obtained from the United States Post Office for the public hearing notice mailed to each property owner.

F. Authority to Amend a Second Resolution

The Development District Act does not expressly authorize the Council to amend a Second Resolution. Council staff recommends that §14-9 be amended to: (1) expressly authorize the Council to amend a Second Resolution; and (2) specify appropriate public hearing and notice requirements.

G. Notice in Sales Contracts

Section 14-17 requires that a contract to sell real property “disclose to the initial buyer, and any later buyer during the life of any special assessment, special tax, or charge authorized under this Chapter, the amount of any special assessment, special tax, fee, or charge, which the buyer must pay”. Any contract that does not include the required disclosure “is voidable at the option of the buyer before the date of settlement”. Section 14-17 clearly applies to sales contracts signed after the Council authorizes a development district tax, which is done at the Second Resolution stage. However, §14-17 would not apply to sales contracts signed between the dates that the Council adopts the First and Second Resolutions. Council staff recommends that the §14-7 be amended to require the same notice in any sales contract signed after the Council adopts a First Resolution.²⁴⁶

H. Fully developed property

Under §14-10(b), any property that is “fully developed before the development district is created” is exempt from paying any development district tax or assessment. Because the term “fully developed” is not defined in the Development District Act, it is not clear from §14-10(b) whether a building that is constructed on undeveloped land located in a proposed development district between the dates that the Council adopts the First and Second Resolutions is “fully developed” property under that section. Council staff recommends that §14-10(b) be amended to clarify that the term “fully developed” does not include any residential or commercial unit that is

²⁴⁶ As explained in Chapter 1, Section C, this report does not address the issue of whether sales contracts for homes located in the CTCDD included required disclosures because that issue does not relate to the roles and authority of the Planning Board, Executive, or Council in the development district creation process. However, we note that the statutory remedy for any violation of those disclosure requirements was for the buyer to void the sales contract before settlement. Nor does this report discuss analyze any voluntary disclosures that may have been provided in sales contracts beyond those required by §14-17, as asserted in the Developers’ Memorandum, p.26.

part of a development project served by infrastructure funded by a development district, regardless of whether the building is purchased before or after the Council adopts the Second Resolution.

I. Authority to Amend a Petition to Create a Development District

The Development District Act does not expressly authorize a property owner to amend the property owner's original petition to create a development district. However, as explained in Chapter 5, Section C, the owners of property located in the proposed CSDD and CVDD submitted amendments to the original petitions to create those districts more than 2 years (original amendment) and 3 years (restated amendment), respectively, after the Planning Board approved the applicable PAPF applications for both districts. Council staff believes that those proposed amendments raise the issue of whether the PAPF approvals for the CSDD and CVDD are still valid. Council staff recommends that the Council explore that issue with Planning and Executive staff to determine: (1) the best way to proceed with the CSDD and CVDD; and (2) whether the Development District Act should be amended to expressly allow amendments to an original petition to create a development district.

J. Other Potential Amendments to County Laws

At a worksession on October 2005, the MFP Committee discussed potential amendments to the Development District Act that were proposed by attorneys representing Clarksburg developers. At that time, the Committee asked Executive staff to evaluate the proposed amendments and advise the Council whether they were needed. The Council has not received any Executive branch recommendation on those amendments. Council staff recommends that the Council ask the Executive to provide recommendations on each proposed amendment. Also, Council staff recommends that the Council ask the Executive, Planning Board, developers, the County's bond counsel, and the public to recommend any other amendments to County law that would improve the development district creation and implementation process.

K. Growth Policy

As explained in Chapter 3, Section C, the County Growth Policy contemplates that the Planning Board will conduct new tests to determine adequacy of public facilities when considering whether to approve a PAPF application for a development district. That component of the Growth Policy is not consistent with how the Planning Board evaluated the adequacy of public facilities for the CTCDD. The Planning Board did not conduct any new adequacy tests. Instead, it simply reviewed the PAPF application to determine whether the proposed district included all infrastructure items required as a condition of subdivision or site plan approval. Council staff recommends that the Council amend the Growth Policy to clarify the PAPF approval process when the Planning Board has already approved a subdivision or site plan for projects located in a proposed development district.