

Implementation of the Development District Act

An Analysis of Issues Raised by the
Clarksburg Town Center Advisory Committee



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September 11, 2007

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Executive Summary

Chapter 1. Introduction

This report analyzes 7 legal issues raised by the Clarksburg Town Center Advisory Committee (CTCAC) regarding the Clarksburg Town Center Development District (CTCDD) in a report entitled “Clarksburg Development Districts – The Illegitimate Transfer of Private Financial Obligations to the Public” (“CTCAC report”), and in other written documents submitted to the Council. As background for Council staff’s analysis of those issues, the report: (1) discusses the origins and policy goals of development districts; (2) reviews State and local laws governing creation of development districts; (3) reviews facts relating to each step in the creation of the CTCDD; (4) summarizes the status of the Clarksburg Skylark Development District (CSDD) and Clarksburg Village Development District (CVDD); and (5) reviews relevant facts regarding the County’s administrative practice with the West Germantown Development District (WGDD) and Kingsview Village Center Development District (KVCDD).

Chapter 2. Origins and Policy Goals of Development Districts

A development district is a special taxing district which is created to finance infrastructure items required to serve new development. Development district bonds are funded by special taxes and assessments levied on property located in a district. They are not an obligation of the County itself. The goals of development districts include:

1. Facilitating growth and development while assuring simultaneous availability of adequate public facilities;
2. Allocating infrastructure costs to the buyers of new commercial and residential property that benefit directly from growth;
3. Relieving developers of the demand for cash or a balance sheet liability limiting future borrowing; and
4. Reducing infrastructure costs that are passed on to property owners by financing those costs with tax exempt bonds that: (i) have lower interest rates than mortgages; and (ii) are repaid with taxes that are deductible for federal income tax purposes.

In 1994, the County enacted the Development District Act to establish procedures to create development districts in the County. Enactment of that law was fueled by a number of factors, including: (1) concern about the character of growth and development in the County and difficulty in implementing master plans; (2) the Germantown West Road Club (“Road Club”); and (3) the County’s fiscal crisis. In the early 1990s, development moratoria were in effect in Germantown and several other areas of the County because of inadequate transportation facilities. The Road Club urged the County to create a development district in West Germantown to help finance infrastructure required to meet adequate public facilities requirements because conventional financing was unavailable. The County’s fiscal crisis motivated its elected officials to find new ways of financing infrastructure needed to implement master plans.

Chapter 3. Legal Framework for Development Districts

The development district creation process established in the Development District Act includes 10 major steps:

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 a 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.

Chapter 4. Clarksburg Town Center Development District

The Council adopted a resolution creating the CTCDD on March 4, 2003. When it was created, the CTCDD was projected to finance 9 infrastructure items. The Planning Board required 4 of those items 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.

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.

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 expect 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 amendments before January 2008.

Chapter 5. Clarksburg Skylark and Clarksburg Village Development Districts

On October 2, 2001, the Council adopted a resolution declaring the Council's intent to create the CSDD and the CVDD. The Planning Board approved the PAPF application for the CSDD and CVDD on February 14, 2002. However, the creation of those districts paused at the Executive Fiscal Report stage. 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 2004, the developers of property located in both proposed development districts implemented a private infrastructure charge on property located in the proposed districts as a way to obtain reimbursement for the cost of infrastructure improvements. 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 when executing sales contracts for their homes. 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.

Chapter 6. West Germantown Development District

The WGDD was created on January 13, 1998. The County has levied special taxes and assessments on property located in the WGDD each year since 2002, and will continue to do so until the district's bonds are paid off in 2027.

Chapter 7. Kingsview Village Center Development District

The KVCDD was created on July 28, 1998. The County has levied special taxes and assessments on property located in the KVCDD each year since 2000, and will continue to do so until the district's bonds are paid off in 2021.

Chapter 8. Legal Issues Raised by the CTCAC Report

The following is a list of the 7 legal issues raised by the CTCAC report, and a brief summary of Council staff's legal conclusions.

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

No. The Clarksburg Master Plan does not control the sequence of development in Clarksburg. 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 enactment of development district enabling legislation and the use of development 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 development district creation to precede subdivision plan approval.

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

No. The Development District Act does not expressly require a development district to be created before the Planning Board approves a subdivision plan for property located in that district. The County's administrative practice confirms that the Act allows the creation of a development district to follow subdivision plan approval. The Council adopted the Second Resolution for the WGDD 4 years and 2 ½ years, respectively, after the Planning Board approved the initial subdivision plans for 2 subdivisions located in that district. The Council adopted the Second Resolution for the KVCDD 2 ½ years after the Planning Board approved the initial subdivision plan for the single subdivision located in that district.

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?*

Yes. The Regional District Act, County subdivision law, County zoning law, and Development District Act serve different purposes. They are not inconsistent with each other. Although the Planning Board can require specific infrastructure items as a condition of subdivision or site plan approval, the Board agreed that it has no legal authority to preclude the County from paying for any item through a development district. The Development District Act expressly

indicates that a development district can be used to fund any infrastructure item required to meet adequate public facilities requirements. The Act's legislative history shows that the Council clearly intended that development districts would be used to fund adequate public facilities requirements. The County's administrative practice with the WGDD and KVCDD indicates that the Planning Board, the Executive, and the Council understood that those districts would fund infrastructure items which the Planning Board required as conditions of subdivision or site plan approval.

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

No. The Development District Act defines eligible "infrastructure improvement" to include 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". However, it also specifies 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. Relying on the latter exclusion, CTCAC argued that any infrastructure item required as a condition of subdivision or site plan approval for the Clarksburg Town Center was ineligible to be funded by the CTCDD. CTCAC's interpretation is not supported by the Act's legislative history, which clearly indicates that those 2 exclusions were intended to cover 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 on the CTCDD's primary list fall into any of those categories, all of them are eligible to be funded by the CTCDD.

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?*

Yes. The Development District Act does not preclude the Executive from recommending additional infrastructure items and the County Charter gives the Executive authority to freely offer that type of recommendation. Moreover, the County Growth Policy expressly authorizes the Executive to recommend to the Council that additional infrastructure items, such as libraries, health centers, local parks, social services, greenways, and major recreational facilities, be funded by a development district.

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

No. The factual record for the Council's public hearing on the CTCDD's Second Resolution shows that the Council complied with all public hearing notice requirements. The Council mailed notice of the hearing to the owners of all privately-owned residential units in Clarksburg Town

Center as of September 30, 2002. Although there is no record that each of the 74 property owners to whom the Council mailed a public hearing notice actually received that notice, the Development District Act does not require proof of receipt. It only requires the Council to notify each property owner "by mail". CTCAC argued that the Council should have mailed the hearing notice to all property owners on the County's tax assessment rolls on November 1, 2002 (five days before the hearing notice was mailed to property owners). However, the Development District Act does not define "latest tax assessment roll" in that way.

7. *Did the procedures used by the Council to obtain property owner approval of the CTCDD comply with State law governing development districts?*

Yes. Chapter 20A of the County Code is a State law enacted in 1994 at the County's request. It authorizes 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) contains an "80% Approval Requirement" that 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.

The County Attorney believes that the 80% Approval Requirement is a nullity and did not apply to the CTCDD because the State Express Powers Act gives the County authority to issue special obligation bonds and the Development District Act properly exercises that authority. That conclusion is consistent with advice given by the Maryland Attorney General in 1994. When Attorney General Curran reviewed the bill that became Chapter 20A to evaluate its "constitutionality and legal sufficiency", he construed the bill in a manner that allowed the County to issue development district bonds, while at the same time advising the County to also rely on its home rule powers as authority to issue those bonds.

If Chapter 20A is viewed as a valid law, the property owner approval that preceded the CTCDD's First Resolution complied with that law. Chapter 20A does not specify, when, in the development district timeline, its 80% Approval Requirement applies; it simply states that the district may not be created unless the 80% Approval Requirement is met. 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 was the sole owner of property located in the proposed CTCDD when the Council adopted the First Resolution for the CTCDD.

Chapter 9. Issues for Further Discussion

Chapter 9 of this report discusses issues that arose in the course of preparing the report which do not relate directly to the legal issues raised by CTCAC. It also includes Council staff's initial recommendation for resolving each issue.