

Implementation of the Development District Act

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



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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.

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 Firestone 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.

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

APPENDIX

The Office of Legislative Oversight compiled this Appendix of fact finding to support the Council's staff's analysis of legal issues raised by the Clarksburg Town Center Advisory Committee. Sue Richards, Senior Legislative Analyst, prepared the material in this Appendix, which is listed below. A brief explanation of the fact finding scope and contents is included on the following page.

Appendix 1. Fact Finding for the Clarksburg Town Center Development District

- 1A Background Information and Chronology of Approvals
- 1B The Evolution of the List of Approved Development District Infrastructure Items
- 1C A Review of the Development District Infrastructure Items and the Developer Obligations in the Planning Board's Regulatory Approval Documents

Appendix 2. Fact Finding for the West Germantown Development District

- 2A Background Information and Chronology of Approvals
- 2B The Evolution of the List of Approved Development District Infrastructure Items
- 2C A Review of the Development District Infrastructure Items and the Developer Obligations in the Planning Board's Regulatory Approval Documents

Appendix 3. Fact Finding for the Kingsview Village Development District

- 3A Background Information and Chronology of Approvals
- 3B The Evolution of the Approved Development District Infrastructure Items
- 3C A Review of the Development District Infrastructure Items and the Developer Obligations in the Planning Board's Regulatory Approval Documents

Appendix 4. A Brief Review of Exactions and Development Taxes in Montgomery County

- 4A Understanding Exactions – In-Kind Contributions and Development Taxes
- 4B A Brief History of Exactions and Development Taxes in Montgomery County
- 4C Coordinating Development District Taxes with WSSC's System Development Charge – A Chronology of the Clarksburg Town Center Water Main
- 4D Coordinating Development District Taxes with the County's Transportation Impact Taxes – An Estimate of Potential Development District Refunds in Clarksburg

Explanation of Fact Finding Scope and Contents

On March 22, Council President Praisner appointed a team of Council and OLO staff to prepare a report on Development District implementation, in response to legal issues raised by the Clarksburg Town Center Advisory Committee.

To assist the Council staff with its legal analysis, OLO was asked to conduct the discrete fact-finding tasks that are summarized in this Appendix. The scope of the report was to include:

- Factual information about the actions to create the County's existing and proposed development districts;
- An integrated chronology of regulatory approval dates and development district approval dates for the existing development districts;
- A review of how the list of infrastructure items approved for funding in each of the existing development districts evolved;
- An analysis of whether the infrastructure items approved for funding in each of the existing districts were also developer obligations established by the Planning Board in its regulatory approval documents; and
- An analysis of the eligibility of district infrastructure items to be funded under the criteria established in the County's development district law (Chapter 14).

The task of matching the infrastructure items approved for development district financing to the infrastructure requirements established in the Planning Board's regulatory approval documents turned out to be a complex undertaking. The development district decision documents and the regulatory approval documents OLO reviewed both lacked the details necessary to determine whether the infrastructure items referenced in both sets of documents were identical or not.

Below is a summary description of the attached appendices that explains how the information OLO compiled for each of existing districts aligns with the tasks initially proposed; it also clarifies where OLO was not able to fully compile the material that was originally envisioned.

- ***Appendix A presents factual information for the Clarksburg Town Center Development District.*** For the CTC Development District, OLO was able to provide factual information about the actions to create the district, an integrated chronology of the regulatory approvals and the development district approvals, an analysis of the correspondence between the infrastructure items approved for development district financing and whether they were also requirements in the Planning Board's regulatory approvals, and information from the regulatory record about the basis for these requirements.

- ***Appendices B and C present factual information for the West Germantown and Kingsview Village Center Development Districts.*** For these Districts, OLO was able to provide factual information about the actions to create each district, integrated chronologies of the regulatory approvals and development district milestones for each district, and a review of the regulatory record to identify references to the infrastructure items financed for each district.

OLO was not able to determine precisely how the items approved for development district financing corresponded to the Planning Board's regulatory approval requirements. Because OLO was not able to determine whether the infrastructure items approved for district financing were also requirements of the Planning Board's regulatory approvals, OLO was able to provide only general answers about the legal basis for each relevant condition of approval.

- ***Appendix D introduces the concepts of exactions and development taxes and provides a brief review of their history in Montgomery County.*** The fourth appendix presents an explanation of exactions and their history in Montgomery County. OLO prepared a chronology of the Clarksburg Town Center Water Main project to examine the coordination between WSSC's system development charge and the use of Clarksburg Town Center development district taxes. OLO also compiled information about impact tax collections in Clarksburg to provide the basis for an estimate of impact tax refunds that could be available to development district applicants under current County law.

A. The Chronology of Approvals for the Clarksburg Town Center Development District

The Clarksburg Town Center Development District (CTCDD) is located in northern Montgomery County. The CTCDD lies 1 mile east of I-270 between MD 121 (Clarksburg Road) and Stringtown Road. It is bounded by Snowden Farm Parkway to the east and Clarksburg's Historic District to the west.

The CTCDD covers 247 acres. It consists of 1 development project, Clarksburg Town Center ("The CTC Project"). The CTC Project is being developed as a neo-traditional community. The currently approved project consists of 1,255 units including 530 multi-family units, 497 townhouses, and 228 single-family detached homes, plus a retail component. On April 26, 2007, the developer filed applications that would reduce the total number of units to 1,240, including 355 multi-family units, 661 townhouses and 224 single-family homes. The new applications propose 265,000 square feet of non-residential space.

On July 5, 2000 the developer of the parcel, Terrabrook LLC, submitted the initial petition for the CTCDD. At that time, Terrabrook was the sole owner of the 263-acre parcel.¹ The developer's initial petition stated the developer intended to build a project consisting of approximately 500 multi-family units, 600 townhouses, and 200 single-family detached units, plus 100,000 square feet of office space and 150,000 square feet of retail space.

1. What were the dates for each step of the development district approval process?

The establishment of the CTCDD began in July 2000; as of July 2007, it is not complete. On September 26, 2000, the Council adopted Resolution 14-648, signaling its intent to create a development district. On March 4, 2003, the Council adopted Resolution 15-87 to establish the CTCDD.

In October 2003, NNPPII-Clarksburg, LLC (referred to as Newland Communities) acquired ownership of the CTC Project. According to Finance Department staff, 1 month later (in November 2003), Newland Communities requested that the County government defer its process to issue development district bonds until after Newland receives regulatory approvals for the third phase of the CTC Project.

¹ The acreage of the CTCDD is smaller than the original acreage owned by the developer because the CTCDD excluded property that was dedicated for the school site and the park, as well as property conveyed to Terrabrook to accommodate the storm water management sand filter facility.

Exhibit A-1 presents dates for each step of the approval process for the CTCDD.

Exhibit A-1. CTCDD Chronology

Step	Description	Date
Step 1	Developer files initial petition to create a development district.	July 5, 2000
Step 2	Council holds public hearing on developer's initial petition.	August 1, 2000
Step 3	Council adopts 1 st resolution expressing intent to create a development district.	Sept. 26, 2000
Step 4	Developer submits application for provisional adequate public facilities (PAPF) approval to the Planning Board.	Nov. 14, 2000
Step 5	Planning Board acts on developer's application for PAPF approval.	March 22, 2001
Step 6	Executive submits Fiscal Report to Council.	Oct. 17, 2002
Step 7	Council holds public hearing.	Dec. 10, 2002
Step 8	Council adopts 2 nd resolution to create a development district.	March 4, 2003
Step 9	Council adopts 3 rd resolution to specify bond conditions.	To be determined
Step 10	Council adopts resolution to establish initial tax rate.	To be determined

Source: Council Resolutions.

2. What were the dates of the regulatory approvals for the CTC Project that makes up the development district?

As noted above, the CTCDD consists of 1 development project, Clarksburg Town Center. The regulatory approvals for the CTC Project span 13 years. They began in 1994 and are ongoing today.

- In late 1994, the developer filed a preliminary plan subdivision application and project plan application. The Planning Department deemed these applications to be complete on November 23, 1994 and December 6, 1994, respectively.

- On June 12, 1995, the Planning Board mailed its Opinion approving Project Plan 9-94004 for the Clarksburg Town Center, subject to 14 conditions.
- On March 26, 1996, the Planning Board mailed its Opinion, approving Preliminary Plan 1-95042 for the Clarksburg Town Center, subject to 17 conditions.

Between July 1997 and June 2004, the developer submitted 3 site plan applications for the CTC Project:

- On July 16, 1997, the Planning Department deemed the developer's application for Site Plan Phase I to be complete. The Planning Board mailed its Opinion approving Site Plan Phase I 8-98001, subject to 44 conditions, on March 3, 1998.
- On October 12, 2001, the Planning Department deemed the developer's application for Site Plan Phase II to be complete. The Planning Board mailed its Opinion approving Site Plan Phase II 8-02014, subject to 7 conditions, on June 17, 2002.
- On June 3, 2004, the Planning Department deemed the developer's application for Site Plan Phase I-Retail to be complete. The developer later withdrew this application.

In addition to these regulatory approvals, Planning staff administratively approved several amendments to Site Plan Phase I and Site Plan Phase II.

On April 26, 2007, the developer filed applications to amend the approved project plan (91994004B), preliminary plan (11995042B), and site plans (8-98001, 8-02014, 8-02014B, and 8-98001G).

3. Did the Planning Board issue its approvals for the project plan, preliminary subdivision plan, and site plans for the CTC Project before or after the Council adopted its resolutions to create the CTCDD?

Exhibit A-2 presents the chronology of regulatory approvals for the CTC Project, interspersed with the chronology of Council actions to initiate and establish the CTCDD. A review of these timelines shows the following:

- The Planning Board approved the project plan for the CTC Project in June 1995, about 5 years before the Council adopted its 1st resolution signaling the Council's intent to create a development district (in September 2000) and almost 8 years before the Council adopted its 2nd resolution to create the CTCDD (in March 2003).
- The Planning Board approved the preliminary plan for the CTC Project, in March 1996, about 4½ years before the Council adopted its 1st resolution signaling its intent to create a development district (in September 2000); and 7 years before the Council adopted its 2nd resolution to create the CTCDD (in March 2003).

Appendix 1A. Fact Finding for the Clarksburg Town Center Development District

- The Planning Board's site plan approvals for the CTC Project occurred before and after Council actions to establish the CTCDD.
 - The Planning Board's Site Plan approval for Phase I in March 1998 preceded adoption of the Council's 1st resolution for the CTCDD (September 2000) by 2 years and 5 months.
 - The Planning Board's Site Plan approval for Phase II in June 2002 fell between the Council's adoption of the 1st resolution (September 2000) and the 2nd resolution (March 2003).
 - The Planning Board's Site Plan approval for Phase III has not yet occurred.
- After the Planning Board granted initial project plan, preliminary plan, and site plan approvals for the CTC Project, the property owner filed several site plan amendments; many of these preceded the creation of the CTCDD.

Exhibit A-2. Chronology of CTC Regulatory and Development District Approvals

Type Of Action	Document	Action/Event	Date
Regulatory Review	Preliminary Plan 1-95042	Developer's filed Preliminary Plan Application is deemed complete.	Nov. 23, 1994
	Project Plan 9-94004	Developer's filed Project Plan Application is deemed complete.	Dec. 6, 1994
		Planning Board mails Opinion approving the Project Plan for the Clarksburg Town Center, subject to 14 conditions.	June 12, 1995
	Preliminary Plan 1-95042	Planning Board mails Opinion approving the Preliminary Plan for the Clarksburg Town Center, subject to 17 conditions.	Mar. 26, 1996
	Site Plan Phase I 8-98001	Developer's filed Site Plan Phase I Application is deemed complete.	July 16, 1997
Planning Board mails Opinion approving Site Plan Phase I, subject to 44 conditions.		Mar. 3, 1998	
Development District	1 st Resolution	Developer files initial petition to establish development district with the County Council.	July 5, 2000
		County Council holds public hearing on developer's initial petition to establish a development district.	Aug. 1, 2000
Regulatory Review	Preliminary Plan Revision 1-95042R	Developer's filed application to revise Preliminary Plan is deemed complete.	Aug. 17, 2000
Development District	1 st Resolution	County Council adopts Resolution 14-648.	Sept. 26, 2000
	Provisional APF Review	Developer files application for PAPF approval with Planning Board.	Nov. 14, 2000
		Planning Board submits letter informing County Executive of Planning Board's unanimous approval of developer's PAPF application.	Mar. 22, 2001
Regulatory Review	Preliminary Plan Revision 1-95042R	Planning Board mails Opinion that revises Preliminary Plan.	Aug. 14, 2001
	Site Plan Phase II 8-02014	Developer's filed Site Plan Phase II application is deemed complete.	Oct. 12, 2001
		Planning Board mails Opinion approving Site Plan Phase II, subject to 7 conditions.	June 17, 2002
Development District	Executive's Fiscal Report	County Executive transmits Fiscal Report and Recommendation to Establish Development District to the County Council.	Oct. 17, 2002
	2 nd Resolution	Council holds public hearing on Resolution #2.	Dec. 10, 2002
		Council adopts Resolution 15-87.	Mar. 4, 2003
Regulatory Review	Site Plan Phase I - Retail 8-04034	Developer's filed application for Site Plan Phase I-Retail is deemed complete.	June 3, 2004
	Compliance Plan	Planning Board approves conceptual compliance plan to redesign the Clarksburg Town Center.	June 15, 2006
	Project, Preliminary and Site Plan Amendments	Developer files applications to amend the current project plan (91994004b), preliminary plan (11995042B), and site plans (8-98001, 8-02014, 8-02014B and 8-98001G).	April 26, 2007

Source: Council Resolutions and M-NCPPC Development Approval Information Center.

B. Evolution of Infrastructure Items Approved for CTCDD Funding

The process to create a development district incorporates multiple reviews of lists of infrastructure items to be financed by the development district. These reviews occur:

- When the developer submits the initial petition to the Council;
- When the developer submits the Provisional Adequate Public Facilities (PAPF) application to the Planning Board;
- When the Executive's Fiscal Report is prepared; and finally,
- When the Council adopts the 2nd resolution.

This section examines how the lists of infrastructure items to be funded by the CTCDD evolved. The source documents for this review include the developer's initial petition, the developer's PAPF application, the Planning Board's PAPF approval letter to the County Executive, the Executive's Fiscal Report, and the Council's 2nd resolution.

Exhibit B-3 (at page 1B-11) summarizes the developer's initial infrastructure funding requests, the recommendations made by the Planning Board and the Executive, and the items the Council approved for funding. The discussion below describes the proposed infrastructure improvements and the rationale for each recommendation.

1. What infrastructure items did the developer propose for CTCDD financing in the initial petition for a CTCDD?

The initial petition filed by the developer proposed 17 items for district financing, including:

- Twelve transportation improvements, including Stringtown Road, Clarksburg Road, Piedmont Road, and various internal streets;
- One water and sewer improvement (a 20" water main extension); and
- Four other improvements, including a civic center and a local park.

The petition stated that each proposed improvement "serves members of the general public, and not merely the residents or occupants of a single development or subdivision",² and:

The public infrastructure proposed to be constructed through the bonds to be issued by the County represent major pieces of infrastructure that will benefit the entire Clarksburg area and includes road construction and major intersection improvements to existing State and County roads, street lighting and sidewalks,

² Petition of Terrabrook Clarksburg LLC [Appended to proposed County Council Resolution: Clarksburg Town Center Development District. Introduced July 11, 2000], p.3.

Appendix 1B. Fact Finding for the Clarksburg Town Center Development District

the trunk line water main serving the project, storm water management facilities, and the civic center building located in the town center. Such improvements fall within the definition of "Infrastructure Improvement" within the purview of Section 14-3 of the Montgomery County Code, and represent investments in the Clarksburg region that will benefit the public interest.³

Exhibit B-1, on pages 1B-2 to 1B-4, lists the 17 improvements and displays project descriptions from Exhibit C of the Petition for the Development District filed by Terrabrook Clarksburg LLC in June 2000.

**Exhibit B-1. Items Proposed For CTCDD
Financing-Developer's Initial Petition**

Item	Transportation Improvements
Street Construction (Item 4)	"These public streets serve to connect the outlying areas with Clarksburg Town Center, the Town Square Civic Center, Clarksburg Elementary School and the Greenway Park, providing access to the greater Clarksburg community".
Main Street (Item 4a)	"A 70' R/W, 36' paving section extends from Rte 355 east through Clarksburg Town Center to Piedmont Rd A305 relocated".
F Street (Item 4b)	"A 60' R/W, 36' paving section extends west from Piedmont Rd. A305 relocated to Main Street providing access to the proposed Clarksburg Elementary School and the Greenway Park".
H Street (Item 4c)	"A 60' R/W, 36' paving section extends westerly from Piedmont Road A305 relocated to Stringtown Rd".
K Street (Item 4d)	"(Greenway Road) a 70' R/W, 36' paving section extends south from Clarksburg Road. crossing Main Street to Stringtown Rd".
Stringtown Road Improvements (Item 6)	"Construction of improvements easterly from Rte 355 to Piedmont Road, including the bike path, median, and curb and gutter. This improvement will be constructed in two segments, the first within one half (52.5 ft.) of the 105 foot right of way between MD 355 and the Greenway Rd (K Street) and the second within one half (60 ft) of the 120 foot right of way between Greenway Rd (K Street) to the Piedmont Road (A305)".
Piedmont Road (Item 7)	"This roadway extending south from Clarksburg Rd to Stringtown Rd will be constructed as a 32 ft. two lane open section road within an eighty (80) foot wide right of way. An eight (8) foot wide bike path will extend along the westerly side to the full extent of the improved road. At the Stringtown Road. intersection, turn lanes and a median will be constructed to match the improvements proposed there".

³*Id.*

**Exhibit B-1. Items Proposed For CTCDD
Financing - Developer's Initial Petition (continued)**

Item	Transportation Improvements (continued)
Lowering Route 355 at Stringtown Road. (Item 8)	"Rte 355 at the intersection of Stringtown Road needs to be lowered to accommodate the proper site (sic) distance".
Route 355 Intersection Imps. (Item 9)	"Reconstruction of the southbound right turn lane along Rte 355 at Rte 121 to provide free flowing movement. Construct the eastbound left turn lane along Rte 121 at Rte 355 and a westbound left turn lane along Rte 121 at Rte 355. Construct a northbound right turn lane along Rte 355 at Stringtown Road".
Clarksburg Road Route 121 Road Imps (Item 10)	"Clarksburg Road from Rte 355 to Piedmont Rd will be improved as follows: From Rte 355 east to Greenway Rd (K Street) construct one-half of the 38 ft section with curb and gutter and a six ft bike path. At the Greenway Road (K Street) interchange, construct a westbound 300 foot left turn lane and taper. From Greenway Rd (K Street) to Piedmont Rd A 305 construct one-half of a 32 foot section with six foot bike path. Provide a left turn lane at Piedmont Rd intersection, requiring a 200' transition beyond Piedmont to existing".
Red Grave Road/Route 355 into CTC (Item 11)	"Construct a 26 ft paving section with curb and gutter in a 50 ft right of way east from Rte 355 to O Street (this is the westerly extension of Main Street)".
Comus Road re-striping (Item 12)	"Re-stripe eastbound Comus Road to provide an exclusive left turn lane at Route 355".
Acquisition of right of ways (Item 13)	"Includes all costs associated with the acquisition of right of ways for all off site road improvements".
Item	Other Improvements
Civic Center (Item 1)	"The Civic Center . . . is proposed to be an approximately 20,000 sq. ft. structure to be used by the Clarksburg community at large for public activities. This building will provide opportunities for holding public meetings, will include a public library, and will include office space for public/governmental agencies. The Town Square itself will provide open space with seating areas, plantings and walkways which will provide a setting for pedestrian activity as well as a focal point for the Clarksburg Town Center".
School/Ball Field site grading (Item 3)	"A portion of the proposed school site is located at the northeasterly corner of the tract, approximately 8 acres bounded by Clarksburg Road on the north and Piedmont Road on the east. The westerly portion of that site is presently owned by MNCPPC and contains facilities currently in use by the Kings Pond Community Park, which must be dedicated prior to implementation of the proposed improvements. The grading will be conducted on both portions of the site and will be graded to accommodate ball fields and a pad site for the new Clarksburg Elementary School".

**Exhibit B-1. Items Proposed For CTCDD
Financing - Developer's Initial Petition (continued)**

Item	Other Improvements (continued)
Trails/Hiker Biker Path (Item 5)	"All the trails and bike paths in the Green Way Park, central to CTC, are included in this item. These trails and bike paths will be part of a trail/bike path system that ultimately connects the County Greenway Park system from Little Bennett Park to Gaithersburg".
Public Local Parks (Item 14)	"Construction of local park, covering 15 to 25 acres, across Piedmont Road from the residential development, with ball fields, tennis courts, a pond and hiker/biker trails, and a small square park in the center of the residential portion of the development which will serve as a focal point for main Street".
Item	Water and Sewer Improvements
20" Water Main Ext (Item 2).	"The proposed 20" water main will provide service to all the adjoining properties as well as Clarksburg Town Center. It will extend from the intersection of Clarksburg Road and Rte 355, east along Clarksburg Rd to The Greenway Rd (K Street), south to Main Street, then east along Main Street to Piedmont Rd, A-305 relocated. It will follow Piedmont Rd south to the existing connection".

Source: Petition for Development District filed by Terrabrook Clarksburg, LLC, Exhibit C, Taxing District Primary Infrastructure.

2. Did the infrastructure items in the developer's PAPF application differ from the infrastructure items in the developer's initial petition?

The developer for the CTC Project did not make any changes to the infrastructure items proposed for development district financing between the initial petition and submission of the PAPF to the Planning Board. Exhibit G, which is attached to the PAPF application, is identical to Exhibit C, which is attached to the initial petition.

3. What infrastructure items did the Planning Board recommend for funding by the CTCDD?

The Planning Board modified the package of infrastructure improvements proposed for financing so that the infrastructure items to be financed by the CTCDD would have a regional benefit. (See the excerpt from the Planning Board's transmittal letter on page 1B-6 for an explanation of the Board's rationale.) To accomplish this, the Board recommended deleting infrastructure items that primarily served the CTC Project and recommended modifying the scope of other items. Specifically:

The Board recommended removing 5 items (3 transportation items and 2 "other" items) because these items did not provide a regional benefit. The items the Board recommended removing were:

- F Street (Item 4b);
- H Street (Item 4c);

Appendix 1B. Fact Finding for the Clarksburg Town Center Development District

- Comus Road re-striping (Item 12);
- School/Ball field site grading (Item 3); and
- Public local park development across Piedmont Road (Item 14).

The Board recommended reducing the project scope of 3 items to include only that portion of the improvement that would provide a regional benefit.⁴ The scope reductions suggested by the Board were for:

- The 20" Water Main Ext. (Item 2);
- Main Street (Item 4a); and
- Trails/Hiker Biker Path (Item 5).

The Board recommended leaving 9 items that the developer had initially proposed intact. In the Board's view, these items (plus the 3 modified items above) merited CTCDD funding because they would provide a regional benefit. These items included:

- The Civic Center (Item 1);
- K Street (Item 4d);
- Stringtown Road Improvements (Item 6);
- Piedmont Road (Item 7);
- Lowering MD 355 at Stringtown Road (Item 8);
- Route 355 Intersection Improvements (Item 9);
- Clarksburg Road Route 121 Road Improvements (Item 10);
- Red Grave Place [MD 355 to CTC boundary (Item 11)]; and
- Acquisition of rights-of-way (Item 13).

The Planning Board Chair explained the Board's role and its rationale in a March 22, 2001 letter to the Executive. It stated, in part:

⁴ The Board reduced the project scope of the 20" Water Main (Item 2) to include only the off-site portion. It reduced the project scope of Main Street (Item 4a) to reflect the Board's estimate of its regional service. It reduced the project scope of Trails/HikerBiker Path (Item 5) to include only the regional greenway trail through the public greenway park.

The Planning Board's role in reviewing the proposed Development District is limited to finding that the proposal meets the Adequate Public Facilities requirements of the development. Terrabrook's proposal meets this requirement and exceeds it by proposing additional non-APF regional benefits such as the Civic Building and the Greenway Trail System. The Planning Board did not support items on the applicant's original proposal which did not have a regional benefit in accordance with Sec. 14-3(g) which defines what type of improvement can be funded through a development district. The district legislation, I believe, is not intended as a funding source for infrastructure that serves only individual projects. The applicant was in agreement with the modified list of infrastructure improvements.⁵

Memoranda from the Community-Based Planning Division and Transportation Planning staff attached to the Planning Board's letter concluded that the proposed infrastructure "conformed to the required APF improvements" as well as the zoning and subdivision requirements. In a staff memorandum to the Planning Board, Community-Based Planning staff raised a concern that a comprehensive district with future developer involvement (which had originally been envisioned by Planning staff) could not be established under the County's bonding guidelines and the requirements of financial lenders. Staff reported, according to the Department of Finance, it would be possible to have a series of development districts based on separate applications and proposed infrastructure improvements that would add up to a more comprehensive coverage of the Clarksburg community. Community-Based Planning staff also stated:

The 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. This traditional approach coordinates private sector improvements during preliminary plan review and identifies needed Capital Improvement Projects can help to ensure that needed infrastructure and timely construction is achieved. Clarksburg is currently in jobs and housing moratorium for APF transportation capacity and is establishing capacity primarily through privately funded transportation improvements.⁶

The memorandum from Transportation Planning staff stated:

Staff's review . . . indicates that the list of roadway improvements includes items that are not required for the APFO approval. The street construction of Main, F, H, & K (Greenway Road) Streets, mainly internal streets providing access to the fronting properties, are not identified as APF-required improvements.⁷

Transportation Planning staff also highlighted that there were other major developments under active subdivision and suggested expanding the proposed Clarksburg Development

⁵Letter from William H. Hussmann to Douglas Duncan, March 22, 2001, p.2.

⁶Memorandum to Planning Board from Karen Kumm Morris, Clarksburg Planner, Community-Based Planning Division, March 2, 2001, p.5.

⁷Memorandum to Karen Kumm Morris, Clarksburg Planning, Community-Based Planning Division from Ki H. Kim, Planner, Transportation Planning, February 26, 2001, p.2.

District to include these developments so that the Development District would provide more comprehensive transportation infrastructure in the Clarksburg area.

4. What infrastructure items did the Executive recommend that the development district fund?

The Executive recommended adjusting the list of items recommended for district financing to reduce the tax burden on future homeowners and increase the level of “general benefit improvements”.

Specifically, the Executive recommended:

- Expanding the project scope for that part of Stringtown Road to be funded by the CTCDD to include:
 - One lane of a 2-lane segment of Stringtown Road to connect segments that were conditions of approval for other developments; and
 - A 25% share of Stringtown Road Extended from MD 355 to I-270.
- Affirming the inclusion of the Civic Center, but establishing a not-to-exceed District contribution of \$4.6 million and recommending that its timing be determined through the capital budget.
- Re-instating the full scope of 2 items the Planning Board had modified:
 - The portion of the 20” water main that traversed the CTC site (Item 2) as a primary funding priority; and
 - The Trails/Hiker Biker Path (Item 5) as a lower priority.
- Agreeing with the Planning Board’s recommendation to:
 - Remove 5 items, which were F Street (Item 4b), H Street (Item 4c), Comus Road Re-striping (Item 12), the School Ball Field Site Grading (Item 3), and the Public Local Parks (Item 14); and
 - Modify the scope of 1 item, which was Main Street (Item 4a), which the Executive recommended as a lower priority.
- Removing the Red Grave Place improvements between MD 355 and the CTC Project boundary (Item 11).

The rationale for the Executive’s recommendation explained in the Fiscal Report, transmitted to the Council, mirrored the approach the Executive used for the West Germantown Development District. The Report’s discussion of “General Benefit Improvements” stated, in part,

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, this 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 adopted 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 support build-out of the Clarksburg area east of I-270 will cost \$500 million (unescalated), only \$74 million of which is now under consideration for financing through development districts currently under review.

The Executive recommends that improvements funded through a Town Center District should include contributions to some additional projects that will benefit not only residents of Town Center, but also residents outside the district.⁸

5. What infrastructure items did the Council decide to fund through the development district?

The Council approved 9 infrastructure items for CTCDD financing. **Exhibit B-2** (on the next page) lists these items, with the estimated cost, development district’s funding share, and estimated completion dates of each. They include:

- Four of the 12 transportation items proposed in the initial petition, including construction of 2 lanes of Stringtown Road and 2 lanes of Piedmont Road, improvements to Clarksburg Road, and the lowering of MD 355 at Stringtown Road;
- Two new transportation items recommended by the County Executive: financing of a 50% share of the Stringtown Road 800’ gap and a 25% share of Stringtown Road Extended from MD 355 to I-270;
- Two of the 4 “other” items proposed in the initial petition: financing for a portion of the Civic Center and financing for a “greenway trails” item; and
- WSSC’s 20” water main extension proposed in the initial petition.

⁸ Clarksburg Town Center Development District: County Executive’s Fiscal Report, October 17, 2002. Item D. General Benefit Improvements, no page number.

Appendix 1B. Fact Finding for the Clarksburg Town Center Development District

The Council also approved a list of 2 items that could be funded by the development district if cost savings were achieved. These items were listed in priority order, and their estimated cost totaled \$3 million. The listed improvements in priority order are:

- Clarksburg Square/Overlook Park Roads, at an estimated cost of \$2.9 million; and
- MD 355/MD 121 Intersection improvements, at an estimated cost of \$100,000.

**Exhibit B-2. Infrastructure Items Approved for CTC Development
District Funding—Council Resolution 15-87**

	Infrastructure Improvement	Estimated Cost (000s)	Cost Share funded by District	Est. Completion Date
1	Civic Center	\$4,640 (not to exceed)	To be determined	To be determined
2	Stringtown Road 800' Gap	\$550	50%	June 2005
3	Stringtown Road Extended (MD 355-I-270)	\$1,600 (Not to exceed)	25%	June 2007
4	Stringtown Road (MD 355-Piedmont Road)	\$4,435	100%	June 2004
5	Piedmont Road	\$2,270	100%	Nov. 2003
6	Lowering MD 355 at Stringtown Rd.	\$905	100%	June 2004
7	Clarksburg Road (MD 355 to Piedmont Road)	\$1,340	100%	Nov. 2004
8	WSSC 20" Water Main.	\$779	100%	Dec. 2004
9	Greenway Trails	\$460	100%	Dec. 2005
	Total Cost	\$16,979		

Source: Council Resolution 15-87 Exhibit C, Clarksburg Town Center Development District Funded Improvements.

6. How does the list of infrastructure items approved by the Council compare to the list recommended by the County Executive?

The list of infrastructure items the Council approved for CTCDD funding is similar but not identical to the list the Executive recommended. Specifically:

Appendix 1B. Fact Finding for the Clarksburg Town Center Development District

- The Council agreed with the Executive's recommendation to expand the number of Stringtown Road improvements and to re-instate the 20" water main and the Trails/Hiker Biker Path;
- The Council agreed with the Executive's recommendation to fund Main Street, K Street and the MD 355 Intersection improvements as a lower priority; however, the Council moved the Trails/Hiker Biker Path item to the primary list.

Exhibit B-3 (on the next page) displays the item by item changes through the various phases of the development district approval process.

Appendix 1B. Fact Finding for the Clarksburg Town Center Development District

Exhibit B-3. Infrastructure Items to be Funded by the CTCDD - Initial Petition to Final Approval

Item # in Initial Petition	Improvement	Developer's Initial Petition (Exhibit C)	Developer's PAPF Application Exhibit G	Planning Board's Recommendation (Letter)	County Executive's Recommendation (Table D)	Is Item included in Res. 15-87? (Exh. C)
TRANSPORTATION IMPROVEMENTS						
4a	Main Street	Yes	Yes	Yes - Modified	Yes-Modified Lower priority	Yes – Modified Lower priority
4b	F Street	Yes	Yes	No	No	No
4c	H Street	Yes	Yes	No	No	No
4d	K Street	Yes	Yes	Yes	Yes-Lower priority	Yes Lower priority
6	Stringtown Road: MD 355 to Piedmont Road	Yes	Yes	Yes	Yes	Yes
	Stringtown Road: MD 355 to I-270	No	No	No	Yes	Yes
	Stringtown Road: 800' Gap	No	No	No	Yes	Yes
7	Piedmont Road	Yes	Yes	Yes	Yes	Yes
8	Lowering Route MD 355 at Stringtown Rd.	Yes	Yes	Yes	Yes	Yes
9	Route 355 Intersection Imps.	Yes	Yes	Yes	Yes-Lower priority	Yes – Lower priority
10	Clarksburg Road Route 121 Road Improvements	Yes	Yes	Yes	Yes	Yes
11	Red Grave Road/MD 355 to CTC	Yes	Yes	Yes	No	No
12	Comus Road Re-striping	Yes	Yes	No	No	No
13	Acquisition of rights-of-way	Yes	Yes	Yes	Included elsewhere	Included elsewhere
Other Improvements						
1	Civic Center	Yes	Yes	Yes	Yes	Yes
3	School Ball Field Site Grading	Yes	Yes	No	No	No
5	Trails/Hiker Biker Path	Yes	Yes	Yes-Modified	Yes-Initial scope Lower priority	Yes Initial scope
14	Public Local Parks	Yes	Yes	No	No	No
Water and Sewer Improvements						
2	20" Water Main Ext. (Item 2)	Yes	Yes	Yes-Modified	Yes-Initial scope	Yes Initial scope

Source: CTCDD Approval Documents.

C. OLO's Review of the Regulatory Documents for the Clarksburg Town Center Project and the CTCDD Infrastructure Items

At the request of Council staff, OLO conducted a review of the regulatory documents for the Clarksburg Town Center (CTC) Project to determine whether construction of each infrastructure item approved for CTCDD funding was also required to be provided by the developer of the CTC Project as a condition of regulatory approval.

This appendix presents a summary of the regulatory requirements for each infrastructure item. The information is based on OLO's review of portions of the regulatory record, other CTCDD decision documents, information from Project Description Forms (PDFs) in the Capital Improvement Program, and discussions with current and former Executive, Planning, and WSSC staff.⁹

Following an initial review of the Planning Board's CTC Project documents, OLO and Council staff met with Planning staff to solicit input about ambiguities in the language of the Board's Opinions and the regulatory record. The discussion of some of the items below reports the opinions, interpretations, and recollections of current Planning staff where OLO found the regulatory record was unclear or incomplete. The presentation of OLO's results follows the list of infrastructure items shown below.

Item #	District Infrastructure Item
1	Civic Center
2	Stringtown Road 800' Gap
3	Stringtown Road Extended (MD 355 to I-270)
4	Stringtown Road (MD 355 to Piedmont Road)
5	Piedmont Road
6	Lowering MD 355 at Stringtown Road
7	Clarksburg Road Route 121 Improvements
8	20" Water Main Extension
9	Greenway Trails

The presentation of each item begins with a description of the project scope approved for development district financing, followed by answers to 3 questions:

⁹ Council and OLO staff held two meetings with Planning staff, one with the former Subdivision Coordinator and a second meeting with the current Chief of the Transportation Planning Division, the former Transportation Coordinator for the Transportation Planning Division, the current Transportation Planner for the Transportation Planning Division, the current I-270 Team Leader for the Community Planning Division and the current Associate General Counsel. Council and OLO staff also held one meeting with current Finance staff and follow-up discussions with DPS staff and the former OMB Coordinator for the Clarksburg Development Districts.

Appendix 1C. Fact Finding for the Clarksburg Town Center Development District

1. What developer obligations related to this CTCDD item did the Planning Board establish as a result of its regulatory approvals?
2. How do these developer obligations relate to the implementation of this development district infrastructure item?
3. According to the regulatory record, did the Planning Board establish these obligations to comply with site plan or APF requirements?

Items Approved for CTCDD Funding That Were CTC Developer Obligations. Exhibit C-1 presents OLO's conclusions about whether the 9 items approved for CTCDD funding were also required to be constructed by the developer as a condition of plan approval.

Exhibit C-1. OLO's Analysis of CTCDD Infrastructure Items and Conditions of Approval in the CTC Project Regulatory Record

#	CTCDD Infrastructure Items	Was construction of this item identified as a condition of approval at:		
		Project Plan	Prelim Plan	Site Plan Phase I
1	Civic Center	No	No	No
2	2a. Stringtown Road 800' Gap	No	No	No
	2b. Stringtown Road Extended (MD 355-I-270)	No	No	No
	2c. Stringtown Road (MD 355-Piedmont Rd)	No	Yes	Yes
3	Piedmont Road	No	Yes	Yes
4	Lowering Rte 355 at Stringtown Rd.	No	No	No
5a	Clarksburg Road Route 121 Road Imps – MD355 to Town Center Boundary	No	No	No
5b	Clarksburg Road Route 121 Road Imps – Town Center Boundary to Piedmont Road	No	No	Yes
6	Greenway Trails	Yes	Yes	Yes
7	20" Water Main Extension	No	No	No

Source: Council Resolution 15-87, County Executive's Fiscal Report Appendix B, and Planning Board CTC Project regulatory approval documents.

Information from the CTC Project Regulatory Records About the Regulatory Basis for Imposing the Conditions. For the 4 items that were identified as conditions of approval for the CTC Project, Council staff asked OLO to report what the regulatory record said about whether the Planning Board established these conditions to comply with site plan or APF requirements. The bullets below and **Exhibit C-2** (on the next page) summarize the results of OLO's review.

- None of the 3 transportation items listed in **Exhibit C-2** were items that Transportation Planning staff recommended as a condition of approval to comply with the requirements of the Adequate Public Facilities Ordinance (APFO). Transportation Planning staff conducted a (LATR) analysis at Project Plan that resulted in a limited number of required intersection improvements.¹⁰ And, some of these improvements were recommended for lower priority funding.¹¹ However, the developer was not required to provide improvements to create staging ceiling capacity because a Clarksburg Policy Area did not exist at that time.
- The CTC Project regulatory record identifies the Greenway Trails as part of the amenity package the developer provided to justify Planning Board approval of the optional method zoning for the CTC Project.

In addition to the 4 items required as conditions of approval for the CTC Project, a 5th item, the MD 355 Lowering, was required as a condition of approval for a different subdivision, the Highlands at Clarksburg project. The letter from the State Highway Administration for this project states that the lowering of the over-vertical curve on MD 355 was required for safety reasons.

¹⁰ Current Transportation Planning staff report that the APF test for the CTC Project was conducted at the time of Project Plan. Since the Planning Board's Preliminary Plan review followed right after the Project Plan review, Transportation Planning staff used the results of the APF review which had been conducted for Project Plan, and no other APF test was done for the Planning Board's Preliminary Plan review. Transportation Planning staff did prepare another Transportation Planning Division memorandum for the Preliminary Plan which was dated August 3, 1995.

¹¹ According to a Transportation Planning staff memorandum dated August 3, 1995, the improvements identified at Project Plan to satisfy the APFO review requirements were: 1. Reconstruction of the southbound right turn-lane along MD 355 at MD 121 to provide a "free flowing" movement. 2. Construction of eastbound and westbound left-turn lanes along MD 121 at MD 355. 3. Construction of a northbound right-turn lane along MD 355 at Stringtown Road. 4. Restriping eastbound Comus Road to provide an exclusive left-turn lane at MD 355. 5. Providing safety improvements along A-260 (Stringtown Road) per conditions of Project Plan Approval. 6. Participation in the Gateway I-270 Office Park Road improvement – widening MD 121 to 4 lanes between I-270 northbound off ramp and the entrance to the Gateway I-270 Office Park – per conditions of Project Plan Approval. The developer proposed Items 1, 2, 3 and 4 for CTCDD funding in the initial petition submitted to the Council and later reviewed by the Planning Board as part of its PAPF review. The Planning Board recommended approval of Items 1, 2 and 3, which the developer packaged as MD 355 Intersection Improvements, as part of its PAPF review. The Executive recommended approval of this item as a lower priority and the Council approved this item as the second item on the secondary list of items to be funded if savings were realized from the primary list. The Planning Board recommended the removal of Item 4 as part of its PAPF review. Since it was not re-instated by the Executive or the Council, it was not recommended for CTCDD funding.

Exhibit C-2. OLO's Analysis of CTCDD Infrastructure Items and Conditions of Approval in the CTC Project Regulatory Record

#	CTCDD 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	
2c	Stringtown Road (MD 355-Piedmont Rd.)	No	Yes	Yes	Master Plan
3	Piedmont Road	No	Yes	Yes	Subdivision Access
5b	Clarksburg Road Route 121 Road Imps. (CTC boundary to Piedmont Road)	No	No	Yes	Other transportation issues associated with the site plan
6	Greenway Trails	Yes	Yes	Yes	Site Plan Requirement Optional Method Zoning Amenity Package

Source: Council Resolution 15-87, County Executive's Fiscal Report Appendix B, and Planning Board CTC Project regulatory approval documents.

CTCDD Item 1 - Civic Center

Project Scope Background. Appendix B of the County Executive's Fiscal Report provides the following description of this item:

The developer's district petition and site plan include a "civic center" of approximately 20,000 square feet to accommodate public meeting rooms, a branch library, and office space for County and other public agencies. As a Planning Board condition under the "optional method" provisions of the RMX-2 zone, the developer is required to dedicate a site for such a center. The developer recommends District funding of \$4,640,000 for a 20,000 sq. ft. building. If the District does not fund this project, the developer does not commit to construct it, but the developer will dedicate the land pursuant to project plan approval conditions.¹²

More information about this project is available from PDF No. 710500, the Clarksburg Library. The project cost is \$13.852 million and the source of funds is "Development District". The fiscal note on the PDF states:

¹² Appendix B. Clarksburg Town Center Development District Fiscal Report, Infrastructure Projects Considered for District Funding, Civic Center/Library, p.1.

Appendix 1C. Fact Finding for the Clarksburg Town Center Development District

As approved by Council Resolution #15-87 creating the Clarksburg Town Center Development District, the District will provide up to \$4,600,000 toward the construction cost of a permanent library in Clarksburg. Dedication of 30,000 square feet of land for a library site is an M-NCPPC subdivision requirement of the Town Center developer. Two additional development districts are proposed adjacent to the Town Center District. The County Executive recommends that if created, these two new districts fund the remaining cost of the library.

The Strategic Facilities Plan 2004-2009 prepared by the Department of Public Libraries provides program and service assumptions about the County's library facilities. It states that the primary service radius for Montgomery County Public Library (MCPL) branches ranges from 1.5 miles to 3 miles with an average of 2.5 miles, and that 80% of customers come from within that radius.¹³ The Strategic Facilities Plan identifies Clarksburg as a growth area, and states:

This town is planned to grow substantially – from 2,000 to 37,000 people – between 2000 and 2025. It meets all of the criteria set for identifying future service. A 20,000 square foot facility is being planned to serve the area. The Department is working with the UpCounty Regional Services Center, the Department of Public Works and Transportation and the developer to finalize the site. Funding for the library is expected to come from development district funding and a PDF has been submitted for the FY05-10 CIP.¹⁴

1. What developer obligations related to this CTCDD item did the Planning Board establish as a result of its regulatory approvals and where are the specific references to these obligations found in the regulatory record?

The Planning Board's regulatory approvals for the CTC Project require the developer to dedicate land for a town square that includes a site for a civic building. The Board's Project Plan and Site Plan Opinions identify the town square as part of an amenity package that justifies granting optional method zoning for the project. The Preliminary Plan Opinion contains a condition that ties the Preliminary Plan to the Project Plan.

Project Plan. The Planning Board's Project Plan Opinion does not explicitly mention the Civic Center or Library, but mentions the town square. For example, Finding #5 in the Project Plan, "Is More Efficient and Desirable than the Standard Method of Development", states:

The Planning Board finds that the proposed project, as conditioned, will be more efficient and desirable than the standard method of development. This optional method project consists of a mix of uses which are recommended in the Master Plan. These uses are not permitted under the standard method of development. The amenities and facilities provided as part of the optional method of development foster the creation of a transit and pedestrian oriented town surrounded by open space. The greenway network of amenities provides a major

¹³ Strategic Facilities Plan 2004-2009, p.13.

¹⁴ *Id.* at 26.

Appendix 1C. Fact Finding for the Clarksburg Town Center Development District

open feature. The town square, and the neighborhood squares provide amenities within the entire development.¹⁵

The Project Plan Staff Report makes reference to “land dedicated for a future civic building, (i.e. meeting rooms and library)” and 1 of the findings states that the County would construct a future building. Specifically:

- Finding #2 states, “the town square also provides land available for a future post office, library, senior center, and meeting rooms”.¹⁶
- Finding #5 states, “a site for a future civic building with a library and senior center to be constructed by Montgomery County is included”.¹⁷

Preliminary Plan. The Planning Board’s Preliminary Plan Opinion does not explicitly mention the Civic Center or Library; however, Condition #14 states that the Preliminary Plan “is expressly tied to and interdependent upon the continued validity of Project Plan No. 9-94004”.¹⁸ And “each term, condition, and requirement set forth in the Preliminary Plan and Project Plan are determined by the Planning Board to be essential components of the approved plans and are, therefore, not automatically severable”.¹⁹

In a discussion of impact taxes in the Preliminary Plan Staff Report, staff states that the dedication of a site for a future building was part of an amenity package that was an appropriate contribution from the developer. The Planning staff states:

When attention is focused on total infrastructure to serve master planned development, the town center’s provision of land for the future school, greenway dedication and the land for a future community center and library must be included in the impact tax deliberations.²⁰

Site Plan Phase I. The Planning Board’s Opinion for Site Plan Phase I Condition #39 states:

The applicant shall work with the County Executive staff to identify a suitable civic building to be located on the town square within the area to be dedicated for that use.²¹

¹⁵ Montgomery County Planning Board Revised Opinion, Project Plan No. 9-94004, Clarksburg Town Center, June 12, 1995, p.10.

¹⁶ Staff Report, Project Plan No. 9-94004, Clarksburg Town Center, March 22, 1995, p.24.

¹⁷ *Id.*, p.33.

¹⁸ Montgomery County Planning Board Revised Opinion, Preliminary Plan No. #1-95042, Clarksburg Town Center. March 26, 1996, p.6.

¹⁹ *Id.*

²⁰ Memorandum to Montgomery County Planning Board from Joseph R. Davis re Preliminary Plan No. 1-95042, Clarksburg Town Center Project, September 22, 1995, p.7.

²¹ Montgomery County Planning Board Opinion, Site Plan Review #8-98001, Clarksburg Town Center, March 3, 1998, p.7.

Appendix 1C. Fact Finding for the Clarksburg Town Center Development District

The Site Plan Staff Report refers to “a Town Square (with partial use for a future civic building)”.²² The Site Plan Staff Report also provides an analysis of Conformance to the Project Plan Approval. It states:

[T]he conformance of the proposed site plan to the Project Plan conditions of approval were established, with conditions, above in Project Description: Prior Approvals. The site plan conforms to the list of Amenity Areas and Recreational Facilities that were part of the Project Plan by providing the following:

Amenity Areas: Town Square, land dedicated for future civic building (with Phase II), streetscape system, neighborhood squares and green area, greenway dedicated for public use, Greenway roadway, specialty planting areas along green way Road . . .²³

²² Memorandum to Montgomery County Planning Board from Wynn E. Witthans, Clarksburg Town Center Phase I, January 22, 1998, p.10.

²³ *Id.* at 21.

Exhibit C-3. Summary of Document References in CTC Project Regulatory Approvals to CTCDD Item 1 – Civic Center

Source Document	Project Plan	Preliminary Plan	Site Plan Phase I	Summary
Planning Board Opinion 9-94004	Finding #5			Establishes dedication of town square site as part of amenity package to justify optional method zoning
Project Plan Staff Report	Findings #2 and #5			States project provides site for building to be constructed by Montgomery County
Planning Board Opinion 1-95042		Condition #14		Ties Preliminary Plan to continued validity of Project Plan
Preliminary Plan Staff Report		Text		States provision of land for a future community center must be included in impact tax deliberations
Planning Board Opinion 1-98001			Condition #39	Requires applicant to work with CE staff to identify suitable civic building to be located in town square
Site Plan Phase I Staff Report			Text	Establishes that site plan conforms to list of amenity areas and recreational facilities, including dedication of land for a future civic building

Source: CTC Project regulatory approval documents.

2. How do these developer obligations relate to the implementation of this development district infrastructure item?

The references to the civic building or town square in the Planning Board’s regulatory documents for the CTC Project show an interdependent relationship exists between the developer’s obligation and this development district item. The developer’s obligation was to dedicate a site for a future building, and the County’s obligation was to design and construct the building.

3. According to the regulatory record, did the Planning Board establish these obligations to comply with site plan or APF requirements?

The obligation to dedicate a site for the Civic Center/Library was a condition of approval to achieve compliance with the Zoning Ordinance's requirement for an amenity package under the Optional Method Zone. No regulatory basis exists for this development district item because construction of the building was not established as a condition of approval.

Stringtown Road

CTCDD Item 2 – Stringtown Road 800' Gap

CTCDD Item 3 – Stringtown Road Extended

CTCDD Item 4 – Stringtown Road – MD 355 to Piedmont Road

Project Scope Background. The project scope for the Stringtown Road infrastructure item changed from the initial petition for the CTCDD to the final resolution adopted by Council. Schedule C of the Developer's Initial Petition proposed financing for construction of a 2-lane segment between MD 355 and Piedmont Road,²⁴ but Resolution 15-87 contains 3 Stringtown Road items. They are:

- Stringtown Road 800' gap;
- Stringtown Road Extended (MD 355 - I-270).
- Stringtown Road (MD 355 – Piedmont Road).

The description of the Stringtown Road project in the County Executive's Fiscal Report expands the project scope proposed for development district financing in the initial petition to add a portion of the 800' gap and a pro-rata share of the Stringtown Road Extended project.

The language from Appendix B of the County Executive's Fiscal Report addresses these 3 items under 2 entries: Stringtown Road and Stringtown Road Extended (MD 355 to I-270). These entries are excerpted below:

Stringtown Road For the entire 0.9 mile segment of Stringtown Road between MD 355 and Piedmont Road, Town Center is required to build two lanes of the ultimate four-lane cross section, including segments not abutting Town Center. Under current staging requirements, the developer must begin work on segments of its two-lane improvements prior to two events – the issuance of 400th and 800th building permits. The first event is anticipated to occur in spring 2003. For the

²⁴ Schedule C of the initial petition described this project as follows: "Construction of improvements easterly from Rte 355 to Piedmont Road, including the bike path, median and curb and gutter. This improvement will be constructed in two segments, the first within one half of the 105 foot R/W between MD 355 and the Greenway Rd (K Street) and the second within one half (60 feet) of the 120 foot R/W between Greenway Rd (K Street) to the Piedmont Road (A305)".

other two lanes, all but an 800-foot middle segment is the responsibility of two other subdivisions. (Clarksburg Village, a proposed development district, and Highlands of Clarksburg.) This 800-foot segment is a re-alignment onto land owned by another party, not currently proposed for subdivision.

The Town Center developer has proposed, and the Executive agrees, that in order to facilitate provision of full four lanes throughout, the other two lanes in this 800-foot segment (incremental cost \$1,100,000) should be constructed by the Town Center developer, funded 50% by Town Center District and 50% by the proposed Clarksburg Village District. The developer and DPWT have discussed mechanisms to assure that to the maximum extent feasible, all or most of the four lanes from MD 355 to Piedmont Road will be designed and constructed simultaneously with costs allocated among the respective developers. (Timing of Clarksburg Village's segment of the road along its frontage coincides with the adjacent half-section to be built by Town Center.) Primary responsibility for design and most of the construction would be assumed by the Town Center developer under agreements to be entered into with DPWT.

Stringtown Road Extended (MD 355 to I-270) As a new project for District funding, the Executive proposes that the Town Center District fund a share of the cost of this extension. A not-to exceed contribution of \$1,600,000 is recommended, based on an approximate 25% share of County G.O. bonds currently proposed for this project. Town Center is projected to account for 25% of the traffic on this new road link. This project is proposed for construction by County DPWT in FY06/07.²⁵

According to the PDF No. 500403, Stringtown Road Extended, this project consists of design, right-of-way acquisition, and construction of a 2,400 foot extension of Stringtown Road westward from MD 355 to I-270 ramps at existing MD 121. It is a 4-lane arterial highway with a sidewalk on the south side, a bike path on the north side, and street trees and streetlights within 120' right-of-way.

**CTCDD Item 2 –
Stringtown Road 800' Gap (50% Share)**

Project Scope Background. According to the County Executive's Fiscal Report, the scope of this item is one-half (1 lane) of a 2-lane segment of Stringtown Road located between the boundaries of the CTC Project and 2 other development projects. The project crosses land that is not currently planned for development. The 2-lane segment is one-half of an ultimate 4-lane road.

²⁵ Appendix B. Clarksburg Town Center Development District Fiscal Report, Infrastructure Projects Considered for District Funding, Roads, p.3.

1. What developer obligations related to this CTCDD item did the Planning Board establish as a result of its regulatory approvals and where are the specific references to these obligations found in the regulatory record?

The Planning Board's approval documents for the CTC Project contain several references related to Stringtown Road (A-260) between MD 355 and A-305. Two of these references, which are directly related to this development district item, require the developer to dedicate a 120' right-of-way for Stringtown Road (Condition #2e in the Project Plan Opinion and 5(c) in the Preliminary Plan Opinion).

Other references establish requirements for the 2-lane segment of Stringtown Road, a portion of which parallels this development district item. For example:

- The Preliminary Plan Opinion requires the developer to agree to provide the necessary roadway improvements identified in the phasing section of the revised Transportation Planning Division memorandum dated September 26, 1995 (Condition 1(a)) and to construct 2 lanes of Stringtown Road in 2 segments, with the timing tied to the issuance of the 400th and 800th building permits.
- The Site Plan Opinion for Phase I (Condition #18) incorporates by reference a memorandum from the Transportation Planning Division that re-iterates the requirement to construct the northern half of Stringtown Road in 2 segments (Recommendations #2 and #6).
- Another condition of the Site Plan Opinion for Phase I (Condition #19) also requires the applicant to sign an APF agreement that addresses Stringtown Road and requires the developer to reimburse the County for costs incurred if the County exercises its powers of eminent domain to acquire right-of-way so that the developer can fulfill its obligations.

Exhibit C-4. Summary of Document References in CTC Project Regulatory Approvals to CTCDD Infrastructure Item 2 – Stringtown Road 800’ Gap

Source Document	Project Plan	Prelim. Plan	Site Plan Phase I	Summary
Planning Board Opinion 9-94004	Condition #2e			Requires 120’ right-of-way dedication and construction
Planning Board Opinion 1-95042		Condition #1a		Requires agreement with Planning Board to provide transportation improvements in revised memo from Transportation Planning dated Sept. 26, 1995
Planning Board Opinion 1-95042		Condition #5c		Requires 120’ right-of-way dedication
Planning Board Opinion 1-95042		Condition #16c		Establishes phasing for 2 lanes of Stringtown Road
Planning Board Opinion 1-98001			Condition #18	Requires conformance to Transportation Planning memo dated Jan. 20, 1998
Transportation Planning memo dated Jan. 20, 1998			Recs. #2 and #6	Re-iterates requirement to construct 2 lanes of Stringtown Road in 2 sections
Planning Board Opinion 1-98001			Condition #19	Requires developer to sign APF agreement and to reimburse County for costs if eminent domain is necessary

Source: CTC Project regulatory approvals.

2. How do these developer obligations relate to the implementation of this development district infrastructure item?

OLO's review of the regulatory record found:

- The Planning Board's Opinions do not explicitly address whether the requirement to provide a 120' right-of-way obligates the developer to acquire and dedicate a 120' right-of-way for the 800' segment of Stringtown Road that lies outside the boundaries of the CTC Project.
- None of the Planning Board Opinions for the Project Plan, Preliminary Plan, or Site Plan Phase I require the developer to construct this specific development district item (i.e., 1 lane of the 800 foot Stringtown Road gap) as a condition of approval.
- During the Board's consideration of the Project Plan, Planning staff proposed that the Planning Board establish the dedication and construction of Stringtown Road as a condition of approval; however, that language was not incorporated into the Planning Board's Project Plan Opinion.²⁶

Current Planning staff indicate that the intent of the language in the Board's Opinions was to require the developer to acquire and dedicate land for a 120' right-of-way for the entire length of Stringtown Road, including the right-of-way for the 800' gap. This interpretation appears to be supported by Condition #19 in the Planning Board Opinion for Site Plan Phase I which requires the developer to sign an "APF agreement," including a requirement to reimburse the County for costs if the County uses its eminent domain powers.

3. According to the regulatory record, did the Planning Board establish these obligations to comply with site plan or APF requirements?

OLO's review found the Planning Board's regulatory record:

- Does not specify the underlying basis for requiring the developer to dedicate the 120' right-of-way for Stringtown Road;
- Does not identify improvements to Stringtown Road as one of the items required as a result of the LATR analysis conducted at Project Plan; and
- Does require the development to sign an "APF agreement" that specifically addresses Stringtown Road.

Current Planning staff indicate the land dedication would have been required for master plan compliance as a condition of Project Plan.

²⁶ Condition #4 in a Revised Draft Opinion attached to the Project Plan Staff Report states, "A-260 Stringtown Road must be dedicated to a right of way of 120 feet and constructed as a four lane, divided arterial road as part of a participation agreement with MCDOT".

**CTCDD Item 3 –
Stringtown Road Extended (MD 355 to I-270) (25% Share)**

Project Scope Background. According to PDF No. 500403, Stringtown Road Extended, this project consists of design, right-of-way acquisition, and construction of a 2,400 foot extension of Stringtown Road westward from MD 355 to I-270 ramps at existing MD 121. It is a 4-lane arterial highway with a sidewalk on the south side and a bike path on the north side, street trees and streetlights within a 120' right-of-way.

The current PDF indicates the total project cost is \$8.810 M and the sources of funds are: Impact taxes (\$5.614M or 64%), Development District (\$1.6M or 18%), Contributions (\$970K or 11%), Development Approval Payment (\$512K or 6%), Investment Income (\$104K, 1%), and Intergovernmental (\$10, <1%).

A fiscal note published in the PDF published in the FY04 Approved CIP states:

Impact tax for this project is assumed at 26.7 percent of the project cost within the Clarksburg Impact Tax Area. The Town Center Development District participation reflects a pro-rated share of what otherwise would be G.O. bond funded. Town Center Development District participation would not exceed \$1,600,000. The Impact Tax share of the project has been adjusted accordingly.

In that PDF, the general obligation bond funds were \$4,722M and the impact tax was \$1.906M.

- 1. What developer obligations related to this development district item did the Planning Board establish as a result of its regulatory approvals and where are the specific references to these obligations found in the regulatory record?**

The Planning Board's approval documents for the CTC Project require the developer to participate in improvements to Stringtown Road between the I-270 northbound off ramp and the entrance to the Gateway 270 Office Park. According to current Transportation Planning staff, the improvements this language refers to are at I-270 along MD 121, which is not the location of the Stringtown Road Extended improvements. Transportation Planning staff do not believe any of the regulatory approvals for the CTC Project require the developer to construct this item.

**CTCDD Item 4 –
Stringtown Road From MD 355 to A-305**

Project Scope Background. According to the County Executive's Fiscal Report, "for the entire 0.9 mile segment of Stringtown Road between MD 355 and Piedmont Road, Town Center is required to build 2 lanes of the ultimate 4-lane cross section, including segments not abutting Town Center. Under current staging requirements, the developer must begin work on

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segments of its 2-lane improvements prior to 2 events – the issuance of 400th and 800th building permits. The first event is anticipated to occur in spring 2003”.²⁷

Portions of this project are the subject of 2 Public Improvements Agreements (99-027 and 01-052) that the CTC Project developer and the County signed following the Planning Board’s preliminary plan approval. These agreements were finalized March 17, 1999 and September 14, 2001.

This project is also included in the 5 projects addressed in PDF. No. 500423, Clarksburg Town Center Development District: Roads. The total current cost estimate for all of the projects this PDF addresses is \$9.521 million and the source of funds is “Development District”.

1. What developer obligations related to this CTCDD item did the Planning Board establish as a result of its regulatory approvals and where are the specific references to these obligations found in the regulatory record?

The Planning Board’s Project Plan, Preliminary Plan, and Site Plan Opinions for the CTC Project require the developer to dedicate and improve this segment of Stringtown Road as a condition of approval. It is not clear from the Planning Board Opinions alone what the limits of these obligations are.

Project Plan. At Project Plan, the Board’s Opinion required:

- Dedication of a 120’ right-of-way (Condition #2e);²⁸ and
- Construction of safety improvements unless the applicant has executed a participation agreement with MCDOT before preliminary plan review (Condition #4).²⁹

The Project Plan Staff Report presented the results of the LATR analysis. The Staff Report stated:

Several transportation improvements are proposed by the applicant to satisfy the requirements of local area review. The remaining issues include the need to construct a portion of A-305 (Mid County Highway), a portion of A-260 (Stringtown Road) with participation from Montgomery County, and additional improvements to A-121 (Clarksburg Road) near the intersection of I-270.³⁰

²⁷ Appendix B. Clarksburg Town Center Development District Fiscal Report, Infrastructure Projects Considered for District Funding, Roads, p.3.

²⁸ Condition #2e. states, “A-260 must be dedicated to a right of way of 120 feet. At the preliminary plan, if determined that the property is not part of a participation agreement with MCDOT and other property owners, the safety improvements described in paragraph 4, will be made to Stringtown Road”.

²⁹ Condition #4, Dedication and Construction of A-260 (Stringtown Road), states, “If a participation agreement is determined necessary at preliminary plan, but does not occur before the necessary access points to the commercial area or part of the residential area from A-260 are needed, then the following improvements to existing Stringtown Road must be completed to increase safety as required by MCDOT. For safety purposes, the improvements at public streets A and H include 250-350 feet of bypass travel lanes at each access point”. pp.2-3.

³⁰ Staff Report, Project Plan No. 9-94004, Clarksburg Town Center, March 22, 1995, p.9.

Preliminary Plan Conditions. Two conditions in the Planning Board's Preliminary Plan Opinion contain explicit references to Stringtown Road. These conditions establish dedication and phasing requirements for Stringtown Road. Specifically:

- Condition #5c of the Board's Opinion requires dedication of a 120' right-of-way for Stringtown Road;

Condition 16 establishes a phasing plan for the project that:

- After the 400th permit, gives the developer the option of:
 - Constructing A-260 from MD 355 to the southern access road of the commercial site; or
 - Constructing A-260 from MD 355 to the northern access road of the residential development.
- After the 800th permit, requires the developer to start construction of the remaining section of A-260 to A-305.

Preliminary Plan Opinion. In addition to the conditions that address this segment of Stringtown Road, the text of the Planning Board's Preliminary Plan Opinion requires the applicant to construct 2 lanes of Stringtown Road to comply with the master plan guidance that alternative financing of transportation infrastructure will be required. The Opinion addresses Stringtown Road under Discussion and Findings. In part, it states:

To ensure that the Applicant funds its share of road infrastructure, as best can be determined at this time, staff recommended that the Applicant improve Stringtown Road (A-260) to County standards as a two lane road within the Master Plan Alignment, No. 2. as of August 25, 1995. The Planning Board concluded that the Stringtown Road improvement, which will be the responsibility of the applicant, represents the current best estimate of the Town Center's share of the Master Plan road infrastructure (as more particularly identified in revised traffic staff memo of 9/26/95.)

Planning staff report. The September 22, 1995 Planning staff memorandum indicates that staff previously identified Stringtown Road as an appropriate roadway that could serve as the Town Center's "pro-rata share" of the master planned roadway infrastructure. The Planning staff report indicates that the Planning Board reviewed the Planning Department's analysis, which was provided at a public meeting on August 3, 1995. The staff report stated:

Item #19 on the Planning Board's August 3, 1995 agenda was the review of the Planning Departments analysis and recommendations concerning the need for a more equitable distribution of road infrastructure improvements among the development projects in Clarksburg. Staff recommended that the Board require new development to participate in road infrastructure improvements. Staff suggested that staff's Scenario #III (c) be applicable to projects in this area. This

scenario would require developers to pay 50 percent of the construction costs of State and County roads situated between properties, and to pay 50 percent of the construction costs for the second two lanes of arterial or major roads that are situated within properties. The different scenarios studies by staff assumed that developers would construct all internal two lane streets located within their properties.

As part of its fact finding for this item, Council staff listened to the tape of the August 3 meeting and reviewed the Planning staff report.

Transportation Planning Division. A September 22, 1995 memorandum from the Transportation Planning Division, which was revised September 26, 1995, explains that the construction “should be for 2 lanes which will be used ultimately as the southbound lanes in accordance with the August 8, 1995 Alignment #2. The hiker/biker trail (eight feet) should be constructed along west side as A-260 is constructed, in accordance with the phasing recommendations as described above”.³¹

Site Plan. The Planning Board’s Opinion for Site Plan Phase I (8-98001) includes 3 general conditions that address 3 district items, including Stringtown Road (A-260), Clarksburg Road (121) and Piedmont Road (A-305).

- Condition 17 requires “conformance to cross section and other recommendations per DPW&T, DPS memos dated January 14 and January 15, 1998”.
- Condition 18 requires “conformance to MCPD Transportation Planning memorandum dated January 20, 1998 included in the Appendix”.³²
- Condition 19 requires an APF agreement; it states:

APF agreement to be executed prior to the first record plat to reflect all road improvement conditions of the Preliminary Plan Approval i.e., dedication, and construction of required improvements pertaining to the construction of Stringtown Road (A-260), Clarksburg Road (A-121) and Mid-County Arterial (A-305). If acquisition of right of way becomes necessary for any of the road improvements, the applicant is required to provide, pursuant to Site Plan conditions 17 and 18, and the County exercises Eminent Domain to acquire these rights of way, the applicant will be responsible to reimburse the County for these reasonable costs.³³

The Transportation Planning memorandum also addresses Stringtown Road.

³¹ Memorandum from Ki H. Kim, Transportation Planner to Joe Davis, Coordinator re Preliminary Plan No. 1-95-042, Clarksburg Town Center Project, September 22, 1995, p.2.

³² Montgomery County Planning Board Opinion, Site Plan Review #8-98001, Clarksburg Town Center, March 3, 1998, p.5.

³³ *Id.*

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- Recommendation #2 states: “Construction. Of the northern half of Stringtown Road (A-260) from Frederick Road (MD 355) to Greenway Road (the southern access road of the commercial site) . . . after the 400th building permit”.³⁴
- Recommendation #6 states: “Reconstruction of the northern half of Stringtown Road (A-260) from Sta 33+50 to Midcounty Arterial (A-305) in accordance with DPS/DPWT requirements”.³⁵

The January 15, 1998 Department of Permitting Services memorandum includes the following reference to Stringtown Road:

The applicant will be responsible for constructing public improvements per the DPW&T approved cross sections within one half (52.5 feet) of the 105 foot right of way between MD 355 and the Greenway Road and within one half (60 feet) of the 120 foot right of way between Sta. 33+50 to the Mid County Arterial (A-305), including the bike path, which will need to be partially located outside the right of way in a Public Improvements Easement.

³⁴ Memorandum from Ki H. Kim, Planner to Wynn Witthans, re Clarksburg Town Center 1A-1B Site Plan 8-98001, January 14, 1998, revised January 20, 1998, p.2.

³⁵ *Id.*

Exhibit C-5. Summary of Document References in CTC Project Regulatory Approvals to CTCDD Infrastructure Item 4 –Stringtown Road from MD 355 to Piedmont Road

Source Document	Project Plan	Prelim. Plan	Site Plan Phase I	Summary
Planning Board Opinion 9-94004	Condition #2e			Requires dedication of a 120' right-of-way
Planning Board Opinion 9-94004	Condition #4			Requires safety improvements unless applicant executes MCDOT participation agreement before Preliminary Plan Review
Staff Report, Sept. 25, 1989	Text			Identifies construction of portion of A-260 as a County participation project as a remaining issue.
Planning Board Opinion 1-95042		Condition #5c		Requires dedication of 120' right-of-way
Planning Board Opinion 1-95042		Condition #16		Establishes phasing plan for 2 lanes of Stringtown Road
Planning Board Opinion 1-95042		Text		Requires improvement of Stringtown Road as 2 lane road to ensure Applicant funds it share of road infrastructure.
Planning staff report dated Sept. 22, 1995		Text		Cites Planning Board review of staff scenarios on August 3, 1995 which were developed to insure more equitable distribution of road infrastructure costs.
Transportation Planning memo, Sept 22, 1995				Requires construction of 2 lanes and a hiker biker trail.
Planning Board Opinion 1-98001			Condition #18	Requires conformance to Transportation Planning memo dated Jan. 20, 1998
Transportation Planning memo, Jan. 20, 1998			Recs. #2 and #6	Requires construction of 2 segments of Stringtown Road
Planning Board Opinion 1-98001			Condition #19	Requires developer to sign APF agreement and to reimburse County for costs if eminent domain is necessary

Source: CTC Project regulatory approval documents.

2. How do these developer obligations relate to the implementation of this development district infrastructure item?

The developer obligations the Planning Board established in its Preliminary Plan and Site Plan Opinions are identical to the scope of this development district infrastructure item. The obligation established in the Project Plan Opinion is more limited.

3. According to the regulatory record, did the Planning Board establish these obligations to comply with site plan or APF requirements?

In OLO's opinion, this item was not an APF requirement; however, the regulatory basis for this item is confused because of the ambiguous use of the terms "APF" and "AGP". For example, the Planning Board's regulatory approval documents also require the developer to sign an "APF agreement" and the Executive's Fiscal Report refers to this item as an "AGP Road". Although references in the regulatory record characterize this improvement as an AGP Road, it was not identified as an APF requirement as a result of the LATR test performed at Project Plan. Specifically, OLO's review of the Planning Board's regulatory decision documents found:

- This obligation was established to ensure that the developer provided his "fair share" of the master planned transportation infrastructure. (According to the former Subdivision Coordinator, Section 50-35(1) of the Subdivision Regulations, Relation to Master Plan, provided the Board's legal authority to impose this condition.)
- This item was not identified as a requirement to comply with the LATR analysis; however, a memorandum from the Transportation Planning Division characterizes this item as a condition of approval resulting from an APF review.

Key excerpts from the Preliminary Plan and Site Plan Opinions include the following:

Preliminary Plan. The text of the Planning Board's Preliminary Plan Opinion states, in part:

The Planning Department staff evaluated the transportation effects of the subject application as required by the Subdivision Regulations and as recommended in the Master Plan. First, the Board must determine that public facilities, including roads, will be adequate to support and service the area of the proposed subdivision. Staff evaluated the impact of the proposed development on nearby roads and intersections in accordance with the Local Area Transportation Review Guidelines. Necessary local area transportation review improvements for this project are identified in condition #2 for Project Plan No. 9-94004.

The second level of transportation review was based on the Master Plan recommendation that development districts, or alternative financing mechanisms, be implemented prior to new development, to ensure that road infrastructure be provided to support recommended Master Plan development . . .

To ensure that the Applicant funds its share of road infrastructure, as best can be determined at this time, staff recommended that the Applicant improve Stringtown Road (A-260) to County standards as a two lane road within the Master Plan Alignment, No. 2, as of August 25, 1995 . . . The Planning Board concluded that the Stringtown Road improvement, which will be the responsibility of the applicant, represents the current best estimate of the Town Center's share of the Master Plan road infrastructure (as more particularly identified in revised traffic staff memo of 9/26/95).³⁶

A Transportation Planning Division memorandum appended to the Preliminary Plan Opinion also addresses the basis for requiring this item as a condition of approval. It states:

Based on our July 28, 1995 memo, we would anticipate that, if the developer builds two lanes of A-260 from MD 355 to A-305 within the master planned alignment, this should represent his part of the total roadway construction cost for Clarksburg. Final determination of actual share would be determined by the County Council when the impact tax legislation is considered for Clarksburg.³⁷

Site Plan. The January 20, 1998 Transportation Planning memorandum appended to the Planning Board's Site Plan Phase I Opinion, suggests this item was required as a result of an APF review and "to satisfy issues raised by DPWT, SHA and Planning staff". Specifically, the memorandum:

- Identifies construction of the northern half of Stringtown Road from Frederick Road to Greenway Road as one of "three roadway improvements . . . required as conditions of approval to satisfy the previously assess APFO review and the phasing requirements".³⁸
- Lists the reconstruction of the other half of Stringtown Road as one of "four roadway improvements . . . recommended as conditions of approval to address transportation issues associated with the subject site plan".³⁹
- Finally, it states, "The roadway improvements recommended as conditions for approval of the subject site plan have been developed to satisfy the project plan and the preliminary plan requirements and to address additional transportation issues which DPWT, SHA and staff consider are necessary to provide a safe and efficient roadway system for the subject site plan".⁴⁰

³⁶ Montgomery County Planning Board Revised Opinion, Preliminary Plan No. #1-95042, Clarksburg Town Center, March 26, 1996, p.2.

³⁷ Memorandum from Ki H. Kim, Transportation Planner to Joe Davis, Coordinator re Preliminary Plan No. 1-95-042, Clarksburg Town Center Project, September 22, 1995, p.2.

³⁸ Memorandum from Ki H. Kim, Planner to Wynn Withans, re Clarksburg Town Center 1A-1B Site Plan 8-98001, January 14, 1998, revised January 20, 1998, p.2.

³⁹ *Id.*

⁴⁰ *Id.* at 5.

CTCDD Item 5 - Piedmont Road

Project Scope Background. The initial petition for development district financing included this item, which was described as follows:

This roadway extending south from Clarksburg Rd to Stringtown Rd. will be constructed as a 32 ft. two lane open section road within an eighty (80) foot wide right of way. An eight (8) foot wide bike path will extend along the westerly side to the full extent of the improved road. At the Stringtown Rd. intersection turn lanes and a median will be constructed to match the improvements proposed there.⁴¹

Appendix B of the County Executive's Fiscal Report describes this item as follows:

Piedmont Road is the third AGP required road proposed for district funding (\$2,385,000). It will be rebuilt to its ultimate two-lane width with bike lanes on both sides. The developer's target for construction start is November, 2002, a condition imposed by Planning Board staging when construction begins on lots to be accessed from this road.⁴²

This project is also addressed in a Public Improvements Agreement (01-052) between the CTC Developer and the County, which was finalized on September 14, 2001. Item 6, Special Provisions, states, "applicant is to enter into an agreement with M-NCPPC regarding phasing the construction of A-305 and A-260. A-305 is to be constructed full width by the applicant between Clarksburg Road and A-260".

This project is also included in the 5 projects addressed in PDF No. 500423, Clarksburg Town Center Development District: Roads. The total current cost estimate for all of the projects this PDF addresses is \$9.521 million and the source of funds is Development District.

- 1. What developer obligations related to this CTCDD item did the Planning Board establish as a result of its regulatory approvals and where are the specific references to these obligations found in the regulatory record?**

The Planning Board's Project Plan, Preliminary Plan, and Site Plan Opinions all require the developer to dedicate and construct this item as a condition of approval.

Project Plan. The Planning Board's Project Plan Opinion requires the applicant to dedicate and construct this segment as a condition of approval. The requirement allows for the possibility that the scope of the required improvement would be reduced at preliminary plan. No evidence exists to show that the scope was reduced.

⁴¹ Petition of Terrabrook L.L. C. Schedule C, filed June 2000.

⁴² Appendix B. Clarksburg Town Center Development District Fiscal Report, Infrastructure Projects Considered for District Funding, Roads, p.4

Condition 3 of the Planning Board's Project Plan Opinion states:

A-305 must be dedicated to a right of way of 80 feet and constructed as a two lane, open section arterial to replace Piedmont Road unless the scope of improvements are reduced at preliminary plan. Along that portion of A-305 near Stringtown Road, the required dedication shall be 40 feet from the current center line of Piedmont Road (along Hennigan, Purdum et al) which will allow for construction of A-305 to Stringtown Road at its current location. If the right-of-way is not available at the time of record plat for that portion of the property along this section, the applicant shall dedicate the full 80 feet along this portion of A-305. Construction will not be necessary until construction of single family detached units within the existing right of way for Piedmont Road has started.⁴³

The March 22, 1995 Project Plan Staff Report Transportation Planning Division memorandum does not identify Piedmont Road as a LATR requirement.

Preliminary Plan. The Planning Board's Preliminary Plan Opinion requires the applicant to dedicate land for Piedmont Road. Condition 16e also references this segment. The language states:

The following phasing requirements are conditioned upon issuance of building permits for the subject preliminary plan: . . . (e) Construction of A-305 from A-260 to MD 121 must begin when the developer starts building any of the residential units on blocks 11, 12, 13, and the northern half of block 10.⁴⁴

The Preliminary Plan Staff Report reported agreement with the applicant to construct 2 lanes of A-305. The language in the Staff Report states:

With regard to proposed road A-305, staff recommends that the applicant construct this two-lane arterial through the limits of the subject property. This is in accordance with the general requirement that developers construct roads that extend through their sites. The applicant has agreed to construct A-305 as recommended by staff.⁴⁵

The Preliminary Plan Staff Report also references this segment in its recommendations about the phasing of the required improvements. Item #5 in the phasing plan states:

Construct A-305 from A-260 to MD 121 when any of the residential units located between A-305 and the first parallel residential street south of A-305 are built.⁴⁶

⁴³ Montgomery County Planning Board Revised Opinion, Project Plan No. 9-94004, Clarksburg Town Center, June 12, 1995, p.3.

⁴⁴ Montgomery County Planning Board Revised Opinion, Preliminary Plan No. #1-95042, Clarksburg Town Center, March 26, 1996, p.7.

⁴⁵ Memorandum to Montgomery County Planning Board from Joseph R. Davis re Preliminary Plan No. 1-95042, Clarksburg Town Center Project, September 22, 1995, p.7.

⁴⁶ *Id.* at 8.

Appendix 1C. Fact Finding for the Clarksburg Town Center Development District

Site Plan. As noted earlier, the Planning Board's Opinion for Site Plan Phase I (8-98001) includes 3 general conditions that address 3 development district items: Stringtown Road (A-260), Clarksburg Road (121) and Piedmont Road (A-305).

- Condition 17 requires "conformance to cross section and other recommendations per DPW&T, DPS memos dated January 14 and January 15, 1998".
- Condition 18 requires "conformance to MCPD Transportation Planning memorandum dated January 20, 1998 included in the Appendix".
- Condition 19 requires an APF agreement; it states:

APF agreement to be executed prior to the first record plat to reflect all road improvement conditions of the Preliminary Plan Approval i.e., dedication, and construction of requirement improvements pertaining to the construction of Stringtown Road (A-260), Clarksburg Road (A-121) and Mid-County Arterial (A-305). If acquisition of right of way becomes necessary for any of the road improvements, the applicant is required to provide, pursuant to Site Plan conditions 17 and 18, and the County exercises Eminent Domain to acquire these rights of way, the applicant will be responsible to reimburse the County for these reasonable costs.⁴⁷

The January 20, 1998 Transportation Planning memorandum incorporated into the Planning Board Opinion by reference, describes A-305 as a 2-lane, 24-foot open section roadway with 4-foot paved shoulders and a Class I bikepath on the west side within an 80 foot right-of-way between Clarksburg Road and Stringtown Road. The history of conditions of approval in this memorandum includes a condition from the Preliminary Plan requiring construction of A-305 to begin when the developer starts building any of the residential units on Blocks 11, 12, 13, and the northern half of Block 10, as numbered in the Preliminary Plan approval.

The January 15, 1998 Department of Permitting Services memorandum includes the following reference to Mid-County Arterial:

No improvements to Mid-County Arterial will be required under Phase I. Main Street will not be connected to existing Piedmont Road under Phase I. However, prior to approve of the record plats, the applicant must prepare a concept plan showing how the DPW&T approved cross section and public amenities will be accommodated within the right of way and any necessary Public Improvement Easement. We will also need to see a concept plan showing how a median at the intersection with Stringtown Road will be accommodated and its relationship to the median on the south side of the intersection of future Mid-County Highway.

⁴⁷ Montgomery County Planning Board Opinion, Site Plan Review #8-98001, Clarksburg Town Center, March 3, 1998, p.5.

Exhibit C-6. Summary of Document References in CTC Project Regulatory Approvals to CTCDD Infrastructure Item 5 – Piedmont Road

Source Document	Project Plan	Prelim. Plan	Site Plan Phase I	Summary
Planning Board Opinion 9-94004	Condition #3			Requires right of way dedication and construction
Planning Board Opinion 1-95042		Condition #16e		Establishes phasing requirements
Planning Staff Report for 1-95042		Item #5		Establishes phasing requirements
Planning Board Opinion 1-98001			Condition #18	Requires conformance to Transportation Planning memo dated Jan. 20, 1998
Planning Board Opinion 1-98001			Condition #19	Requires developer to sign APF agreement and to reimburse County for costs if eminent domain is necessary
Transportation Planning memo, Jan. 20, 1998			Text	States improvement is needed to provide safe and efficient roadway system and references Preliminary Plan phasing requirements

Source: CTC Project regulatory approvals.

2. How do these developer obligations relate to the implementation of this development district infrastructure item?

The developer's obligation to dedicate and construct Piedmont Road, which is established in the Planning Board's Project Plan, Preliminary Plan, and Site Plan Opinions, is identical to the project scope for this development district infrastructure item.

3. According to the regulatory record, did the Planning Board establish these obligations to comply with site plan or APF requirements?

OLO's review of the regulatory record shows that the Planning Board imposed this obligation to provide access and a coordinated, safe, and efficient transportation network; however, the basis for this item is confused because of the ambiguous use of "APF" and "AGP". For example, the Planning Board's regulatory approval documents also require the developer to sign an "APF agreement" and the Executive's Fiscal Report refers to this item as an "AGP Road". Although references in the regulatory record characterize this improvement as an AGP Road, it was not identified as an APF requirement as a result of the LATR test performed at Project Plan. Specifically:

- The language in the Preliminary Plan Opinion suggests the road is needed to provide access and a coordinated transportation network.
- The language in the January 20, 1998 Transportation Planning memorandum suggests this improvement was needed to address transportation issues that DPWT, SHA, and Planning staff considered necessary to provide a safe and efficient roadway system for the subject site plan.
- This item was not identified as a requirement to comply with the LATR analysis; however, the language in Site Plan Condition #19 did require an "APF agreement".
- The language in Condition #19 also stated that the developer must reimburse the County for any costs incurred by the County if the County had to exercise its eminent domain powers to acquire right of way.

When Council and OLO staff met with current Planning staff, they indicated that they believed the regulatory basis for this requirement was Section 50-24, Required public improvements; however, none of the Planning Board Opinions makes an explicit reference to this section.

**CTCDD Item 6 –
Lowering of MD 355 at Stringtown Road**

Project Scope Background. Appendix B of the County Executive's Fiscal Report included the following discussion of this item:

MD 355 Lowering. 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 Springtown 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 part of 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 the lowering among the respective developers.⁴⁸

1. What developer obligations related to this CTCDD item did the Planning Board establish as a result of its regulatory approvals and where are the specific references to these obligations found in the regulatory record?

OLO's review of the regulatory record for this item found:

- The Planning Board Opinions for the Project Plan and Site Plan require the applicant to construct a northbound right turn lane along MD 355 to Stringtown Road; however;
- The regulatory record does not contain an explicit requirement to lower MD 355 as a condition of approval.

Key excerpts from the regulatory record include the following:

Project Plan. The Planning Board's Project Plan Opinion required the developer to construct a northbound right turn lane at MD 355 and A-260 (Condition 2c).

A recommendation in a Transportation Planning Division memorandum appended to the Project Plan Staff report that would have required the developer to participate in an improvement to lower the intersection was not explicitly identified as a condition of approval in the Planning Board's Opinion.

Preliminary Plan. The Planning Board's Preliminary Plan Opinion incorporates the requirement to construct a northbound right turn lane at MD 355 and A-260 by reference. Under Discussion and Findings, the Opinion states that necessary LATR improvements for this project are identified in condition #2 for Project Plan No. 9-94004. The Opinion does not reference comments from the SHA because it was mailed 2 years before SHA provided its comments. (The letter from SHA for the CTC Project is dated December 8, 1997.)

Site Plan. Condition 18 of the Site Plan for Phase 1 incorporates conformance to a January 20, 1998 MCPD Transportation Planning memorandum by reference. That memorandum includes a "discussion on Maryland State Highway Administration's Concern," that states:

In order to provide a desirable sight distance on Frederick Road (MD 355) at Stringtown Road (A-260), the SHA recommended reduction of the over vertical curve along northbound Frederick Road (MD 355) in connection with the subject site plan. 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

⁴⁸ Appendix B. Clarksburg Town Center Development District Fiscal Report, Infrastructure Projects Considered for District Funding, Roads, p.3.

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northbound right turn lane at this intersection with the SHA's construction project.⁴⁹

Recommendation #3 from that memorandum, which requires construction of a northbound right turn lane along MD 355 at Stringtown Road after the 400th permit, deleted language that would have required the applicant to participate in a roadway improvement to reduce the curve.⁵⁰

Exhibit C-7. Summary of Document References in CTC Project Regulatory Approvals to CTCDD Infrastructure Item 6 – Lowering of MD 355 at Stringtown Road

Source Document	Project Plan	Prelim. Plan	Site Plan Phase I	Summary
Planning Board Opinion 9-94004	Condition# 2c			Requires construction of northbound right turn lane at MD 355 and Stringtown Rd.
Planning Board Opinion 1-98001 Phase I Site Plan			Condition #18	Requires conformance to Transportation Planning memo dated Jan. 20, 1998
Transportation Planning memo, Jan. 20, 1998			Rec#3	Requires construction of northbound right turn lane at MD 355 and Stringtown Road after 400 th permit but deletes language requiring applicant to participate in roadway improvement to reduce over vertical curve
Transportation Planning memo, Jan. 20, 1998			Text	Requires applicant to ensure coordination of requirement to construct northbound right turn lane with future SHA improvement to reduce vertical curve

Source: CTC Project regulatory approvals.

2. How does the developer obligations to construct a right turn northbound turn lane at MD 355 and to “coordinate construction of the required improvement with SHA’s construction project” relate to the implementation of this development district infrastructure item?

When OLO and Council staff met to discuss this item with current Planning staff, they provided the following information about the obligation of the CTC developer and the implementation of the MD 355 lowering project.

- In the opinion of current Planning staff, the lowering of MD 355 was implied in the Planning Board’s requirement, as part of the Project Plan approval, that the developer

⁴⁹ Memorandum from Ki H. Kim, Planner to Wynn Withans, re Clarksburg Town Center 1A-1B Site Plan 8-98001, January 14, 1998, revised January 20, 1998, p.2.

⁵⁰ *Id.*

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provide a northbound right turn along MD 355 to Stringtown Road because it was physically infeasible to accomplish that improvement without also lowering the vertical curve before the intersection; and

- The lowering of MD 355 was an SHA requirement that was documented in a letter from SHA in the file for the CTC Project.⁵¹ Typically, a SHA requirement would have been imposed as a requirement through Condition 11 in a Preliminary Plan Opinion, which contains boilerplate language that requires a developer to comply with “Access and improvements as required to be approved by MCDOT and MDSHA”.
- The Planning Board required the lowering of MD 355 as a condition of approval for a different project (i.e., Highlands at Clarksburg, and the developer recently completed that improvement).

Following this meeting, OLO and current Transportation Planning staff conducted more research. OLO compiled the chronology of the MD 355 lowering project that follows to better understand the relationship between the conditions of approval for the 2 projects and the inclusion of this item on the CTCDD infrastructure list.

Regulatory Approvals for Highlands at Clarksburg Project. In September 1997, Centex Homes submitted an application for the approval of a project plan and preliminary plan of subdivision for a parcel of land located at the intersection of MD 355 and Stringtown Road, adjacent to the CTC Project. In May 1999, MDSHA provided its comments on the review of the Traffic Impact Study prepared for the Highlands at Clarksburg project. It stated SHA would require a reduction of the over-vertical curve, in addition to other improvements.

In July 1999, the Planning Board approved the original Project Plan and Preliminary Plans for the 16-acre portion of the project zoned RMX. The approval included a condition that the project comply with MDSHA requirements.

Public Improvements Agreement for CTC Project. In February 1999, the Department of Permitting Services executed Public Improvements Agreement 99-027 with the CTC Project developer. This agreement required the CTC Project developer to install and complete “one-half of the ultimate roadway for Stringtown Road (A-260)” as shown on the plat. The Public Improvements Agreement required the developer to provide median, curb and gutter, 24 feet of roadway paving section, a 4-foot paved shoulder, a drainage ditch, a bikeway, a traffic signal conduit, storm drainage, monuments, sediment control measures, installation of all utility lines underground and street lights.

Council Resolution and Planning Board Approval for the CTCDD. In July 2000, the developer filed its petition to create the CTCDD. This petition requested development district funds for MD 355 lowering (\$477,786). In September 2000, the Council approved a resolution indicating its intent to consider creation of a CTCDD. In November 2000, the developer submitted the application for PAPF approval to Planning Board. In March 2001, the Planning Board sent a letter informing the County Executive of its approval of the PAPF application.

⁵¹ Transportation Planning Division staff provided copies of this memorandum and the 2 memoranda referenced below to OLO and Council staff.

Revised Development Approvals for the Highlands at Clarksburg Project. In April 2001, the Highlands at Clarksburg applicant was granted a 1-year extension to allow for a redevelopment proposal. In October 2001, the Planning Board conducted a public hearing on the revised Project Plan and Preliminary Plan applications. The Project Plan staff report identified the over-vertical curve on MD 355 as a Site Plan Review Issue. Planning staff stated the applicant had conducted several studies to assess the effect of lowering the curve on adjoining properties, especially the historic properties on the west side of MD 355. The M-NCPPC Park Archeologist had submitted a memorandum requesting that this historic site not be disturbed. MDSHA had recommended a cross section that would preserve the historic site.

In December 2001, the Planning Board mailed its Opinion approving Preliminary Plan 1-98009A, subject to 17 conditions, including Condition 10 which required access and improvements as required to be approved by MDSHA prior to issuance of access permits.

Executive's Fiscal Review of the CTCDD. Between March 2001 and October 2002, Executive staff met with the developer representatives and Planning staff to address issues associated with the establishment of the CTCDD.

On October 17, 2002 the Executive transmitted the Fiscal Report for the CTCDD to Council. The Executive portrayed the MD 355 Lowering as an improvement required by the Planning Board and as an improvement required for safety. (Note: The Executive did not request and the Planning Board did not provide specific details of the Planning Board's regulatory requirement.) The Executive recommended a revised cost estimate (\$970,000), which was more than twice the developer's initial cost estimate (\$477,786).

The discussion of the MD 355 Lowering in the Executive's Fiscal Report suggests the developer's cost estimate was based on the total project cost being shared by others. (The text states "An alternative, preferred by the Town Center developer, would be to allocate the cost of the lowering among the respective developers".) By comparison, the Executive's cost estimate reflected a contingency factor (of 20 to 30%) and the full project cost.

The Executive's rationale for allocating the full cost of the MD 355 Lowering to the CTCDD was based on the following set of assumptions and beliefs:

- That "any improvement of Stringtown Road east or west of MD 355 will necessitate lowering of the vertical curve on MD 355;"
- That the Town Center's part of Stringtown Road would precede the Highlands project;
- That the lowering would be implemented as part of Town Center's Stringtown Road project; and,
- That since the Executive proposed funding for Stringtown Road to be covered by the CTCDD, the full cost of MD 355 should be allocated to the CTCDD as well.

On October 28, 2002, the developers for CTC and Highlands met with M-NCPPC, DPWT and DPS staff to resolve conflicts in the conditions of approval for their respective preliminary plans.

Council's Approval of the CTCDD. In March 2003, the Council approved creation of the CTCDD, and the Executive proposed PDF No. 500423, Clarksburg Town Center Development District: Roads as an amendment to the Capital Improvement Program to implement the establishment of the CTCDD. This PDF provided for "acquisition of completed road improvements in the Clarksburg Town Center Development District that will be constructed by the developer and subsequently acquired by the County". The PDF indicated the programmed improvements were "Required Adequate Public Facility" (i.e., that they had been counted for the approval of new development). MD 355 Lowering was 1 of the 4 improvements the PDF identified for acquisition. The PDF authorized the appropriation and expenditure of \$9.5 million in CTCDD bond proceeds for this purpose.

Private Agreement Between the CTC Project Developers and the Highlands at Clarksburg Developer. In August 2003, developers for CTC and Highlands at Clarksburg signed an "Agreement to Share Roadway Construction Costs". This agreement stated (in part):

- Terrabrook had posted a bond for the Stringtown Road construction project;
- Terrabrook had acquired additional right-of-way from 2 property owners and dedicated amounts of property for Centex's new alignment;
- Centex agreed to pay Terrabrook \$25,000 for prorated right-of-way acquisition costs;
- Centex had engaged an engineer for MD 355 Improvements. The scope of these improvements includes lowering MD 355, a northbound right turn lane, and 2 through lanes; and
- Centex had submitted plans for SHA approval and will post construction bonds.

The agreement established Terrabrook's share of costs associated with the MD 355 Improvements at \$905,000, and capped Terrabrook's contribution at this amount. The agreement stated Terrabrook should have no involvement in elements of Route 355 project not directly or indirectly related to its responsibilities under the Development District of the Terrabrook development approvals.

Highlands at Clarksburg Developer Obtains SHA Access Permit. In October 2003, Centex posted a construction bond for MD 355 Improvements in the amount of \$1.1 million. This amount represented project costs of \$734,000 plus a 50% contingency factor. (This amount did not include the cost of a retaining wall.) In February 2004, SHA issued Permit No. 8439 to permit Centex to construct MD 355 Improvements. The permit scope included:

- A right in/right out entrance into the Highlands at Clarksburg project;

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- Improvements 700' south of Stringtown Road to include realignment and reconstruction of MD 355, full depth pavement widening, resurfacing, curb and gutter, sidewalk, storm drain systems, signing and pavement markings;
- Construction of a retaining wall to avoid impact to historic features;
- Construction of a 20' wide residential driveway to serve 5 lots; and
- Relocation of 2 existing residential driveways.

SHA confirmed for OLO that the approved plans included a northbound MD 355 right turn lane starting prior to the development's MD 355 entrance and continuing north to Stringtown Road.

SHA Acquisition of MD 355 for Maintenance. According to MDSHA before a developer improvement to a state road is accepted for maintenance, SHA's District Utilities office must send an approved final inspection memorandum to the Engineering Access Permits Division (EAPD). After EAPD receives this inspection memorandum, it releases the access permit and returns the surety. MDSHA reports that the access permit for Highlands at Clarksburg expired recently. EAPD sent an expiration notice to the permittee and the permittee sent a letter requesting an extension. EAPD reports the work is about 95% complete, with only 1 item remaining. EAPD states they will extend the access permit for 3 months, and they expect the work to be completed by late November 2007.

3. According to the regulatory record, did the Planning Board establish these obligations to comply with site plan or APF requirements?

In OLO's opinion, the intersection improvement to provide a northbound right turn lane along MD 355 to Stringtown Road was an APF requirement for the CTC Project. The requirement to lower MD 355 was not a condition of approval; however, the phasing of the CTC Project was tied to that improvement. The analysis that Transportation Planning staff conducted showed the intersection improvement was needed to comply with Section 50-35(k) of the County's subdivision regulations. Consistent with the Council's AGP guidance in place at that time, the analysis to determine the adequacy of transportation facilities used a LATR analysis only.

**CTCDD Item 7 - Clarksburg Road: MD355 to Town Center boundary and Town Center boundary to Piedmont Road
(100% Share)**

Project Scope Background. Appendix B of the County Executive's Fiscal Report includes the following discussion of this item:

Clarksburg Road For Clarksburg Road, planned as an undivided 24-36-foot wide roadway, the developer has included improvement 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. On the north half of Clarksburg Road, all but two 300-foot segments (out of 3400 feet) of the ultimate width will be constructed by subdivisions on the north side of the road. Turn lanes at the intersection of Clarksburg Road and MD 355 (\$100,000) are required of Town Center because of Local Area Review requirements, timed with issuance of the 800th building permit. The Executive concurs that this be District funded, but only if bond capacity remains after funding higher priority projects.⁵²

This project is also addressed in a Public Improvements Agreement (01-052) between the CTC Developer and the County which was executed on September 14, 2001. Item #6, Special Provisions, states, "on Clarksburg Road between MD 355 and A-305, widen the existing pavement to twenty-five (25) feet from centerline and construct curb, gutter and sidewalk".

This project is also included in the 5 projects addressed in PDF No. 500423, Clarksburg Town Center Development District: Roads. The total current cost estimate for all of the projects this PDF addresses is \$9.521M and the source of funds is Development District.

1. What developer obligations related to this CTCDD item did the Planning Board establish as a result of its regulatory approvals and where are the specific references to these obligations found in the regulatory record?

OLO's review of the Planning Board's regulatory approval documents identified the following developer obligations:

- The Planning Board's Project Plan Opinion requires the developer to construct turn lanes at the intersection of MD 121 and MD 355 (Condition #2b);
- The Preliminary Plan Opinion requires the developer to dedicate an 80' right-of-way for Clarksburg Road (Condition #5a), and to start construction of the intersection

⁵² Appendix B. Clarksburg Town Center Development District Fiscal Report, Infrastructure Projects Considered for District Funding, Roads, p.2.

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improvements at MD 355 after the issuance of the 800th building permit (Condition 16a); and

- The Site Plan Opinion for Phase I requires the developer to execute an APF agreement prior to the first record plat to reflect all transportation improvements, including improvements to MD 121. It also requires the developer to reimburse the County for any eminent domain costs incurred (Condition #19).

Project Plan. The Planning Board's Opinion (Condition #2b) requires construction of an eastbound left turn lane and a westbound left turn lane along MD 121 at MD 355.

Preliminary Plan. The Planning Board's Preliminary Plan Opinion (Condition #5a) requires "Dedication of the following roads as shown on plan must be provided as follows: (a) Clarksburg Road (MD RT 121) for ultimate 80' right-of way".⁵³ Condition 16(d) requires the developer to start construction of the eastbound and westbound intersection improvements after the 800th building permit.

Site Plan Phase I. As noted earlier, the Planning Board's Opinion for Site Plan Phase I (8-98001) includes 3 general conditions that address 3 development district items: Stringtown Road (A-260), Clarksburg Road (121) and Piedmont Road (A-305).

- Condition 17 requires "conformance to cross section and other recommendations per DPW&T, DPS memos dated January 14 and January 15, 1998".

The January 15, 1998 Department of Permitting Services memorandum states in part:

The applicant will be responsible for constructing public improvements per the DPW7T approved cross section within one half (40 feet) of the 80 foot right of way adjacent to the Town Center property (Sta 9+20 to Sta. 19+70).

- Condition 18 requires "conformance to MCPD Transportation Planning memorandum dated January 20, 1998 included in the Appendix". The Transportation Planning memorandum, characterizes Clarksburg Road as one of 3 improvements "to satisfy the previously assessed APFO review and the phasing requirements". It states:

The applicant must construct its portion of the roadways as described above in accordance with the following descriptions of each roadway:

1. Clarksburg Road (A-27) shall be a three-lane, 38-foot wide closed section roadway with a six-foot Class I bikepath on the south side and a sidewalk on the north side, offset within an 80-foot right-of-way between Frederick Road (MD 355) and Street "M", transitioning to a symmetrical section between Street "M" and Greenway Road so as to preserve an existing hedgerow. Clarksburg Road shall taper to a 32-foot-wide, open section

⁵³ Montgomery County Planning Board Revised Opinion, Preliminary Plan No. #1-95042, Clarksburg Town Center. March 26, 1996, p.4.

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roadway with four-foot shoulders within an 80-foot right-of-way between Greenway Road and Midcounty Arterial (A-305).⁵⁴

Earlier on page 2, Transportation Planning required the developer to reconstruct the southern half of Clarksburg Road along the CTC project's property frontage (station 8+10 to station 19+70); however, the memorandum deleted language requiring reconstruction of Clarksburg Road between Frederick Road and the Greenway Road.

- Condition 19 requires an APF agreement. (See page 1C-17 for this language.)

Exhibit C-8. Summary of Document References in CTC Project Regulatory Approvals to CTCDD Infrastructure Item 7 – Clarksburg Road

Source Document	Project Plan	Prelim Plan	Site Plan Phase I	Summary
Planning Board Opinion 9-94004	Condition #2b			Requires construction of eastbound left turn lane and westbound left turn lane along MD 121 at MD 355
Planning Board Opinion 1-95042		Condition #5a		Requires right-of-way dedication
Planning Board Opinion 1-95042		Condition #16d		Establishes phasing requirements
Planning Board Opinion 1-98001			Condition #18	Requires conformance to Transportation Planning memo dated Jan. 20, 1998
Transportation Planning memo, Jan. 20, 1998			Rec#5	Requires reconstruction of Clarksburg Road along specified property frontage for the CTC Project but not between Frederick Road and the Greenway Road

Source: CTC Project regulatory approvals.

⁵⁴ Transportation Planning staff memo, January 20, 1998, p.3.

2. **How do the developer obligation established by the Planning Board to “dedicate an 80’ right-of-way for Clarksburg Road,” “construct intersection improvements,” “sign an APF agreement”, and “reimburse the County for eminent domain costs” relate to the implementation of this development district infrastructure item?**

There are 2 elements to the Clarksburg Road improvements: the intersection improvements at MD 355 and MD 121; and the roadway improvements between MD 355 and A-305.

- The developer’s obligation to construct intersection improvements at MD 121 and MD 355 were not included in the project scope for Clarksburg Road, which the Council approved for “Primary List” development district funding (as recommended by the Executive). These intersection improvements were included on a “Secondary List” which the Council approved for development district funding if cost savings were realized. The intersection improvements at MD 355 and MD 121 had an estimated cost of \$100,000.

The Primary List of infrastructure items which the Council approved included 2 segments for improvements along Clarksburg Road:

- The limits of the first segment are from MD 355 to the (western) Town Center boundary with an estimated cost of \$290,000. According to the Executive’s Fiscal Report, the portion of MD 121 adjacent to the historic district was recommended to be funded as part of the development district even though it was not a developer obligation. This interpretation is consistent with the text in the Transportation Planning Division memorandum. As stated earlier, the language in this memorandum requires the developer to reconstruct the southern half of Clarksburg Road but deletes the qualifier “between Frederick Road (MD 355) and Greenway Road”.
- The limits of the second segment approved for CTCDD funding are from “Town Center boundary to Piedmont Road” at a cost of \$1,050,000. If the reference to the “Town Center boundary” refers to the western boundary, then this description matches the description in the DPS memorandum that states the developer is responsible for constructing this road adjacent to the Town Center property. This description is also similar to the language in the Transportation Planning Division memorandum which requires reconstruction “along the property frontage”. However, the limits of the reconstruction in the Transportation Planning Division memorandum (from station 8+10 to station 19+70) do not match the limits in the DPS memorandum (from station 9+20 to station 19+70.)

3. **According to the regulatory record, did the Planning Board establish these obligations to comply with site plan or APF requirements?**

Clarksburg Road Improvements from the western Town Center Boundary to Piedmont Road. The Planning Board’s regulatory record shows this improvement was included in the 4

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roadway improvements “recommended as conditions of approval to address transportation issues associated with the subject site plan”. Since this language suggests the basis for these improvements was broader than compliance with Section 50-35(k), in OLO’s opinion, this item was not an APF requirement.

When Council and OLO staff met with current Planning staff, they indicated that they believed the regulatory basis for this requirement was Section 50-24, Required public improvements; however, none of the Planning Board Opinions makes an explicit reference to this section.

Establishing the regulatory basis for this improvement is confusing because of the ambiguous use of “APF” and “AGP”. For example, the Planning Board’s regulatory approval documents require the developer to sign an “APF agreement” and the Executive’s Fiscal Report refers to this item as an “AGP Road”. Although references in the regulatory record characterize this improvement as an AGP Road, it was not identified as an APF requirement as a result of the LATR test performed at Project Plan.⁵⁵

Intersection Improvements at Clarksburg Road (121) and MD 355. The Planning Board required the intersection improvements at MD 121 and MD 355 because the Transportation Planning Division’s analysis of LATR conditions concluded they were needed to comply with the APFO in Section 50-35(k). These improvements were recommended on the secondary list of infrastructure improvements for CTCDD funding.

Clarksburg Road Improvements from MD 355 to the western Town Center boundary. Since the Planning Board did not require these improvements as conditions of approval there is no regulatory basis for their imposition.

CTCDD Item 8 - 20” Water Main

Project Scope Background. Appendix B to the County Executive’s Fiscal Report states:

A 20-inch WSSC water 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 item 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 percent 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 the District with water supply and pressure. The Executive recommends this

⁵⁵ The FY96 AGP was in place when the Planning Board conducted its Preliminary Plan review. There was no Clarksburg Policy Area and there were no Clarksburg staging ceilings.

project for District funding. All other water and sewer lines in Town Center will be funded by the developer.⁵⁶

1. What developer obligations related to this CTCDD item did the Planning Board establish as a result of its regulatory approvals and where are the specific references to these obligations found in the regulatory record?

The Project Plan Staff Report contains the only discussion of water service to the site. None of the Planning Board Opinions for the Project Plan, Preliminary Plan, or Site Plan include a requirement for a 20" water main as a condition of approval or specify the details of developer's obligation to provide water service for the CTC Project.

In the Project Plan Staff Report, Planning staff makes a finding that "the proposed development with conditions will not overburden the existing public services, nor those programmed for availability with each stage of construction".⁵⁷ Item 3, Water and Sewer, states:

A 16-inch water main exists in the right of way of Piedmont Road along the northeastern boundary of the site. WSSC records also indicate that a 16-inch water main exists within the right of way of MD 355 within 200 feet of the site. These water mains will be adequate to serve the proposed development.⁵⁸

2. How do these developer obligations established by the Planning Board relate to the implementation of this development district infrastructure item?

The former Subdivision Coordinator for the Planning Department informed OLO and Council staff that documentation of the developer's obligation to provide a water line might be found in a memorandum from WSSC to the Planning Department in the CTC Project subdivision file. At Council staff and OLO's request, the current I-270 Coordinator in the Community Planning Division followed up on this suggestion. She reported that she was unable to find any documentation from WSSC in the CTC Project file.

The current I-270 Coordinator in the Community Planning Division did provide a copy of WSSC's adopted Capital Improvement Program. This information includes a PDF for the Clarksburg Town Center Water Main Project. The current project cost is \$1,045 million and the current funding sources are Contribution/Other (\$871,000) and Development District Bonds (\$174,000). The text of the PDF states, in part, "By County Council Action, the total project cost is the responsibility of the developer". Earlier versions of the PDF, which were published before the approval of the CTCDD, displayed the total funding for this project as Contribution/Other.

⁵⁶ Appendix B. Clarksburg Town Center Development District Fiscal Report, Infrastructure Projects Considered for District Funding, WSSC Water Main, p.4.

⁵⁷ Staff Report, Project Plan No. 9-94004, Clarksburg Town Center, March 22, 1995, p.28.

⁵⁸ *Id.* at 31.

3. **According to the regulatory record, did the Planning Board establish these obligations to comply with site plan or APF requirements?**

OLO's review of the regulatory record found no reference to address this question.

CTCDD Item 9 - Greenway Trails

Project Scope Background. Appendix B of the County Executive's Fiscal Report included the following discussion of this item:

Pedestrian/bicycle trails located along major roads bordering Town Center (Clarksburg, Stringtown, and Piedmont Roads) are planned as part of the road projects and are reflected in those cost estimates. The trail along the east side of Overlook Park Road will be signed as a segment of the Clarksburg Regional Greenway system that ultimately will connect Little Bennett, Ovid Hazen Wells, and Black Rock Parks. In-park greenway trails as well as complementary park facilities in stream valleys to be dedicated to M-NCPPC are also required. Costs of the in-park Greenway trails are estimated at \$480,000 (pending Parks Department verification of scope and cost.) The Greenway trails are proposed by the Executive for District funding only if financial capacity is available after higher priority projects are fully funded. Additional trails, in areas not proposed for dedication as public parkland, will be built by the developer with non-District funds.⁵⁹

1. **What developer obligations related to this CTCDD item did the Planning Board establish as a result of its regulatory approvals and where are the specific references to these obligations found in the regulatory record?**

The Planning Board's Project Plan and Site Plan Opinions identify the greenway as a condition of approval, and the Preliminary Plan includes a condition that expressly ties the Preliminary Plan to the Project Plan.

Project Plan. In the Project Plan Planning Board Opinion, the greenway is mentioned in Condition 11 which states:

All amenities shown within each stage of development must be completed within that stage of development. The concept design for the greenway, the school/park, and other large play fields, must be completed before the approval of the first site plan. Construction of the amenities within the greenway must be finalized before the completion of Stage 3.⁶⁰

⁵⁹ Appendix B. Clarksburg Town Center Development District Fiscal Report, Infrastructure Projects Considered for District Funding, Trails and Bikeways, p.4.

⁶⁰ Montgomery County Planning Board Revised Opinion, Project Plan No. 9-94004, Clarksburg Town Center, June 12, 1995, p.6.

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Finding #5, "Is More Efficient and Desirable than the Standard Method of Development", also refers to the *greenway*. It states:

The Planning Board finds that the proposed project, as conditioned, will be more efficient and desirable than the standard method of development. This optional method project consists of a mix of uses which are recommended in the Master Plan. These uses are not permitted under the standard method of development. The amenities and facilities provided as part of the optional method of development fosters the creation of a transit and pedestrian oriented town surrounded by open space. The green way network of amenities provides a major open feature.⁶¹

The Project Plan Staff Report includes references to the dedication of the *greenway* as a condition of approval, with an additional requirement to provide a design for improvements.

- The Project Plan condition states "construction of the amenities" must be finalized before the completion of Stage 3, but it does not specify the scope of these improvements.
- The Project Plan's list of amenities includes 2 references to the *greenway*. One item is "greenway dedicated for park use" and a second item is "greenway roadways". Under Recreational Facilities, it lists "Greenway pathway and bicycle path (Class I)".
- Findings #2 and #5 also reference the *greenway*. For example, Finding #5, *Greenway Network*, states:

In accordance with the guidelines in the master plan, this development will dedicate the *greenway* for park use. In addition to this minimum requirement, the applicant will provide a design before the approval of site plan that incorporates additional tree planting, an informal trail, a commemorative park area for the family of John Clark, bikeways, and other landscape features that could only be achieved through the optional method of development.⁶²

Preliminary Plan. The Planning Board's Preliminary Plan Opinion does not explicitly reference the *greenway*; however, Condition #14 states that the Preliminary Plan "is expressly tied to and interdependent upon the continued validity of Project Plan No. 9-94004". And "each term, condition, and requirement set forth in the Preliminary Plan and Project Plan are determined by the Planning Board to be essential components of the approved plans and are, therefore, not automatically severable".

In the Preliminary Plan Staff Report, staff suggests that dedication of land was an "adequate" contribution for the developer. Specifically, staff states:

When attention is focused on total infrastructure to serve master planned development, the town center's provision of land for the future school, *greenway*

⁶¹ *Id.* at.10.

⁶² Staff Report, Project Plan No. 9-94004, Clarksburg Town Center, March 22, 1995, p.32.

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dedication and the land for a future community center and library must be included in the impact tax deliberations.⁶³

Site Plan Phase I. The Planning Board's Opinion for Site Plan Phase I refers to the greenway in Condition #37 and Condition #42.

- Condition #37 requires "landscape plans to include . . . detailed plans for greenway to include planting on steep slopes".⁶⁴
- Condition #42 requires that the development program include "MCPD review and approval of path location within the Greenway Park prior to construction".⁶⁵

The Site Plan Staff Report includes several references to the greenway.

- The discussion of Project Administration states: "PJ-11 The amenities proposed for the Phase I Site Plan need to be constructed in accordance with typical site plan phasing requirements; the design concept for the Greenway and adjoining areas has been reviewed and accepted by staff; the greenway amenities will be phased in with the Phase I Site Plan".⁶⁶
- The analysis of Conformance to the Project Plan Approval states: "the conformance of the proposed site plan to the Project Plan conditions of approval were established, with conditions, above in Project Description: Prior Approvals. The site plan conforms to the list of Amenity Areas and Recreational Facilities that were part of the Project Plan by providing the following:

Amenity Areas: Town Square, land dedicated for future civic building (with Phase II), streetscape system, neighborhood squares and green area, greenway dedicated for public use, Greenway roadway, specialty planting areas along greenway road.

Recreation Facilities: Tot Lot, Multiage Play facilities, Picnic/sitting areas; tennis courts (possible with Phase II); bikeway system; greenway pathway and bicycle path (Class I); Nature trail; Nature areas near the Pond; swimming pools, wading pools; indoor fitness facility (in Phase II).⁶⁷

(Note: See **Exhibit C-9** (on the next page) for a summary of these references.)

⁶³ Memorandum to Montgomery County Planning Board from Joseph R. Davis re Preliminary Plan No. 1-95042, Clarksburg Town Center Project, September 22, 1995, p.7.

⁶⁴ Memorandum to Montgomery County Planning Board from Wynn E. Withans, Clarksburg Town Center Phase I, January 22, 1998, p.7.

⁶⁵ *Id.*

⁶⁶ *Id.* at 20.

⁶⁷ *Id.* at 21.

2. How do the developer obligations established by the Planning Board relate to the implementation of this development district infrastructure item?

The language requiring a greenway established in the Planning Board's Project Plan, Preliminary Plan, and Site Plan Opinions appears to require the developer to dedicate the land, design the amenities, and construct the trails and park areas.

3. According to the regulatory record, did the Planning Board establish these obligations to comply with site plan or APF requirements?

The Greenway Trail system was a condition of approval to achieve compliance with the Zoning Ordinance's requirement for an amenity package under the Optional Method Zone. It is difficult to distinguish how the project scope of the item approved for development district funding relates to the overall greenway system established as a developer obligation for the CTC Project.

Exhibit C-9. Summary of Document References in CTC Project Regulatory Approvals to CTCDD Infrastructure Item 9 – Greenway Trails

Source Document	Project Plan	Prelim. Plan	Site Plan Phase I	Summary
Planning Board Opinion 9-94004	Finding #5			Establishes greenway as part of amenity package that justifies optional method zoning
Planning Board Opinion 9-94004	Condition #11			Establishes phasing for amenities and for concept plan for greenway
Planning Board Opinion 1-95042		Condition #14		Ties Preliminary Plan to continued validity of Project Plan
Planning Board Opinion 8-98001			Condition #37	Establishes landscape plans as a developer obligation to include detailed plans for the greenway to include plantings on steep slopes
Planning Board Opinion 8-98001			Condition #42	Requires MCPD review and approval of path location within Greenway Park prior to construction
Site Plan Phase I Staff Report			Text	Project administration address staff review of Greenway design concept and phasing of greenway amenities with site plan
Site Plan Phase I Staff Report			Text	Staff analysis of the conformance of the project plan identifies greenway as part of the amenity package

Source: OLO and CTC Project regulatory approvals.

A. The Chronology of Approvals for the West Germantown Development District

The West Germantown Development District (WGDD) is located in the southwest quadrant of the intersection of Clopper Road (Route 117) and Germantown Road (Route 118). The development district's boundaries are Clopper Road to the northeast, Scheaeffer Road to the southeast, and the South Germantown Recreation Park to the southwest.

The WGDD covers approximately 666 acres. It consists of 2 projects which were developed by 2 separate entities. The projects were marketed jointly under the name "Woodcliffe Park". Arcola Investment Associates¹ developed Arcola Woodcliffe Park, a 414-acre parcel with 816 units, including 714 single-family homes and 102 multi-family units. Artery Hoyles Mill, LLC² developed Artery Woodcliffe Park, a 252-acre parcel with 580 single-family homes.

Petition to create development district

Six land owners filed the initial petition to create the WGDD with the Council on June 21, 1996. They proposed a 717-acre development district that would have funded infrastructure to support the development of 1,606 residential units and a 114,000 square-foot commercial shopping center. The initial petition proposed that the development district encompass 3 subdivisions (Kings Crossing, Hoyles Mill Village, and Kingsview Village Center) and an additional tract known as the "Adrienne Wear Property". **Exhibit A-1** displays the owners and acreage of parcels initially proposed for the WGDD.

Exhibit A-1. List of Property Owners Recommended in the Initial Petition for the WGDD

	Owners in the Initial Petition	Subdivision Name	Acres
1	Arcola Investment Associates	Kings Crossing	414
2	West Germantown L.P.	Hoyles Mill Village	252
3	Adrienne Wear Property	Not under subdivision	5
4	GFS Realty	Kingsview Village Center	5 ³
5	John N. and Mary S. Deoudes		14
6	Clopper Realty Joint Venture		9
7	Montgomery County		18
8	M-NCPPC		
	TOTALS		717

Source: Initial Petition Appendix A

The initial petition proposed that the County and Maryland National Capital Park and Planning Commission (M-NCPPC) participate in the development district because each entity

¹ A Virginia general partnership.

² A Maryland limited liability company.

³ GFS Realty also had an option to purchase and additional 0.49 acre parcel.

owned land that was included in a preliminary plan of subdivision for the Kingsview Village Center. The petition gave the following reasons for seeking the financial participation of Montgomery County and M-NCPPC in the development district:

- The properties owned by the County and M-NCPPC were situated in the Kingsview Village Center Plan, where infrastructure improvements were required to proceed as a condition for the private developments;
- Certain improvements required as a condition of preliminary plan approvals would benefit a large number of County residents, “certainly well in excess of the number of new residents expected to purchase homes within the proposed District”;
- Existing regulatory approvals for developers of other surrounding properties who were not part of the petition required those developers to financially contribute to the infrastructure improvements required as a condition of the Petitioner’s preliminary plan approval;
- The Germantown Master Plan and the Planning Board, through various memoranda and transportation phasing plans, had required the construction of certain infrastructure improvements not required as a condition of the Petitioner’s preliminary plan approval (including the construction of a Park and Ride Lot);
- Certain improvements that were not required to be constructed immediately by any developer could be accelerated by funding them through a development district; and
- The County’s CIP program included improvements adjacent to the District (e.g., the relocation of MD 118) that could be coordinated with the proposed District infrastructure.⁴

Final development district

Compared to the initial proposal, the WGDD approved by the Council had 4 fewer property owners and covered 40 fewer acres. Property owners withdrew at different times for the following reasons:

- The Executive recommended that the County and M-NCPPC not participate in the district because “the cost of this type of financing is unacceptably high and neither the County nor M-NCPPC should contribute revenues required to support the funded infrastructure”.⁵

⁴ Montgomery County Council Petition for Development District. Attachment 3 to Memorandum to MCPB from Charles R. Loehr, dated August 2, 1996, p.4.

⁵ Memorandum to Marilyn J. Praisner, President, Montgomery County Council from Douglas M. Duncan, County Executive, dated September 29, 1997, p.3.

Appendix 2A. Fact Finding for the West Germantown Development District

- GFS Realty, the owner of the Kingsview Village Center, decided not to participate in the District because it was not ready to proceed with development of the Center. Later, GFS Realty asked the Council to create the Kingsview Village Center District.
- The owners of the Adrienne Wear Property asked to be excluded from the district in testimony presented to the Council on January 13, 1998.

1. What were the dates for each step of the development district approval process?

The Council's process to establish the WGDD spanned a 2-year period. It began July 30, 1996 when the Council adopted Resolution 13-636 signaling its intent to consider the creation of a district. The WGDD was created January 13, 1998 when the Council passed Resolution No. 13-1135. On August 4, 1998, the Council adopted Resolution 13-1398, authorizing the issuance of Special Obligation Bonds for West Germantown Infrastructure Improvements. **Exhibit A-2** presents dates for each step of the approval process for the WGDD.

Exhibit A-2. WGDD Chronology

Step	Description	Date
Step 1	Developer files initial petition to create a development district.	June 21, 1996
Step 2	Council holds public hearing on developer's initial petition.	July 23, 1996
Step 3	Council adopts 1 st resolution expressing intent to create a development district.	July 30, 1996
Step 4	Developers submit an application for provisional adequate public facilities (PAPF) approval to the Planning Board.	Oct. 4, 1996
Step 5	Planning Board acts on developers' PAPF application.	Nov. 6, 1996
Step 6	Executive submits Fiscal Report to Council.	Sept. 29, 1997
Step 7	Council holds public hearing.	Nov. 6, 1997
Step 8	Council adopts 2 nd resolution to create a development district.	Jan. 13, 1998
Step 9	Council adopts 3 rd resolution to specify bond conditions.	August 4, 1998

Sources: Council staff memorandum dated July 26, 1996 and Council resolutions.

2. What were the dates of the regulatory approvals for the development projects that make up the WGDD?

The WGDD consists of 2 development projects:

- A 414-acre parcel called Arcola Woodcliffe Park parcel, which was originally called “Kings Crossing;” and
- A 242-acre parcel referred to as Artery Woodcliffe Park parcel, which was originally called the “King Hargett” property and later called “Hoyles Mill Village”.

The earliest regulatory approvals for these properties were granted in 1988. On January 7, 1988, the developer’s preliminary plan application for Kings Crossing was deemed complete (Preliminary Plan 1-88006). On August 16, 1988, the preliminary plan application for the King Hargett property was deemed complete. These regulatory approvals preceded the adoption of a comprehensive Germantown Master Plan amendment.

1989 Germantown Master Plan Recommendations

In June 1989, the County Council, sitting as the District Council, approved the Germantown Master Plan. This Plan addressed the Kings Crossing and King Hargett properties as part of its recommendations for Analysis Area KI-2 in Kingsview Village. The Master Plan:

- Recommended that the area retain its R-200 zoning, and that it would be appropriate for rezoning to the PD-2 Zone;
- Called for development of Proposed Road A-297 from Schaeffer Road to Clopper Road, and the widening of Hoyles Mill Road;
- Called for measures to mitigate the environmental impacts of these improvements on Little Seneca Basin, because 3 tributaries of Little Seneca Creek drain to a section of Little Seneca Creek, which the State classifies as a Class IV stream; and
- Called for development in this area to be subject to special environmental protection measures set forth in an appendix to the Plan.

Regulatory Approvals for Artery Woodcliffe Park (King Hargett)

The Planning Board held hearings at 2 separate times on Preliminary Plan 1-88216 for the King Hargett property, which was filed August 16, 1988. The first hearing was held in December 1993. On January 11, 1994, the Planning Board mailed its Opinion, approving development of the property subject to 16 conditions.

Appendix 2A. Fact Finding for the West Germantown Development District

Condition #1 limited development of the property to 459 units. That condition also required the issuance of building permits for the project to be phased with the required roadway improvements, as outlined in 2 memoranda from the Transportation Planning Division. Condition #16 made the approval valid until February 11, 1997.

In June 1994, the Planning Board took action to increase the development limits for the King Hargett Property pursuant to the FY94 Annual Growth Policy (AGP). Specifically, in addition to the 459 units previously approved dependent on certain roadway improvements, it approved 100 more units under the Limited Residential Development Option in the FY94 AGP. This brought the total development limit to 559 units.⁶

The Planning Board held a second hearing on Preliminary Plan 1-88216 on September 29, 1994. On November 23, 1994, the Planning Board mailed an Opinion that affirmed the development increases granted in June 1994 and authorized 10 more units, bringing the total development limit to 569 units.⁷

The developer of the King Hargett Property packaged the site planning for the property into 2 applications, which were filed simultaneously. The Planning Board heard both site plan applications in June 1995. On August 1, 1995, the Planning Board mailed Opinions approving Site Plan 8-95027 for Hoyles Mill Village, Section 1 and Site Plan 8-95030 for Hoyles Mill Village, Section 2.

On May 24, 1996, the developer submitted an application to revise his approved plan, Preliminary Plan Application 1-88216R. The developer requested a revised phasing plan and an extension of the preliminary plan validity period. The Planning Board held a hearing on this application in June. On July 2, 1996, the Planning Board mailed its Opinion approving the revised plan, subject to 16 conditions.

As noted previously on page 3, later that month, the County Council held a public hearing on the developer's initial petition for a development district, adopting a resolution affirming the Council's intent to create a development district on July 30, 1996.

In October, 1998, Artery Hoyles Mill LLC, the new owner of the property, filed an application to revise the approved Preliminary Plan (1-88216R) for the property. The Planning Board heard this application in January 1999 and mailed its Opinion approving revisions to the Preliminary Plan on May 5, 1999.

Subsequently, Artery Hoyles Mill filed applications to amend the approved Site Plans for the properties. The Planning Board heard these applications in January 1999 and mailed Opinions approving the revisions on February 26, 1999.

⁶ Montgomery County Planning Board Opinion Preliminary Plan 1-88216, King Hargett Property, January 11, 1994.

⁷ Montgomery County Planning Board Opinion Preliminary Plan 1-88216 King Hargett Property, November 23, 1994.

In September 2001, the Planning Board heard the developer's application to amend the site plan for Section II (Site Plan 8-95030C, Hoyles Mill Village, Section II). The Board mailed the Opinion approving amendments to the Site Plan on September 27, 2001.

Subsequently, the developer filed applications to amend 2 approved preliminary plans (1-88216R and 1-01063) and 1 approved Site Plan (8-95030C) to address the impervious limits. The Planning Board heard these applications on April 21, 2005.

3a. Did the Planning Board's preliminary plan and site plan approvals for the Artery Woodcliffe Park project occur before or after the Council created the development district?

Exhibit A-3 presents the chronology of regulatory approvals for the King Hargett property with the dates the Council adopted its resolutions to initiate and establish the WGDD. **Exhibit A-3** shows the following:

- An initial preliminary plan for the property was approved in January 1994, 2½ years before the Council adopted its 1st resolution to consider creation of a development district (July 1996) and 4 years before the Council adopted its 2nd resolution to establish the district (January 1998).
- Subsequently in 1994, the Planning Board approved a second preliminary plan to increase the development limits and in 1996 to revise the phasing and extend the validity period. Both of these preceded Council's 2nd resolution to create the development district, which was approved January 13, 1998.
- The Planning Board approved 2 site plans for the King Hargett property in August 1995, 1 year before the Council adopted its 1st resolution to consider creation of a development district (July 1996) and 2½ years before the Council adopted its 2nd resolution to create the district (January 1998).

**Exhibit A-3. Chronology of Regulatory for Artery Woodcliffe Park
(King Hargett Property) Dec. 1993-Apr. 2005**

Type Of Action	Document	Action/Event	Date
Regulatory Review	Preliminary Plan 1-88216	Planning Board holds hearing on Preliminary Plan 1-88216 for King Hargett Property, filed August 16, 1988.	Dec. 9, 1993
	Preliminary Plan 1-88216	Planning Board mails Opinion approving Preliminary Plan for King Hargett Property, subject to 16 conditions. Condition #1 limits development to 459 units and provides for roadway improvements and building permit phasing as outline in Transportation Planning Division memo dated Dec. 3, 1993, revised on Dec. 8, 1993.	Jan. 11, 1994
Type of action unknown.	Preliminary Plan 1-88216	Planning Board actions on June 16, 1994 and June 30, 1994 approve 559 lots pursuant to FY94 AGP, including 459 approved dependent on certain roadway improvements and 100 under Limited Residential Development Option for the FY94 AGP (Planning Board Opinions mailed November 23, 1994 and July 2, 1996.)	June 16, 1994 June 30, 1994
Regulatory Review	Preliminary Plan 1-88216	Planning Board holds hearing on Preliminary Plan 1-88216, filed August 16, 1988.	Sept. 29, 1994
Type of action unknown.	Preliminary Plan 1-88216	Planning Board mails Opinion affirming development increases approved in June 1994 plus approval of 10 more units, bringing total development capacity to 569 units.	Nov. 23, 1994
Regulatory Review	Site Plan 8-95027	Developer's (Gateway Germantown LP) application for Site Plan 8-95027 is deemed complete.	Feb. 7, 1995
	Site Plan 8-95030	Developer's (Gateway Germantown LP) application for Site Plan 8-95030 is deemed complete.	Feb. 7, 1995
	Site Plan 8-95027	Planning Board holds hearing on Developer's (Gateway Germantown LP) application for Site Plan 8-95027.	June 1, 1995
	Site Plan 8-95030	Planning Board holds hearing on Developer's (Gateway Germantown LP) application for Site Plan 8-95030.	June 1, 1995
	Site Plan 8-95027	Planning Board mails Opinion approving Site Plan 8-95027 for Hoyles Mill Village Sec. 1 subject to 12 conditions.	Aug. 1, 1995
	Site Plan 8-95030	Planning Board mails Opinion approving Site Plan 8-95030 for Hoyles Mill Village Sec. 2 subject to 14 conditions.	Aug. 1, 1995
	Preliminary Plan 1-88216R	Planning Board holds hearing on developer's request to revise previous conditions of approval to propose a revised phasing plan and to request an extension of the validity period.	June 20, 1996
Development District	1 st Resolution	Developer files petition to establish "West Germantown Development District" with County Council.	June 21, 1996
Regulatory Review	Preliminary Plan 1-88216R	Planning Board mails Opinion approving Preliminary Plan 1-88216R for King Hargett Property pursuant to the FY94 AGP Alternative Review Procedures for Limited Residential Development, subject to 16 conditions.	July 2, 1996

**Exhibit A-3. Chronology of Regulatory for Artery Woodcliffe Park
(King Hargett Property) Dec. 1993-Apr. 2005 (continued)**

Type Of Action	Document	Action/Event	Date
Development District	Petition #1	Council holds public hearing on Developer's petition	July 23, 1996
	Council's 1 st Resolution	Council adopts Resolution 13-636 stating its intent to create a development district. CE approved this resolution.	July 30, 1996
	Council's 2 nd Resolution	Council adopts Resolution 13-1135 to create WGDD.	Jan. 13, 1998
	Council's 3 rd Resolution	County Council adopts Res. 13-1398, Authorization of Special Obligations Bonds (West Germantown Infrastructure Improvements)	Aug. 4, 1998
Regulatory Review	Preliminary Plan 1-88216R	Developer's (Artery Hoyles Mill LLC) application to revise Preliminary Plan 1-88216R for King/Hargett Property is deemed complete.	Oct. 6, 1998
	Preliminary Plan 1-88216R	Planning Board holds hearing on developer's (Artery Hoyles Mill LLC) application to revise Preliminary Plan 1-88216R for King/Hargett Property.	Jan. 21,-1999
	Site Plan 8-95027A and 8-95030A	Planning Board holds hearing on Site Plans 8-95027A and 8-95030A, Hoyles Mill Village.	Jan. 21, 1999
	Site Plan 8-95027A and 8-95030A	Planning Board mails Opinion approving Site Plans 8-95027A and 8-95030A, Hoyles Mill Village, subject to 2 conditions. Condition #2 states that the conditions of approval that were part of the original approvals for Site Plan 8-95027 and 8-95030 remain in effect.	Feb. 26, 1999
	Preliminary Plan 1-88216R	Planning Board mails Opinion approving revisions to Preliminary Plan 1-88216R for King/Hargett Property subject to 2 conditions. Previous conditions of preliminary approvals as contained in Planning Board's Opinions dated 11-23-94 and 6-20-96 remain in effect.	May 5, 1999
	Site Plan 8-95030C	Planning Board holds hearing on Site Plan 8-95030C, Hoyles Mill Village Sec. II.	Sept. 13, 2001
	Site Plan 8-95030C	Planning Board mails Opinion approving Site Plan 8-95030C, Hoyles Mill Village Sec. II, subject to 5 conditions.	Sept. 27, 2001
	Preliminary Plan 1-88216R 1-01063 Site Plan 8-95030C	Developer's application to amend approved preliminary plans 1-88216R and 1-01063 and Site Plan 8-95030C to increase the impervious limit is deemed complete.	Date not available.
	Preliminary Plan 1-88216R 1-01063 Site Plan 8-95030C	Planning Board mails Opinion to approve developer's application to amend approved preliminary plans 1-88216R and 1-01063 and Site Plan 8-95030C to increase the impervious limit, per copy of staff report dated April 21, 2005. (Specific date not available.)	2005

Source: M-NCPPC DAIC

Regulatory Approvals for Arcola Woodcliffe Park (Kings Crossing)

In March 1995, the Planning Board held a hearing on the Preliminary Plan application for the Kings Crossing property (#1-88006). On March 21, 1995, the Planning Board mailed an Opinion approving the development of Kings Crossing subject to 16 conditions.

Condition #1 limited development to 816 units. That condition also required the issuance of building permits for the project to be phased with the required roadway improvements, as outlined in 3 memoranda from the Transportation Planning Division dated February 17, 1995, March 9, 1995, and March 10, 1995. Condition #16 made the approval valid until April 21, 1998.

In October 1995, the Planning Department deemed the property owner's site plan application for Kings Crossing to be complete (Site Plan 8-96011). On March 21, 1996, the Planning Board approved the Site Plan for Kings Crossing, subject to 15 conditions.

Subsequently, the property owner filed an application to amend the approved Site Plan (#81996011D). On February 10, 2006, the Planning Board mailed an Opinion approving Site Plan 81996911D, Kings Crossing Moderately Priced Dwelling Units (MPDUs), subject to 14 conditions.

3b. Did the Planning Board's preliminary plan and site plan approvals for the Arcola Woodcliffe Park project occur before or after the Council's adoption of the resolution to create the development district?

Exhibit A-4 presents the chronology of regulatory approvals for the King Crossing's property and the dates the Council adopted its resolutions to initiate and establish the WGDD. **Exhibit A-4** shows the following:

- An initial preliminary plan for the property was approved in March 1995, 1 year and 4 months before the Council adopted its 1st resolution to consider creation of a development district (July 1996) and 2 years and 10 months before the Council adopted its 2nd resolution to establish the district (January 1998).
- The Planning Board approved a Site plan for the Kings Crossing (8-96011) property in March 1996, 4 months before the Council adopted a resolution to consider creation of a development district (July 1996) and 1 year and 10 months before the Council adopted a resolution to create the WGDD (January 1998).
- In February 2006, almost 10 years after the Council adopted its 2nd resolution to establish the WGDD (July 1996), the Planning Board approved a Site Plan amendment to permit development of MPDUs.

Exhibit A-4. Chronology of Regulatory for Arcola Woodcliffe Park (King Crossing Property) March 1995-February 2006

Type Of Action	Document	Action/Event	Date
Regulatory Review	Preliminary Plan 1-88006	Planning Department deems developer's Preliminary Plan Application for Kings Crossing to create 816 lots on 414 acres to be complete.	Jan. 7, 1988
	Preliminary Plan 1-88006	Planning Board holds hearing on Preliminary Plan application for Kings Crossing.	March 16, 1995
	Preliminary Plan 1-88006	Planning Board mails Opinion approving the Preliminary Plan for Kings Crossing, subject to 16 conditions. Condition #1 limits development to no more than 816 dwelling units and provides for the necessary roadway improvements and building permit phasing as outlined in Transportation Planning Division memos dated Feb. 17, 1995, March 9, 1995 and March 10, 1995.	March 21, 1995
	Site Plan 8-96011	Planning Department deems developer's Site Plan application for Kings Crossing to be complete.	Oct. 27, 1995
	Site Plan 8-96011	Planning Board mails Opinion approving the Site Plan for Kings Crossing, subject to 15 conditions.	March 21, 1996
Development District	Petition #1	Council holds public hearing on developers' initial petition for the WGDD.	July 23, 1996
	Council's 1 st Resolution	Council adopts Resolution 13-636 stating its intent to create a development district. CE approved this resolution.	July 30, 1996
	Council's 2 nd Resolution	Council adopts Resolution 13-1135 to create WGDD with note that GFS Realty and property owners for Kingsview wished to delay creation of district for Kingsview Village Center properties. District includes properties owned by Arcola Investment Associates, Artery Hoyles Mill LLC and Mr. and Mrs. Robert Sisson. It consists of 670.7 acres and 2 improvement areas.	Jan. 13, 1998
	Council's 3 rd Resolution	County Council adopts Res. 13-1398, Authorization of Special Obligations Bonds (West Germantown Infrastructure Improvements).	Aug. 4, 1998
Regulatory Review	Site Plan 81996011D	Developer's filed Site Plan application for Kings Crossing MPDUs is deemed complete.	Date not available.
	Site Plan 81996011D	Planning Board mails Opinion approving Site Plan 81996011D, Kings Crossing MPDUs, subject to 14 conditions.	Feb. 10, 2006

Source: M-NCPPC Development Approval Information Center.

B. Evolution of Infrastructure Items Approved for Funding in the WGDD

The process to create a development district incorporates multiple of lists of infrastructure items to be financed by the development district. Publication of these infrastructure lists occur when:

- The developer submits an initial petition to Council;
- The developer submits a provisional adequate public facilities (PAPF) application to the Planning Board;
- The Executive prepares his Fiscal Report; and
- The Council adopts the 2nd resolution.

This section examines how the lists of infrastructure items to be funded by the WGDD evolved. The source documents for this review include the developer's initial petition, the developer's PAPF application, the Planning Board's PAPF approval letter to the County Executive, the Executive's Fiscal Report, and the Council's resolutions.

Exhibit B-3 (on pages 2B-12 and 2B-13) summarizes the developer's initial infrastructure funding requests, the recommendations made by the Planning Board and the Executive, and the items the Council approved for funding. The sections that follow provide more detail about the proposed improvements and the rationale for each recommendation.

1. What infrastructure items did the developers propose for development district financing in their initial petition for a development district?

The petition the developer filed for development district financing proposed 8 transportation improvements, 3 water and sewer improvements, and 2 "other improvements".

Exhibit B-1 (on the next page) uses excerpts from the developers' initial petition to describe each of those items in more detail.

Exhibit B-1. Items Proposed for District Financing – Owners’ Initial Petition

Item	Transportation Improvements
Richter Farm Road (A-297)	“Includes construction grading of four lanes and paving of two lanes (or if the County participates in the District, paving of four lanes) from Clopper Road to MD Route 118 (with participation by other party, Kingsview Village) and participation in the reimbursement of construction costs from MD 118 to Great Seneca Highway”.
Schaeffer Road	“Construct pavement widening and half section roadway improvement along western side from Hoyles Mill Road to southern property line of Hoyles Mill Village”.
Hoyles Mill Road (A-298) and Kings Crossing Blvd	“Includes partial roadway construction and road widening of Hoyles Mill Road from Richter Farm Road to Schaeffer Road (per the Planning Board Opinion approving Site Plan 8-95030); full roadway construction of Kings Crossing Boulevard from Richter Farm Road to the park property; full roadway construction of A-298 as a two-lane arterial from Great Seneca Highway to a point where adjacent property owner construction commences; and right of way acquisition and construction for Hoyles Mill Road (per the Planning Board Opinion approving Preliminary Plan #1-95011)”.
Mateney Road	“Participation in the reimbursement of construction costs between Great Seneca Highway easterly to existing segment (per the Planning Board Opinion approving Preliminary Plan #1-88006)”.
Clopper Road (MD Route 117)	“Includes participation in construction of intersection improvements at Richter Farm Road and Hopkins Road including the construction of an eastbound acceleration/deceleration and a left-turn bypass lane on Route 117 at the intersection with Rt. A-297 and a left turn bypass lane on eastbound Route 117 at the intersection of Hopkins Road (per the Planning Board Opinion approving Preliminary Plan #1-88006); participation in the relocated MD Route 118 project, including reimbursement to the County for a portion of the intersection improvements incorporated into the County’s MD 118 Relocated project (as discussed per memorandum from Craig Hedberg to Bud Liem, dated July 11, 1995 per the Planning Board Opinion approving Preliminary Plan #1-88216); and the widening of MD Rt. 117 from MD Rt. 118 to Great Seneca Highway, with streetscape improvements (per the Planning Board Opinion approving Preliminary Plan #1-95011)”.
Great Seneca Highway	“Intersection improvements at MD Route 117, including right turn lane on northbound Great Seneca Highway to eastbound MD Rt. 117 (per the Planning Board Opinion approving Preliminary Plan #1-95011); and construction of acceleration lane from eastbound proposed A-297 to southbound Great Seneca Highway (per the Planning Board Opinion approving Preliminary Plan #1-88006)”.
Route A-270	“Construction of proposed A-270 to arterial road standards with 80 feet of right of way from MD Rt. 117 to site boundaries (per the Planning Board Opinion approving Preliminary Plan #1-95011)”.

Exhibit B-1. Items Proposed for District Financing – Owners’ Initial Petition (continued)

Item	Water And Sewer Improvements
Park and Ride lot -	“Dedication of 150 acre Park and Ride lot at the southwest corner of the intersection of MD Rt. 117 and proposed A-270 (per the Planning Board Opinion approving Preliminary Plan #1-95011), with County to fund all construction costs thereof”.
Hoyles Mill Wastewater Pumping Station	“(WSSC CIP Project No. S-84.21) and Force Main (WSSC CIP Project B No. S-84.22) – includes full construction”.
Interim Wastewater Pumping Station	“(WSSC CIP Project No. S-82.13) and Force Main (WSSC CIP Project No. S-82.14) - includes full construction”.
Outfall Sewer	“Includes construction of sanitary sewer outfall to the Hoyles Mill Wastewater Pumping Station (per WSSC authorization #96-1517A & #94-9988L.)
Item	Other Improvements
Stormwater management	“Offsite construction of stormwater facility for Kingsview Village Center”.
Local parks	“Includes construction of local parks, pedestrian walkways and bike paths on and adjacent to Kings Crossing, Hoyles Mill Village and Kings Village Center properties as referenced in the Planning Board Opinion approving Preliminary Plan #1-88216, #1-88006 and #1-95011 (with County to fund construction costs of Kings Village Center park.)”

Source: Petition for development District filed by West Germantown Development District Association, Inc. Arcola Investment Associates, West Germantown L.P., Schaeffer Road, L.L.C., GFS Realty, Inc., John N. & Mary S. Deoudes, Clopper Realty Joint Venture, LLC, Adrienne Wear, Schedule B, filed June 21, 1996.

A memorandum from Council staff to the full Council compared the infrastructure the petitioner proposed for funding in the development district application to infrastructure that would have been provided through the regulatory process. Council staff stated:

The development district application includes less of a contribution to public infrastructure cost than the current subdivision approvals call for, in at least two ways. First of all, while these developers must now construct all 4 lanes of Richter Farm Road within their properties as a condition of their respective subdivision approvals, the development district application would have them construct 2 lanes and grade the remaining 2 lanes.

Furthermore, of the \$13 million in road improvements proposed, virtually none of them are in the Germantown Impact Tax Program, which means that – without a development district—these developers would normally be expected to construct the \$13 million of improvements and pay their impact taxes. At current impact tax rates in Germantown, the 1,606 dwelling units and 114,000 square feet of retail space would generate approximately \$3.8 million in impact tax revenue.

However, development district payments are credited against impact tax payments, which means that the \$3.8 million revenue anticipated from these developments to fund impact tax roads would evaporate. All else being equal, half that cost would ultimately be absorbed by future impact tax payers in Germantown (in the form of slightly higher rates) and half would be absorbed by general County revenue.

Before proceeding with final approval of a district, the Planning Board and the Executive should compile a strict accounting of all the contributions from the developers that would be included in the district, with and without the district.⁸

At the end of the packet, Council staff noted that a benefit of the development district is that it would produce a more coordinated build-out than if each development were to proceed independently.

2. Did the infrastructure included in the developer's PAPF application differ in any way from the list included in the developer's initial petition?

The infrastructure list in the developer's PAPF application filed with the Planning Board was identical to the infrastructure list filed in the Council's initial petition; however, according to the developer, this infrastructure list had 1 less improvement than the aggregate lists of infrastructure requirements in the preliminary plan conditions for the projects in the proposed development district. In a cover memorandum for the PAPF application, the developer stated:

Attached as Exhibit "I" is a list of the proposed infrastructure improvements which the Petitioners of the District propose to construct or otherwise provide in connection with the development of the area. This list of infrastructure improvements is an aggregation of the previously approved preliminary plan conditions for King's Crossing (#1-88006), Hoyles Mill Village (#1-88216) and Kingsview Village Center (#1-95011), with one exception...

This change involves the paving of Richter Farm Road or A-297 from Clopper Road to MD 118. The preliminary plans (together with the preliminary plan of another developer who is not a Petitioner) require A-297 to have four (4) paved lanes. The Applicants propose grading four (4) lanes, but paving only two (2), as well as participating in the construction of A-297 from MD Route 118 to Great Seneca Highway⁹

⁸ Memorandum to County Council from Glenn Orlin, Deputy Council Staff Director, re Action – Resolution indicating the Council's intent to create a Germantown West Development District, July 26, 1996, p.3.

⁹ Letter to Charles R. Loehr from Stephen Z. Kaufman and John R. Orrick, Jr. re Application for Adequate Public Facilities Approval West Germantown Development District, October 4, 1996, p.2.

3. What infrastructure items did the Planning Board approve for funding through the development district?

The Planning Board considered the developer's PAPF application at a public meeting held October 31, 1996 and transmitted its recommendation to the County Executive on November 6, 1996. The Planning Board added 2 intersection improvements and an elementary school to the list of infrastructure improvements proposed by the developer.¹⁰

The Board approved the Planning staff's recommendation to approve the adequate public facilities analysis subject to 5 conditions.

- Condition #3 required "all improvements shown in the development district application to be included";
- Condition #4 required "additional intersection improvements at Great Seneca Highway/A-297 and MD 118/A-297 as described in Transportation Planning Division Memorandum of October 22, 1996"; and
- Condition #5 required "a new elementary school as described in Montgomery County Public Schools Memorandum of October 14, 1996".¹¹

The Planning staff report stated the role of the Planning Board was to identify the public facilities needed to support buildout of the development district, and that the AGP contained the criteria the Planning Board must use to evaluate adequacy. Planning staff stated that the transportation test was essentially the same as that used for subdivision review, but that the tests for schools, water and sewer, and police, fire, and health were more stringent than those applied at subdivision.

The Planning staff report also included memoranda from agency staff presenting the results of various facility analyses. Specifically:

- Planning Board staff's transportation analysis found the infrastructure proposed for the development district would be adequate with the addition of 2 intersection improvements;
- MCPS staff's school analysis concluded a new elementary school would be needed;
- WSSC staff's water and sewer analysis found additional facilities that were programmed and fully funded in the CIP would address the inadequacies of the existing facilities; and

¹⁰ The transportation items the Board added were intersection improvements at Great Seneca Highway/A-297 and MD 118/A-297 and a lower taper of A-297. The Board also expanded the scope of the local park improvement to require development district reimbursement of the project's professional service fees. In response to this addition, after the Board transmitted its recommendations to the Executive, the developer added an item to request reimbursement.

¹¹ Montgomery County Planning Board, Approved Minutes for October 31, 1996, Item #16, Adequate Public Facilities Review for West Germantown Development District, p.11.

- Executive staff found police, fire, and health facilities would be adequate.

A memorandum from the Transportation Planning Division to the Chief of Development Review dated October 22, 1996 concluded that:

The Development District meets the APFO review requirements with implementation of all roadway improvements as previously conditioned upon their subdivision approvals and the reduced A-297 construction including additional intersection improvements as described in this memo.¹²

On July 31, 1997, the Planning Board voted to remove the new elementary school from the list of public facilities necessary to support buildout of the development district. This action was based on a revised analysis from Montgomery County Public Schools that showed that existing and programmed school facilities would be adequate to support the development district growth, using the AGP guidelines. The Planning staff report explained that the original MCPS recommendation had considered only the capacity of schools serving the proposed development, whereas the Annual Growth Policy required the capacity of all schools in the cluster to be considered. Given this error in calculation, the applicant had asked the Planning Board to reconsider its recommendation.

4. What infrastructure items did the Executive recommend that the development district fund?

The Executive added infrastructure items for development district financing to ensure that the development district would be used to fund long term infrastructure items with a broader scope of needs than those required through the APFO. The specific "general benefit" items the Executive added were:

- Paving for an additional 2 lanes for 2 segments of Richter Farm Road, from MD 117 to Schaeffer Road, and from Schaeffer Road to MD 118 (Item 1);
- An enhanced scope of improvements for Leaman Farm Road (A-298) (No item number); and
- An enhanced scope of improvements for local parks (Item 13).

The Executive recommended removing 11 items that the developer had requested and the Planning Board had recommended for development district financing. These were a mix of

¹² Memorandum to Charles R. Loehr, Development Review Division from Ki H. Kim, Transportation Planner, Transportation Planning Division dated October 22, 1996. The memorandum identifies the developments proposed for the development district are Kings Crossing, Hoyles Mill Village, and Kingsview Center, and states the developments have received APF approval with a condition to provide a package of roadway improvements. It goes on to state that the applicants of the development district "are now proposing a package of roadway improvements that are different from the conditions of their subdivision approvals, and the main difference involves construction of roadway A-297 as a two-lane roadway instead of a four-lane roadway".

items the Executive was not willing to fund (e.g., professional service fees, items removed to improve the overall affordability of the development district, and items the developer had identified as opportunities for County participation). The specific items the Executive recommended for deletion were:

- Reimbursement for the 4 lane portion of MD 118 to GSH (Item 1);
- Hoyles Mill Road and King's Crossing Boulevard (Item 5);
- Mateney Road (Item 6);
- Great Seneca Highway (Item 8);
- The Park and Ride Lot (Item 10);
- A-297 Lower Taper Extension (no item number);
- The contribution to the off-site stormwater management facility (Item 12);
- The Planning Board's request for professional services fees (Item 13a);
- The developer's request to be reimbursed for WSSC Review Fees (Item 13b);
- The Interim Pumping Station (Item 3); and
- The outfall sewer (Item 11).

The Executive's Fiscal Report presented the reasons for the Executive's modifications to the development district. It explained that the Executive's goal was to "find a plan that allows significant and valuable development to move forward while at the same time assuring the appropriate balance of benefits and risks". To achieve this goal, the Executive:

- Reduced the amount of required financing and tax burden on future homeowners in the district by one-third; and
- Added infrastructure items that he characterized as "general benefit improvements"(e.g., a major 4 lane arterial road through the development and 2 local parks).

The discussion of the inclusion of general benefit improvements in the Executive's Fiscal Report recapped the Council's intent to use development districts to fund long term infrastructure improvements to address a broader scope of needs and facility types than that required by the APFO review. The Executive stated that a second objective, consistent with the Council's concept, was to ensure that developers did not unduly benefit from development district financing and that overall costs to future homeowners did not increase.

In the Executive's view, the impact tax credit provided a clear benefit to the petitioners of the WGDD (estimated at \$2.9 million). Moreover, the list of infrastructure improvements proposed by the developers did not provide sufficient benefit to the other taxpayers in the Germantown impact tax area to balance this benefit. To correct this imbalance, the Executive recommended:

That any package of infrastructure improvements funded through a West Germantown Development District include general benefit improvements in an amount at least approaching the amount of impact tax credit received by the developers. Specifically, the County Executive recommends including in the infrastructure package the funding and construction of A-297 as a four-lane, rather than two-lane roadway from MD 117 to MD 118, the construction of transportation infrastructure that would support future County Government development adjacent to the Kingsview Village Center property, and the improvements to two local parks in the King's Crossing and Hoyle's Mill Village developments.¹³

To fit these general benefit improvements into the reduced amount of financing that the Executive had established to make the development district tax rates affordable for future homeowners, the Executive removed several items for district financing which the developers had originally proposed. The explanation in the Executive's Fiscal Report states:

Because the amount available for acquisition of infrastructure improvements is less than that originally proposed by the developers, the County Executive has worked with the developers to prioritize infrastructure items for financing through the district. A detailed list of infrastructure improvements recommended by the County Executive for financing through the development district and their most current cost estimates is presented at Table C. The Executive has insisted that A-297 be constructed at its four, rather than two-lane cross section consistent with the Master Plan for the Germantown West Policy Area, and that the local parks for King's Crossing and Hoyles Mill Village be improved at a standard consistent with other public use local parks implemented by M-NCPPC. These priorities are reflected in the recommended infrastructure list. To the extent that the items cost less than estimated at the time of the bond issue, the proceeds would be available to fund other infrastructure items that were not included.¹⁴

The Executive's Fiscal Report indicates that the Executive conducted his analysis pursuant to Section 14-8 of the Montgomery County Code, Chapter 14, Development District Act. The Fiscal Report included comments from WSSC and MCPS, a table of cost estimates, a calculation of impact tax credits, and cost estimates for the County Executive's recommended items. The Executive's Fiscal Report did not address the regulatory approvals the infrastructure items had received or the underlying basis for these approvals.

¹³ County Executive's Fiscal Report West Germantown Development District, September 29, 1997, p.11.

¹⁴ *Id.* at 13.

5. What infrastructure items did the Council decide to fund through the development district?

The Council held a public hearing on the 2nd resolution to establish the WGDD on November 6, 1997. Subsequently, the Management and Fiscal Policy Committee held 2 worksessions on the proposed WGDD, followed by a full Council worksession on December 9, 1997.

The resolution the Council introduced for public hearing purposes divided the proposed development district into 2 areas, each with its own infrastructure list:

- Improvement Area I encompassed the King's Crossing and Hoyles Mill Village projects; and
- Improvement Area II encompassed the Kingsview Village Center project.

The resolution also presented 2 options for the list of infrastructure for Improvement Area I:

- Option A, the Developer's Option, proposed the development district fund 3 segments for Richter Farm Road (A-297) plus an outfall sewer; and
- Option B, the Executive's Recommended Option, proposed the development district fund a fourth segment of Richter Farm Road in place of the outfall sewer.

The infrastructure list for Improvement Area II consisted of 3 transportation improvements:

- A-298 Leaman Farm Road (Item 5) at an estimated cost of \$1.641 million;
- Clopper Road (MD 117) (Item 7) at an estimated cost of \$1,117 million; and
- A-270 Kingsview Village Avenue (Item 9) at an estimated cost of \$519,882.

The Council staff memorandum for the full Council worksession reported the following updates of issues that had been discussed previously:

- The developers accepted the Executive's infrastructure recommendations. Council staff stated, "most importantly, the developers agreed to fund the completion of all 4 lanes of Richter Farm Road (A-297) entirely through the district and agreed to fund an outfall sewer privately, rather than through the district".

Appendix 2B. Fact Finding for the West Germantown Development District

- Kingsview Village Center withdrew from the district because its primary developer, GFS Realty Inc., was not ready to proceed. Council staff stated that the area could be included in a later district, and that the deletion of GFS led to a minor change in the road improvement package required by the Planning Board. A memorandum from Transportation Planning stated, based on a review of the traffic impact study used in the last Planning Board discussion of the WGDD, a second eastbound left-turn lane along Richter Farm Road (A-297) at Great Seneca Highway was no longer needed.

Resolution 13-1135, which established the WGDD, identified 4 infrastructure items to be funded by the WGDD. The cost of the improvements was estimated at \$12.8 million, and the WGDD was expected to cover 100% of those costs.

The Council also approved a list of 13 items that could be funded if cost savings resulted. The items, which were listed in priority order, had an estimated cost of \$3.5 million.

Exhibit B-2. Items Approved for WGDD Financing – Council Resolution 13-1135

	Item	Estimated Cost	% Cost funded by District	Est. Completion Date
1a.	Richter Farm Road A-297 MD 117 to Schaeffer Road (2 lanes)	\$4,124,866	100%	Dec. 1999
1b.	Richter Farm Road A-297 – MD 117 to Schaeffer Road (additional 2 lanes)	\$1,100,000	100%	Dec. 1999
1c.	Richter Farm Road A-297 – Schaeffer Road to MD 118 (2 lanes)	\$1,791,098	100%	Dec. 2001
1d.	Richter Farm Road A-297- Schaeffer Road to MD 118 (additional 2 lanes)	\$364,949	100%	Dec. 2001
	Schaeffer Road (Item 4)	\$992,244	100%	Nov. 1998
	Local Parks (Item 13)	\$620,000	100%	Dec. 2003
	Hoyles Mill Wastewater Pumping Station/Force Main (Item 2)	\$3,838,020	100%	Dec. 1998
	Total Cost	\$12,831,177		

Source: Resolution 13-1135, Exhibit D, adopted January 1998.

6. How did the list of infrastructure items that the Council approved compare to the list recommended by the Executive?

The infrastructure items the Council approved for development district financing differed substantially from the list recommended by the Executive. Specifically, the Council:

- Affirmed the Executive's recommendation to add 2 additional lanes to each of the segments of Richter Farm Road which the developer had initially proposed for 2 lanes only (Items 1b and 1d);
- Affirmed the Executive's recommendation's to delete 11 items to improve the affordability of the development district and to reflect the County's decision not to participate (Items 1e, 2, 3, 5; 6, 8, 10, 11, 12, and 14); and
- Deleted 3 items that were no longer needed because of GFS Realty's decision to withdraw from the development district (Item 1f, A-298 Leaman Farm Road, and Item 9).

Exhibit B-3 (on the next 2 pages) displays the item by item changes through the various phases of the district process.

Exhibit B-3. Infrastructure Items to be Funded By the WGDD - Initial Petition to Final Approval

Item # in Initial Petition	Infrastructure Item	Developers' Initial Petition (Sch. B)	Developers' PAPF Application (Exh. I)	Planning Boards' PAPF Letter	County Exec's Fiscal Report (Table C)	Res. 13-1135 (Exh. D only)
Transportation Improvements						
1	Richter Farm Rd A-297					
	1a. MD 117 to Schaeffer (construction grading of 4 lanes and paving of 2 lanes)	Yes	Yes	Yes	Yes	Yes
	1b. MD 117 to Schaeffer (paving of 2 additional lanes)	No	No	No	Yes	Yes
	1c. Schaeffer to MD 118 (construction grading of 4 lanes and paving of 2 lanes)	Yes	Yes	Yes	Yes	Yes
	1d. Schaeffer to MD 118 (paving of 2 additional lanes)	No	No	No	Yes	Yes
	1e. KC (Kings Crossing) and HMV (Hoyles Mill Village) contribution towards 4 lane portion from MD 118 to GSH (Great Seneca Highway)	Yes	Yes	Yes	No	No
	1f. Less KV (Kingsview Village) reimbursement for A-297	No	No	No	Yes	No
4	Schaeffer Road	Yes	Yes	Yes	Yes	Yes
5	Hoyles Mill Road and King's Crossing Blvd	Yes	Yes	Yes	No	No
N.A.	Leaman Farm Road (A-298)	Yes	Yes	Yes	Yes	No
6	Mateney Road	Yes	Yes	Yes	No	No
7	Clopper Road (MD 117)	Yes	Yes	Yes	Yes	No

Exhibit B-3. Infrastructure Items to be Funded By the WGDD - Initial Petition to Final Approval (Continued)

Item # in Initial Petition	Infrastructure Item	Developers' Initial Petition (Sch. B)	Developers' PAPF Application (Exh. I)	Planning Boards' PAPF Letter	County Executive's Fiscal Report (Table C)	CC's Res. #13- 1135 (Exh. D only)
Transportation Improvements						
8	Great Seneca Highway (GSH)	Yes	Yes	Yes-Modified	No	No
9	A-270 Kingsview Village Avenue	Yes	Yes	Yes	Yes	No
10	Park and Ride Lot	Yes	Yes	Yes	No	No
N.A.	A-297 Lower Taper Extension	No	No	Yes-Added	No	No
Other Improvements						
12	Contribution to Off-site Stormwater Management Facility	Yes	Yes	Yes	No	No
13	Local Parks	Yes	Yes	Yes	Yes	Yes
N.A.	Professional Services (Legal and Engineering)	No	No	Yes	No	No
N.A.	WSSC Review Fees ¹⁵	Not initially	Not initially	No	No	No
N.A.	Elementary School	No	No	Yes/No ¹⁶	No	No
Water And Sewer Improvements						
2	Hoyles Mill Wastewater Pumping Station/Force Main	Yes	Yes	Yes	Yes	Yes
3	Interim Pumping Station	Yes	Yes	Yes	No	No
11	Outfall Sewer	Yes	Yes	Yes	No	No

Source: Developers' initial petition filed June 21, 1996 (Schedule B), Developers' PAPF Application filed October 3, 1996, (Exhibit I), Letter from William H. Hussmann to Douglas M. Duncan dated Nov. 6, 1996, County Executive's Fiscal Report (Table C), and Council Resolution 13-1135 Exhibit D.

¹⁵ According to the County Executive's Fiscal Report, the developers' requested reimbursement of WSSC Review fees at an estimated cost of \$400,000 after the Planning Board had submitted its recommendation to the Executive.

¹⁶ The Planning Board's initial PAPF letter recommended an elementary school for development district financing. A follow-up letter subsequently recommended dropping this requirement.

C. OLO's Review of the Regulatory Requirements for the Arcola and Artery Woodcliffe Park Projects and the WGDD Infrastructure Items

At the request of Council staff, OLO conducted a review of Planning Board regulatory documents for the Arcola Woodcliffe Park and Artery Woodcliffe Park projects. OLO's review included the Planning Board's Preliminary Plan and Site Plan Opinions for the Arcola Woodcliffe Park and Artery Woodcliffe Park projects, plus Transportation Planning Division memoranda referenced in the Board's Opinions. OLO did not review plan drawings, signature set documents, or other agency letters in the subdivision file.

Council staff asked OLO to identify references to any of the infrastructure items approved for funding by the WGDD, and answer 3 questions which are listed below. **Exhibit C-1** (on the next page) presents a summary chart of the references, followed by a detailed review for each of the infrastructure items listed below.

Item #	WGDD Infrastructure Item
1	Richter Farm Road (A-297): <ul style="list-style-type: none">• 2 lanes from MD 117 to Schaeffer Road• 2 additional lanes from MD 117 to Schaeffer Road• 2 lanes from Schaeffer Road to MD 118• 2 additional lanes from Schaeffer Road to MD 118
2	Schaeffer Road
3	Local Parks
4	Hoyles Mill Wastewater Pumping Station/Force Main

The detailed presentations begin with a description of the project scope for development district infrastructure item, followed by answers to 3 questions:

1. What developer obligations related to this development district infrastructure item did the Planning Board establish as a result of its regulatory approvals and what are the specific references to these obligations in the regulatory record?
2. How do these developer obligations relate to the implementation of this development district infrastructure item?
3. What does the regulatory record show about whether the Planning Board established these obligations to comply with site plan or APF requirements?

Exhibit C-1 summarizes the references to the WGDD Infrastructure Items in the regulatory approval documents. The requirements are summarized in the footnotes. They call for right-of-way dedication, provision of the facility, construction or participation in an agreement, and phasing.

Exhibit C-1. References to WGDD Infrastructure Items in the Regulatory Approval Documents

Arcola Woodcliffe Park (Kings Crossing)		
WGDD Infrastructure Items	Are there references to this item in the conditions of approval for . . .	
	Preliminary Plan (1-88006)	Site Plan (8-96011)
Richter Farm Road	Yes ¹⁷	No
Schaeffer Road	No	No
Local Parks and Paths	No ¹⁸	Yes ¹⁹
Hoyles Mill Wastewater Pumping Station/Force Main	No	No
Artery Woodcliffe Park (King Hargett)		
WGDD Infrastructure Items	Are there references to this item in the conditions of approval for . . .	
	Preliminary Plan (1-88216 and 1-88216R)	Site Plan (8-95027 and 8-95030)
Richter Farm Road	Yes ²⁰	Yes ²¹
Schaeffer Road	Yes ²²	No
Local Parks and Paths	No ²³	Yes ²⁴
Hoyles Mill Wastewater Pumping Station/Force Main	No	No ²⁵

¹⁷ #1-88006 Recommendation #2 in a February 17, 1995 Transportation Planning Division memorandum requires the developer to participate in the construction of Richter Farm Road; Condition #3 requires all necessary roadway improvements.

¹⁸ #1-88006, Condition #10 requires final delineation of the park boundary to be established at site plan.

¹⁹ #8-96011 Condition #14 requires provision of paths and a play area.

²⁰ #1-88216 Condition #1 requires all necessary roadway improvements; 1-88216R Conditions #6a and 7 require the developer to construct a road or enter into a participation agreement.

²¹ #8-95027 Sec. 1 and #8-95030 Sec. 2 Condition 1.c requires construction or participation in transportation improvements and compliance with the Germantown West Improvements/Development Phasing Program.

²² #1-88216 Condition #1 requires all necessary roadway improvements.

²³ #1-88216 and 1-88216R Condition 5 requires establishment of final location.

²⁴ #8-95027 Sec. 1 and #8-95030 Sec. 2 Condition 1.c requires the development program to include phasing for construction of pedestrian pathways and recreation facilities.

²⁵ #8-96011 Condition #8 requires plan review; it does not address construction.

**WGDD Item #1 –
Richter Farm Road (A-297)**

Project Scope Background. Richter Farm Road is a 4-lane arterial roadway within a 100' right-of-way. The initial petition filed by the developer proposed construction grading of 4 lanes and paving of 2 lanes from Clopper Road to MD 118, plus reimbursement of construction costs from MD 118 to Great Seneca Highway. The Executive modified the project scope to add paving of 2 additional lanes from Clopper Road to MD 118 and to delete the reimbursement of construction costs from MD 118 to Great Seneca Highway. The Council approved the list of infrastructure as modified by the Executive.

1. What references to Richter Farm Road (A-297) are in the Planning Board Opinions for the Arcola Woodcliffe and Artery Woodcliffe Projects?

The Planning Board's Opinions granting regulatory approvals for the Artery Woodcliffe and Arcola Woodcliffe project identify Richter Farm Road in multiple conditions of approval.

The conditions of approval for Arcola Woodcliffe Park Project obligate the developer to dedicate right-of-way and "provide the necessary roadway improvements between Clopper Road and Great Seneca Highway". The conditions of approval for the Artery Woodcliffe project require the developer to dedicate 100' right-of-way and either initiate construction or enter into a road construction participation agreement.

Below are excerpts from Preliminary Plan Opinions 1-88006, 1-88216, and 1-88216R and from Site Plan Opinions 8-95027 and 8-95030.

Arcola Woodcliffe Park. Conditions #1, #3, #5 and #6 in Planning Board's Opinion 1-88006, the Preliminary Plan approval for the Arcola Woodcliffe Park Project, address development district infrastructure item A-297. The relevant language states:

[T]he Montgomery County Planning Board finds Preliminary Plan 1-88006 to be in accordance with the purposes and requirements of the Subdivision Regulations (Chapter 50, Montgomery County Code, as amended) and approves Preliminary Plan 1-88006, subject to the following conditions:

- 1) Agreement with Planning Board to limit development to no more than 816 Dwelling Units and provide for the necessary roadway improvements and building permit phasing as outlined in Transportation Division memos dated 2-17-95 as revised 3-9-95 and new memo dated 3-10-95.

- 3) Dedication of all required rights-of-way (A-297) and other areas to accommodate other public facilities together with first record plat approval and recordation.

Appendix 2C. Fact Finding for the West Germantown Development District

- 5) Final determination to the type of crossing structure for A-297 over the northern unnamed tributary of Little Seneca Creek to be approved at site plan.
- 6) Details of noise berms along A-297 will be revised and approved at site plan.

Condition #1 “obligates the developer to provide necessary roadway improvements and building permit phasing” as outlined in 3 separate Transportation Planning Division memoranda. These Transportation memoranda contain the following requirements related to A-297.

Recommendation #2, in the February 17, 1995 Transportation Planning memorandum, obligates the developer to “participate in constructing Richter Farm Road (A-297) as a 4-lane arterial between MD 117 and Great Seneca Highway”. The recommendations that follow require these construction improvements to be completed in 3 segments:²⁶

- The first segment, between Great Seneca Highway and the Kings Crossing Property, must be under construction prior to the release of the first building permit (Recommendation #3).²⁷
- The second segment, from the Kings Crossing Property west to Clopper Road (MD 117), must be under construction prior to release of the 551st building permit (Recommendation #5).²⁸

Additionally, construction of an acceleration lane from eastbound A-297 to southbound Great Seneca Highway must also be under construction before release of the 551st building permit (Recommendation 6).²⁹ Finally, the applicant must agree to complete all roadway design work and have it approved by the Planning Board before the issuance of any building permits.

The March 9, 1995 Transportation Planning Division memorandum modified the phasing to allow the applicant to proceed with the first 44 dwelling units prior to the construction of any roadway improvements. (Condition #8).³⁰

The Transportation Planning Division memorandum dated March 10, 1995 added 2 more conditions of approval; one of these related to Richter Farm Road. Condition #9 required the construction of an eastbound acceleration/deceleration lane and a left-turn bypass lane on

²⁶ Recommendation 2 states, “the applicant shall participate in constructing Richter Farm Road (A-297) as a four-lane arterial between MD 117 and Great Seneca Highway with construction phasing requirements as described in the following conditions”.

²⁷ Recommendation 3 states, “Richter Farm Road (A-297) as a four-lane arterial between Great Seneca Highway and the Kings Crossing Property must be under construction prior to the release of the first building permit”.

²⁸ Recommendation 5 states, “the portion of Richter Farm Road (A-297) from the Kings Crossing Property west to Clopper Road (MD 117) must be under construction prior to the release of the 551st building permit”.

²⁹ The language states, “the applicant shall construct an acceleration lane from eastbound A-297 to southbound Great Seneca Highway for the full site development. This improvement must be under construction prior to the release of the 551st building permit”.

³⁰ Condition 8 states, “the applicant can proceed with the first 44 dwelling units prior to any roadway improvement conditions”.

Appendix 2C. Fact Finding for the West Germantown Development District

Clopper Road at its intersection with the proposed Richter Farm Road (A-297) prior to release of the 551st permit.

**Exhibit C-2. Summary of Document References in the Arcola Woodcliffe Park Project
Regulatory Approvals to WGDD Item 1 – Richter Farm Road**

Source Document	Prelim. Plan	Site Plan	Summary
Planning Board Opinion 1-88006	Condition #1		Requires developer to provide necessary roadway improvements per Transportation Planning memos dated Feb. 17, March 9 and March 10, 1995.
Transportation Planning memo, Feb. 17, 1995	Rec. #2		Requires participation in construction of Richter Farm Road (A-297) as a 4-lane arterial between MD 117 and Great Seneca Highway.
Planning Board Opinion 1-88006	Condition #3		Requires developer to dedicate right-of-way for Richter Farm Road.
Planning Board Opinion 1-88006	Condition #5		Requires deferral to site plan of final determination of type of crossing structure.
Planning Board Opinion 1-88006	Condition #6		Requires details of noise berms along A-297 to be reviewed and approved at site plan.
Transportation Planning memo, February 17, 1995	Rec. #2		Requires developer to construct roadway subject to subsequent conditions.
	Rec. #3		Requires developer to start construction of roadway between Great Seneca Highway and King Crossing Property prior to release of first building permit.
	Rec. #5		Requires developer to start construction of A-297 between King Crossing Property and Clopper Road prior to release of 551 st building permit.
	Rec. #6		Requires construction of intersection improvement at Clopper Road and A-297 prior to release of 551 st permit.
Transportation Planning memo, March 9, 1995	Condition #8		Revises prior memo to permit development of 44 units prior to road construction.
Transportation Planning memo, March 10, 1995	Condition #9		Revises prior conditions to add requirement for more intersection improvements at Clopper Road and A-297 prior to release of 551 st building permit.

Source: Planning Board Opinions.

Artery Woodcliffe Park Project. Conditions of approval that address Richter Farm Road are found in the Planning Board Opinions granting preliminary plan and site plan approvals.

Preliminary Plan. Planning Board Opinion 1-88216, King Hargett Property, requires the developer to:

- Agree with the Planning Board to limit development and provide for the “necessary roadway improvements and building permit phasing” (Condition #1);
- Dedicate 100’ right-of-way for A-297 (Condition #6); and
- Enter into an easement agreement under certain circumstances (Condition #7).

The specific language states:

[T]he Montgomery County Planning Board finds Preliminary Plan 1-88216 to be in accordance with the purposes and requirements of the Subdivision Regulations (Chapter 50, Montgomery County Code, as amended) and approves Preliminary Plan 1-88216, subject to the following conditions:

1. Agreement with Planning Board to limit development to no more than 459 dwelling units and provide for the necessary roadway improvements and building permit phasing as outline in Transportation Planning Division memo dated 12-3-93 as revised 12-98-93.
6. Dedication for...70’ right of way for Schaeffer Road, 100’ right-of-way for A-297 and partial dedication for A-298 in accordance with preliminary plan drawing. Subject to Condition No. 7, dedication must be accomplished with recordation of the first record plat. On-site construction and phasing of A-297 to be in accordance with on-site phasing plan and may require participation by other projects...Future engineering and design of A-297 to be coordinated with recommendations of master plan.
7. If, prior to recordation of the first record plat (Condition No. 6), the final alignment of A-297 has not been determined, applicant shall enter into an easement agreement with the Planning Board providing for the placement of an easement as depicted on the preliminary plan. The purpose of the easement agreement is to provide for the no cost future dedication by applicant of the final alignment of A-297 within the easement area. When the final alignment is determined, the Planning Board shall release that portion of the area subject to the easement that does not fall within the alignment. Applicant shall have the right to reserve easements reasonably necessary for the development of the project not inconsistent with its intended use as an arterial roadway. If final alignment of A-297 is not decided, then at least 60 days prior to applicant’s notice to staff of the intended submission of a site plan application for Phase II per the on-site phasing plan, staff shall return the preliminary plan to the

Planning Board for the determination of the final alignment of A-297 within the easement area.

Planning Board Opinion 1-88216R, which was approved pursuant to the FY94 Annual Growth Policy Alternative Review Procedures for Limited Residential Development, has 2 conditions that address transportation improvements.

- Condition #1 requires the developer to:

Revise agreement with Planning Board to limit development to no more than 569 dwelling units as follows:

- a) Enter into agreement with Planning Board providing for the payment of the Development Approval Payment to the Montgomery County Department of Finance for 100 units as required pursuant to the FY94 AGP prior to receipt of building permits for the units.
 - b) Agreement with Planning Board to participate in the necessary roadway improvements as outlined in Transportation Division memo dated 12-8-93 (as revised for 469 units and further clarified in applicants letter to the Transportation Planning Division dated 7/11/95.
- Condition #6.a replicates the language in Condition #6 for 1-88216 above; however, Condition #6.b contains new language requiring a Road Construction Participation Agreement for a portion of A-297. It states:

Prior to release of building permits for Phase III, applicant with respect to A-297 to either initiate construction of (i.e. road "under construction") or enter into a Road Construction Participation Agreement to construct that portion of A-297 as ____ it is proposed to pass through Parcel 430 (as more specifically shown on the approved preliminary plan – between Blocks N and W). This requirement to complete A-297 is for the purpose of providing efficient circulation within the boundaries of the area of the project, not portions of A-297 that extend beyond this project to the east or west. The requirement to construct A-297 on Parcel 430 is predicated upon the availability of right of way, the acquisition of which (including cost thereof) is not the responsibility of the applicant.

- Condition #7 replicates the language of Condition #7 in Opinion 1-88216.

Site Plan. Planning Board Opinions 8-95027 and 8-95030 approved the site plans for the Hoyles Mill Village project, Sections 1 and 2 respectively. The Opinions included identical language that subject the approval to the submission of a Site Plan Enforcement Agreement, Development Program, and Homeowners Association Documents with 4 subconditions. Condition #1c addresses transportation improvements. The language states:

Site Plan Enforcement Agreement to include an element requiring each Applicant/Builder of a project or a portion of a project identified in Table I to construct or participate in the construction of each particular transportation improvement referenced in the Germantown West Improvements/Development Phasing Program ("Phasing Program") consistent with the terms and conditions imposed upon the project pursuant to its preliminary plan approval by the Planning Board. This requirement does not increase or decrease the responsibility of any Applicant with respect to the construction of a transportation improvement, each Applicant remains obligated to construct or participate in the cost of constructing an improvement consistent with the preliminary plan for the project ("Required Improvements"). The enforcement agreement shall provide that if an applicant/builder of another project identified on Table I, as may be amended from time to time, has undertaken construction of all or a portion of the Required Improvements attributable to Applicant at the time Applicant files for an initial building permit tied to such Required Improvements, Applicant must pay a pro rata share of all costs and expenses associated with the Required Improvements prior to or contemporaneous with an application for building permits.

The parties shall agree to appropriate formulas and calculations for determining pro rata share. The agreement may provide that the Planning Department should monitor pro rata payments and is authorized to withhold release of a building permit in the event a share has not been paid. The agreement shall provide that the Applicant will cooperate with other developers and not unreasonably delay respective development proposals, including dedication of right of way, provided that the requesting party provides appropriate reimbursement to the Applicant.

Exhibit C-3. Summary of Document References in the Artery Woodcliffe Park Project Regulatory Approvals to WGDD Item 1 – Richter Farm Road

Source Document	Prelim. Plan	Site Plan	Summary
Planning Board Opinion 1-88216	Condition #1		Requires developer to “provide for the necessary roadway improvements and building permit phasing as outline in Transportation Planning memos of Dec. 3, 1993, revised Dec. 8, 1993.
Planning Board Opinion 1-88216	Condition #6		Requires developer to dedicate 100’ right-of-way for Richter Farm Road; to ensure on-site construction and phasing of A-296 is in accordance with on-site phasing plan and to coordinate roadway engineering and design with master plan recommendations.
Planning Board Opinion 1-88216	Condition #7		Requires developer to enter into easement agreement if necessary.
Planning Board Opinion 1-88216R	Conditions #6a and #7		Requires developer to construct road or enter into participation agreement and to comply with conditions in Transportation Planning memo dated December 8, 1993. ³¹
Planning Board Opinions 8-95027 and 8-95030		Condition #1c	Requires construction or participation in transportation improvements with no effect of prior obligation to construct or participate in the cost of construction. Requires compliance with Germantown West Improvements/Development Phasing Program. ³²

Source: Planning Board Opinions.

2. How do these developer obligations relate to the implementation of this development district infrastructure item?

The project scope approved for development district funding consisted of grading and construction of a 4-lane segment of Richter Farm Road from Clopper Road to MD 118. It did not incorporate reimbursement of costs for the segment from MD 118 to Great Seneca Highway, as the initial petition had requested.

Arcola Woodcliffe Park. The conditions of approval for the Arcola Woodcliffe Park project require the developer to “participate in the construction of Richter Farm Road as a 4-lane arterial between MD 117 and Great Seneca Highway”.

³¹ OLO has not reviewed a copy of this memorandum.

³² OLO has not reviewed a copy of this document.

Artery Woodcliffe Park. The conditions of approval for the Artery Woodcliffe Park project require the developer to dedicate land for Richter Farm Road and to initiate construction or sign a participation agreement. The conditions of approval reference the participation of other parties. The site plan conditions require the parties to agree to appropriate formulas and calculations for determining pro rata share, and state the agreement may provide that the Planning Department should monitor pro rata payments.

It is unclear how these developer obligations relate specifically to the implementation of Richter Farm Road as a development district infrastructure item. More information about the scope of improvements funded by the development district and the details of the Board's regulatory requirements are needed to define the relationship and draw conclusions about how the development district funds were used.

3. What do the Planning Board Opinions cite as the legal basis for requiring Richter Farm Road as a condition of approval?

The excerpts from Planning Board Opinions for the Preliminary Plan approvals for Kings Crossing (1-88006) and King Hargett (1-88216 and 1-88216R) reference Chapter 50 generally as the basis for the Planning Board's conditions that require an agreement to provide roadway improvements and dedicate rights-of-way.

The Transportation Planning Division memoranda cited in the Planning Board's Opinions are the Transportation APF Reviews for the project. The February 17, 1995 Transportation Planning memorandum states that sufficient staging ceiling exists and that the roadway improvements are needed to achieve compliance with the Local Area Transportation Review test. It concludes:

Staff concludes that, with implementation of all roadway improvements currently programmed in the Approved Road Program and proposed by the applicant in conjunction with the subject preliminary plan, all nearby intersections are anticipated to operate within an acceptable CLV or at an improved level over background conditions. Staff further concludes that there is sufficient staging ceiling capacity available in the current FY95 AGP Staging Ceiling to accommodate the subject preliminary plan.³³

In the March 10, 1995 Transportation Planning memorandum, staff also stated there were limits to applying a project's impact to a transportation facility. As a result, staff chose not to assign the project's impact along MD 117 to the developer in this case. The specific language states:

As requested by the Planning Board, staff has further analyzed the traffic situation along Clopper Road west of MD 118 in connection with the subject development.

³³ Memo from Ki Kim, Transportation Planning Division to Joe Davis, Development Review Division, February 17, 1995, p.3.

As concluded in our prior memorandum, trips from the project's second phase will utilize and would have an impact on MD 117. Under our LATR and PAR guidelines and standards, the project's impact must be carefully considered. We have analyzed the impact of the project at MD 117 and A-297 and have required that the applicant undertake several improvements to this intersection. These improvements will offer a diversion from MD 117 along A-297, ultimately connecting with both MD 118 and Great Seneca Highway. Its effect will be to reduce impacts to the MD 118/MD 117 and MD 117/Great Seneca Highway intersections.

We also considered the need for further improvements along MD 117. In doing so, we determined that, under our LATR guidelines, there are limits as to the extent that a project's impact to a transportation facility can be measured, studied, and applied. Such things as the project's size, the nature/type of development, and its geographic location (vis-à-vis major roads and employment centers) are considered when fashioning a position concerning a project's impact on nearby roads.

Staff determined that the project's impact on other intersections and links along MD 117 could not be assigned to the developer in this case. We do, however, find that safety concerns do need to be addressed and have offered conditions to this effect. We also want to alert the Board to other improvements to MD 117 that will be occurring over the course of the next few years.

The excerpts from Planning Board Opinions for the Site Plan Approvals for Hoyles Mill Village Sections 1 and 2 (8-95027 and 8-95030) do not contain any references to specific sections of the Zoning Ordinance.

**WGDD Item #2 –
Schaeffer Road**

Project Scope Background. Schaeffer Road crosses the development district diagonally and intersects Clopper Road near the Clopper Road intersection with MD 118. The developers' initial petition requested development district funding to "construct pavement widening and half section roadway improvement along the western side from Hoyles Mill Road to the southern property line of Hoyles Mill Village". It is unclear if the item approved by the Council changed this scope or not.

1. What references to Schaeffer Road are in the relevant Board Opinions for the Artery Woodcliffe Park and Arcola Woodcliffe Park Projects?

The Planning Board regulatory approvals for the Artery Woodcliffe Park Project establish 3 conditions that address Schaeffer Road. The regulatory approvals for Arcola Woodcliffe Park do not contain any conditions of approval that address Schaeffer Road.

Preliminary Plan Opinions for Artery Woodcliffe Park. The Planning Board's Opinions granting regulatory approvals for the Artery Woodcliffe project identify Schaeffer Road in 3 conditions of approval in Preliminary Plan Opinions 1-88216 and 1-88216R. The language from both Opinions is identical.

- Condition #1 requires an agreement with the Planning Board to "provide for the necessary roadway improvements and building permit phasing as outlined in Transportation Planning Division memo dated 12-3-93, as revised on 12-8-93".
- Condition #6 requires dedication of a right-of-way.
- Condition #8 requires Schaeffer Road to be removed from the rustic roads program. (See Condition #6 on page 18 above for exact text for Condition #6.)³⁴

Site Plan Opinions for Artery Woodcliffe Park Site Plans. Planning Board Opinions 8-95027 and 8-95030 approved the site plans for the Hoyles Mill Village project, Sections 1 and 2 respectively. As described earlier, (see the discussion of Richter Farm Road at page 4), each of these Opinions includes identical language that subjects the approval of the project to the submission of a Site Plan Enforcement Agreement, Development Program, and Homeowners Association Documents with 4 subconditions.

Condition #1c, which addresses transportation improvements, states that the Site Plan Enforcement Agreement must "include an element requiring each Applicant/Builder of a project or a portion of a project identified in Table I to construct or participate in the construction of each particular transportation improvement referenced in the Germantown West Improvements/Development Phasing Program ("Phasing Program") consistent with the terms and conditions imposed upon the project pursuant to its preliminary plan approval by the Planning Board". (See page 9 for the complete excerpt.)

³⁴ The language for Condition 8 states, "Schaeffer Road must be removed from the rustic roads program by the County Council prior to site plan approval".

**Exhibit C-4. Summary of Document References in the Artery Woodcliffe Park Project
Regulatory Approvals to WGDD Item 2 – Schaeffer Road**

Source Document	Prelim. Plan	Site Plan	Summary
Planning Board Opinion 1-88216	Condition #1		Requires developer to provide necessary roadway improvements per Transportation Planning memo dated December 3, 1993, as revised December 8, 1993. ³⁵
Planning Board Opinion 1-88216	Condition #6		Requires developer to dedicate right-of-way for Schaeffer Road.
Planning Board Opinion 1-88216	Condition #8		Requires developer to remove Schaeffer Road from the rustic road program.
Planning Board Opinion 1-88216R	Condition #1		Requires developer to make a Development Approval Payment (DAP) and participate in roadway improvements.
Planning Board Opinion 1-88216R	Condition #6a		Requires developer to construct road or enter into participation agreement and to comply with conditions in Transportation Planning memo dated December 8, 1993. ³⁶
Planning Board Opinion 1-88216R	Condition #8		Requires developer to remove Schaeffer Road from the rustic road program.
Planning Board Opinions 8-95027 and 8-95030		Condition #1c	Requires construction or participation in transportation improvements with no effect of prior obligation to construct or participate in the cost of construction. Requires compliance with Germantown West Improvements/Development Phasing Program. ³⁷

Source: Planning Board Opinions and staff memoranda.

2. How do these developer obligations relate to the implementation of this development district infrastructure item?

The developer obligations established in the regulatory approval documents for the Artery Woodcliffe Project require the developer to dedicate right-of-way and participate in improvements to Schaeffer Road.

³⁵ OLO has not reviewed a copy of this memorandum.

³⁶ OLO has not reviewed a copy of this memorandum.

³⁷ OLO has not reviewed a copy of this document.

More information is needed about the scope of improvements funded by the development district and the details of the development programs and agreements referenced in the Board's Opinions to determine the relationship between the developer's obligations and the development district infrastructure item and draw conclusions about how development district funds were used.

3. What do the Planning Board Opinions cite as the legal basis for requiring Schaeffer Road as a condition of approval?

The Planning Board Opinions for the Preliminary Plan approvals of the King Hargett project (1-88216 and 1-88216R) reference Chapter 50 generally as the basis for the Planning Board's conditions that require an agreement to provide roadway improvements and dedicate rights-of-way. In a recent meeting with Council and OLO staff, current Planning staff indicated that their recollection is that the underlying basis for this requirement was access (§50-24 of Chapter 50).

**WGDD Item #3 –
Local Parks**

Project Scope Background. According to the developers' initial petition, the project scope for this item consisted of "construction of local parks, pedestrian walkways and bike paths on and adjacent to Kings Crossing, Hoyles Mill Village and Kings Village Center properties as referenced in the Planning Board Opinion approving Preliminary Plan #1-88216, #1-8806, and #1-95011 (with County to fund construction costs of Kings Village Center park.)"

1. What references to local parks are in the relevant Board Opinions for the Artery Woodcliffe Park and Arcola Woodcliffe Park Projects?

The Planning Board's Opinions granting regulatory approvals for the Artery Woodcliffe and Arcola Woodcliffe projects mention local parks and pathways in several separate conditions of approval. Below are excerpts from the Preliminary Plan Opinions 1-88006, 1-88216 and 1-88216R and from Site Plan Opinions 8-95027 and 8-95030.

Preliminary Plans for Arcola Woodcliffe Park. Planning Board Opinion 1-88006, Kings Crossing, requires the developer to dedicate rights-of-way for parks (Condition #10) and to defer determination of internal pedestrian and bikeway circulation to site plan

(Condition #14). The specific language for Condition #10 states, "Final location of recreation facilities including tot lot locations to be determined at site plan, and final delineation of Park area boundary dedication to be determined at site plan".

Appendix 2C. Fact Finding for the West Germantown Development District

Site Plan for Arcola Woodcliffe Park. The Planning Board's Opinions granting regulatory approvals for the Arcola Woodcliffe (Kings Crossing) project mention local parks and pathways in 2 conditions of approval in Site Plan Opinion 8-96011.

- Condition #13 requires site and landscape plans to include locations and details for signs with a map of the path system located at the street entrances to the paths.
- Condition #14 addresses dedication of the local park. It states:

In regards to the park issues, the following issues shall be addressed prior to the release of signature set: the local park should be dedicated as a public park so that it is available to all are residents; the three park facility restriction lines near the local park noted as 150', 300' and 400' are to be removed and replaced with a 50' set-back from the Wear property; all pathways within the local park dedication area should be built to park standards; all Stormwater Management ponds shall be on homeowners' property; the developer will grade the local park site as noted on the site plan; the developer shall provide the paths and an open play area of 100' x 150' prior to the time the homes in the area of the park are completed; and dedication of the local and stream valley parks shall occur as shown on the plan after satisfactory completion of grading and recreation facility construction.

**Exhibit C-5. Summary of Document References in the Arcola Woodcliffe Park Project
Regulatory Approvals to WGDD Item 3 – Local Parks**

Source Document	Preliminary Plan	Site Plan	Summary
Planning Board Opinion 1-88006	Condition #10		Established final delineation of Park boundary at site plan.
Planning Board Opinion 1-88006	Condition #14		Defer determination of internal pedestrian and bikeway circulation to site plan.
Planning Board Opinion 8-96011		Condition #13	Requires signing plan.
Planning Board Opinion 8-96011		Condition #14	Requires land dedication, replacement of park facility restriction lines, and provision of paths and play area.

Source: Planning Board Opinions.

Appendix 2C. Fact Finding for the West Germantown Development District

Preliminary Plans for Artery Woodcliffe Park Project. Planning Board's Opinions granting regulatory approvals for the Artery Woodcliffe project mention local parks in Condition #5 in Preliminary Plan Opinions 1-88216 and 1-88216R. The language from both Opinions is identical. Condition #5 states:

Final location of local park dedication to be coordinated with Park's Department prior to submission of site plan and finalized at site plan in. In addition, compliance with Condition No. 2 as referenced in Parks Department memo dated 12-6-93 is also required.

Site Plans for Artery Woodcliffe Park Project. Planning Board Opinions 8-95027 and 8-95030 approved the Site Plans for the Hoyles Mill Village project, Sections 1 and 2 respectively. The Opinions included identical language that subject the approval to the submission of a Site Plan Enforcement Agreement, Development Program, and Homeowners Association Documents with 4 subconditions. One of these subconditions, Condition #1a2) addressed the community wide pedestrian pathways and recreation facilities. The specific language states:

Community wide pedestrian pathways and recreation facilities must be completed prior to seventy percent occupancy of each phase of the development. Pathways between units must be completed prior to occupancy of adjacent units.

**Exhibit C-6. Summary of Document References in the Artery Woodcliffe Park Project
Regulatory Approvals to WGDD Item 3 – Local Parks**

Source Document	Prelim. Plan	Site Plan	Summary
Planning Board Opinion 1-88216	Condition #5		Requires establishment of final location and references Parks Department memo dated December 6, 1993. ³⁸
Planning Board Opinions 8-95027 and 8-95030		Condition #1c	Requires Development Program to include phasing schedule for construction of pedestrian pathways and recreation facilities. References Site Plan Enforcement Agreement, Development Program, and Homeowner's Association Documents. ³⁹

Source: Planning Board Opinions and staff memoranda.

³⁸ OLO has not reviewed a copy of this memorandum.

³⁹ OLO has not reviewed copies of these documents.

2. How do these developer obligations relate to the implementation of this development district infrastructure item?

The description of this development district infrastructure item in the developer's initial petitions explicitly references the Planning Board's Preliminary Plan Opinions for Arcola Woodcliffe Park and Artery Woodcliffe Park, and the Planning Board's Site Plan Opinions for Artery Woodcliffe Park.

More details about the scope of the regulatory approvals and the development district infrastructure item are needed to define the relationship of these items and draw conclusions about how development district funds were used. It is unclear whether the Executive's recommendations to enhance the scope of local park improvements to be funded by the development district were reimbursements of prior regulatory approvals or were in addition to these regulatory approvals. The Executive's recommendations were ultimately approved by the Council for development district funding.

3. What do the Planning Board Opinions cite as the legal basis for requiring local parks as a condition of approval?

The excerpts from Planning Board Opinions for the Preliminary Plan approvals for Kings Crossing (1-88006) and King Hargett (1-88216 and 1-88216R) reference Chapter 50 generally as the basis for the Planning Board's conditions that require dedication of land for local parks.

The excerpts from Planning Board Opinions for the Site Plan Approvals for Hoyles Mill Village Sections 1 and 2 (8-95027 and 8-95030) do not contain any references to specific sections of the Zoning Ordinance.

**WGDD Item #4 –
Hoyles Mill Wastewater Pumping Station Force Main**

1. What references to the Hoyles Mill Wastewater Pumping Station and Force Main are in the relevant Board Opinions for the Artery Woodcliffe Park and Arcola Woodcliffe Park Projects?

The Planning Board's Opinion granting preliminary plan approval for the Arcola Woodcliffe (Kings Crossing) project (1-88006) does not contain any references to the Hoyles Mill Wastewater Pumping Station/Force Main. The Planning Board's Opinion granting site plan approval (8-96011) mentions the Hoyles Mill pump station in 1 condition of approval. The regulatory approvals for the Artery Woodcliffe Park Project do not contain any references to this development district infrastructure item.

Site Plan for Arcola Woodcliffe Park Project. The language for Condition #8 (established in Site Plan Opinion 8-96011) states:

Prior to release of the first building permit, applicant to submit preliminary and final sewer plans for location and limits of disturbance for WSSC sewage pump station and gravity line within stream valley for review and approval by staffs of Environmental Planning Division and Department of Parks, in conjunction with WSSC review. Review of these plans to include filed location of plants of interest and consideration of methods to avoid disturbance of threatened and watchlist plant species near proposed pump station.

Exhibit C-7. Summary of Document References in the Arcola Woodcliffe Park Project Regulatory Approvals to WGDD Item 4 – Hoyles Mill Wastewater Pumping Station Force Main

Source Document	Preliminary Plan	Site Plan	Summary
Planning Board Opinion 8-96011		Condition #8	Require submission of location plans for pump station for review and approval by EPD and Parks staff.

Source: Planning Board Opinions.

2. How do these developer obligations relate to the implementation of this development district infrastructure item?

The condition of approval in the Planning Board Opinion (Site Plan Opinion 8-96011) for the Arcola Woodcliffe project (Kings Crossing) project requires the applicant to submit location plans for the Pumping Station for review by Planning Department staff. Neither the Planning Board's Preliminary Plan Opinion nor the Site Plan Opinion for the project addresses whether the provision of the Hoyles Mill Wastewater Pumping Station by the developer or another party was a condition of approval. More information is needed to determine whether this item was a condition of approval or to draw conclusions about how the development district funds were used.

3. What do the Planning Board Opinions cite as the legal basis for requiring the Wastewater Pumping Station as a condition of approval?

The Site Plan Opinion contains a general statement that "the Site Plan meets all of the requirements of the zone in which it is located" but it does not identify a specific section of the Zoning Ordinance that provides the authority of the Planning Board to require the developer to submit location plans for the Pumping Station for Planning Department review.

A. The Chronology of Approvals for the Kingsview Village Center Development District

The Kingsview Village Center Development District (KVCDD) is located in the southwest quadrant of the intersection of Clopper Road (Route 117) and Great Seneca Highway. The Kingsview Village Center Development District encompasses 28.5 acres. When the resolution to establish the development district was introduced, the proposed development district included properties owned by 5 owners, including Montgomery County and Maryland-National Capital Park and Planning Commission (M-NCPPC). After land exchanges that followed the introduction of the resolution, the proposed development district consisted of 4 property owners. GFS Realty Inc. acted as the development agent for these properties which are collectively referred to as the Kingsview Village Center.

No separate initial petition, no separate application for provisional adequate public facilities approval, and no separate Executive Fiscal Report exists for the KVCDD. However, these documents exist for the West Germantown Development District (WGDD); and, at the time each was filed, the petitioners for the WGDD included 3 of the 4 current property owners of the Kingsview Village Center.

The initial petition filed for the WGDD stated that the owners of the Kingsview Village Center contemplated “a mixed use project, including a 114,000 square foot retail shopping center and 208 residential units (48 single-family attached units and 160 multi-family units.)”¹

1. For each district, what were the dates for each step of the development district approval process?

The Council’s process to establish the KVCDD spanned a 2-year period. It began in June 1996, when the Kingsview Village Center property owners filed an initial petition (with other owners) to establish the WGDD. The Council adopted Resolution 13-636 signaling its intent to consider the creation of the WGDD on July 30, 1996.

On May 19, 1998, the Council introduced Resolution 13-1377, Kingsview Village Center Development District. The Background section of Resolution 13-1377 recites the chronology for the approval of the WGDD including:

- The Council’s public hearing on the developers’ initial petition;
- The Council’s adoption of the 1st resolution expressing its intent to create a development district;
- The Montgomery County Planning Board’s review and approval of the developers’ application of provisional adequate public facilities approval;

¹ Montgomery County Council Petition for Development District, West Germantown Development District Association, Inc., et al., Filed June 21, 1996, Schedule A.

Appendix 3A. Fact Finding for the Kingsview Village Center Development District

- The County Executive's submission of a Fiscal Report; and
- The Council's public hearing on the final resolution to create the WGDD.

Following the Council's public hearing on the final resolution to create the WGDD, GFS Realty indicated that it wished to delay the creation of a development district for the Kingsview Village Center properties. This was noted in Resolution 13-1135, which the Council adopted on January 13, 1998.

Four months later, in May 1998, the attorney for GFS Realty transmitted a draft resolution for the creation of the KVCDD to the County Council's attorney. On May 19, 1998, the Council introduced this draft resolution for public hearing. According to a letter from GFS Realty's attorney, dated May 15, the draft resolution contained 2 versions of Exhibit D, the projected costs of the infrastructure improvements. One version proposed funding 100% of the infrastructure improvements through the development district; the other proposed development district funding for 90.5% of these improvements.

On June 16 and June 23, 1998 the Council held a public hearing on the final resolution to create the KVCDD. On July 6, 1998, the Council's Management and Fiscal Policy (MFP) Committee held a worksession on the resolution to create the KVCDD. On July 28, 1998, the Council adopted Resolution 13-1377 to establish the KVCDD. **Exhibit A-1** presents the key dates of the approval process.

Exhibit A-1. KVCDD Chronology

Step	Description	Date
Step 1	Developers (including property owners of Kingsview Village Center) file initial petition to create the WGDD.	June 21, 1996
Step 2	Council holds public hearing on developers' initial petition for the WGDD.	July 23, 1996
Step 3	Council adopts 1 st resolution expressing intent to create a WGDD.	July 30, 1996
Step 4	Developers submit an application for provisional adequate public facilities (PAPF) approval for the WGDD to the Planning Board.	Oct. 4, 1996
Step 5	Planning Board acts on developers' PAPF application for the WGDD.	Nov. 6, 1996
Step 6	Executive submits Fiscal Report to Council for the WGDD.	Sept. 29, 1997
Step 7	Council holds public hearing for the WGDD.	Nov. 6, 1997
Step 8	Council adopts 2 nd resolution to create the WGDD. The resolution includes language noting that the Kingsview Village Center properties wish to delay creation of a development district for their properties.	Jan. 13, 1998
Step 9	The attorney for GFS Realty, Inc. submits a letter and draft resolution for the creation of the KVCDD for introduction.	May 15, 1998
Step 10	Council introduces resolution for public hearing.	May 18, 1998
Step 11	Council holds public hearing on resolution to establish the KVCDD.	June 16 and June 23, 1998
Step 12	Council adopts resolution to create a development district.	July 28, 1998.
Step 13	Council adopts resolution to specify bond conditions.	Oct. 27, 1998.

Sources: Council resolutions and letters.

2. What were the dates of the regulatory approvals for the development project(s) that make up each of the development districts?

The KVCDD consists of a portion of 1 development project, Kingsview Village Center, a mixed use project that consists of a 114,000 square foot shopping center, a 150 space Park and Ride lot, a residential component (326 multi-family dwelling units), and an 8-acre park. The regulatory approvals for the Kingsview Village Center Project span 10 years, from 1994 to 2004.

Appendix 3A. Fact Finding for the Kingsview Village Center Development District

- Initial Preliminary Plan Application. In August 1994, Kingsview Village Consortium, M-NCPPC, and Montgomery County, filed a preliminary plan application to create 48 lots. The Planning Department deemed this application to be complete on August 12, 1994, and the Planning Board held a hearing on this development proposal on August 10, 1995.
- On February 12, 1996, the Planning Board mailed its Opinion approving Preliminary Plan 1-95011, Kingsview Village Center, subject to 14 conditions. Condition #14 stated the preliminary plan was valid until March 12, 1999. (See Appendix 3C for a discussion of this Opinion.)
- Revised Preliminary Plan Application. On June 10, 1999, GFS Realty and Elm Street Development submitted an application to revise the previous conditions of approval. The application requested a change in the residential unit types (from single-family attached to multi-family units), and an increase in the density from 208 to 326 units. The Planning Board held a hearing in August, 1999.
- On August 23, 1999, the Planning Board mailed Opinion 1-95011R that approved:

[T]he revision of Condition No. 1 [of the original Preliminary Plan] . . . subject to the following conditions:

- (1) Prior to MCPB release of building permits for the multi-family dwelling units, applicant to submit an amended Adequate Public Facilities (APF) agreement with the Planning Board to limit development to a maximum of 114,000 square feet of retail and office uses and 326 multi-family dwelling units
- (2) All other previous conditions of approval contained in the Planning Board Opinion dated 07-16-98 remain in full force and effect
- (3) Prior to the issuance of the Use and Occupancy permit of the twelfth (and last) multi-family building, acquisition of 100 feet of right of way and construction, by this applicant or others of the northern two lanes of Leaman Farm Road, an ultimate four-lane roadway, through the Phillips property so as to provide a continuous two-lane roadway between Great Seneca Highway and the Pleasants property, Preliminary Plan No. 1-90017.

The developer submitted the following site plan applications for the Kingsview Village Center Project:

- On November 11, 1997, the developer submitted an application to develop a mixed-use project with 10,255 square feet of office space and 103,745 square feet of retail space. On March 12, 1998, the Planning Board approved this application, subject to conditions.

- On March 5, 1999, the developer submitted an application for PD-11 zoning for 326 multi-family apartments and 3,600 square feet of other general and professional space.
- On May 27, 1999, the Planning Board approved this project, subject to conditions.
- On May 27, 2004, the developer submitted an amendment to the site plan. On August 2, 2004, this application was approved administratively.

3. Did the Planning Board's preliminary plan and site plan approvals for the Kingsview Village Center Project occur before or after the Council's adoption of the resolution to create the KVCDD?

Exhibit A-2 presents the chronology of regulatory approvals for the KVC Project, with the dates the Council adopted resolutions to initiate and establish the WGDD/KVCDD. A review of these timelines shows the following:

- The preliminary plan for the KVC Project was approved in February 1996, 5 months before the Council adopted its 1st resolution signaling its intent to create a development district for West Germantown (July 1996) and approximately 2 years before the Council adopted its 2nd resolution to finalize the WGDD, including the notation that the Kingsview Village Center Project wished not to proceed (January 1998).
- The Planning Board's action to approve the original preliminary plan for the KVC Project preceded Council action to establish the KVCDD. The Planning Board's approval of the preliminary plan February 1996 occurred 2 years and 5 months before Council approval to establish the KVCDD in July 1998.
- The Planning Board's action to approve a revision to the original Preliminary Plan followed Council action to establish the KVCDD. The Council approved the KVCDD in July 1998 and the Planning Board approved revisions to the preliminary plan on August 23, 1999.
- The site plan approvals for the KVC Project occurred before and after Council actions to establish a CTC Development District.
 - The Planning Board's Site Plan approval for the retail and office portions of the project in March 1998 preceded the adoption of the Council's 2nd resolution to establish a development district (July 1998) by 4 months.
 - The Planning Board's Site Plan approval for the residential portion of the project in May 1999 followed the Council's adoption of the resolution to establish the development district (July 1998) by 10 months.

Appendix 3A. Fact Finding for the Kingsview Village Center Development District

Exhibit A-2. Chronology of Regulatory Approvals and Development District Approvals for Kingsview Village Center Aug. 1994-Aug. 2004

Type Of Action	Document	Action/Event	Date
Regulatory Review	Preliminary Plan 1-95011	Developer's application for Preliminary Plan for Kingsview Village Center (1-95011) is deemed complete.	Aug. 12, 1994
		Planning Board holds public hearing on Preliminary Plan application for Kingsview Village Center (1-95011).	Aug. 10, 1995
		Planning Board mails Opinion approving Preliminary Plan for Kingsview Village Center, subject to 14 conditions.	Feb. 12, 1996
Development District	Petition #1	Developer files petition to establish "West Germantown Development District" with County Council.	June 21, 1996
	Petition #1	Council holds public hearing on Developer's petition.	July 23, 1996
	Council's 1 st Resolution	Council adopts Resolution 13-636 stating its intent to create a development district. CE approved this resolution.	July 30, 1996
Regulatory Review	Site Plan 8-98013	Planning Department deems developer's site plan application for Kingsview Village Center (8-98013) to be complete.	Nov. 12, 1997
Development District	Council's 2 nd Resolution	Council adopts Resolution 13-1135 to create WGDD without Kingsview Village Center Properties.	Jan. 13, 1998
Regulatory Review	Site Plan 8-98013	Planning Board holds hearing on developer's site plan application for Kingsview Village Center.	Date not available
	Site Plan 8-98013	Planning Board mails Opinion approving Site Plan 8-98013 subject to conditions.	Mar. 12, 1998
Development District	Council's 2 nd Resolution	Council introduces Resolution 13-1377 to establish the KVCDD.	May 19, 1998
		Council holds public hearing.	June 16, 1998 June 23, 1998
		Council adopts Resolution 13-1377 to establish the KVCDD.	July 28, 1998
	Council's 3 rd Resolution	Council adopts Res. 13-1476 to authorize Special Obligation Bonds.	Oct. 27, 1998
Regulatory Review	Site Plan 8-99030	Planning Department deems application for 326 multi-family units and 3,600 SF of general/prof. space to be complete (8-99030).	Mar. 5, 1999
	Site Plan 8-99030	Planning Board mails Opinion approving Site Plan 8-99030, subject to conditions.	May 27, 1999
	Preliminary Plan 1-95011 R	Planning Department deems developer's application to revise Preliminary Plan 1-95011 to be complete.	June 10, 1999
	Preliminary Plan 1-95011 R	Planning Board holds hearing on Preliminary Plan application 1-95011R.	Aug. 5, 1999
	Preliminary Plan 1-95011R	Planning Board approves revisions to Preliminary Plan 1-95011R	Aug. 23, 1999
	Site Plan 8-98013	Planning Department deems developer's application to amend Site Plan 8-98013A to be complete.	May 27, 2004
	Site Plan 8-98013	Developer's application to amend site plan is approved administratively.	Aug. 2, 2004

Source: M-NCPPC DAIC

B. A Review and Analysis of the Infrastructure Items Approved for Funding in the KVCDD

This appendix provides information about the infrastructure items approved for funding by the KVCDD. Typically, the process to create a development district incorporates multiple lists of infrastructure items to be financed by the development district. Publication of these infrastructure lists occur when:

- The developer submits an initial petition to Council;
- The developer submits a provisional adequate public facilities (PAPF) application to the Planning Board;
- The Executive prepares his Fiscal Report, and
- The Council adopts the 2nd resolution.

For the KVCDD, the steps of this process were modified as described below. First, in October 1997, the resolution the Council introduced for public hearing to establish the WGDD divided the proposed development district into 2 areas, each with its own infrastructure list. **Exhibit B-1** displays the list of transportation improvements proposed for development district funding for Improvement Area II, which was the Kingsview Village Center.

Exhibit B-1. Items Proposed for WGDD Improvement Area II

Item	Estimated Cost	% Cost funded by District	Est. Completion Date
5 A-298 Leaman Farm Road	\$1,641,479	100%	Dec. 1999
7 Clopper Road (MD 117)	\$1,117,440	100%	Dec. 1999
9. A-270 Kingsview Village Avenue	\$519,882	100%	Dec. 1998

Source: County Council Resolution for the West Germantown Development District, Exhibit "D-2" "West Germantown Development District Improvement Area II District Funded Improvements". Introduced October 21, 1997. Appended to Memorandum to Management and Fiscal Policy Committee from Glenn Orlin, Deputy Council Staff Director, MFP Committee #3, November 24, 1997, at circle page 12.

Exhibit B-2 summarizes the recommendations for the transportation items for the Kingsview Village Center properties at various points in the review process for the WGDD. The display shows that all of the Improvement Area II transportation improvements were supported at each point of the review process for the WGDD. Specifically, each item was:

Appendix 3B. Fact Finding for the Kingsview Village Center Development District

- Proposed in the developers' initial petition and PAPF application to the Planning Board;
- Recommended for approval by the Planning Board; and
- Recommended for approval by the County Executive.

Exhibit B-2. Infrastructure Items to be Funded By the WGDD - Initial Petition to Final Approval

Item # in Initial Petition	Infrastructure Item	Developers' Initial Petition (Sch. B)	Developers' PAPF Application (Exh. I)	Planning Boards' PAPF Letter	County Exec's Fiscal Report (Table C)	Res. 13-1135 (Exh. D)
Transportation Improvements						
N.A.	Leaman Farm Road (A-298)	Yes	Yes	Yes	Yes	No
7	Clopper Road (MD 117)	Yes	Yes	Yes	Yes	No
9	A-270 Kingsview Village Avenue	Yes	Yes	Yes	Yes	No

Source: Developers' initial petition filed June 21, 1996 (Schedule B), Developers' PAPF Application filed October 3, 1996, (Exhibit I), Letter from William H. Hussmann to Douglas M. Duncan dated Nov. 6, 1996, County Executive's Fiscal Report (Table C) and Council Resolution 13-1135 Exhibit D.

In May 1998, the attorney for GFS Realty submitted a draft resolution that the Council introduced for public hearing on May 19. The list of infrastructure items proposed for funding by the KVCDD included an additional item (i.e., A-297 Intersection Improvements) and updated cost estimates. **Exhibit B-3** displays the original and updated cost estimates for each item.

Exhibit B-3. Infrastructure Items Proposed for WGDD Improvement Area II and the KVCDD

Infrastructure Item		Estimated Cost as of Jan 1998	Estimated Cost as of May 1998	Difference (Jan. 1998-May 1998)
5	A-298 Leaman Farm Road (Item 5 in WGDD initial petition)	\$1,641,479	\$1,775,000	(\$133,521)
7	Clopper Road (MD 117) (Item 7 in WGDD initial petition)	\$1,117,440	\$650,000	\$467,440
9.	A-270 Kingsview Village Avenue (Item 9 in WGDD initial petition)	\$519,882	\$435,000	\$84,882
	A-297 Intersection Improvements (NEW ITEM)	Not Applicable	\$100,000	(\$100,000)
	Total Cost	\$3,278,801	\$2,960,000	\$318,801

Source: County Council Resolution for the West Germantown Development District, Exhibit "D-2" "West Germantown Development District Improvement Area II District Funded Improvements". County Council Resolution for Kingsview Village Center Development District. Appended to Memorandum to County Council from Michael E. Faden, Senior Legislative Attorney, Agenda Item #1(D), May 19, 1998, at circle page 12.

The draft resolution also contained 2 versions of the development district's proposed share of the costs. One version proposed the development district fund 100% of the costs; the other proposed the development district fund 90.5% of the costs of 3 items and 100% of the cost of the new item.

In testimony presented at the Council's public hearing on June 16, 1998, the attorney for GFS Realty explained this approach as follows:

Attached Exhibit "D" is divided into two options, which while consisting of the same infrastructure list, proposed differing funding percentages of the infrastructure costs through the Development District based upon discussions which GFS Realty, Inc. had with the County Executive's Department of Finance and Office of Management and Budget. The County Executive has indicated to GFS Realty, Inc. that it is considering these options and will respond with a recommendation within the next couple of weeks.²

² Linowes and Blocher LLP Testimony before Montgomery County Council Kingsview Village Center Development District, June 16, 1998. Appended to Memorandum to the Management and Fiscal Policy Committee from Michael Faden, Senior Legislative Attorney, MFP Item 3, July 6, 1998, at circle page 17.

The attorney for GFS added:

As an additional inducement to the County, the Petitioners have agreed that the Implementation Agreement to be entered into in connection with the Kingsview Village Center Development District will require the Petitioners to provide public benefit over and above what is being funded through the District. In the event that Exhibit "D-2" is chosen, the District will fund 90.5% of the infrastructure improvements while the County will directly fund 9.5% of the infrastructure improvements through its general funds; however, GFS Realty, Inc. has agreed to provide the following additional public benefits which aggregate over \$400,000: a Park and Ride lot located in the northeast corner of the development parcel, on a lot which will be owned by the County following the exchanges of land as described above, and the grading of the properties which will be owned by the County and the Maryland National Capital Park and Planning Commission, following the land exchanges. If, on the other hand, it is finally determined that Exhibit "D-1" is preferable to the County Executive and the Petitioners, whereby 100% of the cost of the public infrastructure listed on Exhibit D is being borne by the special taxes and assessments imposed on the private parcels, the private parties will effectively be providing over \$400,000 of public benefit due to the fact that the proportionate responsibility of the public sector property owners for construction of the necessary infrastructure is being assumed privately by the landowners whose properties are located within the District. In either event, the Petitioners will include within the District-funded improvements the construction of an additional turn lane southbound on Great Seneca Highway onto Route A-297.³

The attorney's testimony also stated his view that all the requirements of the County Code related to adequate public facility determinations and the fiscal report had been met. He said:

Notwithstanding the fact that the West Germantown Development District and the Kingsview Village Center Development District will be two separate districts, all of the requirements under the Montgomery County statute regarding Park and Planning determination of adequate public facilities and the fiscal report and recommendation of the County Executive regarding the required infrastructure were completed in connection with the West Germantown Development District process and serve as the basis for the current Resolution before you.⁴

At the MFP Committee meeting on July 6, County Executive staff reported the Executive recommended that the KVCDD "fund 90.5% of the three public road projects, Leaman Farm Road, Kingsview Village Avenue, and widening of Clopper Road, with the County to fund the remaining 9.5 percent (9.5%) out of general funds".⁵

³ *Id.* at circle page 18.

⁴ *Id.* at circle page 17.

⁵ Memorandum from John R. Orrick and Stephen Z. Kaufmann to MFP Committee, July 15, 1998.

Appendix 3B. Fact Finding for the Kingsview Village Center Development District

On July 28, the Council adopted Resolution 13-1377, which established the KVCDD and approved the list of infrastructure items. The cost of the improvements was estimated at \$2.960 million, and the Kingsview Village Development District was expected to cover 90.5% of 3 improvements and 100% of the A-297 road intersection improvement, as recommended by the County Executive. **Exhibit B-4** displays the information presented in Exhibit D attached to Resolution 13-1377.

Exhibit B-4. List of Infrastructure Items Approved for KVCDD Financing – Council Resolution 13-1377

Item	Estimated Cost	% Cost funded by District	Est. Completion Date
1. A-270 Kingsview Village Avenue	\$435,000	90.5%	Dec. 1999
2 A-298 Leaman Farm Road	\$1,775,000	90.5%	Dec. 1999
3 Clopper Road (MD 117)	\$650,000	90.5%	Dec. 1999
4 A-297 Road Intersection Improvements	\$100,000	100%	Dec. 1999
Total Cost	\$2,960,000		
District Share	\$2,688,300		

Source: Resolution 13-1377, Exhibit D, adopted July 28, 1998.

C. OLO's Review of the Relationship of the Regulatory Requirements for the Kingsview Village Center and the Development District Infrastructure Items

At the request of Council staff, OLO conducted a review of the Planning Board's regulatory documents for the Kingsview Village Center Project to determine whether construction of each of the infrastructure items approved for KVCDD funding was also required to be provided by the developer of the KVC Project as a condition of regulatory approval. Council staff asked OLO to address 3 questions:

1. What were the developer obligations established in the Planning Board's approval of the Preliminary Plan, based on a review of the language in the Board's Opinion?
2. What is the relationship between the developer's obligations and the KVCDD Infrastructure Items?
3. What was the regulatory basis for those items that were established as conditions of approval?

This appendix presents the results of OLO's review. It provides a summary of regulatory requirements in the Planning Board's Opinion, information about which district infrastructure items are referenced in the Board's Opinion, and a synopsis of the regulatory basis for the Board's conditions of approval.

1. What were the developer obligations established in the Planning Board's approval of the Preliminary Plan, based on a review of the language in the Board's Opinion?

The relevant developer obligations set forth in the text of the Opinion and the numbered conditions of approval required the applicant to:

- Dedicate right-of-way for Clopper Road (MD 117), Great Seneca Highway, Hoyles Mill Road (MD 298) and Proposed A-270 (Condition #4 in the Board Opinion);
- Construct Hoyles Mill Road (A-298) as a 2-lane arterial from Great Seneca Highway to a point where the Pleasants property begins construction to tie into Relocated MD 118, however, the timing of this improvement must follow public acquisition of the area north of Preliminary Plan 1-95011 and adjoining Preliminary Plan 1-90017 (Condition #1 in the Board Opinion, Recommendation #2 in the Transportation Planning memorandum, and Condition #14 in the Board Opinion);
- Construct a separate right turn lane on northbound Great Seneca Highway to eastbound Clopper Road (MD 117) (Condition #1 in the Board Opinion, Recommendation #3 in the Transportation Planning memorandum);

- Widen MD 117 (Clopper Road) by 24 feet of additional pavement width on the south side from a point where the MD 118 Relocated CIP project ends to Great Seneca Highway, with construction of a bike path and curb as recommended in the master plan. (referenced in the text of the Opinion “as required by SHA” and established in Condition #1 in the Board Opinion, Recommendation #4 of the Transportation Planning memo, and as Condition #9 in the Board Opinion, which requires “Access and improvements as required and approved by MDSHA and MCDOT”).
- Construct A-270 to arterial road standards with 80 feet of right of way (referenced in the text “as required by SHA” and established as Condition #9 in the Board Opinion, which requires “Access and improvements as required and approved by MDSHA and MCDOT”).

2. What is the relationship between the developer’s obligations and the KVCDD Infrastructure Items?

OLO’s review found the initial petition to establish the WGDD included explicit reference to Preliminary Plan Opinion 9-95011 for 3 of the 4 KVCDD infrastructure items. OLO did not obtain enough details about the regulatory requirements or the development district items to independently determine whether the regulatory requirements in the Planning Board’s Opinion were identical to the KVCDD Infrastructure Items.

The 3 KVCDD Infrastructure Items which were explicitly referenced the Planning Board Opinion are:

- A-270 Kingsview Village Avenue is comparable to Proposed A-270;
- A-298 Leaman Farm Road is A-298 Hoyles Mill Road; and
- Clopper Road.

Exhibit C-1 on the next page displays excerpts from the descriptions for each item. The initial petition contained no references to improvements to A-297 Richter Farm Road, which is the 4th development district infrastructure item.

Exhibit C-1. Excerpts of Transportation Infrastructure Items for tge WGDD – Improvement Area II

Item	Transportation Improvements
Hoyles Mill Road (A-298) and Kings Crossing Blvd	“Includes . . . full roadway construction of A-298 as a two-lane arterial from Great Seneca Highway to a point where adjacent property owner construction commences; and right of way acquisition and construction for Hoyles Mill Road (per the Planning Board Opinion approving Preliminary Plan #1-95011)”.
Clopper Road (MD Route 117)	“Includes ... the widening of MD Rt. 117 from MD Rt. 118 to Great Seneca Highway, with streetscape improvements (per the Planning Board Opinion approving Preliminary Plan #1-95011)”.
Route A-270	“Construction of proposed A-270 to arterial road standards with 80 feet of right of way from MD Rt. 117 to site boundaries (per the Planning Board Opinion approving Preliminary Plan #1-95011)”.

Source: Petition for development District filed by West Germantown Development District Association, Inc. et al. Schedule B, filed June 21, 1996.

3. What was the underlying basis for requiring each development district infrastructure item that the Planning Board as a condition of approval?

OLO’s review of the regulatory record shows the Planning Board’s basis for its decision relied on:

- Transportation Planning’s administrative practices for the Adequate Public Facilities Ordinance, including the Council’s Annual Growth Policy;
- Regulations in the Section 50-24(b) of the subdivision ordinance that address road frontages and connectivity; and
- Requirements identified by SHA.

Synopsis of Planning Board Opinion 1-95011. The Planning Board Opinion addressed the application of the Annual Growth Policy guidelines in effect at the time. It stated:

Staging Ceiling Capacity. The plan was reviewed under the FY97 Annual Growth Policy (AGP). Evidence provided to the Planning Board confirms that sufficient staging ceiling capacity exists for both employment and residential development in the Germantown West Policy area.

Local Area Review. The public hearing included an extensive discussion of roadway dedications and improvements within the proposed site as well as on

bordering roads. Though staging ceiling capacity exists for this development, the Applicant must satisfy the AGP Local Area Transportation Review (LATR). Under LATR, certain intersections near a proposed development must operate at an acceptable level of service (LOS) in order for development to proceed.

Absent an acceptable LOS, an applicant must wait for scheduled public improvements to roads before development may occur. Alternatively, the applicant may construct roadway/intersection improvements to address the LOS and to mitigate the traffic impact of development.

The Opinion indicates the Planning staff and the applicants presented different traffic study results and offered different sets of recommended improvements for the Board's consideration. The Planning staff proposed the applicant be required to:

- Construct A-298 as a 2-lane arterial road from Great Seneca Highway to a point where the Pleasant's property begins construction to tie A-298 into Relocated MD 118;
- Construct a separate right turn lane on northbound Great Seneca Highway to eastbound MD 117 (Clopper); and
- Widen MD 117 with 24 feet of additional pavement width on the south side (from the ending point of CIP project relocated MD 118 to Great Seneca Highway) including construction of a bike path and curb as recommended by the master plan and required by the Maryland State Highway Administration (SHA).

The applicant(s) proposed to either:

- Comply with the SHA required construction of A-270 to arterial road standards with 80 feet of right of way;
- Widen MD 117 (Clopper Road) by 24 feet of additional pavement width, as required by SHA; and
- Dedicate 4 lanes of A-298 (Hoyles Mill Road) and provide access points to the sites shown.

Alternatively, the applicant(s) proposed to:

- Widen A-298 to 2 lanes from Great Seneca Highway to the western boundary of the site; and
- Construct A-270 to 80 feet of right of way.

The applicant stated that requiring construction of A-298 and widening MD 117 were cost prohibitive and unnecessary, and suggested that an earlier regulatory approval of a nearby

site which had resulted in modifications to the local road network had rendered the original basis for A-298 at 4 lanes invalid.

The Board approved the project subject to the transportation improvements proposed by Planning staff, with 1 modification. The Board cited Section 50-24(b) of the county code as the basis for requiring improvements to MD 117 and dedication of Great Seneca Highway. The Board acknowledged that the site is bordered by these 2 roads which are both publicly maintained and stated:

Section 50-24(b) of the Subdivision Regulations explains that for lots fronting on an existing State, County or municipally maintained road, a subdivider is required to show dedication for widening the existing right-of-way. In addition, a subdivider must provide such reasonable improvements (including sidewalks) to the road in front of such lots as necessary to serve the needs of the subdivision for access and traffic as required by the road construction code.

The Board also found that A-298 and A-270 were necessary to provide internal circulation and road connectivity, but that the applicant should not be required to underwrite the public acquisition costs for that portion of the right of way it did not control. Specifically, the Opinion stated:

Further consideration of the plan reflects the proposed alignment of A-298 (Hoyles Mill Road). As demonstrated on Exhibit 2, this road is an integral part of the internal development of this site and provides a necessary linking road connection. The Applicant suggested that traffic from the site and from other locations would not use A-298 as a connecting road. The Board is persuaded otherwise by the testimony and evidence presented. The Board finds no support for the suggestion that traffic will utilize a longer route along MD 117, around the site rather than a shorter route, through the site on A-298.

In addition, the Planning Board finds that both A-298 and A-270 are necessary for the internal circulation of the proposed development. As shown on Exhibit 2, A-270 provides the single access from this site to MD 117 (Clopper Road) and A-298 provides the single access to the site from Great Seneca Highway.

Notwithstanding, the Board agrees with the Applicant that it should not be required to underwrite public acquisition of that portion of the A-298 right of way adjacent to the site but not owned or controlled by the Applicant. Rather, the Board finds that the Applicant must complete construction of this portion of A-298 provided the land is acquired for public ownership.

Condition #1 explained the Board's modification as follows:

Prior to MCPB release of building permits, all necessary roadway design shall be approved and roadway improvements under construction as outlined in the Transportation Division memo dated August 3, 1995, with the exception of the

portion of proposed A-298 which is not owned or controlled by the Applicant, and will be acquired for public ownership by Montgomery County. Design and construction of A-298 in the area to be acquired for public ownership shall commence upon the later to occur of design and construction of the portion of A-298 controlled by the Applicant or conveyance to Montgomery County of the area to be acquired for public ownership.

In sum, for the 3 KVCDD Infrastructure Items with explicit references to the Planning Board's Opinion, OLO's review found:

- The Board's Opinion identified A-270 Kingsview Village Avenue as a SHA requirement and "necessary for the internal circulation of the proposed development". Staff did not explicitly identify this item as a requirement of its LATR analysis.
- The Board's Opinion identified A-298 Leaman Farm Road as necessary for the internal circulation of the proposed development and also stated that staff recommended it to "address unacceptable traffic conditions based on the LATR findings".
- The Board's Opinion and the Transportation staff memorandum identified Clopper Road (MD 117) as an SHA requirement. The Board's Opinion also identified it as a bordering, publicly maintained street and referenced requirements in 50-24(b) that apply to these types of streets. Staff did not explicitly identify this item as a requirement of its LATR analysis.

Introduction

Over the years, the County has enacted numerous laws and regulations that have defined an array of public/private partnership arrangements designed to provide and fund public infrastructure. As a result, when the Council enacted the Development District Act in 1994, it created an infrastructure financing mechanism that was layered on top of:

- Longstanding exaction practices administered by the Planning Board;
- A (transportation) development impact tax administered by the County Department of Public Works and Transportation; and,
- A system development charge administered by the Washington Suburban Sanitary Commission.

This appendix examines select instances of how the County's implementation of the Development District Act related to some of the pre-existing strategies to provide or fund public infrastructure which preceded it. This appendix is organized as follows:

- **Part A** introduces the concepts of exactions and development taxes;
- **Part B** presents a brief history of the use of exactions and development taxes in Montgomery County;
- **Part C** examines the relationship between development district taxes and WSSC's system development charge; and
- **Part D** examines the relationship between development district taxes and impact taxes.

A. Understanding Exactions – In-Kind Contributions and Development Taxes

Regulation for Revenue: The Political Economy of Land Use Exactions (1993) by Alan A. Altshuler and Jose A. Gomez-Ibanez analyzes the growing use of development exactions. The following overview highlights some of the authors' key points and themes, which provide useful background for a review of the County's development district law and its implementation.

1. Definition and Use of Exactions

For the purposes of this discussion, an exaction is a mandate that a government imposes on a real estate developer in exchange for receiving a permit. Generally, exactions fall into 2 broad categories: in-kind or financial. Examples of in-kind exactions are a requirement to dedicate a right-of-way for a road and build it, to install a water line, or to build a moderately priced dwelling unit. Examples of financial exactions are impact fees or other development charges.

Since the mid-70's, governments' use of exactions has grown significantly: more communities impose exactions; they are used to address a broader range of purposes; and the contribution rates are higher. A nationwide survey of the use of exactions in 1985 by Elizabeth D. Purdum and James E. Frank found:

- Before 1960, fewer than 1 in 10 communities used exactions, and the most frequent uses were for road and drainage work, water and sewer lines, police stations and parks.
- By 1985, 9 of 10 of the communities used exactions. Of these, 88% imposed some type of land dedication requirement, 89% imposed build/install requirements, and 58% required cash payments.

Altshuler also analyzes the data from Purdum and Frank to understand how the use of exactions for different purposes grew between 1955 and 1985. He reports:

- Between 1955 and 1964, at least 20% of the responding communities had enacted exactions for police stations and parks;
- Between 1960 and 1969, at least 20% had exactions for roads, schools, water lines, water treatment facilities, sewage treatment facilities and solid waste;
- Between 1965 and 1974, at least 20% had exactions for affordable housing; and
- Between 1970 and 1979, at least 20% had exactions for open space and fire stations.

2. Approaches to Determining Exactions

In theory, the amount or type of an exaction must closely relate to the impact of the development. As Altshuler states, "the explicit purposes of exactions must be to finance service capacity for future occupants or to alleviate negative project impacts on the wider community".¹ While the requirement for a nexus might create an expectation that exactions are determined by formulas, in practice ". . . most exactions are negotiated, and judicial oversight is rare".²

Altshuler reports that the Purdum and Frank study showed most exactions were flexible at least in part. He notes:

Only 14% of the communities with build/install requirements, 23% of those requiring land dedication, and 46% of those requiring cash payments relied purely on formulas. The majorities that did not were more or less evenly divided between those utilizing "standards with some flexibility" and those deciding case by case.³

¹ Altshuler, Regulation for Revenue, p.51.

² *Id.* at 54.

³ *Id.* at 36.

Altshuler reports that although courts have expressed interest in precise exaction rules, this appears to be an uphill battle because it directly contradicts a forty-year trend in zoning regulation to embrace more discretionary approvals. Until the early sixties, zoning was a system of precise, fixed regulations. Since then, however, communities have enacted regulatory systems where permission to develop is discretionary. Altshuler cites Susskind and McMahon who observe that this discretionary system of negotiated regulations requires “the city and the developer [to] bargain over the scope and character of each project and agree on the value, timing, and format of compensatory payments or actions for which the developer will be responsible”.⁴

3. The Institutional Dimension of Administering Exactions

Governments typically codify mechanisms to impose exactions in subdivision and/or zoning ordinances which are often administered by independent, quasi-judicial citizen commissions. As a result, Altshuler observes, “local planning and land use regulation traditionally have been outside the mainstream of local decision making”. He continues:

When actually planning, local land use agencies have tended to ignore fiscal and other immediate considerations, preferring to articulate long term “feel good” visions. As exactions have come into fashion, though, it has become increasingly apparent, first, that land use regulation is about community objectives, not just the resolution of private conflicts; and second, that to be effective as a communal instrument it must be thoroughly integrated with fiscal, environmental, and public works policy making. Where exaction financing is well advanced, these ideas are now taken for granted, and this integration is often far advanced.⁵

4. How Exactions Differ from Taxes

The underlying legal theory of exactions is that when a government reasonably determines that certain public needs are “... attributable to a development, a government can require a development to internalize these costs”. From this perspective, exactions are comparable to user fees, and legally there must be a close relationship or nexus between the fee and the development impact.

In contrast, a government can impose a tax to raise revenue for a general public purpose. In principle, there does not need to be a close relationship between the source of the revenue and what it is used for.

Many communities have established impact fees at levels that are designed to cover the cost of facilities to serve new growth, so that they can forego property tax increases (which would affect existing residents) to pay for these facilities. In Montgomery County, impact taxes and development district taxes are taxes, not fees. This means revenues from impact and

⁴ *Id.* at 56.

⁵ *Id.* at 27.

development district taxes are not limited to paying for facilities to serve new development; instead, they may also be used to pay for infrastructure that provides a general benefit or serves a broader public need. In contrast, revenues from the WSSC system development charge must be used to pay for infrastructure that serves the development that pays it.⁶

5. Who Pays Exactions and Development Taxes

Although exactions are collected from developers and builders during the development approval process, the limited evidence that exists suggests that these participants do not bear the ultimate cost. Instead, the costs of exactions are either passed back to the original landowner (in the form of a lower price for the land than the developer would have paid otherwise) or forward to the homebuyer or renter. According to Altshuler, “. . . the ultimate burden or incidence of exactions, like that of other taxes or fees, falls on the parties that are least able to evade them”.⁷

Altshuler identifies 4 exceptions to this generalization, where developers or landowners bear the burden of exactions. This occurs: shortly after the exactions are imposed; when significant variations exist among exactions locally; in communities with hot real estate markets; and, in communities committed to growth control.

In communities committed to growth management, he contends that permit shortages, not the exactions, create high prices for buyers and renters. He observes that developers with permits reap windfall profits which the government may be able to recapture, wholly or in part, by levying exactions. Altshuler reports that limited empirical evidence exists about exaction payments, but the few available studies support the view that exactions are passed on to property buyers or renters.

6. The Appeal of Exactions and Development Taxes

According to Altshuler, the use of exactions has exploded since the '70s because they offer a politically viable way to raise revenue as well as an effective method to resolve debates about growth and development. He notes:

The great appeal of exactions is that they generate revenue for achieving publicly defined purposes without offending any organized blocs of voters. Although developers would prefer not to be saddled with exactions, they are generally few in number, not willing to offend officials who can deny their permits, and optimistic they can pass the costs onto the consumers. So long as they believe exactions play a role in moderating skepticism about growth, that their competition are bearing similar burdens, and that the market will support exaction costs and healthy profit margin, they are willing to go along.⁸

⁶ See Part C for more information about WSSC's systems development charge.

⁷ *Id.* at 98.

⁸ *Id.* at 9.

He also observes:

The great political appeal of exactions is that they seem free to nearly everyone involved in local affairs. They do not show up on anyone's tax bill, and while they are likely to drive up developer prices they remain imperceptible even to purchasers as a distinct cost item . . . So faced with criticism for growing infrastructure inadequacies, local officials find in exactions a uniquely attractive instrument to finance at least the portion of community investment requirements that plausibly can be attributed to new development. Perhaps even more significantly, they find in exactions a marvelously flexible instrument for crafting compromises.

Developers are less sanguine about exactions, because they like to keep their costs down. But they typically view exactions as just one cost item among many, and they often perceive the alternatives to be prolonged local controversy or outright rejection of their plans. Their primary concern is to make money. If the total regulatory package – zoning restrictions, building codes, environmental rules, and exactions – leaves them room to do so, they almost always are disposed to go along. If not, they are inclined to look elsewhere for opportunities, or to wait for another day, rather than to engage in public protest or litigation. Delays are likely to cost them more than anything they can hope to gain, and they generally have a continued need for the favorable exercise of regulatory discretion.⁹

His observations about exactions are equally applicable to impact taxes in Montgomery County.¹⁰

7. Alternatives to Exactions and Development Taxes

Altshuler identifies 4 alternatives to exactions that localities can pursue to address citizens' concerns about development:

1. Reject new development and divert growth to other jurisdictions;
2. Seek assistance from other levels of government;
3. Raise local tax rates, user fees or both; or
4. Accept a decline in services by accepting growth without making a parallel investment in infrastructure.¹¹

⁹ *Id.* at 126.

¹⁰ They generally apply to development district taxes, except that these taxes do appear on a homeowner's tax bill.

¹¹ A modification to option 3 available to Montgomery County is to establish a special taxing district for a specific geographic area to raise revenues for a particular community facility or service. Practically speaking however, this approach is limited because currently any add-on property tax assessed in a district will count against the County Charter property tax yield limit.

B. A Brief History of Exactions and Development Taxes in Montgomery County

From the day of its creation in 1927, the Maryland-National Park and Planning Commission (acting in Montgomery County as the Montgomery County Planning Board) was authorized to require subdivision applicants to dedicate roadways. This had increased significance when the County's first zoning ordinance in 1928 required a minimum street frontage for each buildable lot. It was also customary for the Commission to receive additions to the stream valley park system by dedications of land. Montgomery County's exaction strategies vary by approach and type of facility.

1. Parks, Open Space and Amenity Packages

The County's earliest exactions for local parks and open space to support a particular project began in 1965 with the enactment of the Planning Neighborhood and Town Sector zones. These zones required land to be reserved for schools, playgrounds, local parks and conservation areas. These zones were the predecessors to the Planned Development and Planned Retirement Community zones.

In 1973, the County enacted 3 Central Business District (CBD) zones which created an option for higher density development in exchange for project amenities. The public sculptures, high-quality street trees and lighting, and well-designed public spaces in the Bethesda, Friendship Heights, Silver Spring, and Wheaton downtowns were provided through a combination of development exactions and public funds.

In 1989, the District Council created the RMX-2 zone, which is the zoning for the Clarksburg Town Center. Mirroring the approach in the CBD zones, the regulations for this zone establish maximum commercial and residential density limits. The regulations replaced specific development standards with a more flexible standard that allows "general commercial uses and higher density residential uses...provided that they are in accordance with the provisions of 59-C-10.3, as well as the density, numerical limitations, and other guidelines contained in the applicable master plan approved by the District Council. Since then the Transit Oriented Mixed Use zones took a similar approach.

2. Roads and Schools

In Montgomery County, new development has always been required to build the on-site streets in a new subdivision because they are needed for access to each property. During the past 30 years, the governing premise in this County has also been that new development should pay a share of the off-site transportation improvements needed to address the additional traffic generated by a development. This was first manifested during the 1970's with Planning Board conditions on individual subdivision approvals, and enhanced by the road clubs of the 1980's and, more recently, by development districts in Germantown and Clarksburg.

Appendix 4B. A Brief Review of Exactions and Development Taxes in Montgomery County

We have no reliable estimates as to how much that new development has paid directly for these off-site transportation improvements, but roads in some areas — notably Germantown — were financed largely by exactions on new development. In Germantown, improvements to key segments of MD 118, MD 355, MD 117, Father Hurley Boulevard, Middlebrook Road, Wisteria Drive, and other roads were paid by forms of development exaction. Some of these costs were passed on explicitly to new homebuyers and tenants, and some were borne by developers.

Road clubs (early 1980's). Road clubs allowed multiple builders developing in a common area to share the cost of a road improvement required as a condition of subdivision approval. New homes were required to pay \$300 annually to cover the developer's principal and interest for major off-site road improvements. Two of the first road clubs were established in Germantown to build relocated MD 118 through what is now the Germantown Town Center.

Transportation impact fee/tax (1986-present). County Executive Gilchrist proposed impact fees on new development to fund master-planned improvements that would increase transportation capacity. He initially proposed fees in 3 areas: Germantown, Clarksburg, and Eastern Montgomery County (Fairland/White Oak and Cloverly). However, he retracted his proposal for fees in Clarksburg when Planning Board Chair Christeller argued that an impact fee there would generate premature development pressure. The Council enacted the impact fee law in April 1986, and it took effect that August.

The law has been revised many times in the past 2 decades. The fee rates were amended biennially to reflect construction cost inflation, updated master plans, and other policy changes. In 1998, State road improvements were dropped from the list of projects eligible to be funded. In 1990, the law was successfully challenged in the Maryland Court of Appeals, resulting in curative legislation which converted the fee to an excise tax. In the late 1990's Clarksburg was added as a third impact tax district. In 2001, the Council enacted a countywide impact tax law for the first time, setting the rates in Metro Station Policy Areas (MPSAs) at half the level as elsewhere; then-County Executive Duncan vetoed the bill, and the Council did not override his veto. Later in 2001, the Council enacted Mr. Duncan's version of a Countywide impact tax, which had the same general structure but with lower rates and an extended (2-year) phase-in period. Finally, in 2003, the Council raised the rates substantially; setting Clarksburg's residential rates 50% higher than the general rates and its non-residential rates 20% higher; tightened credit provisions;¹² implemented an automatic biennial inflation-based rate adjustment; and allowed future Councils to revise the rates by Council resolution (as opposed to legislation).

Development Approval Payment (1993-present). The Council approved an alternative review procedure proposed by then-Councilmember Adams as part of the FY93 Annual Growth Policy which allowed developments in certain MSPAs, as well as small residential subdivisions (no more than 100 units per subdivision) in most other policy areas, to meet their transportation adequate public facilities requirements by paying a Development Approval Payment (DAP) at building permit issuance. The DAP rates, established in Chapter 8 of the County Code, are virtually the same as the Construction Excise Tax rates adopted in 1991, which never took effect.

¹² Bill 31-03, Transportation Impact Tax – Amendments, enacted on October 28, 2003, amended Section 52-55, Credits, to provide that a credit expires 6 years after it is certified by DPWT and to provide that DPWT must not certify a credit for any improvement to a State road with certain exceptions.

Appendix 4B. A Brief Review of Exactions and Development Taxes in Montgomery County

DAP revenue was to be used for transportation capacity improvements in rough geographic proportion to the location of the subdivisions making the payments, except that 20% of the revenue was diverted to the Housing Initiative Fund (HIF).

Over the years, very few MSPA developments opted to use this alternative review procedure, but it was frequently used for small residential subdivisions. The 2003 Growth Policy (which took effect in July 2004) discontinued the alternative review procedure for small residential subdivisions. It continued the MSPA procedure, but keyed its approvals to a doubled impact tax. Some DAP funds still trickle in as subdivisions approved under this procedure reach the building permit stage.

Development Districts (1994-present). The Council enacted a law in 1994 that created a process to review and approve development districts. The property owners in a district are assessed an annual property tax surcharge to pay the principal and interest on County bonds, the proceeds of which pay for the major infrastructure of the district. Three development districts have been established: West Germantown, Kingsview Village Center, and Clarksburg Town Center. Bonds have been issued for the first 2, but the County has not yet issued bonds for the Clarksburg Town Center district. Two other potential development districts in Clarksburg have not yet been approved.

Most, but not all, of the infrastructure funded by the development districts is transportation related. Of the \$38,369,000 for development district projects funded to date in the Capital Improvements Program, \$23,723,000 (61.8%) is for transportation projects.

Expedited Development Approval Excise Tax (1998). The Council enacted an alternative review procedure, commonly known as "Pay and Go", which allowed most development to meet its transportation adequate public facility requirements by paying an Expedited Development Approval Excise Tax (EDAET). The EDAET rates were higher in moratorium areas than in other areas. Several months after "Pay and Go" took effect, a new Council restricted its scope to residential development, and a few months later it was repealed altogether. Like DAP, EDAET payments are still received from subdivisions approved under "Pay and Go," but this revenue is diminishing rapidly.

Recordation Tax increment (2002). To generate more revenue for school capital projects, then-Councilmember Subin proposed increasing the recordation tax rate by about 57%, with the increment dedicated solely to the capital program of Montgomery County Public Schools and to Montgomery College's educational technology projects.

Public school impact tax (2003). Then-Councilmember Perez and Councilmember Andrews proposed the public school impact tax as a corollary to the Development Impact Tax for transportation facilities. Unlike the transportation impact tax, the school impact tax applies only to residential development, and its rates include an element of progressivity: a single-family detached home larger than 4,500 square feet pays a \$1 increment for each square foot above that level, with a maximum increment of \$4,000.

3. Water and Sewer Facilities

In 1993, the General Assembly approved legislation authorizing the Montgomery and Prince Georges County Councils to establish, and the Washington Suburban Sanitary Commission (WSSC) to impose, a System Development Charge. The General Assembly authorized this charge so that new development would pay for that portion of the Commission's Capital Improvement Program needed to accommodate growth in WSSC's customer base. The General Assembly established the System Development Charge a year before the Council enacted the County's Development District Act. The next section examines the coordination of these laws in practice.

C. Coordinating Development District Taxes with WSSC's System Development Charge – A Chronology of the Clarksburg Town Center Water Main

This section examines how the implementation of WSSC's system development charge and the County's development district tax were coordinated in practice. It provides a brief description of WSSC's capital programming responsibilities and its procedures for administering the System Development Charge. This overview is followed by a chronology of the Clarksburg Town Center (CTC) Water Main, an infrastructure item currently approved for CTC Development District funding.

This review shows that a disconnect exists between two different financial exactions that are each intended to pay for facilities required to serve growth: the Systems Development Charge and Development District bond revenues. If the Council does not address this disconnect for the CTC Water Main, the developer apparently could be reimbursed twice for the same project costs.

1. Capital Programming and Implementation of Water and Sewer Facilities

Washington Suburban Sanitary Commission (WSSC) is a state chartered, bi-county agency charged with planning, designing, constructing and operating water and sewer services for Montgomery and Prince Georges Counties. The responsibilities for water and sewer service decisions in Montgomery County are shared among the Montgomery County Council, the County Executive and the WSSC. Maryland Code Article 29, Title 7, sets forth the procedures for the WSSC Capital Improvements Program.

- As required by Section 7-104, before October 1 of each year, WSSC must prepare and submit a capital improvements program to the County Executive and County Council. The capital program must include all major projects.¹³
- As required by Section 7-105(a), the County Executive must "submit recommendations and suggested amendments about the WSSC Capital Improvement Program as an integral part of the comprehensive 6 year Capital Improvements Program required by the Montgomery County Charter". The County Executive makes recommendations to the Council by January 15 of each year.
- The County Council, as the County's fiscal authority, annually reviews and approves WSSC's operating and capital budgets.

¹³ Section 7-101(b) defines major projects to include sewer mains at least 15" in diameter, water mains at least 16" in diameter and sewerage or water pumping stations, force mains, and storage or other facilities.

2. Authority and Requirements for WSSC's Systems Development Charge (SDC)

The requirements for WSSC's system development charge are set forth in Section 6-113 of Article 29 and explained in WSSC's Water and Sewer Authorization Manual.

- Section 6-113(b), System development charge – imposition, provides that WSSC may impose a SDC payable by an applicant for new service. The charge is payable when an applicant files a plumbing permit application.
- Section 6-113(c) provides that the Montgomery and Prince Georges County Council shall meet annually to discuss and approve the amount of the system development charge. The Councils must base the charge on the actual cost of construction of WSSC facilities. The charge was phased in over a 3-year period.
- Section 6-113(e) provides that WSSC may only use the funds collected to:
 - Pay for new facilities where the need is directly attributable to the addition of new service (constructed after July 1, 1993); or
 - Amortize any bond issued in connection with the construction of those new facilities.

Besides authorizing the County Councils and WSSC to establish and administer a system of fees based on the amount of facility costs and payable at permit, the law also authorizes WSSC to enact procedures to coordinate the management of turnkey projects with the administration of the System Development Charge. According to WSSC's Budget Unit Coordinator, this provision was included at the request of the development community in response to a developer's desire to build a facility at his own expense so that he can maintain control over the timing of his development project.

Section 6-113(f) authorizes WSSC not only to establish a facility management system that allows a developer to design and install a facility, but also to establish procedures for accepting the facilities into the WSSC system and granting credits equal to the cost of constructing the facilities. Specifically:

- Section 6-113(f) authorizes WSSC to allow a developer to design and construct any on-site or off-site facilities "necessary for a project of the developer" as long as the facilities are:
 - programmed in the WSSC CIP and the Ten Year Water and Sewer Plan; and
 - designed, constructed, and inspected in accordance with WSSC's standards, laws, regulations, and written policies.

Appendix 4C. A Brief Review of Exactions and Development Taxes in Montgomery County

- Section 6-113(f)(2) requires that after WSSC approves facilities constructed by a developer under this subsection, WSSC must:
 - accept the facilities as part of the WSSC system; and
 - grant the developer a credit against any charge imposed under this section in an amount equal to the cost of constructing those facilities.

Two additional sections of the law address how these provisions should be implemented. Section 6-113(R)(3) requires the internal auditor of WSSC to review and approve the costs incurred by the developer. Section 6-113(R)(4) requires the WSSC and the developer to enter into an agreement incorporating the provisions of this subsection.

As a result of the SDC enabling legislation enacted in 1993, WSSC added 2 new CIP funding sources to fund projects to support new growth. As explained in WSSC's CIP,

- SDC "includes anticipated revenue from a System Development Charge and developer contributions;" and
- Contribution/Other is a source of funds for "projects funded by Applicants for growth projects where the County Councils directed that no WSSC rate-supported debt is used to pay for the project".¹⁴

WSSC's Water and Sewer Authorization Process Manual (accessible online at http://www.wsscwater.com/dsg-permits/dsg_ws_manual.cfm) explains the implications of the SDC authorizing legislation. It states:

The 1993 legislation which authorized the WSSC to impose the System Development Charge also allowed for developers and others to construct the water and sewer facilities needed for their development, at their expense, subject to WSSC approval. Upon completion of construction the facilities are turned over to the WSSC for service and maintenance. To do this, the applicant must execute a Memorandum of Understanding (MOU) with the WSSC which covers the design and construction of the facilities in accordance with SOP PD-93-06. Under this agreement the applicant must pay all costs incurred by the WSSC for their construction. This would include plan review, supervision and inspection, and other costs incurred by the Commission. If the facilities to be constructed are in the Capital Improvements Program, the applicant will receive credits toward their Systems Development Charge for the eligible cost incurred by the applicant for the design and construction of the facilities in accordance with SOP CUS 94-03.¹⁵

¹⁴ WSSC Adopted Six-Year Capital Improvements Program Fiscal Years 2007-2012, June 21, 2006, p.5

¹⁵ http://www.wsscwater.com/dsg-permits/dsg_ws_manual.cfm. Chapter 2, Water and Sewer Service Development, Part I., Construction by Applicant, accessed August 13, 2007.

WSSC's Manual also provides a Water and Sewer Service Staging Flow Chart that displays the key steps in the authorization and approval of a water and sewer service facility. (See http://www.wsscwater.com/dsg-permits/dsg_ws_manual.cfm.)

3. WSSC's Standard Operating Procedures to Implement the Systems Development Charge – PD-93-06 and ENG-04-01

Following the establishment of the System Development Charge, WSSC updated and approved 2 related standard operating procedures to implement the law: PD-93-06 and SP ENG-04-01.

PD-93-06, Procedure for Development a Memorandum of Understanding for the Construction of WSSC Systems by Others, defines the procedural steps required to allow the construction of WSSC systems by others. Two key administrative concepts that this procedure establishes are a Memorandum of Understanding and a Turn-Key Project.

- Section 2.00, Definitions, Memorandum of Understanding (MOU) defines a MOU as “An agreement issued to cover design and construction of any water and/or sewerage system or facilities within the Sanitary District in Montgomery and Prince George’s Counties, Maryland, that will be constructed and financed by others . . .”
- Section 2.04, Definitions, Turn-Key Project states “All projects are to be handled under a turn-key concept. Under this concept, the Requestor will design and construct all facilities in accordance with Commission standards and technical criteria. The Commission will not accept or approve the facilities for operation until construction and testing of the facilities have been completed to the satisfaction of the Commission and all expenses have been paid.

SP ENG-04-01, SDC Applicant Credits and Reimbursements, is WSSC's current Standard Operating Procedure for the administration of System Development Charge (“SDC”) Applicant Credits and Reimbursements. This procedure establishes the following definitions and provisions for SDC Credit Agreements and SDC Credit Eligible Costs.

- Section 2.8, SDC Credit Agreement, defines this as “An agreement that summarizes the eligible costs considered for SDC Credit (As described in Section 3.6). The SDC Credit Agreement is appended to an SEP. The credit agreement is included in the MOU as Attachment A”.
- Section 3.6 provides that SDC is the “total eligible Project cost incurred and paid by the Applicant. The SDC Credit is subject to the general guidelines that (1) eligible costs will be the types of costs that WSSC would have incurred had WSSC designed and constructed the Qualified Project, and (2) the SDC Credit will not exceed the maximum amount mutually agreed upon in the SDC Credit Agreement. Eligible costs must be directly allocable to the Qualified Project.

Under SP-ENG-04-01,

- An applicant's SDC credits may not exceed 50% of the estimated total project cost during construction;
- After WSSC accepts a project and places it in service, the applicant must submit a written request for audit to WSSC's Internal Audit Manager, along with an itemized list of eligible costs;
- After WSSC's Internal Audit Section conducts a final audit to determine the actual total eligible project cost, WSSC makes the remaining SDC credits available to the developer up to the eligible project cost; and
- A developer has the option of applying the SDC credits against SDC charges for another project or requesting a cash payment.

Finally, Section 3.9 of SP ENG 04-01 provides that an "SDC Credit Agreement will not provide payment to the Applicant for costs the Applicant did not incur or for costs reimbursed to the Applicant from other sources".

4. Chronology for the Clarksburg Town Center (CTC) Water Main Project

In 1994, a year after the State enacted the SDC, the County Council enacted legislation authorizing the delineation of a special district and the imposition of special taxes and assessments to support new development. As explained in the Council staff's report, the Development District Act authorized the County to use development district revenues to cover the cost of bonds issued to finance infrastructure improvements located in a district. Section 14-3(g) explicitly identifies sewer and water systems among the types of public facilities eligible for development district funding. It does not provide any exclusions for water and sewer facilities programmed with SDC funds or developer contributions.

This section presents a chronology of the development planning, programming, construction, financing, and acquisition of the Clarksburg Town Center Water Main Project ("CTC Water Main") to examine how the authorization and capital programming of the CTC Water Main, the administration of the SDC, and the establishment of the CTC development district tax were related in practice. The chronology reflects:

- WSSC's project planning, capital programming, construction management, and SDC administration practices;
- The Planning Board's regulatory review and approval practices;
- The Executive's capital programming and development district implementation practices; and

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- The Council's capital programming and development district approval practices.

Initial Programming of the CTC Water Main Project. On May 26, 1995, the County Council adopted Resolution 13-157, Budget Approval for the WSSC Fiscal Year 1996 Capital and Operating Budgets. The Approved WSSC Capital Improvements Program included Project W-46.13, Clarksburg Town Center Water Main. According to the Description and Justification section of the Project Description Form (PDF), this project was "added at the request of the Montgomery County Council, March 21, 1995; Clarksburg Master Plan, Stage II". The PDF stated that the project scope was developed in FY 1995 and that the preliminary cost estimate was a placeholder until WSSC completed a comprehensive cost estimate. The PDF displayed the funding source as "Contribution/Other".

The text stated that "100% of this project supports future growth". It indicated that the proposed main would provide service to the 1,300 residential units and to the 275,000 square feet of Commercial/Retail/Civic space within the Clarksburg Town Center tract.

The Planning Board's Regulatory Approvals. Between June 1995 and January 1998, the Planning Board issued 3 Opinions for the CTC Project:

- The Project Plan Opinion was mailed in June 1995;
- The Preliminary Plan Opinion was mailed in March 1996;
- The Phase I Site Plan Opinion was mailed in March 1998.

The regulations that form the basis for the Planning Board's development approval process require the Planning Board to make a finding about the adequacy of public water to serve the proposed development. Notwithstanding these regulatory requirements, none of the Planning Board's Opinions explicitly states that the site currently lacked public water service, or addresses who will be responsible for providing the public infrastructure necessary to serve the site.

Neither the Opinions nor the Planning staff reports contain any conditions requiring the applicant to install and construct a 20" water main, nor do they contain any statements that the County's approved capital program includes a proposed water main project that is designed to serve the CTC Project.

The Project Plan Staff Report contains the only mention of water service. It states that a 16" water main exists adjacent to the site, and makes a declarative statement that water service will be adequate to serve the CTC Project.¹⁶

¹⁶ The former Subdivision Coordinator suggested that there may have been a letter from WSSC in the Preliminary Plan Project file. At the request of Council and OLO staff, the current Chief of Development Review and the current Community Planning Coordinator for the I-270 Coordinator reviewed the CTC Project files. They reported that they did not find any letters from WSSC addressing the adequacy of water and sewer service in the CTC Project files; however, the Chief of Development Review reported that she did find comments from WSSC recorded in the minutes of a Development Review Committee meeting.

Developer's Application to WSSC for an Extension Authorization. In December 1995, Piedmont Land and Clarksburg Land Associates TA Clarksburg Town Center Venture, (the original owner of the CTC Project), filed an extension authorization application with WSSC's Development Services Group.

In December 1996, WSSC's Development Services Group approved this application subject to 18 conditions. WSSC's comments and additional conditions on the approved application state, in part:

The applicant proposes to design and construct the temporary facilities, the 20-inch water main from the existing 16-inch water line in Route 355 to the existing 16 inch water line in Piedmont Road (W-46.13 as shown in the WSSC's proposed FY98 CIP) and Part 4, under Memorandums of Understanding (MOU) with the Commission. Prior to commencement of design, the applicant will be required to pay a deposit for the total estimated WSSC cost of plan review. Prior to the commencement of construction, the MOU(s) must be approved and executed, and a deposit for the total estimated WSSC cost, including construction, supervision, and inspection, shall be paid to the Commission. Upon completion of construction, the facilities will be turned over to the Commission for service and maintenance. Approval is subject to the applicant complying with Standard Procedure PD-93-06, which includes provisions for a Memorandum of Understanding.¹⁷

Execution of the CTC Water Main Project Memoranda of Understanding (MOU), the SDC Credit Agreements, and the Construction Contracts. Following WSSC's approval of an authorization request, a developer executes a Memorandum of Understanding (MOU) with WSSC that addresses the design and installation of the project. The developer also executes an SDC Credit Agreement that summarizes the eligible costs considered for SDC Credit. The SDC Credit Agreement is included in the MOU as Attachment A.

According to current WSSC staff, WSSC and the developer executed Memoranda of Understanding for the CTC Water Main Project since this project was built by the Developer and was underway prior to July 1, 2000 when the System Extension Permit (SEP) process was enacted under Maryland law. Beginning in September 2001, following the Council's programming approval, WSSC executed 24 separate contracts with the developer to provide for the installation and construction of the CTC Water Main Project. **Exhibit C-1** on page 4C-11 lists the contracts with SDC Credit Agreements, and the SDC Credit Amounts established for each of these contracts, plus one contract that is expected to have an SDC Credit Agreement in the future.

Petition for the Establishment of the CTC Development District. In July 2000, the developer filed a petition to create the CTC Development District. This petition requested that the proposed CTC Development District fund the CTC Water Main at an estimated cost of \$326,951. This cost estimate accounted for segments outside the geographic boundaries of the

¹⁷ WSSC Extension Authorization Report Number 96-1729A, approved 12-4-96, p.3.

CTC Project; the developer combined the costs for other segments with the costs of roads located within the geographic boundaries of the CTC Project. In September 2000, the Council adopted Resolution 14-648 indicating its intent to consider the creation of a CTC Development District.

Planning Board's Provisional Adequate Public Facilities (PAPF) Review. In November 2000, the developer submitted a PAPF application to the Planning Board. In March 2001, the Planning Board sent a letter to the County Executive with its recommended infrastructure improvements, including the CTC Water Main. The Planning Board recommended CTC Development District funding for the off-site portion of the CTC Water Main. The Planning Board's rationale for its recommendation was that the "improvements to be included in the Development District should serve the regional area, not just the residents of a single development".

Executive's Fiscal Review. Over the next 18 months, Executive staff managed the Executive's review of the CTC Development District petition. As described in the Executive's Fiscal Report, this was a collaborative effort led by staff in the Office of Management and Budget and Finance with input from Planning Department staff in the Community Planning Division and the developers.

The Executive's review for the CTC Water Main Project included:

- Consultation with WSSC staff to verify the cost estimate information submitted by the developer, as required in Section 14-8(a); and
- Consultation with Planning staff to determine whether the project was required as a condition of regulatory approval.

In June 2002, WSSC's Development Services Group notified the OMB Coordinator for Clarksburg that the cost estimate appeared reasonable and consistent with preliminary estimates developed by WSSC. In its letter, WSSC staff noted that over half of the water main had been installed, and provided information about other programmed projects in the area. The OMB Coordinator did not request and WSSC staff did not provide information about the CTC Water Main project's source of funds, nor did either staff raise concerns about the relationship between the use of the CTC Development District bond proceeds and WSSC's SDC credits.

In October 2002, the County Executive forwarded his recommendations for a CTC Development District to the County Council. His cover letter characterized the CTC Water Main as one of 3 projects originally proposed by the developer that would provide general benefit to the Clarksburg community at large. The Executive's cost estimate, which was \$779,000, reflected the total project cost. The Executive's Fiscal Report classified the CTC Water Main as "Not Required," based on information provided by Planning staff. A discussion under "Items for Future Evaluation" indicated that any WSSC systems development charge credits accruable to the district as an item for future evaluation should be handled as part of the implementation agreement.

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WSSC's Notice of Substantial Completion and Payment of SDC Credits. In July 2001, WSSC issued a notice of substantial completion for one of the first 2 CTC Water Main contracts. Subsequently, the applicant submitted requests for audit of the first 2 contracts to WSSC's Internal Audit Manager. In January 2003, the Internal Audit Manager issued final audit reports and WSSC issued 2 checks totaling \$365,212 to the developer for SDC reimbursement.

Establishment of the CTC Development District and Amendment of the Capital Project. On January 13, 2003, the Executive forwarded his recommended amendments to the County's Approved CIP. On March 4, 2003, the Council approved Resolution 15-87, approving the creation of the CTC Development District.

On March 11, OMB staff forwarded a revised PDF for the CTC Water Main Project to the Council staff CIP Coordinator. The PDF amended the funding source for the CTC Water Main Project to show \$397,000 in Contribution/Other funds and \$382,000 in Development District Bonds. According to WSSC's Budget Unit Coordinator, the allocation of \$397,000 to Contribution/Other reflected the actual amount the developer had spent on the project to date; the allocation to Development District Bonds reflected the remaining costs at that time.

According to WSSC's Budget Unit Coordinator, this approach addressed WSSC's intention to use the Contribution/Other funding source to show that the Applicant was paying for the project, and it also met the Executive staff's desire to display development district bonds as an intended funding source. The Council Committee packet, prepared by Council staff, reiterated the information from the Executive's letter.¹⁸ In June 2003, the Council approved the FY04 CIP including this PDF. For the next 3 fiscal years (from FY05 through FY07), the PDFs that were submitted by WSSC, recommended by the Executive, and approved by the Council continued to show these 2 sources of funds.¹⁹

WSSC's Release for Service of Additional Capital Project Segments and Payments for SDC Credits. Between March 2002 and March 2004, WSSC issued final releases for service for 4 additional contracts for the CTC Water Main, and in April 2005, the applicant submitted a request for audit to WSSC's Internal Auditor. The Internal Auditor was informed the developer would be submitting documentation to increase the authorized maximum eligible SEP amounts for 3 of the contracts. Although the Internal Auditor contacted the developer numerous times over the next 2 years, she did not receive any additional documentation. In May 2007, given the lack of response, the Internal Auditor notified the developer that she was placing the audit request in inactive status.

Current Capital Project Status. On May 24, 2007, the County Council adopted Resolutions 16-170 and 16-171 to approve the FY08 to FY13 Capital Improvements Program for WSSC. The Approved WSSC Capital Improvements Program includes Project W-46.13, Clarksburg Town Center Water Main. In FY08, the total programmed expenditure for this

¹⁸ WSSC staff indicate the Executive's transmittal letter and Council staff packet are the only documentation they have in the file to explain the change in funding source.

¹⁹ WSSC staff reports that it continued to follow this practice in FY05, FY06, and FY07, but it did not follow this practice in FY08 or FY09. For these years, the source of funds is only Contribution/Other. WSSC staff does not have an explanation for why it reverted back to showing only Contribution/Other.

Appendix 4C. A Brief Review of Exactions and Development Taxes in Montgomery County

project is \$33,000 including \$3,000 in Planning and Design Fees, \$26,000 in Construction Costs, and \$4,000 in Other Costs. The Expenditure Detail (Report CIP230) in the CIP Budget Summary Schedules shows the total project cost is \$1.098 million. It shows all of the funds are scheduled to be expended in FY08.

The PDF in the approved FY08 CIP and the draft FY09 CIP revert to displaying the sources of fund for the CTC Water Main Project as Contribution/Other. The PDF indicates the project construction is 95% complete. WSSC's Budget Unit Coordinator anticipates WSSC will close out the capital project in FY10.

As of September 2007, WSSC's SDC Credit and Voucher data show:

- WSSC has issued a total of \$365,212 to the developer in SDC reimbursements for two audited contracts;
- WSSC has placed four contracts in inactive status. These contracts have a combined SDC Credit balance of \$98,696, which represents 50% of the authorized maximum eligible SEP amount; and
- WSSC has not received an audit requests for three contracts, which have a combined SDC Credit balance of \$91,809.50 (representing 50% of the authorized maximum eligible SEP amount).

If the remaining balance of \$190,505 is doubled, it equals \$381,010. This amount represents the additional amount WSSC has budgeted to refund to the developer based on its current SDC Credit Agreements. This amount, combined with the \$365,212 the developer has already received equals \$746,222. This amount is slightly less than the \$779,000 approved for acquisition of the CTC Water Main using CTC development district bond proceeds.

Appendix 4C. A Brief Review of Exactions and Development Taxes in Montgomery County

Exhibit C-1. Status of WSSC's SDC Credits and Vouchers for the Clarksburg Town Center Water Main Project

Contract Numbers	Audit Status	Authorized Maximum Eligible SEP Amounts	50% of Maximum Eligible SEP Amount Available as SDC Credit for Plumbing Permit Fees	WSSC Dates of Substantial Completion or Release for Service	Total requests for reimbursement submitted by the developer	Actual Eligible Costs	SDC Reimbursements Payments to Developer in Cash	Balance Remaining
DA1729C96	Audit Completed	\$177,642.00	\$88,821.00	Not available	\$213,473.00	\$172,621.00	\$172,621.00	\$0.00
DA1729E96	Audit Completed	\$199,333.50	\$99,666.25	July 17, 2001	\$251,761.00	\$192,591.00	\$192,591.00	\$0.00
DA1729I96	Request Submitted- On hold	\$20,823.59	\$10,411.80	March 27, 2002	\$70,936.50	On Hold		\$10,411.80
DA1729L96	Request Submitted- On hold	\$110,854.22	\$55,427.11	May 30, 2003	\$105,758.43	On Hold		\$55,427.11
DA1729M96	Request Submitted- On hold	\$26,244.88	\$13,122.44	Oct. 10, 2003	\$167,438.85	On Hold		\$13,122.44
DA1729N96	Request Submitted- On hold	\$39,468.55	\$19,734.28	March 3, 2004	\$232,299.49	On Hold		\$19,734.28
DA1729R96	No audit request submitted	\$92,636.00	\$46,318.00	Nov. 22, 2004	No audit request submitted			\$46,318.00
DA1729S96	No audit request submitted	\$44,299.00	\$22,149.50	Dec. 20, 2004	No audit request submitted			\$22,149.50
DA1729W96	No audit request submitted	\$46,684.00	\$23,342.00					\$23,342.00
DA3689C03	No audit request submitted	To be determined						
Totals		\$757,984.74	\$378,992.38		\$1,041,667.27	\$365,212.00	\$365,212.00	\$190,505.13

Source: WSSC Internal Audit and Permit Services Unit, August 2007.

D. Coordinating Development District Taxes with the County's Transportation Impact Taxes

The Executive's Fiscal Reports for the CTC Development District and the West Germantown Development District cited the structure of the County's development district law and impact tax law as a key justification for using development district proceeds to acquire infrastructure with a regional benefit.

This section of the appendix presents information about the implementation of these 2 laws in Clarksburg. It begins with a review of key sections of County law that define the current relationship between development districts and impact taxes. This overview is followed by information about the collection of transportation impact tax collections in the Clarksburg Impact Tax area between FY02 and FY07.

This review shows that if declarations for the three Clarksburg development districts were to be recorded in the County land records as of June 30, 2007, the district developers or homebuilders would be eligible for impact tax refunds totaling \$6.537 million, including \$2.514 million in cash refunds and \$4.023 million in adjustments to credit escrow accounts. This amount represents 55% of all Clarksburg impact tax payments collected between FY02 and FY07.

1. The Relationship of Development District Act and Impact Tax Act in Montgomery County Code

Four sections of the County Code (2 sections of Chapter 14 and 2 sections of Chapter 52) establish a set of related requirements for impact tax payments for properties that are part of a development district.

- One section of the law, Section 14-10(e), requires development district taxes to be credited against impact taxes or construction excise taxes that County law imposes;
- Another section of the law, Section 52-55(d), assigns the impact tax credit to the applicant of a development district;
- A third section of the law, Section 14-17(c) requires the Director of Finance to record a declaration that encumbers all of the real property in a development district before issuing any bonds; and
- Another section of the law, Section 52-54(a)(4) provides that a person who has paid a development impact tax and is eligible for a credit can also be eligible for a refund after the Director of Finance records a declaration that encumbers the property and states it is subject to a development district in the County land records.

Appendix 4D. A Brief Review of Exactions and Development Taxes in Montgomery County

The specific sections of the County Code are as follows:

Section 14-10, Special Taxes and Assessments, establishes financing requirements for the development district. It requires the Council's 3rd resolution to authorize the imposition of a special assessment at a rate that generates enough revenues to pay the principal and interest on the bonds and replenish the debt service reserve fund.

Sec. 14-10(e) establishes that the total amount of any development district tax must be credited against any impact tax or construction excise tax imposed in Chapter 52. It states:

- (e) The total amount of any development district special tax . . . paid under this Chapter must be credited against:
 - (1) the development impact tax and construction excise tax imposed under Chapter 52, as applicable; and
 - (2) Any other charge, fee or tax listed in the resolution adopted under Sec. 14-9 (including any front foot benefit charge, assessment, or tax imposed on construction) which is imposed by the County expressly to finance the costs of infrastructure improvements necessary to allow development.

Section 52-55, Credits, defines several circumstances when a property owner who pays a development impact tax is entitled to a credit. Subsection 52-55(d) states:

To the extent provided in Section 14-10(e), an applicant is entitled to a credit against the impact tax imposed by this Article for any development district special tax, special assessment, fee, or charge paid under Chapter 14 for property located in the development district for which a building permit is sought. In calculating the amount of the credit, a special tax, special assessment, fee, or charge imposed under Chapter 14 must be considered paid for a property when a declaration encumbering the property required under Section 14-17(c) has been recorded in the County land records.

Section 52-54, Refunds, addresses refunds of development impact taxes. Subsection (a) specifies 4 circumstances when a person who has paid a development impact tax may apply for a refund. As defined in Section 52-54(a)(4), one circumstance that qualifies a person for a refund of a development impact tax occurs when a property for which the impact tax has been paid is encumbered in the County land records as part of a development district, as required in 14-17(c). The language of Section 52-54(a)(4) states:

A declaration encumbering the property for which the development impact has been paid has been recorded in the County land records as required under Section 14-17(c) and the applicant is entitled to a credit under Section 52-55(d).

Section 14-17, *Disclosure to Buyers*, of the Development District Act establishes requirements for disclosure to buyers. Section 14-17(c) requires the Director of Finance to record a statement encumbering the property in a development district in the County land records before the County issues development district bonds. Section 14-17(c) states:

- (c) Before any bonds are issued under this Chapter, the Director of Finance must record among the land records of the County at the cost of the development district a declaration encumbering all real property located in the district and designating that property as subject to a development district. The declaration must terminate when the Director records a release stating that all bonds are fully repaid.

2. Impact Tax Collections Received from Clarksburg Development Projects

On May 1, 2001, the County Council enacted Bill 4-01, Impact Tax-Amendments to create a Clarksburg impact tax district and adopt tax rates and a transportation program for the district. On October 28, 2003, the County Council enacted Bill 31-03, Transportation Impact Tax – Amendments, to revise the transportation impact tax districts and rates. One part of this legislation replaced the transportation program in the Clarksburg Impact Tax district with 8 criteria to direct the use of impact tax funds.

Since the establishment of the Clarksburg impact tax district,

- The Department of Permitting Services has collected impact tax payments before it issues a building permit;
- The Department of Public Works and Transportation has administered the establishment and use of impact tax credits; and
- The Department of Finance has maintained the records to show the source and disbursement of revenues.

At OLO's request, the Department of Finance provided information about impact tax revenues and the Department of Permitting Services provided information about the types and sources of impact tax payments. **Exhibit D-1** summarizes the Department of Finance data for the Clarksburg Impact Tax District Account between FY02 and FY07. As of June 2007, the County has collected \$5.944 million in impact tax payments from building permits issued for several Clarksburg development projects. The County has used \$5.640 million in impact tax collections for the Stringtown Road Extended Capital Improvements Project, which is the only project that has used Clarksburg Impact Tax collections so far. The County has \$691,678 in impact tax payments for the Clarksburg Impact Tax District on hand.

Exhibit D-1. Impact Tax Collections and Use for the Clarksburg Impact Tax District, FY02-FY07

Fiscal Year	Impact Tax Collections	Impact Tax Budgeted	Impact Tax Usage
FY2002	\$176,555	\$0	\$0
FY2003	\$585,025	\$304,000	\$66,188
FY2004	\$1,618,099	\$286,000	\$398,341
FY2005	\$2,360,719	\$783,000	\$347,627
FY2006	\$4,449,554	\$3,128,000	\$2,562,250
FY2007	\$754,966	\$1,139,000	\$2,265,594
Total Impact Tax Collections	\$5,944,918	\$5,640,000	\$5,640,000
Interest Income	\$386,760		
Total Collections and Interest Income	\$6,331,678		
Total Impact Tax Usage	\$5,640,000		
Total Impact Tax on hand	\$691,678		

Source: OLO and Finance, August 2007.

Exhibit D-2, on the next page, displays data from the Department of Permitting Services about how various development projects in Clarksburg have paid the required impact tax. Under the law, a property owner may pay an impact tax due at building permit in cash or with a credit voucher.²⁰ The DPS data show:

- The value of impact tax contributions the County received between FY02 and FY07 totals \$11.854 million, including \$5.944 million in cash payments and \$5.909 million in credit vouchers; and
- Of these contributions, \$6.537 million (55%) are from properties in one of the 3 existing or proposed Clarksburg development districts and \$5.317 million (45%) are from properties that are not proposed to be in a development district; .

As explained above, County law provides that an applicant of a development district is eligible for a refund of impact taxes paid. This means that as of the end of FY07, the applicants of the Clarksburg development districts are eligible for refunds totaling \$6.537 million, including:

- \$1.798 million for the Clarksburg Town Center Development District applicant;
- \$2.492 million for the Clarksburg Skylark Development District applicant; and

²⁰ Under §52-55(b), a property owner must receive a credit for constructing or contributing to certain transportation improvements if the improvement reduces traffic demand or provides additional transportation capacity. A property owner who wishes to receive a credit must enter into an agreement before any building permit is issued. DPWT administers the credit certification program.

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- \$2.247 million for the Clarksburg Village Development District applicant.

DPS reports that it would process a refund request according to how the original payment had been made. For example, since the applicant for the Clarksburg Town Center Development District paid its impact taxes in cash, DPS would authorize Finance to disburse a cash refund of up to \$1.798 million. On the other hand, since the applicant for the Clarksburg Skylark Development District paid \$545,000 in cash and \$1.947 million in credits, DPS would authorize Finance to disburse a cash refund of \$545,000, and DPS would authorize a \$1.947 million increase in the Clarksburg Skylark credit escrow account that it maintains.

DPS also reports that after the Director of Finance records the declaration for a district in the land records, DPS no longer collects impact taxes for properties in the district that are seeking a building permit.

Exhibit D-2. Clarksburg Transportation Impact Tax Payments (Cash and Credit) for Development District Properties and Non-Development District Properties, FY02-FY07

Clarksburg Subdivision Developments	Cash Payments Received for Impact Taxes Due	Credit Issued from Escrow Accounts for Impact Taxes Due	Total Value of Cash Payments and Credits Issued through FY07	Share of total value through FY07	Amount of Impact Tax Collections Eligible for Cash and Credit Refunds
Clarksburg Town Center	\$1,797,591.00	\$0	\$1,797,591.00	15%	\$1,797,591.00
Clarksburg Skylark	\$ 544,819.00	\$1,947,119.00	\$2,491,938.00	21%	\$ 2,491,938.00
Clarksburg Village	\$ 171,243.00	\$2,076,130.00	\$2,247,373.00	19%	\$ 2,247,373.00
Subtotal for development districts	\$ 2,513,653.00	\$4,023,249.00	\$6,536,902.00	55%	\$ 6,536,902.00
Non-Development District Subdivisions	\$ 3,431,265.07	\$1,886,257.63	\$5,317,522.70	45%	\$0
TOTALS	\$ 5,944,918.07	\$5,909,506.63	\$ 11,854,424.70	100%	\$ 6,536,902.00

Source: OLO and DPS, 2007.

3. Impact Tax Refund Payments for the West Germantown Development District

OLO obtained information from Finance and DPS about refunds for the West Germantown Development District to determine the amount and sources of funds for impact tax

Appendix 4D. A Brief Review of Exactions and Development Taxes in Montgomery County

refund requests. According to DPS, the County processed requests for \$1.3 million in impact tax refunds for the West Germantown Development District. Exhibit X displays the dates and amounts of impact tax refunds. According to Finance, the source of funds for these refunds, which were all cash disbursements, was the Germantown Impact Tax account. According to DPS, there were no refunds for subdivisions in the West Germantown District processed as adjustments to credit escrow accounts.

The \$1.3 million in impact tax refund payments understates the total development district offset against impact tax collections because it represents only that portion of impact taxes that the County collected before the Director of Finance recorded a declaration of the district. It does not include impact tax payments that DPS did not collect after the district was recorded. In 1997, the County Executive's Fiscal Report for the West Germantown Development District estimated the net impact tax credit at \$2.895 million. This estimate was based on FY97 impact tax rates and credits for improvements to Great Seneca Highway.

Exhibit D-3 Impact Tax Refund Payments for the West Germantown Development District

Hoyles Mill Village/Woodcliffe Park		
Date	Payee	Amount
Sept. 26, 2002	Artery Holyes Mill LLC	\$625,802
April 8, 2003	Artery Holyes Mill LLC	\$3,554
April 8, 2003	Toll Brothers	\$14,838
Subtotal for Hoyles Mill Village		\$644,194
Kings Crossing		
Date	Payee	Amount
Jan. 22, 2003	Richmond American	\$84,614
Jan. 22, 2003	Mid-Atlantic	\$2,492
Jan. 22, 2003	The Ryland Group	\$301,028
May 15, 2003	Ryan Homes	\$240,666
Feb. 3, 2004	NV Homes	\$44,172
Subtotal for Kings Crossing		\$672,972
Grand Total for WGDD		\$1,317,166

Source: DPS, September 2007.

MONTGOMERY COUNTY CODE
Chapter 14

Chapter 14. DEVELOPMENT DISTRICTS.

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§ 14-2. Purposes.

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Article III. Financing a Development District.

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§ 14-12. Bonds—Payment, sinking funds, reserve funds, pledges and other financial guaranties, proceeds.

§ 14-13. Resolution; investment of special fund or sinking fund; tax exemption.

§ 14-14. Form, terms and conditions of bonds.

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§ 14-16. Administration of district; termination.

§ 14-17. Disclosure to buyers.

§ 14-18. Construction of chapter.

ARTICLE I. GENERAL PROVISIONS.

Sec. 14-1. Short Title.

This Chapter may be referred to as the Montgomery County Development District Act. (1994 L.M.C., ch. 12, § 1.)

Sec. 14-2. Purposes.

- (a) The purposes of this Chapter are to:
 - (1) authorize 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;
 - (2) authorize the issuance of bonds or other obligations of the County that are payable from special assessments or special taxes collected, or tax increments created, in a development district;
 - (3) specify the procedures to be followed in creating a development district, issuing bonds, and assessing and enforcing the collection of special assessments or special taxes in such a district; and
 - (4) provide for the tax-exempt nature and form of the bonds.
- (b) Development districts would be especially useful in achieving these 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 availability of land will permit significant development within the life of a development district. (1994 L.M.C., ch. 12, § 1.)

Sec. 14-3. Definitions.

In this Chapter the following words have the following meanings:

- (a) Adequate Public Facility means any infrastructure improvement required by the Planning Board as a condition of approving a preliminary plan of subdivision under Section 50-35(k) or identified in the Growth Policy as necessary for adequate public facilities approval in a development district.
- (b) Additional Public Facility Capacity means the provision of an infrastructure improvement not fully funded in the first 4 years of the County's then-applicable Capital Improvement Program.
- (c) Bond means a special obligation or revenue bond, note, or similar instrument issued under this Chapter or any other law if the indebtedness evidenced thereby will be repaid from revenue generated by special assessments, special taxes, fees, or charges levied under this Chapter, or special funds established under the Tax Increment Financing Act, in a development district.
- (d) Cost means the aggregate dollar cost of:
 - (1) building, rebuilding, or renovating any infrastructure improvement, and acquiring any land, structure, real or personal property, right, right-of-way, franchise, easement, or interest;
 - (2) machinery and equipment, including machinery and equipment needed to expand or enhance services in a development district;
 - (3) financing charges and interest before and during construction and, if the County Executive finds it advisable, for a limited period after completing construction; interest and reserves for principal and interest, including costs of municipal bond insurance and any other financial guaranty, and costs of issuance;
 - (4) extensions, enlargements, additions, or improvements;
 - (5) architectural, engineering, financial, and legal services;
 - (6) plans, specifications, studies, surveys, and estimates of costs or revenues;

- (7) administrative expenses necessary or incident to deciding whether to proceed with any infrastructure improvement; and
 - (8) any other expense necessary or incident to building, acquiring, or financing any infrastructure improvement.
- (e) Development includes redevelopment of underdeveloped land.
- (f) Development District means a special taxing district created for the purposes listed in Section 14-2.
- (g) Infrastructure Improvement means 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, and the land where it is or will be located. 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.
- (h) Owner means a person or entity with legal title to property, or a contract purchaser of a property.
- (i) Special Assessment means a levy on property which is assessed in relation to any special benefit received from the construction of one or more infrastructure improvements to support development in a development district.
- (j) Special Benefit means any advantage or betterment accruing to real property as the direct result of any infrastructure improvement. The allocation of any additional public facility capacity to a development project is a special benefit.
- (k) Special Fund means an independent account in which special assessment, special tax, fee, charge, or tax increment payments received for a development district are deposited.
- (l) Special Tax means a property or excise tax levied in a development district, not based on any special benefit received, to pay for one or more infrastructure improvements to support development in that district.
- (m) Tax Increment Financing Act means the State Tax Increment Financing Act in Article 41 of the Maryland Code.

- (n) Tax Increment means for any tax year the amount by which the assessable base as of the January 1 before that tax year exceeds the original taxable value, as provided in the Tax Increment Financing Act. (1994 L.M.C., ch. 12, § 1; 2004 L.M.C., ch. 2; § 2.)

Sec. 14-4. Powers of County.

In addition to any power granted under any other law, the County may, subject to applicable state law and this Chapter:

- (a) create one or more development districts;
- (b) levy special assessments, special taxes, fees, or charges, in any development district; and
- (c) issue bonds and other obligations payable from:
 - (1) special assessments, special taxes, fees, or charges, levied in any development district; or
 - (2) special funds established under the Tax Increment Financing Act. (1994 L.M.C., ch. 12, § 1.)

ARTICLE II. CREATING A DEVELOPMENT DISTRICT.

Sec. 14-5. Location.

Any development district:

- (a) must be located entirely in the County, but may include land in any municipality;
- (b) need not consist of a contiguous geographic area unless otherwise required by State law;
- (c) should largely, if not entirely, consist of undeveloped or underdeveloped land; and
- (d) 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. (1994 L.M.C., ch. 12, § 1.)

Sec. 14-6. First Council Resolution.

- (a) If a petition signed by at least 80 percent of the owners of real property and the owners of at least 80 percent in value of the real property, as shown by the latest assessment rolls, located in a proposed development district, is filed with the County Council, the Council must hold a public hearing after at least 15 days notice in two newspapers of

general circulation in the County. The petition must list the maximum number of housing units and the maximum nonresidential space that the signing property owners intend to build in the district.

- (b) Alternatively, the County Council, on request of the County Executive or on its own motion, may hold a public hearing after giving notice as required in subsection (a). The notice must:
 - (1) specify the proposed 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.
- (c) After holding a hearing under subsection (a), the Council, by resolution approved by the Executive, may declare its intent to establish a development district consisting of a specified geographic area. In the resolution the Council must explain why intensive development of and public investment in that area during the term of the district will benefit the public interest.
- (d) If the Executive disapproves a resolution adopted under this Section within 10 days after it is adopted and the Council readopts it by a vote of six Councilmembers, or if the Executive does not act within 10 days after the Council adopts it, the resolution takes effect.
- (e) For the purposes of this Section, 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.
- (f) The adoption of a resolution under this Section does not:
 - (1) obligate the Council to create a development district; or
 - (2) limit a district to the area described in the resolution. (1994 L.M.C., ch. 12, § 1; 1996 L.M.C., ch. 1, § 1.)

Sec. 14-7. Planning Board Review; Compliance with Adequate Public Facilities and Annual Growth Policy Requirements.

- (a) After the Council has adopted a resolution under Section 14-6, one or more owners of land located in the proposed district may submit an application for provisional adequate public facilities approval, covering the entire proposed district, 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 action necessary under Section 50-35(k);
 - (2) identify any infrastructure improvement necessary to satisfy the Growth Policy's adequate public facilities requirements for a development district; and
 - (3) estimate the cost to provide each such improvement.
- (b) Within a reasonable time, the Board must jointly review for compliance with Section 50-35(k) and the Growth Policy all developments located in the proposed district as if they were one development. In that review, the Board must apply all otherwise applicable standards and procedures. The Board may conditionally approve an application if it finds that the proposed district will meet all requirements under Section 50-35(k) and any added requirements which apply to a district under the Growth Policy. The Board may condition its approval on, among other things, the creation and funding of the district and the building of no more than the maximum number of housing units and the maximum nonresidential space listed in the petition filed under Section 14-6 or any later amendment to the petition.
- (c) In the aggregate, the applications approved must commit the applicants to produce (through the funding of the proposed development district or otherwise) the infrastructure improvements needed to meet the applicants' adequate public facility requirements in the proposed district and any added requirements which apply to an applicant under the Growth Policy. In its approval, the Board must list those infrastructure improvements.
- (d) An applicant may withdraw a development from a district before the district is created under Section 14-9(c). An applicant must not withdraw a development after the district is created. If an applicant withdraws a development before the district is created, the applicant's provisional adequate public facility approval is cancelled. If any withdrawal would significantly impair the ability of the proposed district to finance the required infrastructure improvements, the Planning Board may modify or cancel any approval under subsection (b) and may attach new conditions to any previous approval.
- (e) (1) After a development district is created and the financing of all required infrastructure improvements is arranged, any development located in the district has for all purposes satisfied:
- (A) the adequate public facility requirements of Section 50-35(k);
 - (B) any added requirements which apply to a district under the Growth Policy; and

- (C) any other requirement to provide infrastructure improvements which the County adopts within 12 years after the district is created.
- (2) This subsection does not relieve any taxpayer from paying a generally applicable County tax, assessment, fee, or charge.
- (f) The County may reserve for its own use or transfer to other owners through regular development approval processes, or as otherwise provided by law, any additional public facility capacity attributable to improvements financed by the district which exceeds the capacity required for developments in the district. (1994 L.M.C., ch. 12, § 1; 2004 L.M.C., ch. 2, § 2.)

Sec. 14-8. Executive Fiscal Report.

- (a) After the Planning Board has acted under Section 14-7(b) but before the Council holds a public hearing under Section 14-9(a), unless otherwise provided in the resolution adopted under Section 14-6, the County Executive, after consulting the Superintendent of Schools with respect to school facilities and the Washington Suburban Sanitary Commission with respect to water and sewer facilities, must submit a report estimating:
 - (1) the cost of each infrastructure improvement listed by the Planning Board under Section 14-7(c); and
 - (2) (A) the amount of revenue needed to cover the district's share of all infrastructure improvements funded, fully or partly, by a district; and
 - (B) the estimated tax rate for each form of taxation available to the district that would produce the necessary revenue.

The Executive should compare these estimates to those submitted by the applicants under Section 14-7(a).

- (b) In this report the Executive should also recommend whether to create a district, its boundaries if one is created, which infrastructure improvements listed by the Planning Board the district should fully or partly fund, and alternative financing or revenue-raising measures. (1994 L.M.C., ch. 12, § 1.)

Sec. 14-9. Second Council Resolution.

- (a) The Council must hold a public hearing on the final resolution to create a development district not earlier than 45 days after the Planning Board has acted on all applications filed under Section 14-7 for that district.

- (b) (1) The Council must give notice of the hearing by:
 - (A) advertisement in at least two newspapers of general circulation in the County at least 21 days before the hearing; and
 - (B) notifying by mail the record owner of each property located in the proposed district at the address shown on the latest tax assessment roll.
- (2) Each notice mailed under this subsection must include:
 - (A) a copy of the proposed resolution to establish a district; and
 - (B) an estimated rate for any tax, assessment, fee, or charge proposed to fund infrastructure improvements for the district.
- (c) If the Council intends to use special obligation debt to finance the district, and the district was initiated by the Council under subsection 14-6(b), before the Council adopts a resolution under this Section the Council must receive a petition signed by at least 80 percent of the owners of real property and the owners of at least 80 percent in value of the real property, as shown on the latest assessment rolls, located in the proposed district.
- (d) After the public hearing, the Council by resolution approved by the County Executive may create a development district. If the Executive disapproves a resolution within 10 days after it is adopted and the Council readopts it by a vote of six Councilmembers, or if the Executive does not act within 10 days after the Council adopts it, the resolution takes effect.
- (e) A resolution adopted under this Section must:
 - (1) define the development district by specifying its boundaries and listing the tax account number of each property in the district;
 - (2) list each infrastructure improvement that will be financed by the development district, the estimated completion date and 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; and
 - (4) create a special fund for the development district.

- (f) A resolution adopted under this Section may also require that a building permit must not be issued for any listed development (or part of a development) in the district until the earlier of:
- (1) the date a specific infrastructure improvement begins construction; or
 - (2) a specific date. (1994 L.M.C., ch. 12, § 1; 1996 L.M.C., ch. 1, § 1.)

ARTICLE III. FINANCING A DEVELOPMENT DISTRICT.

Sec. 14-10. Special Taxes and Assessments.

- (a) A resolution adopted under Section 14-9 must also authorize the imposition of a special assessment, special tax, fee, or charge, or any combination of them, in the development district at a rate designed to provide adequate revenues to pay the principal of, interest on, and redemption premium, if any, on the bonds and to replenish the debt service reserve fund, or create a special fund under the Tax Increment Financing Act. The resolution may reserve the Council's authority to adjust any rate schedule.
- (b) The resolution must provide, except when clearly inconsistent with state law, that:
- (1) any property which is fully developed before the development district is created is exempt from any special assessment, special tax, fee, or charge imposed under this Chapter; and
 - (2) the owner of any property exempt from payment under paragraph (1) which is later developed more intensively and benefits from any development capacity attributable to infrastructure improvements financed by the district must pay any tax, fee, or charge that it would have otherwise paid under this Chapter.
- (c) A special assessment or special tax must:
- (1) be levied and collected in the same manner, for the same period or periods, and with the same date or dates of finality as otherwise provided by law; and
 - (2) end when all bonds issued for the district have been paid in full.
- (d) The special assessments, special taxes, fees, charges, or tax increments authorized under subsection (a) must be payable as otherwise provided by law or (if state and County law are silent) as provided in the resolution adopted under Section 14-9, but not before any bonds are issued.

- (e) The total amount of any development district special tax, special assessment, fee, or charge paid under this Chapter must be credited against:
 - (1) the development impact tax and construction excise 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 front foot benefit charge, assessment, or tax imposed on construction) which is imposed by the County expressly to finance the costs of *infrastructure improvements necessary to allow development*.
- (f)
 - (1) If a district has issued special obligation bonds under this Chapter, a taxpayer who did not sign a petition under Section 14-6(a), or that taxpayer's successor in interest, may defer any special ad valorem tax on real property imposed to support that debt until the Planning Board approves a development plan or plan of subdivision or resubdivision for that taxpayer's property.
 - (2) The Director of Finance and the taxpayer may agree on a payment schedule.
 - (3) The taxpayer must pay interest on any deferred tax at the rate set by law for unpaid real property taxes during each year that taxes are deferred. (1994 L.M.C., ch. 12, § 1.)

Sec. 14-11. Special Fund.

- (a) The resolution creating a special fund under Section 14-9 must:
 - (1) pledge to the special fund the proceeds of any special assessment, special tax, fee, or charge levied under Section 14-10 or the tax increment; and
 - (2) require that proceeds from any special tax, special assessment, fee, charge, or tax increment be paid into the special fund.
- (b) When any bonds authorized by this Chapter with respect to a development district are outstanding, funds in the special fund must be used in any fiscal year to pay the principal of, interest on, and redemption premium, if any, on the bonds and to replenish any debt service reserve fund established with respect to the bonds.
- (c) After the bonds authorized by this Chapter with respect to a development district are fully paid, further special assessments, special taxes, fees, or charges must not be levied and the district terminates by operation of law. If the County Council so determines, any balance in the special fund must be paid to the general fund of the County.

- (d) Any required infrastructure improvement fully funded in the first 4 years of the then-applicable Capital Improvements Program must not be funded with the proceeds of bonds issued under this Chapter, but must be constructed with other funds designated in the Capital Improvements Program. (1994 L.M.C., ch. 12, § 1.)

ARTICLE IV. ISSUING DEBT.

Sec. 14-12. Bonds—Payment, Sinking Funds, Reserve Funds, Pledges and Other Financial Guaranties, Proceeds.

- (a) If the resolution adopted under Section 14-13 so provides, the Executive must take all necessary actions to issue bonds under this Chapter.
- (b) Bonds must be payable from the special fund required under Section 14-11 and any other assets or revenues of the district pledged toward their payment.
- (c) If the resolution adopted under Section 14-9(c) provides for the issuance of bonds, the resolution must establish an adequate debt service reserve fund and may also authorize the Executive to:
- (1) establish sinking funds;
 - (2) pledge other assets in and revenues from the district towards the payment of the principal and interest; or
 - (3) arrange for insurance or any other financial guaranty of the bonds.
- (d) All proceeds received from any bonds issued must be applied solely towards:
- (1) costs of the infrastructure improvements listed in the resolution adopted under Section 14-9(d)(2);
 - (2) costs of issuing bonds; and
 - (3) payment of the principal and interest on loans, money advances, or indebtedness incurred by the County for any purpose stated in this Chapter. (1994 L.M.C., ch. 12, § 1.)

Sec. 14-13. Resolution; Investment of Special Fund or Sinking Fund; Tax Exemption.

- (a) In order to issue bonds, the County Council must adopt a resolution that:
- (1) describes the proposed infrastructure improvements and states that the County has complied with the procedures in this Chapter;
 - (2) specifies the maximum principal amount of bonds to be issued;
 - (3) covenants to levy special taxes, special assessments, or both, at a rate and amount sufficient in each year when any bonds are outstanding to:
 - (A) provide for the payment of the principal of and interest on the bonds, and the redemption premium, if any, on the bonds;
 - (B) replenish any debt service reserve fund established with respect to the bonds; and
 - (C) enforce the collection of all special assessments and special taxes as provided in Section 52-36, et seq., of the County Code and Section 14-808, et seq., of the Tax Property Article of the Maryland Code, or other applicable law; and
 - (4) specifies (to the extent not already controlled by state or County law) the basis of any special assessment, special tax, fee, charge, or tax increment in a development district, and any exemptions from a special assessment, special tax, or tax increment, subject to any change in law that does not materially impair the district's ability to pay principal and interest and maintain adequate debt service reserves;
 - (5) declares that:
 - (A) the construction of the infrastructure improvements financed by the bonds:
 - (i) creates a public benefit, and special benefits, if applicable, to the properties assessed in the development district; and
 - (ii) serves a public purpose; and
 - (B) the projected special assessment, special tax, fee, charge, or tax increment revenue will be sufficient to retire the bonds, taking into account the value of land in the district; and

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- (6) (A) prohibits acceleration of assessments or taxes because of any bond default;
 - (B) limits the maximum special assessment, special tax, fee, or charge applicable to any individual property in a development district; and
 - (C) prohibits any increase in, or extension of the term of, the maximum special assessment, special tax, fee, or charge applicable to any individual property because of any delinquency or default by any other taxpayer.
- (b) To the extent not otherwise required by state law, the resolution may specify, or may authorize the County Executive by executive order to specify as needed:
- (1) the actual principal amount of the bonds to be issued;
 - (2) the actual rate or rates of interest for the bonds;
 - (3) how and on what terms the bonds must be sold;
 - (4) how, when, and where interest on the bonds must be paid;
 - (5) when the bonds may be executed, issued, and delivered;
 - (6) the form and tenor of the bonds, and the denominations in which the bonds may be issued;
 - (7) how, when, and where the principal of the bonds must be paid within the limits in this Section;
 - (8) how any or all of the bonds may be called for redemption before their stated maturity dates; or
 - (9) any other provision not inconsistent with law that is necessary or desirable to finance an infrastructure improvement.
- (c) The special fund and any sinking fund or reserve fund established by the County to provide for the payment of the principal of or interest on any bonds issued by the County under this Chapter must be invested by the County fiscal officer having custody of the fund in the manner prescribed by Article 31, Sections 6 and 7 of the Maryland Code. Any fiscal officer having custody of the proceeds of the sale of any such bonds may invest the proceeds, pending their expenditure, as prescribed under Article 95, Section 22 of the Maryland Code.

- (d) To the extent provided in State law, the principal amount of the bonds, the interest payable on the bonds, their transfer, and any income derived from the transfer, including any profit made in the sale or transfer of the bonds, must be exempt from County taxation of any kind. (1994 L.M.C., ch. 12, § 1.)

Sec. 14-14. Form, terms and conditions of bonds.

- (a) Any bond may be in bearer form or in coupon form or may be registrable as to principal alone or as to both principal and interest. Each bond is a security as defined in Section 8-102 of the Commercial Law Article of the Maryland Code, whether or not it is either one of a class or series or by its terms is divisible into a class or series of instruments.
- (b) Each bond must be signed manually or in facsimile by the County Executive, and the seal of the County must be affixed to the bonds and attested by the Clerk of the Council. If any officer whose signature or countersignature appears on the coupons ceases to hold that office before the bonds are delivered, the officer's signature or countersignature is nevertheless valid and sufficient for all purposes as if the officer had remained in office until delivery.
- (c) Each bond must mature not later than 30 years after issuance.
- (d) All bonds must be sold in the manner, either at public or private sale, and upon the terms as the County Executive directs. Any contract to acquire property may provide that payment must be made in bonds. Any bond issued under this Chapter is not subject to Article 31, Sections 10 and 11 of the Maryland Code. (1994 L.M.C., ch. 12, § 1; 2006 L.M.C., ch. 33, § 1.)

Sec. 14-15. Credit of County not Pledged.

- (a) Any bond issued under this Chapter is not an indebtedness of the County within the meaning of Section 312 of the Charter.
- (b) Any bond issued under this Chapter must not pledge the full faith and credit of the County and must state that the full faith and credit of the County is not pledged to pay its principal, interest, or premium, if any. (1994 L.M.C., ch. 12, § 1.)

ARTICLE V. MISCELLANEOUS PROVISIONS.

Sec. 14-16. Administration of district; Termination.

- (a) The Executive must administer each district, prepare bond issues, collect taxes and revenues, and oversee construction of infrastructure improvements.

- (b) Construction of each infrastructure improvement listed in the resolution creating a district must begin promptly when bond proceeds or other funds are available. Unless otherwise authorized by law, bidding and construction of infrastructure improvements must follow the County's usual process for constructing capital improvements.
- (c) The County may contract with another public agency or (subject to competitive procurement laws) a private party, including the Revenue Authority or owners of property in a development district, to construct any infrastructure improvement when significant cost or time savings are likely to result.
- (d) If the County has not issued any bonds for a district created under this Chapter, or if all bonds issued to finance a district have been repaid, the Council may terminate the district by resolution approved by the Executive. If the Executive disapproves a resolution within 10 days after it is adopted and the Council readopts it by a vote of six Councilmembers, or if the Executive does not act within 10 days after the Council adopts it, the resolution takes effect. (1994 L.M.C., ch. 12, § 1.)

Sec. 14-17. Disclosure to Buyers.

- (a) A contract to sell real property must disclose to the initial buyer, and any later buyer during the life of any special assessment, special tax, fee, or charge authorized under this Chapter, the amount of any special assessment, special tax, fee, or charge which the buyer must pay. Any contract which does not disclose all items required by this Section is voidable at the option of the buyer before the date of settlement.
- (b) A notice in a contract of sale which substantially conforms to the following text complies with this Section:

Each year the buyer of this property must pay a special assessment or special tax imposed under Chapter 14 of the Montgomery County Code. As of (date of this 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).

If an increase in any special assessment, special tax, fee, or charge 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.

- (c) Before any bonds are issued under this Chapter, the Director of Finance must record among the land records of the County at the cost of the development district a declaration encumbering all real property located in the district and designating that property as subject to a development district. The declaration must terminate when the Director records a release stating that all bonds are fully repaid.
- (d) The Director of Finance must indicate on the real estate tax bill for each property in a development district the amount of any special assessment or special tax imposed on the property. (1994 L.M.C., ch. 12, § 1.)

Sec. 14-18. Construction of Chapter.

- (a) This Chapter is necessary for the welfare of the County and its residents and must be liberally construed to achieve the purposes stated in Section 14-2.
- (b) The powers granted under this Chapter supplement any power conferred by any other law and do not restrict any other power of County government. (1994 L.M.C., ch. 12, § 1.)

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§20A-1

Chapter 20A. SPECIAL OBLIGATION DEBT.**Sec. 20A-1. [Definitions; special obligation debt].**

- (a)
 - (1) In this section the following words have the meanings indicated.
 - (2) “*Costs*” means any expense necessary or incident to building, acquiring, or financing any public infrastructure improvement.
 - (3) “*Development district*” means a special taxing district or special assessment district that:
 - (i) is created to facilitate financing under this section for the costs of public infrastructure to serve proposed:
 - 1. new development; or
 - 2. redevelopment of commercial or industrial properties; and
 - (ii) the County Council designates as a development district.
- (b) Subject to the limitations under this section, the County Council may enact a law to provide for the issuance of bonds or other obligations to finance the costs of public infrastructure for a development district for which the principal, interest, and any premium shall be paid from special taxes, assessments, fees, or charges collected by the County in the development district.
- (c)
 - (1) Bonds or other obligations issued under this section may not constitute a general obligation debt of the County or a pledge of the County's full faith and credit or taxing power.
 - (2) Bonds or other obligations issued under this section may be sold at a private negotiated sale and are not subject to Article 31, §§ 10 and 11 of the Annotated Code of Maryland.
 - (3) With the exception of § 312 of the County charter, bonds or other obligations issued under this section shall be subject to the provisions of that charter.
 - (4) This section may not be construed to limit the power of the County to create development districts or issue special obligation bonds or other obligations under any other applicable law.
 - (5) The bonds and any other evidences of obligation issued under this section, their

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transfer, the interest payable on them, and any income derived from them, including any profit realized on their sale or exchange, shall be exempt at all times from every kind and nature of taxation by the state or by any of its political subdivisions, municipal corporations, or public agencies of any kind.

- (d) (1) Prior to the issuance of debt under this section, the County shall notify and consult with those organizations that rate the County's general obligation bonds in an effort to ensure, to the extent reasonably possible, that the County's general obligation bond ratings will not be adversely affected by the issuance of the special obligation debt.
- (2) (I) Except as provided under subparagraph (II) of this paragraph, bonds may not be issued under this section unless the County obtains a rating of investment grade for the bonds from at least one of the organizations that rate the County's general obligation bonds.
- (II) An investment grade rating is not required for bonds that are sold to not more than 35 purchasers, each of whom certifies to the County and the participating underwriter that the purchaser:
 - 1. has such knowledge and experience in financial and business matters that it is capable of evaluating the merits and risks of investment in the bonds; and
 - 2. is not purchasing for more than one account or with a view to distributing the bonds.
- (3) Bonds or other evidences of indebtedness issued under this section shall be treated as securities to the same extent permitted for special obligation debt issued under Article 24, § 9-1301 of the Code.
- (e) (1) Debt issued under this section:
 - (i) shall be used only to finance the costs of public infrastructure to serve the development district; and
 - (ii) shall be secured by revenues derived from the development district.
- (2) This subsection does not prohibit the financing under this section of public infrastructure that also provides benefits to the general public.
- (f) (1) Before the creation of a new development district established to finance special obligation debt under this section, the County Council shall provide public

notice of the creation of the proposed district by advertisement in at least two newspapers of general circulation in the County and at least one public hearing.

- (2) A new development district may not be created to finance special obligation debt under this section unless the proposed action is approved by:
 - (i) 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
 - (ii) the owners of at least 80% of the assessed valuation of the real property located within the proposed development district.

- (g) A law enacted by the County Council under this section:
 - (1) shall specify the types of infrastructure and related costs that may be financed;
 - (2) shall require:
 - (i) reasonable disclosure in the real estate contract to buyers of real property within a development district of any special assessment, special tax, or other fee or charge for which the buyer would be liable due to development district financing under this section.
 - (ii) that a seller's failure to provide the disclosure required under item (i) of this paragraph renders the contract voidable at the option of the buyer before the date of settlement; and
 - (iii) that adequate debt service reserve funds be maintained;
 - (3) may not allow:
 - (i) acceleration of assessments or taxes by reason of bond default; or
 - (ii) an increase in the maximum special assessments, special taxes, or other fees or charges applicable to any individual property in the event that other property owners become delinquent in the payment of a special assessment, special tax, or other fee or charge securing special obligation debt issued under this section; and

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- (4) may provide:
 - (i) for exemptions, deferrals, and credits; and
 - (ii) that a lien attaches to property within a development district to the extent of that property owner's obligation under any special obligation debt financing.

- (h) A development district created for purposes of development district financing under this section shall terminate when all debt attributable to the development district is repaid.

- (i) An encumbrance on property in a development district attributable to development district financing under this section shall:
 - (1) be recorded in the land records of the County; and
 - (2) have the same priority as County taxes under state and County law.

- (j) (1) This subsection applies only to:
 - (i) a special ad valorem tax that is imposed to support special obligation debt under this section; and
 - (ii) an owner of land in the development district who:
 - 1. did not approve of the creation of the district under subsection (f)(2) of this section; and
 - 2. elects to defer special taxes under this section effective on the date of finality next following the creation of the development district.

- (2) a person who is a successor in interest to an owner of land in the development district acquires the same rights and obligations under this subsection as the person's predecessor in title.

- (3) (i) Payment of special ad valorem taxes under this section shall be deferred until a development plan or a plan of subdivision or resubdivision is approved.

- (ii) the property owner and the County may agree to a payment schedule.

- (iii) deferred special taxes shall be subject to the interest rate applicable by law to unpaid County property taxes for each year of the deferral.
 - (iv) provisions for the deferral under this subsection shall be included in the law enacted by the County Council.
- (k) This section does not prohibit the County or the Montgomery County Planning Board from obtaining from developers appropriate infrastructure contributions to support proposed development as allowed by law in addition to those financed under this section. (1994, ch. 612, § 1; 1996, ch. 625, § 1.)

CORRECTED COPY

Resolution No:	<u>15-375</u>
Introduced:	<u>October 28, 2003</u>
Adopted:	<u>October 28, 2003</u>

**COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND**

By: County Council

SUBJECT: 2003-5 Annual Growth Policy – Policy Element

Background

1. County Code Section 33A-15 requires that no later than November 1 of each odd-numbered year, the County Council must adopt an Annual Growth Policy (AGP) Policy Element to be effective until November 1 of the next odd-numbered year, to provide policy guidance to the agencies of government and the general public on matters concerning land use development, growth management and related environmental, economic and social issues.
2. On June 13, 2003, as required by Section 33A-15, the Planning Board transmitted to the County Council its recommendations on the 2003-5 Policy Element. On August 6, 2003, the Planning Board transmitted revised and expanded recommendations. The Final Draft Policy Element as submitted by the Planning Board contained supporting and explanatory materials.
3. On September 16 and 24, 2003, the County Council held public hearings on the Policy Element.
4. On September 22 and 29 and October 7, 14 and 27, 2003, the Council's Planning, Housing, and Economic Development Committee conducted worksessions on the recommended Policy Element.
5. On October 21 and 23, 2003, the Council conducted worksessions on the Policy Element, at which careful consideration was given to the public hearing testimony, updated information, recommended revisions and comments of the County Executive and Planning Board, and the comments and concerns of other interested parties.

Action

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

The 2003-5 AGP Policy Element is approved as follows:

Applicability; transition

AP1 Effective dates

This resolution takes effect on July 1, 2004, and applies to any application for a preliminary plan of subdivision filed on or after that date. Any preliminary plan of subdivision for which a completed application was filed before July 1, 2004, is subject to all provisions of the previous Annual Growth Policy, as contained in Council Resolution 15-259. All provisions of Resolution 15-259 continue in effect until July 1, 2004.

AP2 Previous approvals

If any preliminary plan of subdivision that was approved before July 1, 2004, is either modified or withdrawn and replaced by a new application for a subdivision plan at the same location or part of the same location, the Planning Board when it approves or re-approves a preliminary plan of subdivision after July 1, 2004, must retain any transportation improvement required in the previously approved plan.

Guidelines for the Administration of the Adequate Public Facilities Ordinance

County Code Section 50-35(k) ("the Adequate Public Facilities Ordinance or APFO") directs the Montgomery County Planning Board to approve preliminary plans of subdivision only after finding that public facilities will be adequate to serve the subdivision. 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 the adequacy of public facilities. These guidelines supersede all previous ones adopted administratively by the Planning Board to the extent that these guidelines conflict with previous ones. They also supersede those provisions of the Adequate Public Facilities Ordinance that were specified to apply only until the County Council had approved an Annual Growth Policy.

The Council accepts the definitions of terms and the assignment of values to key measurement variables that were used by the Planning Board and its staff in developing the recommended Annual Growth Policy. The Council delegates to the Planning Board and its staff all other necessary administrative decisions not covered by the guidelines outlined below. In its administration of the APFO, the Planning Board must consider the recommendations of the County Executive and other agencies in determining the adequacy of public facilities.

The ceilings and directives described in this AGP are based primarily on the public facilities in the amended FY 2003-2008 Capital Improvements Program (CIP) and the Maryland Department of Transportation FY 03-08 Consolidated Transportation Program (CTP). The Council also reviewed related County and State funding decisions, master plan guidance and zoning where relevant, and related legislative actions. These ceilings and directives and their supporting planning and measurement process have been the subject of a public hearing and review during worksessions by the County Council. Approval of the ceilings and directives reflects a legislative judgment that, all things considered, these ceilings and procedures constitute a reasonable, appropriate, and desirable set of growth limits, which properly relate to the ability of the County to program and construct facilities necessary to accommodate growth. These growth limits will substantially advance County land use objectives by providing for coordinated and orderly development.

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 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 additional public facility capacity beyond that contained in the approved Capital Improvements Program, or through other measures which accomplish an equivalent effect.

The administration of the Adequate Public Facilities Ordinance must at all times be consistent with adopted master plans and sector plans. Where development staging guidelines in adopted master plans or sector plans are more restrictive than AGP guidelines, the guidelines in the adopted master plan or sector plan must be used to the extent that they are more restrictive.

Guidelines for Transportation Facilities

TP Policy Areas

TP1 Policy Area Boundaries and Definitions

For the purposes of transportation analysis, the County has been divided into 313 areas called traffic zones. Based upon their transportation characteristics, these areas are grouped into transportation policy areas, as shown on Map 1. In many cases, transportation policy areas have the same boundaries as planning areas, sector plan areas, or master plan analysis (or special study) areas. The policy areas in effect for 2004-5 are: Aspen Hill, Bethesda CBD, Bethesda-Chevy Chase, Clarksburg, Cloverly, Damascus, Derwood, Fairland/White Oak, Friendship Heights, Gaithersburg City, Germantown East, Germantown Town Center, Germantown West, Glenmont, Grosvenor, Kensington/Wheaton, Montgomery Village/Airpark, North Bethesda, North Potomac, Olney, Potomac, R&D Village, Rockville City, Shady Grove, Silver Spring CBD, Silver Spring/Takoma Park, Twinbrook, Wheaton CBD, and White Flint. The following are Metro Station Policy Areas: Bethesda CBD, Friendship Heights, Glenmont, Grosvenor, Rockville Town Center, Shady Grove, Silver Spring CBD, Twinbrook, Wheaton CBD, and White Flint. Detailed boundaries of the policy areas are shown on Maps 2-31.

The boundaries of the Gaithersburg City and Rockville City policy areas reflect existing municipal boundaries, except where County-regulated land is surrounded by city-regulated land. The boundaries of these municipal policy areas do not automatically reflect any change in municipal boundaries; any change in a policy area boundary requires affirmative Council action.

TP2 Transportation Pipeline

Planning staff must keep a record of all previously approved preliminary plans and other data about the status of development projects, and continuously update the pipeline number of approved preliminary plans, thus constantly keeping in view, and presenting to the Planning Board, the amount of capacity still available at any given time. The continuous updating must include all changes to the amount of development approved under outstanding preliminary plans, with the exception of those which result from the discovery of accounting errors. Such errors must be reported to the Council each year in May, and must be reported on a quarterly basis, or more frequently, to the Planning Board who may bring them to the attention of the Council if the Board judges them to be significant. The Planning Board should maintain a periodically updated queue list of applicants for preliminary plan of subdivision approval.

Under County Code §50-20(c), the Planning Board must set the period of validity for a finding of public facilities adequacy on a case-by-case basis for each subdivision, although the validity period for any subdivision must not be less than 5 years nor more than 12 years, not including any extension allowed under §50-20. In general, the Planning Board must set the validity period of a subdivision at 5 years unless:

- (a) for non-residential development, the subdivision is larger than 150,000 square feet and consists of more than one building; or
- (b) for residential development, the subdivision consists of more than 200 housing units.

TP3 Unique Policy Area Issues

Because of the unique nature of the Georgetown Branch Trolley Project and the North Bethesda Transitway in comparison with other transportation systems which are normally used in calculating development capacity, it is prudent to approach the additional capacity from these systems in a conservative way, particularly with respect to the timing of capacity and the amount of the capacity recognized. Therefore, the capacity from the Georgetown Branch Trolley Project must not be counted until the actual system is constructed and operated, or at least until there is reasonable certainty as to its exact date of operation and amount of actual ridership. The initial capacity from the North Bethesda Transitway must not be counted until the project is fully funded in the first 5 years of either the County or State capital improvements program, and until the County Council has approved projected ridership.

To discourage sprawl development, no capacity for new development may be counted beyond the boundary of the Town of Brookeville existing on March 9, 1999, as a result of relocating MD 97 around Brookeville.

The Local Area Review for the Silver Spring CBD policy area must use the following assumptions and guidelines:

- All traffic limitations are derived from the heaviest traffic demand period, in Silver Spring's case, the p.m. peak hour outbound traffic.
- When tested during a comprehensive circulation analysis, the critical lane volumes for intersections in the surrounding Silver Spring/Takoma Park policy area must not be worse than the adopted level of service standards shown in Table 1 unless the Planning Board finds that the impact of improving the intersection is more burdensome than the increased congestion.
- The Planning Board and the Department of Public Works and Transportation must implement Transportation Systems Management for the Silver Spring CBD. The goal of this program must be to achieve the commuting goals for transit use and auto occupancy rates set out below.
- The County Government, through the Silver Spring Parking Lot District, must constrain the amount of public and private long term parking spaces.

The parking constraints and commuting goals needed to achieve satisfactory traffic conditions with these staging ceilings are as follows:

Parking constraint: A maximum of 17,500 public and private long-term spaces when all nonresidential development is built; (this maximum assumes a peak accumulation factor of 0.9, which requires verification in Silver Spring and may be subject to revision). Interim long-term parking constraints must be imposed in accordance with the amount of interim development. Long-term public parking spaces must be priced to reflect the market value of constrained parking spaces.

Commuting goals: For employers with 25 or more employees, attain 25 percent mass transit use and auto occupancy rates of 1.3 persons per vehicle during the peak periods, or attain any combination of employee mode choice that results in at least 46% non-drivers during the peak periods. For new nonresidential development, attain 30 percent mass transit use and auto

occupancy rates of 1.3 persons per vehicle during the peak periods, or attain any combination of employee mode choice that results in at least 50% non-drivers during the peak periods.

Progress towards achieving these goals should be measured annually by using scientific and statistically valid survey techniques.

To achieve these goals it will be necessary to require developers of new development in Silver Spring to enter into traffic mitigation agreements and the employers and certain owners to submit transportation mitigation plans under Chapter 42A of the County Code.

Each Annual Growth Policy must reflect the Annual Report of the Silver Spring Transportation Management District, which must include a report of the status of critical signalized intersections (as defined in the report of October 5, 1987). The Annual Growth Policy must include a projection of future traffic conditions based on intersection improvements in the proposed CIP and full achievement of the Transportation Management District goals. The Council will take this information into account in the decisions on the Growth Policy and the CIP.

In accordance with the amendment to the Silver Spring Sector Plan, subdivision applications for nonresidential standard method projects throughout the CBD may be approved for development or additions of not more than 5,000 square feet of gross floor area. However, if, for a particular use the addition of five peak hour trips yields a floor area greater than 5,000 square feet, that additional area may be approved for that particular use.

In the North Bethesda Transportation Management District, the goal is 39 percent non-driver mode share for residents of multifamily housing in the peak hour. In the Bethesda Transportation Management District, the goal is 37 percent non-driver mode share for workers and residents of multifamily housing. In the Friendship Heights Transportation Management District, the goal is 39 percent non-driver mode share for workers.

TP4 Development District Participation

Under Chapter 14 of the County Code, development districts may be created by the County Council as a funding mechanism for needed infrastructure in areas of the County where substantial development is expected or encouraged. The Planning Board may approve subdivision plans in accordance with the terms of the development district's provisional adequate public facilities approval (PAPF).

TP4.1 Preparation of a PAPF

The development district's PAPF must be prepared in the following manner:

One or more property owners in the proposed district may submit to the Planning Board an application for provisional adequate public facilities approval for the entire district. In addition to explaining how each development located in the district will comply with all applicable zoning and subdivision requirements, this application must:

- show the number and type of housing units and square footage and type of the non-residential space to be developed, as well as a schedule of proposed buildout in five-year increments;
- identify any infrastructure improvements necessary to satisfy the adequate public facilities requirements for development districts; and
- estimate the cost to provide these improvements.

TP4.2 Planning Board Review

The Planning Board must then review all developments within the proposed development district as if they are a single development for compliance with the Adequate Public Facilities Ordinance. The Planning Board must identify the public facilities needed to support the buildout of the development district after considering the results of the following tests for facility adequacy:

- 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 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 staff 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 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 time period. 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 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.

TP4.3 Planning Board Approval

The Board may conditionally approve the PAPF application if it will meet all of the requirements of the APFO and AGP. The Board may condition its approval on, among other things, the creation and funding of the district and the building of no more than the maximum number of housing units and the maximum nonresidential space listed in the petition.

For an application to be approved, the applicants must commit to produce the infrastructure improvements needed to meet APF requirements in the proposed district as well as any added requirements specified by the Planning Board. The Planning Board must list these required infrastructure improvements in its approval. The infrastructure improvements may be funded through the development district or otherwise. The development district's PAPF must be prepared in the following manner:

The Planning Board must not approve a PAPF application unless public facilities adequacy is maintained throughout the life of the plan. The timing of infrastructure delivery may be accomplished by withholding the release of building permits until needed public facilities are available to be "counted," or by another similar mechanism.

Infrastructure may be counted for public facilities adequacy, for infrastructure provided by the district, when construction has begun on the facility and funds have been identified and committed to its completion, and, for infrastructure provided by the public sector, when:

- for Local Area Transportation Review, the project is fully-funded within the first 4 years of the approved County, state, or municipal capital improvements program;
- for water and sewer facilities, the project is fully-funded within the first 5 years of the approved WSSC capital improvements program;
- for public school facilities, the project is fully-funded within the first 5 years of the approved Montgomery County Public Schools capital improvements program; and
- for police, fire, and health facilities, the project is fully-funded within the first 6 years of the relevant approved capital improvements program.

TP4.4 Additional Facilities Recommended for Funding

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 recreation facilities.

TP4.5 Satisfaction of APF Requirements

As provided in Chapter 14 of the County Code, once the development district is created and the financing of all required infrastructure is arranged, the development in the district is considered to have satisfied all APF requirements, any additional requirements that apply to development districts in the AGP, and any other requirement to provide infrastructure which the County adopts within 12 years after the district is created.

TL Local Area Transportation Review (LATR)

TL1 Standards and Procedures

To achieve an approximately equivalent transportation level of service in all areas of the County, greater congestion is permitted in policy areas with greater transit accessibility and usage. Table 1 shows the intersection level of service standards by policy area. Local Area Transportation Review must at all times be consistent with the standards and staging mechanisms of adopted master plans and sector plans.

Local area transportation review must be completed for any subdivision that would generate 30 or more peak-hour automobile trips. For any subdivision that would generate 30-49 peak-hour automobile trips, the Planning Board after receiving a traffic study must require that either:

- all LATR requirements are met; or
- the applicant must make an additional payment equal to 50% of the applicable transportation impact tax before it receives any building permit in the subdivision.

In administering the Local Area Transportation Review (LATR), the Planning Board must not approve a subdivision if it finds that an unacceptable peak hour level of service will result after taking into account existing roads, programmed roads, available or programmed mass transportation, and improvements to be provided by the applicant. If the subdivision will affect an intersection or roadway link for which congestion is already unacceptable, then the subdivision may only be approved if it does not make the situation worse.

The nature of the LATR test is such that a traffic study is necessary if local congestion is likely to occur. The Planning Board and staff must examine the applicant's traffic study to determine whether adjustments are necessary to assure that the traffic study is a reasonable and appropriate reflection of the traffic impact of the proposed subdivision after taking into account all approved development and programmed transportation projects.

For Local Area Transportation Review purposes, the programmed transportation projects to be considered are those fully funded for construction in the first 4 years of the current approved Capital Improvements Program, the state's Consolidated Transportation Program, or any municipal capital improvements program. For these purposes, any road required under Section 302 of the County Charter to be authorized by law is not programmed until the time for petition to referendum has expired without a valid petition, or the authorizing law has been approved by referendum.

If an applicant is participating in a traffic mitigation program or one or more intersection improvements to meet Local Area Transportation Review requirements, that applicant must be considered to have met Local Area Transportation Review for any other intersection where the volume of trips generated is less than 5 Critical Lane Movements.

Each traffic study must examine, at a minimum, the number of signalized intersections in the following table unless the Planning Board affirmatively finds that special circumstances warrant a more limited study.

Maximum Peak-Hour Trips Generated	Minimum Signalized Intersections in Each Direction
< 250	1
250 - 749	2
750 - 1,249	3
1,250 - 1,750	4
> 1,750	5

At the Planning Board's discretion, each traffic mitigation program must be required to operate for at least 12 years but no longer than 15 years. The Planning Board may select either trip reduction measures or road improvements (or a combination of both) as the required means of traffic mitigation.

The Planning Board has adopted guidelines to administer Local Area Transportation Review. To the extent that they are consistent with this Policy, the Planning Board guidelines may continue to apply or may be amended as the Planning Board finds necessary.

After consulting the Council, the Planning Board may adopt administrative guidelines that allow use of a "delay" or queuing analysis, different critical lane volume standards, or other methodologies, to determine the level of congestion in appropriate geographic locations such as in urbanized areas, around Metrorail stations, or in specific confined areas planned for concentrated development related to other forms of transit.

In administering Local Area Transportation Review, the Planning Board must carefully consider the recommendations of the County Executive concerning the applicant's traffic study and proposed improvements or any other aspect of the review.

To achieve safe and convenient pedestrian travel, the Planning Board may adopt administrative guidelines requiring construction of off-site sidewalk improvements consistent with County Code §50-25. To maintain an approximately equivalent transportation level of service at the local level considering both auto and non-auto modes of travel, the Planning Board may permit a reduction in the amount of roadway construction or traffic mitigation needed to satisfy the conditions of Local Area Transportation Review in exchange for the construction of non-automobile transportation amenities, such as sidewalks or bus shelters.

TL2 Metro Station Policy Area LATR Standards

In each Metro Station Policy Area, the Planning Board, in consultation with the Department of Public Works and Transportation, must prepare performance evaluation criteria for its Local Area Transportation Review. These criteria must be used to accomplish: (a) safety for pedestrians and vehicles; (b) access to buildings and sites; and (c) traffic flow within the vicinity, at levels which are tolerable in an urban situation. The County Executive also must publish a Silver Spring Traffic Management Program after receiving public comment and a recommendation from the Planning Board. This program must list those actions to be taken by government to maintain traffic flow at tolerable levels in the Silver Spring CBD and protect the surrounding residential area.

TL3 Potomac LATR Standards

In the Potomac Policy Area, only the areas contributing traffic to the following intersections must be subject to Local Area Transportation Review: (a) Montrose Road at Seven Locks Road; (b) Democracy Boulevard at Seven Locks Road; (c) Tuckerman Lane at Seven Locks Road; (d) Democracy Boulevard at Westlake Drive; (e) Westlake Drive at Westlake Terrace; (f) Westlake Drive at Tuckerman Lane; (g) Bradley Boulevard at Seven Locks Road; (h) River Road at Bradley Boulevard; (i) River Road at Piney Meetinghouse Road; and (j) River Road at Seven Locks Road.

TA Alternative Review Procedures

TA1 Metro Station Policy Areas

An applicant for a subdivision which will be built completely within a Metro station policy area need not submit any application or take any action under **TL Local Area Transportation Review** if the applicant agrees in a contract with the Planning Board and the County Department of Public Works and Transportation to:

- meet trip reduction goals set by the Planning Board as a condition of approving that subdivision, which must require the applicant to reduce at least 50% of the number of trips attributable to the subdivision, either by reducing trips from the subdivision itself or from other occupants of that policy area;
- participate in programs operated by, and take actions specified by, a transportation management organization (TMO) to be established by County law for that policy area (or a group of policy areas including that policy area) in order to meet the mode share goals established under the preceding paragraph;

- pay an *ongoing annual contribution or tax* to fund the TMO's operating expenses, including minor capital items such as busses, as established by County law; and
- pay double the applicable development impact tax without claiming any credits for transportation improvements.

TA2 Expiration of Approvals Under Previous Alternative Review Procedures

Annual Growth Policy resolutions in effect between 1995 and 2001 contained Alternative Review Procedures that required any development approved under those procedures to receive each building permit no later than 4 years after the Planning Board approved the preliminary plan of subdivision for that development. Any outstanding development project approved under an Alternative Review Procedure is subject to the expiration dates in effect when that development project was approved, with the following 2 exceptions.

TA2.1 Certain multi-phased projects

A multi-phased project located in the R&D or Life Sciences Center zone may receive some of its building permits later than 4 years after its preliminary plan of subdivision is approved if:

- when the Planning Board approves or amends a site plan for the development, it also approves a phasing schedule that allows an extended validity period, but not longer than 12 years after the preliminary plan of subdivision was approved; and
- the applicant receives the first building permit for a building in the development no later than 4 years after the Planning Board approves the preliminary plan of subdivision for the development.

TA2.2 Certain developments in I-3 zone

Similarly, if the development is located in the I-3 zone, and a previously approved subdivision plan and site plan contains more than 900,000 square feet of office space and at least 40% of that space has been constructed by November 1, 2001, the Planning Board may approve an amendment to its site plan which allows an extended validity period, but not longer than 12 years after the preliminary plan of subdivision was approved.

TA3 Golf Course Community

An applicant for a planned unit development in the Fairland-White Oak policy area that includes a golf course or other major amenity which is developed on a public/private partnership basis need not take any action under **TL Local Area Transportation Review** if the applicant pays to the County a Development Approval Payment, established by County law, before the building permit is issued. However, the applicant must include in its application for preliminary plan approval all information that would have been necessary if the requirements for Local Area Transportation Review applied.

The Planning Board may approve the application if:

- not more than 100 units, in addition to Moderately Priced Dwelling Units (MPDUs), are built in the first fiscal year after construction of the development begins, and
- not more than 100 units, in addition to MPDUs and the unbuilt remaining portion of all prior years' approved units, are built in any later fiscal year.

TA3.1 MPDU Requirements

Any applicant for a subdivision under **TA3** must agree, as part of the application, that it will build the same number of MPDUs among the first 100 units that it would be required to construct at that location if the subdivision consisted of only 100 units, or a pro rata lower number of MPDUs if the subdivision will include fewer than 100 units.

TA3.2 Requirement to Begin Construction

Any applicant for a subdivision approval under **TA3** must agree, as part of the application, that it will not begin to construct any residential unit approved in the application later than 3 years after the plat is recorded or the site plan is approved (whichever occurs later).

TA4 Corporate Headquarters Facility

TA4.1 LATR

An applicant for a preliminary plan of subdivision need not take any action under Local Area Transportation Review if the applicant meets the following conditions:

TA4.1.1 Jobs/Location

The applicant must have employed an average of at least 500 employees in the County for the 2 years before the application was filed, and the applicant must seek to build or expand a corporate headquarters located in the North Bethesda Policy Area.

TA4.1.2 Size/Use

Any new or expanded building approved under this Procedure must not exceed 900,000 square feet, and must be intended primarily for use by the applicant and the applicant's affiliates or business partners.

TA4.1.3 Traffic Information

Each application must include all information that would be necessary if the requirements for Local Area Transportation Review applied.

TA4.1.4 Mode Share Goals

Each applicant must commit to make its best efforts to meet mode share goals set by the Planning Board as a condition of approving the subdivision.

TA4.1.5 TMO Participation

Each applicant must participate in programs operated by, and take actions specified by, the transportation management organization (TMO), if any, established by County law for that policy area to meet the mode share goals set by the Planning Board.

TA4.1.6 TMO Payment

If an applicant is located in a transportation management district, the applicant must pay an annual contribution or tax, set by County law, to fund the TMO's operating expenses, including minor capital items such as busses.

TA4.1.7 Development Approval Payment Limits

The applicant must pay the applicable Development Approval Payment (DAP) as provided in County Code §8-37 through 8-42, but not more than the DAP in effect on July 1, 2001.

TA4.1.8 Eligibility

An applicant may use this Procedure only if it met the criteria in **TA4.1.1** for number of employees and site location on November 1, 2003.

TA5 Strategic Economic Development Projects

An applicant for a preliminary plan of subdivision need not take any action under **TL Local Area Transportation Review** if all of the following conditions are met.

TA5.1 Traffic information

The applicant files a complete application for a preliminary plan of subdivision which includes all information that would be necessary if the requirements for LATR applied.

TA5.2 Designation

The County Council has approved the County Executive's designation of the development as a strategic economic development project under procedures adopted by law or Council resolution.

TA5.3 Transportation Impact Tax Payments

The applicant must pay double the applicable transportation impact tax without claiming any credits for transportation improvements.

Public School Facilities

S1 Geographic Areas

For the purposes of public school analysis and local area review of school facilities at time of subdivision, the County has been divided into 24 areas called high school clusters, as shown in Map 32. These areas coincide with the cluster boundaries used by the Montgomery County Public School system.

The groupings used are only to administer the Adequate Public Facilities Ordinance and do not in any way require action by the Board of Education in exercising its power to designate school service boundaries.

S2 School Capacity Measures

The Planning Board must evaluate available capacity in each high school cluster and compare enrollment projected by Montgomery County Public Schools for each fiscal year with projected school capacity in 5 years. If sufficient high school capacity will not be available in any cluster, the Planning Board must determine whether an adjacent cluster will have sufficient high school capacity to cover the projected deficit.

The Planning Board must use 100% of Council-funded capacity at the high school level and 105% of Council-funded capacity at the middle and elementary school level as its measures of adequate school capacity. This capacity measure does not count relocatable classrooms in computing a school's permanent capacity.

Council-funded regular program classroom capacity is based on calculations that assign 25 students for grades 1-6, 44 students for half day kindergarten where it is currently provided, 22 students for all day kindergarten where it is currently provided, and an effective class size of 22.5 students for secondary grades.

S3 Grade Levels

Each cluster must be assessed separately at each of the three grade levels -- elementary, intermediate/middle, and high school.

S4 Determination of Adequacy

After the Council has approved the FY 2005-2010 CIP, the Planning Board must recalculate the projected school capacity at all grade levels in each high school cluster. If the Board finds that public school capacity will be inadequate at any grade level in any cluster, but the projected enrolment at that level will not exceed 110% of capacity, the Board may approve a residential subdivision in that cluster during FY 2005 if the applicant commits to pay a School Facilities Payment as provided in County law before receiving a building permit for any building in that subdivision. If projected enrollment at any grade level in that cluster will exceed 110% of capacity, the Board must not approve any residential subdivision in that cluster during FY 2005.

After the Council in 2005 has approved the amended FY 2005-2010 CIP, the Planning Board again must recalculate school capacity. If capacity at any level is projected to be inadequate, the Board must take the actions specified in the preceding paragraph in FY 2006.

S5 Senior Housing

If public school capacity is inadequate in any cluster, the Planning Board may nevertheless approve a subdivision in that cluster if the subdivision consists solely of multifamily housing and related facilities for elderly or handicapped persons or multifamily housing units located in the age-restricted section of a planned retirement community.

S6 Clusters in municipalities

If public school capacity will be inadequate in any cluster that is wholly or partly located in Rockville, Gaithersburg, or Poolesville, the Planning Board may nevertheless approve residential subdivisions in that cluster unless the respective municipality restricts the approval of similar subdivisions in its part of the cluster because of inadequate school capacity.

S7 Development District Participants

The Planning Board may require any development district for which it approves a provisional adequate public facilities approval (PAPF) to produce or contribute to infrastructure improvements needed to address inadequate school capacity.

Guidelines for Water and Sewerage Facilities

In accordance with the Adequate Public Facilities Ordinance, applications must be considered adequately served by water and sewerage if the subdivision is located in an area in which water and sewer service is presently available, is under construction, is designated by the County Council for extension of service within the first two years of a current approved Comprehensive Water Supply and Sewerage Systems Plan (i.e., categories I, II, and III), or if the applicant either provides a community water and/or sewerage system or meets Department of Permitting Services requirements for septic and/or well systems, as outlined in the Adequate Public Facilities Ordinance. These requirements are determined either by reference to the Water and Sewerage Plan, adopted by the Council, or by obtaining a satisfactory percolation test from the Department of Permitting Services.

Applications must only be accepted for further Planning staff and Board consideration if they present evidence of meeting the appropriate requirements.

Guidelines for Police, Fire and Health Services

The Planning Board and staff must consider the programmed services to be adequate for facilities such as police stations, firehouses, and health clinics unless there is evidence that a local area problem will be generated. Such a problem is one which cannot be overcome within the context of the approved Capital Improvements Program and operating budgets of the relevant agencies. Where such evidence exists, either through agency response to the Subdivision Review committee clearinghouse, or through public commentary or Planning staff consideration, a Local Area Review must be undertaken. The Board must seek a written opinion from the relevant agency, and require, if necessary, additional data from the applicant, to facilitate the completion of the Planning staff recommendation within the statutory time frame for Planning Board action. In performing this Local Area Review, the facility capacity at the end of the sixth year of the approved CIP must be compared to the demand generated by the "most probable" forecast for the same year prepared by the Planning Department.

Guidelines for Resubdivisions

An application to amend a previously approved preliminary plan of subdivision does not require a new test for adequacy of public facilities if:

Revisions to a preliminary plan have not been recorded, the preliminary plan has not expired, and the number of trips which will be produced by the revised plan is not greater than the number of trips produced by the original plan.

Resubdivision of a recorded lot involves the sale or exchange of parcels of land (not to exceed a total of 2,000 square feet or one percent of the combined area, whichever is greater) between owners of adjoining properties to make small adjustments in boundaries.

Resubdivision of a recorded lot involves more than 2,000 square feet or one percent of the lot area and the number of trips which will be produced by the revised plan is not greater than the number of trips produced by the original plan.

**Timely Adequate Public Facilities Determination
and Local Area Transportation Review under Chapter 8.**

APF1 General.

Except as otherwise provided by law, an adequate public facilities determination or local area transportation review conducted under Article IV of Chapter 8 (Buildings) must use the standards and criteria applicable under this Resolution when evaluating the adequacy of public facilities to serve the proposed development.

APF2 Traffic Mitigation Goals.

Any proposed development that is subject to requirements for a traffic mitigation agreement under Article IV of Chapter 8 and Chapter 42A-9A of the County Code must meet the traffic mitigation goals specified in paragraphs (1) or (4), as appropriate.

- (1) Subject to paragraph (2), the portion of peak-period nondriver trips by employees of a proposed development must be at least the following percentage greater than the prevailing nondriver mode share of comparable nearby land use:

In Policy Areas With LATR CLV Standard of	Required Percentage Greater Than Prevailing Nondriver Mode Share
1800 and 1600	100%
1550	80%
1500	60%
1475 and 1450	40%

LATR CLV standards for each policy area are shown on Table 1.

- (2) The portion of peak-period nondriver trips by employees calculated under paragraph (1) must not be less than 15% nor higher than 55%.
- (3) The applicant for a proposed development in a policy area specified under paragraph (1) is responsible for reviewing existing studies of nondriver mode share; conducting new studies, as necessary, of nondriver mode share; and identifying the prevailing base nondriver mode share of comparable land uses within the area identified for the traffic study. Comparable land uses are improved sites within the area identified for the traffic study for the proposed development that have similar existing land use and trip generation characteristics. As with other aspects of the traffic study required by Article IV of Chapter 8, selection of the comparable studies and land uses to be analyzed and determination of the prevailing base nondriver mode share are subject to review by the Planning Department and approval by the Department of Public Works and Transportation.
- (4) Proposed development in the Silver Spring CBD must meet the commuting goals specified under TP3.

- (5) In accordance with County Code Section 42A-9A, the applicant must enter into an agreement with the Director of the Department of Public Works and Transportation before a building permit is issued. The agreement may include a schedule for full compliance with the traffic mitigation goals. It must provide appropriate enforcement mechanisms for compliance.
- (6) As provided by law, these goals supersede traffic mitigation goals established under Section 42A-9A(a)(4).

Issues to be Addressed in the Future

Scheduling of items by the Planning Board under this Section may be reviewed and modified at the Board's regular work program meetings with the County Council.

F1. Time Limits of a Finding of Adequate Public Facilities: The Planning Board must examine the number, age, and other characteristics of projects in the pipeline of approved development and make recommendations for revising the time limits of a finding of adequate public facilities, including extension provisions.

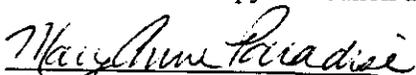
F2. Adequacy of Police and Fire/Rescue Facilities: The Planning Board, in cooperation with appropriate Executive branch agencies and after consulting the Council's Public Safety Committee, must consider potential options for testing the adequacy of public safety (police and fire/rescue) infrastructure.

F3. Maximum Unmitigated Trip Level for Metro Station Areas: The Planning Board must submit to the Council by February 1 an AGP amendment proposing a specific maximum number of unmitigated trips for each Metro Station Policy Area under the Alternative Review Procedure for Metro Station Policy Areas, considering its current number of jobs and housing units and its current congestion levels.

F4. Annual Development Approval Report: The Planning Board must submit to the County Council by September 15 each year an updated report listing and describing significant developments approved by that date or expected to be approved by the following July 1 that would impact road and school capacity. The report must include a prioritized list of road and intersection improvements based on current and projected congestion patterns and additional anticipated development.

F5. Measuring the effect of ATMS: The Planning Board, with the aid of the Executive and interested transportation professionals and citizens, must evaluate the effect associated with various Advanced Transportation Management System technologies, such as possible increase in intersection capacity or spreading of peak period volumes. A pilot study, perhaps funded as a public/private partnership, should be conducted in one or two selected corridors where these technologies are planned to be installed to quantify the incremental benefits of various technologies, such as automatic vehicle locators in transit vehicles, extended green time at signalized intersections for transit vehicles, real time traffic signal timing, video surveillance, and incident management. If the study identifies actions, the Planning Board should propose policy changes for Council approval, to be implemented in the Board's Local Area Transportation Review guidelines based on the study's findings.

This is a correct copy of Council action.



Mary Anne Paradise
Acting Clerk of the Council

TABLE 1

Local Area Transportation Review Congestion Standards by Policy Area

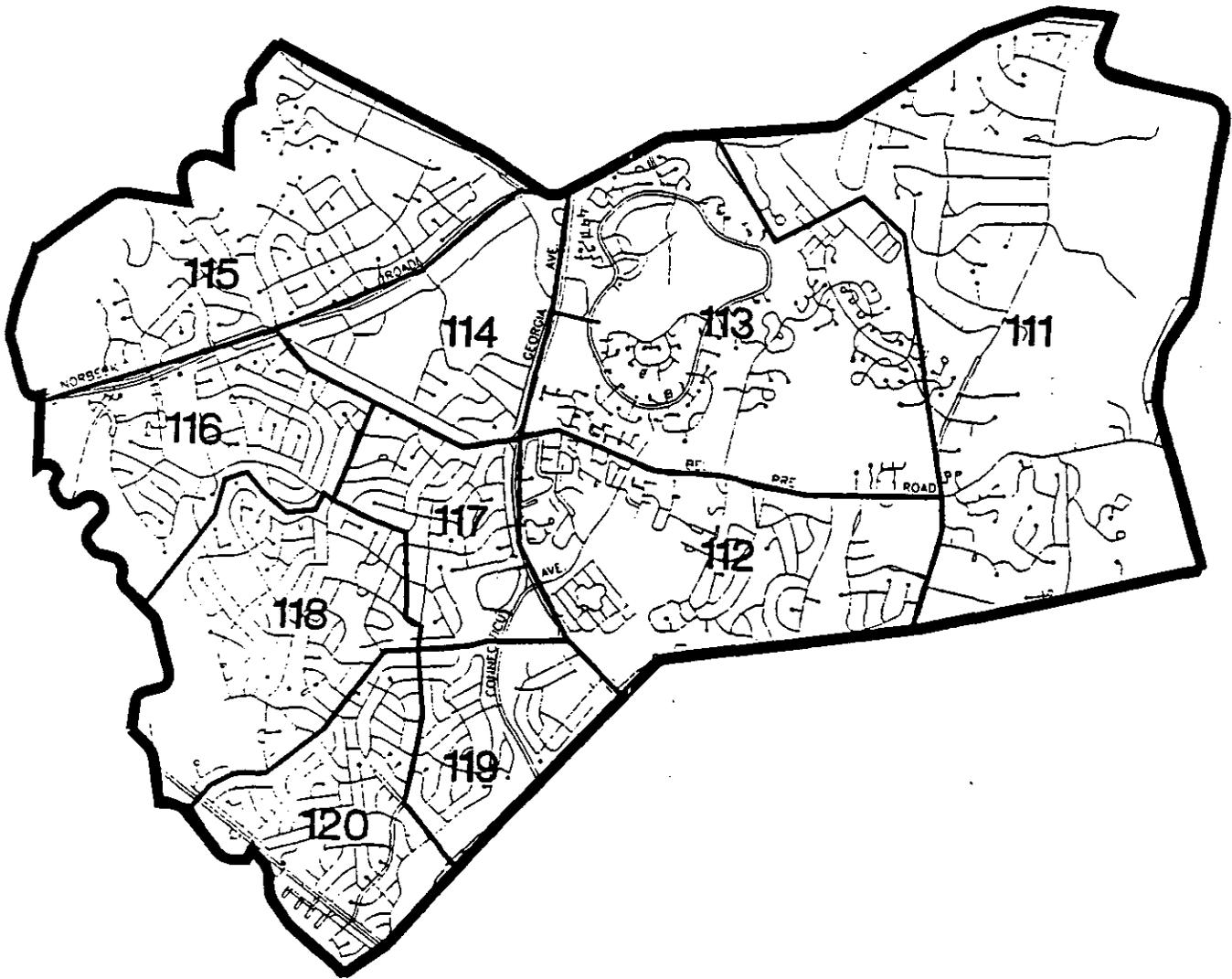
<u>PolicyArea</u>	<u>Critical Lane Volume Standard</u>
Metro Station Policy Areas	1800
Bethesda-Chevy Chase	1600
Kensington/Wheaton	1600
Silver Spring/Takoma Park	1600
North Bethesda	1550
Rockville City	1500
Aspen Hill	1500
Fairland/White Oak	1500
Derwood	1475
Cloverly	1475
Olney	1475
North Potomac	1475
Potomac	1475
R&D Village	1475
Clarksburg	1450
Gaithersburg City	1450
Germantown East	1450
Germantown Town Center	1450
Germantown West	1450
Montgomery Village/Airpark	1450
Damascus	1450
Rural Areas	1400

Notes

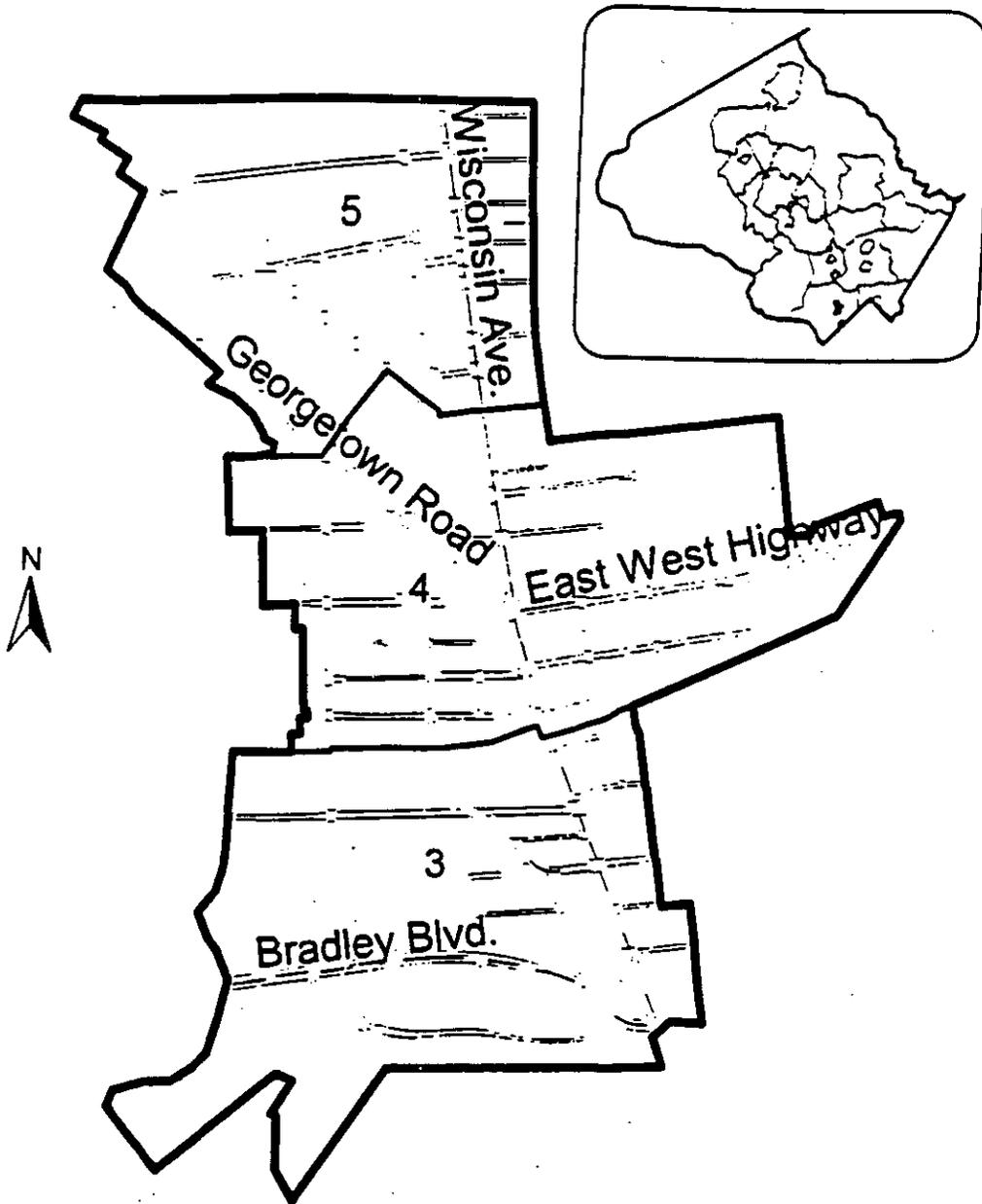
Rural areas are: Darnestown/Travilah, Goshen, Patuxent, Poolesville, and Rock Creek.

Potomac, Friendship Heights CBD and Silver Spring CBD have special LATR rules identified in their master plans or in the Growth Policy.

Aspen Hill

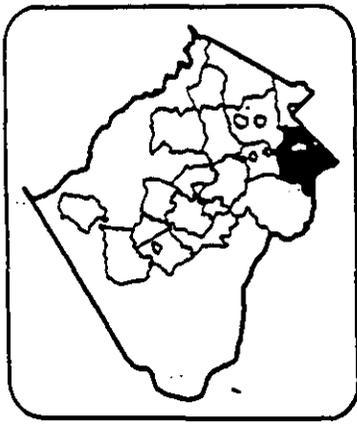
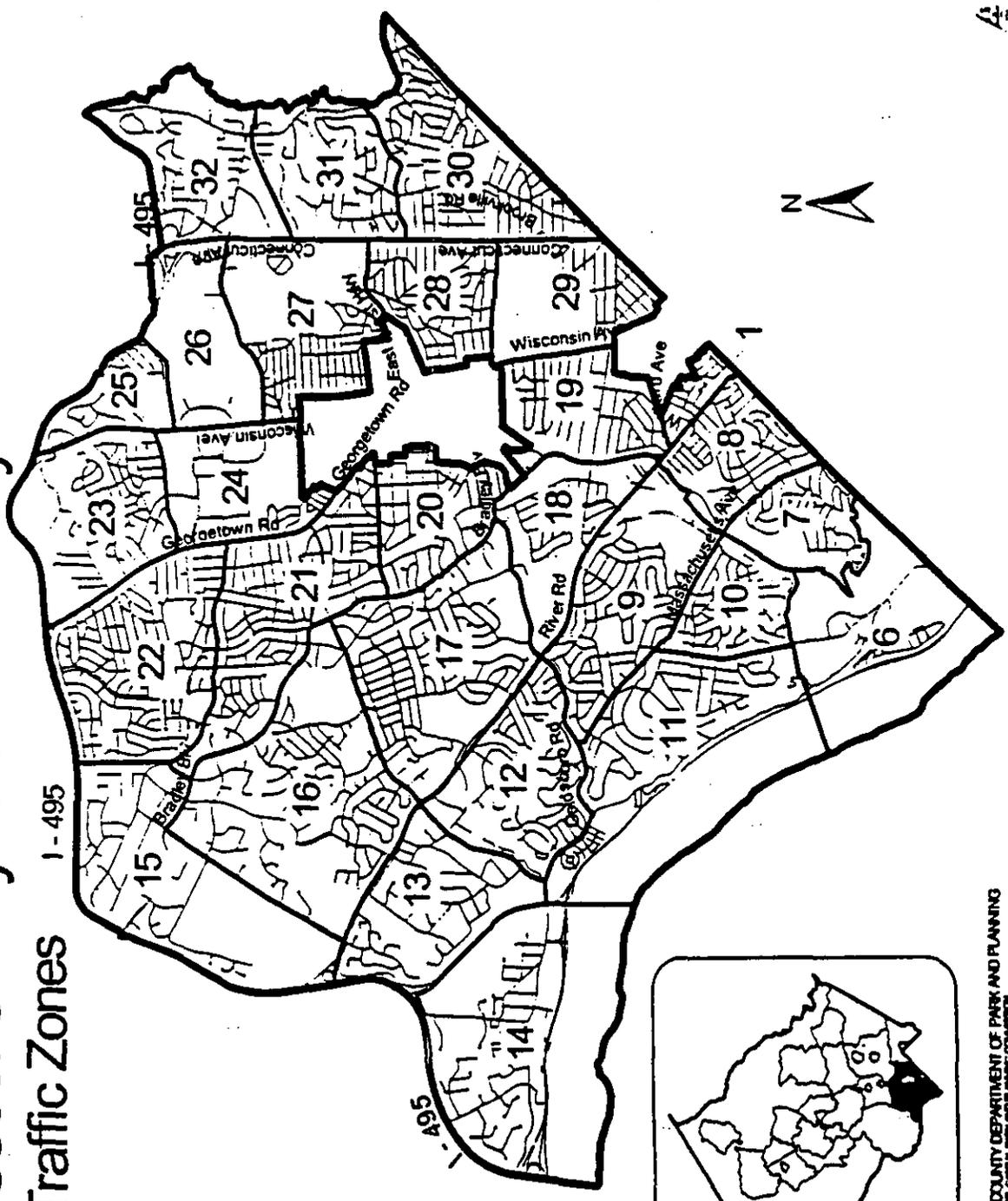


Bethesda CBD Policy Area With Traffic Zones



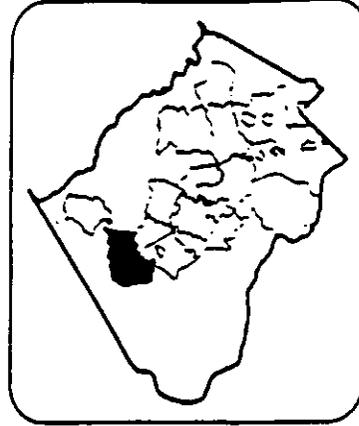
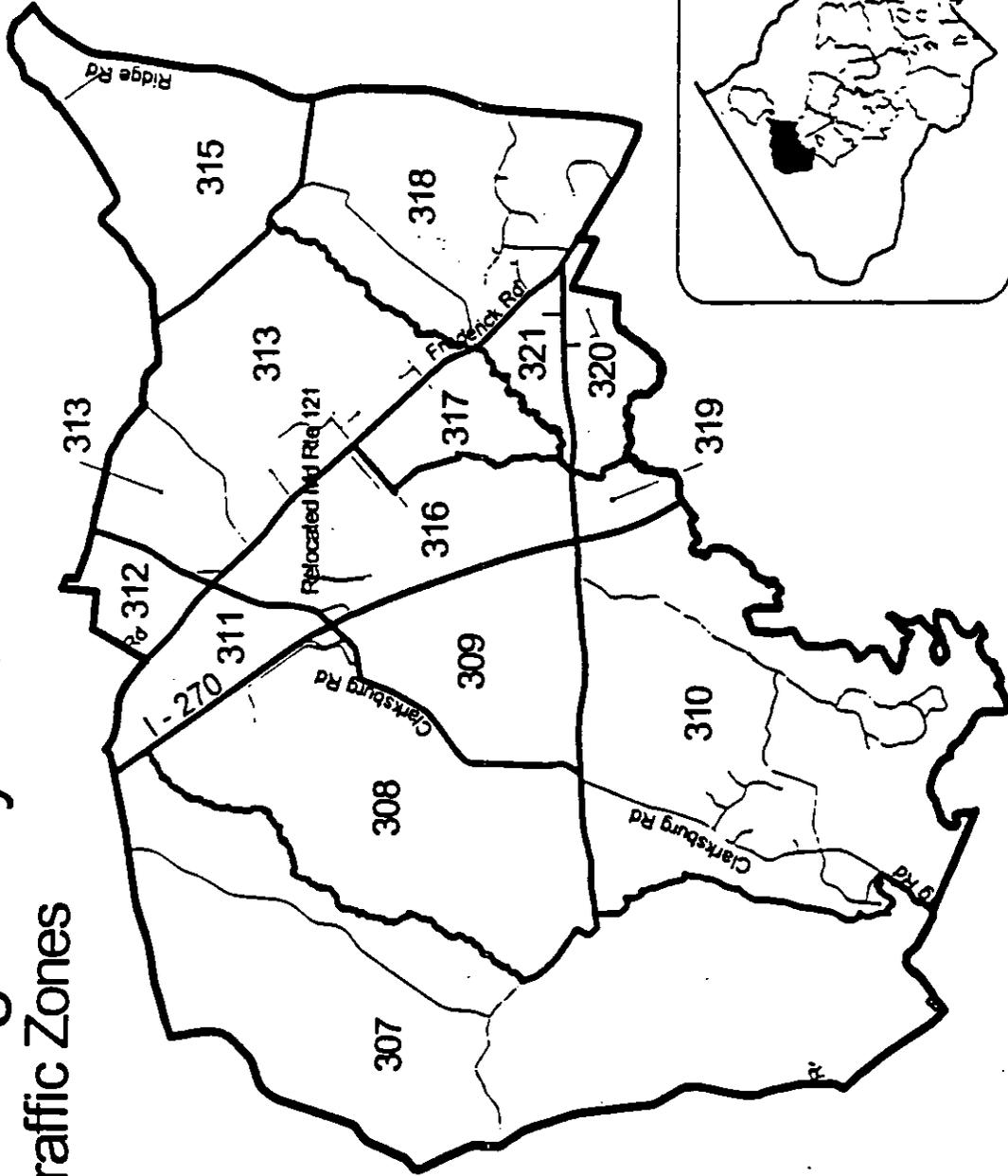
Bethesda/Chevy Chase Policy Area

With Traffic Zones 1-495

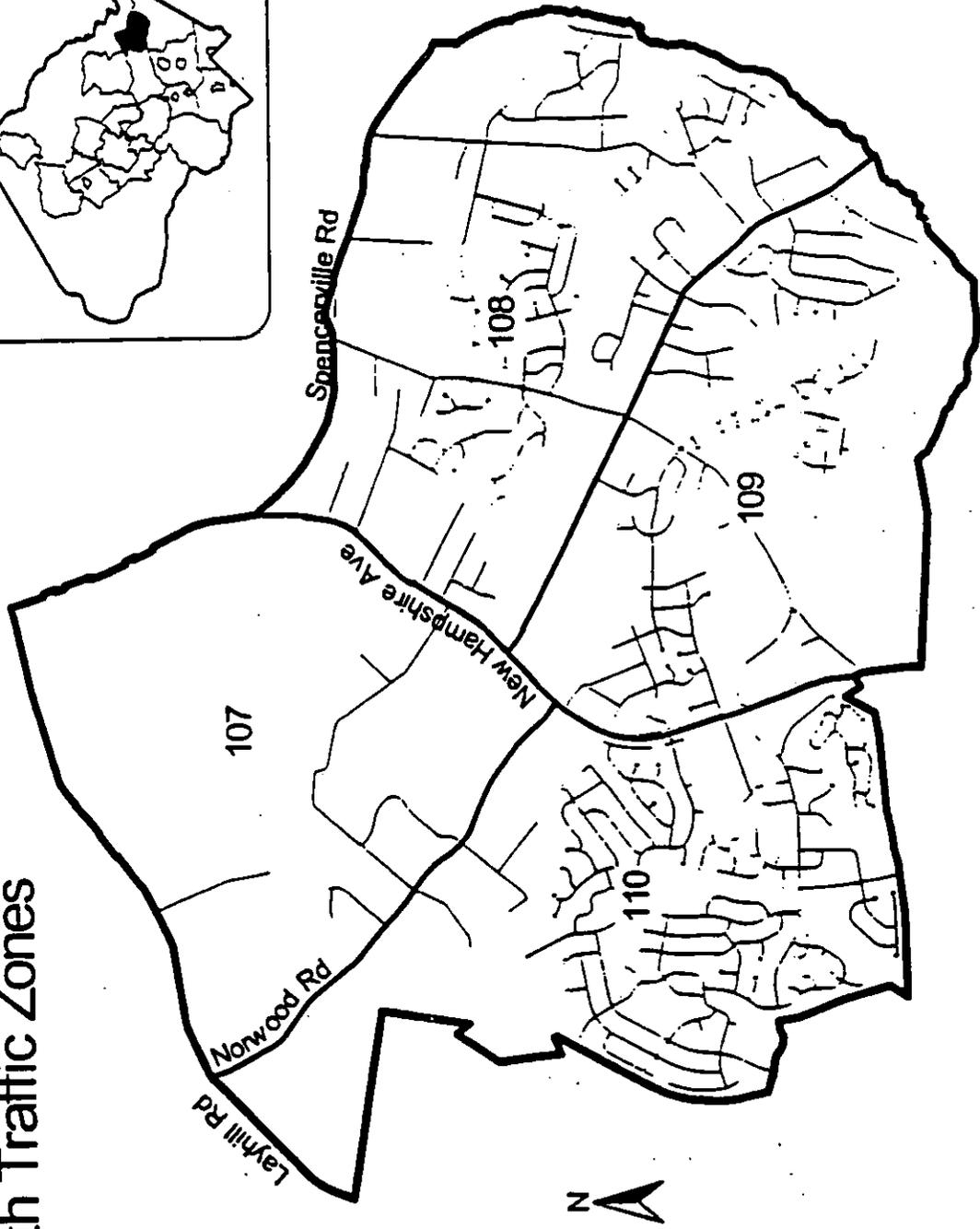
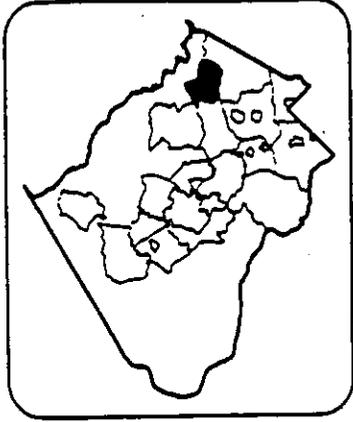



MONTGOMERY COUNTY DEPARTMENT OF PARK AND PLANNING
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 TEL: 301-279-3000 FAX: 301-279-3001

Clarksburg Policy Area With Traffic Zones



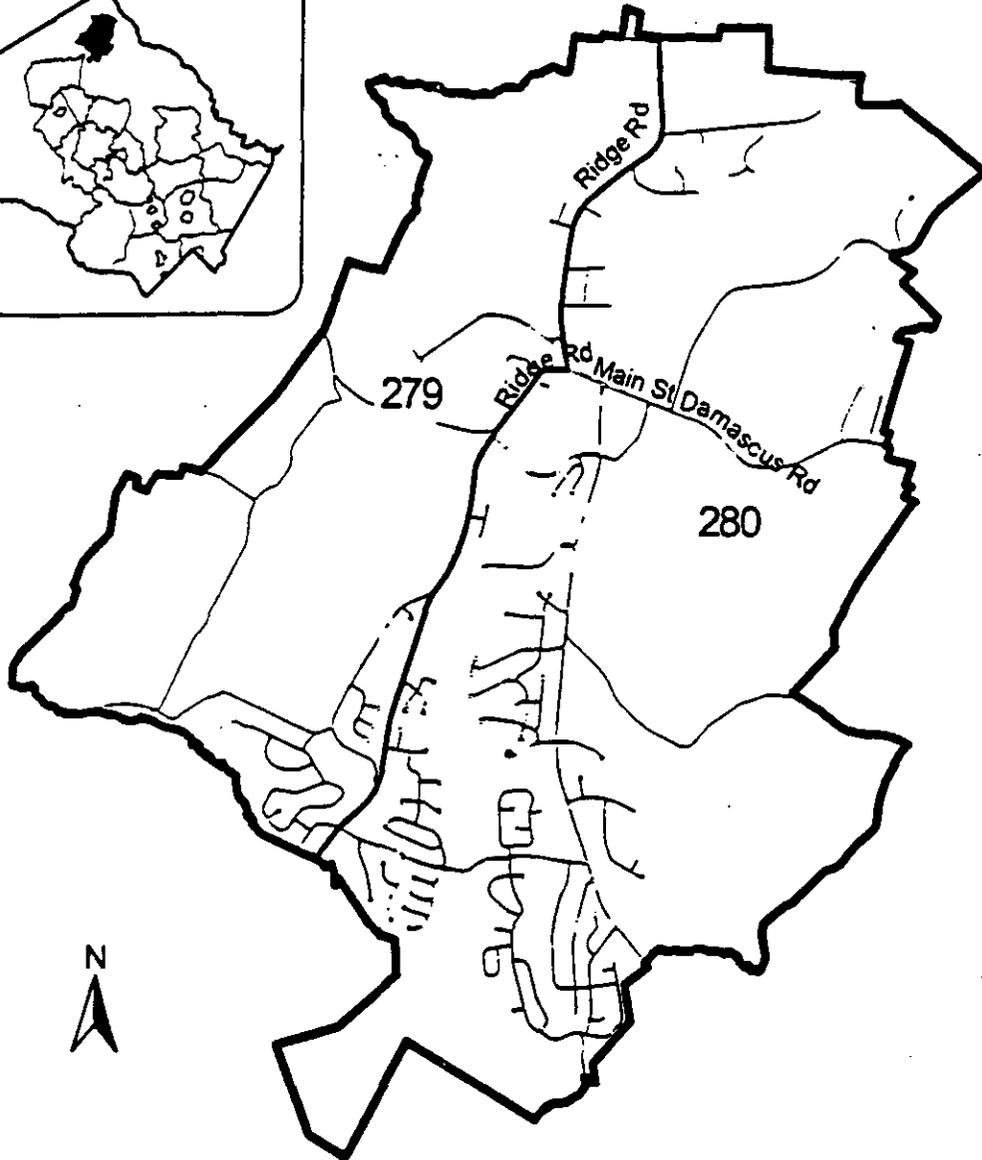
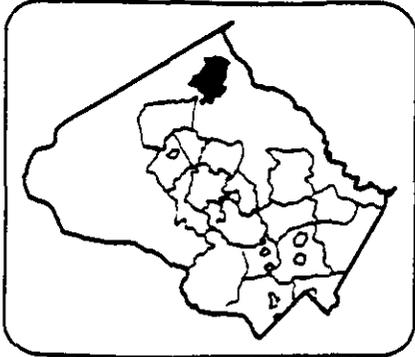
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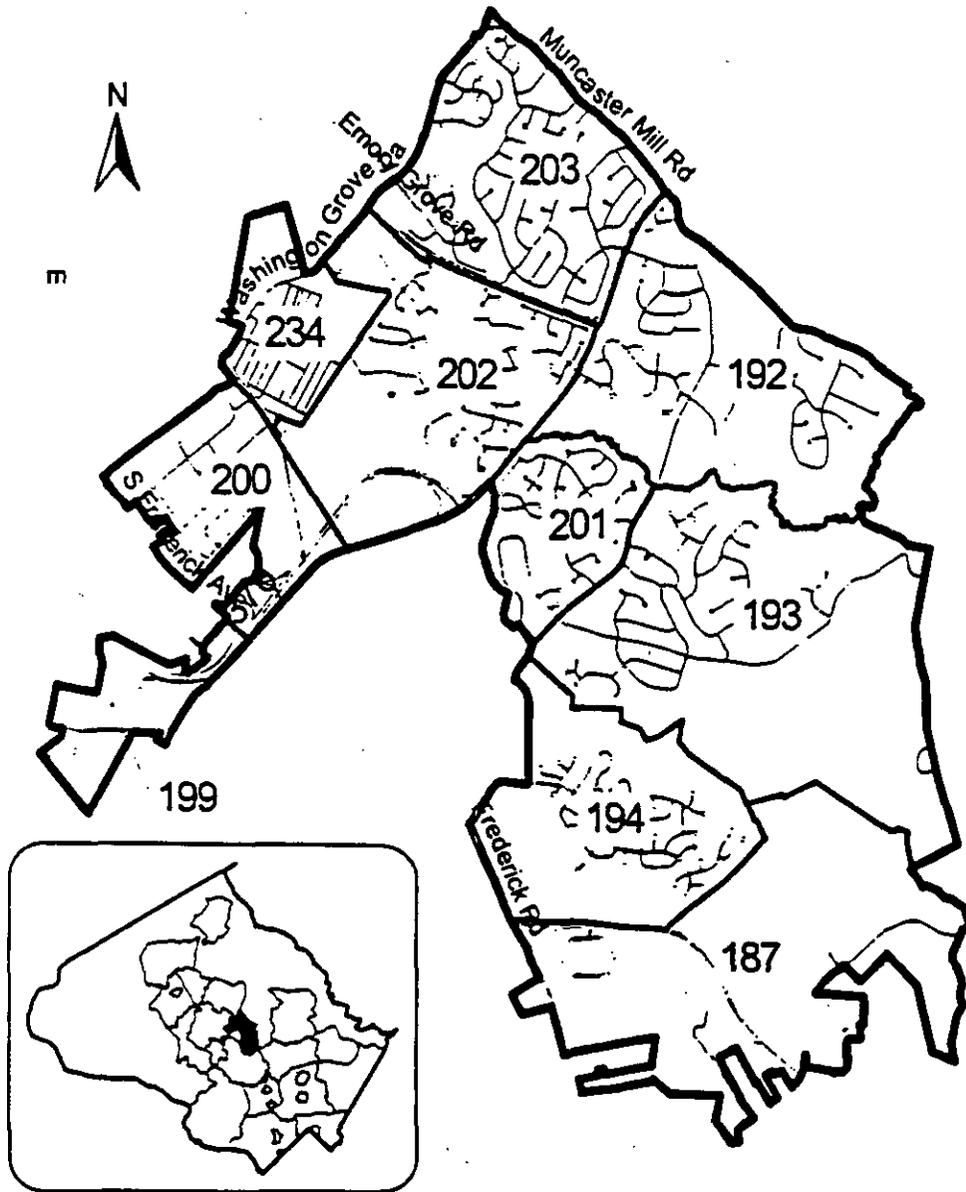
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 TEL: 301-771-2200 FAX: 301-771-2201
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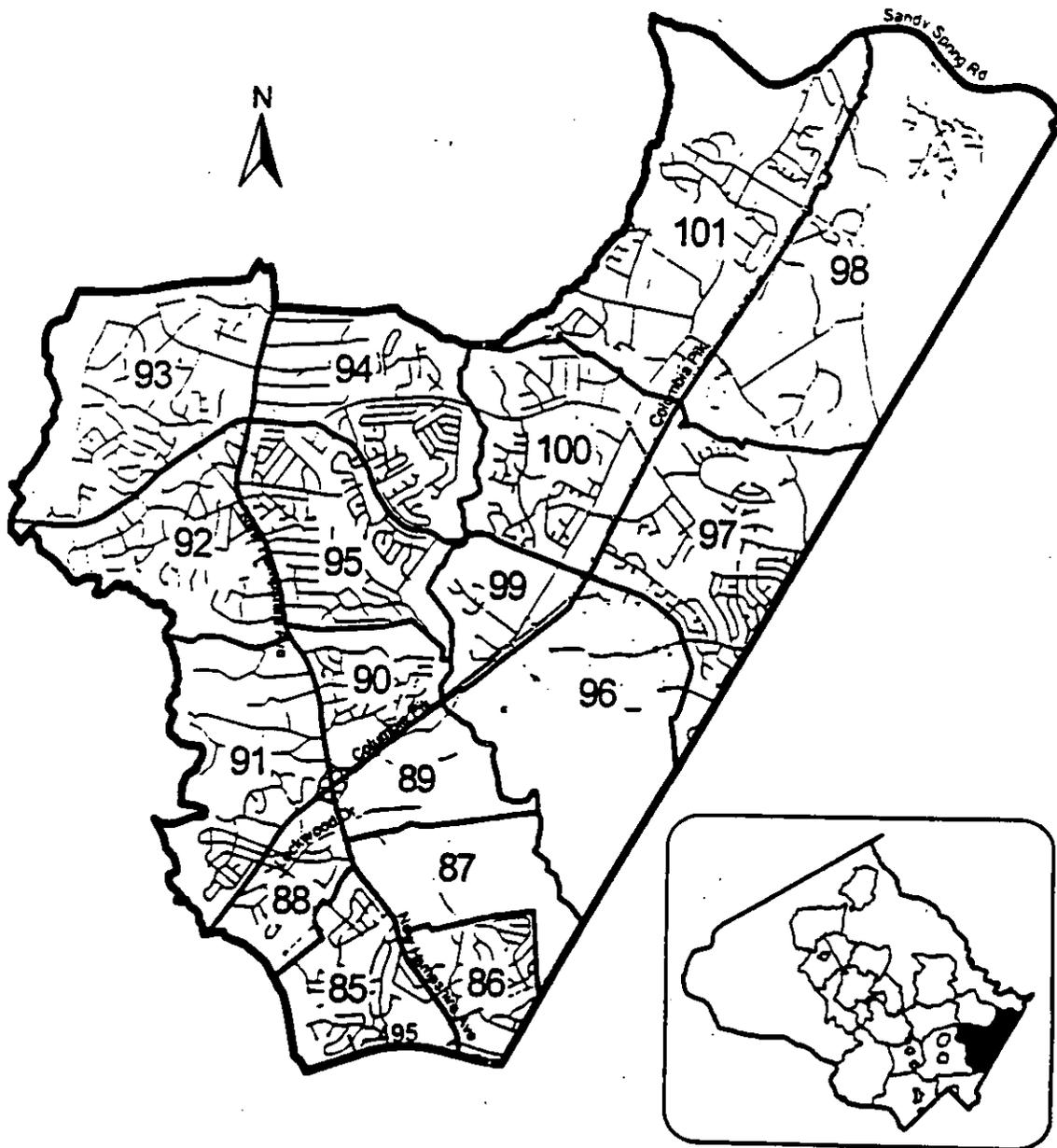
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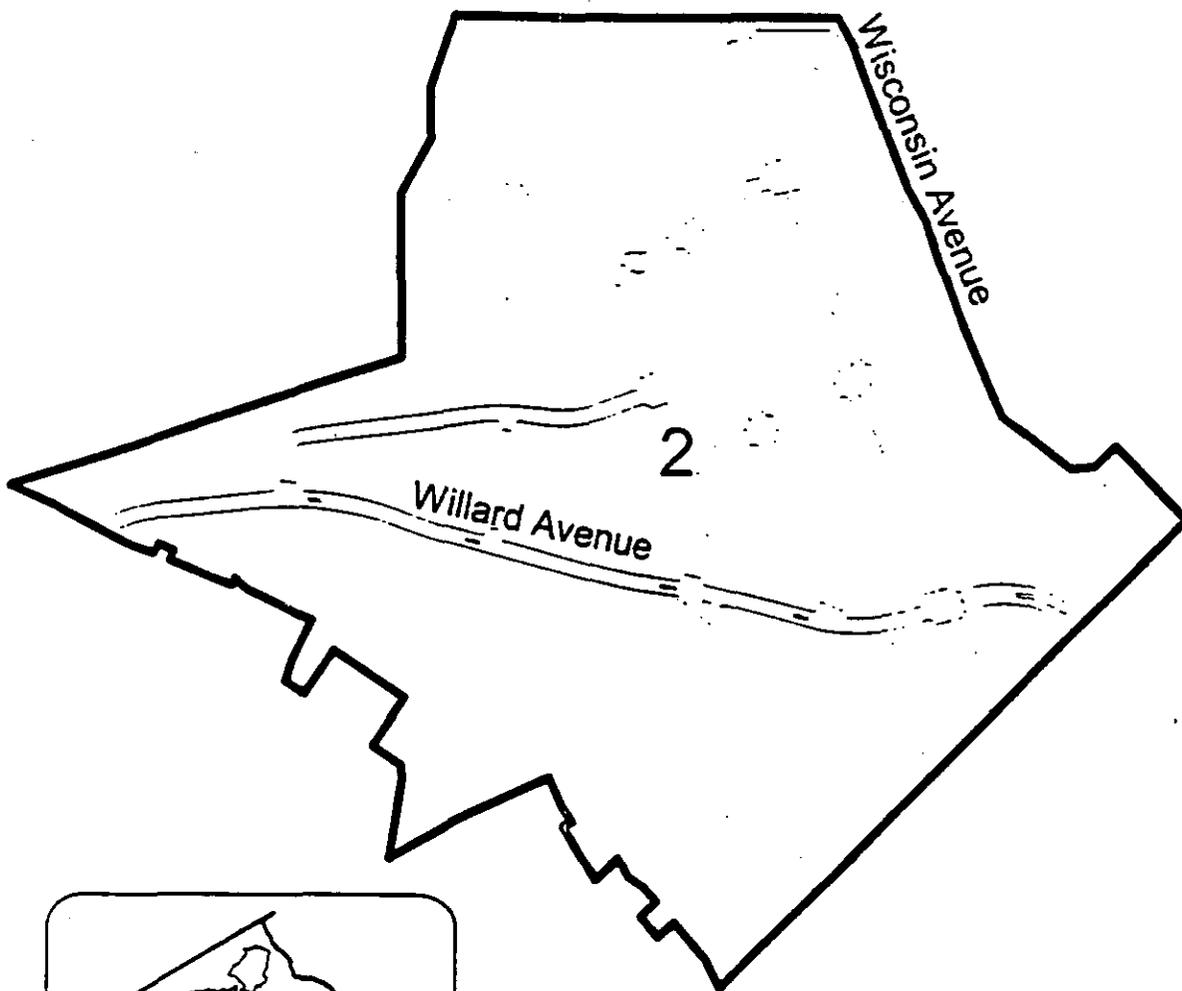
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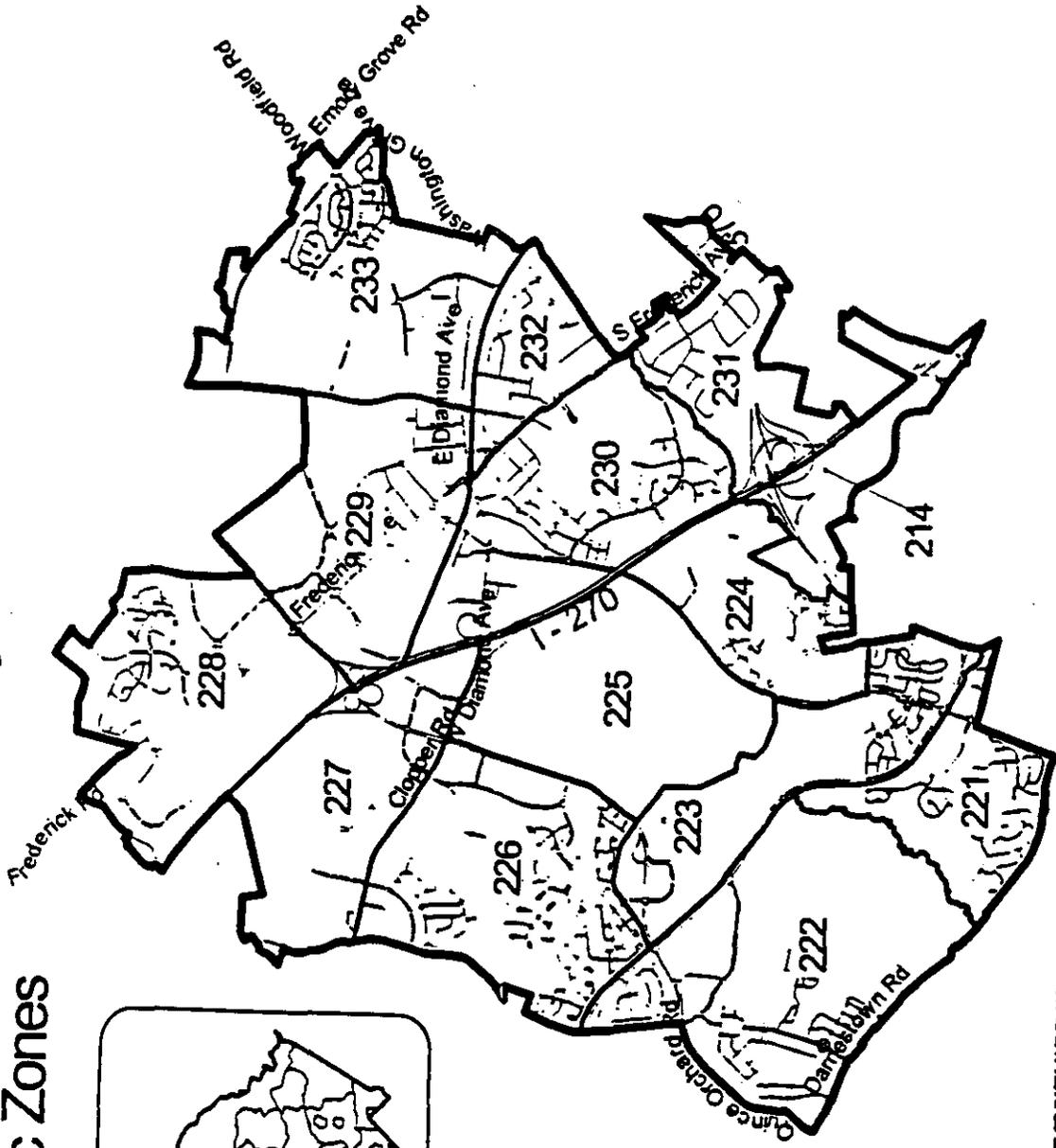
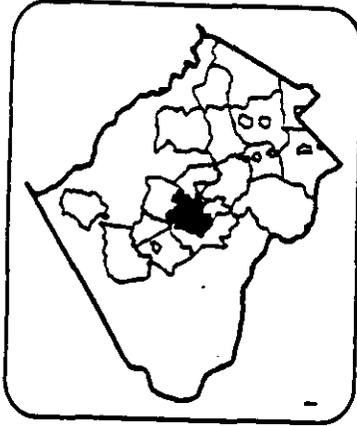
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Friendship Heights Policy Area With Traffic Zones

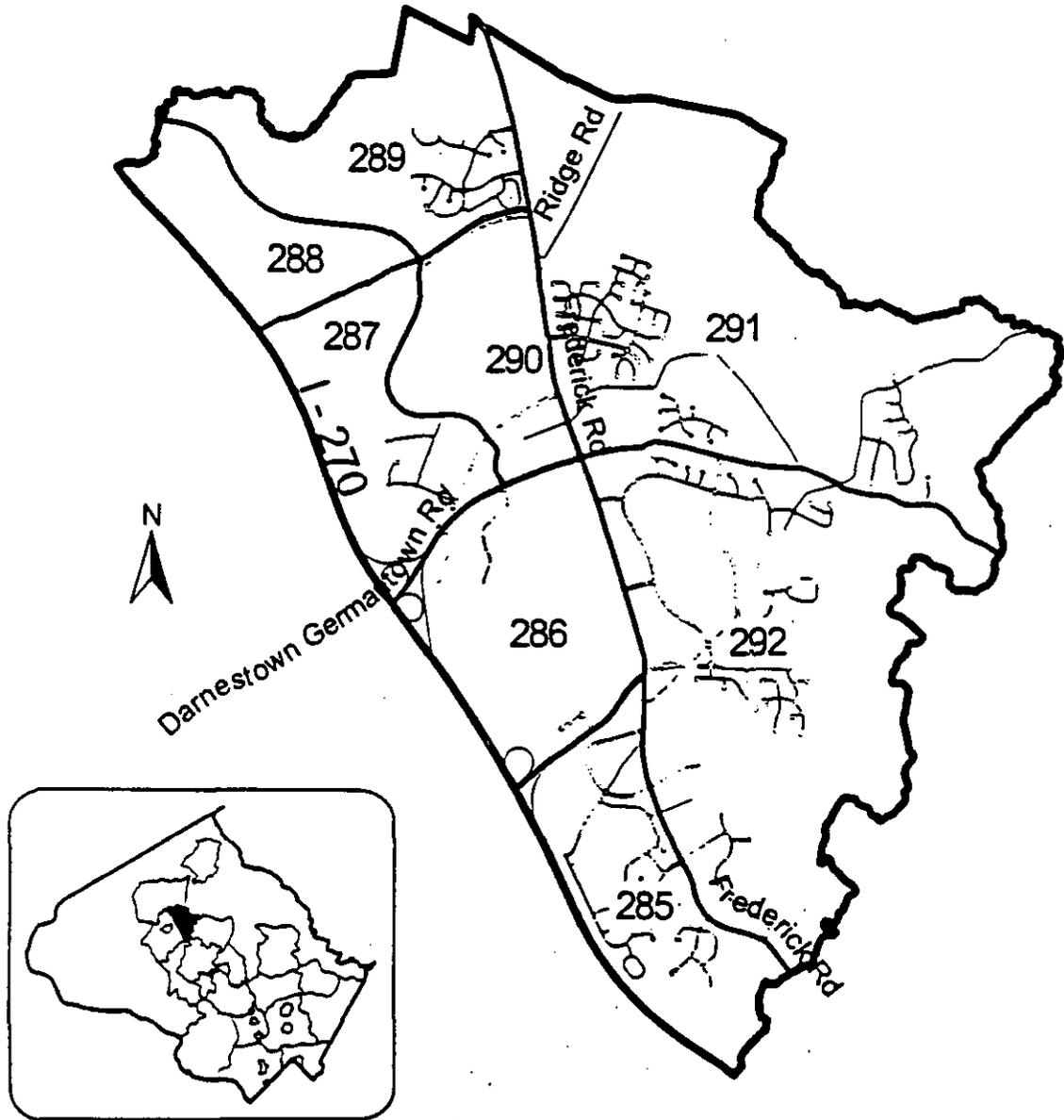


Gaithersburg City Policy Area With Traffic Zones



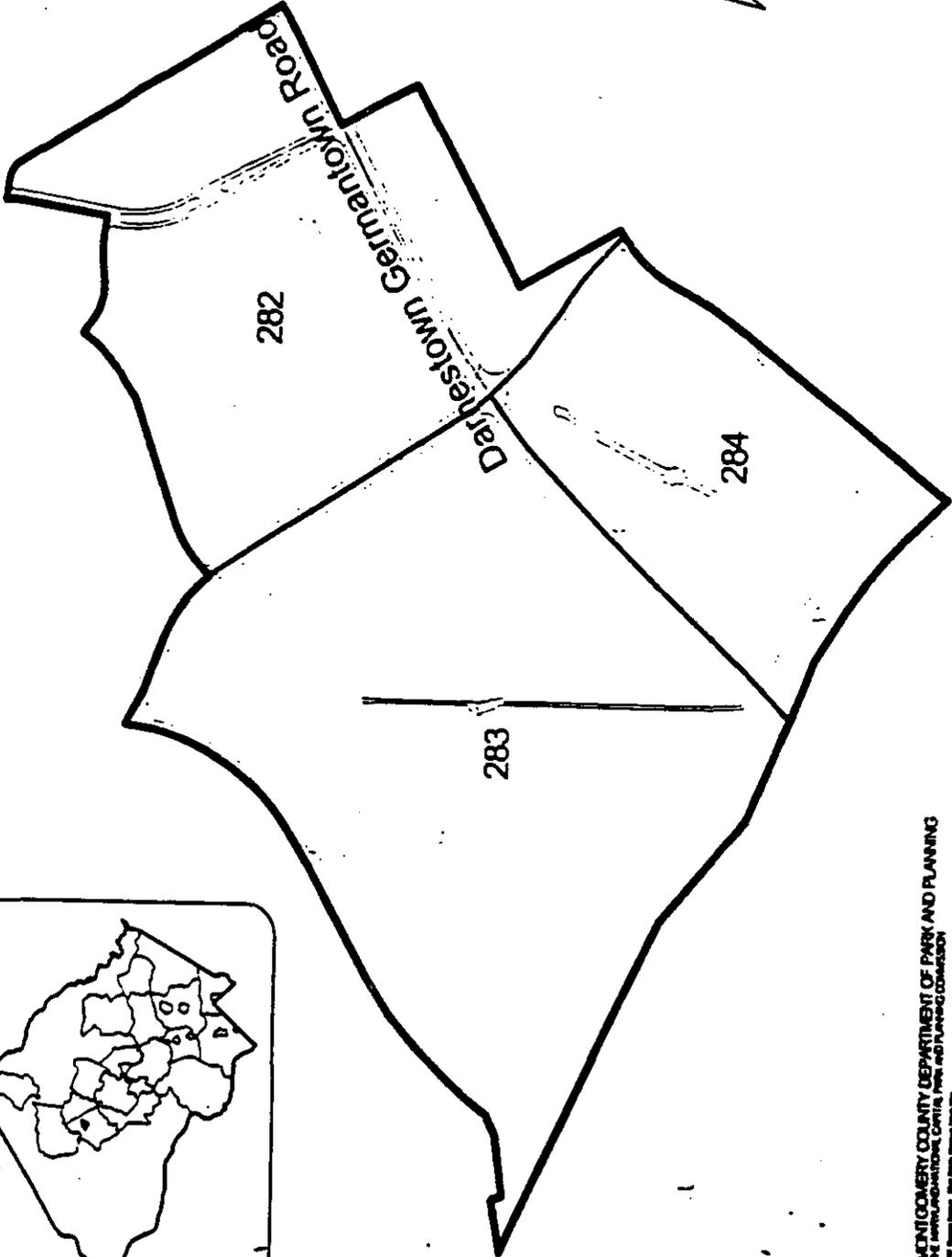
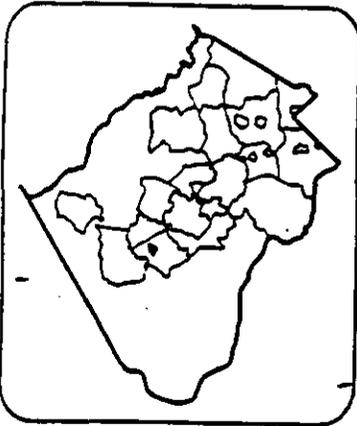
MONTGOMERY COUNTY DEPARTMENT OF PARKS AND PLANNING
11000 WOODBRIDGE DRIVE, SUITE 200, GAITHERSBURG, MD 20878
301-287-2200

Germantown East Policy Area With Traffic Zones



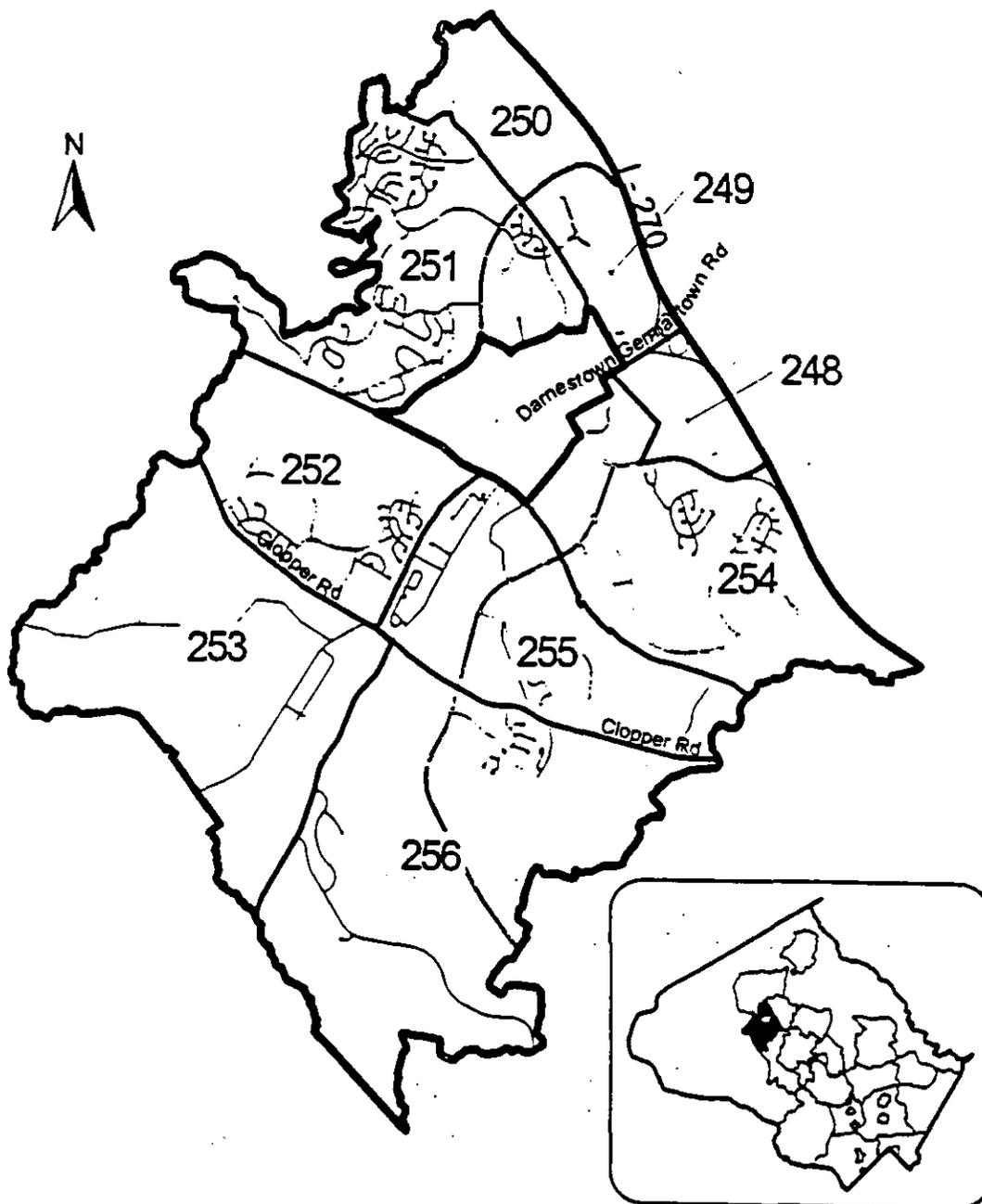
Germantown Town Center Policy Area

With Traffic Zones

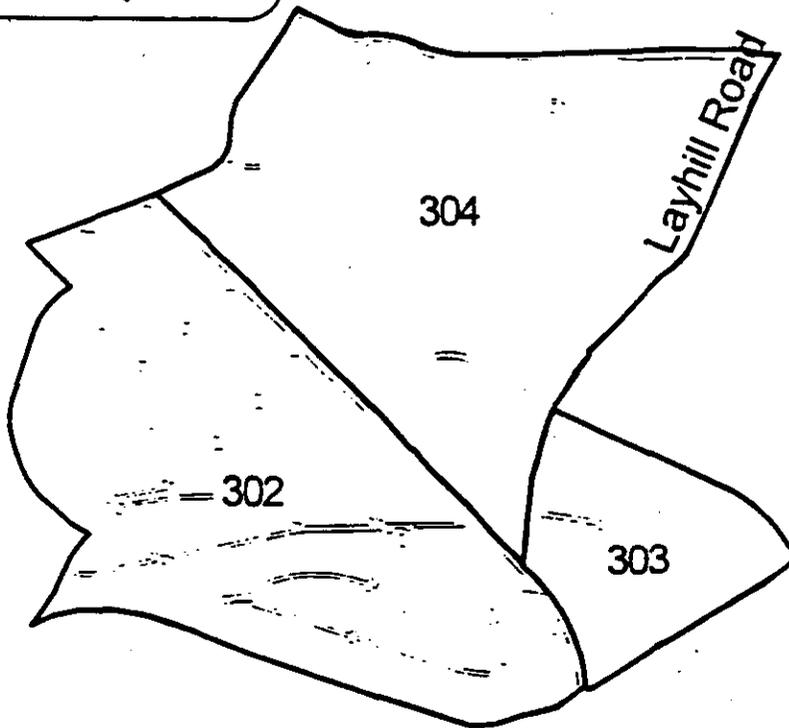
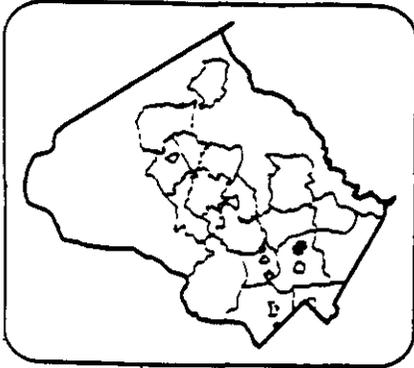



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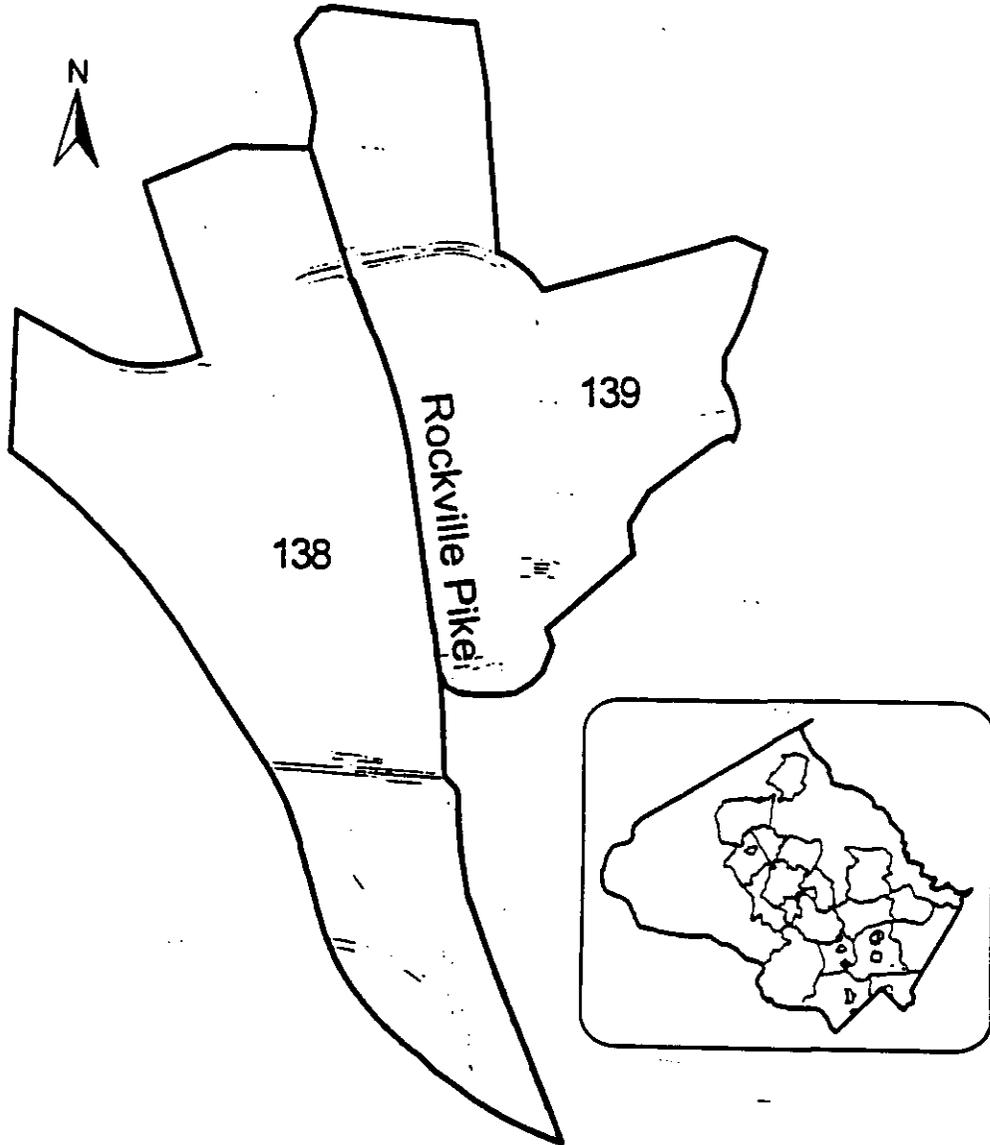
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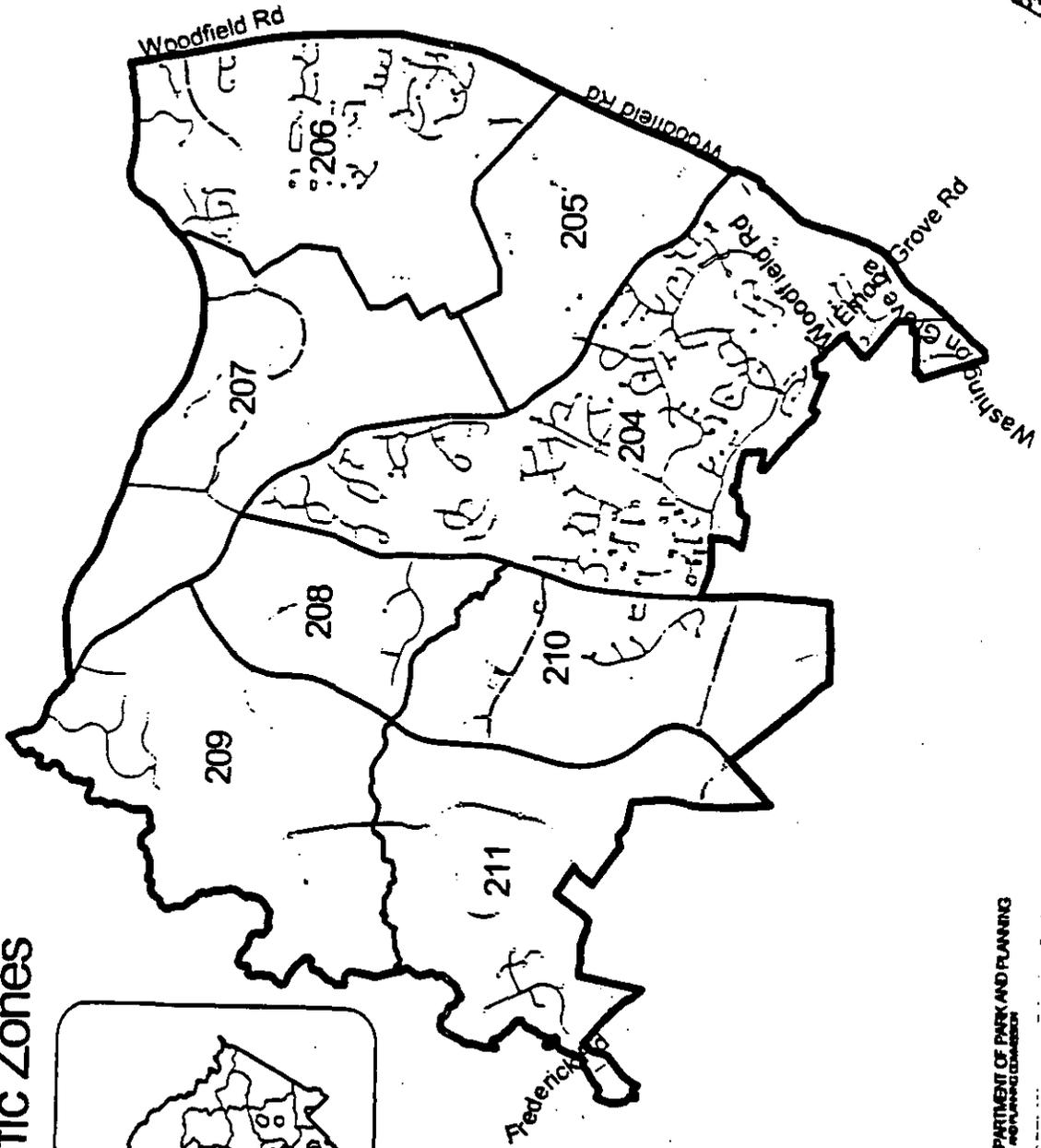
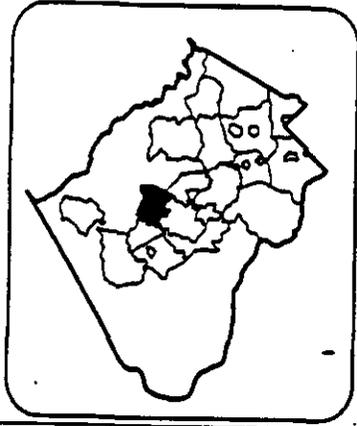
Glenmont Policy Area With Traffic Zones



Grosvenor Policy Area With Traffic Zones

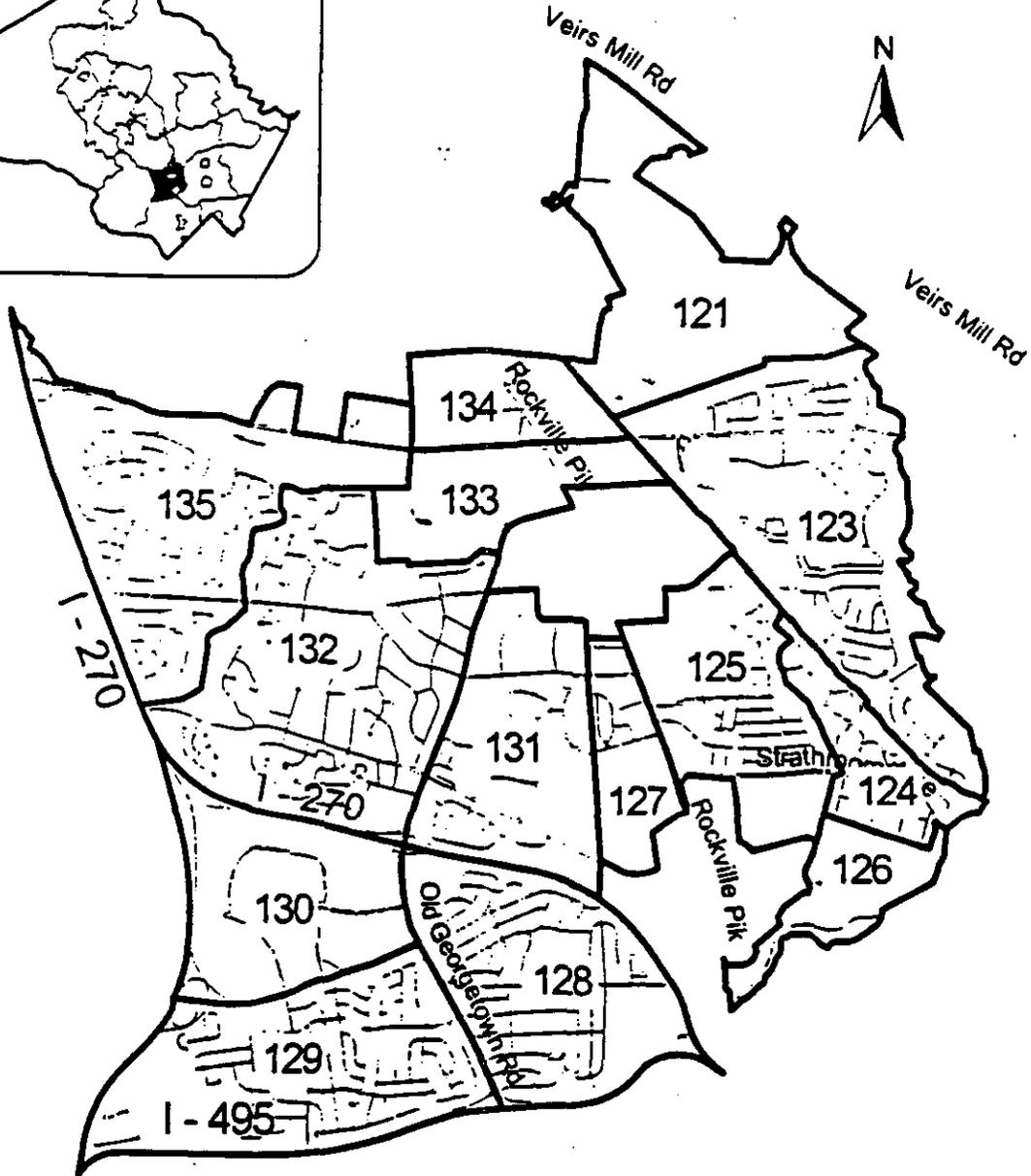
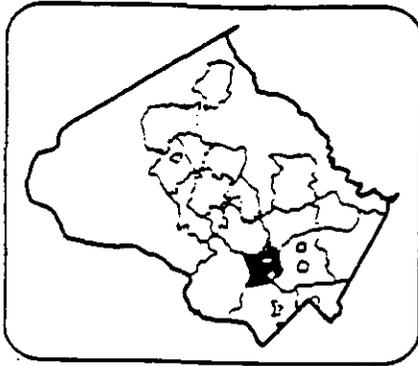


Montgomery Village/Airpark Policy Area With Traffic Zones

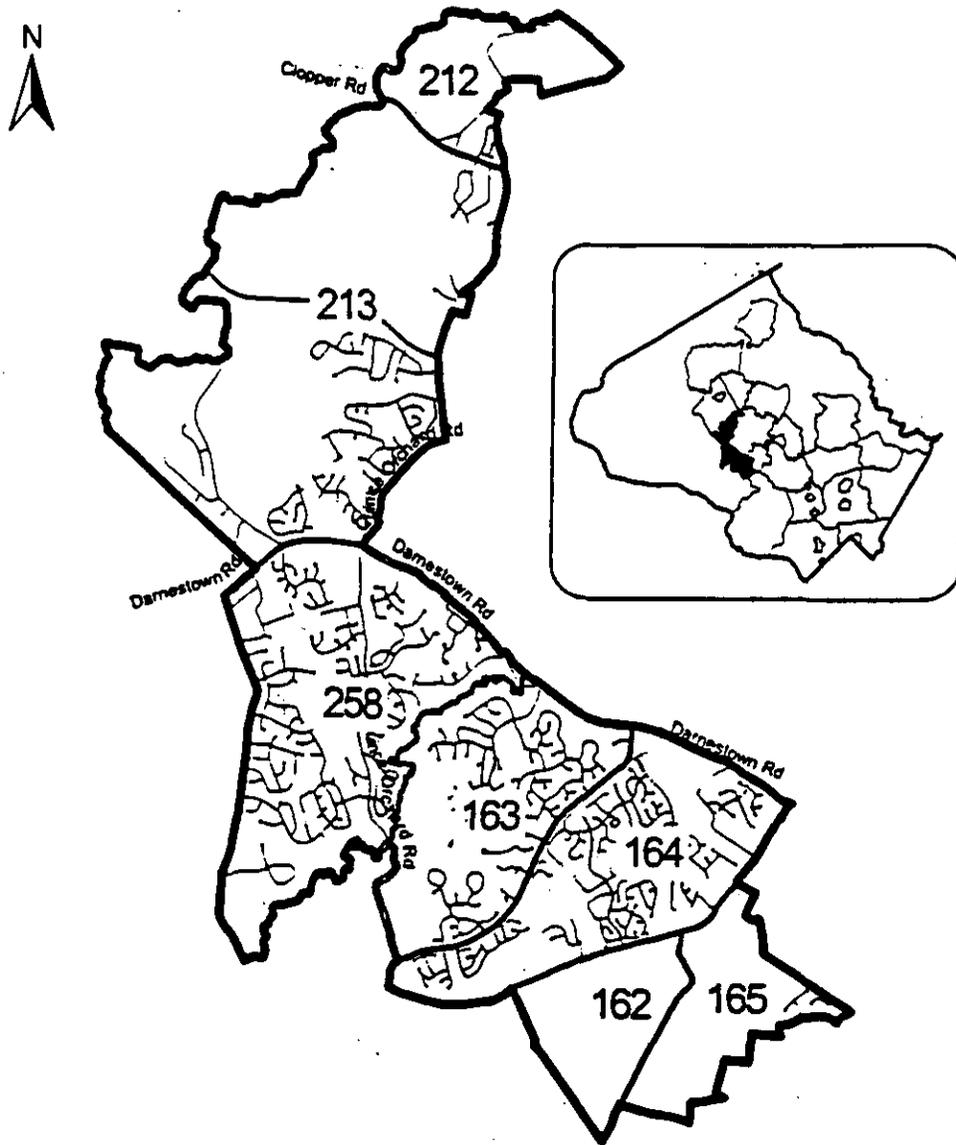


MONTGOMERY COUNTY DEPARTMENT OF PARK AND PLANNING
 THE MONTGOMERY COUNTY CAPITAL PLAN AND PLANNING EXHIBIT
 For more information, see the accompanying text.

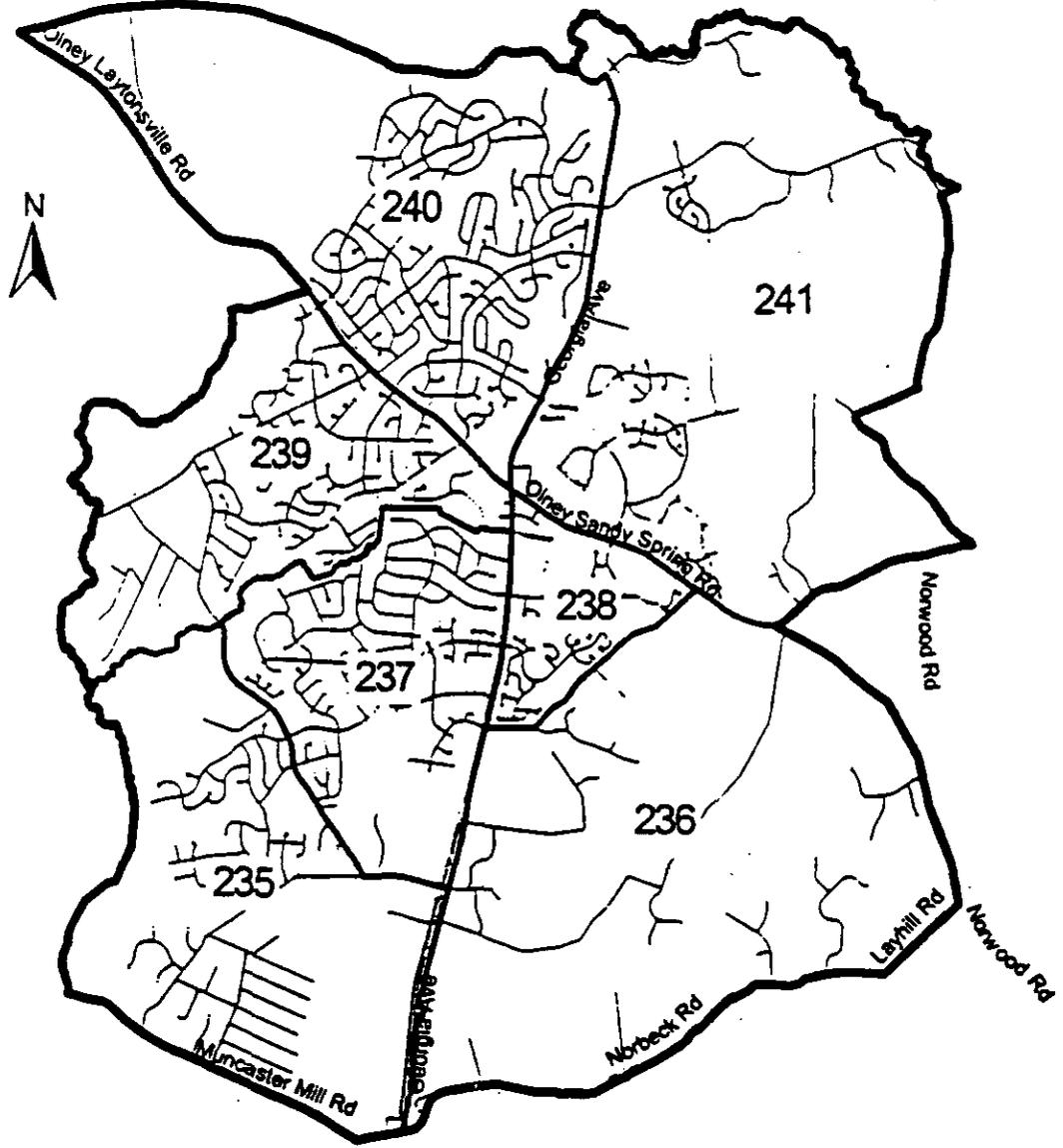
North Bethesda Policy Area With Traffic Zones



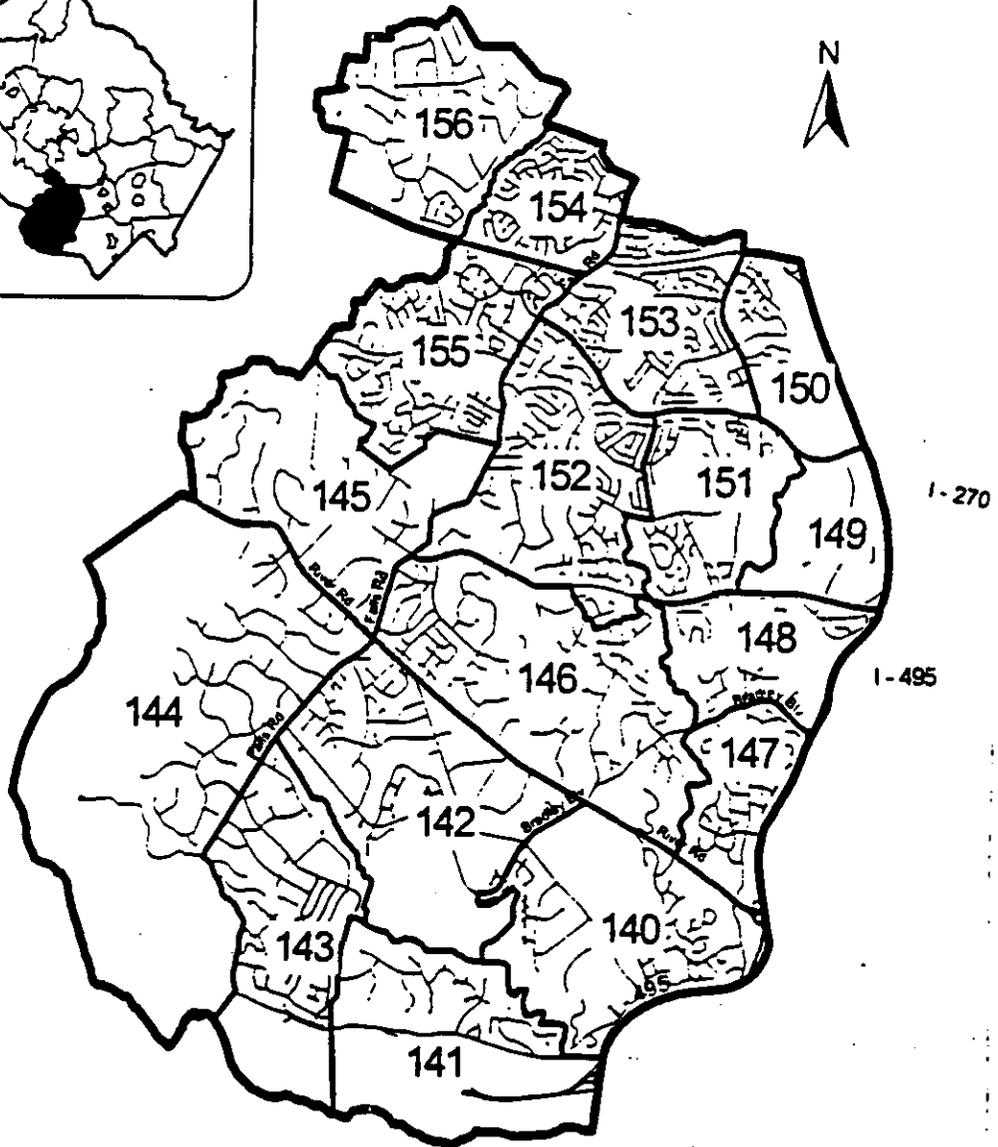
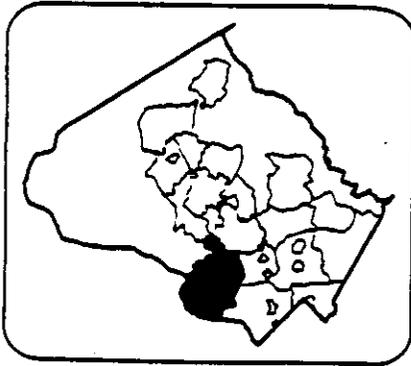
North Potomac Policy Area With Traffic Zones



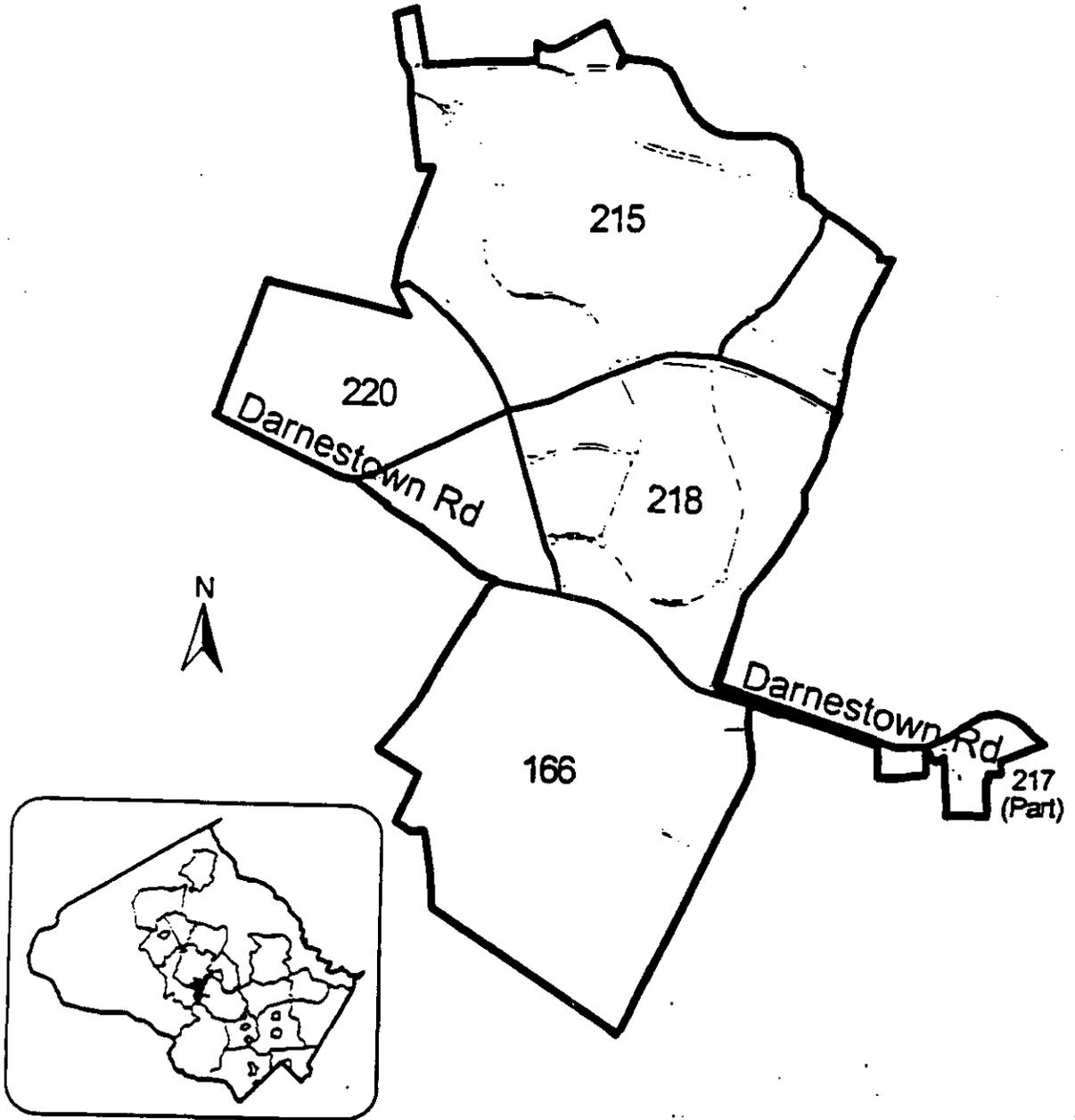
Olney Policy Area With Traffic Zones



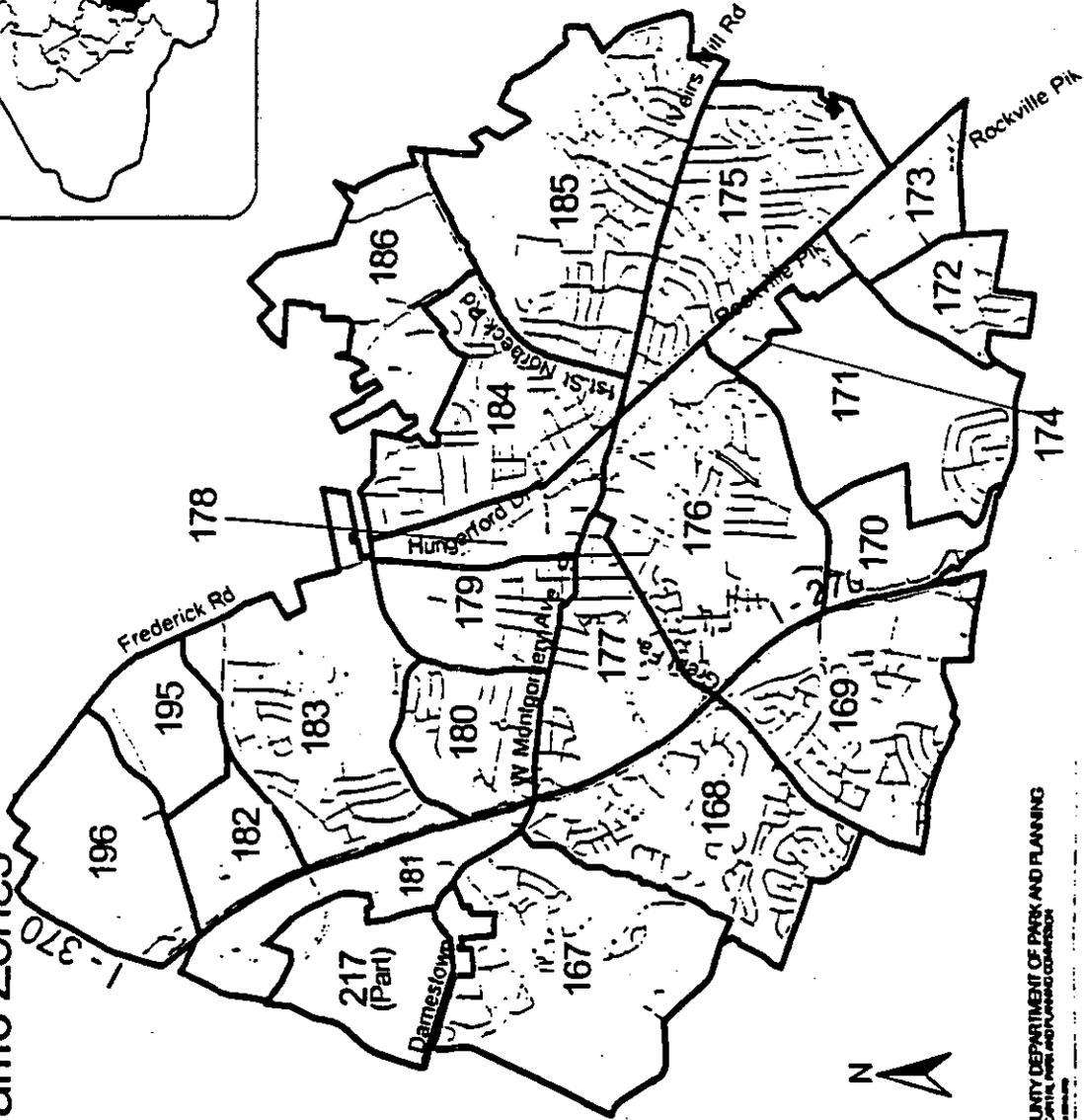
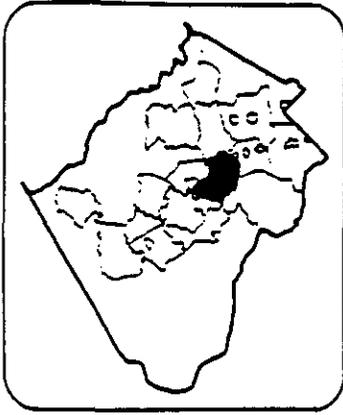
Potomac Policy Area With Traffic Zones



R & D Village Policy Area With Traffic Zones

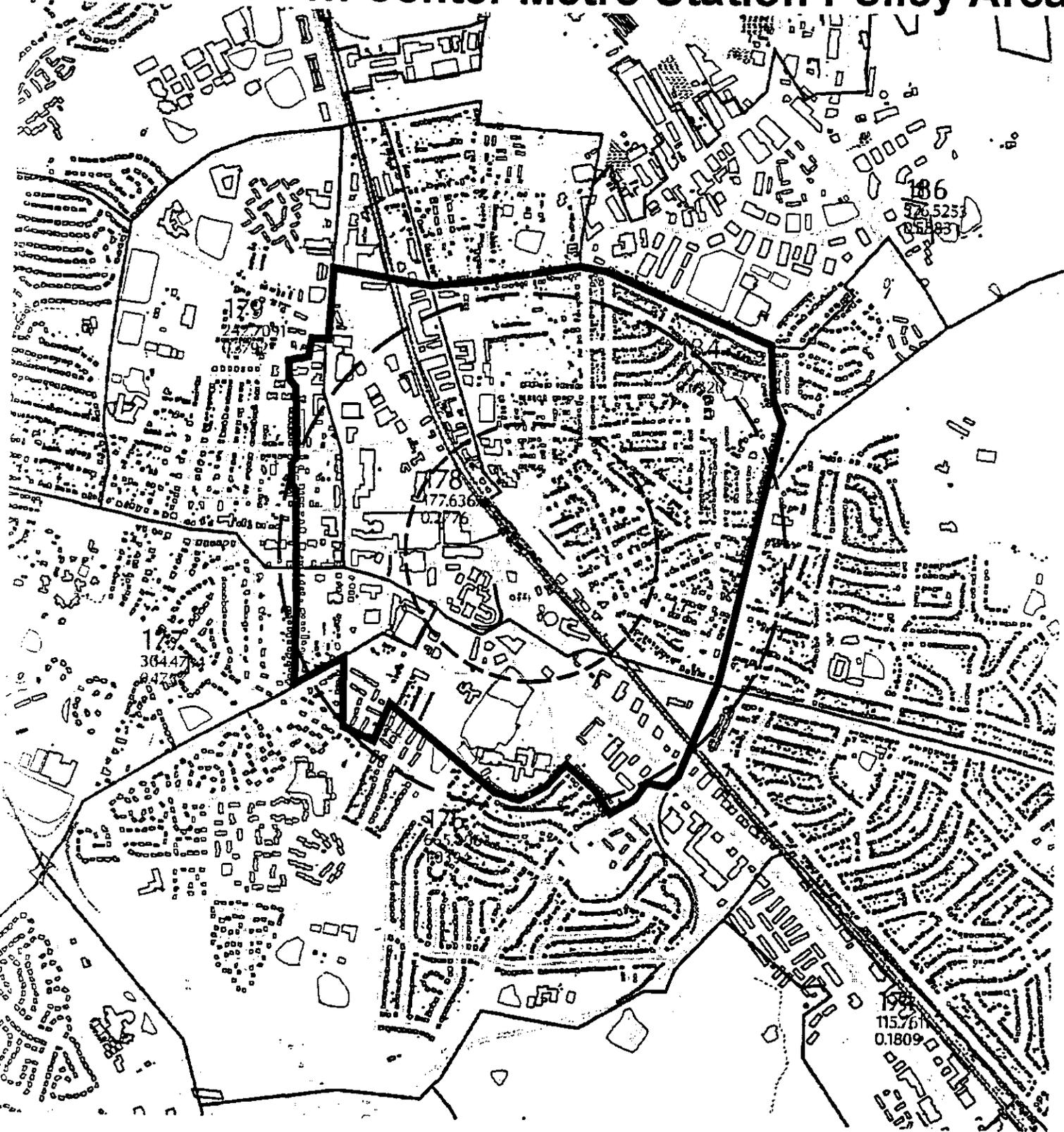


Rockville Policy Area With Traffic Zones



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 ROCKVILLE, MARYLAND 20850
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Rockville Town Center Metro Station Policy Area



-  MSPA boundary
-  1/4 mile from Metro station
-  1/2 mile from Metro station



Planimetric / Orthophoto
Source Data



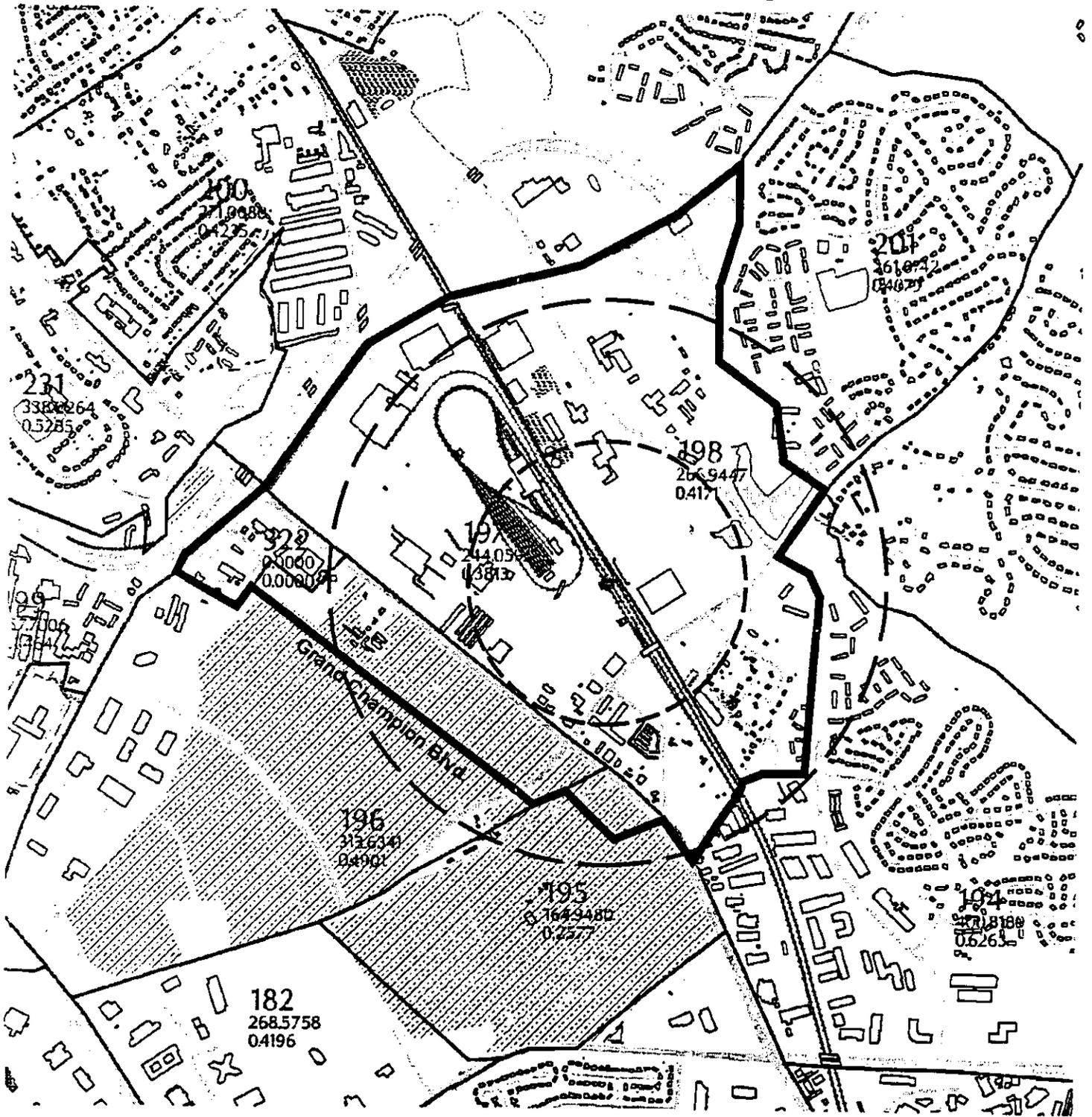
Research & Technology Center



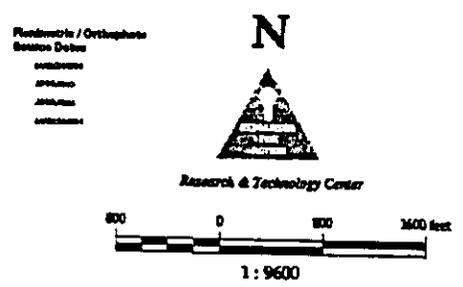
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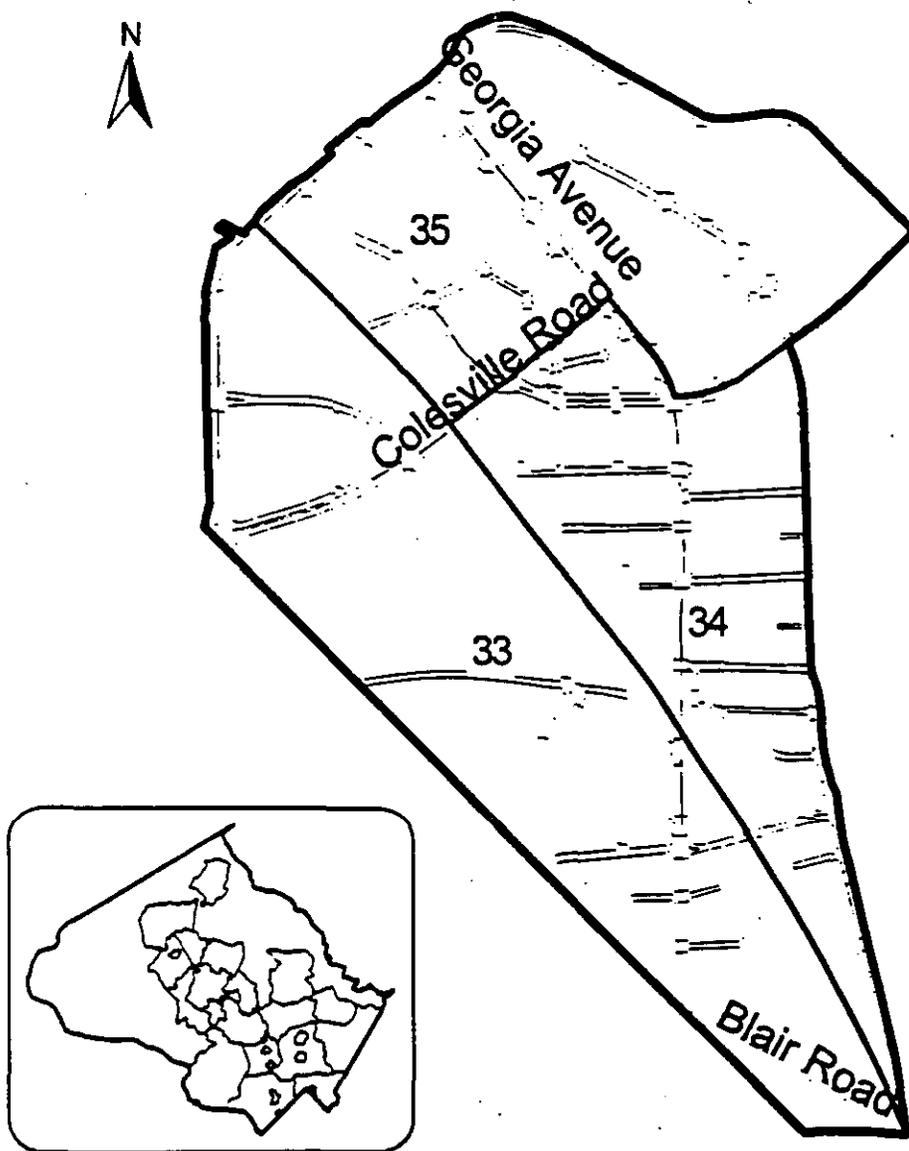
Shady Grove Metro Station Policy Area



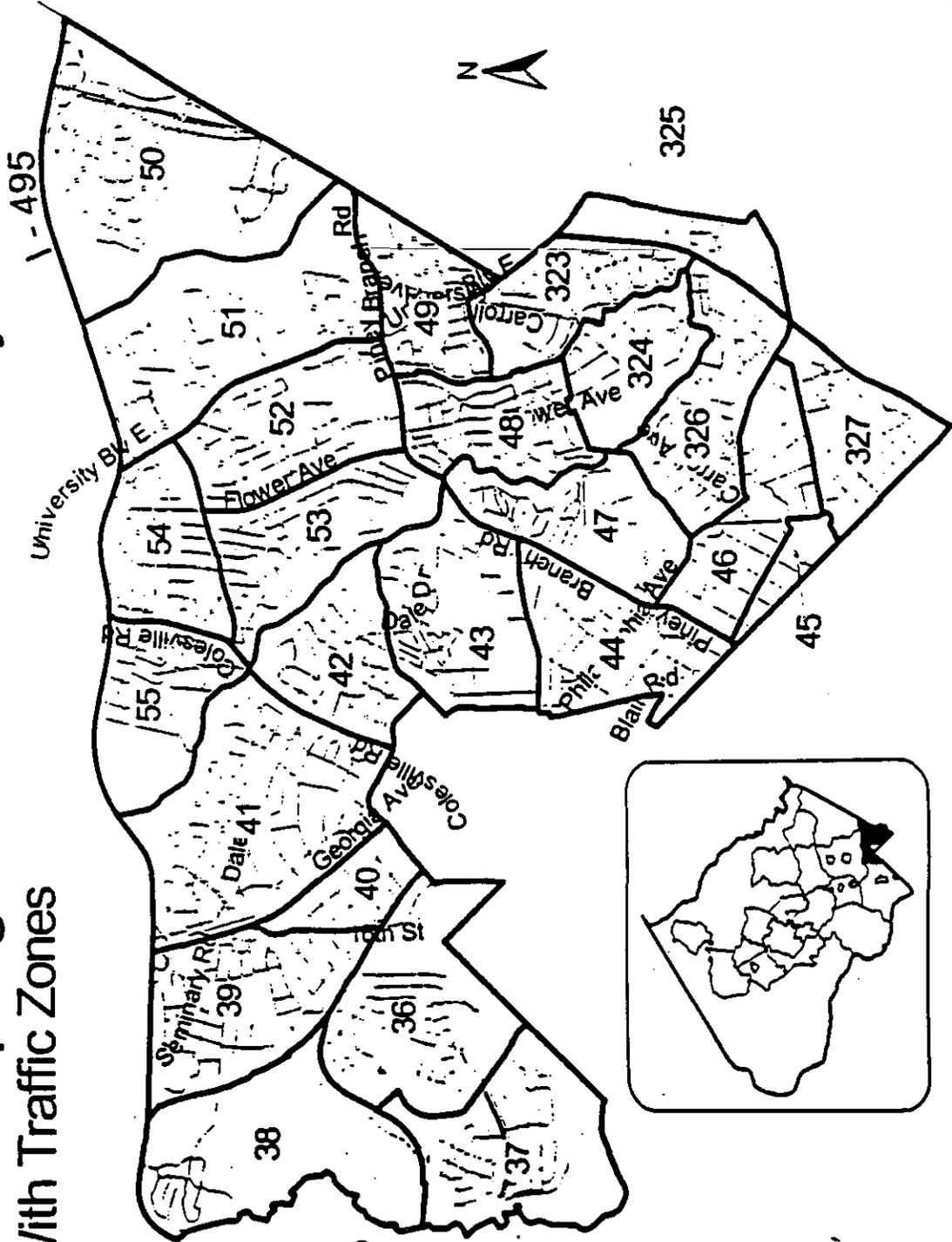
- MSPA boundary
- 1/4 mile from Metro station
- 1/2 mile from Metro station



Silver Spring CBD Policy Area With Traffic Zones

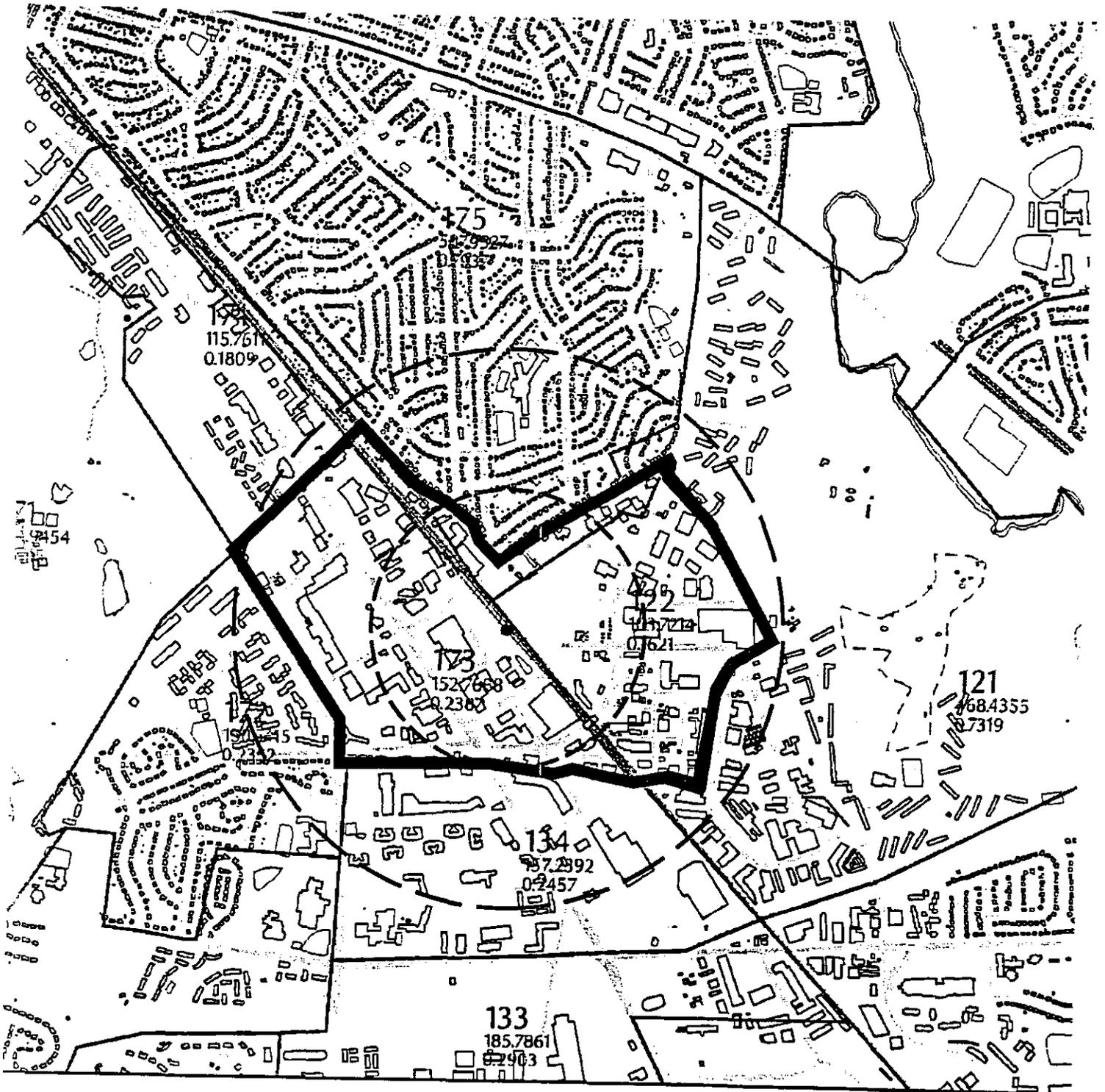


Silver Spring/Takoma Park Policy Area With Traffic Zones



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 TEL: 301-231-7300 FAX: 301-231-7301

Twinbrook Metro Station Area



-  MSPA boundary
-  1/4 mile from Metro station
-  1/2 mile from Metro station

Developed residential land near Metro.

Key Map



Planimetric / Orthophoto
 Source Data
 Imagery
 Photos
 Metadata

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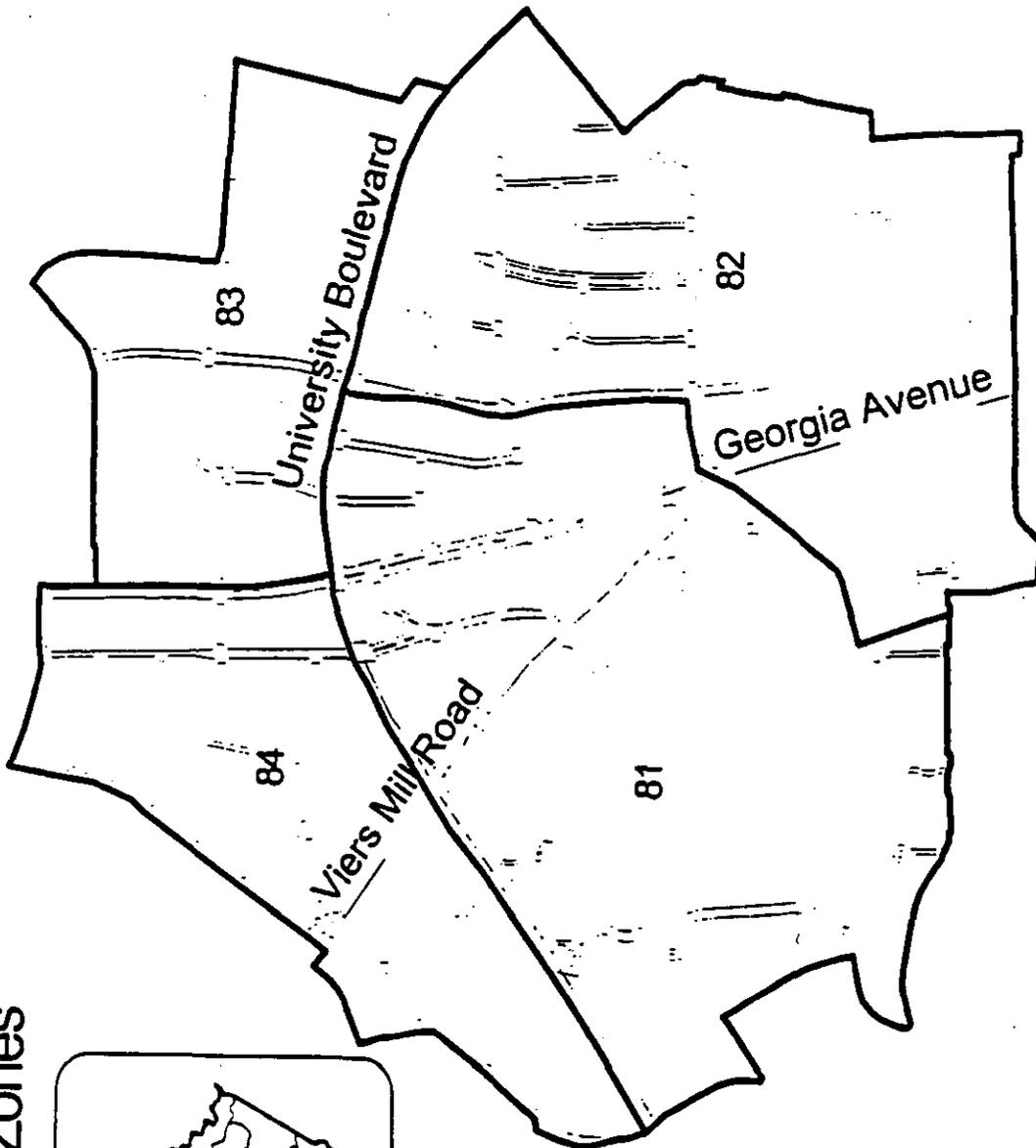
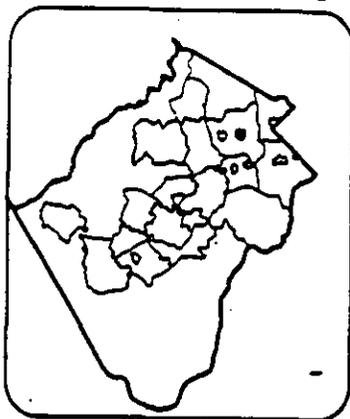


Research & Technology Center



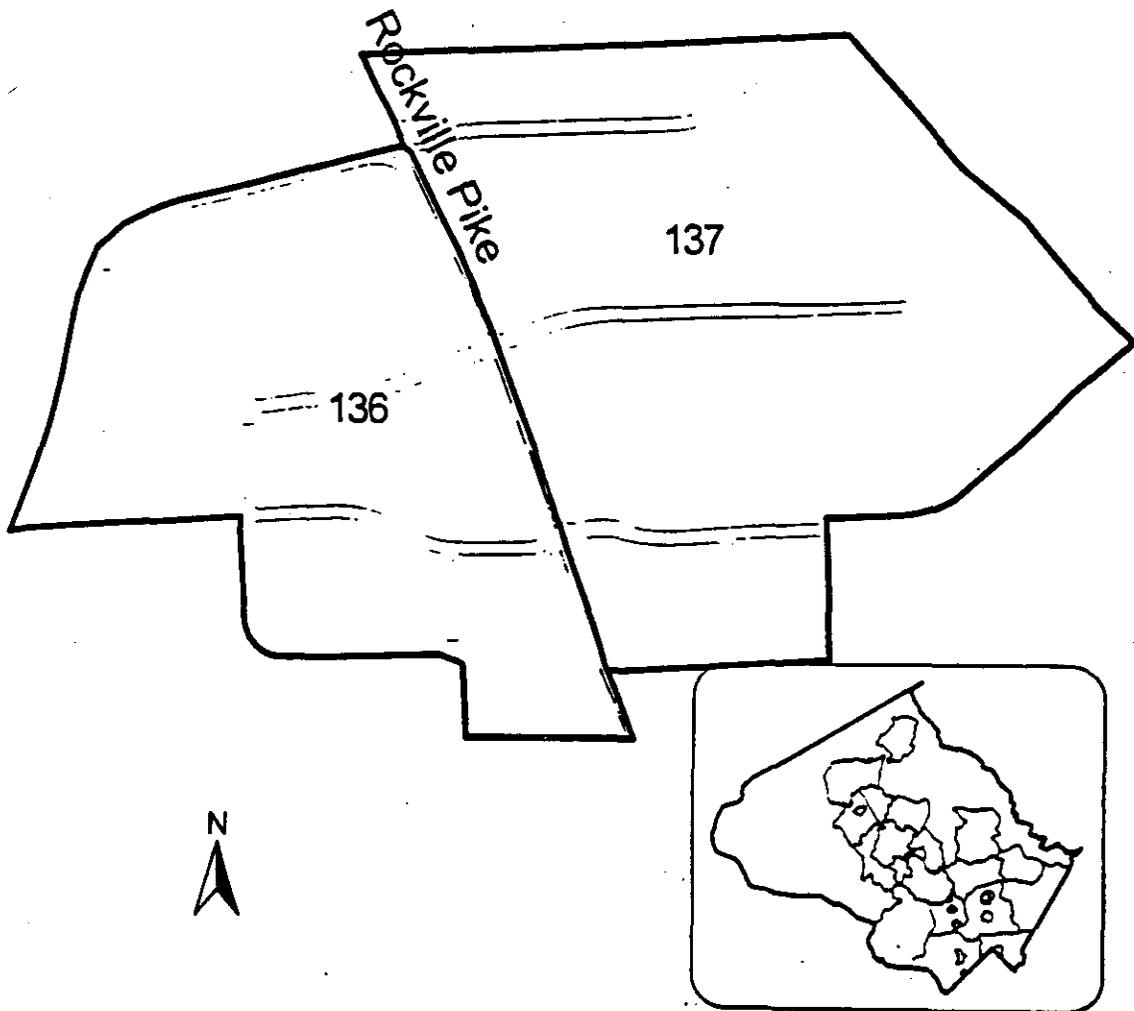
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Wheaton CBD Policy Area With Traffic Zones

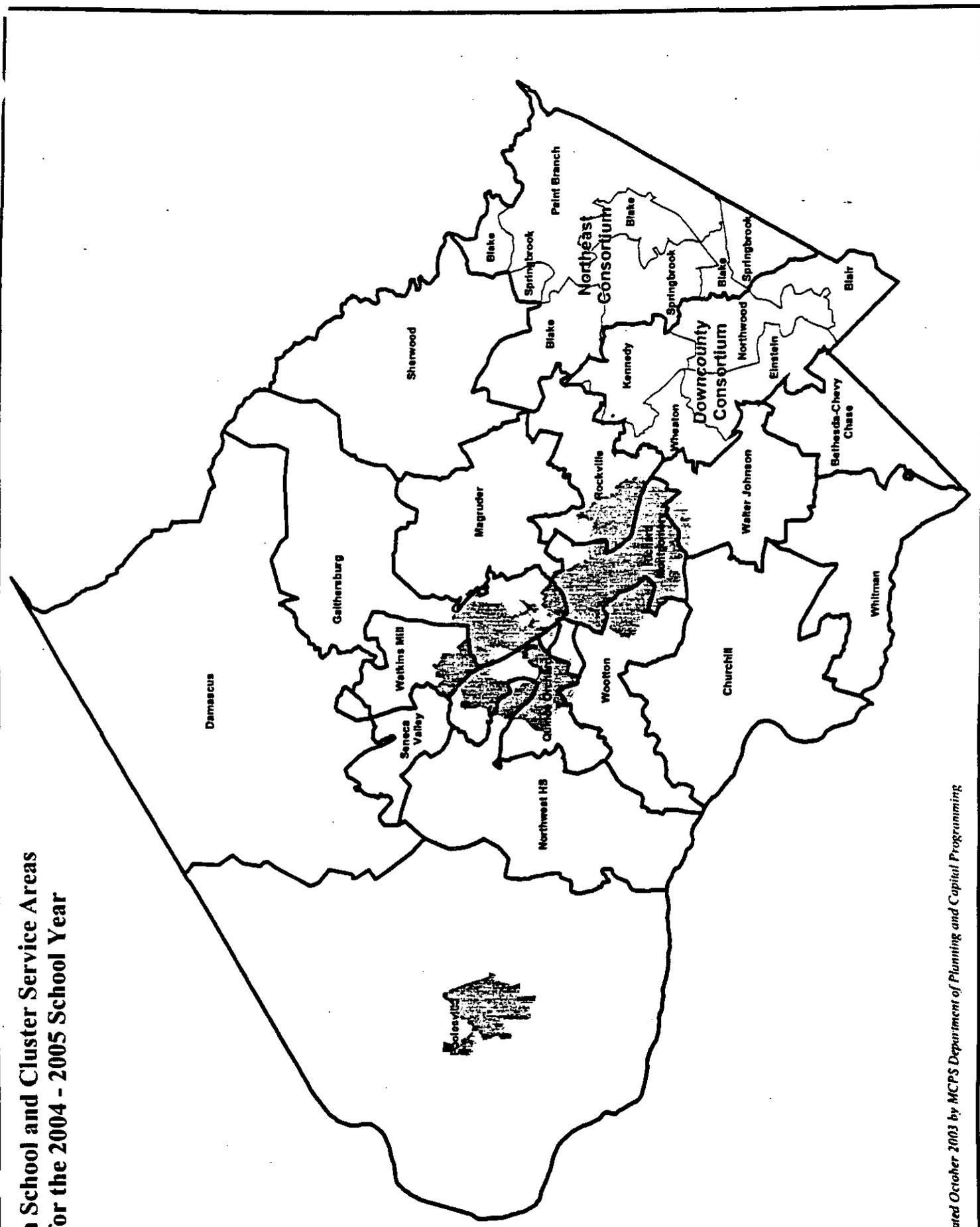


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141 MARYLAND AVENUE, SUITE 200, BETHESDA, MD 20814
Tel: 301-279-3000 Fax: 301-279-3001

White Flint Policy Area With Traffic Zones



High School and Cluster Service Areas for the 2004 - 2005 School Year



Appendix 8

Resolution No.: 13-216

Introduced: May 16, 1995

Adopted: July 11, 1995

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

By: County Council

Subject: Approval of [FY 95] FY 96 Annual Growth Policy

Background

1. County Code Section 33A-15 requires that no later than July 15 of each year, the County Council must adopt an Annual Growth Policy (AGP) Ceiling Element to be effective throughout the next fiscal year, providing policy guidance to the various agencies of government and to the general public on matters concerning land use development, growth management and related environmental, economic and social issues.

2. On May 15, [1994] 1995, in accordance with the requirements of Section 33A-15, the County Executive transmitted to the County Council his comments and recommendations on the [FY 95] FY 96 Annual Growth Policy Ceiling Element and [FY 94] FY 95 Annual Growth Policy Amendment based on the Final Draft Annual Growth Policy documents submitted by the Planning Board on May 1, 1994.

3. In addition, the Final Draft Annual Growth Policy Ceiling Element as submitted by the Planning Board contained supporting and explanatory materials [including forecasts for the most probable trends in population and households,] a set of recommended growth capacity ceilings for each policy area within the County, proposed guidelines for the administration of the Adequate Public Facilities Ordinance, and other background information relevant to the subject of growth policy.

4. In addition, the Final Draft Annual Growth Policy Amendment as submitted by the Planning Board contained recommendations for [amending the methodology for determining the adequacy of transportation facilities in Montgomery County] testing development districts for public facilities adequacy.

5. On [June 9, 1994] June 20, 1995, the County Council held a public hearing on the [FY 95] FY 96 Annual Growth Policy Ceiling Element and [FY 94] FY 96 Annual Growth Policy Amendment.

6. On [May 24, 1994] May 26, 1995, the County Council adopted the Capital Improvements Program for fiscal years [1995-2000] 1996-2001.

7. On [June 23, 1994, July 5, 1994, and July 12, 1994] June 27, 1995 the Council conducted a worksession[s] on the Annual Growth Policy, at which time careful consideration was given to the public hearing testimony, updated information, recommended revisions and comments of the County Executive and Montgomery County Planning Board, and the comments and concerns of other interested parties.

[8. The County Council reviewed the facts and assumptions underlying this Annual Growth Policy. This review included: 1) a detailed review by policy area of existing and projected transportation facilities and conditions; 2) a review of the methodology for determining the adequacy of transportation facilities, including pedestrian facilities; 3) a discussion of the de minimis rule; 4) a review of the Annual Report of the Silver Spring Transportation Management District; and 5) a review of issues related to the establishment of a Clarksburg policy area for FY 95.]

8. The Council recognizes efforts made by the Planning Board and the Executive to improve the consistency and reliability of the County growth management data base. These efforts have resulted in a reduction of errors from prior years. In this regard, the Council stresses the need for sustained administrative vigilance in assessing the validity of computer based systems and the reliability of data collection efforts. The Council recognizes that a quantitatively oriented system such as the Annual Growth Policy, though subject to limitations, can promote objectivity and fairness in land-use decision making.

Action

The County Council for Montgomery County, Maryland, adopts the foregoing background statement and approves the following Resolution:

The Planning Board's Final Draft [FY 95] FY 96 Annual Growth Policy Ceiling Element, [FY 94] FY 95 AGP Amendment, and comments and recommendations of the County Executive have been reviewed and amended by the County Council, so that the following constitutes the entire Annual Growth Policy for [FY 95] FY 96:

I. Guidelines for the Administration of the Adequate Public Facilities Ordinance:

The Montgomery County Subdivision Ordinance, County Code Section 50-35(k) ("the Adequate Public Facilities Ordinance or APFO"), directs the Montgomery County Planning Board to approve preliminary plans of subdivision only after finding that public facilities will be adequate to serve the subdivision. 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 the adequacy of public facilities. These guidelines supersede all previous ones adopted administratively by the Planning Board to the extent that these guidelines conflict with previous ones. They also supersede those provisions of the Adequate Public Facilities Ordinance which were specified to apply only until the County Council had approved an Annual Growth Policy.

The Council accepts the definitions of terms and the assignment of values to key measurement variables which were used by the Planning Board and its staff, and accepted by the Executive, in developing the recommended Annual Growth Policy. The Council delegates to the Planning Board and its staff all other necessary administrative decisions not covered by the guidelines outlined below. In its administration of the APFO, the Planning Board is directed to request and consider the recommendations of the County Executive and other agencies in determining the adequacy of public facilities.

Subdivision applications may be subject to two different types of test. One is called the Policy Area Transportation Review. The other is called the Local Area Transportation Review.

The Policy Area Transportation Review divides the County into policy areas. These are geographic areas for which the adequacy of public facilities is addressed on an area-wide basis, as follows:

- With regard to transportation, a staging ceiling may be established for each policy area.
- With regard to school facilities, a legislative determination will be made whether the school facilities for each cluster will be adequate.

The staging ceiling for a policy area is defined as the maximum amount of land development that can be accommodated by the existing and programmed public facilities serving the area, at an assigned level of service standard. The legislative directive concerning school policy areas reflects a determination whether additional development can be accommodated by the schools. The policy area staging ceilings and directives approved in this Annual Growth Policy [are to] remain in effect throughout [FY 95] FY 96 unless amended subsequently by the County Council after public hearing. However, the Planning Board may adjust the policy area staging ceilings, in accordance with the Board's administrative procedures, to reflect trip reduction programs, developer participation in capital improvement projects, or direction in this Resolution to adjust staging ceilings upon the occurrence of certain events.

Except for special circumstances which are described below (see discussions of "Ceiling Flexibility"), if a proposed subdivision is in a geographic policy area for which previously approved development (pipeline) exceeds the staging ceiling, or for which a negative school facility directive exists, then the Planning Board must find the public facilities to be inadequate.

The purpose of the Policy Area Transportation Review method for evaluating the adequacy of transportation facilities is to place the individual subdivision within the context of a comprehensive, countywide assessment, which takes account of, and properly allows for, the upstream and downstream traffic impacts of development in various geographic areas. Similarly, the purpose of the policy area directives concerning school facilities is to reflect the ability of the public school system to accommodate students from new development.

The policy area ceilings and directives described in this AGP are based primarily on the public facilities in the Approved [FY 95-00] FY 96 -01 Capital Improvements Program (CIP) and the Maryland Department of Transportation [FY 94-99] FY 95-00 Consolidated Transportation Program (CTP). The Council also reviewed related County and State funding decisions, master plan guidance and zoning where relevant, and related legislative actions. These ceilings and directives and their supporting planning and measurement process have

been the subject of a public hearing and review during worksessions by the County Council. Approval of the ceilings and directives reflects a legislative judgment that, all things considered, these staging ceilings and procedures constitute a reasonable, appropriate, and desirable set of interim growth limits, which properly relate to the ability of the County to program and construct facilities necessary to accommodate growth. These growth limits will substantially advance County land use objectives by providing for coordinated and orderly development.

These guidelines are not intended to be used as a means for government to avoid its responsibility to provide adequate public facilities. Annual review and oversight allows the Council to identify problems and initiate solutions that will 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 additional public facility capacity beyond that contained in the approved Capital Improvements Program, or through other measures which accomplish an equivalent effect.

The administration of the Adequate Public Facilities Ordinance shall at all times be consistent with adopted master plans and sector plans. Where development staging in adopted master plans or sector plans are more restrictive than AGP guidelines, the guidelines in the adopted master plan or sector plan shall be used to the extent that they are more restrictive. More restrictive guidelines can be found in the Friendship Heights Sector Plan, and the Silver Spring CBD Sector Plan. The ceiling in the Potomac policy area is set at the zoning ceiling based on the policy in the Potomac Master Plan.

The ceiling in all rural areas is set at the zoning ceiling subject to guidelines for Local Area Transportation Review and guidelines for water and sewerage facilities. Rural areas are Clarksburg, Darnestown/Travilah, Goshen, Patuxent, Poolesville, and Rock Creek.

A. Guidelines for Transportation Facilities

1. Policy Area Transportation Review

(a) Policy Areas; Establishment of Staging Ceilings

(1) Policy Areas - Boundaries and Definitions

For the purposes of transportation analysis, the County has been divided into 292 areas called traffic zones as seen in Map 1. Based upon their transportation characteristics, these areas are grouped into transportation policy areas. In many cases, transportation policy areas have the same boundaries as planning areas, sector plan areas, or master plan analysis (or special study) areas. The policy areas in effect for [FY 95] FY 96 are: Aspen Hill, Bethesda CBD, Bethesda-Chevy Chase, Cloverly, Damascus,

Derwood/Shady Grove, Fairland/White Oak, Gaithersburg City, Germantown East, Germantown Town Center, Germantown West, Grosvenor, Kensington/Wheaton, Montgomery Village/Airpark, North Bethesda, North Potomac, Olney, Potomac, R&D Village, Rockville City, Silver Spring CBD, Silver Spring/Takoma Park, Twinbrook, Wheaton CBD, and White Flint.

Detailed boundaries of these policy areas are shown in the Planning Board's Final Draft AGP.

The boundaries of the Gaithersburg City and Rockville City policy areas reflect existing municipal boundaries, except where the cities are expected to annex properties in the near future or where County regulated land is surrounded by city regulated land. The boundaries of these municipal policy areas do not automatically change with any changes in municipal boundaries but will require affirmative Council action.

(2) Components of Policy Area Transportation Review

There are two components to Policy Area Transportation Review: a countywide freeway test and a total transportation level of service test for each policy area.

The countywide freeway level of service is the average volume-to-capacity ratio for freeway segments, weighted by the vehicle miles of travel on those freeway segments. Freeways are defined as the following limited access highways: I-495, I-270, I-270 East and West Spurs, I-370, the Cabin John Parkway, and the Clara Barton Parkway. The countywide freeway level of service standard is 0.90 (D/E).

The total transportation level of service is computed for each policy area, and represents a statistical average of roadway and transit level of service over the whole policy area. The transit level of service includes transportation by rail, bus, walking and bicycling. The roadway level of service includes transportation by driving alone and carpools. These levels of service are calculated by the transportation planning model described below.

The standard for roadway level of service in each policy area is based on a policy that it is appropriate to permit greater roadway congestion to occur in areas in which greater transit accessibility and usage provides an alternative mode of travel for many travelers in the area. In that way, there is an approximately equivalent total transportation level of service for residents and employees throughout the County. The total transportation level of service standard is 0.585 (C-) in each policy area.

Table 6 shows the factors used in calculating the total transportation level of service: the regional transit accessibility index for each policy area, the average

congestion index standard for local roads, and the mode shares for transit and auto. It is based upon materials contained in the Final Draft FY 94 Annual Growth Policy Amendment.

- The **Regional Transit Accessibility Index** measures how well the transit network connects jobs and houses. The more houses and jobs that can be accessed by transit in the least time, the higher the regional transit accessibility index value.
- The **Average Congestion Index** for local roads is the average volume-to-capacity ratio for roadway segments on major highways, arterials, and selected primary residential streets, weighted by the vehicle miles of travel on those roadway segments.
- **Mode shares** are computed from the transportation planning model, validated by the most recent observed data. All facilities and programs intended to reduce the auto-driver mode share are periodically evaluated to determine actual results achieved.

(3) Determination of Staging Ceilings

Through the use of a transportation planning model, the Planning staff has computed a balanced relationship between a programmed set of transportation facilities and a geographical pattern of jobs and housing units. Policy area ceilings have been established through an iterative process which assigns a hypothetical future land use pattern (i.e., jobs, and housing units derived from interim market projections) to the County, and tests its traffic impact through the use of this model. Through a process of repetitive trial and error, this land use pattern has been modified so that it produces a traffic volume and distribution that is equivalent to the average level of service standard for each policy area.

This iterative procedure has as an objective minimizing the difference between anticipated congestion levels and the automobile level of service standard on local roads in each policy area and on freeways countywide. If the level of service on local roads in a policy area is anticipated to exceed the level of service standard, the amount of future land use permitted is reduced in that policy area. In addition, the magnitude of the hypothetical future land use patterns in nearby policy areas is reduced to limit adverse "upstream/downstream" effects. If the level of service standard on freeways is anticipated to be exceeded, the magnitude of the hypothetical future land use patterns in nearby policy areas is reduced until the anticipated level of service on freeways is approximately equal to the level of service standard.

The allocation of transportation capacity between jobs and housing by the County Council reflects the General Plan's recommendations regarding the balance of jobs and housing. Attainment of that goal is often expressed by the ratio that describes the relationship between the number of employed residents per household to the number of jobs per household. Since the current jobs-to-housing ratio of existing and approved development is tilted towards jobs, allocations of new capacity as well as allocations of any reductions in capacity should generally favor housing. This may vary in policy areas with a significant staging ceiling deficit in jobs.

Some modifications to this approach may be made in specific policy areas to reflect the character of an area and its related development policies as set forth in the relevant master plan(s), the size and allocation of jobs and housing in the existing base and pipeline of development. Modifications may also be made to avoid or reduce the duration of any subdivision moratorium or to address specific equity considerations. The product of these adjustments is tested against the appropriate level of service in the transportation model to determine the specific ceiling allocation as described above. The staging ceilings established by this method are shown in Tables 1 and 2.

The Planning Board may adopt Policy Area Transportation Review guidelines and other technical materials to further document the procedures underlying the establishment of staging ceilings.

The transportation planning model takes into account all existing and approved development and all eligible programmed transportation CIP projects. For these purposes, "approved development" includes all approved preliminary plans of subdivision. "Eligible programmed transportation CIP projects" include all County CIP, State Transportation Program projects, and City of Rockville or Gaithersburg projects for which 100 percent of the expenditures for construction are estimated to occur within the first four years of the applicable programs.

Because of the unique nature of the Georgetown Branch Trolley Project and the North Bethesda Transitway in comparison with other transportation systems which are normally used in calculating development capacity, it is prudent to approach the additional capacity from these systems in a conservative way, particularly with respect to the timing of capacity and the amount of the capacity recognized.

- Therefore, the counting of capacity from the Georgetown Branch Trolley Project will not occur until the actual system is constructed and operated, or at

least until there is reasonable certainty as to its exact date of operation and amount of actual ridership; and

- The counting of the initial capacity from the North Bethesda Transitway will not occur until the County Executive has determined that construction will begin in two years; until 100 percent of the expenditures have been appropriated; and until the County Council has approved projected ridership. Upon completion of the first full year of operation, and in all subsequent years for which staging analyses are made, the staging ceiling calculations shall reflect the actual ridership achieved.

Planning staff shall keep a record of all previously approved preliminary plans and other data about the status of development projects, and continuously update the pipeline number of approved preliminary plans, thus constantly keeping in view, and presenting to the Planning Board, the amount of capacity still available under the adopted ceiling at any given time. The continuous updating shall include all changes to the amount of development approved under outstanding preliminary plans, with the exception of those which result from the discovery of accounting errors. Such errors shall be reported to the Council each year in May prior to the Council's adoption of the AGP, and shall be reported on a quarterly basis, or more frequently, to the Planning Board who may bring them to the attention of the Council if the Board judges them to be significant. (Tables 1 and 2 show the capacity remaining as of [June 9, 1994] March 31, 1995). The Planning Board should maintain a periodically updated queue list of applicants for preliminary plan of subdivision approval.

When the subdivision pipeline has risen to meet the ceiling, no more subdivisions shall be approved by the Planning Board in that policy area, except under certain special circumstances, which are outlined below.

(b) Silver Spring CBD Policy Area Ceiling

The Silver Spring CBD was established as a separate policy area in 1987. The boundaries of the policy area are shown in the Final Draft FY 95 Annual Growth Policy Ceiling Element.

The job and housing ceilings for this policy area must meet the following administrative guidelines:

- All traffic limitations are derived from the heaviest traffic demand period, in Silver Spring's case, the p.m. peak hour outbound traffic;

- The average level of service for the surrounding Silver Spring/Takoma Park Policy Area must not be worse than the adopted roadway level of service standard shown in Table 6, unless the Planning Board determines that the impact of improving the intersection is more burdensome than the increased congestion;
- The outbound traffic, including both local CBD traffic and through traffic, must not exceed the Silver Spring practical cordon capacity of 18,000 vehicles in the peak hour;
- The Planning Board and the Department of Transportation will implement Transportation Systems Management for the Silver Spring CBD; the goal of this program will be to achieve the commuting goals for transit use and auto occupancy rates set out below.

The County Government, through the Silver Spring Parking District, will constrain the amount of public and private long term parking spaces.

The staging ceilings as shown in Tables 1 and 2 meet these administrative guidelines.

[As of June 9, 1994, the remaining capacity for jobs is 4,655, of which 122 must be retail jobs in optional method development. As of June 9, 1994, the remaining capacity for housing is 4,183.] The parking constraints and commuting goals needed to achieve satisfactory traffic conditions with these staging ceilings are as follows:

- **Parking constraint:** A maximum of 17,500 public and private long-term spaces when all nonresidential development is built; (this maximum assumes a peak accumulation factor of 0.9, which requires verification in Silver Spring and may be subject to revision). Interim long-term parking constraints will be imposed in accordance with the amount of interim development. Long-term public parking spaces will be priced to reflect the market value of constrained parking spaces.
- **Commuting goals:** For employers with 25 or more employees, attain 25 percent mass transit use and auto occupancy rates of 1.3 persons per vehicle during the peak periods, or attain any combination of employee mode choice that results in at least 46% non-drivers during the peak periods; and

For new nonresidential development, attain 30 percent mass transit use and auto occupancy rates of 1.3 persons per vehicle during the peak periods, or attain any combination of employee mode choice that results in at least 50% non-drivers during the peak periods.

Progress towards achieving these goals should be measured annually by using scientific and statistically valid survey techniques.

To achieve these goals it will be necessary to require developers of new development in Silver Spring to enter into traffic mitigation agreements and the employers and certain owners to submit transportation mitigation plans as set forth in Chapter 42A, Article II, of the County Code.

Each Annual Growth Policy will reflect the Annual Report of the Silver Spring Transportation Management District, which must include a report of the status of critical signalized intersections (as defined in the report of October 5, 1987). The Annual Growth Policy must include a projection of future traffic conditions based on intersection improvements in the proposed CIP and full achievement of the Transportation Management District goals. The Council will take this information into account in the decisions on the Growth Policy and the CIP.

In accordance with the amendment to the Silver Spring Sector Plan, subdivision applications for nonresidential standard method projects throughout the CBD may be approved for development or additions of not more than 5,000 square feet of gross floor area. However, if, for a particular use the addition of five peak hour trips yields a floor area greater than 5,000 square feet, that additional area may be approved for that particular use.

(c) Special Ceiling Allocation for Affordable Housing and Health Care Facilities

The County's policy of balancing growth in each policy area with the supply of public facilities may have the effect of undermining other important County policies for the provision of: 1) a balanced and adequate housing supply, with emphasis on the availability of affordable housing for low and moderate income families; and 2) reasonably accessible health care facilities. This subsection provides a limited exception to policy area transportation review requirements to ensure that these policies are not undermined. The Planning Board may approve subdivision applications for affordable housing and health care facilities in any policy area with insufficient remaining capacity, according to the following guidelines:

(i) Affordable Housing

(1) An affordable housing development is defined as a housing development which is either owned by the Housing Opportunities Commission or by a partnership in which HOC is the general partner; or a privately-owned housing development in which 20% of the units are occupied by households at or below 50% of the area median income,

adjusted for family size, or 40% of the units are occupied by households at or below 60% of the area median income, adjusted for family size. Such a development must be certified by HOC as having met the definition of affordable housing and the owner of that development must agree with HOC to maintain the occupancy requirements for at least 15 years. These requirements include the provision of any MPDU's.

(2) Except as provided in paragraph (3), in a policy area with insufficient remaining capacity, the Planning Board may approve in each fiscal year not more than:

- (a) 125 units for projects owned or controlled by HOC;
- (b) 300 units for privately owned affordable housing developments; or
- (c) an aggregate of 300 units in a policy area with both HOC owned and controlled developments and privately owned affordable housing developments.

(3) The Planning Board must not approve additional housing units under this allocation in a policy area:

- (a) that in the fiscal year listed in the table below has been in a moratorium for new housing subdivision approvals for more than the number of consecutive years listed in the table below and the remaining capacity for the policy area is at least the number of housing units listed in the table below in deficit; and
- (b) the Planning Board has cumulatively approved 500 housing units in that policy area under this special ceiling allocation.

**Remaining Capacity Threshold in Housing Units
by Length of Moratorium**

Year	4 years	5 years	6 years	7 years	8 years	9+ years
[FY 95	-2000	-1800	-1600	-1600	-1600	-1600]
FY 96	-2000	-1800	-1600	-1400	-1400	-1400
FY 97	-2000	-1800	-1600	-1400	-1200	-1200
FY 98 and beyond	-2000	-1800	-1600	-1400	-1200	-1000

In this chart, fiscal year means the period beginning July 15 and ending July 14 of the following calendar year.

Subject to the housing unit cap under paragraph (2), approvals under this special ceiling allocation may resume if the deficit in remaining capacity in the policy area has been reduced under the number of housing units listed in

the table above but only to the extent that transportation capacity has increased (as calculated from the housing unit point listed in the table above) due to a programmed transportation improvement that is either under construction or is funded for construction in the fiscal year for which the special ceiling allocation is requested from the Planning Board.

If the subdivision moratorium is eliminated in a policy area subject to this paragraph and is later reinstated, the calculation of the number of cumulative housing units approved under this special ceiling allocation starts at zero.

(ii) Health Care Facilities - General

(1) "Health care facility" and "medical service" have the meanings defined in Title 19 of the Health - General Article of the Maryland Code. "Health care facility" does, however, include kidney disease treatment facilities. It includes a medical office building and medical or dental clinic, as permitted in the zoning ordinance, provided that no general office space is leased or otherwise made available. It does not include home health care agencies.

(2) Assuming all other requirements for preliminary plan approval are met, and subject to all limitations of this subsection, the Planning Board may grant a special ceiling allocation for a health care facility if:

(a) a State certificate of need has been issued for a health care facility requiring such approval; or

(b) for facilities not requiring a certificate of need, a determination is made under this paragraph that:

(I) a need exists for the proposed health care facility due to an insufficient number of practitioners or facilities providing similar medical services presently available to existing or previously approved concentrations of population within the policy area and that the applicant reasonably can be expected to serve that specific need; and

(II) the needs to be served by the health care facility cannot be reasonably accommodated in existing or previously approved (but unbuilt) general office space within the policy area.

(iii) Health Care Facilities - Procedures

(1) Upon receipt of a request for a special ceiling allocation under subparagraph (ii)(2)(b), the Planning

Board must refer the request to: (1) the Office of Zoning and Administrative Hearings with procedural instructions for a hearing on the request, and (2) the Director of the Department of Health for the director's recommendation on the issue of need under subparagraph (ii)(2)(b)(I).

(2) The applicant must voluntarily consent to a deferral of its application before the Planning Board until after completion of proceedings before the hearing examiner. Requests must be considered on a first come, first served basis in the making of the request for the special ceiling allocation. The Director of Health must make its recommendation to the hearing examiner which shall become a part of the hearing record. The hearing examiner must transmit both the record and a recommendation to the Planning Board in accordance with the Board's procedural instructions. The Planning Board may rely on the record before the hearing examiner without need for further testimony. As with other subdivision issues, the applicant has the burden of producing evidence to support its request and the burden of proof on all applicable standards.

(iv) Health Care Facilities - Findings

(1) In making a determination of need under subparagraph (ii)(2)(b)(I), the following factors, among other relevant information, should be considered: (1) the recommendation of the Director of the Department of Health; (2) any state or local health plan for the area; (3) the type of medical service and number of practitioners providing the service who are located within the policy area or within a reasonable distance in contiguous policy areas; (4) the business plan of the applicant; (5) occupancy projections, including proposed lease or similar arrangements; and (6) any proposed acquisition or relocation of specialized medical equipment.

(2) In making a determination on the practicality of existing or planned general office space to reasonably accommodate the needs served by the proposed health care facility under subparagraph (ii)(2)(b)(II), the following factors, among other relevant information, must be considered:

(a) the certainty of suitable general office space becoming available within the time frame proposed by the applicant;

(b) the need for special construction (i.e sound proofing, lead lined walls or other facilities or construction not normally provided in general

office space), plumbing, electrical (i.e. dedicated lines for special equipment), or similar requirements for at least a majority of occupants;

(c) if otherwise suitable general office space is in close proximity to or is likely to serve (based on proposed lease or similar arrangements) other health care facilities, medical practitioners, or related services; and

(d) the likelihood that otherwise suitable general office space will be able to satisfy the needs identified under subparagraph (ii)(2)(b)(I), based on the current marketing plans of the owner of the general office space, cost to the practitioner or health care facility, or other market factors.

A negative finding under either item (a), (c), and (d), above, or an affirmative finding under item (b), above, is sufficient to satisfy the standard under subparagraph (ii)(2)(b)(II).

(v) Health Care Facilities - Special Limitations

(1) The Planning Board must not approve a preliminary plan for a medical office building or medical or dental clinic under this paragraph that is expected to produce more than 50 new or additional jobs.

(2) A health care facility must not be granted more than one special allocation under this paragraph.

(3) Not more than 50 jobs may be approved in a policy area, or 100 jobs, in the aggregate county-wide, in each fiscal year.

(4) The applicant must enter into an agreement with the Planning Board to maintain the development as a health care facility for a period of at least 15 years and to undertake appropriate traffic mitigation measures.

(vi) Special Ceiling Allocations - General Requirements

(1) Any development approved under this subsection must meet all zoning requirements and all other subdivision requirements, including standards for local area transportation review.

(2) Development approved under this subsection will be added to the pipeline.

(3) The next final draft annual growth policy must contain a list of all pending or approved development under this subsection.

(d) Ceiling Flexibility for Developer Participation Projects

Staging Ceiling Flexibility allows the Planning Board, after considering the recommendation of the County Executive, to approve a preliminary plan application which exceeds the staging ceiling. In allowing the staging ceiling to be exceeded, caution should be exercised to assure that the average level of service for the relevant policy area is not adversely affected. Except as otherwise expressly stated in this subsection, the same level of service criteria already established in the Annual Growth Policy shall be used in evaluating an application to be approved under these ceiling flexibility provisions.

In general, such approval above the staging ceiling shall be conditioned upon the planned and scheduled construction by either the applicant and/or the government, of some public facility projects, or other appropriate capacity measure, (such as the private operation of a transit program) which, if added to the approved CIP or CTP programmed facilities, will add capacity or its equivalent to the existing facility system and result in no lessening of the area-wide level of service.

In general, the capacity addition must be scheduled for completion at the same time or before the proposed development is to be completed. The application must also be approved under Local Area Transportation Review standards. The nature, design and scale of the additional project or program must receive prior approval from the relevant governmental agencies responsible for constructing or maintaining such facilities or programs. The recommendation of the Executive also will be evaluated carefully.

Both the subdivision plan and the necessary additional facilities must be in accordance with an adopted master plan or other relevant policy statement; the design of the facilities must be subject to mandatory referral to the Planning Board; and the applicant and the relevant public agency must execute an appropriate public works agreement prior to record plat approval.

The phrase "additional transportation facilities" means transportation facilities other than those on which the policy area staging ceilings of the current Annual Growth Policy are based.

(i) Full-Cost Developer Participation

In cases where the applicant agrees to pay for the full cost of all the additional necessary public facilities, and the relevant administering agency has agreed, the Planning Board may approve subdivision plans whose public facility needs exceed the net remaining capacity under the adopted staging ceiling.

Where the applicant commits to provide the full cost of a transit, para-transit or ridesharing program, such application may be deemed to have passed the staging ceiling test, insofar as transportation is concerned, if the Board finds, after reviewing recommendations of the County Executive, that the program will reduce the number of peak-hour, peak-direction automobile trips by as many trips as would be generated by the proposed development. After a preliminary subdivision plan has been approved on this basis, later applications may be credited for reduced trips generated by the new proposal.

(ii) Partial-Cost Developer Participation

Partial-cost developer participation is available for certain types of development projects under certain circumstances described below. In cases of proposed partial-cost developer participation, the Planning Board may approve subdivision plans whose public facility needs exceed the net remaining capacity only if the following criteria, standards and requirements set forth in paragraphs (1) and (2) below are met. Related guidance to the Planning Board is set forth in paragraph (5), including provisions relating to approval of, and participation by, other subdivision applicants. Procedures and requirements for executive and legislative action for partial-cost developer participation are contained primarily in paragraphs (3) and (4).

(1) Eligible Project Criteria

- (a) The project has a development staging plan beyond 4 years and enables the consolidation or expansion of an employer already located in the County or allows the establishment of facilities for a new employer. Employer facilities must be primarily for specific and defined employment needs of the employer and not for the sale or leasing of speculative office, industrial or retail commercial space. The employer's business plan, purchase or lease arrangements, staging plan, occupancy projections, and other relevant factors should be considered to determine the primary purpose of the proposed facilities;
- (b) The project has a development staging plan extending beyond 4 years and enables planned development of superior and integrated design and/or transit serviceability in zoning categories that expressly allow partial-cost developer participation as designated by the District Council;
- (c) The project is to be located in the Research and Development Village, including the County-owned

Life Sciences Center, as identified in the approved and adopted Master Plan; or

- (d) The project is to be located in the Germantown Town Center, as identified in the approved and adopted Germantown Comprehensive Master Plan.

(2) Public-Private Participation Requirements

- (a) Additional transportation facilities proposed to serve an eligible project must be sufficient, when combined with net remaining capacity, to provide policy area capacity for both the eligible project and other completed subdivision applications that have been filed earlier than that of the eligible project within the policy area.
- (b) The applicant for the eligible project agrees to condition subdivision approval on a staging schedule which will link the issuance of specific building permits receivable in each staging period to the execution of specific transportation construction contracts in the same staging period.
- (c) The applicant for the eligible project must construct or agree to pay all costs for all additional transportation facilities other than those facilities currently included for start of construction within the first six years of the adopted CIP or within the State Consolidated Transportation Program (CTP).
- (d) The applicant for the eligible project agrees to contribute transportation facilities and/or cash in a minimum amount of the greater of the following:
 1. A total of 35% of the cost of all additional transportation facilities, with the cost determined as of the date of execution of the construction contract; or
 2. A contribution of 100% of the costs of all additional transportation facilities other than those facilities currently included for start of construction within the first six years of the adopted CIP or within the adopted CTP; such costs are to be determined as of the date of execution of the construction contract for that transportation facility; or

3. Impact taxes, if applicable, at the date of issuance of building permit.
- (e) All applicants with residential components agree to be subject to special conditions with regard to school capacity, as described in Section B, Guidelines for Public School Facilities, below.
- (f) The applicant for an eligible project must execute a memorandum of understanding with the County Executive prior to Council action under paragraph (4)(b) specifying the private sector commitments under this paragraph. A separate participating subdivision applicant may also execute the memorandum of understanding. An applicant must agree in the memorandum of understanding that the public improvement agreement be made a condition of subdivision approval.

(3) Procedures and Action - Executive

All formal requests for staging ceiling flexibility under this provision must be made in writing to the County Executive after the applicant has filed a complete subdivision application with the Planning Board. The County Executive must review the request and determine whether or not to recommend authorizing legislation and/or a CIP amendment. The following items, among other relevant factors, should be considered:

- (a) whether the proposed subdivision plan constitutes an eligible project and otherwise meets all requirements of this subsection;
- (b) whether the proposed additional transportation facilities are consistent with the Executive's transportation program in terms of timing, location, design and cost;
- (c) the effect of the proposal on County operating budget or capital programs;
- (d) the financial and managerial capability of the applicant to undertake all requirements of this subsection utilizing current estimates of rights-of-way, design, and construction costs, adjusted for inflation to the date expected for their payment;
- (e) the existence of unresolved transportation programming, fiscal, or other policy issues.

On not less than a quarterly basis, the County Executive must transmit to the Council and Planning Board all written requests for partial cost developer participation that were not recommended and a brief description of the reason. The Council may request the County Executive to reevaluate a request, provide greater detail, or initiate appropriate budgetary or legislative action.

(4) Procedures and Action - County Council

(a) All proposed CIP amendments and requests for legislative special capital improvement project authorizations must be considered by the Council in accordance with all applicable fiscal and legislative procedures. In addition to any other information required to be submitted under law, the County Executive should submit to the Council information describing:

1. the eligible project for which the facilities are necessary;
2. the proposed staging schedule for both the facilities and the project;
3. public facility programming issues;
4. the impact on the County's finances including the affordability of the proposed public facility program; and
5. a memorandum of understanding specifying, among other things, the private sector commitments under paragraph (2) above.

Before Council action, the Planning Board should comment on the public facility issues presented by the special capital improvement project legislation or CIP designation, the relationship between the additional transportation facilities and the proposed staging schedule, the effect on policy area ceilings, and any other relevant matters, as appropriate.

(b) For additional transportation facilities required under paragraph (2)(a), above, to be available for partial-cost developer participation under this subsection, the County Council must:

1. enact all authorizing legislation or resolutions that would be required under law for the facility; and

2. designate the additional transportation facilities in the CIP, as appropriate for partial cost developer participation or as being fully funded by the private sector.

Transportation facility projects remain subject to all necessary applicable appropriations and federal, state and local regulatory or other approvals.

- (c) Subsequent to any favorable County Council action, the County Executive, or designee, must execute a detailed public improvement agreement that formalizes the memorandum of understanding. The County Executive must periodically report to the Council on the status of public improvement agreements under this subsection and notify the Council of any material changes in circumstances affecting its legislative actions under the partial-cost developer participation provisions.

(5) Planning Board Action; Other Subdivision Applicant Participation

- (a) In its determination of whether transportation facilities are adequate to meet the needs of an eligible project, the Planning Board may count those facilities that have received favorable Council action under paragraph (4)(b), above, for both policy area ceilings and local area transportation review, without the need for those facilities to be shown in the Approved Road Program.
- (b) The Planning Board may similarly count these facilities and approve a subdivision plan with a completed application filing date that is earlier than that of the application of an eligible project if the applicant agrees to participate in the provision of additional transportation facilities, on a proportional trip generation or other agreed cost basis, and in accordance with the staging and public school requirements set forth in paragraph (2)(b) and (e), above. A public improvement agreement may include all participating subdivision applicants.
- (c) A non-participating applicant with an earlier application filing date than the eligible project may have its application approved within the same general time period as the eligible project if it meets normal local area transportation review requirements; however, it must be conditioned so that building permits will be approved only when building permits for the eligible project or

participating subdivisions are eligible for approval. A non-participating applicant remains subject to all local transportation area review and other regulatory requirements.

(iii) Development District Participation

Pursuant to Chapter 14 of the County Code, development districts may be created by the County Council as a funding mechanism for needed infrastructure in areas of the County where substantial development is expected or encouraged. The Planning Board may approve subdivision plans in accordance with the terms of the development district's provisional adequate public facilities approval (PAPF).

The development district's PAPF must be prepared in the following manner:

(1) One or more property owners in the proposed district may submit to the Planning Board an application for provisional adequate public facilities approval for the entire district. In addition to explaining how each development located in the district will comply with all applicable zoning and subdivision requirements, this application must:

- show the number and type of housing units and square footage and type of the non-residential space to be developed, as well as a schedule of proposed buildout in four-year increments;
- identify any infrastructure improvements necessary to satisfy the adequate public facilities requirements for development districts; and
- estimate the cost to provide these improvements.

(2) The Planning Board must then review all developments within the proposed development district as if they are a single development for compliance with the Adequate Public Facilities Ordinance. The Planning Board will identify the public facilities needed to support the buildout of the development district after considering the results of the following tests for facility adequacy:

- Transportation tests for development districts are identical to those for (i) Full-Cost Developer Participation, except that some portion of the needed facilities may be funded by the public sector. Existing staging ceiling capacity will only be considered to the extent that there is more than enough capacity to accommodate pending complete subdivision applications in the

- queue. If development districts cross policy area boundaries, staging ceiling capacity in one policy area must not be used as the basis for approving development located within another policy area. Planning Department staff will prepare a list of transportation infrastructure needed to maintain public facility adequacy.
- The PAF application will be referred to 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 staff 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 public facility adequacy.
 - The PAF application will 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 will be considered adequate if existing or programmed (fully-funded within the first four 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 will 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. If a test is not met, WSSC will prepare a list of water and sewer system infrastructure needed to maintain public facility adequacy.
 - The PAF application will be referred to the County Executive for recommendations for each stage of development in the proposed district regarding police, fire, and health facilities. Adequacy of police, fire, and health facilities will 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 which remains is available to be used by the development district. If any facility capacity deficits exist, the County Executive

will prepare a list of infrastructure needed to maintain public facility adequacy.

- (3) The Board may conditionally approve the PAPF application if it will meet all of the requirements of the APFO and AGP. The Board may condition its approval on, among other things, the creation and funding of the district and the building of no more than the maximum number of housing units and the maximum nonresidential space listed in the petition.

For an application to be approved, the applicants must commit to produce the infrastructure improvements needed to meet APF requirements in the proposed district as well as any added requirements specified by the Planning Board. The Planning Board must list these required infrastructure improvements in its approval. The infrastructure improvements may be funded through the development district or otherwise.

The Planning Board must not approve a PAPF application unless public facilities adequacy, as defined by the tests in (iii)(3), is maintained throughout the life of the plan. The timing of infrastructure delivery may be accomplished by withholding the release of building permits until needed public facilities are available to be "counted," or by another similar mechanism.

Infrastructure may be counted for public facilities adequacy when:

1. for infrastructure provided by the district, construction has begun on the facility and funds have been identified and committed to its completion; and
2. for infrastructure provided by the public sector:
 - For Policy Area Transportation Review, the project is fully-funded within the first four years of the approved County, state, or municipal capital improvements program;
 - For Local Area Transportation Review, the project is included in the most recent edition of the Approved Road Program;
 - For water and sewer facilities, the project is fully-funded within the first four years of the approved WSSC capital improvements program;

- For public school facilities, the project is fully-funded within the first four years of the approved Montgomery County Public Schools capital improvements program; and
 - For police, fire, and health facilities, the project is fully-funded within the first six years of the relevant approved capital improvements program.
- (4) 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 recreation facilities.
- (5) Congruent with Chapter 14 of the Montgomery County Code, once the development district is created and the financing of all required infrastructure is arranged, the development in the district is now considered to have satisfied all APF requirements, any additional requirements that apply to development districts in the AGP, and any other requirement to provide infrastructure which the County adopts within 12 years after the district is created.

[(iii)] (iv) Miscellaneous Provisions

Further staging ceiling flexibility is not available in the Silver Spring CBD because traffic mitigation measures of the Transportation Management District have been relied upon to establish the ceilings for the Silver Spring CBD policy area.

(e) Ceiling Flexibility - De Minimis Impacts

The approval of preliminary plans which add only a few vehicle trips will be considered on a case-by-case basis by the Planning Board. In general, in policy areas with no ceiling balance (i.e., no remaining capacity), all land at one location for which zoning or other constraints permit no more than ten trips in total may receive approval of up to five trips. Non-residential plans submitted for the purpose of expanding structures which were completed prior to 1982, or which otherwise request additional development on land that was partially developed prior to 1982, may receive approval for additional development which adds no more than five trips. The term, "all land at one location," means all land that would be included in a determination of whether a project is a "significantly sized project" under the Planning Board's adopted guidelines for Local Area Transportation Review.

(f) Amendment of Policy Ceilings

From time to time, these staging ceilings may be amended by the Montgomery County Council, after public hearing, to reflect changing conditions such as additions to the Capital Improvements Program or the State's Consolidated Transportation Program, changing patterns of public facility usage, revised levels of public service, and other relevant criteria.

Policy area ceilings may also be amended by the County Council to resolve public policy conflicts and to accomplish a particular public policy objective.

(g) Allocation of Staging Ceiling to Preliminary Plans of Subdivision

The Planning Board allocates available staging ceiling capacity in a policy area based on the queue date of an application for preliminary plan of subdivision approval.

(i) Assignment of queue date

The queue date of a preliminary plan of subdivision is the date:

- (1) a complete application is filed with the Planning Board;
- (2) a traffic study is filed, if required to obtain a new queue date under paragraph (iv)(2); or
- (3) 6 months after the prior queue date if the prior queue date expires under subparagraph (iii)(1)(a) and the application does not require a traffic study.

(ii) Calculation of available staging ceiling capacity

The Planning Board determines whether there is adequate staging ceiling capacity available for a project by subtracting the capacity required by projects with earlier queue dates from the remaining capacity on Table 2 as updated periodically. Based on this calculation, the Planning Board may:

- (1) approve a project for which there is sufficient capacity;
- (2) approve part of a project for which there is sufficient capacity, leaving the remainder of the project in the queue until additional capacity becomes available;

- (3) deny an application for a project for which there is insufficient capacity; or
- (4) defer approval of a project and leave the project in the queue until sufficient capacity becomes available for all or part of the project. In situations where there is insufficient capacity, staff must not schedule a hearing on the application unless the applicant requests one.

If there is sufficient capacity for a project based on the queue date, the Planning Board must not deny an application based on pipeline (but not staging ceiling) changes while the queue date is in effect.

(iii) Expiration of queue date

- (1) A queue date for an application for preliminary plan of subdivision approval expires:
 - (a) 6 months after the queue date if there was sufficient staging ceiling capacity for the entire project on the queue date and the Planning Board has not approved the application or granted an extension of the queue date (see paragraph 2 below);
 - (b) 6 months after sufficient capacity becomes available for the entire project if a traffic study is not required under paragraph (iv)(1);
 - (c) 6 months after a traffic study is filed if required under paragraph (iv)(1); or
 - (d) on the applicant's failure to request background data, to submit a traffic study, or to submit a complete updated traffic study after notice that a study is incomplete, all within the time limits in subsection (iv).
- (2) The Planning Board may grant one or more 6-month extensions of a queue date if the applicant demonstrates that a queue date expired or will expire because of governmental delay beyond the applicant's control. The Planning Department may grant one 6-month extension of a queue date for Health Department approval of individual sewage disposal or wells. Any additional queue date extensions for Health Department approval may only be granted by the Planning Board.

(iv) Traffic studies**(1) Required when sufficient capacity becomes available.**

The queue date of an application for which there is not sufficient staging ceiling capacity when the complete application is filed will expire when sufficient capacity becomes available, unless the applicant:

(a) requests background data from the Planning Board to prepare a traffic study within 1 month after capacity becomes available; and

(b) submits a traffic study within 1 month after receiving the background data. However, if the Planning Board provides the background data between June 1 and September 15, the study must be submitted by October 15.

(2) Required to obtain a new queue date after expiration

If the queue date of an application which includes a traffic study expires, an updated traffic study must be filed to obtain a new queue date.

(3) Notice of incomplete traffic study

The Planning Board must notify an applicant within 15 days after a traffic study is filed if the study is incomplete. An applicant must file a complete traffic study within 30 days of receipt of the notice that a study is incomplete.

(v) Special Ceiling Allocation for Affordable Housing

If an application for a preliminary plan approval that uses the special ceiling allocation for affordable housing is denied by the Planning Board after July 1, 1992, the applicant retains its original queue date and is subject to all other applicable provisions of this subsection.

(2) Local Area Transportation Review (IATR)**(a) Establishment of Local Area Transportation Review Standards**

The transportation planning model used for Policy Area Review addresses the average level of traffic in the policy area. If this were the only test, an area with acceptable average level

of service could have one or more intersections, or roadway links, with unacceptably poor levels of service. It is necessary, therefore, that a local area test be applied to assure that new development is not allowed to cause such congestion.

To achieve an approximately equivalent transportation level of service in all areas of the County, greater congestion is permitted in policy areas with greater transit accessibility and usage. Table 7 shows the intersection level of service standards by policy area. Local Area Transportation Review shall, at all times, be consistent with the standards and staging mechanisms of adopted master plans and sector plans.

Local Area Transportation Review must be undertaken for subdivisions which would generate 50 or more peak hour automobile trips in either of the following circumstances:

- For the policy area, total approved development is within 5 percent of the policy area ceiling; or
- For the local area, the proposed development is located near a congested area.

In administering the Local Area Transportation Review (LATR), the Planning Board must not approve a subdivision if it finds that an unacceptable peak hour level of service will result after taking into account existing roads, programmed roads, available or programmed mass transportation, and improvements to be provided by the applicant. If the subdivision will affect an intersection, or roadway link for which congestion is already unacceptable, then the subdivision may only be approved if it does not make the situation worse.

The nature of the LATR test is such that a traffic study is necessary if local congestion is likely to occur. The Planning Board and staff will examine the applicant's traffic study to determine whether adjustments are necessary to assure that the traffic study is a reasonable and appropriate reflection of the traffic impact of the proposed subdivision after taking into account all approved development and programmed transportation projects.

For Local Area Transportation Review purposes, the programmed transportation projects to be considered are those included in the most recent edition of the County Executive's Approved Road Program (ARP). The Approved Road Program shall include only roads programmed in the current approved Capital Improvements Program and the Maryland Consolidated Transportation Program for which:

- (1) The County Executive has determined that construction will begin within two years of the effective date of the approved road program; and

- (2) In the case of the County CIP, 100 percent of the expenditure for contracts, have been appropriated.

For these purposes, roads required under Section 302 of the Charter to be authorized by law are not to be considered programmed until the time for petition to referendum has expired without a valid petition, or the authorizing law has been approved by referendum.

If an applicant is participating in a traffic mitigation program or one or more intersection improvements to meet Local Area Transportation Review requirements, that applicant will be considered to have met Local Area Transportation Review for any other intersection where the volume of trips generated is less than five Critical Lane Movements.

The Planning Board has adopted guidelines for the administration of Local Area Transportation Review. To the extent that they are consistent with these legislative guidelines, the Planning Board guidelines may continue to apply or to be amended as the Planning Board deems it necessary to do so.

After consultation with the Council, the Planning Board may adopt administrative guidelines that allow use of a "delay" or queuing analysis, different critical lane volume standards, or other methodologies, to determine the level of congestion in appropriate geographic locations such as in urbanized areas, around Metrorail stations, or in specific confined areas planned for concentrated development related to other forms of transit.

In its administration of Local Area Transportation Review, the Planning Board shall give careful consideration to the recommendations of the County Executive concerning the applicant's traffic study and proposed improvements or any other aspect of the review.

To achieve safe and convenient pedestrian travel, the Planning Board may adopt administrative guidelines requiring construction of off-site sidewalk improvements consistent with Section 50-25 of the County Code. To maintain an approximately equivalent transportation level of service at the local level considering both auto and non-auto modes of travel, the Planning Board may permit a reduction in the amount of roadway construction or traffic mitigation needed to satisfy the conditions of Local Area Transportation Review in exchange for the construction of non-automobile transportation amenities, such as sidewalks and bus shelters.

(b) Silver Spring CBD LATR Standards

In the area designated as the Silver Spring CBD Policy Area, the Planning Board, in consultation with the Department of Transportation, will prepare performance evaluation criteria for its Local Area Transportation Review. These criteria will be

used to accomplish: (a) safety for pedestrians and vehicles; (b) access to buildings and sites; and (c) traffic flow within the vicinity, at levels which are tolerable in an urban situation. The County Executive will publish a Silver Spring Traffic Management Program after receiving public comment and a recommendation from the Planning Board. This program will list those actions to be taken by government to maintain traffic flow at tolerable levels in the Silver Spring CBD, and protect the surrounding residential area.

(c) Potomac LATR Standards

In the Potomac Policy Area, only the areas contributing traffic to the following intersections will be subject to Local Area Transportation Review: (a) Montrose Road at Seven Locks Road; (b) Democracy Boulevard at Seven Locks Road; (c) Tuckerman Lane at Seven Locks Road; (d) Democracy Boulevard at Westlake Drive; (e) Westlake Drive at Westlake Terrace; (f) Westlake Drive at Tuckerman Lane; and (g) Bradley Boulevard at Seven Locks Road.

(d) Friendship Heights LATR Standards

Until a new sector plan is approved by the County Council, for analysis of properties located within the Friendship Heights Central Business District (as defined by the 1974 Friendship Heights Sector Plan) that have had preliminary plans of subdivision approved before July 1, 1993, any traffic trips from approved and/or built projects on certain properties in the District of Columbia which exceed the total of 2,329 new trips allocated to those same properties in the District of Columbia pursuant and subject to the August 30, 1973 statement of the Inter-Jurisdictional Policy Task Force on Friendship Heights (as set forth in Appendix "E" and referred to on pages 39-41 of the 1974 Friendship Heights Sector Plan), shall not be used in making a determination that local intersections are operating at adequate levels of service.

(3) Alternative Review Procedures

(a) Metro Station Policy Areas

An applicant for a subdivision which will be built completely within the Bethesda CBD, Wheaton CBD, Grosvenor, White Flint, or Twinbrook Metro station policy areas need not submit any application or take any action under **(2) Local Area Transportation Review (LATR)** if the applicant agrees in a contract with the Planning Board and the County Department of Transportation to:

(1) make its best efforts to meet mode share goals established by the Planning Board as a condition of approving that subdivision;

(2) participate in programs operated by, and take actions specified by, a transportation management organization (TMO) to be established by County law for that policy area (or a group of policy areas including that policy area) in order to meet the mode share goals established under paragraph (1);

(3) pay an ongoing annual contribution or tax to fund the TMO's operating expenses, including minor capital items such as busses, as established by County law; and

(4) pay a development approval payment (DAP), to be established by County law, over a multi-year period starting when the building permit is issued and indexed to reflect inflation in construction costs.

The Planning Board must conduct a comprehensive Local Area Transportation Review for each policy area in which it approves a subdivision under this procedure and should specify for inclusion in the Capital Improvements Program any transportation improvements needed to support that subdivision.

(b) Limited residential development

In fiscal years 1994, 1995, and 1996, an applicant for a residential subdivision need not take any action under (1) **Policy Area Transportation Review** or (2) **Local Area Transportation Review (LATR)** if the applicant pays to the County a development approval payment (DAP), to be established by County law, before the building permit is issued. However, the applicant must include in its application for preliminary plan approval all information that would be necessary if the requirements for Local Area Transportation Review applied.

This procedure may also be used, if the applicant reapplies for subdivision approval, for any residential subdivision with a preliminary plan of subdivision approved by the Planning Board before July 1, 1993. However, this procedure does not apply to a subdivision which has had a preliminary plan of subdivision approved by the Planning Board under the Special Ceiling Allocation for Affordable Housing, unless the subdivision is located in a large lot zone where Moderately Priced Dwelling Units (MPDU's) are not required.

The use of this procedure is subject to the following conditions:

(1) The procedure must not be used in any part of the County which is located in a rural area as defined in this Resolution.

(2) The procedure must not be used in any policy area which is exempt from the Special Ceiling Allocation for Affordable Housing or would be exempt from that Allocation if the Planning Board had approved at least 500 housing units in that policy area under that Allocation.

(3) Under this procedure, the Board must not approve:

(A) more than 100 units at any one location under common ownership and control, as defined in the Planning Board's LATR Guidelines; and

(B) more than 300 units in any policy area in each fiscal year.

(4) Any applicant for a subdivision approval under this procedure must agree, as part of the application, that it will build the same number of Moderately Priced Dwelling Units (MPDU's) among the first 100 units that it would be required to construct at that location if the subdivision consisted only of 100 units, or a pro rata lower number of MPDU's if the subdivision will include fewer than 100 units.

(5) Any applicant for a subdivision approval under this procedure must agree, as part of the application, that it will not begin to construct any residential unit approved in the application later than 3 years after the plat is recorded or the site plan is approved (whichever occurs later).

The Planning Board must report in the Final Draft AGP each year on the number of housing units approved and built under this procedure and should specify for inclusion in the Capital Improvements Program any transportation improvements needed to support those units.

B. Guidelines for Public School Facilities

(1) Geographic Area

For the purposes of public school analysis and local area review of school facilities at time of subdivision, the County has been divided into 21 areas called high school clusters as shown in Map 6. These areas coincide exactly with the cluster boundaries used by the Montgomery County Public School system.

The Council evaluates available capacity in each high school cluster and compared enrollment projected by Montgomery County Public Schools for each fiscal year with projected school capacity four years out.

If insufficient capacity is available, the Council determines whether an adjacent cluster or clusters has sufficient capacity to cover the projected deficit in school capacity. The Council's groupings are only for the administration of the Adequate Public Facilities Ordinance and are not in any way a required action by the Board of Education in exercising its power to designate school service boundaries.

(2) School Capacity Measure

The Council uses 110 percent of Council funded program capacity as

the school capacity measure in the administration of the Adequate Public Facilities Ordinance. This capacity measure does not count relocatable classrooms in computing a school's permanent capacity.

Based on the approved [FY 95-00] FY 96 -01 CIP, the Council funded regular program capacity is a class size of 25 for grades 1-6, 44 for half day kindergarten where it is currently provided, 22 for all day kindergarten where it is currently provided, and an effective class size of 22.5 for secondary grades.

(3) Grade Levels

Each of the three grade level clusters, namely elementary, intermediate/middle school, and high school are assessed separately as part of the Annual Growth Policy.

(4) Determination of Adequacy

Using the approach outlined above, and assuming the approved [FY 95-00] FY 96 -01 CIP, the Council declares school capacity for school year 1998 to be adequate for anticipated growth during [FY 95] FY 96 in all high school clusters at all grade levels. Tables 3, 4, and 5 present the results of this analysis.

The Planning Board, in its review of preliminary plans of subdivision in [FY 95] FY 96, shall consider schools to be adequate for APFO purposes in all clusters.

(5) Affordable Housing

Because school capacity is determined to be adequate under paragraph (4) of this subsection, the Special Ceiling Allocation for Affordable Housing may be invoked only with respect to transportation ceilings. The need for such a special ceiling allocation with respect to school capacity will be considered at such time that capacity is determined to be inadequate in a particular cluster.

(6) Ceiling Flexibility for Partial Cost Developer Participation

When a subdivision with a residential component is approved for transportation capacity under the provisions of the Partial Cost Developer Participation subsection, the Planning Board may approve the subdivision for school facility adequacy if: (a) the subdivision is located in a school cluster area that has been designated as adequate for school capacity; and (b) the applicant agrees to condition his subdivision approval on a staging schedule, which will require the applicant to receive a subsequent APF approval for school capacity for all of the housing units that are scheduled in his staging plan to receive building permits after the end of the four year period used in calculating school capacity in this Annual Growth Policy. This does not imply any obligation on the part of the Council to provide public school facilities in accordance with any staging plan and the applicant may provide private resources for school sites and/or school construction in order to assure adequate school capacity.

C. Guidelines for Water and Sewerage Facilities

In accordance with the language of the Adequate Public Facilities Ordinance itself, both for policy areas with a staging ceiling and in those without one, applications shall be considered adequately served by water and sewerage if the subdivision is located in an area in which water and sewer service is presently available, is under construction, or is designated by the County Council for extension of service within the first two years of a current approved Comprehensive Water Supply and Sewerage Systems Plan (i.e., categories I, II, and III) or if the applicant either provides a community water and/or sewerage system or meets health department requirements for septic and/or well systems, as outlined in the Adequate Public Facilities Ordinance. These requirements are determined either by reference to the Water and Sewerage Plan, adopted by the Council, or by obtaining a satisfactory percolation test from the County Health Department.

Applications will only be accepted for further planning staff and Board consideration if they present evidence of meeting the appropriate requirements.

D. Guidelines for Police, Fire and Health Services

The Planning Board and staff shall consider the programmed services to be adequate for facilities such as police stations, firehouses, and health clinics unless there is evidence to believe that a local area problem will be generated. Such a problem is one which cannot be overcome within the context of the approved Capital Improvements Program and Operating Budgets of the relevant agencies. Where such evidence exists, either through agency response to the Subdivision Review committee clearinghouse, or through public commentary or planning staff consideration, a Local Area Review shall be undertaken. Such review shall seek a written opinion from the relevant agency, and will require, if necessary, additional data from the applicant, to facilitate the completion of the planning staff recommendation within the statutory time frame for Planning Board action. In performing this Local Area Review, the facility capacity at the end of the sixth year of the approved CIP shall be compared to the demand generated by the "most probable" forecast for the same year prepared by the Montgomery County Planning Department.

E. Guidelines for Resubdivisions

Applications to amend a previously approved preliminary plan of subdivision shall not require a new test for adequacy of public facilities in the following instances:

- Revisions to a preliminary plan which has not been recorded, if the preliminary plan has not expired and the number of trips which will be produced by the revised plan is not greater than the number of trips produced by the original plan.
- Resubdivision of a recorded lot involving the sale or exchange of parcels of land (not to exceed a total of 2,000 square feet or one percent of the combined area, whichever is greater) between owners of adjoining properties to make small adjustments in boundaries.

- Resubdivision of a recorded lot involving more than 2,000 square feet or one percent of the lot area if less than three years have passed since preliminary plan approval; or, if construction has begun on any portion of the preliminary plan, less than five years have passed since preliminary plan approval; or, if construction of an APF related road improvement required as a condition of the original preliminary plan is proceeding as scheduled, less than 10 years have passed since preliminary plan approval. In each case, the number of trips which will be produced by the revised plan must not be greater than the number of trips produced by the original plan.

II. Timely Adequate Public Facilities Determination and Local Area Transportation Review under Chapter 8 - Buildings.

- A. **General.** Except as otherwise provided by law, an adequate public facilities determination or local area transportation review conducted under Article IV of Chapter 8 must use the standards and criteria applicable under Section I. of this Resolution when evaluating the adequacy of public facilities to serve the proposed development.
- B. **Traffic Mitigation Goals.** Any proposed development that is subject to requirements for a traffic mitigation agreement under Article IV of Chapter 8 and Chapter 42A-9A of the County Code must meet the traffic mitigation goals specified in paragraphs (1) or (4), as appropriate.

- (1) Subject to paragraph (2), the portion of peak-period nondriver trips by employees of a proposed development must be at least the following percentage greater than the prevailing nondriver mode share of comparable nearby land use:

In Policy Areas With LATR CLV Standard of	Required Percentage Greater Than Prevailing Nondriver Mode Share
1800 and 1650	100%
1600	80%
1550	60%
1500 and 1525	40%

LATR CLV standards for each policy area are shown on Table 7.

- (2) The portion of peak-period nondriver trips by employees calculated under paragraph (1) must not be less than 15% nor higher than 55%.
- (3) The applicant for a proposed development in a policy area specified under paragraph (1) is responsible for: reviewing existing studies of nondriver mode share; conducting new studies, as necessary, of nondriver mode share; and identifying the prevailing base nondriver mode share of comparable land uses within the area identified for the traffic study. Comparable

land uses are improved sites within the area identified for the traffic study for the proposed development that have similar existing land use and trip generation characteristics. As with other aspects of the traffic study required by Article IV of Chapter 8 of the Code, selection of the comparable studies and land uses to be analyzed and determination of the prevailing base nondriver mode share are subject to review by the Planning Department and approval by the Department of Transportation.

- (4) Proposed development in the Silver Spring CBD must meet the commuting goals specified under Section I(A)(1)(b) of this Annual Growth Policy.
- (5) In accordance with Section 42A-9A of the Code, the applicant must enter into an agreement with the Director of the Department of Transportation prior to issuance of a building permit. The agreement may provide for a schedule for full compliance with the traffic mitigation goals. It must provide appropriate enforcement mechanisms for compliance.
- (6) As provided by law, these goals supersede traffic mitigation goals established under Section 42A-9A (a)(4) of the Code.

III. Issues to be Addressed in the Future

In adopting the [FY 95] FY 96 Annual Growth Policy, the Council recognizes that not all aspects of a comprehensive approach to growth policy can be addressed within one year. To ensure that the policy making process continues to be developed and refined, the following matters are to be addressed by the Planning Board, Board of Education, and the County Executive during the next fiscal year or in the next (FY 96) AGP Policy Element for presentation to, and decision by, the County Council:

1. During Fiscal Year 1995:

(a) **AGP Process Changes** - Council staff must prepare legislation to implement the Council's decision to codify major elements of the AGP in a legislative framework, allowing technical procedures to be formulated as administrative rules.

(b) **Pipeline Reform** - The Planning Board, with the aid of the Executive, must develop guidelines for (1) determining the time limits for findings of public facilities adequacy, and (2) permitting the transfer of staging ceiling among projects in the same policy area. During the FY 94 AGP worksessions, the Council concurred with the Planning Board's recommendation that the time limits of a finding of adequate public facilities, currently 12 years for all development types, more closely reflect the size and type of development approved. The Council also concurred with the Board's recommendation that the County permit the transfer of adequate public facilities approval from one project to another.

(c) **Adequacy of Public Facilities in Development Districts** - The Planning Board, with the aid of the Executive, must prepare an Annual Growth Policy amendment to address how development districts will meet the requirements of the Adequate Public Facilities Ordinance.

2. **For the FY 96 AGP Policy Element**

- (a) **Adequacy of Public School Facilities - Ceiling Flexibility** - The staffs of the Board of Education, the Executive, the Planning Board and the Council must continue to evaluate options for a potential ceiling flexibility provision in the APFO school test. The staff group must report its options and findings to the Council's Education Committee. If sufficient staff consensus exists on an option, Planning staff must include it in the Staff Draft of the next Annual Growth Policy to solicit public comment.
- (b) **Shady Grove Policy Area** - The Planning Board, with the aid of the Executive, must conduct appropriate analyses to allow the creation of a policy area in the Shady Grove Metrorail Station area, including the delineation of the policy area and the timing of its creation.
- (c) **Ceiling Flexibility - Partial-Cost Developer Participation** - The Planning Board should examine the utility of retaining this provision in the Annual Growth Policy.
- (d) **Extension of Metro Area Alternative Review Procedure** - The Planning Board should evaluate the possible application of the Alternative Review Procedure for Metro Station Policy Areas to other policy areas.
- (e) **Special Ceiling Allocation for Health Care Facilities** - The Planning Board should examine the utility of retaining this provision in the Annual Growth Policy.
- (f) **Ceiling Flexibility - De Minimis Impacts** - The Planning Board, with the aid of the Executive, must review the de minimis impacts provisions of Policy Area Transportation Review and Local Area Transportation Review, including issues related to outlots and consideration of pro rata contributions toward transportation infrastructure.
- (g) **Glenmont Policy Area** - The Planning Board, with the aid of the Executive, must conduct appropriate analyses to allow the creation of a policy area in the Glenmont Metrorail Station area, including the delineation of the policy area and the timing of its creation.
- (h) **Clarksburg Policy Area(s)** - The Planning Board, with the aid of the Executive, must conduct appropriate analyses to allow the creation of one or more policy areas within the Clarksburg Planning Area.

- (i) **Monitoring and Evaluating LATR Standards** - The Planning Board, with the aid of the Executive, and in consultation with the community, must monitor and evaluate congestion and pedestrian use at intersections higher than 1,525 Critical Lane Volume to determine whether the Local Area Transportation Review standards adopted in the FY 95 Annual Growth Policy should be adjusted further.

Specific scheduling of items to be undertaken by the Planning Board under this Section may be addressed or changed at the regular work program meetings with the County Council.

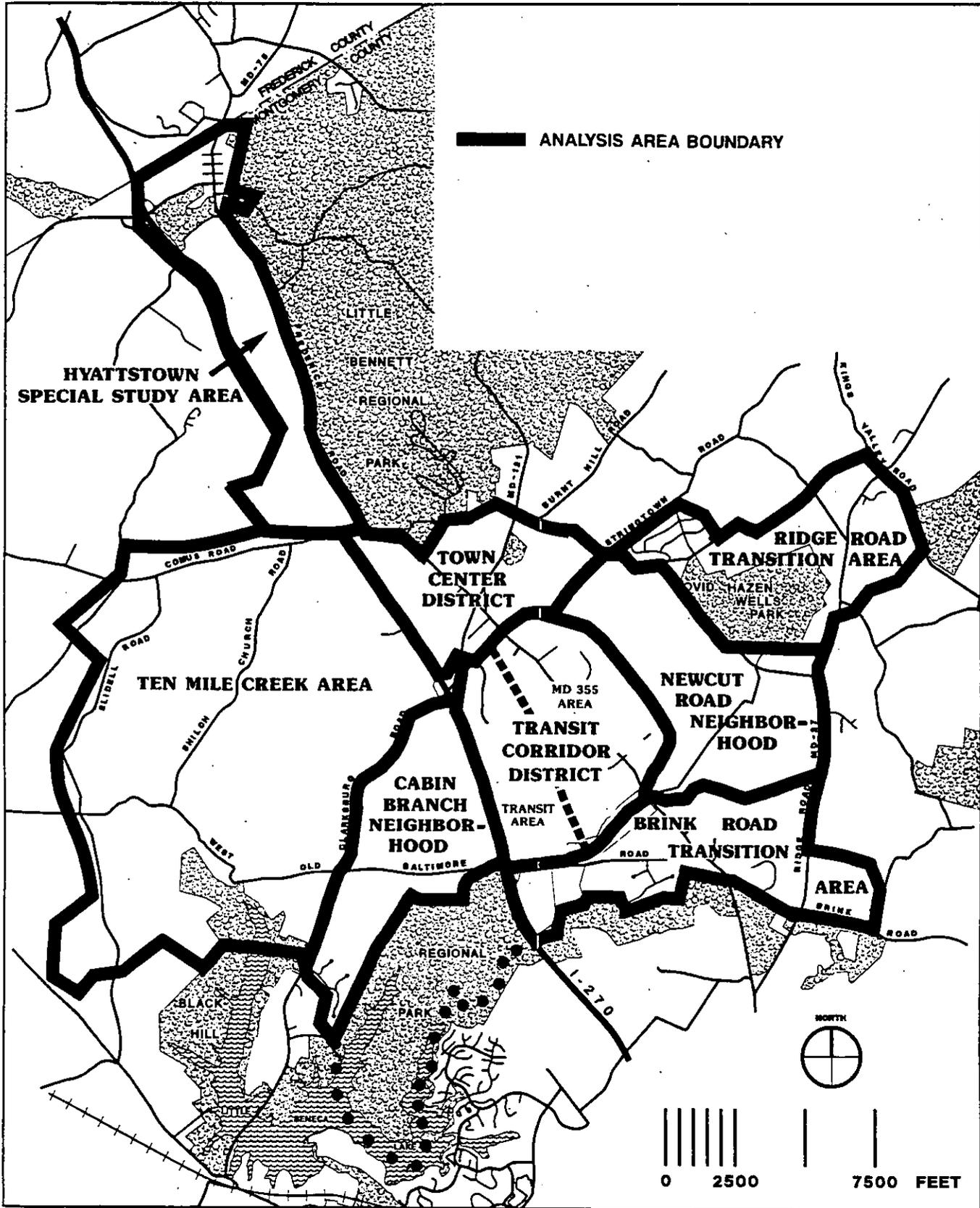
This is a correct copy of Council action.



Kathleen Freedman, CMC
Secretary of the Council

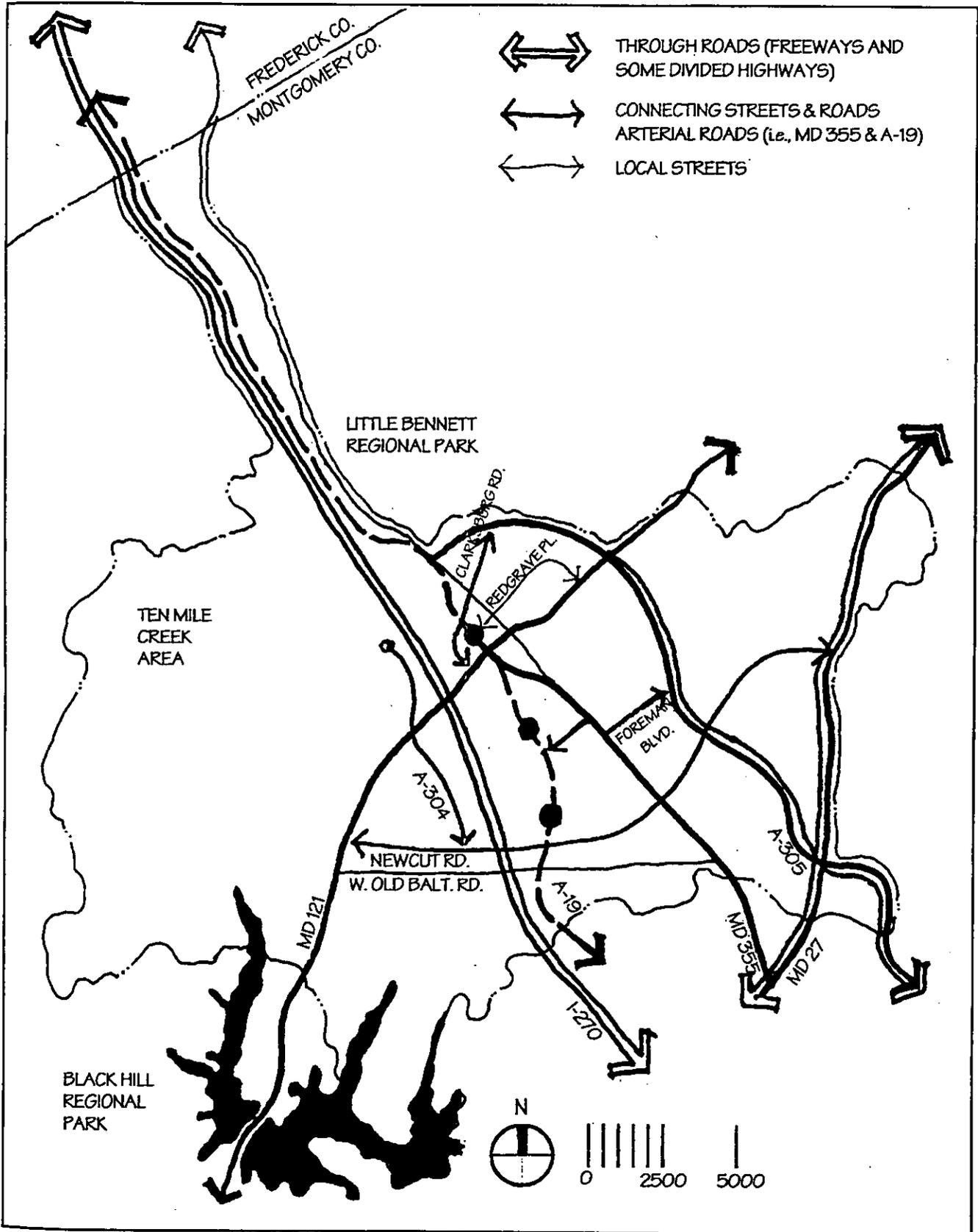
Analysis Areas

Figure 18



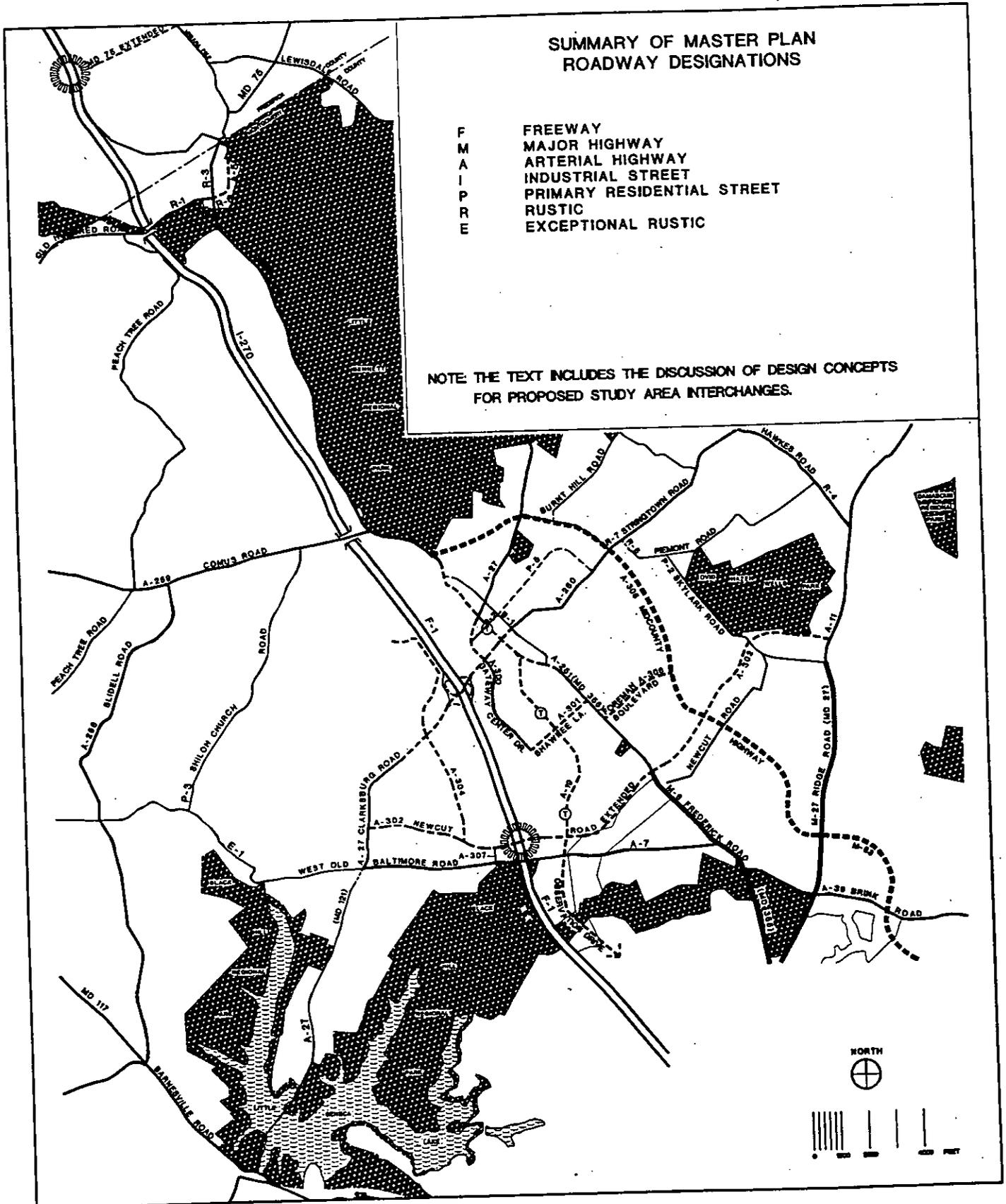
Hierarchy of Roads and Streets

Figure 11



Generalized Highway and Transit Plan

Figure 40



SKETCH OF
CLARKSBURG TOWN CENTER
DEVELOPMENT DISTRICT

CLARKSBURG (2ND) DISTRICT
MONTGOMERY COUNTY, MARYLAND

SCALE: 1"=600' FEBRUARY, 2003



CLARKSBURG
ROAD

BURNT HILL ROAD

PART FOUR
3,158,908 ϕ OR
72.5185 AC.

PIEDMONT
ROAD

PART TWO
396,833 ϕ OR
9.1100 AC.

PART ONE
7167339 ϕ OR
164.5395 AC.

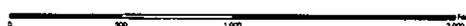
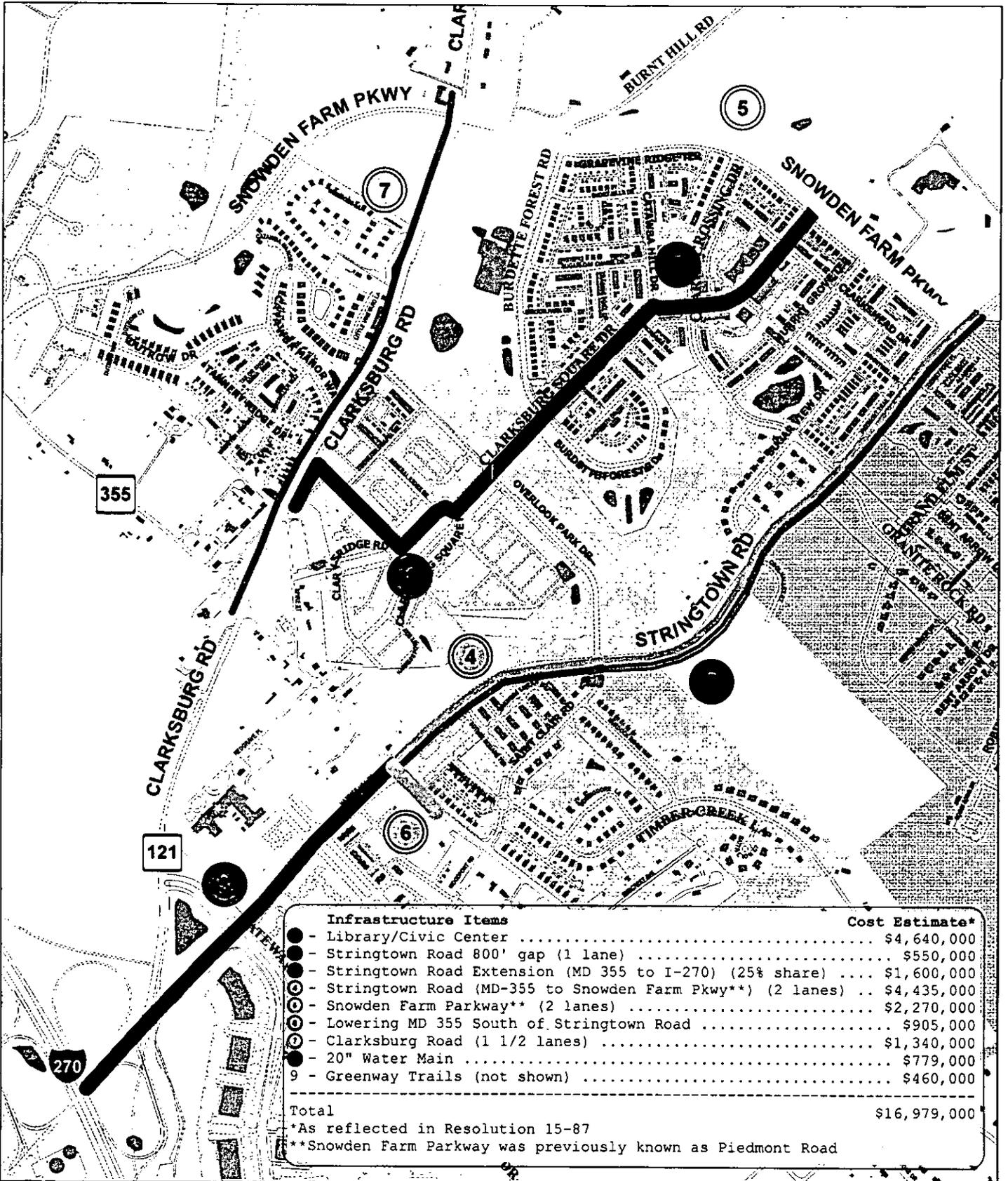
STRINGTOWN ROAD

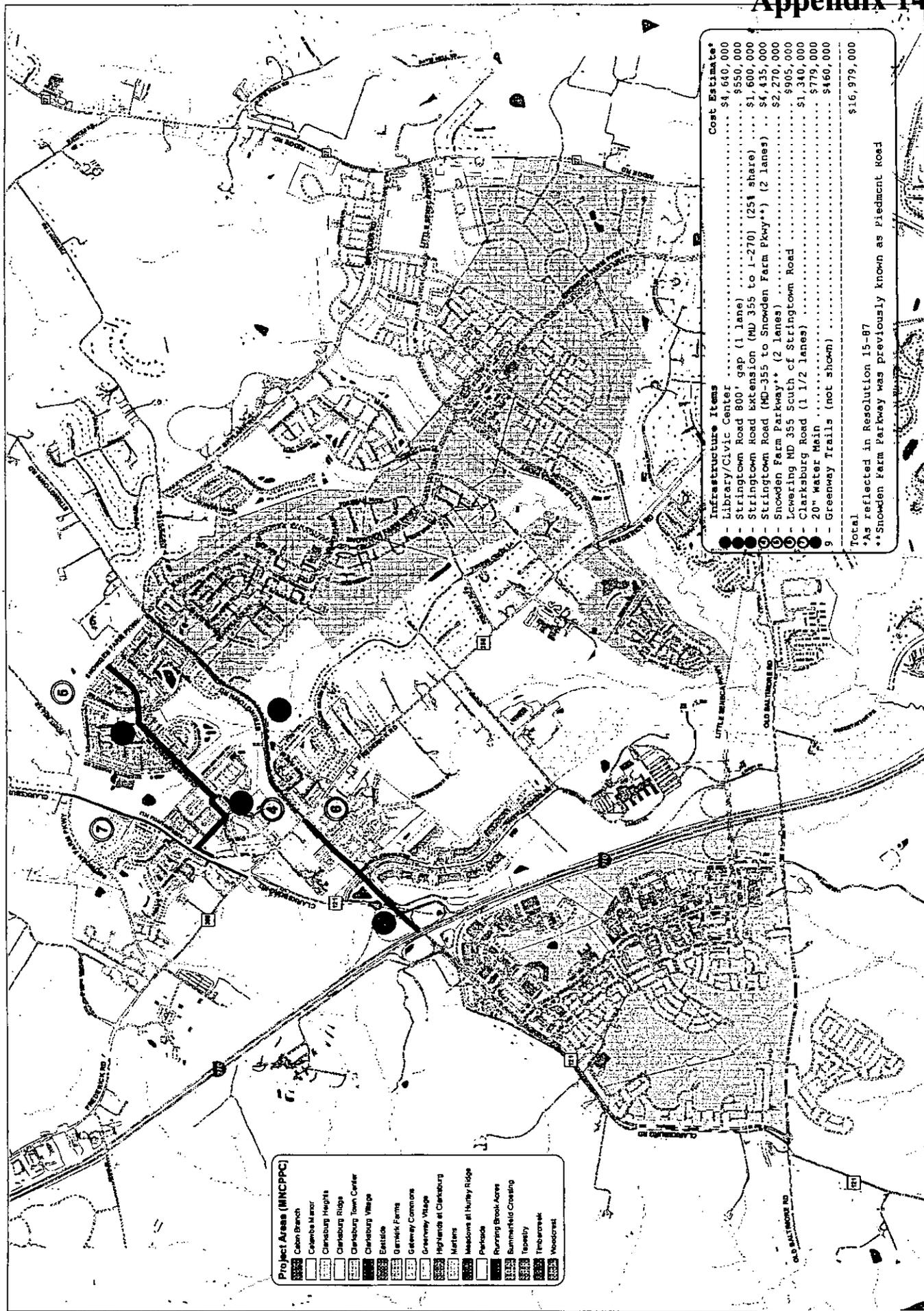
PART THREE
6,535 ϕ OR
0.1500 AC.

STRINGTOWN ROAD

CPJ Charles P. Johnson & Associates, Inc.
PLANNERS • ENGINEERS • LANDSCAPE ARCHITECTS • SURVEYORS
1051 ELTON ROAD SUITE 300 SILVER SPRING, MARYLAND 20903
Phone: 201-454-1000 E-mail: cpj@cpja.com Fax: 201-454-1099
FREDERICK, MD FAIRFAX, VA

Infrastructure Items Funded by the Clarksburg Town Center Development District





- Project Areas (MNCPPC)**
- Cabin Branch
 - Columbia Manor
 - Clarksburg Heights
 - Clarksburg Ridge
 - Clarksburg Town Center
 - Clarksburg Village
 - Eastside
 - Garwick Farms
 - Gateway Commons
 - Greenway Village
 - Highlands at Clarksburg
 - Marlers
 - Meadows at Hurley Ridge
 - Parkside
 - Rolling Brook Acres
 - Summerfield Crossing
 - Tenacity
 - Timbercreek
 - Woodcrest

Cost Estimate*

Library/Civic Center	\$4,640,000
Stringtown Road 800' gap (1 lane)	\$550,000
Stringtown Road Extension (MD 355 to I-270) (25% share)	\$1,600,000
Stringtown Road (MD-355 to Snowden Farm Pkwy**) (2 lanes)	\$4,135,000
Snowden Farm Parkway** (2 lanes)	\$2,270,000
Lowering MD 355 South of Stringtown Road	\$905,000
Clarkburg Road (1 1/2 lanes)	\$1,340,000
20" Water Main	\$779,000
Greenway Trails (not shown)	\$160,000
Total	\$16,979,000

*As reflected in Resolution 15-87
 **Snowden Farm Parkway was previously known as Piedmont Road

Department of Technology Services - GIS
 Streets and Buildings
 Street Centerlines
 2003 Building Outlines
 Hydrography
 Street & Sidewalk
 Lakes & Ponds

Infrastructure Items Funded by
 the Clarksburg Town Center Development District

Maryland National Capital Park and Planning Commission
 Other Map Layers
 ■ Building
 ■ Sidewalk
 ■ Street Centerline
 ■ Proposed
 ■ Existing
 ■ Proposed

Date: 08/06/2007
 Data Source: MNCPPC, DTSGIS, and DPS
 Prepared by: Department of Planning Services



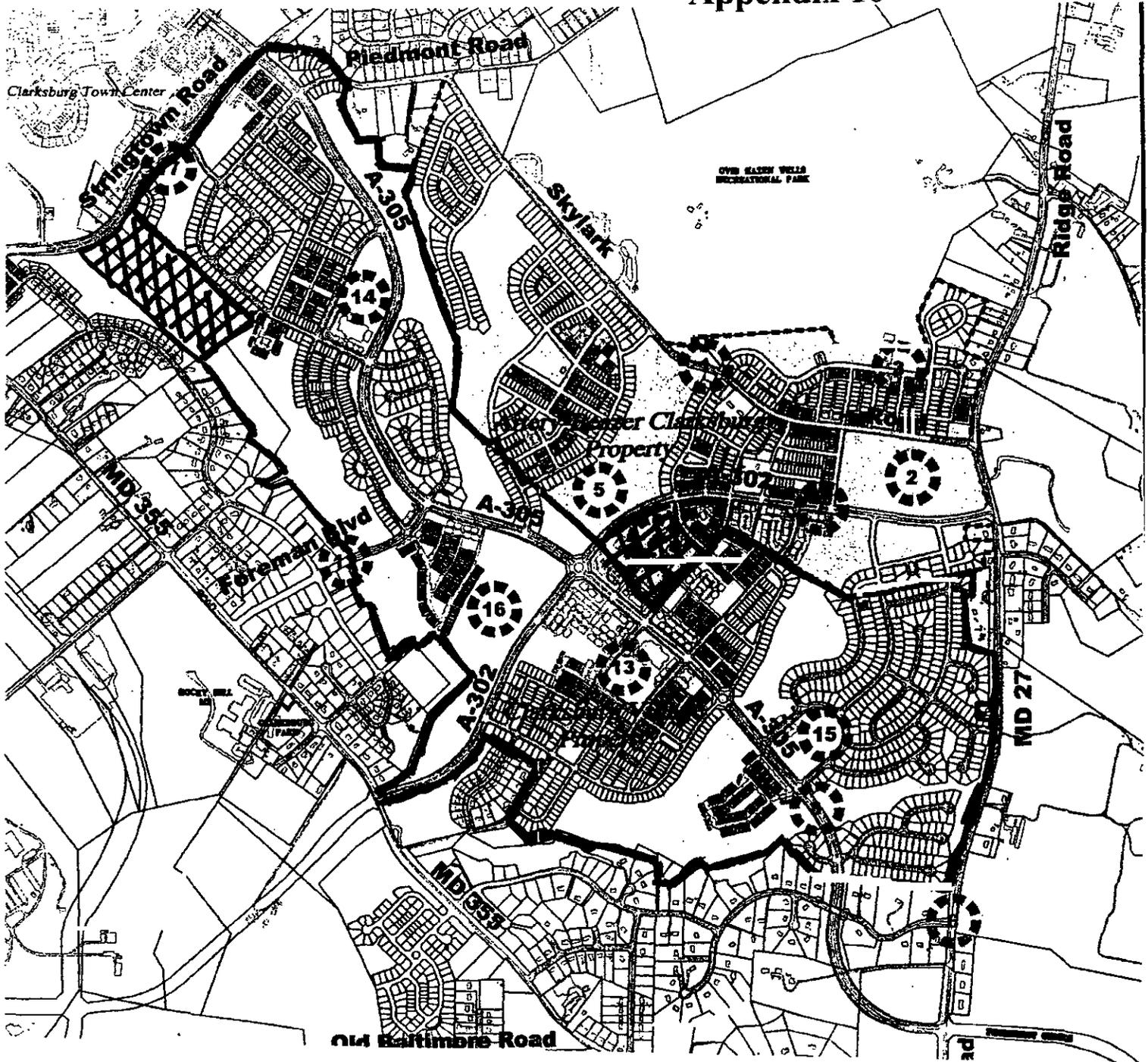
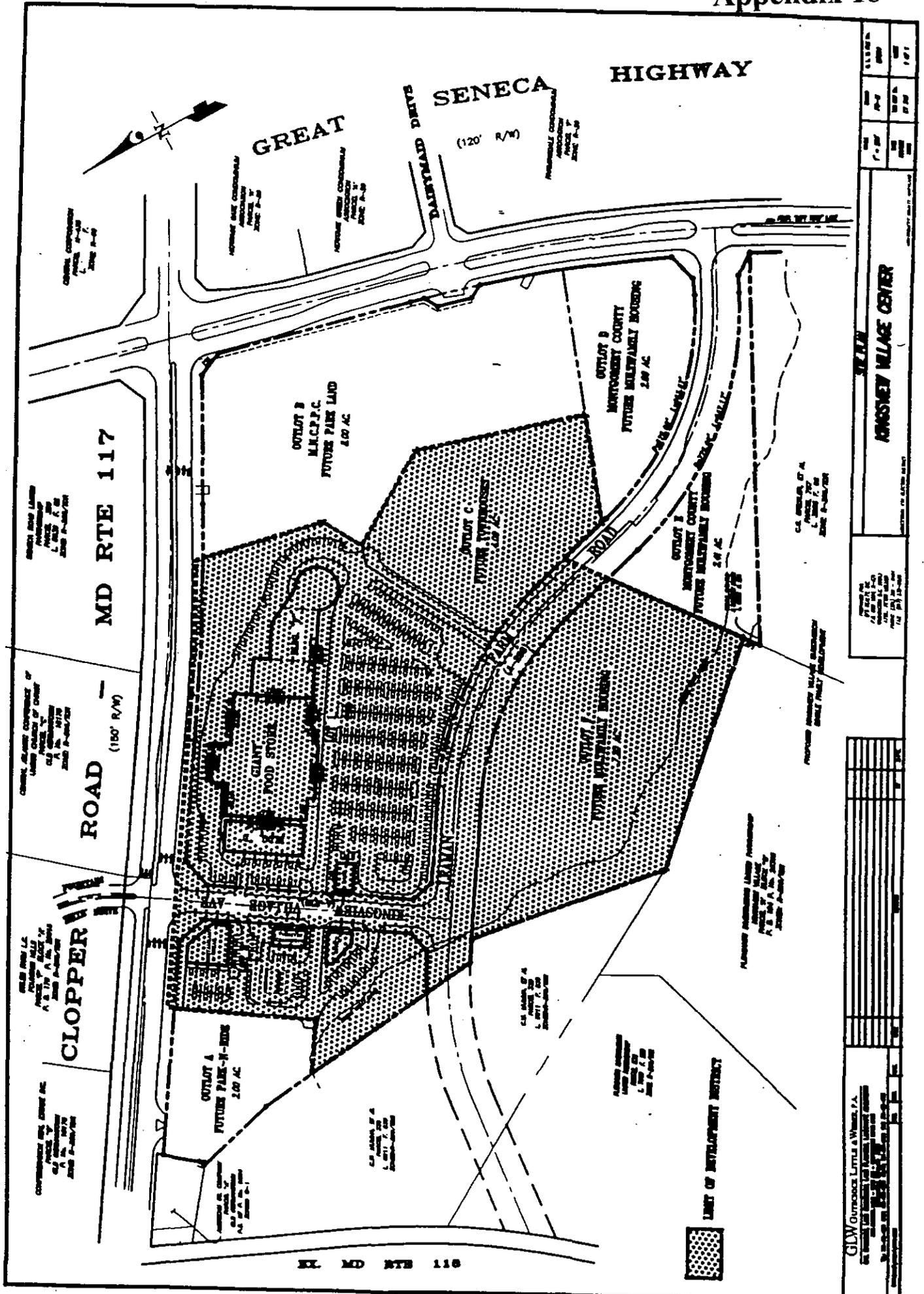


Exhibit B

- Current boundary for Clarksburg Village Development District
- ▣ Proposed additional land



CONTRACTOR'S COPY OF
 PLANS FOR THE
 DEVELOPMENT OF
 THE SITE
 AS SHOWN ON
 THESE PLANS
 IS NOT TO BE
 USED FOR ANY
 OTHER PURPOSES

CONTRACTOR'S COPY OF
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NO.	DATE	BY	REVISION

ANSNEY VILLAGE CENTER

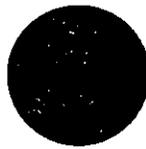
SECTION OF SECTION 40

PLANS FOR THE DEVELOPMENT OF THE SITE AS SHOWN ON THESE PLANS IS NOT TO BE USED FOR ANY OTHER PURPOSES

NO.	DATE	BY	REVISION

GLM CONSULTANTS LIMITED A Whelan P.A.
 2000 WOODBINE ROAD, SUITE 100, WASHINGTON, D.C. 20004
 TEL: (202) 462-1100 FAX: (202) 462-1101

Bud. Fin. Econ. Dev.



OFFICE OF INSPECTOR GENERAL

Thomas J. Dagley
Inspector General

027389

MEMORANDUM

March 27, 2007

TO: Marilyn Praisner, President
County Council

FROM: Thomas J. Dagley
Inspector General

SUBJECT: Office of Inspector General Audit of Selected CIP Projects

This is to inform the County Council that the Office of Inspector General has initiated an audit of cost data and related information for selected Capital Improvements Program (CIP) projects included in the County Executive's Recommended FY07 Capital Budget and Capital Improvements Program dated January 2006.

Attached please find a copy of my memorandum to Tim Firestine, Chief Administrative Officer, explaining the audit objectives and CIP projects selected for review.

If you have any questions or comments, please do not hesitate to contact me.

Re: #0027
cc: Council Members

RECEIVED
MONTGOMERY COUNTY
COUNCIL

2007 MAR 29 AM 8:13





OFFICE OF INSPECTOR GENERAL

Thomas J. Dagley
Inspector General

MEMORANDUM

March 27, 2007

TO: Tim Firestine
Chief Administrative Officer

Thomas J. Dagley

FROM: Thomas J. Dagley
Inspector General

SUBJECT: Audit of Cost Data and Related Information for Selected Capital
Improvements Program (CIP) Projects

Reference is made to my memorandum, dated March 8, 2007, advising the Office of Inspector General (OIG) was initiating an examination of cost data and related information for selected CIP projects. The examination is a modification of an action plan published in our Four-Year Work Plan in August 2005 regarding supply management and facilities. In this regard, the OIG anticipates conducting additional examinations of CIP projects in fiscal year 2008.

Based upon information developed during the planning phase of this audit, we have identified two objectives for this 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.

During the planning phase, we concentrated on reviewing CIP projects in the County Executive's Recommended FY07 Capital Budget and Capital Improvements Program (CIP), Fiscal Years 07-12, January 2006. We also reviewed the Approved FY 07 Operating and Capital Budgets, July 2006. As a result, we plan to include the following CIP projects in our methodology:

Transportation

- Clarksburg Town Center Development District: Roads (Project # 500423)
- Stringtown Road Extended (Project # 500403)



19-2

Montgomery College

- Rockville Science Center (Project # 036600)
- Germantown Child Care Center (Project # 956645)
- Takoma Park Campus Expansion (Project # 996662)

Montgomery County Public Schools

- Northwood High School (Project # 016545)
- Sherwood High School Addition (Project # 036507)

In a discussion with Paul Folkers, Assistant Chief Administrative Officer, it was agreed that we will work directly with MCG department directors, the College, and MCPS to obtain the data and information needed. For College and MCPS projects, I will send each agency head a separate memorandum. For reporting purposes, we anticipate issuing a separate report for each project category examined.

Charles Becker, Assistant Inspector General, is the manager for this audit. He will update you periodically as the audit progresses, and we will inform you of any significant findings in a timely manner.

Re: #0027

cc: Council Members

May 2007



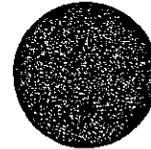
MONTGOMERY COUNTY PLANNING BOARD
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

OFFICE OF THE CHAIRMAN

May 18, 2007

Honorable Marilyn Praisner
President
Montgomery County Council
100 Maryland Avenue
Rockville, MD 20850

028624



Re: Clarksburg Development Districts

Dear President Praisner:

In your March 22, 2007 letter to the Planning Director, you asked whether the Clarksburg Town Center Advisory Committee ("CTCAC") report, *Clarksburg Development Districts - The Illegitimate Transfer of Private Financial Obligations to the Public*, accurately reflected the role of the Planning Board in the development districts, and for any other comments that might assist the Council in analyzing the CTCAC report. The Planning Board is pleased to provide this response.

RECEIVED
MONTGOMERY COUNTY
COUNCIL
2007 MAY 21 AM 11:22

In order to respond to your letter, and so that we could better understand the issues raised in the CTCAC report, the Board's staff compiled documents related to the Board's review of the proposed development districts under Chapter 14-7 of the Code. We have received several inquiries from other arms of County government for documents related to the establishment of the Clarksburg development districts, and in response to those requests, have made available the compiled documents.

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The Master Plan

The Clarksburg Master Plan, which was adopted in June 1994, contains a separate section on "Development Districts or Similar Alternative Financing Mechanisms." It states:

Development District enabling legislation was passed by the State legislature in 1994. Separate enabling legislation at the local level is currently under review by the County Council.

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Clarksburg Master Plan at pp. 204-205.

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Preliminary and Site Plan Requirements

At the time preliminary and site plans were reviewed for the Clarksburg Town Center, Clarksburg Village, and Greenway Village, as at the time of Master Plan, the Board knew that development districts were a potential infrastructure-funding source. But because certain of the development districts had not been proposed (let alone finalized), the Board did not know what, if any, facilities would be approved for inclusion in a development district.

For example, the Board’s order approving the Clarksburg Town Center contemplated the possibility that a development district might be used to finance unspecified infrastructure. The approval was conditioned on the provision by the developer of those facilities required to meet the APF tests then in force. These included not only projects that primarily served the development but also others that, while necessary for the development to proceed, were designed at a size sufficient to serve other users. Some projects, such as the civic center and library, were not included as part of the APF test.

In its March 26, 1996 order approving the Clarksburg Town Center preliminary plan, the Board noted the absence of a development district, and, therefore, required the developer to provide certain infrastructure projects beyond those strictly required for the Clarksburg Town Center. The Board pointed out that the Master Plan contemplated that the funding for capital improvements would have to come from a variety of sources, including government and private development. It further noted that

the Master Plan recommended that development in Clarksburg should occur in stages conditioned on the ability of private developers to fund a significant portion of the infrastructure improvements or the availability of other sources of revenues.

Finding that the estimated funding gap was approximately \$126 million, the Board accepted the staff’s estimate that the applicant’s share of the deficit was about 10 percent of the total, and made the improvement of Stringtown Road the responsibility of the applicant as representing the Town Center’s approximate share of the Master Plan road infrastructure.

The Board suggested that this contribution might be reevaluated if and when another funding mechanism was adopted, but concluded that “the infrastructure schemes proposed by the Master Plan are legislative in nature and will be determined by the Council, and may or may not grandfather development predating such legislation,” and “to anticipate the Council’s actions would be presumptive, and premature.” *Id.*

Review of Proposed Development Districts under Chapter 14-7

The applications for APF approval of the Clarksburg Town Center, Clarksburg Village, and Greenway Village development districts, and the staff reports analyzing those applications, made clear that the developers sought to use the development districts to pay for the infrastructure needed to meet their APF requirements. The Board reviewed the proposed development districts to determine whether the facilities proposed by the applicant for inclusion in the districts served a regional purpose and met each development's APF requirements. The Board also discussed the issue of whether the facilities met Chapter 14-3(g)(2)'s definition of "infrastructure improvement," and questioned whether, absent a change in that definition, any of the facilities that were required to meet the applicant's APF requirements would qualify for inclusion in a development district.

In a March 22, 2001 letter to then-Council President Ewing reporting on the Board's findings with respect to the proposed Clarksburg Town Center development district, then-Chairman Hussmann transmitted the Board's recommendation that facilities included in the development district be limited to those that would serve "the regional area, not just the residents of a single development." Because the developer's application for adequate public facilities approval under Chapter 14-7 included improvements that it was required to provide under preliminary and site plan approvals, the Board also questioned whether the facilities that the developer was required to provide to meet APF and site plan requirements qualified for inclusion in the development district. Thus, the Board conditioned its "approval" of the development district on the amendment of

Chapter 14-3(g)(2), if necessary, to allow improvements to be the responsibility of a single developer so long as the proposed improvements serve a greater public benefit than a single development.

The Chairman's letter did not elaborate on this condition, but attached the staff memorandum, which was less qualified in recommending that it would be necessary for Chapter 14 to be amended to allow a single developer to be reimbursed for facilities that it was solely responsible for providing under APF or site plan requirements. It appears that the Board added the "if necessary" language to the less qualified language proposed by its staff based upon the assertion by the developer's representatives that the Board did not have the authority to condition its "approval" of the Clarksburg Town Center development district on the amendment of the law, and more generally in deference to the Council's role as the body responsible for ultimately determining what facilities could be included the development districts. Chairman Hussmann's letter concluded by saying that "[t]he Planning Board is pleased that development in the Town Center is going forward as the Master Plan envisioned."

Honorable Marilyn Praisner
May 18, 2007
Page 5 of 6

The Board raised similar issues in reviewing the proposed Clarksburg Village and Greenway Village development districts. In a March 15, 2002 letter to then-Council President Silverman, then-Chairman Holmes reported the Board's unanimous approval of the applications for those districts. The letter reflects that the Board was concerned about whether certain of the facilities proposed for inclusion in the development district complied with Chapter 14-3(g)(2), but that it viewed itself as having a limited role in answering that question:

The Planning Board also discussed at some length the issue of whether the proposed development plans complied with the legislation's statute 14-3(g)(2). The issue is whether or not a single developer can utilize public financing through a development district for the sole purpose of financing their adequate public facilities requirement for a single development. Our legal counsel has advised that the proposed development districts do not appear to comply with this statute. It is not the Planning Board's role as defined in Chapter 14 to make a finding on compliance with this legislation; therefore we are raising this as an issue for the Council to resolve in reviewing the applications.

Chairman Holmes's letter concluded by saying that "[t]he Planning Board is pleased that development in Clarksburg is proceeding as the Master Plan envisioned and that so much of the infrastructure and facilities are supplied by the private sector and other innovative financing mechanisms."

Legal and Policy Considerations

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 that the applicant provide the improvements without regard to the funding source – the Board disagrees. But there is at least one important exception to this general rule. In 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.

Whether reimbursing a developer through a development district for facilities that a single developer is obligated to provide under preliminary or site plan approvals makes good policy is another question. The Board does not think so.

The concept of development districts is not well suited to single-developer projects. Development districts are intended to facilitate the provision of infrastructure projects that benefit a larger community, and which, because of their scale or function, can rarely be provided (or even required) of a single developer. Such infrastructure should be provided, if feasible, through the cooperation of several developers, or through a fee or tax levied on the users or all property owners in the community that enjoys them. To levy a district tax on a single subdivision to pay for a facility that benefits a much wider community is difficult to defend as equitable. Similarly, it may be inequitable to require a developer to underwrite the full cost of a regional facility far larger than needed to meet the requirements of the subdivision(s) it is building. If a development district is to be used to finance infrastructure in Clarksburg, it would make the most sense to have a single district covering the entire planning area and to allocate costs for special or area-wide facilities across the entire area, with the exception of those facilities that are the result of a proffer associated with subdivision approval or associated with a compliance action.

The Board does not think there is a significant reason to be concerned that developers may have relied on development district financing to make their projects financially viable. This Board touched upon this issue during the March 2001 public hearing on the Clarksburg Town Center development district in an exchange about whether homes within the district would be sold at reduced prices. Then-Chairman Hussmann commented that the development district financing mechanism appeared to be a "pretty good deal" for the developer. The Town Center's representatives responded that the development district would also provide benefits for residents. But Chairman Hussmann expressed skepticism about whether the infrastructure costs would be subtracted from the home prices. Rather, he argued, the developers would sell the homes for what the market would bear. This concern appears to have been shared by County Executive Duncan, who commented in his October 17, 2002 memorandum to the Council regarding the creation of the Clarksburg Town Center development district that there was no concrete evidence that homes in the County's development districts were being sold at lower prices than those outside the districts.

The Board hopes that these comments will assist the Council in its review of the issues raised in the CTCAC report.

Sincerely,



Royce Hanson
Chairman



MONTGOMERY COUNTY PLANNING BOARD
 THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

OFFICE OF THE CHAIRMAN

May 18, 2007

RECEIVED
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Honorable Marilyn Praisner
 President
 Montgomery County Council
 100 Maryland Avenue
 Rockville, MD 20850

Re: Clarksburg Development Districts

Dear President Praisner:

In your March 22, 2007 letter to the Planning Director, you asked whether the Clarksburg Town Center Advisory Committee (“CTCAC”) report, *Clarksburg Development Districts – The Illegitimate Transfer of Private Financial Obligations to the Public*, accurately reflected the role of the Planning Board in the development districts, and for any other comments that might assist the Council in analyzing the CTCAC report. The Planning Board is pleased to provide this response.

In order to respond to your letter, and so that we could better understand the issues raised in the CTCAC report, the Board’s staff compiled documents related to the Board’s review of the proposed development districts under Chapter 14-7 of the Code. We have received several inquiries from other arms of County government for documents related to the establishment of the Clarksburg development districts, and in response to those requests, have made available the compiled documents.

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Honorable Marilyn Praisner

May 18, 2007

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The Board hopes that these comments will assist the Council in its review of the issues raised in the CTCAC report.

Sincerely,



Royce Hanson
Chairman



OFFICE OF THE COUNTY ATTORNEY

Isiah Leggett
County Executive

Leon Rodriguez
County Attorney

MEMORANDUM

July 26, 2007

TO: Isiah Leggett
County Executive

Marilyn J. Praisner, President
Montgomery County Council

VIA: Leon Rodriguez
County Attorney

Marc P. Hansen
Deputy County Attorney

FROM: Clifford L. Royalty
Chief, Division of Zoning, Land Use, & Economic Development

RE: *Development Districts*

By letters to the Chief Administrative Officer and the County Executive, dated March 16, 2007, and March 20, 2007, respectively, the Clarksburg Town Center Advisory Committee, Inc. ("CTCAC"), and its counsel questioned the legality of the establishment and implementation of the Clarksburg Town Center development district ("the development district"). Attached to the letters is a ninety-eight page CTCAC report (titled "Clarksburg Development Districts – The Illegitimate Transfer of Private Financial Obligations to the Public") that synthesizes CTCAC's allegations. You have asked that we respond to the legal issues raised in the CTCAC report.¹

¹ This memorandum does not undertake a policy analysis concerning the desirability or fairness of implementing a development district in Clarksburg or elsewhere.

The CTCAC report can be distilled to a concise list of legal issues that are described (though cryptically) in the March 16, 2007, letter from CTCAC's counsel and in a summary included with the report. Those issues are:

1. Whether the Clarksburg Master Plan and Hyattstown Special Study Area ("Clarksburg Master Plan") requires the creation of the development district to precede preliminary plan approval;
2. Whether Chapter 14 of the Montgomery County Code requires the creation of the development district to precede preliminary plan approval;
3. Whether the financing of infrastructure by the development district is inconsistent with the Regional District Act, the County's subdivision regulations, and the County's zoning ordinance;²
4. Whether the development district will finance the construction of infrastructure that is not an allowable "infrastructure improvement" within the meaning of Chapter 14;
5. Whether the County Executive may recommend that additional infrastructure be financed by the development district;
6. Whether the resolution creating the development district is invalid because the residents of the Clarksburg Town Center were not properly notified of the public hearing on that resolution;
7. Whether the procedures followed to obtain property owner approval of the development district complied with Chapter 20A of the Montgomery County Code.

Summary of Response

In addressing each issue, we will follow the above chronology.

As to Issue No. 1, we conclude that the Clarksburg Master Plan does not, and cannot, dictate the timing of the creation of the development district.

As to Issue No. 2, we conclude that Chapter 14 does not require the creation of the development district to precede preliminary plan approval.

² The Regional District Act is codified at Article 28 of the Annotated Code of Maryland. The County's subdivision regulations and zoning ordinance are codified at Chapters 50 and 59, respectively, of the Montgomery County Code.

As to Issue No. 3, we conclude that the infrastructure financing methodology is not inconsistent with the Regional District Act or County law.

As to Issue No. 4, we tentatively conclude that the infrastructure (or improvements) proposed to be financed by the development district meets the definition of "infrastructure improvement" in Chapter 14.

As to Issue No. 5, we conclude that the County Executive is not precluded from recommending that additional infrastructure be financed through the development district.

As to Issue No. 6, it appears that the residents of Clarksburg Town Center were notified of the public hearing on the resolution creating the development district. Even if the notice was imperfect, we conclude that the Town Center residents are barred from asserting a claim as a consequence.

As to Issue No. 7, we conclude that the requirement for property owner approval was met and that Chapter 20A is a nullity.

Background

The living history of Clarksburg is neither abbreviated, nor easily summarized. Because the purposes of our analysis are not furthered by recounting that history, we do not address it here.³ The pertinent starting point for this analysis is Chapter 14 of the Montgomery County Code which is titled the "Montgomery County Development District Act." As its title implies, Chapter 14 ("the Chapter") is the legal apparatus upon which the development district was constructed. One of the express purposes of Chapter 14 is to:

authorize 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.

§ 14-2(a)(1).⁴

The Chapter allows for the "issuance of bonds or other obligations of the County that

³ The chronology of the Clarksburg development is amply discussed in the Office of Legislative Oversight's Report Number 2006-3, "Fact-Finding Review of the Clarksburg Town Center Project."

⁴ Unless otherwise indicated, section references are to the Montgomery County Code (2004), as amended.

are payable from special assessments or special taxes collected, or tax increments created, in a development district.” § 14-2(a)(2). The Chapter observes that development districts “would be especially useful . . . where . . . an approved master plan recommends significant development in a specific area of the County” and where “extensive and long-term” infrastructure is needed. § 14-2(b). The consequential phrase “infrastructure improvement” is defined 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, and the land where it is or will be located.

§ 14-3(g)(1).

However, “infrastructure improvement” does not include an improvement that:

primarily serves the residents or occupants of only one development or subdivision; or

is the responsibility of a single developer under the Planning Board’s site plan and adequate public facilities requirements.

§ 14-3(g)(1) and (2).

Under Chapter 14, the creation of a development district can be initiated by filing with the Council a petition “signed by at least 80 percent of the owners of real property and the owners of at least 80 percent in value of the real property . . . located in a proposed development district . . .” § 14-6(a). After holding an advertised public hearing on the petition, the Council, “by resolution approved by the Executive, may declare its intent to establish a development district consisting of a specified geographic area.” § 14-6(c). For the purposes of this First Resolution, “a single owner of multiple parcels must be treated as one owner.” § 14-6(e). Once the First Resolution is adopted, “one or more owners of land located in the proposed district may submit an application for provisional adequate public facilities approval, covering the entire proposed district, to the Planning Board.” § 14-7(a). The application must “explain how each development proposed in the district” will comply with the law, “identify an infrastructure improvement necessary to satisfy the Growth Policy’s adequate public facilities requirements for a development district,” and “estimate the cost to provide each such improvement.” § 14-7(a)(1)(2) and (3). The Planning Board must then “jointly review for compliance with Section 50-35(k)⁵ and the Growth Policy all developments located in the proposed district as if they were one development.” § 14-7(b). The Board “may conditionally approve an application if it finds that the proposed district will meet all requirements under Section 50-35(k) and any added

⁵ Section 50-35(k) of the County Code is known as the “adequate public facilities ordinance.”

requirements which apply to a district under the Growth Policy.” § 14-7(b). Chapter 14 further provides that:

[i]n the aggregate, the applications approved must commit the applicants to produce (through the funding of the proposed development district or otherwise) the infrastructure improvements needed to meet the applicants’ adequate public facility requirements in the proposed district and any added requirements which apply to an applicant under the Growth Policy.

§ 14-7(c).

After the development district is created, “and the financing of all required infrastructure improvements is arranged, any development located in the district” is deemed to have satisfied all public facilities requirements. § 14-7(e).

Once the Planning Board has acted, the County Executive must then submit a report “estimating . . . the cost of each infrastructure improvement listed by the Planning Board,” the “amount of revenue needed to cover the district’s share of infrastructure improvements funded, fully or partly, by a district,” and “the estimated tax rate for each form of taxation available to the district . . .” § 14-8(a)(1) and (2). In its report, the Executive “should also recommend whether to create a district, its boundaries if one is created, which infrastructure improvements listed by the Planning Board the district should fully or partly fund, and alternative financing or revenue-raising measures.” § 14-8(b).

The development district process then makes its way to the final phase which begins with a public hearing before the Council on a “final resolution” (also known as the “Second Resolution”) to “create” a development district. § 14-9(a). The Council must give notice of the hearing through an “advertisement in at least two newspapers of general circulation in the County . . .” and by “notifying by mail the record owner of each property located in the proposed district at the address shown on the latest tax assessment roll.” § 14-9(b)(1)(A) and (B). If the Council “intends to use special obligation debt to finance the district and the district was initiated by the Council” (as opposed to a property owner), before adopting the final resolution, the Council “must receive a petition signed by at least 80 percent of the owners of real property and the owners of at least 80 percent in value of the real property, as shown on the latest assessments rolls, located in the proposed district.” § 14-9(c). After the aforementioned public hearing, the Council may then create the development district “by resolution approved by the County Executive.” § 14-9(d).

The final (or “Second”) resolution must:

define the development district by specifying its boundaries and listing the tax account

number of each property in the district;

list each infrastructure improvement that will be financed by the development district, the estimated completion date and cost of that improvement, and the share of that cost which the County or another government agency will pay;

create, and specify the amount or percentage of, a contingency account for unexpected cost overruns; and

create a special fund for the development district.

§ 14-9(e)(1)-(4).

The final resolution must also:

authorize the imposition of a special assessment, special tax, fee, or charge, or any combination of them, in the development district at a rate designed to provide adequate revenues to pay the principal of, interest on, and redemption premium, if any, on the bonds and to replenish the debt service reserve fund, or create a special fund under the Tax Increment Financing Act.

§ 14-10(a).

All proceeds received from any bonds issued must be applied solely towards:

costs of the infrastructure improvements listed in the resolution adopted under Section 14-9(d)(2);

costs of issuing bonds; and

payment of the principal and interest on loans, money advances, or indebtedness incurred by the County for any purpose stated in this Chapter.

§ 14-12(d)(1)-(3).

Like the Clarksburg development as a whole, the development district has its own complex history. Before the bill that would become Chapter 14 was introduced by the County Council, the County's bond counsel opined, in a letter dated October 2, 1992, that the County lacked the authority to issue the bonds contemplated by the future Chapter 14. Bond counsel reasoned that the Express Powers Act does not authorize the County to issue such "special obligation bonds," i.e. bonds that will be paid for from taxes or fees collected within a

development district. Bond counsel concluded that:

the County does not have the power to issue bonds or other obligations payable from the special assessments or taxes collected in development districts to be created under the Proposed Legislation. A specific grant of power from the Maryland General Assembly is required to issue bonds or other obligations payable from such assessments or taxes.

(Correspondence dated October 2, 1992, from "Smith, Somerville & Case" to then County Attorney Joyce Reuben Stern, p. 3).⁶

That "specific grant of power" came in the form of House Bill 895 which the General Assembly enacted and which the County codified as Chapter 20A of the Montgomery County Code. The core purpose of Chapter 20A is to authorize the County to issue "bonds or other obligations to finance the costs of public infrastructure for a development district for which the principal, interest, and any premium shall be paid from" taxes, fees, and charges collected in the district. § 20A-1(b). Of particular relevance to CTCAC's allegations is Section 20A(f)(2) which states:

A new development district may not be created to finance special obligation debt under this section unless the proposed action is approved by:

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

the owners of at least 80% of the assessed valuation of the real property located within the proposed development district.

§ 20A-1(f)(2).

After Chapter 20A and Chapter 14 were enacted, the County proceeded with the creation of the development district, beginning with the "First Resolution" required by Chapter 14. (See Resolution No. 14-648).

Discussion

1. The Clarksburg Master Plan Does Not Control the Sequence of Development in Clarksburg

⁶ The letter opinion is literally signed "Smith, Somerville & Case."

In his March 16, 2007, letter, counsel for CTCAC states that, “[u]nder the Clarksburg Master Plan, creation of development districts . . . must precede, not follow, preliminary plan approval” Neither counsel for CTCAC, nor CTCAC, cites specific language in the Clarksburg Master Plan that supports that conclusion. CTCAC notes that the Master Plan recommends that each stage of development be initiated when “either . . . State and County enabling legislation for development districts or alternative financing mechanisms are in place.” (See CTCAC report, p. 32; Clarksburg Master Plan, pp. 192-193). Either of these triggers is sufficient under the Master Plan to allow the development to proceed. As is noted above, the first trigger, i.e. enabling legislation, was actuated.

Moreover, CTCAC places its comments regarding the Master Plan under the rubric “Master Plan Legal Requirements.” (See, e.g., CTCAC report, p. 28). Both the rubric and the conclusion of CTCAC’s counsel illustrate a more fundamental difficulty with CTCAC’s claim; the Clarksburg Master Plan, like all master plans, *recommends*, it does not *require*. See *West Montgomery County Citizens Association v. Maryland-National Capital Park and Planning Commission*, 309 Md. 183, 196, 522 A.2d 1328, 1334 (1987). The phrase “Master Plan Legal Requirements” is an oxymoron. The Master Plan does not, and cannot, require the development district to precede preliminary plan approval.

Insofar as CTCAC argues that the Master Plan recommendation is elevated to a legal requirement by virtue of § 50-35(l) (which requires that a preliminary plan “substantially conform to the applicable master plan”), CTCAC misses the mark. A preliminary plan may reference the development district, but it does not determine when, or if, a development district will be created. Chapter 14 governs the creation of a development district. And § 50-35(l) requires only “substantial,” not total, compliance with a master plan. Even if § 50-35(l) operated in the manner hypothetically suggested by CTCAC, a preliminary plan could, legally, vary from the master plan.

2. Chapter 14 Does Not Require the Development District to Precede Preliminary Plan Approval

CTCAC, though not its counsel, attempts to garner support from Chapter 14 for its argument that the development district must precede preliminary plan approval. The CTCAC report cites to § 14-7(b) which allows the Planning Board to “conditionally approve” an application for adequate public facilities review “if it finds that the proposed district will meet all requirements under Section 50-35(k) and any added requirements which apply to a district under the Growth Policy.” (CTCAC report, p. 47). CTCAC claims that “[r]eview for provisional approval, and actions under § 14-7(b), would be superfluous if subdivision approval had already been obtained under Chapter 50.” (CTCAC report, p. 47). But that is not so. The language that CTCAC quotes is removed from its context. Section 14-7(b) states that, in determining compliance with § 50-35(k) of the subdivision regulations and “the Growth Policy,” the Planning Board must review “all developments in the proposed district as if they were one development.”

The Planning Board is thus charged with reviewing the development district as a whole; some developments within the district (or portions of the district) may have obtained preliminary plan approval, while others may have not.⁷ CTCAC also ignores § 14-2(a)(1) which expressly allows for the “reimbursement” of the costs incurred to provide infrastructure that has presumably been approved by the Planning Board. The term “reimbursement” obviously contemplates that the infrastructure was built before the development district was created.

More importantly, whatever underlying intent can be derived from Chapter 14, it is undisputed that the statute does not expressly require the development district to precede preliminary plan approval. Nor does the statute expressly preclude the preliminary plan approval from preceding the development district. By their actions, it is apparent that the County and the Planning Board have interpreted the law as allowing for the development district to follow plan review. Such an “administrative construction” of the law is compelling evidence of legislative intent. *Lussier v. Maryland Racing Commission*, 343 Md. 681, 684 A.2d 804 (1996).

There is no doubt that certain provisions of Chapter 14 impliedly assume that the development district will be created before construction begins. *See, e.g., §§ 14-5(c) and 14-16(b)*. But the plain language of Chapter 14 and the implementation of the Chapter lend no support to CTCAC’s claim that Chapter 14 *requires* the development district to come first. *See Sinai Hospital v. Department of Employment*, 309 Md. 28, 46, 522 A.2d 382, 381 (1987) (long standing administrative construction of a statute coupled with legislative acquiescence in that interpretation “gives rise to a strong presumption that the interpretation is correct.”)

3. The Infrastructure Financing Methodology is Not Inconsistent with State or County Law

As best we can glean from the documents that we have gathered, the Planning Board, pursuant to Chapter 14, recommended that the following improvements be funded by the development district:

1. All roadway improvements that are required to meet Adequate Public Facilities (Clarksburg Road, Stringtown Road, and Piedmont Road).
2. The 20-inch water main.
3. Acquisition of Rights of Ways for regional roadways.
4. The proposed Civic Building.
5. Street Construction – Part of Main Street from MD 355 to Public Street K and

⁷ Indeed, the Clarksburg Town Center development is proceeding in phases, each with its own site plan approval.

Public Street K (the Greenway Road).

6. Redgrave Place Connection to Main Street.
7. Regional Greenway Trail through public park.
8. MD 355 Intersection Improvements including intersection with Stringtown Road.

(Correspondence dated March 22, 2001, from William Hussman to Douglas M. Duncan).

Pursuant to § 14-8, as part of his fiscal report, the County Executive recommended the following modified “primary list” of improvements to be funded by the development:

1. Civic Center/Library.
2. Stringtown Road 800’ Gap.
3. Stringtown Road (MD 355 – I270).
4. Stringtown Road (MD 355-Piedmont Road).
5. Piedmont Road.
6. Lowering MD 355 at Stringtown Rd.
7. Clarksburg Road:
MD 355 to Town Cntr bdry
Twn Ctr bdry to Piedmnt Road.
8. WSSC 20” Water Main.

(“Clarksburg Town Center Development – County Executive’s Fiscal Report,” Table D).

The Executive also identified additional projects that could be funded by the development district if certain savings are realized. (“Clarksburg Town Center Development – County Executive’s Fiscal Report,” Table D). Through the Second Resolution, the Council approved for development district funding all of the improvements identified by the Executive in the “primary list.” (Resolution No. 15-87, Exhibit C). The Council also added “Greenway trails” to that list. (Resolution No. 15-87, Exhibit C).

CTCAC argues that the financing of infrastructure through a development district is

precluded by the County's subdivision regulations and zoning ordinance. Offering little in the way of analysis, CTCAC states, repeatedly, that it would be "inconsistent with" the subdivision approvals "for a developer to later be reimbursed" for meeting the subdivision obligations imposed by the Planning Board.⁸ (CTCAC report, p. 9, *et seq.*). CTCAC asserts a similar claim as to zoning approvals. (CTCAC report, p. 16). The CTCAC report implies that infrastructure that the developer was required to build as a condition of receiving preliminary plan and site plan approval cannot be funded by the development district.

In support of its argument, CTCAC alleges that the items on the Council-approved infrastructure list, excepting the "Civic Center," were required by the Planning Board to be provided as a condition of subdivision and site plan approval. (See, e.g., CTCAC report, pp. 76 and 83). That allegation appears to be untrue. According to the County Executive's fiscal report, in addition to the Civic Center, the Planning Board did not require the developer to construct, as a condition of preliminary plan approval, the "Stringtown Road 800' gap," Stringtown Road extended, Clarksburg Road from MD 355 to the Town Center boundary, and the WSSC 20" water main. (See "Clarksburg Town Center Development – County Executive's Fiscal Report," Table D). The remaining improvements (Item Nos. 4, 5, 6, and part of 7 from the above "primary list") do appear to have been required by the Planning Board as a condition of preliminary or site plan approval.⁹ CTCAC seems to argue that infrastructure that a developer is obligated by the Planning Board to provide cannot be funded by the development district. (See CTCAC Report, p. 76). But the law does not so state and the legislative history reflects no such intent.

Neither Chapter 50 (the subdivision regulations), nor Chapter 59 (the zoning ordinance) govern the sources of funding for infrastructure. Chapter 50 creates a process for subdividing property and ensuring that infrastructure will be built to support any concomitant development. Chapter 50 generally requires that public facilities and improvements be constructed to support development. Certain provisions of Chapter 50 may require a developer to construct, provide, or, more often, dedicate certain facilities. *See, e.g., §§ 50-24(b) and (c) and 50-30(c)(1)*. But Chapter 50 does not govern the ultimate source of funding for that infrastructure, nor does it

⁸ In his March 16, 2007, letter, CTCAC's counsel frames the issue more narrowly and does not explicitly claim that reimbursement is prohibited. Also, CTCAC's counsel references an inconsistency between Chapter 14 and the Regional District Act only insofar as the Planning Board performs subdivision review under the Regional District Act. Therefore, we need not discuss the Regional District Act separately; that discussion is subsumed within the Chapter 50 discussion.

⁹ Without more information from the Planning Board, we are unable to definitively determine what infrastructure the Planning Board required through subdivision and zoning review and what portion of that infrastructure is assignable to the different methods of review.

preclude the County, or a development district, from funding the infrastructure.¹⁰ Likewise, Chapter 59 regulates the use of property, not the funding of infrastructure. Chapters 50 and 59 simply do not address infrastructure funding. Through Chapter 50 (and apparently Chapter 59), the Planning Board requires the dedication and provision of land and infrastructure as a condition of its land use approvals. But Chapters 50 and 59 do not prevent (or authorize the Planning Board to prevent) the County from funding that infrastructure through a development district or otherwise.

Chapter 14 clearly serves a different purpose than Chapters 50 and 59. Unlike those chapters, Chapter 14 is a funding vehicle; it is a mechanism for funding infrastructure.¹¹ And, insofar as Chapter 50 or 59 can be read to govern infrastructure funding, they have been amended by Chapter 14 which expressly states that it was intended to “supplement” not “restrict” the County’s “power.” § 14-18 (b); *see Haub v. Montgomery County, Maryland*, 353 Md. 448, 727 A.2d 369 (1999) (to the extent the provisions of two statutes cannot be harmonized the provisions of the most recently enacted statute govern).

Moreover, CTCAC’s implied interpretation of Chapters 50 and 59 would create a conflict with Chapter 14. As has been noted, Chapter 14 expressly acknowledges that “infrastructure improvements needed to meet the applicants’ adequate public facility requirements in the district” may be funded by the “proposed development district or otherwise.” § 14-7(c). Chapter 14’s definition of “Adequate Public Facility” includes “infrastructure improvement,” which, in turn, is defined to include facilities (like roads) that would typically be required through the County’s adequate public facilities ordinance. Chapter 14 also provides that, if a developer “withdraws a development before the district is created,” the developer’s “provisional adequate public facility approval is cancelled.” § 14-7(d). This provision is meaningful only if the development district is a source of funding for the facilities to be constructed pursuant to the “adequate public facility approval.”

Chapter 14’s legislative history offers additional interpretative guidance. Admittedly, that legislative history, when shorn of its context, is rife with ambiguities. However, it is evident

¹⁰ In its preliminary plan approval, the Planning Board obliquely expresses a desire to “ensure” that the developer “fund its share of road infrastructure . . .” (Planning Board Opinion, Preliminary Plan 1-95042, p. 2). Whatever its meaning, this reference is not reflective of the law or of any legal impediment to the funding of infrastructure through a development district. Indeed, the Planning Board acknowledges that it “does not generally consider who will fund dedications or improvements required under a preliminary or site plan . . .” (See Correspondence dated May 18, 2007, from Royce Hanson to Marilyn Praisner, p. 5).

¹¹ For example, Chapter 14 expressly authorizes the County to “provide . . . reimbursement for the cost of infrastructure.” § 14-2(a)(1).

from the memoranda drafted by Council staff and the tenor of the discussions at the Council's MFP committee that the Council understood that the development districts could, potentially, fund any public infrastructure. For example, according to the minutes of its March 22, 1993 worksession, the MFP Committee "[s]upported the concept of providing the authority to create development districts as a mechanism to fund public infrastructure." (p. 2, circle 85). That statement, and the discussions that flow therefrom, reflect no intent to exempt from "public infrastructure" facilities that the Planning Board requires a developer to construct. Likewise, Council staff reported that an "ad hoc working group" had recommended "an amendment to the Annual Growth Policy to specify what kinds of infrastructure improvements, in addition to those required to comply with the APFO, a development district should finance in whole or part." (See the Memorandum dated June 21, 1994, from Michael Faden to the County Council, p. 8). This statement, and the discussion within which it is contained, reflects a collective understanding that a development district could fund, at a minimum, infrastructure that the Planning Board required through its review under the adequate public facilities ordinance ("APFO"). An amendment to the Annual Growth Policy was considered to ensure that the development district could fund more than just the APFO facilities. Indeed, the Annual Growth Policy itself acknowledges that "APF" infrastructure may be funded through a development district. (See, e.g., Resolution No. 13-216, Approval of FY 96 Annual Growth Policy, pp. 21-23; 2003-5 Annual Growth Policy – Policy Element, pp. 5-7).

In a recent letter, CTCAC's counsel has elaborated upon the arguments contained in the CTCAC report. (See correspondence dated June 5, 2007, from David W. Brown to Leon Rodriguez, *et al.*). According to CTCAC's counsel, "CTCAC has never claimed that Development Districts cannot be utilized to pay for infrastructure improvements deemed by the Board necessary to satisfy adequate public facilities requirements . . ." though counsel concomitantly suggests that it "should be considered inappropriate" for a development district to fund "infrastructure that the Planning Board has decreed be funded by the developer . . ." (Correspondence dated June 5, 2007, from David W. Brown to Leon Rodriguez, *et al.*, pp. 7, and 10). Counsel does not explain how, or by what authority, such a Planning Board "decree" would preclude the development district from funding infrastructure required of a developer. And counsel's characterization of the Planning Board approval process illuminates the flaws in CTCAC's logic. As expressed by its counsel in the June 5 letter, CTCAC contends that, with respect to the Clarksburg Town Center, the Planning Board "imposed funding obligations" on the developer "that the developer accepted . . . in exchange for development approval." (Correspondence dated June 5, 2007, from David W. Brown to Leon Rodriguez, *et al.*, p. 8). Apparently, CTCAC's theory is that, by accepting the "funding obligations" allegedly imposed by the Planning Board, the developer "waived" any claim that the Planning Board should have "ensured that a financing mechanism" (other than, apparently, developer funding) was in place before the developer proceeded with construction. (Correspondence dated June 5, 2007, from David W. Brown to Leon Rodriguez, *et al.*, p. 6). CTCAC's theory has no basis in law or fact. Insofar as the Planning Board could be deemed to have imposed infrastructure "funding obligations" on the developer, there is no legal means by which the Planning Board could

preclude the County from paying for that infrastructure through a development district. The “waiver” of a claim by the developer has no bearing on what the County is authorized to do. Indeed, this issue has been put to rest by the Planning Board which has rejected CTCAC’s argument regarding infrastructure financing. In its May 18, 2007, letter, the Planning Board states:

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.¹²

(Correspondence dated May 18, 2007, from Royce Hanson to Marilyn Praisner, p. 5).

CTCAC’s counsel has somehow convinced himself that the Planning Board “does not disagree” with CTCAC’s analysis. (Correspondence dated June 5, 2007, from David W. Brown to Leon Rodriguez, *et al.*, p. 8). CTCAC’s counsel is wrong. The Planning Board letter could not be plainer in rejecting CTCAC’s argument.

In construing a statute, the goal is to ascertain the intent of the legislative body that enacted the statute. Although the process of interpretation begins with the language of the statute, even the clearest language must be informed by legislative history and the need to avoid illogical results. *Kaczorowski v. Baltimore*, 525 Md. 628 (1987). Moreover, statutes are to be harmonized. *University System of Maryland v. The Baltimore Sun Company*, 381 Md. 79, 847 A.2d 427 (2004). And Chapter 14 itself states that it “must be liberally construed to achieve the purposes” of the development district. § 14-18(a). CTCAC manufactures a conflict in order to generate statutory disharmony. Chapter 14 simply does not conflict with Chapters 50 and 59; not by express language, not by operation, and not by implication. Accordingly, CTCAC’s interpretative gambit must be rejected.

4. The Proposed Improvements May Be Financed by the Development District

In his March 16, 2007, letter, CTCAC’s counsel claims that “the development district as created . . . envisions taxpayer financing of numerous infrastructure items that do not meet the definition of ‘infrastructure improvement’ in Chapter 14” Counsel does not specify what

¹² The Planning Board excepts from its analysis facilities or amenities required through a “violation compliance program.” (Correspondence dated May 18, 2007, from Royce Hanson to Marilyn Praisner, p. 5). Because that exception is irrelevant to our analysis, we need not address it.

infrastructure improvements he is referring to. CTCAC argues, more explicitly, that all infrastructure improvements that are funded by the development district “must be for [the] general benefit,” rather than the “benefit of one development.” (CTCAC Report, p. 87). In support of this argument, CTCAC cites to the cover memorandum attached to the County Executive’s fiscal report and to § 14-3(g)(1) of the County Code. (CTCAC Report, p. 87). CTCAC removes both the memorandum and the law from their proper context.

Regarding the memorandum, CTCAC accurately quotes the Executive’s statement that 47% of the infrastructure costs “on the primary list are for projects that provide general benefit to the Clarksburg community at large.” (CTCAC Report, p. 87; See Memorandum dated October 17, 2002 from Douglas M. Duncan to Steven A. Silverman, p. 3). But that statement was describing or summarizing the fiscal report; the fiscal report states, repeatedly, that 47% of the infrastructure costs “would be for improvements beyond those required by the Planning Board.” (See “Clarksburg Town Center Development – County Executive’s Fiscal Report,” circles 9 and 12). Thus, the fiscal report itself does not state that no general benefit is derived from 53% of the infrastructure costs.

And, regardless of what the Executive intended, the issue that CTCAC raises ultimately derives from the County Code section that CTCAC cites. As is discussed above, Chapter 14 excludes from the definition of “infrastructure improvement” any improvement that “primarily serves the residents or occupants of only one development or subdivision or is the responsibility of a single developer under the Planning Board’s site plan and adequate public facilities requirements.” § 14-3(g)(1) and (2). CTCAC impliedly reads that provision as requiring all development district funded infrastructure to generate a “general benefit.” (CTCAC Report, p. 87). That phrase is not to be found in the law, though it may be descriptive of the Council’s intent in enacting the provision. The core legal issue that CTCAC touches upon is whether the foregoing language truly intends to exempt from development district funding any infrastructure that the Planning Board requires a single developer to provide.¹³ On its face, the provision can

¹³ We are aware that the Planning Board has suggested that a single developer district is inconsistent with § 14-3(g)(2) and that an amendment to that section may be necessary. (See March 22, 2001, correspondence from William H. Hussman to Douglas M. Duncan, p. 1; March 5, 2002, correspondence from Arthur Holmes, Jr. to Steven A. Silverman, p. 4). The Planning Board expresses the opinion that development districts are “not well-suited to single-developer projects” because development districts fund infrastructure that benefits “a larger community” and such infrastructure, because of its “scale or function,” cannot be provided by a single developer. (Correspondence dated May 18, 2007, from Royce Hanson to Marilyn Praisner, p. 5). The Planning Board further opines that it would be “inequitable” to require a single developer to “underwrite the full cost of a regional facility” (Correspondence dated May 18, 2007, from Royce Hanson to Marilyn Praisner, p. 5). The Planning Board’s policy arguments identify no legal impediment to a single-developer district. And the Planning Board’s opinion ignores Chapter 14’s legislative history which acknowledges the possibility of a single-developer district.

be read in that fashion. However, when read in that fashion, the exclusion subverts the purposes of the law. The entire Clarksburg Town Center development district was created at the behest of successive single developers. As a consequence, a single developer went before the Planning Board to obtain all of the site plan and preliminary plan approvals for the Town Center. Excluding from development district funding all of the infrastructure that the Planning Board required that individual developer to provide would eviscerate both Chapter 14 and the development district and would be inconsistent with the provision of Chapter 14 that allows for infrastructure required by the adequate public facilities ordinance (and thus the Planning Board) to be funded by the development district. As has been noted, Chapter 14 is to be "liberally construed" to effect its purposes. § 14-18(a). As has also been noted, we are charged with ascertaining the intent of the Council and harmonizing the various provisions of Chapter 14. *University System of Maryland v. The Baltimore Sun Company*, 381 Md. 79, 847 A.2d 427 (2004). To do so, we read the infrastructure improvement exclusion as applying to infrastructure that serves a limited portion of the development district, like, for example, certain internal or tertiary residential roads that serve no through traffic.

Our reading of the law is supported by the legislative history of Chapter 14. For example, Council staff explained that § 14-3(g)(1) "is intended to exclude such items as internal streets and abutting sidewalks" and that § 14-3(g)(2) "is intended to exclude, among other things, intersection improvements that are needed by only one landowner." (Memorandum dated December 6, 1993, from Michael Faden to Management and Fiscal Policy Committee, p. 1).¹⁴ The Planning Board and the County have apparently read the exclusion consistently with that legislative history (and more narrowly than CTCAC). As has been noted, those administrative interpretations are persuasive evidence of what the law intended.

5. The County Executive May Recommend Additional Infrastructure for Development District Financing

CTCAC claims that "§ 14-8 does not provide for the Executive to add infrastructure improvements to those proposed by the applicant or . . . the Planning Board." (See CTCAC Report, p. 87). While it is true that § 14-8 does not "provide for" the Executive to supplement the Planning Board list, the provision does not preclude the Executive from doing so either. Section 14-8 requires the Executive to submit a fiscal report, but does not prohibit the Executive from including recommendations concerning infrastructure in the report. Section 14-8(b) states

¹⁴ Council staff also explained that §§ 14-3(g)(1) and (2) "do not mean that a single-property development district could never be created; they only require that that the infrastructure items funded by that district must serve a wider area or population, such as part of a regional road or transit system, or a school or library which draws from a larger area." (Memorandum dated June 21, 1994, from Michael Faden to the County Council, p. 3).

that the Executive “should” make certain recommendations in the report; that does not mean that the Executive cannot make other recommendations. The Executive has, reasonably, interpreted Chapter 14 as allowing the Executive to recommend additions to the Planning Board’s infrastructure list. CTCAC again seeks to generate a conflict rather than harmonize the law with the County’s administrative practice. Also, the Executive’s recommendation is just that, a recommendation. In the exercise of its Charter-granted authority, the Executive is free to offer a recommendation. And the Council is just as free to reject it. Since the infrastructure recommendation is not binding, it generates no legal consequences that would aggrieve CTCAC.

6. Lack of Actual Notice to All Property Owners Does Not Render the Second Resolution Invalid

CTCAC claims that some or all of the Clarksburg Town Center property owners did not receive notice of the hearing on the Second Resolution. (See CTCAC report, p. 90). That accusation is seemingly refuted by documentation maintained by Council staff. It does appear that the Council advertised the hearing and that the property owners were notified by mail of the hearing. Nevertheless, even if the notice was imperfect, that procedural irregularity would not necessarily give rise to a viable claim by property owners. There is no evidence that property owners were prejudiced by any lack of notice and any claim arising from that alleged procedural defect, having occurred in 2002, is stale. See *Schaeffer v. Anne Arundel County*, 338 Md. 75, 656 A.2d 751 (1995).

7. The Creation of the Development District Need Not Comply with Chapter 20A

As has been discussed, bond counsel opined, in 1992, that the County did not have the authority under the Express Powers Act¹⁵ to issue the “special obligation” bonds that would fund improvements within the development district. Our office, and apparently the Maryland Attorney General, disagrees. The Express Powers Act confers upon the County the following powers:

(O) Assessments, Levy and Collection of Taxes

To levy and collect taxes for the organization, operation, maintenance of libraries, fire and ambulance services, and other municipal services and to authorize the purchase, sale, construction, maintenance, and operation of all real and personal property necessary or incidental to such services, **and to establish, modify, amend and abolish special taxing areas for any of the purposes enumerated in this article**, except that nothing herein contained shall be construed to permit the modification or abolition of existing special taxing areas performing municipal services, (other than furnishing fire protection or

¹⁵ Article 25A, § 5 of the Annotated Code of Maryland.

library service) and governed or administered by a citizen's committee or a commission elected or appointed independently of the county council.

(P) Bonds or Evidences of Indebtedness

(1) To provide for the borrowing of moneys on the faith and credit of the county and for the issuance of bonds or other evidences of indebtedness therefor in such sums, for such purposes, on such terms and payable at such times, and from such taxes or other sources as may have been or may be provided by or pursuant to local law, subject to any limitations imposed by the charter adopted by the county and to the following limitations:

- (i) The aggregate amount of bonds and other evidences of indebtedness outstanding at any one time shall not exceed 15 per centum upon the assessable basis of the county, except that (a) tax anticipation notes or other evidences of indebtedness having a maturity not in excess of 12 months, **(b) bonds or other evidences of indebtedness issued or guaranteed by the county payable primarily or exclusively from taxes levied in or on, or other revenues of, special taxing areas or districts heretofore or hereafter established by law,** and (c) bonds or other evidences of indebtedness issued for self-liquidating and other projects payable primarily or exclusively from the proceeds of assessments or charges for special benefits or services, shall not be subject to, or be included as bonds or evidences of indebtedness in computing or applying, said 15 per centum limitation.

(2) To provide for the issuance of bonds or other obligations payable as to principal and interest and premium, if any, solely from the funds or revenues received from or in connection with any system, project, or undertaking, all or part of which is financed from the proceeds of such bonds or obligations. Bonds or obligations issued under this paragraph do not constitute an indebtedness of the county or a pledge of its faith and credit or taxing power, may be sold at private (negotiated) sale, and are not subject to the limitations of paragraph (1) of this subsection, Article 31, §§ 10 and 11 of the Code, or any provision of the issuing county's charter. Nothing in this paragraph shall be construed as a limitation on the power of a county to issue revenue bonds under the provision of any other applicable law.

Article 25A, § 5(O) and (P) of the Annotated Code of Maryland (emphasis added).

We recognize that the courts generally construe such grants of power strictly against a governmental entity; the courts have stated, in pertinent part, that municipalities possess only those powers that are “granted in express words” or “necessarily or fairly implied in or incident

to the express powers granted.” *Rushe v. Hyattsville*, 116 Md. 122, 126, 81 A. 278, 279 (1911). However, we conclude that the power to issue “special obligation” bonds is expressly granted to the County by the above language (or, at a minimum, “fairly implied” by that language) particularly that which is highlighted.¹⁶ Section (O) permits the County to establish “special taxing areas” (which is what a development district is) for any of the purposes described in the Express Powers Act (which includes the construction of infrastructure). Even more to the point, section (P)(1) allows the County to issue bonds or other “evidences of indebtedness” payable from taxes or “other sources.” That description easily encompasses a development district. Further, section (P)(1)(i)(b) excludes from debt limitations “bonds . . . payable primarily or exclusively from taxes levied in or on, or other revenues of, special taxing areas or districts” The exclusion would be unnecessary if the County did not have the authority to issue the bonds contemplated by the development district.

In reviewing HB 895, the Attorney General noted that bond counsel did not consider all of the language in the Express Powers Act and acknowledged the possibility that Chapter 20A could be a “nullity” because it was attempting to grant to the County authority that the County already had. (See Correspondence dated May 20, 1994, from J. Joseph Curran to The Honorable William Donald Schaefer).¹⁷ In a subsequent opinion, citing to the Express Powers Act, the Attorney General recognized that a “charter county” has the “authority to issue general or limited obligation debt to finance road construction.” 89 Op. Att. Gen 107, 108 (2004) (emphasis added).

We conclude that Chapter 20A was unnecessary and, thus, as hypothetically described by the Attorney General, Chapter 20A is a nullity. The County has the authority to issue special obligation bonds under the Express Powers Act and is properly exercising that authority through Chapter 14.

In order to provide a comprehensive analysis, we will address CTCAC’s claim that Chapter 20A’s 80% requirement must have been met when the Second Resolution was approved by the Council.¹⁸ As has been discussed, Chapter 14 requires the 80% property owner approval

¹⁶ We are aware that municipalities and other chartered counties have felt a need to secure special bonding authority from the State. *Md. Ann. Code art. 23A, § 44A; art. 24, § 9-1301*. We may have reached a different conclusion regarding county bonding authority than whoever advised those municipalities and counties. Nevertheless, the quality of our analysis is not trumped by the quantity of those who may disagree.

¹⁷ The General Assembly is without power to enact a local law within the scope of a power granted to charter counties under the Express Powers Act (Art. 25A). *Art XI-A, § 4; Ritchmont Partnership v. Board of Supervisors of Elections*, 283 Md. 48 (1978).

¹⁸ The reference to the Chapter 20A “80% requirement” is a shorthand description of § 20A-

at the First Resolution, but not at the Second Resolution, unless the development district was initiated by the Council (which the Town Center was not). If the district is initiated by the Council, the 80% approval must be obtained from the property owners at the time that the Council takes up the Second Resolution. The requirement of 80% approval at the Second Resolution was added to Chapter 14 in 1996, some two years after Chapter 14 and Chapter 20A were enacted. (See County Bill No. 25-95). Thus, at the time that Chapter 20A was drafted and enacted, Chapter 14 applied an 80% approval requirement only at the First Resolution.

Chapter 20A does not specify when, in the development district timeline, its 80% approval requirement must be met. Chapter 20A simply states that the district may not be created unless 80% of the property owners approve. Arguably, in the Chapter 14 timeline, that approval could come at the First Resolution or the Second. But Chapter 14's progenitor contained no 80% approval requirement at the Second Resolution when Chapter 20A was enacted. We have been informally advised that the drafter of Chapter 20A was mindful of the bill that would become Chapter 14. And the County Council's staff provided a draft of Chapter 14 to the County's delegation in the General Assembly before HB 895 (which became Chapter 20A) was enacted. (See December 9, 1993, memorandum from Ben Bialek to the County Affairs Committee; Correspondence dated May 20, 1994, from J. Joseph Curran to The Honorable William Donald Schaefer). In practice, the County has interpreted Chapters 14 and 20A as applying the 80% requirement to the First Resolution when the development district process is initiated by a private entity. In light of the County's prior practice, the legislative history, and the plain language of Chapter 14, we resolve any ambiguity by applying Chapter 20A's 80% requirement to the First Resolution.

Please contact us if you would like to discuss our opinion.

cc: Timothy L. Firestine, Chief Administrative Officer
Kathleen Boucher, Senior Legislative Attorney
Michael Faden, Senior Legislative Attorney
Jennifer Barrett, Director, Department of Finance
Joseph Beach, Director, Office of Management and Budget
Thomas J. Dagley, Inspector General

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1(f)(2) which requires a development district to be approved by "80% of the owners of the real property located within the proposed development district" and by "the owners of at least 80% of the assessed valuation of the real property located within the proposed development district."



029827

OFFICE OF THE COUNTY EXECUTIVE
ROCKVILLE, MARYLAND 20850

Isiah Leggett
County Executive

MEMORANDUM

July 26, 2007

TO: Marilyn Praisner, President
Montgomery County Council

FROM: Isiah Leggett, County Executive 

SUBJECT: Clarksburg Development Districts

2007 JUL 26 PM 4: 51

RECEIVED
MONTGOMERY COUNTY
COUNCIL

After reviewing the conclusions provided by the County Attorney's Office on legal issues concerning the Clarksburg development districts, I am forwarding to the Council my recommendations on what I believe are the next appropriate steps in the development district process for Clarksburg. A copy of the County Attorney's opinion is attached.

In a report dated March 20, 2007 titled "Clarksburg Development Districts – The Illegitimate Transfer of Private Financial Obligations to the Public", the Clarksburg Town Center Advisory Committee (CTCAC) challenges the authority of the County to create and implement development districts. The CTCAC argues specifically that the Clarksburg Town Center development district was created in violation of state and county law and that the development district is being used, improperly, to fund the developer's infrastructure obligations. CTCAC further argues that the notice and approval provisions of county law were not met when the Clarksburg Town Center development district was created. CTCAC concludes that the County is legally precluded from moving forward with the development districts.

A separate group, the Clarksburg Development District Advisory Group (CDDAG), was created by the previous County Executive and charged with recommending next steps in the development districts process. CDDAG released its report to the public in March of this year. The CDDAG report raises many of the same legal issues that were discussed in the CTCAC report, as well as a number of policy issues.

After a careful review of the legal issues raised, in the context of the development district law and the legislative history, *the County Attorney has determined that the Clarksburg Town Center development district was lawfully created and that the developer may be reimbursed for the costs expended to provide infrastructure.* The

County Attorney has further determined that the residents of Clarksburg Town Center were properly notified of the creation of the development district. A more in-depth legal analysis is in the attached opinion.

I have been briefed by the County Attorney's Office on the results of its review of the legal issues raised regarding the Clarksburg Town Center Development District by CTCAC, and also by County staff on its review of the numerous policy issues that were raised by the CDDAG. Because the three development districts are in different stages in the approval process, I have reviewed a number of options regarding the Clarksburg Town Center Development District and also a number of options regarding the proposed Clarksburg Village and Greenway Village development districts and have reached the conclusions expressed below.

Conclusions

Given the conclusions of the County Attorney's Office, and these various options and considerations, we are faced with significant choices to make about how to proceed with the three existing or proposed development districts in Clarksburg. For all three districts, there are policy issues that are complex, but not insurmountable. I have heard from the community, and understand their concerns. I have reviewed a number of options regarding all three districts. All of the potential options available to me raise challenges and consequences of concern to the community and the developers. While this is a less than ideal situation, I believe we must now move forward.

Recommendations on Clarksburg Town Center

I am convinced that the Town Center is key to the viability and success of the overall community and only by moving forward with the Clarksburg Town Center Development District can we ensure that the expected overall comprehensive development will occur in the foreseeable future. Key considerations in this conclusion are the County's ability to move forward as soon as possible with the Clarksburg Library, which otherwise might have to move to the back of the queue if funded through the usual CIP process. This could severely hamper the County's ability to attract viable commercial interests to the town center area.

Some minor modifications to the list of infrastructure approved in the second resolution passed by the County Council may be in order after a subsequent review. I believe that this adjustment can be implemented by amending the second resolution.

Recommendations on Clarksburg and Skylark (Greenway) Village

For the Village districts, I am concerned that the option of recommending against the districts would have too many unacceptable outcomes in terms of desired infrastructure not being timely built. In addition we lack the necessary controls or limits associated with the private alternative of the developers themselves levying fees on homeowners. Instead, I believe we still have the opportunity to significantly shape the outcome of the review, taking into account concerns raised by the residents of those areas. I would like to explore a *down-sized* district that better responds to the legitimate concerns of the residents regarding the overall tax burden, but also provides sufficient financing for the developer-required infrastructure.

I have directed my staff to renew efforts to complete the Executive's Fiscal Report, after revisiting assumptions and other agency reviews to reflect the passage of time and the current status of development approvals and needed underlying infrastructure. Specifically, I have asked my staff to work with the developers to arrive at an infrastructure package that ensures the completion of unbuilt transportation infrastructure, as well as key amenities needed by the community such as the Clarksburg Library.

Achieving agreement with the developers on an updated infrastructure list to be funded will be challenging, but in order to ensure that we have a successful implementation of needed infrastructure, and an attractive, viable community of which we can all be proud, this is the most viable option.

Additional Recommendations

A key concern of the citizens has been the amount of awareness and disclosure to potential homebuyers of additional taxes required in the development districts. I have asked the Office of Consumer Protection with the support and advice of the Office of the County Attorney to work with the development community in Clarksburg to ensure that the builders are appropriately disclosing potential development district taxes, in compliance with the development district law and through voluntary compliance if necessary. Disclosure must occur at each step of the buying process, from sales brochure to purchase contract, and must not be a surprise at the closing table. I urge the County Council to join in this effort to pass any additional measures necessary to ensure that this goal is met.

Marilyn J. Praisner
July 26, 2007
Page 4

In summary, I believe that given the findings of the legal review, I recommend that we move forward with the development district infrastructure financings in Clarksburg, but at the same time fully explore modifications in response to the community concerns expressed. I look forward to working with you as we move forward in this process.

Attachment

cc: Timothy L. Firestine, CAO
Jennifer E. Barrett, Director, DOF
Joseph P. Beach, Director, OMB
Leon Rodriguez, County Attorney
Catherine Matthews, UpCounty Regional Services Center
Art Holmes, Director, DPWT
Eric Friedman, Director, Consumer Protection

Implementation of the Development District Act

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

Document Supplement



Kathleen Boucher, Senior Legislative Attorney
Montgomery County Council

Fact Finding Appendices
Sue Richards, Senior Legislative Analyst
Office of Legislative Oversight

September 11, 2007

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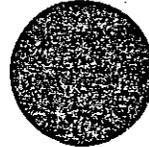
zoning

Amy Presley
President
Clarksburg Town Center Advisory Committee
PO Box 934
Clarksburg, MD 20871

March 20, 2007

Council President Marilyn Praisner and
County Councilmembers
Montgomery County Council
100 Maryland Avenue
Rockville, MD 20850

027276



Dear Council President and Councilmembers:

With this letter, the Clarksburg Town Center Advisory Committee, Inc. (CTCAC) is transmitting a copy of its report entitled, "Clarksburg Development Districts – The Illegitimate Transfer of Private Financial Obligations to the Public."

As you are aware, last year County Executive Doug Duncan initiated a Development District Advisory Committee to review and report on Development Districts in Clarksburg. CTCAC has long been interested in the subject of Development Districts and decided that it was necessary to conduct its own review and analysis in order to present to the Council and Executive its assessment and conclusions regarding the current state of Development Districts in Clarksburg.

The enclosed report represents a significant body of research and analysis by CTCAC, including in excess of 275 hours of legal review by the law firm of Knopf & Brown. The report comprehensively assesses relevant events from 1991, prior to enactment of Development District enabling legislation, through the present day.

As detailed in the report, the overall conclusion reached by CTCAC is that, if the Council proceeds to pass a second resolution for Clarksburg Skylark or Clarksburg Village districts, or passes the third resolution for issuance of bonds for Clarksburg Town Center development district, the Council will be taking illegal actions. Specifically, these actions would be

- inconsistent with the Planning Board's subdivision approvals under Chapters 50 & 59 of the County Code
- in conflict with the Board's exclusive jurisdiction over subdivisions under the Regional District Act, and
- inconsistent with both the State and County Development District enabling legislation (Mont. County Code Chs. 20A & 14)

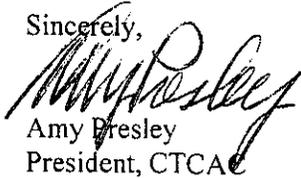
County Council
Page Two
March 20, 2007

The report concludes that moving forward with Clarksburg Development Districts would unlawfully transfer from developers to the public more than \$60 Million in private infrastructure improvement obligations. To remedy this situation, the following action must be taken *without delay*:

- Dissolution of current resolutions for Clarksburg Development Districts;
- Thorough, independent investigation and fact-finding to verify and publicly report on the failure of Development District implementation;
- Commitment by the County to ensuring enforcement of existing infrastructure improvement obligations as previously approved by the Planning Board; and
- Full review and amendment to, if not repeal of, Chapter 14.

I hope that this letter, along with our more detailed report will assist you in validating and acting on the concerns raised by CTCAC.

Sincerely,



Amy Presley
President, CTCAC

✓ cc: Michael Faden,
Senior Legislative Attorney

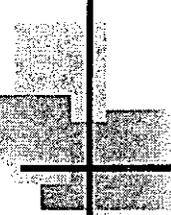


Clarksburg Development Districts -
The Illegitimate Transfer
of Private Financial Obligations to the Public

Report prepared by
Clarksburg Town Center Advisory Committee, Inc. (CTCAC)
to the Montgomery County Council and County Executive

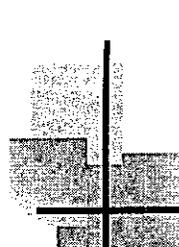
March 20, 2007

Legal review provided by Knopf & Brown



Situation Overview

- The County Council, with an interest in having development “pay for itself,” but apparently misguided by actions and information that have led to erroneous applications of law, is facilitating the illegitimate transfer of private financial obligations (in excess of \$60 Million) to the public.
- The vehicle for this transfer is the Development District – a special tax mechanism touted as a means of ensuring adequate public facilities and infrastructure improvements in a more timely and coordinated fashion, but being unlawfully applied to relieve developers of obligations legally imposed on them through the standard development approval process.
- The Development Districts in Clarksburg are dangerously close to accomplishing this transfer. (Development District resolutions are in varying stages of approval for Clarksburg Town Center, Clarksburg Village, and Clarksburg Skylark. Clarksburg Town Center is closest to realization, poised at the third and final Resolution for the issuance of bonds.)

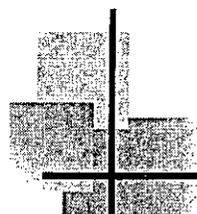


Situation Overview

- Passing legislation and issuing bonds in accordance with current Development District Resolutions constitutes illegal action* by Council resulting in transfer of the financial burden for required infrastructure improvements from Clarksburg Developers to the Clarksburg taxpayers.

**Inconsistent with the Planning Board's subdivision approvals under Chapter 50 of the County Code and in conflict with the Board's exclusive jurisdiction over subdivisions under the Regional District Act (Art. 28, §§7-111, 7-115, 7-116, Md. Code Ann.), and inconsistent with both the State and County Development District enabling legislation, Mont. County Code Chs. 20A & 14)*

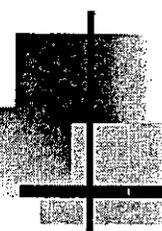
- To understand how the misapplication of Development District law constitutes an illegal transfer of obligations, it is critical to first recognize the requirements for development approval relative to infrastructure improvements and adequate public facilities under Chapters 50 and 59 of the County Code, independent of Development District legislation.
- It is also necessary to recognize the specific requirements for development approval in accordance with the Clarksburg Master Plan, as well as the legal requirements for formation of a Development District in accordance with Chapters 20A and 14 of the County Code.



Situation Overview

- Whether Development District financing of infrastructure is preferable to conventional methods is a public policy question distinct from appraisal of the *implementation* of the decision to allow development district financing. This report does *not* question the underlying policy decision, but focuses on implementation (although inadequate or improper implementation does raise the question as to whether the option should be available at all).
- CTCAC prepared this report in order to:
 - Document the current situation,
 - Outline the legal requirements for development approval in general and specific to Clarksburg,
 - Outline the legal requirements for creation of a Development District,
 - Document the legal insufficiencies of current Clarksburg Development District legislation,
 - Alert the County Council and County Executive to the illegitimacy of prior actions relative to the enactment of Chapter 14 and to the Clarksburg Development Districts specifically, and
 - Ensure dissolution of current Clarksburg Development District resolutions, and a commitment of support to enforcement of existing developer obligations.

Legal Requirements for Development Approval Under Chapter 50 of the County Code



Legal Requirements – Approval of Subdivisions (Chapter 50)

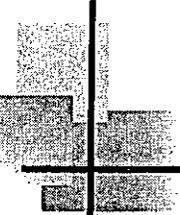
- §50-2 Purpose of chapter.

“The purpose of this chapter is to provide for:

- (a) The harmonious development of the district.
 - (b) Coordination of roads within the subdivisions with other existing, planned or platted roads or with other features of the district or with the commission’s general plan or with any road plan adopted or approved by the commission as part of the commission’s general plan.
 - (c) Adequate open spaces for traffic, recreation, light and air, by dedication, or otherwise.
 - (d) Reservation of lands for schools and other public buildings and for parks, playgrounds, and other public purposes.
 - (e) The conservation of or production of adequate transportation, water, drainage and sanitary facilities.
 - (h) The avoidance of such scattered or premature subdivision or development of land as would involve danger or injury to health, safety or welfare by reason of the lack of water supply, drainage, transportation or other public services or necessitate an excessive expenditure of public funds for the supply of such services.”
- *Note: It is the purpose of Chapter 50, not that of Development Districts, to achieve these goals.*

Legal Requirements – Approval of Subdivisions (Chapter 50)

- "§50-4 Administration of chapter.
 - This chapter shall be administered by the county planning board. (Mont. Co. Code 1965, §104-4.)
 - Editor's note – In Baker v. Montgomery County Council, 241 Md. 178, 215 A.2d 831 (1966), the court ruled that the word "shall" in the predecessor to the above section is mandatory."
- "§50-5. Effect of chapter on other ordinances, etc.
 - This chapter shall not be deemed to repeal or modify or otherwise affect in any manner any other ordinance, resolution, rule or regulation of the county; provided, that wherever this chapter imposes more stringent regulations, restrictions, limitations or requirements, the provisions of this chapter shall prevail. (Mont. Co. Code 1965, §104-5.)" (emphasis added)
- Under the Regional District Act, Art.28, §§7-111, 7-115 & 7-116, Md. Code Ann., responsibility for administration of requirements under Chapter 50 lies exclusively with the Planning Board.
- *Note: No other County legislation or resolution can supersede the Planning Board responsibilities. No other County legislation or resolution can serve to provide relief of "more stringent...requirements" imposed by the Planning Board through Chapter 50.*



Legal Requirements – Approval of Subdivisions (Chapter 50)

- §50-27 Water and sewer facilities.
 - “(a) General. Before approving a subdivision, the board shall consider the availability of water and sewage facilities or the lack thereof to the proposed subdivision. Determination shall be made upon the recommendation of the Washington Suburban Sanitary Commission and the department of the environmental protection, as applicable, for the proper type of water supply and sewage disposal to be required in each subdivision.”
 - “(b)(1) Required. All subdivisions shall be supplied with private or public central water and sewer facilities when conditions affecting the subject property result in one (1) of the following determinations:
 - ...b. Existing public water and sewer mains can be extended to serve the subdivision...”
 - “(b)(2) Conditions Relating to Installation of Utilities. ...Prior to recording of a final plat of subdivision to be served by public water or sewer or both, the subdivider shall produce evidence that he has complied with the conditions, if any, required for the installation of the utilities.”
- *Note: Provision of water and sewage facilities to a subdivision is mandatory. The Board determines (with input from WSSC and DEP) the type of supply required and imposes conditions for provision if necessary.*

Legal Requirements – Approval of Subdivisions (Chapter 50)

- §50-30 Public sites and adequate open spaces.
 - “(a) *Platting and dedication.* Whenever a tract to be subdivided includes a proposed site for a park, playground, school or other public use, in whole or in part, as shown on the adopted general plan for the district or on the applicable master plan, such space for public use or part thereof within the subject tract shall be shown by the developer on the subdivision plan after proper determination by the board and public agency involved in the acquisition and use of each such site as to its necessity. When such public sites and open space areas have not been acquired by donation, dedication, purchase, or condemnation, the site or area may be reserved as provided in section 50-31.”

- *Note: The Board determines when a public site or area is required for "dedication" by the applicant. Unless purchase or condemnation by the County or reservation of the site in accordance with §50-31 is specified at subdivision approval, providing the necessary site becomes an applicant's obligation as a condition of approval. It would be inconsistent with an approval based on this obligation for a developer to later be reimbursed for meeting this obligation.*

Legal Requirements – Approval of Subdivisions (Chapter 50)

- §50-30 Public sites and adequate open spaces.
 - “(b) *Local recreation.* The board shall require platting and dedication to public use of adequate spaces for recreation wherever it is reasonable to do so, taking into account the recommendations included in the applicable master plan and the circumstances existing in that portion of the district where such subdivision is located, taking into account also the size and character of such subdivision. Whenever the required recreational area involves more than a reasonable area of land, then the subdivider may be required to provide what is determined by the board to be his reasonable share and the balance of such required area shall be reserved for a period of three (3) years pending acquisition by the appropriate agency. “Reasonable share or area to be dedicated” shall mean an area of a size relevant to the recreational needs of the present and future inhabitants of the particular subdivision involved.”

- *Note: The Board determines what areas must be platted and dedicated as public use spaces for recreation and/or what “reasonable share or area” should be dedicated. These determinations are made based upon the master plan and other considerations. It would be inconsistent with an approval based on this obligation for a developer to later be reimbursed for meeting this obligation.*

Legal Requirements – Approval of Subdivisions (Chapter 50)

- §50-30 Public sites and adequate open spaces.
 - “(c) *Adequate open space for traffic, coordination of roads, utilities and storm drainage.* (1) Roads. In its consideration of the approval of a proposed subdivision, resubdivision or of a preliminary plan, the board shall require the dedication to public use of adequate open spaces for traffic and the coordination of roads within the subdivision with other existing, planned or platted roads, or with other features of the district, or with the commission's general plan or with any road plan adopted or approved by the commission as a part of the commission's general plan. Such dedication to public use shall be to the full extent of any and all rights-of-way for all roads, streets and highways, including widening of any existing street, determined to be necessary and proper and such as would be required by reason of maximum utilization and development of the subject property in its present zone classification or that higher use shown on any adopted or approved master plan of the applicable jurisdiction.”
- *Note: Board determinations on dedication of roads and widening of existing streets become an applicant’s obligation as a condition of approval. It would be inconsistent with an approval based on these obligations for a developer to later be reimbursed for meeting these obligations.*

Legal Requirements – Approval of Subdivisions (Chapter 50)

- §50-30 Public sites and adequate open spaces.
 - “(c) *Adequate open space for traffic, coordination of roads, utilities and storm drainage.* (3) Rights-of-Way and Easements Other Than Roads. The Board may require dedication to public use of rights-of-way or platting of easements of land necessary for such public uses as pedestrian paths, equestrian trails, bikeways, water and sanitary sewer, and storm drainage facilities. The Board must approve the extent, location, and width of each pedestrian path, equestrian trail, and bikeway right-of-way after reviewing the applicable master plan. The extent and width of water and sanitary sewer rights-of-way must be determined by the Washington Suburban Sanitary Commission in its jurisdiction. The extent and width of drainage rights-of-way must be determined by the Washington Suburban Sanitary Commission and the Department of Permitting Services after receipt of drainage studies prepared by the applicant’s engineer.”

- *Note: Board determinations relative to dedication of land for pedestrian paths, bikeways, etc., along with determinations made by WSSC /DPS and incorporated by the Board, become an applicant’s obligation as a condition of approval. It would be inconsistent with an approval based on these obligations for a developer to later be reimbursed for meeting these obligations.*

Legal Requirements – Approval of Subdivisions (Chapter 50)

- §50-35 Preliminary subdivision plans-Approval procedure.
 - “(k) *Adequate public facilities.* The Planning Board must not approve a preliminary plan of subdivision unless the Board finds that public facilities will be adequate to support and service the area of the proposed subdivision. Public facilities and services to be examined for adequacy include roads and public transportation facilities, sewerage and water service, schools, police stations, firehouses, and health clinics.
 - (1) Periodically the County Council must establish by resolution, after public hearing, guidelines to determine the adequacy of public facilities and services. A growth policy periodically approved by the County Council may serve this purpose if it contains those guidelines...
 - (4) The Board must consider the recommendations of the Executive and other agencies in determining the adequacy of public facilities and services in accordance with the growth policy or other applicable guidelines.”
- *Note: Preliminary plan approvals are subject to the Board findings and conditions relative to ensuring adequate public facilities. Growth policy and master plan guidelines must also be factored in to the plan approval.*

Legal Requirements – Approval of Subdivisions (Chapter 50)

- §50-35 Preliminary subdivision plans-Approval procedure.
 - “(l) *Relation to Master Plan.* In determining the acceptability of a preliminary plan submitted under this Chapter, the Planning Board must consider the applicable master plan, sector plan, or urban renewal plan. A preliminary plan must substantially conform to the applicable master plan, sector plan, or urban renewal plan, including maps and text, unless the Planning Board finds that events have occurred to render the relevant master plan, sector plan, or urban renewal plan recommendation no longer appropriate.”

- *Note: In order to approve a preliminary plan that does not substantially conform to the applicable master plan text (i.e. requirement or recommendation), the Board would have to make a finding that such recommendation is no longer appropriate.*

Legal Requirements for Development Approval Under Chapter 59 of the County Code (Optional Method of Development)

Legal Requirements – Approval of RMX2 Optional Method (Chapter 59)

- §59-C-10.3 Optional Method of Development Regulations.
 - "59-C-10.3.1. The optional method.

This 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 approved and adopted master plans.
 - Approval of this optional method of development is dependent upon the provision of certain public facilities and amenities by the developer. The requirement for public facilities and amenities is essential to support the mixture of uses at the increased densities of development allowed in this zone."

- *Note: Higher densities under this zone category are awarded in exchange for provision of certain public facilities and amenities. Approval is conditioned upon, and "**dependent**" upon developer provision of facilities and amenities as determined by the Planning Board (or by other agencies – e.g. DPWT, WSSC) and incorporated into the conditions of approval. To relieve a developer of any of these obligations post-approval nullifies the intent of the optional method of development, subverting both the zoning and subdivision ordinances and the Planning Board's authority.*

Legal Requirements – Approval of RMX2 Optional Method (Chapter 59)

- §59-D-2.11 Project plan required.
 - “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. The project plan shall be such as would result in the satisfaction of the stated purposes of the zone applied for, and the fact that a project complies with all of the stated general regulations, development standards or other specific requirements of the zone shall not, by itself, be deemed to create a presumption that the proposed development would be desirable and shall not be sufficient to require the approval of the project plan or the granting of the application.”

- *Note: The Project Plan is the guidepost for subsequent approval of the Preliminary Plan and Site Plan. An applicant would understand at the time of Project Plan submission that infrastructure obligations (public facilities and amenities) will be imposed in exchange for added density. Preliminary Plan and Site Plans incorporate these obligations and are binding upon the applicant.*

Legal Requirements – Approval of RMX2 Optional Method (Chapter 59)

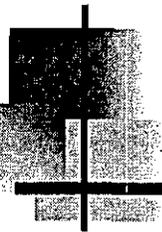
- §59-D-2.12 Contents of project plan.
 - The project plan must clearly indicate how the proposed development meets the standards and purposes of the applicable zone. It must include the following, in addition to any other information which the applicant considers necessary to support the application:
 - ... “(d) (5) The location of land to be dedicated to public use.” ...
- *Note: Certain dedications of land are invariably required of the developer for approval under RMX zones. (See also 50-30 (a) & (b)). It would be inconsistent with an approval based on this obligation for a developer to later be reimbursed for meeting this obligation.*

Legal Requirements – Approval of RMX2 Optional Method (Chapter 59)

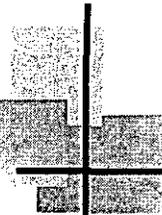
- §59-D-2.12 Contents of project plan:
 - “(f) A statement and analysis demonstrating the manner in which the development would result in a more efficient and desirable development than could be accomplished by the use of the standard method of development.”
 - “(h) The relationship, if any, of the development program to the county's capital improvements program.”

- *Notes: “(f)” indicates that an application for development under the optional method must produce a result superior to that which could be achieved under standard density. If benefits proposed by a developer or imposed by the Planning Board are subsequently reduced or eliminated, the foundation for an award of extra density is negated.*

- *“(h)” signifies the expectation that developer contributions are separate and independent from the County’s obligations under the CIP. The County is expected to coordinate the timing of County funding for CIP improvements with the timetable for master plan staging and developer fulfillment of obligations under the approved plans.*



Clarksburg Master Plan – Background



Clarksburg Master Plan Background

- At planning and draft stage of the Clarksburg Master Plan (early 1994), County Council (PHED Committee), Planning Board, Residents and Developers discussed concerns that the County could not finance the total infrastructure required for buildout of Clarksburg (Clarksburg was in moratorium).
- Estimates of the shortfall (based on OPI Study, Planning Board and Council estimates) were \$75M-\$126M.
- *Increased* developer participation was acknowledged as a prerequisite for developing in Clarksburg.
- Development Districts and alternative methods of financing (including land dedication, developer contributions in-kind or in-cash, construction excise taxes, development district payments, and other development fees) were considered as appropriate vehicles.



Clarksburg Master Plan Background

- The need for staging of development according to timing of funds available was a key issue. This drove the PHED Committee to request the Planning Board to develop Staging Options.
- Staging Options were developed and presented by the Planning Board to the PHED Committee. All options presented relied on both “Staging Triggers” and “Implementing Mechanisms” being met prior to development.
- Specific Staging Triggers and Implementing Mechanisms were incorporated into the Implementation Strategies of the adopted Master Plan.

Basis for Development Staging Requirements and Developer Financing/Alternative Financing

- PHED Committee Memorandum (April 19, 1994) – Clarksburg Master Plan and Hyattstown Special Study Area – Public Facilities
 - Recognition of shortfall in funding needed to support development vs. likely revenues to be generated: \$75M shortfall or considerably higher if CET revenues not available (p. 2)
 - Acknowledgement that alternative forms of financing were neither imminent nor guaranteed, hence the need for staging considerations and the request to Planning Department to prepare staging options (p. 2)
 - Summary of Planning Board worksession on staging (April 18, 1994) -- four staging options presented, and common requirement for all four options: "trigger" for development = "having one or more infrastructure financing mechanisms in place" (p. 3)
 - Statement that "Staff supports Staging Option 3 with modifications recommended by the Planning Board" (p. 4)
 - Supporting attachments to Memorandum: Planning Board recommendation letter (April 19, 1994) and Clarksburg Master Plan Staging Options Report (April 1994)

Basis for Development Staging Requirements and Developer Financing/Alternative Financing

- Planning Board Recommendation Letter (April 19, 1994) from William Hussman, Chairman Planning Board to William Hanna, Chairman PHED Committee
 - Planning Board recommends "Staging Option 3: East Side Priority, with modifications (p. 1)
 - Mentions OPI representatives included in study (p. 1)*
**Note: OPI documents include Fiscal Impact Analysis Summary (May 1993) and Fiscal Impact Analysis (July 1993)*

- Clarksburg Master Plan Staging Options Report (April 1994)
 - Review of Planning Board's Draft Master Plan staging options (two-prong staging strategy to respond to fiscal uncertainties) (p. 1)
 - Discussion regarding uncertainty as to development districts as a financing mechanism and the need for development in Clarksburg to be *conditioned* on the ability of private developers to fund a significant portion of infrastructure improvements (pp. 3-4)
 - Acknowledgement that County, State, and Federal revenues alone will not be able to fund the public infrastructure needed (p. 9)
 - Acknowledgement that all four staging options presume one or more non-traditional financing mechanisms need to be implemented *before* any private development occurs (p. 9)

Basis for Development Staging Requirements and Developer Financing/Alternative Financing

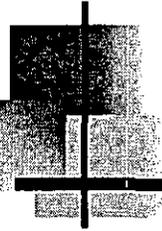
- Clarksburg Master Plan Staging Options Report (April 1994)
 - Recognition of important role APFO and AGP will play in determining amount and timing of growth that can be accommodated; need for one or more AGP policy areas for Clarksburg at earliest date possible (p. 9)
Note: Clarksburg Policy Area subsequently created in 1995
 - Staging principles reinforce fiscal requirements (p. 25):
 - "Ensure that the timing and sequence of private development is responsive to the County's ability to fund associated capital improvement projects."
 - "Endorse the creation of mechanisms which would offer the possibility for private developers to join in public-private ventures to fund essential community facilities."
 - "Include funding of school construction...and other public facilities as elements of public-private ventures..."
 - Supporting attachment to Report (Circle 45): Memorandum (November 16, 1993) from William Hanna, Chair PHED Committee to Robert Marriott, Director Planning Department
 - Requests that staging plan reflect that owners of property can proceed without delay if the owner is ready to "develop and ready to fund the necessary infrastructure to proceed."

Clarksburg Town Center Developer's View of Development Districts vs. Alternative Financing

Sumner Development Company letter, Steven M. Klebanoff, President to William Hanna, County Council President (May 16, 1994)

- Klebanoff expresses disagreement with draft Master Plan language concerning development districts, noting its limiting effect relative to staging, and reminding Council that "development districts were only one of any number of ways the private sector could choose to help pay the infrastructure shortfall...even the private sector simply writing a check!" (pp. 2-3)
- Klebanoff requests changes: "The language pertaining to private sector contributions to infrastructure costs must be made broader. It was not the intention of the Council that a development district be the only possible funding mechanism. The current wording implies that it was and is unnecessarily limiting." (p. 3)
- *Notes: The adopted Master Plan staging provides for "alternative methods of financing" in lieu of development districts.*
- *CTCAC has not reviewed the file record evidencing the evolution of the applicable Master Plan language. The comments from Klebanoff are assumed to have initiated the changes to the Master Plan Staging language.*

Legal Requirements for Development Approval Under the Clarksburg Master Plan



Master Plan Legal Requirements - Staging Triggers and Implementing Mechanisms

- Implementation Strategies – Staging Recommendations – The Need for Staging (p. 186)
 - County revenues to be “supplemented by developer funding.”
 - Plan “supports staging strategies that are responsive to fiscal concerns and recommends development that is keyed to revenue mechanisms being in place or imminent.”

- Implementation Strategies – Staging Recommendations – Staging Principles – Principle #2 (p. 188)
 - Notes OPI analysis/funding shortfall of \$75 million to \$100 million and states that “In light of this finding, it is clear that staged development should be *conditioned* on the ability of private developers to fund a significant portion of the infrastructure improvements called for in the Plan or the availability of other new sources of revenue.” (emphasis added)
 - Notes that “Private sources of funds could include land dedication, developer contributions (in-kind or in-cash), construction excise taxes, development district payments, or other development fees.”

Master Plan Legal Requirements - Staging Triggers and Implementing Mechanisms

■ Staging Principles – Principle #3 (p. 189)

- “Land development should be coordinated with the provision of major capital improvements, such as the sewerage system and the transportation network.”
- “Staging policies should be developed to coordinate the timing of land development in Clarksburg with the provision of such public improvements as roads, sewerage facilities, schools, parks, libraries, and police and fire stations.”

■ Staging Sequence for Private Development (pp. 192-93)

- “Plan recommends that four Master Plan stages guide the sequencing of public facilities and private development in Clarksburg.”
- “Each stage will be initiated or ‘triggered’ once all of the triggers described in Tables 18 through 21 have been met for that stage.” . . .
“With the exception of stage 1, all stages require State and County enabling legislation for development districts or that alternative financing mechanisms *are in place.*” (emphasis added)
- “After a stage has been triggered, individual developments within that stage can proceed once public agencies and the developer have complied with *all* of that stage’s implementing mechanisms...” (emphasis added)

Master Plan Legal Requirements – Table 19 (P. 105)

- Description
 - “Stage 2 includes those portions of the Town Center District that do not drain into the Ten Mile Creek watershed.”
- Staging Triggers¹
 - “1) Either (a) State and County enabling legislation for development districts, or (b) alternative infrastructure financing mechanisms are in place.
 - Footnote 1: “All staging triggers must be met to initiate this stage of development.”
- Implementing Mechanisms²
 - “2) Properties in this stage are subject to AGP and APFO approval by the Planning Board.”
 - “3) One or more development districts (or alternative financing mechanisms) that can provide public facilities in accordance with the APFO and additional local determinations by the County Council are *implemented*.” (emphasis added)
 - Footnote 2: “Individual developments within this stage can proceed once public agencies and the developer have complied with all of the implementing mechanisms.”

Master Plan Legal Requirements – Development District Application

- Development districts “are not intended as a financing mechanism for infrastructure improvements that are considered the responsibility of a single developer under the Planning Board’s site plan and adequate facilities requirements.” (p. 204)

Summary of Legal Implications of Master Plan Staging Triggers and Implementing Mechanisms

- *No development can proceed without "public agencies and the developer" first complying with "all of the stage's implementing mechanisms."*
 - *Either a development district or alternative method of financing must be implemented in order for the Planning Board to approve a Preliminary Plan.*
 - *The Planning Board must find that development meets APFO and must condition approvals on provision of infrastructure and public facilities as required.*
- *A Development District cannot at any time be used to relieve a Clarksburg developer of a private infrastructure obligation imposed as a subdivision approval condition by the Planning Board.*
- *No Clarksburg developer can proceed to develop and later lawfully apply for development district funding to cover infrastructure obligations imposed by the Planning Board at the preliminary plan stage.*
- *If the Planning Board approves a preliminary plan in Clarksburg with developer infrastructure obligations but without a development district implemented at the time, it is implicit that approval is based on an in-place alternative financing method (i.e., developer obligation).*

Developer Counsel Perspective and Confirmation of Master Plan Legal Requirements

- Letter from Robert Harris, Esquire, Wilkes, Artis, Hedrick & Lane to William Hussmann, Planning Board Chairman (September 21, 1995)
 - As representative of developer clients for Clarksburg's east side (including Kingstead Manor Joint Venture, DiMaio Joint Venture and Clarksburg Village Partnership), Mr. Harris discusses his clients' acceptance of "the Master Plan's imposition of a private contribution requirement to help fund the designated package of roads." (p. 1)
 - In the effort to ensure that his clients do not wind up shouldering a disproportionate share of the roadway costs, Mr. Harris notes that "the five, east-side property owners want to ensure that proper steps are taken to expeditiously establish an equitable funding mechanism for the private share of roadway costs...based upon a pro rata share of overall development and trip generation.." (pp. 1-2)
 - He notes that "This, in turn, requires that the Town Center Preliminary Plan contain conditions which impose these obligations in accordance with the Master Plan." (p. 2)

Developer Counsel Perspective and Confirmation of Master Plan Legal Requirements

- Letter from Robert Harris (continued)
 - Quoting from the Master Plan requirements, Mr. Harris notes that: "The Master Plan contains two infrastructure funding conditions, both of which must be satisfied before development can proceed. First a stage must be 'triggered' or, in other words, open for consideration of development applications...Beyond that 'trigger', however, as specified at pages 195 and 197 of the Master Plan, individual development within such stage can proceed only after compliance with the designated funding mechanism. More specifically, it requires implementation of an alternative financing mechanism, not just the legislative authorization to establish one." (p.2)(emphasis in original)

Legal Interpretation of Master Plan Staging Triggers and Implementing Mechanisms

- Letter from Robert Harris (continued)
 - “Application of Condition at Time of Preliminary Plan Approval – Subdivision regulations require consideration of Master Plan provisions at the time of approval of a preliminary plan. Specifically, 50-35(1), states that:

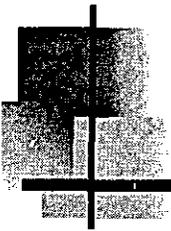
In determining the acceptability of the preliminary plan submitted under the provisions of this chapter, the Planning Board must consider the applicable master plan. A preliminary plan must substantially conform to the applicable master plan, including maps and text, unless the Planning Board finds that events have occurred to render the relevant master plan recommendation no longer appropriate.

Thus, absent a Planning Board finding that the two-fold Clarksburg Master Plan requirements for private sector infrastructure funding are ‘no longer appropriate,’ these mandates must be substantially met before any preliminary plan of subdivision can be approved.” (p. 4)

Legal Interpretation of Master Plan Staging Triggers and Implementing Mechanisms

- Letter from Robert Harris (continued)
 - Mr. Harris also notes that the legal viability of the connection between the Master Plan and subdivision processes has been upheld by the Court of Appeals of Maryland, citing "Coffey v. M-NCPPC, 293 Md. 24, 441 A.2d 1041 (1982)" and "Board of County Commissioners of Cecil County v. Gaster, 285 Md. 223, 401 A.2d 666 (1979)." Further, he states that in Coffey the "court noted that, where the County's subdivision regulations required compliance with a Master Plan, the Master Plan was entitled to the same obedience as any other legislative enactment, and was not merely a guide or set of recommendations." (p. 4)

- *Note: This letter was included in the Staff Report submitted to the Planning Board for Clarksburg Town Center preliminary plan review, and was subsequently incorporated as an attachment to the written Opinion.*



Development Districts – Background

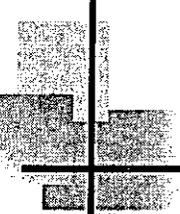
Development Districts – Rationale

- In 1991, Council staff worked together with Linowes and Blocher to develop draft Development District legislation.
- Various letters were submitted to the MFP Committee containing discussion of issues surrounding proposed legislation for development districts
- Letter (with 11-page issues memorandum attachment) from Neil A. Lindberg, Linowes and Blocher to Senior Legislative Attorney, Montgomery County Council (November 25, 1991)
 - Notes that Germantown Road Club was ready and willing to develop public infrastructure (such as roads exterior to the development), but that financing for such improvements by conventional means was at the time unavailable.
 - Outlines advantages of proceeding with a development district:
 - "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."
 - Repayment will be "in small annual installments, of the costs of the infrastructure improvements over the life of an income producing asset, while road clubs and impact fees require up-front expenditure of significant sums."
 - Development districts "will facilitate desired growth in Montgomery County while allocating costs to only the immediate benefitted [sic.] properties, not to the entire County."

Functional Intent of Development Districts

CTCAC analysis upon review of all MFP Worksession memoranda and other pre-enactment material:

- *Development district to be identified (as to geographic area and infrastructure improvements) **before** development takes place (at or before preliminary plan).*
- *Development district approved by public authority, after evaluation for its adequacy in alleviating shortfall in public facilities and infrastructure.*
- *Bonds to be issued and funds made available for public infrastructure (in Montgomery County, all or part of the APF requirements related to the project).*
- *Taxing of development district land begins, to pay debt service on bonds. Those taxed are the owners of the development district land, which at the outset may be only a single developer or collective developers rather than homeowners.*
- *Developer submits development application for approval by planning/zoning authority, which identifies developer infrastructure responsibilities and coordinates their installation with public infrastructure responsibilities of the development district.*
- *Following approval, infrastructure is constructed. Developer constructs infrastructure assigned to him; bond issuing authority uses competitive procurement process to construct infrastructure assigned to the development district. This may or may not result in construction by the developer.*



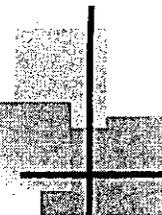
Functionality of Development Districts if Implemented *After* Development Approval

- *Functions to reimburse developer (using proceeds from issuing development district bonds) for infrastructure improvements already required of the developer through the development approval process and potentially already installed by the developer.*
- *Fails to fulfill the intent of development districts as originally projected:*
 - *There is no early growth facilitation (developer was able to get the job done without up-front public funds)*
 - *Developer gets all his money back in one lump-sum and pays none or little of the development district taxes (which by then are the responsibility of the homeowners)*
 - *No competitive procurement of public facilities occurs; public authority is stuck with developer assertions of cost*
 - *No advance determination by planning/zoning authority of infrastructure cost allocation between the taxed residents and the developer*
 - *Actual allocation made after-the-fact by bond issuing authority, with strong likelihood of little or no meaningful guidance from planning/zoning authority*
 - *Result is strong risk that developer will be repaid for infrastructure that should have been exclusively the developer's financial responsibility under original approvals*

Legal Requirements for Establishing a Development District Under Chapter 20A (State Law)

Legal Requirements – Development Districts (Chapter 20A)

- §20A-1 (f)
 - (1) "Before the creation of a new development district established to finance special obligation debt under this section, the County Council shall provide public notice of the creation of the proposed district by advertisement in at least two newspapers of general circulation in the County and at least one public hearing."
 - (2) "A new development district may not be created to finance special obligation debt under this section unless the proposed action is approved by:
 - (i) 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
 - (ii) the owners of at least 80% of the assessed valuation of the real property located within the proposed development district."
- *Note: The requirement is for the "proposed action" i.e., development district creation, to be "approved" by 80% of owners of real property and 80% of owners of assessed valuation of real property.*



Legal Requirements – Development Districts (Chapter 20A)

- §20A-1 (k)
 - “This section does not prohibit the County or the Montgomery County Planning Board from obtaining from developers appropriate infrastructure contributions to support proposed development as allowed by law in addition to those financed under this section.”

- *Note: Confirmation that pre-existing requirements for developers to make appropriate infrastructure contributions to support proposed development as allowed by law are not intended to be displaced by Ch. 20A.*

Legal Requirements for Establishing a Development District Under Chapter 14 (County Code)

Legal Requirements – Development Districts (Chapter 14)

- §14-3 Definitions.
 - (g) "...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."
- *Notes: All references to "infrastructure improvement" within Chapter 14 must be read to explicitly exclude improvements which either primarily serve one development or subdivision or are the responsibility of a single developer as conditioned by the Planning Board to meet adequate public facilities requirements. (Page 204 of the Clarksburg Master Plan also applies this principle to Clarksburg.)*
- *These exclusions were not contained in the original draft development district legislation introduced on December 1, 1992; they were added before Chapter 14 was enacted on June 21, 1994, apparently in response to concerns raised by the Planning Board and reiterated by the MFP Committee Chair at the time.*

Legal Requirements – Development Districts (Chapter 14)

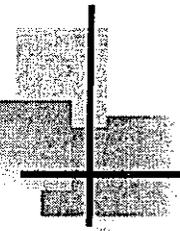
- §14-6 First Council Resolution.
 - “(a) If a petition signed by at least 80 percent of the owners of real property and the owners of at least 80 percent in value of the real property, as shown by the latest assessment rolls, located in a proposed development district, is filed with the County Council, the Council must hold a public hearing after at least 15 days notice in two newspapers of general circulation in the County. The petition must list the maximum number of housing units and the maximum nonresidential space that the signing property owners intend to build in the district.”
 - “(b) Alternatively, the County Council, on request of the County Executive or on its own motion, may hold a public hearing after giving notice as required in subsection (a). The notice must:
 - (1) specify the proposed 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.”
 - “(c) After holding a hearing under subsection (a), the Council, by resolution approved by the Executive, may declare its intent to establish a development district consisting of a specified geographic area. In the resolution the Council must explain why intensive development of and public investment in that area during the term of the district will benefit the public interest.”
- *Note: 80% approval requirement is not repeated at second resolution stage for developer initiated petitions.*

Legal Requirements – Development Districts (Chapter 14)

- §14-7 Planning Board Review...
 - “(a) After the Council has adopted a resolution under Section 14-6, one or more owners of land located in the proposed district may submit an application for provisional adequate public facilities approval, covering the entire proposed district, 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 action necessary under Section 50-35(k);
 - (2) identify any infrastructure improvement necessary to satisfy the Growth Policy's adequate public facilities requirements for a development district; and
 - (3) estimate the cost to provide each such improvement.”
 - “(b) Within a reasonable time, the Board must jointly review for compliance with Section 50-35(k) and the Growth Policy all developments located in the proposed district as if they were one development. In that review, the Board must apply all otherwise applicable standards and procedures. The Board may conditionally approve an application if it finds that the proposed district will meet all requirements under Section 50-35(k) and any added requirements which apply to a district under the Growth Policy...”
- *Review for provisional approval, and actions under §14-7(b), would be superfluous if subdivision approval had already been obtained under Chapter 50. This makes sense only if the expectation is for development district formation to **precede** not follow preliminary plan approval.*

Legal Requirements – Development Districts (Chapter 14)

- §14-8 Executive Fiscal Report
 - “(a) After the Planning Board has acted under Section 14-7(b) but before the Council holds a public hearing under Section 14-9(a)...the County Executive... must submit a report estimating:
 - (1) the cost of each infrastructure improvement listed by the Planning Board under Section 14-7(c); and
 - (2) (A) the amount of revenue needed to cover the district's share of all infrastructure improvements funded, fully or partly, by a district; and
 - (B) the estimated tax rate for each form of taxation available to the district that would produce the necessary revenue.
 - The Executive should compare these estimates to those submitted by the applicants under Section 14-7(a).”
 - “(b) In this report the Executive should also recommend whether to create a district, its boundaries if one is created, which infrastructure improvements listed by the Planning Board the district should fully or partly fund, and alternative financing or revenue-raising measures. (1994 L.M.C., ch. 12, § 1.)”
- *Notes: Board review is a mandatory prerequisite for Executive action (yet, as noted in §14-7, anticipated prior to subdivision approval) – further evidence that district creation is intended to precede subdivision approvals.*
- *Executive recommendation on creation of a district must necessarily include legal judgment as to its validity (even if not explicitly stated in the report).*

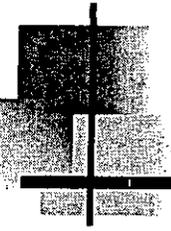


Legal Requirements – Development Districts (Chapter 14)

- §14-9 Second Council Resolution.
 - (b) (1) "The Council must give notice of the hearing by:
 - (A) advertisement in at least two newspapers of general circulation in the County at least 21 days before the hearing; and
 - (B) notifying by mail the record owner of each property located in the proposed district at the address shown on the latest tax assessment roll."
 - (b) (2) "Each notice mailed under this subsection must include:
 - (A) a copy of the proposed resolution to establish a district; and
 - (B) an estimated rate for any tax, assessment, fee or charge proposed to fund infrastructure improvements for the district."
- *Note: See also Chapter 20A – Special Obligation Debt as the basis for these requirements (§20A-1 (f) (1)).*

Legal Requirements – Development Districts (Chapter 14)

- §14-9 Second Council Resolution.
 - (c) “If the Council intends to use special obligation debt to finance the district, and the district was initiated by the Council under subsection 14-6(b), before the Council adopts a resolution under this Section the Council must receive a petition signed by at least 80 percent of the owners of real property and the owners of at least 80 percent in value of the real property, as shown on the latest assessment rolls, located in the proposed district.”
 - (d) “After the public hearing, the Council by resolution approved by the County Executive may create a development district.”...
- *Note: By limiting the 80% approval requirement at the second petition stage to Council-initiated petitions, §14-9 (c) does not fulfill requirements of §20A-1 (f) (2) whenever there has been a material change in ownership between resolutions. In addition, meaningful approval requires knowledge of the proposed action, which is not fully determined until the steps in both §14-7 and §14-8 have been completed—after the first petition.*

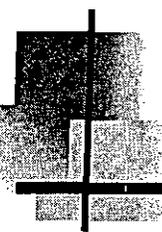


Review and Analysis of Events

Chronology of Events – Clarksburg Town Center

For the purposes of this report, CTCAC references Clarksburg Town Center subdivision approvals and related developer obligations in view of the Town Center development district creation; However, CTCAC has also reviewed Clarksburg Village and Clarksburg Skylark and determined that problems with district creation and the illegitimate transfer of obligations are the same with all three districts.

- Preliminary Plan – September 28, 1995
- Site Plan Phase I – January 22, 1998
- Site Plan Enforcement Agreement – March 18, 1999
- Development District Petition by Developer – July 5, 2000
- Development District First Resolution by Council – September 26, 2000
- Developer Application to Planning Board (§14-7) – November 14, 2000
- Planning Board Recommendation to Council – March 22, 2001
- Site Plan Phase II – May 9, 2002
- Executive Fiscal Report (§14-8) – October 17, 2002
- Development District Second Resolution by Council – March 4, 2003
- Recent Development District Activity (2005)



Clarksburg Town Center Preliminary Plan Approval – Developer Obligations

Clarksburg Town Center – Preliminary Plan Approval

- Staff Report (September 22, 1995) specifically addresses staging and implementing mechanism requirements, and recommendations for developer share of infrastructure improvements
 - Pages 3-4 discuss the background and Planning Board's acknowledgement at Project Plan that "one or more development districts or alternative financing mechanisms that can provide public facilities in accordance with the APFO and additional local determinations by the County Council" had not yet been met but would be addressed at Preliminary Plan approval.
 - As part of the Project Plan discussion, Board had expressed "strong concern that there is a need for alternative infrastructure financing mechanisms to assure that the full Master Plan road network is provided in a timely fashion and is financed in as equitable a manner as possible...the Board members concluded that additional work was necessary to determine the Clarksburg Town Center's 'fair share' of master planned infrastructure" (pp. 4-5)
 - "The different scenarios studied by staff assumed that developers would construct all internal two lane streets located within their properties." (p. 6)
 - Staff concluded that, in addition to other requirements, "the applicant's agreement to upgrade and to reconstruct portions of Stringtown Road is recognition that they must share in the costs of the master plan infrastructure." (p.7)

Clarksburg Town Center – Preliminary Plan Approval

- Staff Report (September 22, 1995) recommendations (continued)
 - For proposed road A-305 (Piedmont Road/now Snowden Farm Parkway): "Staff recommends that the applicant construct this two-lane arterial through the limits of the subject property. This is in accordance with the general requirement that developers construct roads that extend through their site. The applicant has agreed to construct A-305, as recommended by staff." (p. 7)
 - The phasing "differs from the phasing included in the project plan opinion because the addition of Stringtown Road must be incorporated into the road program." (p. 7) (Staff response to Board's issues at Project Plan – i.e. APFO in light of no development districts in place; answer was to assign Stringtown Road improvements to developer along with other conditions such as A-305 and greenway dedication, etc.).
 - Staff incorporates Project Plan Opinion (9-94004 approved May 11, 1995) (Circle 11-21)
 - Staff report incorporates Master Plan staging requirements, Table 19. (Circle 22)
 - Staff report incorporates WSSC letter from Dominic Tiburzi, Division Manager to David Lake, Manager DEP (May 26, 1995):
 - "As you know, the Clarksburg Master Plan contains a staging sequence to provide for the orderly and fiscally responsible development of public facilities to service the Clarksburg area. These stages can be initiated once all of a number of 'triggers' or conditions are met." (p. 1)
 - "There will also be additional dependencies such as... the 20-inch water line that feeds the area (W-45.13)." (p. 2)

Clarksburg Town Center – Preliminary Plan Approval

- Staff report incorporates Transportation Planning Division Memorandum from Ki Kim, Transportation Planner to Joe Davis, Coordinator Development Review Division (September 22, 1995). (Circle 31)
 - “This memorandum contains 1) our recommendations on the phasing requirements and 2) discussions on the proportional share of roadway construction for the Clarksburg Master Plan.” (p. 1)
 - “Based on our July 28, 1995 memo, we would anticipate that, if the developer builds two lanes of A-260 from MD 355 to A-305 within the master planned alignment, this should represent his part of the total roadway construction cost for Clarksburg. Final determination of actual share would be determined by the County Council when the impact tax legislation is considered for Clarksburg.” (pg.2)* *(Note that Staff Report (p.7) addresses this issue – “If it is determined that the Clarksburg Town Center’s share of infrastructure costs needs to be increased, then an impact tax could be assessed at building permit.”)*
- Staff report incorporates letter from Bob Harris - Wilkes, Artis, Hedrick & Lane to William Hussmann, Planning Board Chairman (September 21, 1995). (Circle 53)

* A-260 = Stringtown Road; A-305 = Piedmont Road/Snowden Farm Pkwy.

Clarksburg Town Center – Preliminary Plan Approval

- "Staff's recommendation of approval of the Preliminary Plan is subject to the following conditions:" (pp. 1-3)
 - (1) (a) "Agreement with the Planning Board to provide the necessary roadway improvements as identified in the Transportation Planning Division memorandum dated 9-22-95."
 - (4) Dedication of the following roads as shown on plan must be provided as follows:
 - (a) Clarksburg Road (MD RT 121) for ultimate 80' right of way
 - (b) Piedmont Road (Master Plan A-305) for ultimate 80' right of way
 - (c) Stringtown Road (Master Plan A-260) for ultimate 120' right of way
 - (10) Access and improvements as required to be approved by MCDOT and MDSHA
 - (14) "Preliminary Plan 1-95042 is expressly tied to and interdependent upon the continued validity of Project Plan 9-94004. Each term, condition, and requirement set forth in the Preliminary Plan and Project Plan are determined by the Planning Board to be essential components of the approved plans and are therefore non-severable. Should any term, condition, or requirement associated with the approved plans be invalidated, then the entirety of the approved plan shall immediately expire without the need for further action by the Planning Board." *(Note: Council cannot later override conditional requirements, through institution of development district or any other action, nor can Board change conditions without amendment, or the plan "shall immediately expire.")*

Clarksburg Town Center – Preliminary Plan Approval

- Preliminary Plan 1-95042, approved by Planning Board on September 28, 1995 and Opinion issued on March 26, 1996
 - Background (pp. 2-3)
 - “The Master Plan anticipated a funding shortfall for the construction of schools, local roads and other community facilities recommended in the Master Plan to serve the expected new growth. In response to this, the Master Plan recommended that development in Clarksburg should occur in stages conditioned upon the ability of private developers to fund a significant portion of the infrastructure improvements...”
 - “To ensure that the Applicant fund its share of road infrastructure, as best can be determined at this time, staff recommended that the Applicant improve Stringtown Road (A-260) to County standards as a two lane road within the Master Plan Alignment...Staff estimated the Applicant’s share of this infrastructure to be approximately 10 percent, or \$12.5 million, with no County or State input. The Planning Board concluded that the Stringtown road improvement, which will be the responsibility of the applicant, represents the current best estimate of the Town Center’s share of the Master Plan road infrastructure (as more particularly identified in revised traffic staff memo of 9/26/95).”
 - “Staff noted that if the Council adopts an impact tax...then the Applicant’s contribution...if found lacking, will be augmented by additional tax requirements.”

Clarksburg Town Center – Preliminary Plan Approval

- The Planning Board approved the plan...subject to the following conditions:" (pp. 4-7)
 - (1) (a) "Agreement with the Planning Board to provide the necessary roadway improvements as identified in the phasing section of the revised Transportation Planning Division Memorandum dated 9/26/95."
Note: Memo describes applicant's "proportional share of roadway construction" and includes of A-260 (Stringtown Road), A-305 (Piedmont/Snowden Farm Parkway), and MD 355 and 121 improvements.
 - (5) Dedication of the following roads as shown on plan must be provided as follows:
 - (a) Clarksburg Road (MD RT 121) for ultimate 80' right of way
 - (b) Piedmont Road (Master Plan A-305) for ultimate 80' right of way
 - (c) Stringtown Road (Master Plan A-260) for ultimate 120' right of way
 - Planning Board added detail on conditions for School Site improvement (Conditions 6&7, pp. 4-5)
 - (11) Access and improvements as required to be approved by MCDOT and MDSHA.
 - Planning Board added phasing requirements tied to issuance of building permits (Condition 16, pp. 6-7)

Clarksburg Town Center – Preliminary Plan Approval

- *Note: Conditions of approval of the Preliminary Plan required developer provision of infrastructure improvements. Fulfillment of these requirements was never explicitly or implicitly contingent upon creation of a Development District wherein the developer would be reimbursed for these expenditures.*



Clarksburg Town Center Site Plan Approvals – Developer Obligations

Clarksburg Town Center – Site Plan-I Approval

- Site Plan 1-98001, approved by Planning Board on January 22, 1998 and Opinion issued on March 3, 1998:
 - “Based on the testimony and evidence presented and on the staff report which is made a part hereof” (p. 2)

- The Planning Board approved the Site Plan subject to the following conditions (among others):
 - (17) “Show conformance to cross section and other recommendations per DPW&T, DPS memos dated January 14 and 15, 1998, respectively, included in the Appendix and as they may be amended.”
 - (18) “Conformance to MCPD Transportation Planning memo dated January 20, 1998 included in the Appendix.” (p. 5)
 - (19) “APF agreement to be executed prior to the first record plat to reflect all road improvement conditions of the Preliminary Plan Approval i.e. dedication, and construction of required improvements pertaining to the construction of Stringtown Road (A-260), Clarksburg Road (A-121) and Mid-County Arterial (A-305). If acquisition of right-of-way becomes necessary for any of the road improvements, the applicant is required to provide, pursuant to Site Plan conditions 17 and 18, and the County exercises Eminent Domain to acquire these rights-of-way, the applicant will be responsible to reimburse the County for these reasonable costs.” (p. 5)

Clarksburg Town Center – Site Plan-I Approval

- (30) “Per the Project Plan approval, when the ROW is made available, construct Main Street to MD 355 within the Historic District prior to completion of the project. At such time when the land is made available, share direct moving expenses only for relocating an existing house within the Historic District, and if the applicant and owner agree, make available the identified outlot to be merged with a portion of the adjacent parcel so as to create another lot.” (p. 6)
- (39) “The applicant shall work with the County executive staff to identify a suitable civic building to be located on the town square within the area to be dedicated for that use.” (p. 7) *(Note: applicant required to dedicate the area, but not construct the building.)*
- MCPD Transportation Planning memo dated January 20, 1998 (referenced in approval and included in appendix):
 - Notes that “Staff recommends the following roadway improvements as conditions of approval for the proposed site plan” and proceeds to detail seven roadway improvements the developer is obligated to provide. (pp. 1-2)

Clarksburg Town Center – Site Plan-I Approval

- MCPD Transportation Planning memo dated January 20, 1998 (continued):
 - “The following three roadway improvements are required as conditions of approval to satisfy the previously assessed APFO review and the phasing requirements:
 1. Reconstruction of the southbound right-turn lane along Frederick Road (MD 355) at Clarksburg Road (A-27) to provide a “free flowing” movement after the 44th building permit.
 2. Construction of the northern half of Stringtown Road (A-260) from Frederick Road (MD 355) to Greenway Road (the southern access road of the commercial site), construction of Greenway Road between A-260 and Main Street (P-5), and construction of P-5 across the stream valley into the residential area north of the stream valley after the 400th building permit.
 3. Construction of a northbound right-turn lane along Frederick Road (MD 355) at Stringtown Road (A-260) after the 400th building permit...” (p. 2)

Clarksburg Town Center – Site Plan-I Approval

- MCPD Transportation Planning memo dated January 20, 1998 (continued):
 - “The following four roadway improvements are recommended as conditions of approval to address transportation issues associated with the subject site plan:
 4. Construction of Greenway Road between Main Street (P-5) and Clarksburg Road (A-27) along the property frontage...in accordance with the description as provided in this memorandum for site access.
 5. Reconstruction of the southern half of Clarksburg Road (A-27) along the property frontage...in accordance with the description as provided in this memorandum for site access.
 6. Reconstruction of the northern half of Stringtown Road (A-260) from station 33+50 to Midcounty Arterial (A-305) in accordance with DPS/DPWT requirements.
 7. Provision of traffic calming measures; e.g., 15-foot curb radii, intersection chokers, raised crosswalks, within the internal streets in accordance with DPWT and DPS design requirements.”
 - The memo then provides “Descriptions of Roadways,” noting that “The applicant must construct its portion of the roadways as described above in accordance with the following descriptions of each roadway..” (p. 3)

Clarksburg Town Center – Site Plan-I Approval

- MCPD Transportation Planning memo dated January 20, 1998 (continued):
 - Construction of eastbound and westbound left-turn lanes along Clarksburg Road (A-27) at Frederick Road (MD 355) (p. 4)
 - Restriping eastbound Comus Road to provide an exclusive left-turn lane at Frederick Road (MD 355) (p. 4)
 - Providing safety improvements along Stringtown Road (A-260) per conditions...
 - Participation in the Gateway I-270 Office Park road improvements – widening Clarksburg Road (A-27) to four lanes between I-270 northbound off-ramp and the entrance to the Gateway I-270 Office Park.

Clarksburg Town Center – Site Plan-I Approval

- *Note: Conditions of approval for Site Plan Phase I required developer provision of infrastructure improvements. Fulfillment of these requirements was never explicitly or implicitly contingent upon creation of a Development District wherein the developer would be reimbursed for these expenditures.*

Clarksburg Town Center – Site Plan-I Enforcement Agreement

- *Beyond the Board's clear imposition of conditions and obligations upon the developer at Site Plan approval, the Site Plan Enforcement Agreement, signed March 12, 1999, further ratifies all obligations as imposed by Board:*
 - "WHEREAS, the parties hereto desire to set forth herein their respective requirements and obligations pursuant to Section 59-D-3.3 of the Montgomery County Code..." (p. 2)
 - "In accordance with approval by the Planning Board...Developer agrees that...it will execute and maintain all the features of the site plan for that phase as required...in fulfillment of the approval granting Site Plan No. 8-98001..." (pp. 2-3)
 - "This agreement shall be binding upon the heirs, successors and assigns of all parties hereto." (p. 5)

- *Note: Even though Clarksburg Town Center ownership transferred twice, each successive owner was bound by the conditions and obligations imposed by the Planning Board.*

Clarksburg Town Center – Site Plan-II Approval

- Site Plan 8-02014, approved by Planning Board on May 9, 2002 and Opinion issued on June 17, 2002:
 - “...Montgomery County Planning Board APPROVES Site Plan #8-02014...subject to the following conditions” (p. 2)
 - Park and School Site (pgs.2-4)
 - “A. Per the MCPS Memo of May 2, 2002, attached, the applicant shall provide adequate engineered fill and retaining walls if necessary, for the site and will rough grade the remainder of the school site to allow for school construction at a reasonable cost...”
 - “B. Regarding the ball fields, the plan shall be consistent with condition #6 of Preliminary Plan 1-95042 as follows:
Dedication of the proposed park/school, as shown on the Applicant’s revised preliminary plan drawing, is to be made to M-NCPPC...”

Clarksburg Town Center – Site Plan-II Approval

- Site Plan 8-02014 (continued):
 - (g) "Applicant to construct paved hiker/biker trails in the following locations:
 - i. Along the east side of Overlook Park Drive from Stringtown Road to Clarksburg Road...
 - ii. From the Clarksburg Greenway Trail along Overlook Park Drive to the Kings Local Park pond trails (two connections to the pond trail)...
 - iii. Along the south side of Clarksburg Road from the pond area trails to the intersection with Piedmont – per Phase I approval.
 - iv. Along the south side of Piedmont from Clarksburg Road to Street "F" – per phase one approval.
 - v. Along the west side of Street "F" from Piedmont to Main Street and continuing along Main Street to the Greenway Trail along Overlook Park Drive – within the right-of way per DPWT standards.
 - vi. Trails are to be constructed to park standards when outside of right-of-way. Exact trail alignments to be coordinated with M-NCPPC and DPWT staff, and should be appropriately located..."

Clarksburg Town Center – Site Plan-II Approval

- Site Plan 8-02014 (continued):

- Exhibit B (p. B-5)

“5. Applicant shall comply with the terms of the Adequate Public Facilities Agreement for Clarksburg Town Center dated March 8, 1999, including the phasing requirements set forth in Conditions No. 16 of Preliminary Plan No. 1-95042 as follows:

- (b) ...reconstruction of the southbound right turn lane along MD 355 at MD 121 to provide a “free flowing” movement.
- (c) ...construction of A-260 from MD 355 to the southern access road.. construction of A-260 from MD 355 to the northern access road and construction of a northbound right-turn lane along MD 355 at A-260...
- (d) Construction of A-305 from A-260 to MD 121...”

Clarksburg Town Center – Site Plan-II Approval

- *Note: Conditions of approval for Site Plan Phase II required developer provision of infrastructure improvements. Fulfillment of these requirements was never explicitly or implicitly contingent upon creation of a Development District wherein the developer would be reimbursed for these expenditures.*

Summary of Infrastructure Improvement Obligations as Agreed to by Developer

■ Roadway Improvements

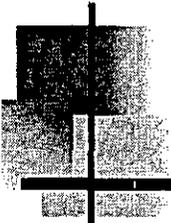
- Reconstruction of the southbound right-turn lane along Frederick Road (MD 355) at Clarksburg Road (A-27)
- Construction of the northern half of Stringtown Road (A-260) from Frederick Road (MD 355) to Overlook Park Drive ("Greenway")
- Construction of the northern half of Stringtown Road (A-260) from Overlook Park Drive to Piedmont/Snowden Farm Parkway
- Construction of Overlook Park Drive between Stringtown Road and Clarksburg Road (A-27)
- Construction of a northbound right-turn lane along Frederick Road (MD 355) at Stringtown Road
- Reconstruction of the southern half of Clarksburg Road (A-27) along the property frontage
- Construction of eastbound and westbound left-turn lanes along Clarksburg Road (A-27) at Frederick Road (MD 355)
- Construction of Main Street connecting to MD 355 (historic district)
- Construction of A-305 (Piedmont Road/Snowden Farm Pkwy.) between MD 121 and Stringtown Road

Summary of Infrastructure Improvement Obligations as Agreed to by Developer

- Roadway Improvements (continued)
 - Restriping eastbound Comus Road to provide an exclusive left-turn lane at Frederick Road (MD 355)
 - Participation in the Gateway I-270 Office Park road improvements – widening Clarksburg Road (A-27) to four lanes between I-270 northbound off-ramp and the entrance to the Gateway I-270 Office Park.

- Other*
 - 20" water main running through the subject property
 - Dedication of land for library/civic building
 - Construction and dedication of parks (school and Piedmont Woods)
 - Construction and dedication of bikeway and pedestrian paths
 - Standard recreation "green areas" throughout project

- **Note: This summary constitutes only a partial list of requirements imposed as conditions of approval by the Planning Board. (For additional details, see conditions contained within preliminary plan and site plan approvals.)*



Actions Relative to Creation of Clarksburg Town Center Development District

Developer Petition to Council for Creation of Development District

- Petition for Development District – July 5, 2000 (p. 6-8):
 - Infrastructure Improvements proposed by Terrabrook via Linowes & Blocher for inclusion in development district:
 - “Civic Center (included public library)
 - 20” water main extension
 - School/Ball Field site grading
 - Street Construction – Main, F, H, & K Streets
 - Trails/Hiker Biker Path (all the trails...)
 - Stringtown Road Improvements
 - Piedmont Rd A305 Mid-County Arterial
 - Lowering Rte 355 at Stringtown Rd
 - Rte 355 Intersection Improvements
 - Clarksburg Road Rte 121 Road Improvements
 - Red Grave Rd/Rte 355 into Clarksburg Town Center
 - Comus Road re-striping
 - Acquisition of rights of ways
 - Public Local Parks”

- *Note: ~\$17 Million in infrastructure. With exception of Civic Center, all items are developer’s obligation/conditions of approval as imposed at Preliminary Plan and Site Plan.*

County Council Resolution #14-648 (First Resolution)

- Resolution introduced July 11, 2000
- Public Hearing August 1, 2000
- Resolution adopted September 26, 2000

- *Note: Resolution packet includes the petition by the developer and identifies the infrastructure improvements proposed for inclusion in the development district. However, there was no discussion on any of these dates as to appropriateness of infrastructure improvements relative to requirements under §14-3 (g) (1) & (2).*

Developer Application to Planning Board (for action under §14-7) – November 14, 2000

- Application prepared by Stephen Z. Kaufman and John R. Orrick, Jr. notes that approvals already received for Project Plan, Preliminary Plan and Site Plan Phase I (p. 2)
- "As a prerequisite to these approvals, the Applicant's development had to meet all subdivision and zoning requirements, including Section 50-35(k)." (p. 2)
- "Consequently, this development conforms to all zoning and subdivision requirements and will continue to satisfy these requirements once the District is created because all of the preliminary plan conditions have been incorporated into the infrastructure improvements of the District." (p. 2)
- *Notes: The first quoted statement confirms the developer counsel understanding that fulfillment of the subdivision and zoning requirements are a prerequisite to the approvals granted.*
- *The second quoted statement erroneously links compliance with preliminary plan zoning and subdivision requirements to the creation of the development district. Further, it nonsensically characterizes approval conditions as being incorporated into improvements under the District.*

Developer Application to Planning Board (for action under §14-7) – November 14, 2000

- "Further, the use of the development district procedure will enable the Applicant to proceed with the planned Clarksburg Town Center project, since, although the Clarksburg policy area is currently in moratorium for residential and commercial construction, the infrastructure required to be built under the above-referenced preliminary plan will be funded in its entirety through the District." (p.2)
- *Notes: "...will enable" implies that development districts are the key to the construction of required infrastructure. This statement ignores the fact that developer-funded construction requirements had already been imposed long before – at plan approvals. None of these requirements were explicitly or implicitly contingent on developer reimbursement from Development District bonds.*
- *Requirements for infrastructure improvements were earlier imposed on the developer in order to (a) proceed with development while the area was in moratorium, (b) fulfill developer requirements under Chapter 50, and (c) gain added density under the optional method.*

Developer Application to Planning Board (for action under §14-7) – November 14, 2000

- "As mentioned above, the list of proposed infrastructure improvements incorporates all of the conditions of the approved preliminary plan." (p. 2)
- "We also note that the water improvements required as conditions of the preliminary plan for Applicant's property are included within the infrastructure to be constructed by the District." (p. 2)
- "The infrastructure improvements proposed in the Clarksburg Town Center Development District Petition and submitted in this Application satisfy the County's adequate public facilities requirements as mandated by Section 14-7 of the Montgomery Code for the entire proposed District."
- *Note: Confirmation that proposed items for the District are, in fact, applicant's conditions of approval under the preliminary plan. Satisfaction of adequate public facilities is a finding to be made by the Planning Board at time of approval of subdivision, as mandated by Chapter 50. That requirement was met by the Planning Board in obligating the developer to provide infrastructure improvements as outlined in conditions of approval...long before 2000.*

Staff Report ("Attachment A") to Planning Board Referrals – March 2, 2001

- "Staff finds that the proposed Town Center Development District meets the requirements of the District Legislation as modified by the following conditions:
 - 1. Amend Chapter 14-3 (g) (2) to allow for improvements to be the responsibility of a single developer so long as the proposed improvements serve a greater public benefit than a single development." (p. 1)
 - "The Applicant states that all proposed infrastructure improvements comply with Zoning and Subdivision requirements under Section 50-35(k) and meet APF requirements as determined by previous approvals of Preliminary Plan (#1-95042) thus satisfying AGP concerns. The Applicant also intends to request that the Council accommodate a more "stream-lined" review process by eliminating the required Public Hearing prior to Council enactment of the district." (p. 2)
 - "Staff finds that the proposed development district meets the requirements of the enabling legislation if Sec. 14-3 (g) (2) is amended to permit improvements by a single developer, and if the list of proposed infrastructure improvements is modified as per staff's recommendations to include only those improvements that have a more regional benefit beyond the local development." (p.6) (emphasis in original)

Referral Letter to Council by Planning Board (action under §14-7) – March 22, 2001

- “The Planning Board found that the proposed Town Center Development District meets the Adequate Public Facilities requirements of the District Legislation as modified by the following conditions:”
 - “Amend Chapter 14-3(g)(2), if necessary, to allow for improvements to be the responsibility of a single developer so long as the proposed improvements serve a greater public benefit than a single development.” (p. 1)

- *Note: Although it is clear that the Planning Board’s recommendation was tied to conditions including amendment of Chapter 14, there is no record of Council assessment of the recommended change to §14-3(g)(2). Even if amendment was considered, it would (or should) have been evident that change to this section would be inconsistent with both Chapters 50 and 59. §14-3(g)(2) has never been amended since its 1994 enactment.*

Referral Letter to Council by Planning Board (action under §14-7) – March 22, 2001

- "improvements are limited to:
 - Civic Building
 - Twenty-inch water main, off-site
 - Street Construction – Part of Main street from MD 355 to Public Street K
 - Stringtown Road Improvements
 - Piedmont Road Improvements
 - Clarksburg Road Improvements contiguous to Town Center
 - Redgrave Place connection to Main Street
 - Acquisition of Right of Ways of regional roadways
 - Regional Greenway Trail through public greenway park
 - MD 355 Intersection Improvements including intersection with Stringtown Road" (p. 1)
- "A copy of the staff report is attached for your review. See attachment A."
- *Note: Again, all items listed are already developer obligations under prior approvals.*

Referral Letter to County Executive by Planning Board (action under §14-7) – March 22, 2001

- “The Planning Board found that the proposed Town Center Development District meets the Adequate Public Facilities requirements of the District Legislation as modified by the following conditions:”
 - “Amend Chapter 14-3(g)(2), if necessary, to allow for improvements to be the responsibility of a single developer so long as the proposed improvements serve a greater public benefit than a single development.” (p. 1)

- *Note: Although it is clear that the Planning Board’s recommendation was tied to conditions including amendment of Chapter 14, CTCAC has found no record of County Executive assessment of the recommended change to §14-3(g)(2), which would have been expected in view of the Executive’s responsibility to determine the legal validity of the proposed district (§14-8(b)).*

Referral Letter to County Executive by Planning Board (action under §14-7) – March 22, 2001

- "...improvements are limited to:
 - Civic Building
 - Twenty-inch water main, off-site
 - Street Construction – Part of Main street from MD 355 to Public Street K
 - Stringtown Road Improvements
 - Piedmont Road Improvements
 - Clarksburg Road Improvements contiguous to Town Center
 - Redgrave Place connection to Main Street
 - Acquisition of Right of Ways of regional roadways
 - Regional Greenway Trail through public greenway park
 - MD 355 Intersection Improvements including intersection with Stringtown Road" (p. 1)
- "A copy of the staff report is attached for your review. See attachment A."
- *Note: Again, all items listed are already developer obligations under prior approvals.*

County Executive Fiscal Report (§14-8) – October 17, 2002

- ...“my goal was to find a way to allow this new community to move forward as contemplated in the 1994 adopted master plan, while assuring an appropriate balance of benefits and risk.” (p. 1)
- *Note: This statement by the County Executive implies that there was no existing way to move development forward without development district implementation, when, in fact, there was. The way to move forward under the adopted Master Plan was already clearly defined within the Master Plan itself, which was reviewed by the Planning Board at the time of preliminary plan approval. Long before the Executive Fiscal Report was prepared, the Board had already imposed obligations on the applicant in accordance with the Master Plan as “a way to allow” the necessary infrastructure improvements.*

County Executive Fiscal Report (§14-8) – October 17, 2002

- “d) Approximately \$7.9 million (47 percent) of the costs on the primary list are for projects that provide general benefit to the Clarksburg community at large. This amount will fund (at least partially) two projects not previously considered for district funding: an unfunded gap in the widening of Stringtown Road east of MD 355, and extending Stringtown Road to I-270. It will also help fund projects originally proposed by the developer, a civic center/library, a 20-inch water main, and a segment of Clarksburg Road within the historic district that are not otherwise development requirements.” (p. 3)
- *Note: Section §14-8 does not provide for the Executive to add infrastructure improvements to those proposed by the applicant or “listed by the Planning Board.” It only provides for recommendation as to “whether to create the district, its boundaries if one is created, which infrastructure improvements listed by the Planning Board the district should fully or partly fund, and alternative financing or revenue-raising measures.” (§14-8 (b)) Also, **all** infrastructure improvements (not just 47%) must be for general benefit vs. benefit of one development. (See §14-3 (g) (1)) CTCAC has found no evidence that the Executive performed a factual and legal analysis to confirm the validity of infrastructure items proposed for inclusion in the District.*

County Executive Fiscal Report (§14-8) – October 17, 2002

- "In March 2002, the County hired an independent financial advisor (Public Financial Management, Inc.) to assist in the review of the financial feasibility of the proposed district. This report reflects analysis by the advisor, its subcontractors, and County staff through a process that included frequent consultation with Planning Board staff and the developer."
- *Note: Under §14-8 (a), the Executive is required to estimate the cost of each infrastructure improvement and compare the estimates to those provided by the applicant. In his Town Center Report, the Executive provides conclusory numbers. There is no evidence of analysis of costs for individual items. There is no substantiation of alleged cost increases or other adjustments made by the Executive to the applicant's estimates. Without the full report by Public Financial Management, Inc. (it does not appear to have been provided to the Council) there is no public substantiation of individual items reviewed or conclusions drawn. (It is notable that the Executive's review, despite various adjustments, ultimately provides for the \$17M total as originally requested by the applicant.)*

County Executive Fiscal Report (§14-8) – October 17, 2002

- *Note: In general, the requirements for Executive recommendation under §14-8 implicitly include legal assessment of the validity of the district itself and also each specific infrastructure improvement to be included. Nowhere in the report is there an analysis of the legal validity of inclusion of any of the infrastructure items, despite the fact that the Executive was notified by the Planning Board (in letter from Planning Board to Executive) that the basic definition of what infrastructure improvements are includable in the District had to be broadened to legitimize the Town Center Development District.*

County Council Resolution #15-87 (Second Resolution)

- Resolution introduced October 29, 2002
- Resolution adopted March 4, 2003
- Issues:
 - Requirements under Chapter 14, Section 14-9 (b) were not met:
 - First homeowners moved into Town Center November 2001 (at least 75 had settled in Town Center by December 10, 2002), yet no homeowners were notified by Council of the hearing for the 2nd resolution.
 - Appropriate notification was not given to residents/owners by mail (residents did not receive notification and, hence, no information relative to proposed resolution or to estimated rate for tax, assessment, fee or charge to fund infrastructure improvements for the district, as required).
 - The resolution to approve the Town Center development district was a "proposed action" (under §20A-1 (f)(2)) that required approval by 80% of owners of real property and 80% of owners of assessed valuation of real property, particularly in light of the material change in land ownership in the 2-1/2 years between the petition resolution (September 26, 2000) and the creation resolution (March 4, 2003).
- *Note: Because the 2nd resolution is both substantively and procedurally invalid, the Council cannot proceed to the 3rd resolution.*

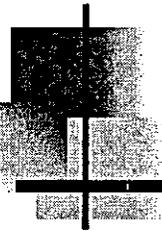
Development District Activity – 2005

- October 10, 2005 Memorandum from Michael Faden to MFP Committee
 - "...attorneys Jack Orrick and Steve Kaufman are expected to attend this update session."
 - "The legislative amendments discussed in the memo on ©5-8 from Mr. Orrick and Mr. Kaufman have not all been endorsed by either Executive branch or Council staff, but are included to give this Committee a forecast of potential issues when amendments to the development district law come before you." (p. 1)

- *Note: It is alarming to read that amendments to Chapter 14 are being proposed at such a late date in the district approval process. It is equally alarming that, although developer-initiated amendments "have not all been endorsed," they are still considered "a forecast" of what will indeed come before the Council.*

Development District Activity – 2005

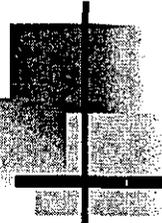
- October 3, 2005 Memorandum from John Orrick and Stephen Kaufman to Michael Faden (attachment to memorandum to MFP)
 - "Elimination of Initial Public Hearing by Law Unless Specifically Requested"
 - "Technical Corrections. Several provisions of current Ch. 14 need to be amended to clarify or remove language which does not reflect current County policy or established law with respect to the funding of infrastructure through the development districts."
- *Notes: Elimination of the initial public hearing is consistent with the points CTCAC makes about Development Districts that post-date approval of plans. It serves little purpose to conduct a hearing prior to knowing what the "proposed action" will be in accordance with Chapter 20A and prior to required action under §14-7 and §14-8 (Planning Board and Executive review).*
- *Relative to unspecified "Technical Corrections," it is apparent that there remains a direct conflict with the Clarksburg development districts and the infrastructure improvement limitations in §14-3 (g) (1) & (2). CTCAC questions whether reference to "Technical Corrections" to "clarify or remove language" is a "forecast" of an amendment to this section in an attempt to validate inclusion of infrastructure improvements which would otherwise clearly remain the responsibility of the developer under Chapters 50 & 59.*



Actions Relative to Other Clarksburg Development Districts

Other Clarksburg Development Districts

- Petitions for both Clarksburg Skylark and Clarksburg Village development districts have been filed and first resolutions have been passed by the Council. (No development district has actually been created for either project.)
- Both projects have received subdivision approvals (including Site Plans) designating associated developer-funded infrastructure improvement obligations.
- Infrastructure improvements for these proposed development districts are estimated at \$50 Million (\$49,560,645 petitioned for Clarksburg Village and Clarksburg Skylark combined district)
- *Note: Total obligation including all Clarksburg Development districts petitioned/created = ~~\$67,560,645.~~
\$66,560,645.*



Summary

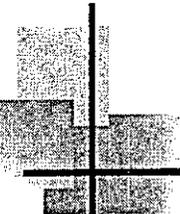
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Summary

- Obligations imposed on the developer through Board-approved conditions are evident, as is the reason for imposing such conditions: fulfillment of the Master Plan staging requirements; fulfillment of APFO requirements under §50-35 (k); fulfillment of general requirements under Chapter 50; and fulfillment of additional requirements for optional method development under Chapter 59.
- A development district cannot be applied to a development that has already received approval based on associated developer-funded infrastructure improvement obligations. If no development district was *implemented* at the time of approval, in accordance with Master Plan requirements, then the absence of a development district at the time of approval signifies that an “alternative method of financing” – i.e. developer obligation – was the basis for approval.
- Conditions imposed at subdivision approvals required developer provision of infrastructure improvements. Fulfillment of these requirements was never explicitly or implicitly contingent upon creation of Development Districts for developer reimbursement of such requirements.

Summary

- Even when a development *is* eligible for development district creation, Chapter 14 establishes that development districts are not to be utilized to fund a developer's infrastructure obligations §14-3 (g) (1) & (2).
- Implementation of a development district cannot be legitimized merely by adding non-project-specific facilities to the project-specific, developer-obligated facilities being improperly proposed for a development district.
- Council has no legal authority (via the development district mechanism or otherwise) to override approval conditions imposed on the developer in Planning Board opinions (Planning Board has exclusive jurisdiction over subdivisions under the Regional District Act – Art. 28, §§7-111, 7-115, 7-116, Md. Code Ann.).
- Apart from all apparent reasons why a development district could not even be lawfully proposed or implemented for Clarksburg Town Center, Clarksburg Village, or Clarksburg Skylark, the County Council would still be required to comply with Chapters 20-A and 14 in creating any such districts. Council's prior actions relative to Clarksburg development districts are inconsistent with both the State and County Development District enabling legislation. Council's failure to adhere to procedural requirements under Chapter 14 renders the Town Center District legally insufficient on that basis alone.



Summary – Call to Action

Moving forward with Clarksburg Development Districts would unlawfully transfer to the public greater than \$60 Million in private infrastructure improvement obligations. To remedy this situation, the following action must be taken:

- Dissolution of current resolutions for Clarksburg Development Districts (Clarksburg Town Center, Clarksburg Village, and Clarksburg Skylark), and removal from the CIP of all Clarksburg Development District entries.
- Thorough, independent investigation and fact-finding to verify and publicly report on development district implementation.
- Commitment by the County to ensuring enforcement of existing infrastructure improvement obligations as previously approved by the Planning Board.
- Full review and amendment to, if not repeal of, Chapter 14 (Requires re-evaluation of the purposes of Development Districts in general and intended applications to avoid conflict with Chapters 50 & 59 and the Planning Board's authority.)

Clarksburg Development Districts: An Advisory Report

Presented by
The Clarksburg Development District Advisory Committee

March 21, 2007

Executive Summary

The historic town of Clarksburg is growing at a tremendous rate and will quickly reach an end-state populace of approximately 40,000. This amounts to nearly a 4000% increase in a short time. This growth was targeted and planned by Montgomery County under the guidance of Maryland's Planning Act of 1992 and Montgomery County's General Plan to develop Clarksburg as the final employment and residential center along I-270 and provide a suitable transition between higher-density development further south and more rural areas to the north of Clarksburg. The Planning Act affirmed the need to conserve environmental resources; protect resource areas; direct rural growth to existing population centers; and to address funding mechanisms in order to achieve its objectives.

The 1994 Clarksburg Master Plan was created to allow huge increases in density and population while protecting existing resources in response to the Planning Act, the General Plan, and the existing community of Clarksburg. The Master Plan addressed the need to conserve environmental resources, maintain water quality, and limit the overall impact of new development through staged, carefully detailed and orchestrated development of the "new transit- and pedestrian-oriented town" which would spring from the farmlands of northern Montgomery County. Each portion of the new town was placed into a stage within the Master Plan; each stage had requirements to be met before it could open and begin to develop.

Throughout the Master Planning process, it was stated that development in Clarksburg should not be allowed to proceed unless there was financing available first. This clearly did not happen, and indeed, other issues have now arisen in Clarksburg as detailed in other sections of this report. The County bears no small part of responsibility for those "other issues" - and now expects the same homeowners directly affected by those issues to pay not only for the privilege of enduring those mistakes (through the development districts) but also - in Clarksburg Town Center - for the ongoing maintenance and upkeep of the main gathering civic space for the town of Clarksburg (through increased HOA fees). The County has further burdened the Clarksburg Town Center homeowners with the cost of some of the items listed in the Compliance Plan presented to the Planning Board, which is clearly in conflict of applying penalties against developers for their noncompliance with County regulations and undermines the Planning Board's authority.

Infrastructure and civic spaces play a pivotal role in the development of any town, providing the skeleton which shapes the place and the quality of life that residents will experience. When a town is artificially grown, these play a particularly crucial role, as is the case with Clarksburg. The appropriate shape of infrastructure and civic spaces, and the overall town patterns of development are addressed in 8 of the 10 overall guiding policies in the Clarksburg Master Plan. Staging of development was considered so crucial that it was made Policy #10: *development be staged to address fiscal concerns and to be responsive to community building and environmental protection objectives.*

Financial concerns continue to dominate development discussion in Clarksburg for the developers, the County, and most importantly the residents, who arguably occupy two roles (that of County Taxpayer and that of homeowner directly affected by development). To meet the huge projected costs of future development in Clarksburg, alternative financing vehicles were discussed in the Master Plan. The vehicles could include developer contributions, land dedication, excise taxes, impact taxes, and development district payments, among other choices. Due to the need for alternate financing vehicles and the need to rezone properties to significantly increased density (and therefore higher-profit developments), there was a correspondingly higher expectation of developer cost-participation than had been the case previously in Montgomery County. The need for completion of the infrastructure before or concurrent with development was indispensable: without it, and without financing for it, new residential development (and particularly higher-density residential development) was proscribed.

Development Districts have been advanced by developers as the prescribed vehicle to meet the alternate financing requirement outlined in the Master Plan. However, the Master Plan noted:

They are not intended, however, as a financing mechanism for infrastructure improvements that are considered the responsibility of a single developer under the Planning Board's site plan and adequate facilities requirements. (204)

All new subdivisions in Clarksburg have been subject to the Adequate Public Facilities Ordinance and the Adequate Growth Policy, as well as applicable Montgomery County Code (Chapters 50 and 14 particularly). As a condition of approval, the Montgomery County Planning Board imposed additional infrastructure and land dedication requirements on the developers of Clarksburg Town Center, Clarksburg Village, and Arora Hills (Greenway Village). These requirements were set forth, detailed, and expected of developers independent of any prescribed financing vehicle. However, it is clear, from the subdivision code to the Master Plan, that any alternative financing vehicles (including development districts) were to have been secured *prior* to any development approvals. It is therefore indicative by inference that whatever alternatives were in place at the time of application and approval were acceptable not only to the Planning Board and County Council, but also to the developers who came forward.

The proposal of development districts to fully fund – and therefore reimburse – the developers for required infrastructure items detailed as a condition of development approval in Clarksburg is incredible. It amounts to a shifting to private citizens of developer obligations, obligations which were accepted willingly as a prerequisite of development approval. This is questionable under Montgomery County code. The particular manner in which this shift has been attempted in Clarksburg is beyond belief, and should not be tolerated or condoned by any County official or agency.

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1.0 Introduction

Montgomery County designated Clarksburg the “last frontier” of development along the I-270 corridor with the intent to grow a corridor enclave roughly the size of Rockville. Clarksburg is a 250-year-old town that was still composed primarily of farmland and rural homesteads as recently as 2003.

Existing infrastructure and public facilities are completely inadequate to meet the needs of this new “transit- and pedestrian-oriented” town. From the planning and workgroup sessions for the 1994 Clarksburg Master Plan until now, the Clarksburg community at-large has voiced concern regarding funding equity, the timing, and the cost of adequate infrastructure and has consistently maintained the need to avoid “undue tax burden” on any Clarksburg citizens.

Development Districts have been proposed by developers as a solution to the question of funding civic and infrastructure needs created by such tremendous growth. However, as currently proposed, development districts place little or no financial burden on those who will profit most from the development and corresponding growth of Clarksburg; rather they place it fully on the citizens who made that development viable.

1.1 Group Charge

The Clarksburg Development District Advisory Council (CDDAC) is composed of Clarksburg residents and was formed to review existing Development District legislation and application of that legislation in Clarksburg and provide recommendations on implementation to the County Executive. The full charge of the Committee is attached in Appendix A.

1.2 Group Representation

The Clarksburg Development District Advisory Committee is composed of residents representing each of the three proposed districts – Arora Hills (Greenway Village); Clarksburg Town Center; and Clarksburg Village. County officials from various agencies participated in group meetings on an as-needed basis. While the group repeatedly expressed the desire to meet with County Council members, the opportunity was not made available to this advisory committee.

Clarksburg homeowners who were appointed to the committee by the County Executive include Amie Bryson, Lynn Fantle, Greg Fioravanti, Jorge Hernandez-Fujigaki, Elizabeth Forrest, Dave McDermott, Julie Neafach, and Susan Schottland.

County employees who were of particular assistance were Jennifer Russel, Clarksburg Ombudsman; Catherine Matthews, Director, Upcounty Government Center; Sue Edwards, I-270 Corridor Team Leader, Community-Based Planning, Jennifer Barrett and Michael Coveyou, Department of Finance; and Scott Reilly, Assistant Chief Administrative Officer.

2.0 Development District Issues

2.1 History of Development District Concept in Clarksburg

Prior to the adoption of the 1994 Clarksburg Master Plan, the Office of Planning Implementation analyzed the potential fiscal impact of development in Clarksburg and provided the County Executive with

information designed to help the Planning Board, the Executive, and the Council decide how the master plan should be implemented and specifically, whether the master plan should include a staging element, and what type it should be

in order that the Executive might evaluate issues associated with plan implementation, as required by the Regional District Act.¹ Primary among the findings was the need to address the source, timing and nature of monies for necessary infrastructure or, in their absence, the shape development should and would be allowed to assume. While it was assumed that “in general, these projects are expected to be bond-funded using County General Obligation Bonds,”² there was also recognition that the Master Plan as envisioned would require re-zoning “throughout” the planning area to facilitate the higher densities and mixed-use that was desired in order to successfully blend the existing historic Clarksburg with the new development by creating a small-town scale (rather than traditional suburban), look, and feel to the newer areas.

Two options were discussed: the aim was to allow the proposed higher-density projects to go forward if revenue sources were available; absent the funding, “only limited areas” were to be allowed to rezone into higher (more profitable) densities, in order to limit the possibility of “fiscal competition with other areas of the County,” to avoid magnification of the strains of an artificially imposed explosive growth rate. Possible revenue sources to fund the “gap” between the cost of necessary infrastructure and the projected available funding included Construction Excise Taxes; Impact Taxes; a development district payment; and from property and income taxes from the new developments. The average single-family detached home was projected to be valued below \$300,000; townhouses were projected to be priced lower than \$200,000. Corresponding revenue projections were thus significantly lower than those realized today, with even condominiums typically priced and assessed above \$200,000.

¹ *Fiscal Impact Analysis: Clarksburg Master Plan and Special Study Area*, Montgomery County Government Office of Planning Implementation, July 1993, p.6-7.

² *Fiscal Impact Analysis: Clarksburg Master Plan and Special Study Area*, Montgomery County Government Office of Planning Implementation, July 1993, p. 9.

2.2 Status of Development District Enabling Legislation

Legislation pertaining to development districts is present at both the State (Chapter 20A) and County (Chapter 14) levels. State Chapter 20A-1 (f) reads:

(1) Before the creation of a new development district established to finance special obligation debt under this section, the County Council shall provide public notice of the creation of the proposed district by advertisement in at least two newspapers of general circulation in the County and at least one public hearing.

(2) A new development district may not be created to finance special obligation debt under this section unless the proposed action is approved by:

(I) 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

(ii) the owners of at least 80% of the assessed valuation of the real property located within the proposed development district

No development district in Clarksburg has complied with these requirements. In the case of Town Center, extant owners of real property in CTC during October 2002 – March 2003 were not properly notified, did not join the petition to create a development district, and in no way gave implicit or explicit approval of the district. Chapter 20A-1 (k) continues:

This section does not prohibit the County or the Montgomery County Planning Board from obtaining from developers appropriate infrastructure contributions to support proposed development as allowed by law in addition to those financed under this section.

The Planning Board has the ability and authority to impose infrastructure requirements independent of development district financing at the time of proposal or approval – and the Board distinctly did so when approving development in Clarksburg. No preliminary plan or other approvals in Clarksburg make reference to the particular necessity of development district placement for any reason whatsoever. Further, “appropriate infrastructure contributions to support proposed development” connotes a requisite financial contribution on the part of a developer as a consequence of the ability to fully utilize land for profit in Montgomery County.

Development Districts are additionally governed in Montgomery County by Chapter 14, which is clearly based on the state statute.

§14-6 First Council Resolution

(a) If a petition signed by at least 80 percent of the owners of real property and the owners of at least 80 percent in value of the real property, as shown by the latest assessment rolls, located in a proposed development district, is filed with the County Council, the Council must hold a public hearing after at least 15 days notice in two newspapers of general circulation in the County . . .

(f) The adoption of a resolution under this Section does not:

- (1) obligate the Council to create a development district; or*
- (2) limit a district to the area described in the resolution*

§14-7 Planning Board Review; Compliance with Adequate Public Facilities and Annual Growth Policy Requirements

(a) After the Council has adopted a resolution under Section 14-6, one or more owners of land located in the proposed district may submit an application for provisional adequate public facilities approval, covering the entire district, 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 action necessary under Section 50-35(k);*
- (2) identify any infrastructure improvements necessary to satisfy the Annual Growth Policy's adequate public facilities requirements for a development district; and*
- (3) estimate the cost to provide each such improvement*

(c) In the aggregate, the applications approved must commit the applicant to produce (through funding of the proposed development district or otherwise) the infrastructure improvements needed to meet the applicants' adequate public facility requirements in the proposed district and any added requirements which apply to an applicant under the Annual Growth Policy.

§14-9 Second Council Resolution

(c) If the Council intends to use special obligation debt to finance the district, and the district was initiated by the Council under subsection 14-6 (b), before the Council adopts a resolution under this Section, the Council must receive a petition signed by at least 80 percent of the owners of real property and the owners of at least 80 percent in value of the real property, as shown on the latest assessment rolls, located in the proposed district

It is clear throughout Chapter 14 that the intent is to initiate development district creation early in the development process, prior to any plan approvals. Following the logical sequence delineated in Chapter 14 would create no duplicate APFO or AGP approvals; the requirements for approval (developer obligations) would be set clearly by the Planning Board apart from those obligations to be paid by the residents of a district.

Absent district creation prior to early plan approvals, the practical effect is to shift developer obligations from private developers to individual homeowners. It is further clear that issues may be created during the lag between district initiation and creation unless the initial applicant has taken, and will take no action to initiate the sale or transfer of land to builders or homeowners between first and second resolution.

Under Chapter 14, the Council and the Montgomery Planning Board are intended to work in concert during the initiation, creation and placement of a development district. There is no possible manner in which that can occur if the Council and the Board intend the same costs and obligations to be borne by different parties. Further, it is not credible that the Planning Board would impose few or no financial obligations for infrastructure improvements upon a developer, but instead shift them wholly to private citizens.

Clarksburg Town Center:

On September 26, 2000, the County Council adopted Resolution 14-648 (the first resolution), under §14-6(b) stating the intent to create a development district in Clarksburg Town Center. A petition was filed with the signature of the only owner of real property at that time, the developer. It is important to note that this resolution did not create, nor did it obligate the County Council to impose, a development district for Town Center.

On March 22, 2001, the Chairman of the Montgomery County Planning Board found that the district proposed for Town Center met AGP and APFO requirements and conditioned approval of the proposed district as follows:

- 1. Amend Chapter 14-3(g)(2), if necessary, to allow for improvements to be the responsibility of a single developer so long as the proposed improvements serve a greater public benefit than a single development.*
- 2. Proposed improvements to be included in the Development District should serve in the regional area, not just the residents of a single development.*

The concern of the Planning Board regarding single-development benefit has been consistently that infrastructure items included in a development district must serve the greater public good and not be the responsibility of a single developer. Chapter 14 was not modified as recommended to allow Board approval of the district.

On October 29, 2002, Resolution 15-87 (Clarksburg Town Center Development District second resolution) was introduced into the County Council. This resolution created the

CTC Development District upon approval, in March, 2003. Per §14-9, a petition signed by at least 80% of the owners of real property, as shown on the latest assessment rolls, should have been received. No property owner other than Terrabrook joined this petition; Terrabrook did not comprise 80% of the owners at that time.

Clarksburg Village/Arora Hills:

Clarksburg Village and Clarksburg Skylark (Arora Hills) developers petitioned the Council jointly to include their properties in a development district in July 2001. Resolution 14-1009, adopted October 2, 2001, authorized the intent to create a Development District in the Newcut Road area of Clarksburg as specified by the petitions filed with the Council on July 17, 2001. The Council stated the intent at that time to jointly consider the petitions jointly.

Clarksburg Village and Arora Hills properties have been further encumbered by a “private infrastructure district” discussed later in this report.

2.3 Master Plan Staging

The Master Planning process revealed a strong desire within both the County and community to control the impact of development on the existing community, especially regarding environmental and traffic issues. The environmental impact was of particular gravity, as most of Clarksburg was then, as now, served by well and septic systems. The adopted 1994 Master Plan strongly emphasized the need to minimize the impact of planned future development on Clarksburg by designating a phased development plan in the form of staging areas. Each stage would be “triggered” by the completion of a sequence of particular events, detailed and specific to each stage, called “staging triggers.” Until the triggers were all met, the stage was not initiated, or open.

Development in Clarksburg Town Center, Arora Hills, and Clarksburg Village was triggered by compliance with the specific staging triggers detailed in the Master Plan,³ and was allowed to move forward only once all Implementing Mechanisms were in place. Unlike other County master plans, the 1994 Clarksburg plan specifically set itself apart, relying on AGP, APFO, zoning code, and financing mechanisms for enforcement of its vision rather than seeking incremental rezoning of large parcels.

After a stage has been triggered, individual developments within that stage can proceed once public agencies and the developer have complied with all of that stage’s implementing mechanisms and the traditional regulatory requirements of that property’s zoning.⁴

³ “All staging triggers must be met to initiate this stage of development,” Table 19-20, p. 195-196.

⁴ *Clarksburg Master Plan and Hyattstown Special Study Area*, June 1994, p. 193.

Among the stages' available financial implementation mechanisms, development districts are only one possible alternative, however, *all financing* — including Development District funding — was *required under the Master Plan to be implemented before any development in Stage Two or Three could be initiated*. Absent a Development District, development could proceed using "alternative infrastructure financing mechanisms" which might include developer funding, County funds, or other fees or taxes, such as impact taxes or construction excise taxes, assessed at the time of building permit.

After each stage triggered but before progressing further to approvals,⁵ each development within that stage was required to:

- 1) Meet all regulatory requirements of the applicable zone
- 2) Comply with existing Annual Growth Policy
- 3) Meet Adequate Public Facilities Ordinance
- 4) Achieved the implementation of necessary financial mechanisms

2.3.1 Triggers and Implementation

To initiate a stage, the Clarksburg Master Plan required that either State or County enabling legislation for development districts or alternative infrastructure financing mechanisms be in place. These "triggers" would open a portion of Clarksburg to potential development. All triggers were required to have been met before any development could potentially begin (in any form) within a given stage.

After the staging triggers had been met, the Master Plan provided for implementation mechanisms. These mechanisms took the form of requirements to be met before approvals could be issued. Implementation⁶ of financing mechanisms was required before development could proceed within either Stage Two or Stage Three.

No development in Stage Two or Stage Three has met all requirements for staging triggers and implementation mechanisms.

2.4 Disclosure

Disclosure to home buyers within the three existing Development District areas presents numerous ethical and legal compliance issues. The method of disclosure of the Development District to prospective homeowners varied widely and was dependent upon type and time frame of home purchase (from a builder or as a resale; before or after the passage of first or second resolution).

⁵ *Clarksburg Master Plan and Hyattstown Special Study Area*, June 1994, p. 195-196.

⁶ *Implementation of a development district would be the passing of a third resolution and issuance of the related bonds; the reason for this requirement was, again, to avoid overburdening either the taxpayers or the community during development.*

Clarksburg Town Center

In the Clarksburg Town Center Development District, the earliest purchasers received no notice or disclosure regarding a Development District; they moved into Town Center a full year or more before Council resolution 15-87 creating the district was adopted. Approximately 100 families had moved into Town Center before the resolution was passed by Council in 2003. Clarksburg Town Center is designated as a Stage Two property in the 1994 Master Plan, which carries an explicit requirement that any financing, including a development district or any alternative financing, be implemented prior to any development. The *Town Center Project Plan (1997)* asserts compliance with the specific Master Plan requirements regarding staging, although clearly the requirements were not met.

Some later disclosures to buyers noted that the development was 'proposed' to be located within a special taxing district which 'may' be created. Resale home buyers did not receive even this minimal information. In many cases, disclosure was reported by residents as misrepresented and misleading. Initial purchasers of Clarksburg Town Center properties after August 2003 received more extensive disclosure documentation, however, some of these listed 'TBD' as the amount of tax; resale buyers continue to lack adequate disclosure and as late as December 2006 were receiving no disclosure whatsoever about the existence of a *Development District*. This is particularly disturbing for those home buyers who purchased at the upper edge of their budgetary constraints and are now faced with potential tax ranging from a low of \$1300 to a high of nearly \$3000 on top of ever-increasing state property taxes, with the likelihood of that tax increasing at a rate of 2% per annum.

Clarksburg Village and Arora Hills (Greenway Village)

In the Arora Hills and Clarksburg Village Development Districts, disclosure from builders was not made to prospective home buyers when the initial contract was signed, but rather at closing or afterward. Disclosure took the form of verbal notice and an annexed document. The annexed document contained a legal notice that a *Development District* had been petitioned for by the developers, although additional information was minimal and misleading. In Arora Hills, the amount to be assessed to homeowners was listed as an annual tax amount 'TBD', with an annual assessment typically falling between the amounts of \$900-\$1200 (which gave the impression to homeowners under that this amount was capped at \$1200). During one of the CDDAC meetings with the developer, the potential amount was quoted as significantly higher – capped at \$1500 annually with potential for increase by a further 2% each year.

Disclosures again varied widely – builders used different agreements in different neighborhoods at different times. While the wide variety of disclosures used may have constituted 'legal' disclosure, *practical or fair disclosure (at the time of contract signing, with full financial and comparative disclosure)* was not achieved by any builders or the developer. It was nearly impossible for homeowners to be fully aware of their future financial obligations without a close examination of the land records post-settlement, wherein they would find the lien placed by the developer. Few homeowners were

knowledgeable enough to seek out such information independently, and those who did were confronted with a lien they knew little and could determine less about.

Financial Implications of Disclosure Issues

Important financial information (e.g., a specific amount of obligation) was rarely made to homeowners, and is still lacking in most Clarksburg transactions. This issue arises from poor implementation of development district law, inattention to the staging principles of the Master Plan, inattention to development status in Clarksburg by the Council and Planning Board staff, and the manner in which developers petitioned the County Council. The lack of a known amount, early in the development and home buying processes, leads to the potential for abuse of development district provisions by developers to cover costs or add 'hidden' opportunities for profit at the home buyers' expense. The price of homes located within potential development districts in Clarksburg are not now and never were adjusted to be lower than comparable units located elsewhere in Clarksburg but outside a potential development district.

This 'blank check' approach to fund infrastructure would have certainly dissuaded many buyers if disclosure had been properly made -- and is likely to discourage future buyers of resale homes in the development district areas. Given the nature and manner in which disclosure was (not) made to homeowners, residents were not only properly notified, but rather mislead, and not fully informed about the nature of Development Districts. The late, undefined notice essentially assured that consumers would neither understand, nor have time to properly understand, their obligations. This may lead some residents into dire financial straits, because the additional obligation for a development district tax was not included in any calculations during the home buying process. Furthermore, lack of disclosure also potentially violates a variety of consumer protection laws.

There are further complaints about the disclosures used (past or present) in all three Development Districts. While some do appear to provide adequate legal notice, none of the disclosures provide any comprehensive information regarding the proposed districts. *There has been little, if any, discussion with prospective home buyers throughout Clarksburg as to the nature of the districts.* Several homeowners called the County Finance Department to find out more information about the development district before closing, but were unable to obtain any information beyond the nebulous mention contained in their documents. As a result, one homeowner stated that "the Development District was added to a list of things in my contract that I didn't like [the amount of information available about] but could nothing about, unless I was willing to walk away from buying a home that I wanted and had already invested considerable time and effort to pursue."

2.5 Private Infrastructure Option

In the Arora Hills and Clarksburg Village Development Districts, closing documentation included an "annex" document notifying buyers of the proposed Development District. In that document was a provision that should the Development District not be created, the developer privately reserved the right to create a private taxation district in the same

amount range. This was another issue 'forced' on buyers due to the timing of the disclosure, giving buyers no time to research validity or reasonably understand any options available to them. Prospective homeowners were lead to believe that it was a 'meaningless disclosure' as they would be required to pay this fee/tax in any event.

Addition of the Intent to Create a Private Taxation District clause was not disclosed to County officials until well after the annex document's use had already begun by the developer (at least 18 months later.) While seemingly under no explicit obligation to inform the county of this particular clause, in fact this constitutes an "alternative financing method" as mentioned in the Master Plan, and should have received the approval of the County Council or MNCPPC to satisfy the requirements of a Stage Three development (as Arora Hills and Clarksburg Village are). Further, inclusion of this impacts the County financing methods and supports a pattern of behavior by developers – why would this 'clause' be necessary, if developers expected approval of the Development District and/or had sought its implementation as envisioned, well before any development took place?

In a CDDAC meeting, David Flanagan, of Elm Street Development, the Clarksburg Village developer, told members that the cost of their "general infrastructure" is already in their contracts and that homeowners will pay him one way or another. He told CDDAC members that residents can either pay for it through the Clarksburg Village Development District (which is tax deductible) and he (the developer) would get more money back; or they could pay for it in the form of a private bond which he would get, which is not tax deductible, and he would receive a smaller repayment.

In the event that developers attempt to create 'private tax districts', it has been stated to the Committee that Developers could issue liens against property titles. Based on wording listed in disclosure statements, it is legally questionable whether this could be enforced, but rather was used to gain homeowner 'compliance', and it appears to be an 'insurance option' for developers to secure as much profit and capital as possible.

The developers of Clarksburg Village and Arora Hills (Elm Street and Artery, respectively) have created a situation where the residents of those areas are forced – without full, open, and timely disclosure – to pay for additional infrastructure fees well in excess of other County residents (including Clarksburg areas outside of districts, and other County areas outside of Clarksburg) – and essentially with a 'blank check' at settlement.

2.6 Intent of Development Districts

Development districts are seemingly intended to provide multiple benefits: to developers, local government, and homeowners – by allowing the funding of infrastructure improvements necessary for new residents and commercial districts in a timely and transparent manner. County government and developers are said to benefit by having a designated funding mechanism to finance necessary improvements, while homeowners receive more 'livable' communities at time of move in (rather than waiting

for improvements to ‘catch up’ after residents have moved in) and lower home prices as a result.

Development districts as proposed in Clarksburg, do not fulfill either the objectives of development district legislation or those of the Clarksburg Master Plan.

It is widely perceived that, instead of properly disclosing the Development Districts and fees – and discounting home prices as a result – developers instead charged a premium price for their homes, charging what the market would bear, then ‘hid’ the additional infrastructure costs/fees until closing or after (as described in previous sections).

In Clarksburg, it is apparent that there has been little, if any, benefits to residents through the use of alternative financing of any sort, including Development Districts – instead, it would appear to have the opposite effect on properties, particularly within the proposed districts. Adding \$1500+ annually to residents property tax bills for the next 26 years is equivalent to increasing assessed home values by approximately \$150,000 – and yet, property values will drop because the tax burden is not equal throughout Clarksburg. One resident in Clarksburg Town Center noted that “Why would anyone buy an NV home in Town Center, if there is a Development District versus buying the same home in Clarksburg Ridge, which is, literally, across the street and has no Development District planned, so homeowners will pay substantially less in property taxes?”

2.7 Inequity of Neighborhood Financial Contribution: Utilization/Impact Taxes versus Development Districts

The Clarksburg Planning area identifies approximately 18 new communities. In order to receive approval to develop these parcels, the Planning Board required developers to build “general infrastructure.” After the adoption of the Master Plan, the County Council drafted and passed Chapter 14 as way to fund general infrastructure throughout the County. In the absence of approved development districts, general impact taxes were imposed and repeatedly increased in Clarksburg as a way to equalize the contributions between communities that would be placed into development districts and those which would not.

Under Chapter 14 of Montgomery County Code, a developer, neighborhoods of property owners, or a builder can petition to place property into a development district. As of August 2006, there are three developers that have filed these petitions in Clarksburg. The developer for Clarksburg Town Center is awaiting the County Council’s third and final approval of the petition process after which bonds can be issued. In Clarksburg Village and Arora Hills, developers have reached first resolution, the intent to create the Districts.

The method in which development districts are progressing in the Clarksburg area – where some new communities are included in a district and other new developments directly adjacent are not – has created an “us vs. them” climate wherein neighborhood residents are comparing their additional contributions via development districts to neighboring new communities where residents are not required to contribute. It is quite

apparent that all communities will directly benefit from infrastructure improvements currently scheduled to be completely funded via development districts by residents in those districts. Construction of much of this “non-district” development may even have been approved by the County, contingent upon the existence of ‘required’ infrastructure that would be provided by other, larger communities within the proposed Development Districts. Certainly, impact taxes were expected to contribute to the general infrastructure for Clarksburg, yet the collection of such has been severely lacking.

It is apparent that neither the County Council nor Park and Planning took a holistic view of Clarksburg when processing development documents and allowing petitions to be brought forth for development districts. Impact taxes were expected to minimize some of the discrepancy between communities and be correspondingly higher in non-district communities; instead, they have magnified the level of inequity. It appears that the few communities proposed to be within development district regimes are expected to fund the majority of infrastructure improvements for the entire town of Clarksburg – despite the reality that new development outside of the districts was equally contingent on infrastructure being in place early in the development process.

Another example of financial inequity results when Clarksburg is compared to the rest of Montgomery County. The development district concept, in conjunction with the “Clarksburg surcharge” of transportation and school impact taxes, encourages residents to ‘pick apart’ what they pay for versus what others receive from the County via regular property taxes. Why are residents of Clarksburg targeted to pay additional impact taxes/development district fees for building a school or a library well in excess of what other County residents pay – when those other residents receive those services through usual property taxes? Clarksburg residents continue to pay County property taxes at a similar, if not higher rate, than their fellow County residents.

Correspondence between CDDAC members and County Council members has revealed that there is an impression among members of the Council that the higher impact tax (Clarksburg Surcharge) is a functional way for other developments in Clarksburg to pay equitably. This is clearly not the case. Even allowing for an impact taxes refund to homeowners in any created development districts, there would still be a larger financial burden borne by the property in the district.

An analysis of impact tax burden vs. development district tax borne by a single-family detached home shows the disparity. The transportation impact tax in Clarksburg (post 2004 revision) for a single family detached home was a one- time \$8250 fee for all permits issued, irrespective of development district status. The potential amount of a Clarksburg Village development district fee of \$1500 annually for 26 years which equals an additional payout of \$39,000 in taxes, without inclusion of the projected 2% annual escalation. Subtracting any impact tax refund to the homeowner reduces this to \$30,750 – \$22,000 more than a Clarksburg resident not living in. A development district will pay for a nearly identical new home.

2.8 Requirements of Developer versus Community Desires

There is a gap between developer requirements – which are issued by the Planning Board as a precondition for development and “additional amenities” desired by the community. Developer requirements include infrastructure construction and improvements, such as utilities and roads – not only within the community, but bordering, or even outside of the community; these requirements might include land dedication or construction of particular community amenities as well. It is important to note that while developers are required to build infrastructure improvements as part of their approved plans, in Clarksburg, “additional amenities” were often promised in an accelerated fashion. This has not yet occurred in any higher-density development in Clarksburg; the pools and community playground facilities (or lack thereof) have received particular attention in the press due to this discrepancy. The lack of development district disclosure adds immeasurably to the feelings of resentment and anger over missing community amenities and infrastructure as a result.

One Arora Hills homeowner noted the option of choosing the exact same single family home from the same builder in the Clarksburg Ridge development (located in Clarksburg but not in an existing/proposed development district) for \$10,000 less – but specifically chose Arora Hills for the amenities, such as bike paths, that were to be included in the community – without mention of a Development District or private tax district. When adding cost of the Development District/private tax to the price of the home, simple math determines the true cost of those ‘bike paths’ – assuming the later cap rate and no impact tax refund of $\$1500 \times 26 \text{ years} = \$39,000$ in addition to the \$10,000 price premium, for a total of at least \$49,000 per house.

In Clarksburg Town Center, residents who were misled by the developer and builders on not only the nature and location but also disposition of some neighborhood amenities has been well-documented. ‘Minor’ changes by the developer and County planning staff made major differences to residents, some of whom had also (as the Arora Hills homeowner above) chosen Town Center for the additional, accelerated amenities. Within the community, this was widely viewed as a business practice designed to maximize the number of lots that could be developed and sold for profit. The consistency with which these types of issues occurred placed a portion of the citizens of Clarksburg in the unenviable position of paying premium prices for communities that resembled the most average suburban developments elsewhere in the County, and even higher prices than their Clarksburg neighbors who had chosen properties outside of proposed districts.

2.9 Economic Impact

It is likely that final approval of the proposed development districts would have a significant impact on the local economy. At a time when the local community is attempting to attract and grow commercial and employment centers, millions of dollars would be removed from the local economy and paid to non-local developers who had already profited from the development of their land. It can be reasonably surmised that additional disposable income in the pockets of Clarksburg residents would benefit local businesses directly; the removal of those dollars from the area for nearly three decades will stifle growth long-term.

A rough estimate using an average assessment of \$1200 per household in a development district, multiplied by the approximate number of households in the proposed Development Districts – 1300 in Arora Hills, 2300 in Clarksburg Village, and 1200 for Clarksburg Town Center for a total of 4800 households, it can be concluded that the amount of loss to the local economy would be at least \$5,760,000 annually.

This amount would be removed from the income of local residents and unavailable to the local economy while directly benefitting developers who had been relieved of their financial obligations. Multiply this amount by 26 years, and the total impact of direct taxes/fees can be estimated to be at least \$149,760,000 over the lifetime of the districts. This figure alone – which is exclusive of general taxes and other taxes/fees paid by Clarksburg homeowners such as water/sewer improvement fees – would seem to bear further examination by the County. There has been, to date, no public audit of the proposed development district costs.

This situation is further exacerbated if private tax districts are allowed in some communities. If this occurred, the monies paid by homeowners to developers would not be tax deductible, therefore increasing the impact substantially.

There will be additional direct impacts as well. Several homeowners have expressed to committee members that the Districts will create financial hardship for them – a hardship they were not able to predict when buying their homes. Those homeowners who might have financed with "interest only" or more exotic mortgages in order to afford the premium prices charged for homes in a 'hot' market are particularly vulnerable. The additional burden will likely result in some homeowners being forced to either sell their homes or face foreclosure, and others will simply sell – if they can – to avoid the disproportionate tax burden. It is questionable that financial institutions would have approved mortgages for some buyers had they been calculating eligibility inclusive of development district taxes during the mortgage approval process. Mortgage calculations inclusive of the district taxes have been impossible in Clarksburg to date as a result of the districts' status.

2.10 Impact Fees and Multiple Taxation

Considerable confusion exists over the taxation structure being used to fund infrastructure improvements at all levels: County, developer, and homeowner. In addition to Development Districts, there are several other taxes and fees that Clarksburg residents pay that ultimately result in multiple and duplicate tax/fee structures to pay the cost of the same infrastructure improvements.

The impact tax is a one-time fee assessed against the builder as part of the permitting process, which is then passed directly to residents in the price of the home. Impact taxes are designated to be spent in the local area where the fees are collected (in other words, funds received from Clarksburg should be spent in Clarksburg). Effective March 1, 2004, the law was revised to separate school impact taxes from transportation impact

taxes; the law was also changed to charge Clarksburg residents a 50% surcharge over other “general” new development in the County for both the school and transportation impact taxes. The transportation impact tax for residents was set to range from \$1500 per unit (for a multifamily-senior unit) to \$8250 per unit (single family detached). These taxes are intended to mitigate the “impact” of new development, and effectively should be set high enough to cover the genuine impact to the County. However, application of this tax appears to overlap with the stated purpose of the development districts, as each is designated for local transportation improvements.

In order to offset this multiple taxation for the same service, by law, if a development district is established then impact taxes within the development district are to be refunded. However, this leads to a conflict between builders and the residents of any development district as to the disposition of the refund. It is CDDAC’s belief that after final approval of any development district refunds should be provided to current property owners under the law. However, at least one CDDAC member has been told that they are routinely given to builders, as they paid the initial fee. This disregards the probability that such a tax was passed along to residents as part of the cost of a home. This would provide a financial incentive – at taxpayer expense – for builders to press for creation/establishment of districts under current County laws.

As noted previously, the surcharge in impact taxes alone, specifically in Clarksburg, unfairly burdens Clarksburg residents. All residents (new or long-term) in other parts of the County expect and receive the benefit of new libraries, roads/transportation projects and schools – without Development Districts or higher impact taxes. Targeting homeowners in one area of the County to shoulder this financial burden is unacceptable.

2.11 Transparency and Process Management/Stewardship

The funding mechanism and relationship between impact taxes and development districts is not widely understood by citizens. The relationship between County-mandated requirements for developers as prerequisite for development and developer responsibility to County agencies and residents for those requirements is also confusing. The process for notification and community input is notably flawed or disconnected from those processes used by County offices and agencies as a result. The extensive and lengthy time often spent in Clarksburg to place a development district seems to benefit not developers, County or homeowners, but rather to exacerbate the situation. The situation the average homeowner experiences in the proposed district areas is difficult to understand and it has been nearly impossible to communicate any community concerns to the right agency or representative in a timely fashion.

In order to be equitable and fair to all parties, the development district process needs to first be complete before homeowners arrive in a proposed district; failing early introduction, the process must include all property owners in an equitable and transparent fashion. It must include full disclosure for residents and developers up front. Such disclosure would not merely state that a district has been proposed, but also list the items that are included in that district; further it must include the full amount that a homeowner might expect to pay, annually and over the life of the district. Homeowners must have

the information and ability to understand their full financial obligation before signing a purchase contract. Comprehensive disclosure of this nature would not only allow potential home buyers to completely understand and analyze their obligations, it would also assure them that their tax dollars were being directed to projects that clearly benefit the local community.

2.12 Change in Economic Conditions

When development district legislation was created in Montgomery County, the idea was advanced that funding mechanisms were necessary to ensure new development would 'pay for itself'. A variety of taxes and fees were under discussion in the county to meet that end; development districts were thought to ensure that developers would pay for promised infrastructure improvements in an accelerated manner. In addition to development district taxes, impact fees and water/sewer private front-foot fees.

Montgomery County has recently experienced an unprecedented surge in housing prices. Due to this economic upturn, it is certain that developers were able to charge builders a higher amount per lot and that this amount was passed on to buyers. Depending upon the date of initial acquisition for various tracts of land in the Clarksburg area, this surge likely provided developers with a substantial profit per lot; the surge also likely served as an economic incentive to maximize the number of units in any given development. The County experienced a correspondingly large rise in income related to the surge of property taxes due to increased property assessments (even though property taxes have slightly decreased on a per-dollar-value percentage of assessed value). Development districts in Clarksburg have not been reconsidered or modified in view of the new economic circumstances; this would be an appropriate action for the Council to take going forward in Clarksburg.

3.0 Improving the Development District Process

The members of CDDAC have come up with a number of 'lessons learned' that can be applied not only to the existing/proposed development districts in Clarksburg, but also to any future development districts elsewhere in the County. These are intended only as starting point for future discussion.

3.1 Revisit the Law, Disclose Properly, Simplify

There seems to be no logical reason why all Clarksburg/County residents are not expected to pay an equal, clear and fully-disclosed amount toward any County service or infrastructure that is open to the public. Tax equity among all County residents is the first and foremost item to consider. It is wrong to penalize any particular group of residents for having had the misfortune to have chosen the 'wrong' neighborhood, particularly when hard information is not readily available to the public.

Requirements for approval by the Planning Board placed on developers should be a funding matter that is implicit upon developers; and that any resulting home costs should

have be included up-front in the price of the home (as many homeowners in Clarksburg believe was the case) or included in impact taxes – removing the need for a separate funding mechanism which appears designed to maximize developer profit at the expense of taxpayers. Any additional up-front cost (‘developer risk’) is simply a portion of the cost of doing business. Developers approaching the Board for plan approval are aware of County requirements before development begins; the costs and associated risks are known in advance. Unfortunately for residents, development districts – particularly those created post-plan approval – can lead to residents being taken advantage of, whether intentionally or through benign neglect by County agencies.

CDDAC proposes that development district laws – in their current iteration and implementation – simply do not work. The code which sanctions the districts needs to either be completely reassessed and rewritten - or eliminated.

An important issue raised by citizens is that of political campaign contributions by developers and their legal representatives to elected members of the County Council. It is a matter of public record that some County Council members have received more than half of their campaign contributions from those interests. This can create an environment for collusive behavior at constituent expense - potentially allowing developers, builders and their legal representatives to exert significant influence over members of the County Council.

Due to conflict of interest, any elected official who has received significant funds from developers or their legal representatives – or who otherwise has business interests with them – should excuse him or herself from debate and voting on any development district regulations.

Given the large number of outstanding issues relating to development districts and their implementation in Clarksburg, it is suggested that all of the laws and implementation processes be comprehensively reviewed or be completely overhauled to ensure equity for all parties involved. Such a review would include revisiting all policies, procedure for approvals of site plans for compliance with the applicable statues, and ensuring that taxpayers are paying an equitable share of any infrastructure costs – in a fully disclosed manner – along with the County and any developers. Any existing loopholes should be closed to eliminate the temptation for developers to manipulate the development process at taxpayer expense – part of the reason why these laws were enacted in the first place.

3.2 Inclusive Tax Zone/District to Replace Development Districts

Creation of a single, inclusive tax zone/district should have been used for all ‘new development’ areas within Clarksburg, inclusive not only of the three proposed development districts, but all areas of new development in Clarksburg. This would have addressed the inherent inequity between large new communities and smaller new communities adjacent or nearby.

3.3 Community Input

Better and more extensive community input is needed throughout the process regarding the inclusion of improvements/services in any development district. This would begin to ensure that government and developers benefitting from development districts are practicing 'good stewardship' of taxpayer dollars, and identify projects to be funded with the agreement of the community.

3.4 Increase Transportation Impact Tax

While Clarksburg has an impact tax 50% higher than any other area in Montgomery County – and this applies to both school and transportation impact taxes – the inclusion of transportation projects being proposed within the development districts suggests that impact taxes are not high enough to offset new development costs in the area. It is suggested that the impact tax structure for Clarksburg be revisited to better meet these costs.

3.5 Disposition of Impact Tax

The disposition of the impact tax in the event of final approval of a development district is of great importance to taxpayers within the proposed districts. Although these taxes were paid by builders, they were passed along to home buyers as part of the purchase process. Any refund of impact taxes to developers or builders is unfair to residents for two reasons: homeowners would pay a second tax (development district) for the same infrastructure improvements that they had already paid for when purchasing their home (impact tax in purchase price); any refund would create a windfall to builders at taxpayer expense.

3.6 Reduce County Property Tax in Development Districts

County areas not included in development districts are not assessed 'extra' for school building/construction, road improvements, or other County services provided; one equitable solution is to deduct the amount of development district tax, it would be fair to reduce the amount of County taxes paid in the development district areas equal to the direct subsidy being provided to the County for the period of the development district's existence. It is noted that tax laws would need to be amended to provide this relief to taxpayers.

3.7 Revisit and Enforce Developer/Builder Obligations

Poor disclosure or nondisclosure regarding development districts and premium upcharges to homeowners in areas that may have been misrepresented by builders as containing 'extra amenities' indicate that the developer/builder community is obligated to at least partially, if not fully, offset the costs of the development districts.

Some improvements have been delayed or modified beyond any reasonable expectation, creating hardship and long-term inconvenience in the community. Some projects have 'started', but not completed in a timely fashion. We propose that any laws currently tied to the 'starting' of infrastructure projects be changed to the 'completion' of such projects instead.

4.0 Additional Concerns

4.1 Private Infrastructure Company

One unresolved issue, in the case of Clarksburg Village and Arora Hills, is the 'private Development District' clause that was inserted into homeowner contracts without the knowledge or consent of appropriate County agencies. Developers should never be allowed to create their own, private 'tax districts', and all applicable State and County laws should be enforced to prevent developers/builders from doing so.

4.2 Potential for Litigation

It is possible that without resolution of the above issues – to the satisfaction of the County, developers, and homeowners – that either developers, the County, or past and present homeowners within the proposed Development District will feel that they have no recourse but to pursue litigation. Litigation could include, but is certainly not limited to: violation of consumer protection laws; violation of County and State subdivision and development district laws; nondisclosure; disputes over amounts/location/ timeliness of infrastructure and/or amenities either built or to be built; disposition of impact tax refunds; equitable collection of taxes, etc. It is of course desirable for all parties that the above issues be resolved through discussion and negotiation.

4.3 Questionable Intent

If the Development District is functionally a "financing vehicle" for development, why are only select Montgomery County taxpayers, and indeed, only select parts of communities being asked to provide this? If the County taxpayers agree to assist developers in some fashion, the burden is rightfully spread equally throughout the county, as other obligations such as libraries, schools, roads, parks, etc. have been traditionally distributed.

This is, simply put, a matter of equity to all Montgomery County taxpayers. It affects especially those property owners who are longstanding county residents. These residents comprise the majority in the proposed districts and are now faced with dramatically increased tax payments. These residents have paid for infrastructure, schools, libraries, parks, beautification, and other Countywide necessities constructed in other sections of the County for many years. The present lack of equitable treatment for Clarksburg homeowners due simply to the location of their homes is untenable. There is no viable excuse regarding the location of the homes in new communities; plan approval and subdivision approval each carry certain inherent and overt obligations that were placed

on and agreed to by the developers long before any district was proposed. A direct payment for reimbursement of financial and development obligations would be simply additional profit for the developer, taken from the pockets of Montgomery County citizens.

5.0 Summary

The Clarksburg Master Plan was intended to provide a skeleton for development of the new town as it grows to an end-state of 40,000 residents. Growth was planned by Montgomery County to shape Clarksburg as the final employment and residential center along I-270 while meeting the needs of conservation and protection of the environment, directed growth, and the funding and timing of development.

The Plan proposed deliberate stages for development of the town with the intent to manage growth, maintain infrastructure and services, and minimize the environmental impact where it was most crucial. Alternative financing was specifically required to be in place before any development was allowed to proceed.

No Development District in Clarksburg has been implemented prior to the sale of homes; no district has yet complied with the Master Plan staging requirements and been implemented prior to Preliminary Plan; no Planning Board approvals in Clarksburg have ever included a requirement for a Development District, and no findings of AGP or APFO adequacy have been contingent upon a district. The approval of every developer's plans in Clarksburg has included requirements that were imposed on the developer independent of any public financing; one plan approval indicated specific infrastructure items that were allowed to be included in a district, but it was not mandatory, indicating that the remaining infrastructure obligations belonged to the developer alone.

Of the proposed Development Districts in Clarksburg, one has reached second resolution, in Clarksburg Town Center; two have reached first resolution, Clarksburg Village and Clarksburg Skylark (Arora Hills). All districts either had or will have homeowners living in the district before the district had been created under County law, yet no homeowner in Clarksburg has approved or joined a petition to create a district. The time lag between first and second resolution has created serious questions regarding the districts in Clarksburg.

Disclosure regarding the districts to prospective home buyers, perhaps as a consequence of delayed creation/implementation, has been at best incomplete; at worst, it has been non-existent. For property owners in Clarksburg Village and Arora Hills, there has been a very disturbing addition of an 'annex document' regarding the Private Infrastructure District the developer intends to create if the County does not provide Development District reimbursement for items that were either required as a condition of approval or required as a consequence of development.

Alternative financing in Clarksburg was never intended to supplant County contributions to public improvements. Such financing, including Development Districts, was intended to accelerate infrastructure and amenities that might otherwise be delayed; however, this did not occur, and many residents see the imposition of a vehicle such as a Development District as little more than a subsidy to the developers as a result. Further, the inconsistent nature in which financial obligations would be imposed has created a division in the community, an "us-versus-them" mentality.

Properties within proposed districts have not experienced any tax relief in the form of reduced tax assessments; rather, they generally pay higher taxes than those properties located outside of proposed districts, even without the imposition of a Development District tax. For some homeowners, the Development District tax would be a burden heavy enough to force them to sell their homes and leave Clarksburg.

Development Districts as proposed in Clarksburg will shift the cost of developer obligations from the developers' pocketbooks to private citizens by releasing developers from the full provision of roads, sewers, and land dedication as required for approval by the Planning Board. The County must hold developers accountable to the requirements imposed upon them by the Board and by the Council via zoning regulations. If the County does not, the citizens of Clarksburg cannot reasonably be expected to bear those obligations – they were never intended to be public, but rather a “payment” for the privilege to develop land in Montgomery County.

Appendix A – Group Charge

The Clarksburg Development District Advisory Committee was formed in June, 2006.

The charge of CDDAC includes the following:

- The members of the Committee shall education themselves as to the mechanics of the Development District concept. Such efforts shall include, but not be limited to the history of the concept, the status of the districts, the financial basis for establishment of same and actions taken to date to initiate districts. Some effort should be taken to measure the level of knowledge that current residents in all three pending districts have of the concept.
- The group shall review previously identified infrastructure projects for Town Center and discuss with developer representatives proposed infrastructure improvements to support Development Districts of Clarksburg Village and Arora Hills. Input, in the form of recommendations about improvements, as well as priorities desired by the residents would be appropriate in this instance. Task force members will be encouraged to seek such input from other community members.
- The members of the Task Force will investigate and research, with the assistance of appropriate staff, mechanisms utilized in the region and the national development community for funding infrastructure improvements. Benefits and risks will be evaluated with “Best Practices” as the highlight of such an effort.
- The Task Force shall seek input and reactions from other community members within the three proposed districts to add to the fabric of their knowledge, prior to making a recommendation to the County Executive on the Development District concept.
- The CDDAC will prepare a set of recommendations to convey to the County Executive regarding appropriate next steps to take relative to the implementation of Development Districts in all three areas (Clarksburg Town Center, Arora Hills, Clarksburg Village).

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DAVID W. BROWN

March 16, 2007

Mr. Tim Firestine
 Chief Administrative Officer
 Montgomery County
 101 Monroe Street, 2nd Floor
 Rockville, Maryland 20850

Dear Mr. Firestine:

I am writing on behalf of the Clarksburg Town Center Advisory Committee, Inc. ("CTCAC") to memorialize for you the conclusions reached in CTCAC's recent investigation of the appropriateness of utilizing development districts in Clarksburg. These conclusions, and the factual and legal basis for them, were detailed by CTCAC President Amy Presley to you, Jennifer Barrett and Jennifer Russell in a meeting on March 14, 2007, which I also attended.

1. Under the Clarksburg Master Plan, creation of development districts (which occurs with the passage of a second Council Resolution) in Clarksburg must precede, not follow, preliminary plan approval. None of the three Clarksburg development districts (Town Center, Village, and Skylark) met this requirement.
2. The Town Center development district as created, and most likely the other two as proposed, envisions taxpayer financing of numerous infrastructure items that do not meet the definition of "infrastructure improvement," in Chapter 14 of the County Code, §14-3(g). Only infrastructure meeting that criteria may be included in a development district.
3. In a Council resolution creating a development district, any material abrogation of the Chapter 14 infrastructure limitation on eligibility for development district financing is
 - a. inconsistent with the Planning Board's exclusive jurisdiction over subdivision approval, mandated by State law in the Regional District Act;

- b. inconsistent with the developer infrastructure obligations set forth in preliminary plan approvals;
 - c. inconsistent with §§50-27, 50-30, and 50-35(k) of the Subdivision Ordinance; and
 - d. inconsistent with obligations imposed on optional method of development under Chapter 59 of the Code, including §§59-10-C-3.1, 59-D-2.11, 59-D-2.12 and possibly others.
4. Resolution 15-87 includes infrastructure added by the County Executive, in violation of §14-8 of the County Code.
 5. The resolution creating the Town Center development district is procedurally invalid because
 - a. the notice to residents required under §14-9(b) was not sent to all (if any) record property owners as shown on the latest tax assessment; and
 - b. the procedures followed to obtain property owner approval of the creation of the development district violated State law, i.e. §20A-1(f)(2) of the Montgomery County Code.

The foregoing is a summary of the presentation in Wednesday's meeting. I trust that this letter, along with the more detailed information shared in the presentation, will be sufficient for you to validate and act on the concerns raised by CTCAC. Specifically, CTCAC expects that you will begin immediately to take necessary actions to ensure

1. thorough investigation and fact-finding to determine and publicly report on the development district situation;
2. dissolution of current, legally insufficient, resolutions for Clarksburg development districts;
3. enforcement of existing infrastructure improvement obligations as previously approved by the Planning Board; and
4. commitment to full evaluation of the future viability of Chapter 14 as a development tool.

Mr. Tim Firestine
March 16, 2007
Page 3

Please advise me of how you plan to proceed, and do not hesitate to call me or Amy Presley directly if we can be of further assistance.

Sincerely yours,

A handwritten signature in cursive script that reads "David W. Brown". The signature is written in black ink and extends across the width of the page.

David W. Brown

LINOWES AND BLOCHER LLP

ATTORNEYS AT LAW

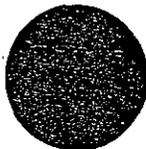
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Enclosures in file

May 24, 2007



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The Honorable Leon Rodriguez, Esquire,
County Attorney
The Honorable Mark Hansen, Esquire
Deputy County Attorney
Office of the County Attorney
101 Monroe Street
Rockville, Maryland 20850

The Honorable Michael Faden, Esquire,
Senior Legislative Attorney
The Honorable Kathleen Boucher, Esquire
County Council Attorney
Montgomery County Council
100 Maryland Avenue
Rockville, Maryland 20850

Re: Analysis and Response to Citizen Reports Regarding Use of Development Districts in the Clarksburg Planning Area

Dear Lady and Gentlemen:

Regarding the above identified matter, this firm represents the Applicants currently seeking final approval and implementation of the three identified Development Districts within the Clarksburg Planning Area. In connection therewith, please find enclosed for your review and consideration a comprehensive analysis and response memorandum with executive summary which addresses the issues raised by the two citizen reports recently submitted to the County regarding the use and implementation of Development Districts in Clarksburg. Also enclosed are a number of appendices in support of the main response memorandum. The first three appendices (A, B and C) describe the detailed histories of both the enabling legislation and of the Clarksburg Town Center, Clarksburg Skylark and Clarksburg Village Development District Applications. The remaining appendices provide documentation and other supporting evidence which we believe confirms without question, that all requirements set forth in both Chapter 20A and Chapter 14 of the Montgomery County Code regarding the approval process of the subject Development Districts have been fully and completely complied with by the Applicants, both branches of County Government and all reviewing agencies.

Specifically, the response memorandum addresses issues raised concerning the qualification and inclusion of community-wide serving infrastructure as being appropriately identified and

Leon Rodriguez, Esquire
Mark Hanson, Esquire
Michael Fadden, Esquire
Kathleen Boucher, Esquire
May 24, 2007
Page 2

included for funding as part of the Development Districts in question, the public and transparent nature of the implementing process that followed, and documents in detail, the provision of notice to homeowners and other affected parties at every step of the Application process.

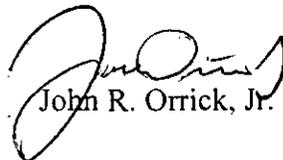
In closing, on behalf of our clients, this response memorandum is submitted in order to assist with the review process that both the County Executive and County Council have asked your respective offices to conduct. If after you have reviewed the material presented, there is a requirement for further clarification or additional information concerning the matters discussed, please contact us at your earliest convenience.

Very truly yours,

LINOWES AND BLOCHER LLP



Stephen Z. Kaufman



John R. Orrick, Jr.

cc: Doug Delano
Martha Guy, Esquire
Sharon Koplman, Esquire
Laurie Ballenger
Hayes McCarty
David Carney
Dave Flanagan
Tom Marshall

RESPONSE MEMORANDUM

TO: Montgomery County Executive, and Montgomery County Council, and the Office of the Montgomery County Attorney

DATE: May 24, 2007

RE: Response to Clarksburg Development District Citizens Advisory Committee and Clarksburg Town Center Advisory Reports

EXECUTIVE SUMMARY

This executive summary provides key points from the attached Response Memorandum on issues raised in two reports released in March 2007, the report of the Clarksburg Development District Advisory Committee (the "Advisory Report") and the report of the Clarksburg Town Center Advisory Committee (the "Residents' Report"; collectively, the Advisory Report and the Residents' Report, are referred to as the "Citizens' Reports"), concerning the legality of Development Districts in Clarksburg, Montgomery County. The Response Memorandum prepared on behalf of the three firms developing the three pending Clarksburg Development Districts – Clarksburg Town Center, Clarksburg Village and Clarksburg Skylark. It provides a general response and overview of the County's Development District laws and their inter-relationship with the subdivision laws in Montgomery County. The Response Memorandum addresses each of the points raised in opposition to the Clarksburg Development Districts by the Citizens' Reports.

Development Districts are a very useful tool within the County's growth management regulations to address the shortfall of funding for public infrastructure. The County Executive has identified this need as one of the top priorities in his administration. Montgomery County has utilized its development district law to create two development districts in Germantown, the West Germantown Development District and the Kingsview Village Center Development District. The State of Maryland has authorized ten counties and all municipalities to authorize the creation of "special taxing districts," which have functioned very well as a means of financing the construction of needed infrastructure.

Compared to other jurisdictions, the development district approval and financing rules established by Chapters 14 and 20A of the Montgomery County Code make for a lengthy and exacting process for developers. Chapters 14 and 20A, and the administrative policies developed by the County in West Germantown and Kingsview, are designed to ensure that the County and its citizenry receive the maximum benefits from any development district.

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In 1994, Clarksburg was a rural area of Montgomery County which was anticipated to see significant population growth over the next twenty years. The Clarksburg Master Plan & Hyattstown Special Study Area, adopted in June 1994 (the "Master Plan") recognized the need for supplementation of County revenues by developer funding and expressly identified the use of development districts to help finance the needed infrastructure for Clarksburg because the County simply did not have sufficient revenues to fund in a timely manner the necessary infrastructure for new communities as it had done in the early years of the County's growth. Accordingly, developers seeking land use approvals for the development of large-scale planned communities in Clarksburg embarked upon these projects with the expectation that development districts would be forthcoming.

The key points of interest detailed in the Response Memorandum are:

- Chapter 14 and Chapter 20A of the Montgomery County Code, the County's Development District laws, are interrelated and complimentary to the County's Subdivision Regulations. Whereas the Development District laws authorize only one of many methods of financing infrastructure, the Subdivision Regulations are concerned with whether certain infrastructure is constructed, not how it is financed.
- The Citizens' Reports incorrectly state that any public infrastructure approved by the Planning Board cannot later be financed by a development district. Their arguments fail to recognize the legal relationship between the development district creation process (financing) and the development review process (design and construction). The development review process and the development district creation process are substantively and procedurally interrelated. However, applicable laws and regulations do not dictate a rigid, sequential approval process.
- The Planning Board, while authorized to require that certain infrastructure be installed prior to the issuance of building permits, is not authorized, and has no authority, to dictate the manner in which infrastructure improvements are financed, either by the County or by a developer.
- The "single-developer" provision of Section 14-3(g)(2) of the Montgomery County Code does not preclude a single-developer district; it simply excludes from a development district any infrastructure that is only useful to the residents of a single subdivision. The infrastructure included in a development district must be regional in nature—infrastructure that is useful to members of the public beyond those residents of a single new subdivision. The term "infrastructure improvement" means the entire facility, road or other improvement that is regional in nature, which must not be the sole responsibility of a single developer. All infrastructure included in the Clarksburg Development Districts has been carefully selected by the County to comply with this requirement.

- The 80% rule, requiring the approval of at least 80% of the landowners to petition for the creation of a development district of Section 20A-1(f)(2) of the Montgomery County Code, applies only at the time of the *initial* petition (the *first* County Council resolution) for a *developer-initiated* development district. All developers involved in the creation of development districts in Clarksburg complied with this requirement.
- The notices required by Chapter 14, disclosing the intent to create development districts, were utilized by the developers in each of the pending Clarksburg Development Districts. The notices given to home purchasers exceeded the requirements of Section 14-17, were reviewed by the County Finance Department and the County's independent Bond Counsel, and were separately executed and acknowledged by each new home buyer at the time purchase contracts were signed.
- Chapter 14 of the Montgomery County Code requires no fewer than two (2) public hearings and no fewer than four (4) separate legislative actions taken by the Montgomery County Council following the study and recommendations of both of the Montgomery County Planning Board and the Montgomery County Executive prior to the issuance of bonds to implement a development district. This degree of governmental action provides considerable transparency and multiple opportunities for public participation in the development district process, indeed more so than any other Maryland jurisdiction provides.
- The right to impose private water and sewer charges, home owners association fees, and charges associated with the construction and installation of various types of infrastructure improvements, for example, roads, sidewalks, open space and recreational areas ("Private Infrastructure Charges"), is well-established in real property law, case law and statutory law in the State of Maryland. Case law in Maryland supports the principle that covenants to pay money often run with the land (apply to all subsequent purchasers of the property), including covenants for the payment of money associated with a developer's cost for the installation of certain streets and utilities.
- Section 52-54 of the Montgomery County Code provides for the refund of a development impact tax to "any person who has paid" it when a development district is implemented and encumbers the property. The plain meaning of the statutory language dictates that the person or entity that actually paid the impact tax is eligible for the refund. Development impact taxes are a cost of development, in addition to many other costs, which may contribute to the price of a home, along with principles of supply and demand, but this does not mean that the homeowner literally "paid" the impact tax.

CONCLUSION

The Citizens' Reports provide no basis for the dissolution or reconsideration of any actions taken to date by the developers or by the County, either with respect to the creation of development districts by the County or by the developers with respect to the creation of private infrastructure charges as an alternative means of financing infrastructure expense. The County's development district law is an important tool to be utilized by the County to manage growth. The processes followed by the County in the creation of the Clarksburg Town Center Development District and in the consideration of the pending Clarksburg Village and Clarksburg Skylark Development Districts complied in all relevant and material respects with the provisions of County law. Home purchasers were given notice of the proposed development districts prior to purchasing their homes as required under Chapter 14 of the County Code. The development district process has been a transparent and deliberate process, which involved a considerable amount of public scrutiny and attention.

The County now needs to move forward. The County cannot afford to walk away from the time and effort which has been spent both by the public sector and the private sector to date in the formation of these development districts. The developers of the Districts discussed herein have relied in good faith upon the County to implement the financing afforded through the development district process, have spent considerable sums of money in this effort, and are determined to complete the process as expeditiously as possible.

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I. INTRODUCTION

This report provides a response to the issues raised in two reports released in March 2007 concerning the applicability and legality of Development Districts in Clarksburg, Montgomery County. It was prepared on behalf of the three firms developing the three pending Clarksburg Development Districts – Clarksburg Town Center, Clarksburg Village and Clarksburg Skylark. It provides a general response and overview of Development District laws and their inter-relationship with subdivision laws in Montgomery County. It provides a response to the report of the Clarksburg Development District Advisory Committee (the “Advisory Report”). It also provides a direct response to the statements contained in the report of the Clarksburg Town Center Advisory Committee (the “Residents’ Report”; collectively, the Advisory Report and the Residents’ Report, are referred to as the “Citizens’ Reports”).

This report begins with a brief overview of the history of development districts in Montgomery County. A more detailed history is attached in an appendix.¹ A detailed history of the status of each of the three Clarksburg Development Districts also is attached in the appendices.²

II. BRIEF HISTORY OF DEVELOPMENT DISTRICTS IN MONTGOMERY COUNTY: ENABLING AUTHORITY

A. Review of the State Enabling Legislation and the Adoption and Implementation of Chapter 14 and Chapter 20A of the Montgomery County Code

The history of development districts in Montgomery County dates back approximately 15 years to when the Montgomery County Council first began considering the adoption of an enabling statute for development districts in 1992. On December 1, 1992, at the request of County Executive Neil Potter and sponsored by County Council President, Bruce Adams, a bill was introduced to enable the creation of development districts in Montgomery County. This bill was later adopted in June 1994 as Chapter 14 of the Montgomery County Code.

The adoption of Chapter 14 was initially deferred in order for the County to determine whether or not it would need additional enabling legislation from the State of Maryland. After the County decided to seek State legislation, the 1994 Maryland General Assembly enacted House Bill 895 which provided express authority from the State of Maryland for the County to issue special obligation debt on behalf of development districts. House Bill 895 was later codified as Chapter 20A of the Montgomery County Code. On May 20, 1994, Attorney General J. Joseph Curran, Jr. issued an opinion to Governor William Donald Schaefer, expressing the constitutionality and legal sufficiency of House Bill 895 and commenting on certain aspects of that legislation, including issues that are discussed in more detail herein concerning the requirement that 80 percent of the property owners must grant their approval in order to implement a development district.³

¹ See Appendix A.

² See Appendices B and C.

³ See Appendix D.

The legislative history for Chapters 14 and 20A of the Montgomery County Code state that the central purpose of the 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.” The legislative history indicates that the benefits of development districts for property owners include 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 for the property owners who will benefit from the capacity those improvements create.⁴

Two important planning documents published in 1994 emphasized the need for development districts as a tool the County should implement in order to fund the extensive infrastructure requirements needed in Clarksburg, which at the time was essentially a rural area. First, the Clarksburg Master Plan & Hyattstown Special Study Area, approved by the County Council and adopted June 1994 (the “Master Plan”), by the Maryland-National Capital Park and Planning Commission (“M-NCPPC”) recognized the need for supplementation of County revenues by developer funding and expressly identified the use of development districts to help finance the needed infrastructure for Clarksburg. Second, in December 1994, the Report to the Montgomery County Council by the Working Group on Infrastructure Financing was issued by a group of citizens, including representatives of civic groups, environmental groups, developers and others, together with non-voting staff members of County agencies. This report discussed the use of financing mechanisms for infrastructure in the County as analogous to a “3-legged stool,” with one leg representing funding by gas taxes, one leg representing funding by general County tax revenues, and the third leg representing funding by the benefited development, including through the use of development districts. Since 1994, the policy of Montgomery County has been consistently to require that the users of new growth (*i.e.*, the homebuyers, property owners, and other beneficiaries of development) should pay a portion of the cost of new development. In locations such as Clarksburg where infrastructure is lacking, the costs to be borne by new developments are understandably higher than in other places in the County, which already have adequate infrastructure.

The need for development district financing, along with other developer contributions, to address the County’s infrastructure requirements is based on the fact that the County simply does not have sufficient revenues to fund in a timely manner the necessary infrastructure for new communities as it had done in the early years of the County’s growth. Without the provision of the needed infrastructure, the growth areas of the County were in moratorium. The development community, recognizing this need, agreed to help solve the issue. The ultimate beneficiary of the infrastructure, however, is the homebuyer/property owner. Clearly, costs incurred in providing the necessary infrastructure will be passed directly to the homebuyer and the other end-users of the community as part of either the cost of the home, or through add-on charges and assessments, if possible. These costs are no different from any other costs of construction, whether they are the cost of land, materials, labor or permitting fees. The ability of the developer to pass along such costs, however, is dependent upon market conditions, which are not within the control of the development community.

⁴ See Appendix E.

The use of development district financing provides an option for a public-private partnership between the County and the development community to utilize the County's low tax-exempt interest rate financing ability, to pass along the costs of major-capacity infrastructure to the ultimate users, in accord with the County's growth policy of requiring new growth to "help pay for itself." The homeowner also benefits from the County's lower interest rate and the fact that the taxes are only paid while the homeowner is living in the home.

Montgomery County has utilized Chapters 14 and 20A to create two development districts in Germantown, the West Germantown Development District and the Kingsview Village Center Development District. Further, the State of Maryland has a general enabling legislation applicable to nine counties and all municipalities to authorize the creation of "special taxing districts" which function in a manner similar to development districts. Development districts created by Montgomery County, as well as other jurisdictions in the State of Maryland, and indeed, throughout the country, have functioned very well as a means of financing the construction of needed infrastructure.⁵

Chapters 14 and 20A of the Montgomery County Code contain many unique provisions which make the development district approval and financing process much more difficult for developers and homebuilders than in other jurisdictions.⁶ Further, Montgomery County adopted certain policy positions in connection with the implementation of the Germantown development districts that have extended the time period for financing infrastructure improvements and limited the amount of infrastructure eligible to be financed through Chapters 14 and 20A.⁷ Finally, Section 14-18 of Chapter 14 contains very important language which must be kept in mind when analyzing the arguments stated in the Citizens' Reports, including the statement that Chapter 14 is necessary for the welfare of the County and its residents and must be **construed liberally** to achieve its purposes and that the powers granted under Chapter 14 "**supplement any power conferred by any other law and do not restrict any other power of County government.**"⁸

⁵ See, Article 24, Section 9-1301 and Article 23A, Section 44A of the Annotated Code of Maryland for the general State enabling legislation. In addition to Montgomery County, special taxing districts have been utilized to finance infrastructure through bond offerings in Frederick County, Prince George's County, Anne Arundel County and Baltimore City. See, "A Summary of State Legislation to Encourage Innovative Infrastructure Finance Options," prepared for the National Association of Home Builders by a national conference of state legislatures, August 2005, for a cite to special taxing district enabling laws in other states.

⁶ See Appendix A, Section I.B.

⁷ See Appendix A, Section I.C.

⁸ See Appendix A, Section I.D.

III. SPECIFIC LEGAL ISSUES RAISED BY CLARKSBURG DEVELOPMENT DISTRICT ADVISORY COMMITTEE AND CLARKSBURG TOWN CENTER ADVISORY COMMITTEE

A. Montgomery County's Development District and Development Review and Approval Laws Are Complimentary To Each Other and Designed To Work in Concert to Assure Funding and Construction of Necessary Public Infrastructure

One of the main thrusts of the Citizens' Reports is that any public infrastructure contemplated by and included in a development approval by the Planning Board cannot be later included as infrastructure to be financed by a development district, and that such infrastructure, instead, must be solely and entirely developer funded.⁹ These arguments fail to accurately recognize the legal relationship between the development district creation process and the development approval process in Montgomery County; fail to delineate the clear distinction between infrastructure requirements and infrastructure financing mechanisms; and fail to apply a correct legal analysis to the facts and circumstances of the instant matter.

In those instances where the County has identified an area of high priority for new development or re-development with extensive infrastructure needs that cannot be provided by the County or the developer in the short-term, the use of development districts provides an additional option with respect to the construction and financing of public infrastructure and the review and approval of developments to be served by such infrastructure. When development districts are utilized, the development review process and the development district creation process are substantively and procedurally interrelated. Applicable laws and regulations do not dictate a rigid, sequential approval as suggested by the Citizens' Reports. The contention that any public infrastructure mentioned in a subdivision or site plan condition of approval requires sole developer financing of such infrastructure ignores this interrelationship, as well as the clear distinctions between required infrastructure versus general benefit infrastructure and infrastructure construction versus mechanisms of infrastructure finance.

i. There Exists a Clear Distinction Between Planning Board Authority to Approve Development Pursuant to the Regional District Act and the Infrastructure Finance Tools Available to Implement Construction of Public Infrastructure

The Residents' Report places great emphasis on the Planning Board's exclusive authority to administer Montgomery County's subdivision regulations pursuant to the Regional District Act and claims that proceeding with the use of development districts in Clarksburg would be in

⁹ Advisory Report's position on this matter is summarized by the statement in its March 21, 2007 report, "absent district creation prior to early plan approvals, the practical effect is to shift developer obligations from private developers to individual homeowners" (p.9). Similarly, the Residents' Report's position is summarized by the statement in its March 20, 2007 report "a development district cannot be applied to a development that has already received approval based on associated developer-funded infrastructure improvement obligations...conditions imposed at subdivision approvals required developer provision of infrastructure improvements" (p.96).

conflict with the Board's exclusive jurisdiction over subdivisions and inconsistent with the Planning Board's subdivision approvals. This position erroneously assumes that the provisions of Chapter 14 and the use of development districts in the County is in competition with, or seeks to supercede, Planning Board authority under the Regional District Act instead of being specifically designed by the County Council to complement and work in concert with one another.¹⁰

While the Regional District Act specifies that the Planning Board has the authority to administer the subdivisions regulations, the financial decision-making involved in funding the required infrastructure resides exclusively with the County. Specifically, the responsibility for preparing the capital improvements budgets and programs of public works is "vested in the county government and its administrative, fiscal and planning staffs and not in the staff of the Commission and the County Planning Board."¹¹ The Planning Board, while authorized to require that certain infrastructure be installed prior to the issuance of building permits, does not have the broad power to dictate the manner in which those infrastructure improvements are financed either by the County or by a developer. Further, the Planning Board's enabling legislation specifically limits its powers to only those items listed in §7-111 and states that the powers granted to the Board "shall not be construed to grant powers in any substantive area not otherwise granted."

Specific instances of the respective Citizens' Reports' failure to draw proper legal conclusions from the provisions of law cited relating to the Planning Board's authority and responsibility include:

- The Residents' Report reproduces the purpose clause of the subdivision regulations (p.6), but does not attempt to address the interrelationship between these purposes and the purpose clause of the County's development district law (Section 14-2 of the County Code) to "authorize 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..."(emphasis added).¹²
- The Report also recites Section 50-5 of the subdivision regulations stating "wherever this chapter imposes more stringent regulations, restrictions, limitations or requirements, the provisions of this chapter shall prevail," but mischaracterizes this provision by implying that the subdivision regulations are somehow in conflict with, or provide more stringent restrictions than, the requirements of Chapter 14. Chapter 14 does not address the requirements imposed by the subdivision regulations, let alone seek to relax or lessen the requirements of the subdivision regulations. Instead, Chapter 14, in concert with Chapter 20A, separately provides for and authorizes a public financing tool to be used to finance,

¹⁰ Section 14-18(b) of the County Code expressly states, "the powers granted under this Chapter supplement any power conferred by any other law and do not restrict any other power of County government."

¹¹ Article 28 §7-111(a).

¹² Section 14-18(a) of the Montgomery County code states that the development district law "is necessary for the welfare of the County and its residents and **must be liberally construed to achieve the purposes stated in Section 14-2**" [emphasis added].

refinance or reimburse for the cost of infrastructure improvements necessary for the development of land.

- The Report goes on to identify the Planning Board's responsibilities to review the adequacy of public facilities, including water and sewer facilities, transportation facilities and open spaces, as part of subdivision review, but does not address the connection between the Planning Board's findings and conditions relative to adequacy of public facilities and the mechanisms for funding any required improvements. The Planning Board clarified its own role in determining alternative road infrastructure funding mechanisms when it "determined that the infrastructure schemes proposed by the Master Plan are legislative in nature, will be implemented by the Council, and may or may not grandfather development predating any such legislation." Further, the "Board concluded that to anticipate the Council's actions would be presumptive."¹³ While the Planning Board's subdivision approvals under the subdivision regulations indeed contain binding conditions relative to staging of development and adequacy of public facilities, these conditions in no way address or are intended to address how such improvements are financed.

It is also critical to understand that while the Planning Board has authority to impose certain infrastructure requirements as part of subdivision approval, such requirements must have a close nexus to the proposed subdivision. The types of infrastructure that may be required of a developer, which are closely related to the subdivision, include internal roads and sidewalks, utility improvements to serve the subdivision, and internal water and sewer lines, as well as portions of arterial roads and regional infrastructure that benefit the subdivision to the extent of the impact of the individual subdivision on such adjacent infrastructure.¹⁴ The subdivision regulations cannot be interpreted to impose a requirement for sole developer funding of infrastructure improvements that go beyond this nexus.

ii. **The Subdivision and Adequate Public Facilities (APF) Review Process Set Out in Chapter 50 of the Montgomery County Code Is Concerned With Assuring Adequacy of Public Facilities, Not How Such Facilities Are Financed**

The County subdivision regulations require that "every proposed subdivision or resubdivision shall be submitted to the board for tentative or conditional approval in the form of a preliminary plan prior to the submission of a subdivision record plat."¹⁵ During preliminary plan

¹³ See Revised Opinion of the Montgomery County Planning Board dated March 26, 1996, Clarksburg Town Center Preliminary Plan No. 1-95042.

¹⁴ Section 50-24 of the Code states:

(a) The roads, streets, alleys, sidewalks and crosswalks with appurtenant drainage, street trees and other integral facilities *in each new subdivision* must be constructed by the subdivider or developer . . .

(b) . . . the subdivider shall provide, in addition to such required dedication for widening the existing right-of-way, such reasonable improvement to the road *in front of such lots necessary to serve the needs of such subdivision* for access and traffic as required by the road construction code. (emphasis added).

¹⁵ Section 50-34(a) of the Montgomery County Code.

review, the Planning Board reviews and evaluates a proposed subdivision's compliance with all requirements of the subdivision regulations, zoning ordinance, street and road standards, environmental regulations and the adequacy of public facilities. With respect to the adequacy of public facilities, Section 50-35(k) of the subdivision regulations state "the Planning Board must not approve a preliminary plan of subdivision unless the Board finds that public facilities will be adequate to support and service the area of the proposed subdivision."

Pursuant to Section 50-35(f) of the subdivision regulations, the Planning Board may approve a preliminary plan with conditions to ensure that any development, in accordance with an approved preliminary plan, complies with applicable regulations and that development occurs only when the public facilities to support such development are adequate. In exercising its authority pursuant to the Regional District Act and the subdivision regulations to review and place conditions of approval upon preliminary plans, the Planning Board's charge is limited to ensuring that development not exceed the capacity of public facilities to support such development by imposing conditions relating to the provision of public facilities prior to development and/or staging of development based on specific public facility triggers. The Planning Board is not charged with determining how the construction of public facilities and infrastructure will be financed by the County or by the developer.

iii. The Provisional Adequate Public Facilities (PAPF) Process Set Out in Chapter 14 of the Montgomery County Code Assesses Public Infrastructure Needs for the Development District Financing Option

Chapter 14 of the County Code establishes a multi-step process that can be utilized by the County to identify and provide financing, refinancing or reimbursement for the cost of public infrastructure improvements through development districts by issuing municipal tax-exempt bonds. Once the County Council initiates the development district creation process by adopting a resolution that expresses the intent to create a development district, Section 14-7 of the County Code provides a process for a Provisional Adequate Public Facilities (PAPF) approval from the Planning Board for the entire development district. The purpose of the PAPF process is to identify and begin estimating the costs of public infrastructure improvements to be financed by the development district and to assess the adequacy of such public infrastructure in an entire development district.

The suggestion that any and all subdivision approvals in a given area wait for final development district approval or that any needed public infrastructure identified in an existing subdivision approval cannot be incorporated into a development district is itself impractical and nonsensical and would significantly undermine the ability to create and use development districts to finance needed public infrastructure in the County. While the Residents' Report claims that PAPF "makes sense only if the expectation is for development district formation to precede not follow preliminary plan approval", there is no legal basis for mandating this timing. This position is also at odds with the County's policy decision to mandate the use of development districts to finance the acquisition of substantially completed infrastructure.¹⁶

¹⁶ See Appendix A, Section I.C., for a discussion of such policy decisions.

Contrary to the claim of the Residents' Report, PAPF approval pursuant to Section 14-7 of the Montgomery County Code is not superfluous simply because there is a prior subdivision approval. PAPF approval evaluates the adequacy of public facilities for a development district in its entirety (as opposed to just one subdivision) and also initiates the conversation with respect to identification and cost of infrastructure to be financed by the development district. Preliminary plan APF review does not address the question of infrastructure cost because it is not aimed at how public infrastructure is financed, leaving that question to the individual developer and/or the conventional capital improvements plan (CIP) process of the County. The creation and use of a development district introduces an additional public infrastructure financing option and does not prevent a developer from incorporating public infrastructure projects previously included as part of an APF approval or in the CIP.

The County's growth policy specifically addresses the PAPF process. The growth policy states that infrastructure improvements identified as part of the PAPF process "may be funded through development districts or otherwise" and that "the timing of infrastructure delivery may be accomplished by withholding the release of building permits until needed public facilities are available to be 'counted', or by another similar mechanism." The PAPF process, as with the general APF review process under the subdivision regulations, is intended to independently assess the adequacy of public facilities, identify needed public infrastructure and stage development based on the adequacy of public infrastructure. However, for PAPF, adequacy is reviewed for an entire development district, not just one subdivision. As stated in the growth policy, a specific funding mechanism for the public facilities required is not mandated, but instead, PAPF provides the *option* of development district financing for public infrastructure needed in a development district. This refutes the rigid notion of the Citizens' Reports that a specific financing tool is mandated by either an APF or PAPF review and approval. Rather, both APF and PAPF review are alternative tools to ensure that development does not proceed without adequate public infrastructure.

The PAPF process does not supplant the requirement for preliminary plan approval in accordance with Chapter 50 for individual subdivisions, but instead provides an alternative APF determination for subdivisions included within an entire development district. There is nothing in either the subdivision regulations or Chapter 14 that prevents previously approved subdivisions from being included in a development district, nor is there any provision of law that prevents commenced or unbuilt public infrastructure from being included in a development district, as long as the development district creation process is followed. A preliminary plan APF determination and any associated conditions of approval from a previously approved preliminary plan could prohibit issuance of building permits for development until the construction of necessary public infrastructure, but cannot dictate how such public infrastructure must be financed.

iv. **The Interrelationship of Development Review Process and Development Districts in Clarksburg**

As the Clarksburg Town Center Development District is further along than the other development districts called into question (Clarksburg Village and Clarksburg Skylark), a close analysis of the overall relationship between the development approval and development district creation process is helpful.

Project Plan. Pursuant to the County's development review process, the development approvals for Clarksburg Town Center began with the review and approval of Project Plan 919940040 (the "Project Plan") by the Planning Board. The Project Plan was approved with conditions by opinion dated June 12, 1995. Specific instances of the Residents' Report's failure to draw the proper legal conclusions from the provisions of the law it cites relating to the Project Plan include:

- The Residents' Report mischaracterizes the preamble to Section 59-C-10.3.1 of the Zoning Ordinance, which states "approval of this optional method of development is dependent upon the provision of certain public facilities and amenities by the developer" and that provision of optional method amenities "is essential to support the mixture of uses at the increased densities of development." However, instead of properly interpreting this section as merely preamble to the optional method approval mechanism, the requirements of which are specified in the remainder of Section 59-C-10.3 and implemented via Planning Board review of a project plan, the Residents' Report erroneously interprets this statement of purpose to be a binding requirement for developer funding of all public infrastructure associated with a given project plan whether dictated by Section 59-C-10.3 or not. This selective and out of context interpretation is inconsistent with the statutory structure of the Zoning Ordinance and Section 59-C-10.3. Further, the Report fails to cite to Section 59-C-10.3.9(c), which provides specifically that "for the purposes of this section, **public facilities and amenities do not include road improvements or other capital projects that are required to provide adequate public facilities on a timely basis to serve the property**" (emphasis added). Identification of APF public infrastructure is left to the preliminary plan process and the Planning Board does not address financing of necessary public infrastructure.
- Similarly, the Residents' Report also mischaracterizes the introduction to Section 59-D-2.11 of the Zoning Ordinance, which introduces the project plan submission and approval provisions. This language, which states in part "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 greater densities and intensities permitted by the optional method of development, the developer is required to submit a project plan...", is a mere preamble to the project plan submission and approval provisions, and does not somehow impose public infrastructure obligations and requirements outside of those otherwise specifically provided for by the Zoning Ordinance.

In actuality, Section 59-D-2.11 is solely intended to describe the purpose of project plans and to make reference to the variety of explicit Zoning Ordinance requirements with respect to green space, public space, community amenities, etc. imposed as part of an optional method development. Again, actual identification of APF public infrastructure is left to the preliminary plan process and the Planning Board does not address the financing of necessary public infrastructure. The Report is correct that project plans are "guidepost[s] for subsequent approval of the preliminary plan and site plan," they are no more than that. The Project Plan conditions of approval address development staging as it relates to necessary public infrastructure, but do not dictate the financing mechanisms for construction of such infrastructure.

- The Residents' Report cites Section 59-D-2.12(f) of the Zoning Ordinance, which requires a statement addressing how the optional method project is more desirable than a standard method project upon submission of a project plan, and interprets this section to mean that public infrastructure associated with a given project cannot be financed in any part using a development district. This conclusion is completely disconnected from and wholly outside the scope of any topic related to Section 59-D-2.12 (f). The Section addresses the contents of a project plan filing. It requires a statement justifying the use of the optional method when compared to the standard method of development from a density, site design and development standard perspective. Regardless of whether an optional method or standard method is used, an APF determination is required as part of preliminary plan review and approval and, in no event is the method of public infrastructure financing within the purview of a project plan filing.
- The Residents' Report then again cites Section 59-D-2.12(h) of the Zoning Ordinance, which requires a statement addressing "the relationship, if any, of the development program to the county's capital improvement program" and somehow concludes that developer contributions are separate and independent from the CIP. Again, Section 59-D-2.12 addresses only the contents to be included in a project plan filing and does not impose any legal requirements beyond those found elsewhere in the County Code. This filing requirement merely asks for a statement as to the relationship between the development and the CIP, which could reflect a variety of circumstances, and indicates that the Planning Board does not assume or control how infrastructure will be financed.

Initial Preliminary Plan. Pursuant to the requirements of the County subdivision regulations, the Clarksburg Town Center project also underwent review and approval of the Clarksburg Town Center Preliminary Plan (Preliminary Plan #119950420, the "Preliminary Plan"). The Preliminary Plan was approved with conditions by the Planning Board opinion dated March 26, 1996. While the Residents' Report discusses the Preliminary Plan staff report, for purposes of analysis of the Preliminary Plan and the obligations and staging elements related thereto, the approved Planning Board Preliminary Plan opinion and actual Preliminary Plan are the operative documents.

With respect to Preliminary Plan conditions of approval related to the adequacy of public facilities, the Preliminary Plan opinion clearly distinguishes between (a) the public facilities, including roads, that will be adequate to support and service the area of the proposed subdivision and (b) the "second level of transportation review" based on the Master Plan recommendation that development districts, or alternative financing mechanisms, be implemented to ensure that road infrastructure be provided. The Preliminary Plan states "necessary local area transportation review improvements for this project are identified in condition #2 for Project Plan No. 9-94004." Project Plan condition #2 contains a list of road improvements needed at various stages to provide enough capacity to serve the proposed development. Development staging based on the adequacy of public facilities is distinct from the mechanisms used to finance such public infrastructure. Further, the public infrastructure improvements contained in Project Plan condition #2 were not included in the second County Council Development District resolution (approved pursuant to Section 14-9 of the Montgomery County Code), for the Clarksburg Town Center Development District and are, therefore, not to be development district financed.

The “second level of transportation review” discussed in the Preliminary Plan based on the Master Plan recommendation that development districts, or alternative financing mechanisms, be implemented to ensure that road infrastructure be provided to support recommended Master Plan development refers to public infrastructure that is not required as part of the Preliminary Plan APF review, but is general public infrastructure to support all planned development in Clarksburg. In approving the Preliminary Plan, the Planning Board expressly acknowledged that with respect to general public infrastructure in Clarksburg **“the infrastructure schemes proposed by the Master Plan are legislative in nature, will be implemented by the Council...that to anticipate the Council’s actions would be presumptive, and premature.”** This illustrates awareness by the Planning Board that while it can conduct an APF review and establish required APF infrastructure improvements and development staging based on future infrastructure improvements, it cannot dictate how such infrastructure will be financed. As we now know, the Council later decided to use development districts to finance additional general public infrastructure in Clarksburg.

The Preliminary Plan opinion evidences an understanding of the distinction between construction of required improvements and financing of those improvements. Regarding the Planning Board’s discussion of master planned infrastructure at both the Project Plan and Preliminary Plan levels, the Preliminary Plan opinion states **“the Planning Board expresses a desire to allocate among developers a responsibility to *construct* portions of road infrastructure in a fair and equitable manner.”** Further, the Preliminary Plan opinion references the Planning Board’s request for an analysis of how and when road infrastructure would be *built*. In fact, in all instances of the Planning Board’s discussion and stated conditions of approval, the Preliminary Plan opinion references and requires *construction* of infrastructure on a staging schedule. Accordingly, construction of public infrastructure by a private entity clearly appears eligible for impact tax credits or reimbursement from development district financing, meaning it is to be publicly financed regardless of who physically constructs the infrastructure improvements.

Subsequent Preliminary Plan Amendments. While the Residents’ Report only discussed the originally approved Preliminary Plan, the Plan has, in fact, been amended twice since its original approval in 1996. On July 12, 2001 the Planning Board approved revisions to the Preliminary Plan conditions of approval (Preliminary Plan #11995042R) relating to grading, as indicated in the approval opinion dated August 14, 2001. This approval incorporated the original Preliminary Plan conditions of approval. On November 8, 2001 the Planning Board approved amendments to the Preliminary Plan (Preliminary Plan #11995042A) relating to abandonment of dedicated rights of way, as indicated in the approval opinion dated February 28, 2002. This approval incorporated the original Preliminary Plan conditions of approval and the revised conditions of approval from the August 14, 2001 approval opinion.

Of legal significance is the fact that the actions by the Planning Board to amend the Preliminary Plan not only afforded the Planning Board and others the opportunity to discuss and revise the Preliminary Plan, but the most recent Preliminary Plan amendment approval represents the operative approval date and document. As stated, the most recent amendment to the Preliminary Plan was approved on February 28, 2002, nearly one and a half years after the adoption of County Council Resolution 14-648 stating its intent to create a Clarksburg Town Center Devel-

opment District. Therefore, the Planning Board approved the Preliminary Plan amendments with full knowledge of the intent to create a development district and any issues related thereto were discussed and settled at that time.

The Residents' Report states, in summary of its position with respect to the Preliminary Plan, that "conditions of approval of the Preliminary Plan required developer provision of infrastructure improvements. Fulfillment of these requirements was never explicitly or implicitly contingent upon creation of a development district wherein the developer would be reimbursed for these expenditures." This is an erroneous conclusion based on a flawed interpretation of the subdivision regulations and Chapter 14. In actuality, the Preliminary Plan conditions of approval simply required developer *construction* of certain infrastructure improvements and staged approved development based on the availability of public infrastructure. Use of development districts was definitely anticipated by the Master Plan and all development approvals; however, the law does not require a development district "contingency" provision in Preliminary Plan conditions of approval. Chapter 14, instead, provides procedural and substantive requirements for the creation of a development district and allows for financing, refinancing or reimbursement of public infrastructure improvements. The legality of development districts and the infrastructure included therein requires a showing of compliance with all applicable development district laws, and not a showing that eligible development district infrastructure was made "contingent" on the creation of a development district at the time such infrastructure was conceived or included as a staging requirement in a preliminary plan.

Development District PAPF Approval. As stated previously, all procedural and substantive requirements for the creation of the Clarksburg Town Center Development District pursuant to Chapter 14 of the County Code were followed.

Pursuant to Section 14-7 of the Montgomery County Code, after adoption of the first resolution of the County Council stating its intent to create the district, the petitioner for the Clarksburg Town Center Development District submitted the required application to the Planning Board for a PAPF approval for the entire development district. The PAPF process, as with the APF process under the subdivision regulations, is intended to assess the adequacy of public facilities, identify needed public infrastructure and stage development based on the adequacy of public infrastructure. However, for PAPF, adequacy is reviewed for an entire development district, not just one subdivision, or a portion of a subdivision. PAPF approval, as stated in the growth policy, does not mandate a specific funding mechanism for public facilities required as part of PAPF review, but instead provides the *option* of utilizing development district financing for public infrastructure needed in a development district.

Per Section 14-3(g) of the County Code, infrastructure improvements eligible for development district financing include virtually all types of public infrastructure, but may not ultimately be improvements primarily serving residents of only one development and may not be the responsibility of a single developer's APF requirements. As part of the PAPF review and approval by the Planning Board, the County Executive and the County Council, all reviewing agencies determined that the public infrastructure ultimately included as eligible for development district financing in the Town Center District served a regional purpose and **was not singularly the responsibility of the Town Center development under APF.** This determination was

based on a thorough review by the Planning Board and the County Council of the prior preliminary plan approvals and APF determinations for Clarksburg Town Center. Specifically, the Planning Board and the County Council recognized the difference between required APF infrastructure and general benefit master planned infrastructure when determining which public infrastructure improvements would be included in the Clarksburg Town Center development district.

v. **The County's Capital Improvement Program (the "CIP") Per Se Evidences the Intention to Publicly Fund General Benefit Infrastructure Included in the Clarksburg Town Center Development District**

The purpose of the County's CIP is to provide a framework for long-term planning of major public improvement projects and to provide a roadmap for the County, the public and developers as to the development of public infrastructure throughout the County. The County Charter requires that the CIP "shall include a statement of the objectives of capital programs and the relationship of capital programs to the County's long-range development plans; shall recommend capital projects and a construction schedule; and shall provide an estimate of costs, a statement of anticipated revenue sources, and an estimate of the impact of the program on County revenues and the operating budget."¹⁷

The public infrastructure projects identified for development district funding in the Town Center project have, in some cases, been identified in the County's CIP budgets since 2001. After Resolution 15-87 creating the Clarksburg Town Center Development District was approved on March 4, 2003, the subsequent CIP budgets were amended to account for the source of funding for portions of the capital improvements identified in the budget. In one such budget, the County stated that **"an implementation agreement between the County and the developer will set forth the conditions for disbursement of funds after inspection and acceptance by the County of substantially completed improvements. Amounts shown [in the CIP budget] are the maximum that will be disbursed from development district funds for the improvements."**¹⁸ Further the County stated that **"the Town Center Development District participation reflects a pro-rated share of what otherwise would be G.O. bond funded."**¹⁹

The Stringtown Road extension has been identified in the County's CIP budget since 2001 and is an example of a public improvement which could not, in its entirety, have been required of a single developer because it is a general improvement serving the general public, not just the residents of one subdivision, but the funding mechanism of development districts allows the road to be completed by a single developer with a reimbursement by the County. The developer is in effect a "private contractor" in the transaction in that the developer pays for the construction of a County project, installs the infrastructure and then is reimbursed by the County.

According to the Advisory Report, "it is not credible that the Planning Board would impose few or no financial obligations for infrastructure improvements upon a developer, but

¹⁷ Montgomery County Charter, § 302.

¹⁸ See CIP Budget, Clarksburg Town Center Development District: Roads – No. 500423, January 10, 2004. Contained in Appendix G.

¹⁹ CIP Budget, Stringtown Road Extended – No. 500403, January 10, 2004 (emphasis added).

instead shift them wholly to private citizens.” The Planning Board has no purview over how infrastructure costs are financed. Secondly, the imposition of infrastructure requirements on the development community are, in fact, borne by the private citizens and other end users, directly or indirectly, as part of the economic calculus that goes into the land development activities. Ultimately, the market conditions will determine whether development in a given area is profitable or unprofitable. This is entirely consistent with the County’s general policy of requiring new growth to pay a portion of its own costs.

vi. **The Clarksburg Master Plan Contemplated the Use of Development Districts in Order to Provide Needed Flexibility in the Financing of Identified Public Infrastructure**

The 1994 Approved and Adopted Clarksburg Master Plan and Hyattstown Special Study Area (the “Master Plan”) contains extensive recommendations for the planning and development of Clarksburg. In addition to addressing in detail the amount, type and mix of development recommended for the various neighborhoods and areas of Clarksburg, the Master Plan addresses and provides recommendations regarding the implementation and financial considerations associated with its recommendations. The Residents’ Report cites the implementation recommendations from the Master Plan as a legal basis for the proposition that any public infrastructure improvements associated with development approvals obtained prior to the final implementation of a development district cannot be properly included in a development district. This conclusion constitutes a flawed reading of the Master Plan implementation recommendations and is erroneous with respect to the force of law it assigns to the Master Plan recommendations. The argument offers an unreasonably rigid, impractical and unworkable interpretation of the Master Plan’s policy implementation recommendations, rather than acknowledging that development staging recommendations in the Master Plan exist to provide alternatives based on the availability of adequate public infrastructure.

The Master Plan acknowledged that the traditional County-funded CIP mechanism for public infrastructure improvements would not be sufficient to pay for public infrastructure needed in Clarksburg and that additional funding sources, including development districts, would be utilized. In response to these fiscal concerns, the Master Plan recommended staging principles and sequencing in order to coordinate the timing of development with the provision of public facilities. It must be emphasized that the Master Plan did not aim to explore in detail how public infrastructure would be financed, as this would have been both outside the purview of the Master Plan and infeasible at the time of Master Plan adoption in 1994. Instead, the Master Plan made recommendations only as to the staging of development based on the availability of such infrastructure. The Master Plan’s recommended staging principles including the following:

- **Fiscal Concerns (p.188)**: “The timing and sequence of development in Clarksburg should be responsive to the likelihood that funding for the capital improvements required by new growth in the area will come from *a variety of sources*, including the County and private development...it is clear that staged development should be conditioned on the ability of private developers to fund a significant portion of the infrastructure improvements called for in the Plan *or the availability of other new sources*

of revenues.” [Note that concerns and options are presented, but no conclusions drawn.]

- **Fiscal Concerns (p.188):** “This Plan recognizes, that while the specific details and implementation mechanisms related to alternative financing 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” [Note that use of development districts is considered by the Master Plan to be one of the potential forms of private financing.]

In addition to these overall staging principles, which were purposefully broad and non-conclusory, the Master Plan provided more specific staging recommendations for individual development stages based on these principles. All portions of Clarksburg located east of I-270, including the Clarksburg Town Center, were included in Stage 3 of the Master Plan staging sequence recommendations. The Master Plan recommended a dual-triggered staging mechanism by which each stage would be initiated or “triggered” based on a set of overall triggers and then, after a stage has been triggered, individual developments within that stage could proceed once all of that stage’s implementing mechanisms have been met.

The overall staging triggers for Stage 3 included a requirement that “either (a) State and County enabling legislation for development districts, or (b) alternative infrastructure financing mechanisms are in place.” Because Chapter 20A of the County Code, the State development district enabling legislation, was enacted in April 1994, and Chapter 14 of the County Code, enabling development districts in the County, was adopted by the County Council later in 1994, the Stage 3 staging trigger was met allowing development in Stage 3 to proceed.

Beyond these staging triggers, the Master Plan recommended implementing mechanisms that allow individual developments within each stage to proceed once they are complied with. With respect to Stage 3, the Residents’ Report specifically identifies implementing mechanisms #4 and #5 as a basis for why a development district could not later be created and used to finance public infrastructure improvements. As explained in turn below, neither implementing mechanism provides a legal basis for this position:

- **Implementing Mechanism #4:** “Properties in this stage are subject to AGP and APFO approval by the Planning Board.” As stated before, the Clarksburg Town Center project did receive APF approval from the Planning Board, with distinction between and identification of the public infrastructure required for APF compliance and the more general public infrastructure required for the Clarksburg region. For Clarksburg Town Center, this implementing mechanism was complied with and has no bearing on the legality of the Clarksburg Town Center Development District and the infrastructure included therein.

- **Implementing Mechanism #5:** “One or more development districts (or alternative financing mechanisms) that can provide infrastructure facilities in accordance with the APFO and additional local determinations by the County Council are implemented.” The Resident’s Report argues that because the Clarksburg Town Center preliminary plan proceeded before final implementation of the Clarksburg Town Center Development District, none of public infrastructure referenced or associated with the Preliminary Plan can be lawfully included in the development district. This staging recommendation was simply concerned with the availability of the infrastructure prior to development and does not bear on its eligibility for development district reimbursement. The development district is a financing alternative for certain infrastructure which satisfies the County’s requirements, but is not the exclusive vehicle for the funding of all infrastructure required to satisfy APFO. Consequently, the alternative financing mechanisms utilized by the developers, including conventional financing and shared participation of financing of infrastructure with other developers in the County, are not precluded.

In any event, the staging recommendations contained in the Master Plan cannot impose legal requirements beyond those contained in the applicable law with respect to APF, PAPF and development districts.

B. The “Single-Developer” Provision of Section 14-3 Does Not Preclude Inclusion in a Development District of infrastructure which the Planning Board Required a Developer to Construct

The Residents’ Report questions the inclusion of certain infrastructure in the list to be funded through the Clarksburg Development District based on the language of Section 14-3(g)(2) of the Montgomery County Code. The interpretation advanced was not so intended, is very restrictive and, if read literally, would make it impossible to use a development district to fund any infrastructure which is identified as a developer requirement in a preliminary plan or site plan. This reasoning would entirely defeat the purpose of using development districts in the first place.

The more accurate reading of Section 14-3(g)(2) is that infrastructure which collectively may be constructed by one or more developers or by the County itself, such as sections of a major arterial road, which provides capacity for traffic beyond what is provided for a single development, is the type of infrastructure which should be financed through development districts rather than smaller, more local, improvements. The representatives of County government have consistently upheld this interpretation. In fact, the legislative history contained in the staff report to the County Council written by the Council’s Senior Legislative Attorney at the time of adoption of Chapter 14 by the Montgomery County Council in 1994, which includes a detailed summary of each of the provisions of Chapter 14, reads as follows:

In Staff’s view, these (*i.e.*, the exclusions in Section 14-3(g)(1) and 14-3(g)(2)) 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.

At the time of adoption by the Montgomery County Planning Board of the application for PAPF approval of the Clarksburg Town Center Development District, as required by Section 14-7 of the Montgomery County Code, a question was raised by a staff member as to whether or not the Clarksburg Town Center infrastructure complied with the requirements of Section 14-3(g)(2). The report of the Planning Board indicated that prior to the issuance of bonds for the Clarksburg Town Center, Section 14-3(g)(2) should be amended, if necessary, to clarify the position of the County with respect to the availability of development district funding.

On numerous occasions Section 14-3(g) of the Montgomery County Code has been interpreted by representatives of the staff of the County Finance Department, County bond counsel and representatives of the County Council staff.²⁰ Without exception, representatives of the County government have indicated that they agree that the language in Section 14-3(g)(2) is not to be interpreted to limit the ability of a developer which has obtained preliminary plan approvals from utilizing the development district process to fund otherwise eligible infrastructure required to be constructed as part of its preliminary plan approval; and have expressed a willingness to pursue an amendment to either delete Section 14-3(g)(2) or to clarify its interpretation. Clarifying legislation to amend Chapter 14 has in fact been drafted and reviewed by representatives of the County Government, but has not yet been introduced before the County Council. Although we do not believe an amendment is necessarily required, clarification of Chapter 14 may be accomplished at any time prior to the issuance of bonds by the County to finance the infrastructure.

At the time that the Montgomery County Planning Board considered the applications of Clarksburg Skylark Development District and Clarksburg Village Development District pursuant to Section 14-7 of the Montgomery County Code, the Montgomery County Planning Board staff interpreted the language in Section 14-3(g)(2) as the basis for making recommendations to the Planning Board that additional infrastructure which had not been originally required under the terms of the approved preliminary plans for Clarksburg Village or pending for Clarksburg Skylark be included within the infrastructure required for the combined Development Districts to achieve their PAPF satisfaction under Section 14-7 of the Montgomery County Code.²¹

In an exchange of correspondence between the developers' attorneys and Ms. Michelle Rosenfeld, then-Associate General Counsel of the Montgomery County Planning Board, following receipt of the reviewing staff's memo, it was questioned whether Section 14-3(g)(2) was adequate legal authority for Planning Board staff to recommend that additional infrastructure be included within the Clarksburg Village and Clarksburg Skylark Development Districts. Prior to the submission of this letter, counsel for the developer had occasion to discuss the issue again with the attorney to the County Council. The Council's attorney then sent the following e-mail

²⁰ The County had previously approved the West Germantown Development District and Kingsview Village Development District after having addressed the applicability of Section 14-3(g)(2) to the included infrastructure.

²¹ See Memorandum to Montgomery County Planning Board dated February 8, 2002, from Karen Kumm-Morris, Clarksburg Planner, Community-Based Planning Division, p. 2, in Appendix H.

to Planning Board Staff on February 12, 2002, regarding the correct interpretation of Section 14-3(g)(2):

I read your first memo (Clarksburg Village) and discussed the issue with [development counsel]. I think you may be reading the development district law too narrowly. While we expected this mechanism to be used by groups of developers, I don't see anything in the law that would prohibit a single developer/landowner from creating a development district. I also agree . . . that Section 14-3(g)(2) wasn't intended to require the developer to provide more infrastructure than the APF requires it to provide. (That is not to say that the Council can't require more infrastructure, or that the Planning Board can't recommend more; in both cases, the opposite is true, and I don't want to discourage the Board from doing so.) What we intended by (2) was that the infrastructure that the development district funds must be useful to more than a single developer – in other words, for a multiple-developer district, the infrastructure must be useful to the entire district. While, as I said, we didn't really think about the possibility of a one-developer district, in that case, I think (2) means that the infrastructure must be useful to persons outside the district; so, for example, internal roads that are needed to meet APF local area requirements wouldn't suffice, but roads that would be used by through-commuters would. Hope this helps. Let me know if you need anything else.

The response of [the Planning Commission Associate General Counsel] on February 26, 2002, was as follows:

I note from the outset that the interpretation of Section 14-3(g) is ultimately a matter for the District Council. That aside, however, it appears to me that both your interpretation and Staff's interpretation are in accord. Both interpretations, while using different semantics, essentially require the same finding – that the required APF improvements must serve residents outside of the development proposed by the single developer responsible for the APF improvements in order for these improvements to qualify as "infrastructure improvements" under Section 14-3(g). [The Council's attorney's] e-mail dated Feb. 12, 2002, also supports this interpretation.

In summary, while the language in Section 14-3(g)(2) may, if taken out of context of the rest of Chapter 14, be susceptible to a potential more narrow reading than intended, clearly the view of everyone of the staffs of the County Council, the County Executive and the Montgomery County Planning Board whom at the time had occasion to interpret the issue was that (i) the language should not be used to restrict the availability of development districts to fund otherwise eligible infrastructure which may be the responsibility of a single developer under an approved preliminary plan, and (ii) that this language should and can be either removed from Chapter 14 at the appropriate time or clarified to avoid future confusion prior to the issuance of bonds by the County.

C. Proper Interpretation of §20A-1 and §§ 14-6 and 14-9 of Chapter 14 for Developer-Initiated Development Districts Confirms There Was Full Compliance with the “80% Rule”

The Residents’ Report argues that the second County Council Resolution, No. 15-87 adopted by the Montgomery County Council on March 4, 2003 for the Clarksburg Town Center Development District, was invalid in part due to the fact that the resolution did not receive the approval by 80% of the owners of real property and 80% of the owners of assessed valuation of real property pursuant to Section 20A-1(f)(2) of the Montgomery County Code. The Advisory Report makes a similar allegation, albeit based on their perception that Section 14-9 of the Montgomery County Code requires a petition signed by at least 80% of the owners of real property at the time of the second resolution to have been received by the County Council. The allegations in both reports are wrong and are contradicted by the plain language of the statutes and by the May 20, 1994, letter written by Attorney General J. Joseph Curran at the time of the adoption of Chapter 20A of the Montgomery County Code.

Chapter 20A-1(f)(2) of the Montgomery County Code contains the requirement that no new development district may be created to finance special obligation debt unless the proposed action is approved by:

- (i) 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
- (ii) the owners of at least 80% of the assessed valuation of the real property located within the proposed development district.

In Maryland Attorney General Curran’s May 20, 1994 letter to Governor William Donald Schaefer, this section of the statute was discussed in the context of whether there might be a violation of the equal protection clause of the Fourteenth Amendment based on the one-person/one-vote principal.²² The equal protection argument centered around whether the requirement of “approval” by the property owners in Section 20A-1(f)(2) is to be interpreted to be a vote, which triggers equal protection franchise rights or, alternatively, as a mere request or petition to the County Council, which is the ultimate arbiter of the matter. If the latter, and the “prior approval” by the property owners were merely a preliminary expression of encouragement, there would be no equal protection concern according to the Attorney General. On the other hand, if a true vote of the property owners to actually approve the creation of a development district was required by the language in Section 20A-1(f), the Attorney General’s opinion saw a potential for equal protection clause concerns.

The opinion of the Attorney General went on to describe the fact that the actual language in Section 20A-1(f) was to be interpreted in light of the Montgomery County Council implementing legislation in Chapter 14 and referred directly to the language in Section 14-6 of

²² See Appendix D for a copy of the letter.

the Montgomery County Code, which contains the 80% requirement in reference to only the initial petition of property owners. The Attorney General's letter concludes that the intent of the legislation was that the 80% requirement be satisfied only at the time of filing an initial petition by the property owners and that **it is the County Council, and not the property owners, which have the power to approve the creation of the development district.** His letter states in conclusion, "landowner 'approval' under House Bill 895, as so implemented, would then be a genuinely preliminary matter and not an election subject to one-person/one-vote requirements."

The language in Section 20A-1(j)(2) of the Montgomery County Code is consistent with the notion that no further owner approvals are required even if subsequent property owners take title to the property in intervening years following the filing of the petition. This Section states as follows:

A person who is successor in interest to an owner of land in a development district acquires the same rights and obligations under the subsection as the person's predecessor in title.

The language in Chapter 14 is even clearer with respect to the requirement for the 80% property owner approval. Section 14-6(a) of the Montgomery County Code provides that in order for a development district to commence at the request of a property owner, a petition signed by at least 80% of the owners of real property and the owners of at least 80% in value of the real property as shown on the latest assessment rolls, must file **an initial petition** with the Montgomery County Council. Section 14-6 was amended in 1996 by the Montgomery County Council to authorize an alternative means of creation of a development district whereby the County Council itself is the moving party to create the development district. A new Section 14-6(b) was added to provide that the County Council, on the request of the County Executive or on its own motion, may hold a public hearing after giving public notice to specify the proposed boundaries for a proposed development district. In either case under Sections 14-6(a) or 14-6(b), the County Council was required to hold a hearing and to adopt a resolution declaring its intent to establish a development district and explaining why intensive development of and public investment in the proposed area during the term of the district would benefit the public interest. At the time of the amendment to Section 14-6, Section 14-9(c) was added which reads as follows:

If the Council intends to use special obligation debt to finance the district, *and the district was initiated by the Council under Subsection 14-6(b)*, before the Council adopts a resolution under this Section, the Council must receive a petition signed by at least 80% of the owners of real property and the owners of at least 80% in value of the real property, as shown on the latest assessment roles, located in the proposed district. (Emphasis added.)

Requiring the prior approval of 80% of the property owners in the case of **an alternative County Council-initiated petition** makes sense since there would not have been any prior consent given by the existing property owners to initiation of the action by the County Council.

Since the filing of a developer-initiated petition, and not a County Council-initiated action commenced each of the Clarksburg Districts, the language in Section 14-9(c) is inapplicable.

The Residents' Report acknowledges the inapplicability of Section 14-9(c) to developer-initiated petitions, but argues that this Section 14-9(c) does not fulfill the requirements of Section 20A-1(f)(2) "whenever there has been a material change in ownership between resolutions." As noted above, Section 20A-1(f)(2) does not contain any such requirement. The fact that there may have been a change in ownership between the date of the initial petition and the date of the creation of the development district does not provide a successor in interest rights beyond those of the predecessor.

The Council's staff report issued at the time of the adoption of Chapter 14 also supports this interpretation of County law:

The State law requires "approval" of the district by the specified number of property owners; the Attorney General interpreted the law so that this petition [referring to the petition under Section 14-6 of the Montgomery County Code] can function as approval, instead of making the Council, Executive and Planning Board go through the entire process of creating a district without being sure that enough property owners will approve it . . . ("Approval" of a district should not be confused with participation in it. Once a district is legally created, the owners of all property located in it must pay whatever tax or assessment is imposed. However, Section 14-10(f) allows landowners who are not ready to develop their land when a district is created to defer special property taxes until a subdivision or development plan is approved for their own property.)

Finally, it should be noted that both the West Germantown Development District and the Kingsview Village Center Development District were formed based upon initial petitions filed by the original developer property owners, similarly to the Clarksburg Development Districts.

D. "Fully Developed Property" Within the Meaning of §14-10(b) of Chapter 14 Does Not Refer to Property Proposed to be Constructed in the New Plan of Development

While not expressly mentioned in either of the two Citizens' Reports, certain members of the staff of the County Council and the County Executive have indicated that some citizens in Clarksburg assert that because they bought their homes prior to the date of creation of a tax district (*i.e.*, prior to March 4, 2003, in the case of the Clarksburg Town Center Development District; and any of the homeowners currently residing in the proposed Clarksburg Village and Clarksburg Skylark Development Districts since no County Council resolution creating those districts has ever been adopted), their properties are exempt from any special taxes based upon their reading of Section 14-10(b) of the Montgomery County Code. This provision reads as follows:

- (b) The resolution must provide, except when clearly inconsistent with State law, that:

- (1) any property which is fully developed before the development district is created is exempt from any special assessment, special tax, fee or charge imposed under this Chapter; and
- (2) the owner of any property exempt from payment under paragraph (1) which is later developed more intensively and benefits from the development capacity attributable to infrastructure improvements financed by the district must pay any tax, fee, or charge that it would have otherwise paid under this Chapter.

The clear intent of Section 14-10(b) of the County Code as interpreted by County bond counsel in connection with the formation of the earlier West Germantown Development District is that properties located within a community that are not part of the general plan of development and are not subject to further development, such as an existing residence built prior to the commencement of construction of the subdivision for which the improvements are being undertaken, should not be subject to tax simply because it is physically located within the boundaries of an approved development district. For example, in the case of West Germantown Development District, a 5-acre property with a single-family residence located inside the boundaries of that District was excepted from the requirements that special taxes be imposed based upon this Section of the law. Similarly, within the geographic boundaries of the proposed Clarksburg Village and Clarksburg Skylark Districts, there are several pre-existing single-family residences which were built long before the developers started development of their respective communities and which would be exempt under this Section of the law from any special taxes.

This situation should be contrasted with the situation of a property owner purchasing a new house within a community proposed to be included within a development district. The new home purchaser is purchasing a home in a subdivision being developed under a general plan of development and clearly benefits from the construction of the infrastructure being financed by the development district. It is disingenuous for the homeowner to argue in this case that the property is "fully developed" because his or her house happens to have been constructed prior to the adoption of the development district implementing resolution. The whole purpose of Chapter 14 is to fund infrastructure that benefits the entire new community. From a legal standpoint, the words "fully developed" are to be read in light of the clause in Section 14-10(b)(2), which states that any property which benefits from the development capacity attributable to infrastructure improvements financed by the district must pay any tax, fee or charge that would otherwise have been paid. Clearly, all of the new homes located in Clarksburg Town Center, Clarksburg Skylark and Clarksburg Village developments have benefited from the infrastructure and accordingly, cannot be considered "fully developed" for purposes of the referenced exemption.²³

²³ Further, as discussed in Section III.F. of this memorandum the home purchasers signed written notices of the pending development districts.

E. The County Council Has the Ability to Use Development Districts to Fund “General Benefit” Infrastructure in Addition to Infrastructure Proposed by the Development District Petition

The Residents’ Report avers that Section 14-8 of the Montgomery County Code was not strictly adhered to because the County Executive recommended the addition of approximately \$7.9 million of infrastructure projects that provide general benefit to the Clarksburg community at-large, including an unfunded gap in the widening of Stringtown Road east of Maryland 355 and an extension of Stringtown Road west of MD Route 355 to I-270. The report alleges that Section 14-8 does not give the County Executive authority to add infrastructure improvements to those proposed by an applicant or listed by the Planning Board in the PAPF approval under Section 14-7 of the Montgomery County Code.

The logic of this argument is not consistent with the provision of Chapter 14. Section 14-8 neither expressly provides nor prohibits the County Executive from making recommendations for inclusion of infrastructure beyond that petitioned for by a developer or approved by the Planning Board.²⁴ In point of fact, the governing section for the creation of a development district is not Section 14-8 at all, but Section 14-9(e), which describes the requirements of the second resolution adopted by the County Council to create a development district. Section 14-9(e)(2) provides that such resolution must

“list every infrastructure improvement that will be financed by the development district, the estimated completion date and cost of that improvement, and the share of that cost which the County or another government agency will pay.”

It is the County Council, not the County Executive, which is ultimately responsible for the selection of the infrastructure to be included within a development district as required by Section 14-9. Whether the County Council chooses to adopt the recommendations of the County Executive with respect to the recommended list of infrastructure is a matter within the Council’s discretion.²⁵

The Residents’ Report goes on to argue that the County Executive failed to analyze the costs of the infrastructure proposed to be included within any of the development districts and failed to conduct a legal analysis to confirm the validity of infrastructure items proposed for inclusion in the district pursuant to Section 14-3(g) of the Montgomery County Code. The facts demonstrate otherwise. In each of the development districts undertaken to date, including the Clarksburg Town Center Development District, and the proposed Clarksburg Village and Clarks-

²⁴ Similarly, we note that Section 14-8 does not expressly require the County Executive to request a group of citizens to issue a report as part of the Executive branch deliberation under Section 14-8; nonetheless, this is exactly what County Executive Duncan did in March 2006 when he appointed the Clarksburg Development District Advisory Committee. Taking the logic of the Residents’ Report to the extreme, the establishment of this Committee would also be in violation of Section 14-8.

²⁵ The inclusion of “general benefit” infrastructure was originally recommended by the County Executive in the Fiscal Report issued in connection with the West Germantown Development District. This policy determination is discussed in more detail in Appendix A, Section I.C. to this memorandum.

burg Skylark Development Districts, the County Executive branch, through the Department of Finance and through the Office of Management and Budget, performed an exhaustive analysis of the infrastructure proposed to be included within each District, both to determine the legal adequacy, as well as the estimated cost of such infrastructure.²⁶

A designated staff person was hired by the Office of Management and Budget in 2002 to meet with each of the developer groups to review, on a line item-by-line item basis, each item of infrastructure, and to validate the inclusion of that infrastructure within the definition of Section 14-3(g). Cost estimates for the proposed infrastructure were vetted carefully with representatives of various County agencies responsible for construction and/or maintenance of such infrastructure, including in the case of transportation infrastructure, the Department of Public Works and Transportation, in the case of park infrastructure, the Department of Parks, and in the case of water and sewer infrastructure, the Washington Suburban Sanitary Commission. Indeed, in the case of Clarksburg Village and Clarksburg Skylark Development Districts, the County Executive was still in the process of evaluating the proposed infrastructure at the time the County Executive issued his announcement in April 2006 that all further consideration of the Development Districts would be suspended pending receipt of the report of the Clarksburg Development District Advisory Committee.

In summary, no violation of Section 14-8 has occurred in any of the pending Development Districts. As previously noted, the decision by the County to include additional general benefit infrastructure is a policy decision adopted at the time the County first began evaluating the two Germantown Districts. While it can be argued that inclusion of such infrastructure is too restrictive to the extent that it restricts the ability of a developer petitioner to have other infrastructure which it is required to build financed through a development district bond financing, or adds too much burden on the benefited development, the Montgomery County enabling laws do not prohibit inclusion of such infrastructure within a development district approved by the County Council.

F. The Developers Fully Complied With Notice Requirements Under Section 14-9 and Section 14-17 of the Montgomery County Code

The Residents' Report alleges that, in the case of the Clarksburg Town Center, the second County Council resolution was invalid due, in part, to the fact that the requirements of Section 14-9(b)(1) were not met. Section 14-9(b)(1) requires that the County Council must give advance notice of the public hearing required in order to adopt the second resolution by:

- (A) advertisement in at least two newspapers of general circulation in the County at least 21 days before the hearing; and
- (B) notifying by mail the record owner of each property located in the proposed district at the address listed on the latest tax assessment roll.

²⁶ See Appendices B and C to this memorandum that describes the timelines for the consideration of each of the Clarksburg Town Center, Clarksburg Village and Clarksburg Skylark Development Districts.

In fact, the record is clear that Council Staff Attorney Faden sent such property owner notices after review of the notices by Jim Cumbie, bond counsel to Montgomery County. In an e-mail dated November 7, 2002,²⁷ which the Council's Senior Legislative Attorney sent to Jennifer Barrett of the Department of Finance (and copied to Glenn Wyman of the County Finance Department, Keenan Rice – the County's tax consultant, Dean Kapland – the County's financial advisor, Jim Cumbie – the County's bond counsel, and Jack Orrick of Linowes and Blocher), the following was stated:

I sent the property-owners' notice out yesterday in the attached form, pretty much as recommended by Keenan [Rice – the County's financial consultant] and Jim [Cumbie – the County's bond counsel]. I didn't mention any term of years for the reasons you noted. If anyone has any issues to raise, please let me and Glen Orlin know soon so we can think about how to address them before the hearing and MFP Worksession.

The draft notice attached to the e-mail stated that a public hearing would be held on December 3, 2002 to consider the proposal to create a development district in Clarksburg Town Center as provided in Chapter 14 of the Montgomery County Code. The notice further set forth the legal authority for creation of the Town Center Development District, the estimate of the special tax and attached a copy of the proposed resolution, all as required by Section 14-9(b) of the Montgomery County Code.

Council staff also caused notice of the public hearing to be published in at least two newspapers of general circulation prior to the hearing date. In fact, the hearing originally scheduled for December 3, 2002, was continued until December 10, 2002, due to the fact that one or more of the notices were not published at least 21 days prior to the original notice date of December 3, 2002, as required by Section 14-9(b)(1)(A).

Further, although not required by the County enabling laws, the developer of the Town Center project at the time, Terrabrook, sent its own notices of the proposed public hearing to each of the property owners living in the Clarksburg Town Center as indicated on the tax assessment rolls at that time. The letter, dated November 4, 2002, was signed by Tracy Graves, Vice President of Terrabrook, and provided additional information to the property owners concerning the purpose of the public hearing, as well as including a copy of the form of disclosure statement which the residents in the Clarksburg Town Center had signed prior to purchasing their homes in the Town Center, which complied with the provisions of Section 14-17(b) of the Montgomery County Code.²⁸

The arguments made in each of the Citizens' Reports that the development districts were created without notice to the homebuyers are not correct. Under each of the lot sales contracts entered into between Terrabrook/Newland, Artery/Beazer and Elm Street and their respective homebuilders, disclosures that exceeded the level of detail required by Section 14-17 of the Montgomery County Code were included regarding the proposed creation of the tax districts.

²⁷ See email and attachment in Appendix I.

²⁸ See copy of letter and attachment in Appendix J.

These lot sales contracts required each homebuilder to include a separate disclosure form in the home sales agreements it entered into with each home purchaser which had to be separately signed and acknowledged by the home purchaser at the time the real estate sales contract for the home was entered into. Representatives of the developers for the Clarksburg districts have collected copies of the signed disclosure notices sent to them by the homebuilders from the vast majority of the homebuyers in each of their respective developments.²⁹

Other forms of notice that were available to homebuyers at the time of purchasing their homes included community meetings, including meetings held by the Clarksburg Civic Association during which plans for the creation of the development districts were discussed, notices in the newspapers reporting the legislative actions taken to create the development districts as well as other articles which appeared in the local press³⁰ and, in the case of the Clarksburg Village and Clarksburg Skylark Development Districts, by the recorded Declarations in the land records which established the private infrastructure charges applicable to their respective developments, discussed in more detail in Section III.G. of this memorandum.³¹

Section 14-17 of the Montgomery County Code requires that a contract to sell real property at any time during the life of the development district must disclose the existence of the development district, including the amount of any special assessment or special tax which the buyer must pay. The forms of disclosure utilized by the developers in each of the pending Clarksburg Development Districts exceeded the requirements of Section 14-17 in detail, having been reviewed by representatives of the County Finance Department and bond counsel. These notices were set forth in separate disclosure appendices to the sales contract, which had to be separately executed and acknowledged by the home purchaser, not merely included within the contract boilerplate. Although certain of the notices provided to homebuyers did contain indefinite dates as to the likely commencement of the special taxes, or in the case of the private infrastructure charges contemplated for the Clarksburg Village or Clarksburg Skylark Development Districts, the time of commencement of the private infrastructure charges, these notices fully satisfied the requirements of Chapter 14 due to the fact that the actual commencement date for the special taxes and/or private infrastructure charges was not known at the time that the disclosures were given.

²⁹ Hundreds of such disclosure forms are on file and examples from home purchase contracts in all three developments are contained in Appendix K.

³⁰ Copies of certain articles that appeared in the Gazette and other local media are attached at Appendix M.

³¹ In *Bright v. Linganore Ass'n.*, 104 Md. App. 394, 1995, the court examined the question of whether a property owner would be on notice by virtue of instruments recorded in his or her chain of title. In holding that the property owner was on notice for any such instrument, the court held as follows:

An owner's "chain of title" is simply the preceding recorded deeds (or other instruments of transfer, such as a will) going back in time, in order, i.e., the last recorded to first recorded instrument. In Maryland, these deeds or instruments are generally found in the public land records, testamentary records, Orphans' Court records, and judgment and lien records of the particular county where the land is located. A subsequent owner, therefore, has notice of what is contained in his or her actual chain of title even if he or she has never seen it, heard it, or even imagined that it existed. (emphasis added)

Section 14-17 of the Montgomery County Code does not expressly require that notice of a **contemplated** development district be provided, instead requiring only that notice be given following the commencement of special taxes with the filing of a declaration by the County. Again, the developers, in the abundance of caution, provided additional disclosure to home purchasers that a development district was, in fact, contemplated, and provided the best information they had at the time regarding the range of special taxes and/or private infrastructure charges, as well as the date of commencement for such charges.

It has been stated that some secondary purchasers of homes who purchased their homes from original homeowners in Clarksburg, and not directly from homebuilders, did not receive notices at the time they purchased their homes. This situation is not controllable by the developers or the homebuilders since these parties did not take part in these transfers. Section 14-17(a) provides that the legal remedy for failure to include a disclosure in a contract of sale is that such contract shall be voidable at the option of the buyer prior to the date of settlement.

Purchasing a home can be a daunting and confusing experience. Nevertheless, there is no excuse for a home purchaser who fails to read disclosure forms that are presented and signed by the home purchaser at time of contract, and the failure to understand the import of the disclosure is not a basis for invalidating the actions taken to establish the development district under County law, in any event.

G. The Imposition of Private Infrastructure Charges for the Clarksburg Village and Clarksburg Skylark Developments Are Enforceable Liens Under the Maryland Contract Lien Act

The authority to impose private assessments against lots within a development to cover and/or defray the developer's costs for the construction and installation of certain infrastructure improvements is a matter well established by case law and applicable statutes in the State of Maryland.³²

For example, it has long been the practice in the State of Maryland that developers can impose charges for the development costs associated with the installation of infrastructure improvements consisting of private water and sewer systems benefiting the lots within the development. Since July 1999, developers of new subdivisions in Montgomery and Prince George's Counties (and prior to 1999, Baltimore and Anne Arundel Counties) have been required to install private infrastructure improvements consisting of water and/or sewer lines for new subdivisions. The costs associated with the developer's installation of water and sewer lines are deferred charges imposed upon the lots that are benefited by the water and/or sewer lines. The deferred charges associated with the construction and installation of these water and/or sewer lines are generally imposed as lien supported assessments payable by the lot owner in annual installments over a period of several years (usually between 25 to 30 years) to the developer or entity established by the developer. In fact, there is a strong recognition of private

³² See *Raymond J. Williams, et al. v. Anne Arundel County, Maryland, et al.*, 334 Md. 109, 117 (1994) (discussing the long-standing practice of creating special community benefit tax districts in Anne Arundel County and noting the earliest creation of a special tax district in 1929), citing O. Reynolds, Jr., *Local Government Law* §99, at 300 (1982) and *Gould v. Mayor & City Council of Baltimore*, 59 Md. 378, 380 (1883).

water and sewer charges found in Section 14-117 of the Real Property Article, Annotated Code of Maryland, which requires a disclosure of private water and sewer charges to be imposed by the developer.

As with private water and sewer charges, charges associated with the construction and installation of other types of infrastructure improvements, for example, without limitation, roads, sidewalks, open space and recreational areas ("Private Infrastructure Charges"), can also be imposed against benefited property as a covenant running with the land, which is binding on all owners of the benefited property. Case law in Maryland supports the well-established principle that covenants to pay money often run with the land, including covenants for the payment of money associated with a developer's cost for the installation of certain streets and utilities.³³

The customary practice utilized by most real estate developers in Maryland to establish enforceable covenants to pay money for improvements that benefit lots within a subdivision (including, but not limited to, private water and sewer charges and Private Infrastructure Charges), is for the developer to record a written instrument among the land records for the jurisdiction in which the lot is located, that imposes the monetary obligation on the lot owner of the benefited lot. Examples of these types of written instruments can be widely found in the forms of declarations of covenants, declarations for homeowners associations recognized pursuant to the Maryland Homeowners Act, and reciprocal easement agreements among owners of adjacent properties, typically benefited by shared amenities such as parking or stormwater management facilities. A recorded instrument imposing Private Infrastructure Charges likewise legally establishes enforceable covenants to pay money and creates lien rights and the right to collect the charges.³⁴

A lien on real property to secure the payment of a private monetary obligation to pay money has long been enforceable in the State of Maryland pursuant to the Maryland Contract Lien Act. In addition to other enforcement rights as may be created in the documents creating private water and sewer charges and Private Infrastructure Charges, the charges imposed under these arrangements are typically also specifically drafted to invoke the Maryland Contract Lien Act. Availability of the remedies provided under the Maryland Contract Lien Act is implicit recognition of the validity of private water and sewer charges and Private Infrastructure Charges. Pursuant to the Maryland Contract Lien Act, Real Property Article, Title 14, Section 14-201, *et seq.*, the term "contract" means "a real covenant running with the land or a contract recorded among the land records of a county or Baltimore City." Pursuant to Section 14-202 of the Maryland Contract Lien Act, a "lien" on property may be created by a contract and enforced under the Maryland Contract Lien Act if: (1) the contract expressly provides for the creation of a lien, and (2) the contract expressly describes the party entitled to establish and enforce the lien and the property against which the lien may be imposed. Therefore, because the instrument recorded by the developer imposing Private Infrastructure Charges satisfies the foregoing requirements of Maryland Contract Lien Act, the developer is entitled to enforce the Private Infrastructure

³³ *Gallagher v. Bell*, 69 Md. App. 199, 516 A.2d 1028 (1986), *cert. denied*, 308 Md. 382, 519 A.2d 1283 (1987).

³⁴ Examples of such recorded declarations are contained in Appendix L.

Charges against the benefited lot owners by obtaining a lien against the benefited lots in accordance with the Maryland Contract Lien Act.³⁵

Each of the developers for Clarksburg Village and Clarksburg Skylark has or will record Declarations in the land records prior to the sale of completed dwelling units to home buyers which establish a right to collect Private Infrastructure Charges from the owners of the property within each subdivision as an alternative to the creation of the respective development districts for these subdivisions. Further, at the time of contract, each homebuyer has or will receive a disclosure form that contains detailed information relating to the possible establishment of the development district, or in the alternative, the Private Infrastructure Charges. The title report obtained by a homebuyer as part of the purchase process discloses the existence of the Declaration, a copy of which is readily obtainable in Montgomery County's land records. These actions are legally sufficient to create a lien for the Private Infrastructure Charges without any requirement for County action.

H. The Party Paying Impact Taxes and/or Constructing Public Infrastructure is Entitled to Receipt of Impact Tax Refunds and/or Credits Under Chapter 52 of the County Code

Development impact taxes for transportation improvements and public school improvements are intended to be a mechanism by which new development in Montgomery County pays a determined share of the public infrastructure improvements required to support such development.³⁶ The amount of impact taxes due is based on the type of new development (i.e. single-family residential, multi-family residential, commercial) and the location of new development (i.e. Metro Station Policy Area, Clarksburg or other policy area). Collected development impact taxes are then used, as determined by the County via the CIP process, for public infrastructure improvements.

As stated by the Advisory Report, there is substantial overlap between the purposes of the development impact tax law and the provisions of Chapter 14. Both are intended to provide a financing mechanism for public infrastructure improvements needed to support planned development. While development impact taxes are due upon application for a building permit, development district financing is implemented pursuant to the more complex process established in Chapter 14 of the County Code. For this reason, the development impact tax law provides for the issuance of development impact tax refunds or credits as applicable when development districts are used to finance public infrastructure based on the recognition that development district financing will be used in lieu of development impact taxes.

³⁵ It is our view that the disclosure requirements of Section 14-117 apply by analogy to Private Infrastructure Charges, and that compliance with these requirements further supports the enforceability of Private Infrastructure Charges so disclosed.

³⁶ See Sections 52-47, et seq. and Section 52-87, et seq. of the County Code (addressing development impact taxes for transportation improvements and development impact taxes for public school improvements, respectively, new development is required to pay a set amount of per unit or per square foot impact tax at the time of building permit application).

Specifically, Section 52-54 of the Montgomery County Code states

“any person who has paid a development impact tax may apply for a refund of the tax if...a declaration encumbering the property for which the development impact tax has been paid is recorded in the land records as required under Section 14-17(c) and the applicant is entitled to the credit under Section 52-55(d).”

Section 52-92 of the Montgomery County Code for public school improvement law incorporates this refund provision with respect to school development impact taxes. Naturally, and as stated by the law, only a person who paid a development impact tax can obtain a refund of such payment. Section 14-17(c) of the Montgomery County Code requires the County to record a development district declaration in the County land records prior to the issuance of bonds; this declaration serves as notice to encumbered properties and as a trigger for the ability to apply for development impact tax refunds. Issuance of bonds for a development district occurs after a County Council resolution per Section 14-13 of the Montgomery County Code, which is subsequent to two prerequisite Council resolutions pursuant to §§14-6 and 14-9 of the Montgomery County Code. With respect to Clarksburg Village and Clarksburg Skylark Development Districts, the second resolution per Section 14-9 has not yet occurred; with respect to the Clarksburg Town Center Development District, the third resolution per Section 14-13 authorizing the sale of bonds is yet to go before the County Council. Therefore, the County has not yet recorded the required declaration that would trigger a development impact tax refund application in any of the three pending districts.

As stated, an additional eligibility requirement for a development impact tax refund is that the applicant is entitled to the credit under Section 52-55(d) of the Montgomery County Code. Section 52-55(d) states

“to the extent provided in Section 14-10(e), an applicant is entitled to a credit against the impact tax imposed by the Article for any development district special tax, special assessment, fee, or charge paid under Chapter 14 for property located in the development district for which a building permit is sought.”

Per Section 52-55(d), development district special assessments are considered paid when the 14-17(c) declaration is recorded. Section 14-10(e) of the Montgomery County Code is the mirror image of Section 52-55(d) and provides that

“the total amount of any development district special tax, special assessment, fee, or charge paid under this Chapter must be credited against...the development impact tax and construction excise tax imposed under Chapter 52, as applicable.”

These provisions of the law operate together to provide refunds or credits as applicable of development impact tax where development districts are used instead of development impact taxes to finance public infrastructure improvements.

The Advisory Report contains a discussion of development impact tax policy, potential improvements to the development impact tax process and entitlement to development impact tax refunds. The report includes an analysis of development district and non-development district homeowner costs and suggests that impact taxes originally charged in development districts should be refunded to homeowners. Specifically, the report states that “in order to offset this multiple taxation for the same service, by law, if a development district is established then impact taxes within the development district are to be refunded...this leads to a conflict between builders and the residents of any development district as to the disposition of the refund.” Advisory Report, p. 19. While the report may perceive a conflict over development impact tax refunds in development districts, the law does not. Section 52-54 is clear that refunds of development impact taxes are only available to a person who has paid a development impact tax. As a matter of statutory interpretation, statutory language must be afforded a plain meaning interpretation and, in so doing, a person who has “paid” a development impact tax must be interpreted to mean the person or entity that actually paid the impact tax at the time of building permit application.

The Advisory Report states that “the impact tax is a one-time fee assessed against the builder as part of the permitting process, which is then passed directly to residents in the price of the home” and that refunds given to builders “disregards the probability that such a tax was passed along to residents as part of the cost of a home.” The suggestion that a homeowner actually “paid” the development impact tax is an improper interpretation of the law and cannot be supported by facts. There are a multitude of factors that contribute to the price of a home, which are too many to be listed in this memorandum, and in no case can a homeowner point to a line item in their sales contract for payment of a development impact tax. Development impact taxes are a cost of development, along with many other development costs, that may contribute to the price of a home,³⁷ however this does not lead to the conclusion that a homeowner “paid” the development impact tax or that the homeowner is entitled to its refund under current development impact tax law. In any case, market conditions that are beyond the control of the developer and homebuilder ultimately contribute significantly to the price paid by a homebuyer, and conditions in the market will ultimately guide the decisions of the developer/home builder with respect to the mechanisms for recouping their costs of construction.

Even in the absence of a development district, a developer property owner who constructs public infrastructure and receives a development approval based on such construction is entitled to receive development impact tax credits, as calculated by the County. Section 52-55(a) of the development impact tax law states that a property owner is “entitled to a credit if the owner receives approval before July 1, 2002 of a subdivision plan, development plan or similar development approval by the County or a municipality that requires the owner to build or contribute to a transportation improvement that provides additional transportation capacity.” Further Section 52-55(b) provides that a property owner “must receive a credit for constructing or contributing to an improvement of the type listed in Section 52-58 if the transportation improvement reduces traffic demand or provides additional transportation capacity.” As discussed previously, Improvements providing “additional transportation capacity” are interpreted to be those above and

³⁷ In fact, studies suggest that impact taxes are considered when developers acquire the land, and are not added to the price of the homes. The market determines prices of homes, as the builders will price them as high as supply and demand will allow. Memo by Planning, Housing and Economic Development Committee, April 20, 2007.

beyond what is required under the APF analysis for a development, or are the responsibility of a single developer for purposes of inclusion in a development district.

As it relates to the distinction between preliminary plan and APF requirements to stage development based on the construction of public infrastructure improvements on one hand and the financing of those public infrastructure improvements on the other, the relationship between the development impact tax law and the provisions of Chapter 14 is informative. In most instances, where development districts are **not** utilized, development impact taxes are either (1) paid to the County and used by the County to finance construction of public infrastructure or (2) paid to the County and then credited back to an owner who actually constructs public infrastructure improvement. Under this mechanism, while either the County or a private entity may construct public infrastructure, the County finances such construction in either case. When development districts are created and utilized, development impact taxes are not used for public infrastructure finance at all and are refunded to the original payer of such taxes. Instead, public infrastructure can either be (1) constructed and financed by the County using bond proceeds or (2) constructed by a private entity and financed by the County via reimbursement using bond proceeds. The County's longstanding policy and practice of reimbursement versus financing at the time of construction is discussed elsewhere in this memorandum. However, the main point is that under this mechanism, again, the County provides the vehicle to finance the public infrastructure regardless of who constructs the improvements.

IV. CONCLUSION

The Citizens' Reports provide no basis for the dissolution or reconsideration of any actions taken to date by the developers or by the County, either with respect to the creation of development districts by the County or by the developers with respect to the creation of private infrastructure charges as an alternative means of financing infrastructure expense. The County's development district law is an important tool to be utilized by the County to manage growth. The processes followed by the County in the creation of the Clarksburg Town Center Development District and in the consideration of the pending Clarksburg Village and Clarksburg Skylark Development Districts complied in all relevant and material respects with the provisions of County law. Home purchasers were given notice of the proposed development districts prior to purchasing their homes as required under Chapter 14 of the County Code. The development district process has been a transparent and deliberate process, which involved a considerable amount of public scrutiny and attention.

The County now needs to move forward. The developers of the Districts discussed herein have relied in good faith upon the County to implement the financing afforded through the development district process, have spent considerable sums of money in this effort, and are determined to complete the process as expeditiously as possible.

Respectfully submitted,

Linowes and Blocher LLP

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APPENDIX A
DEVELOPMENT DISTRICTS IN MONTGOMERY COUNTY:
ENABLING AUTHORITY, POLICY DECISIONS AND HISTORY OF USE

I. DEVELOPMENT DISTRICTS IN MONTGOMERY COUNTY: ENABLING AUTHORITY, POLICY DECISIONS AND HISTORY OF USE

A. Review of the State Enabling Legislation and the Adoption and Implementation of Chapter 14 and Chapter 20A of the Montgomery County Code

Part II of the memorandum described a brief history of the development district law in Montgomery County, Chapter 14 and 20A of the Montgomery County Code. This appendix provides more detail concerning the provisions of those laws and how the Montgomery County development district law differs from the State enabling legislation. Further, in the implementation of Chapter 14 by Montgomery County in consideration of the approval of the two Germantown development districts,¹ the County has adopted certain policy decisions which affect the ability of developers to receive reimbursement for a significant portion of the infrastructure that might otherwise be eligible.

One of the charges given to the Clarksburg Development District Advisory Committee by the County Executive included the investigation and research into mechanisms utilized in the region and the national development community for funding infrastructure improvements, to arrive at a "best practices" evaluation of the benefits and risks to development district financing.

¹ Prior to the utilization of development districts in Clarksburg, the Montgomery County development district process was used to create and fund two development districts in Germantown – the Kingsview Village Center Development District and the West Germantown Development District. Each of these Districts went through the complete process required under Chapter 14 of the Montgomery County Code and resulted in the imposition of special taxes and assessments on the residents and business owners located in each of those respective Districts without controversy.

The petition to create the West Germantown Development District and the Kingsview Village Center Development District (which had originally been petitioned for as a single district and were later separated due to differing timetables in the construction schedules of the ownership groups) were filed on June 21, 1996, only two years following the adoption of the Montgomery County enabling statutes. Due to various events involving the developer groups, as well as the County's need to design a process to implement the development district law, the first of these districts, the West Germantown Development District, was not formed until January 13, 1998. Kingsview Village Center Development District was formed as a separate district on July 28, 1998. Montgomery County issued \$2.4 million of special obligation bonds on behalf of Kingsview Village Center Development District in December 1999. The issuance of the approximately \$15.9 million of special obligation bonds on behalf of West Germantown Development District did not occur until April 2002.

Unfortunately, the Advisory Report did not address this issue and failed to mention the fact that development districts are utilized throughout the country and Maryland as an important means of infrastructure finance. The report also overlooked the existence of the two functioning development districts in Montgomery County, the West Germantown Development District and the Kingsview Village Center Development District. The report therefore did not address one of its more essential tasks, which was to investigate the so-called, best practices, benefits and risks of using development districts as a financing mechanism in other jurisdictions.

B. Montgomery County's Development District Enabling Law Distinguishes the County's Process From that of Other Jurisdictions

There are several distinguishing factors in the Montgomery County development district enabling laws and the process that the County utilizes to create development districts that make this type of financing in Montgomery County very different from the law and process utilized in other Maryland jurisdictions. We believe that these distinctions very adequately protect the citizens of the County and add further burdens on developers and homebuilders attempting to use development districts as a financing tool.

Chapter 14 of the Montgomery County Code, as supplemented by Chapter 20A, contains a very detailed and complex vetting process which must be followed in order for a development district to be created and bonds to be sold on its behalf by the County. The process requires the involvement of both the County Council and the County Executive branches of County Government, in addition to the Montgomery County Planning Staff and Board as a prerequisite to the creation of a development district. In contrast to the general State enabling legislation for "special taxing districts," codified as Article 24, Section 9-1301, and Article 23A, Section 44A, which was enacted in 1995 and provides for a single public hearing prior to the adoption of a resolution by a designated County or municipality creating the district and the adoption of a second legislative action in order to issue bonds on behalf of a special taxing district, Chapter 14 of the Montgomery County Code requires no fewer than two (2) public hearings and no fewer than four (4) separate legislative actions be taken by the Montgomery County Council.² Further,

² Chapter 14 requires three legislative actions – the adoption of the initial County Council resolution pursuant to Section 14-6, the adoption of the second County Council resolution pursuant to Section 14-9, and the adoption of a resolution to authorize the sale of bonds on behalf of the Development District pursuant to Section 14-13. In

prior to the adoption of the resolution creating the development district, Chapter 14 requires the study and recommendations of both of the Montgomery County Planning Board and the Montgomery County Executive. This degree of governmental involvement provides considerable transparency and multiple opportunities for public participation in the development district process, indeed more so than any other Maryland jurisdiction provides.

The definition of "infrastructure improvement" in Section 14-3(g) of the Montgomery County Code limits the use of development district financing severely in comparison to the general Maryland enabling statute by prohibiting the use of such financing for infrastructure which primarily serves the residents or occupants of only one development or subdivision. As interpreted by the County, this provision prohibits development districts from financing the construction of internal roads, on-site water and sewer connections or other internal infrastructure which a developer must construct in order to sell finished building lots to builders, even though such infrastructure is public infrastructure, which can be financed in other jurisdictions through municipal bonds issued on behalf of special taxing districts, and may be required to satisfy APF.

The financing impact in the County enabling laws of limiting development district financing to only arterial roads and major water and sewer trunk lines is not insubstantial. For example, in Clarksburg Town Center, the developer has spent many additional millions of dollars to construct internal roads and sidewalks, that are not proposed to be funded through the Clarksburg Town Center Development District, which compares to just \$8.9 million of APF roads and sidewalks which are proposed to be funded through that District. An additional \$8.1 million of APF roads and other public infrastructure eligible under the County's enabling laws to be included in a development district and requested in the application petition was not included by the County Council in the list of infrastructure to be financed through the Town Center Development District due to County policy guidelines. Similarly, the Clarksburg Village and Clarksburg Skylark developers are funding the construction of internal streets and other internal infrastructure, as well as a considerable amount of eligible infrastructure, outside of the

addition, the County Council is required to amend the Capital Improvements Program ("CIP") in order to include the Development District infrastructure in the list of improvements to be funded through the CIP.

development district process. Accordingly, the availability of development district financing appears to be much more restrictive in Montgomery County than in other Maryland jurisdictions.

Unlike other jurisdictions, in Montgomery County the Department of Finance is the moving party behind development district financing through the hiring of independent experts and consultants directly on behalf of the County, the selection of the underwriters to issue the bonds, and administration of the disposition of bond proceeds through a detailed implementation agreement with the developer. In many other jurisdictions, developers select the underwriter and the financial advisors, develop the bond financing package, and initiate the financing with the county or municipal financing department acting much more in an implementation role to facilitate issuance of the bonds.

In addition, during the entire process of developing the Chapter 14 and Chapter 20A enabling legislation, and in the creation and funding of the two Germantown Development Districts, as well as the work done to date on the Clarksburg Development Districts, the County has utilized outside bond counsel to advise it on the legalities of each step in the process, as well as utilizing representatives of the County Attorney's staff and the legal staff to the Montgomery County Council. This process has been a deliberate, thorough and exhaustive process, albeit a process which has not moved very quickly.

C. Key Policy Decisions First Made By Montgomery County During the Implementation of the West Germantown Development District and the Kingsview Village Center Development District.

In addition to the distinctions in Montgomery County's enabling laws, the County adopted certain policy positions in connection with the implementation of development districts which, have affected the timing and amount of funding for infrastructure through development districts. These policy decisions are enumerated in detail in the County Executive's Fiscal Report for West Germantown Development District (which also serves as the County Executive's Fiscal Report for Kingsview Village Center Development District) issued on August 16, 1997.³

³ A copy of the County Executive's Fiscal Report for West Germantown Development District is attached to this Memorandum as Appendix F.

The following policy decisions originally established for the Germantown Districts have been applied to the three pending Clarksburg Development Districts.

- The use of a “take-out financing” bond structure that only allows developers to be reimbursed after they have advance-funded and constructed the required infrastructure improvements.⁴
- The use of a static threshold amount as an affordability standard in order that special taxes and assessments imposed on properties located within development districts do not exceed a percentage ratio of the *ad valorem* real property taxes.⁵
- The addition of “general benefit infrastructure,” which is *not* required to be constructed directly by a developer’s APF approvals, but which provides other benefits to the residents.⁶ Given that a credit against development impact taxes is provided by Section 14-10(e) of the Montgomery County Code, the County Executive deemed that there needed to be off-setting general benefits to the taxpayers living on the properties subject to the special taxes.
- Limitations on the amount of infrastructure proposed to be financed by providing a minimal value-to-lien ratio of 4:1, whereby the appraised value of the properties need to exceed by four times the total amount of the bond financing. Although

⁴ The County Executive’s Fiscal Report for West Germantown and Kingsview Village Center indicated that using development district financing as acquisition financing rather than construction financing achieved three goals: (i) maximizing the amount of infrastructure which can be financed; (ii) minimizing the cost to the future homebuyer; and (iii) reducing the risk of the financing for bondholders. (See County Executive’s Fiscal Report - West Germantown Development District, p. 8-9.)

⁵ In the West Germantown and the Kingsview Village Center Development Districts, the County Executive’s standard was to limit the projected special assessments to no greater than a 25 percent (25%) increase over the then-current *ad valorem* real property tax rates that applied to the subject location. Given the then-projected market value of a single family detached house in Germantown of \$300,000, the maximum initial annual special tax burden was projected to be in the neighborhood of \$811, which the County Executive deemed an acceptable level of tax burden on those taxpayers. (See West Germantown County Executive Fiscal Report, pp. 8-9.)

⁶ The inclusion of the general benefit infrastructure had the further effect of removing certain infrastructure, which the developers had petitioned for to be financed through the tax district. In the case of the West Germantown and Kingsview Village Center Development Districts, the total amount of such infrastructure, which was removed from the development district was approximately \$11.2 million, or slightly more than half of the original requested infrastructure list which the developers had petitioned the County to finance through the development district. (See County Executive Fiscal Report for West Germantown Development District, pp. 8 and 10.)

generally accepted underwriting standards throughout the State of Maryland, and in other jurisdictions by bond underwriters, require a much lower value-to-lien ratio than 4:1, the County requires that this ratio be adhered to at all times.⁷

The aforementioned policy decisions have continued, although they have been modified somewhat in the case of the three pending Clarksburg Development Districts. In more recent discussions between representatives of the County's Finance Department and representatives of the developers for Clarksburg Skylark and Clarksburg Village, the requirement for so-called "general benefit infrastructure" has been increased to nearly half of the infrastructure to be funded through development district bonds. The original intent of the policy recommendation (*i.e.*, to offset the effects of the impact tax credits afforded to developers) has evolved into a generic policy intent that development district financing provide additional benefits to the County in general.⁸

These policy decisions also continue to have the direct effect of limiting the amount of infrastructure which is eligible to be financed under the County enabling statutes through the development district process, and requiring developers to seek alternative financing for an extensive amount of infrastructure required to be constructed to satisfy APF requirements. Further, these policy decisions must be kept in mind when examining the Clarksburg Development Districts because they appear to have directly contributed to the lengthy passage of time between the public hearings when initial notices were sent and the implementation

⁷ Consequently, in the case of the West Germantown Development District bonds, the County required that there be a limit on the amount of bond proceeds available to be spent in the early years of the project, and subjected certain bond proceeds to escrow until there was a sufficiently higher assessed value of underlying properties to enable the 4:1 value-to-lien ratio to be met. This policy decision both reduced the total amount of infrastructure that might be financed, as well as delayed the funding of the infrastructure through the proceeds of development district bonds. (*See* West Germantown Development District County Executive Fiscal Report, pp. 8 and 12.)

⁸ Similarly, the affordability guidelines, which were established in West Germantown, have been extended to Clarksburg, albeit on a slightly different scale. Whereas the original intent of the affordability guidelines was to limit the level of the special taxes to 25 percent of the then-prevailing real property tax levels, the County has adopted a somewhat arbitrary ceiling of \$1,200 per single family detached house based upon 2003 dollar values with respect to the level of annual special taxes, with the understanding that the level of special taxes and accordingly, the affordability limits, would be increased 2 percent (2%) per year thereafter. Given the increase in the selling prices of single family detached homes in Clarksburg, the \$1,200 (2003 dollars) affordability cap is now much lower than the 25 percent of prevailing real property taxes on such homes which the County had utilized as its benchmark in Germantown.

and issuance of bonds. They also have affected the type and dollar amount of infrastructure proposed to be financed by the respective development districts.

D. General Construction of Chapter 14

Section 14-18 of Chapter 14 contains some very important language which must be kept in mind when analyzing certain of the allegations brought by the Clarksburg Development District Advisory Committee and the Clarksburg Town Center Advisory Committee.

Section 14-18(a) states as follows:

This Chapter is necessary for the welfare of the County and its residents, and must be liberally construed to achieve the purposes stated in Section 14-2.

Section 14-2 of the Montgomery County Code states the general purposes of Chapter 14 are, in part, to:

authorize 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, . . .

Construing the powers of the County broadly as required by Section 14-18(a) mandates that every effort be made to enable the use of development districts rather than seeking ways to limit such use through distorted and attenuated interpretations of County law as set forth in the two Citizen reports.

Further, Section 14-18(b) of the Montgomery County Code states as follows:

The powers granted under this Chapter supplement any power conferred by any other law and do not restrict any other power of County government.

The foregoing language clearly contradicts the interpretations made by the Citizen reports that Chapter 14 is somehow in violation of other County planning and zoning laws and regulations, and that failure of developers to utilize the development district process prior to seeking preliminary plan approval is illegal under County law. The plain language of Section 14-18(b) is

to the contrary. The development district law is a supplement to, and not an abrogation of, any powers granted under any other law to County Government.

APPENDIX B

CLARKSBURG TOWN CENTER (TERRABROOK/NEWLAND COMMUNITIES)

II. CLARKSBURG TOWN CENTER (TERRABROOK/NEWLAND COMMUNITIES)

A. Detailed History of Development District Creation and Development Approvals

We have already provided a detailed discussion of the development approvals obtained for the Clarksburg Town Center in Section III.A.v. of this memorandum. Accordingly, we believe the facts clearly establish that the processes followed by the County in the creation of the Clarksburg Town Center Development District, as well as in connection with the ongoing consideration of the Clarksburg Village and Clarksburg Skylark Development Districts to date, complied fully with the requirements of Chapter 14 and Chapter 20A of the Montgomery County Code. As noted below in the case of each of these districts, there was considerable public notice concerning their creation, including multiple articles in the press, and the lengthy County process afforded interested citizens with multiple opportunities to participate in the discussions.

i. Filing of Development District Petition and Approval of Initial Resolution by County Council

Shortly before the filing of the petition requesting creation of the Town Center Development District on July 5, 2000, the underlying property for the Town Center was purchased by Terrabrook Clarksburg LLC from the prior owners, Piedmont Land Associates L.P. and Clarksburg Land Associates L.P. The petition to create the Town Center Development District signed by Terrabrook Clarksburg LLC, the sole property owner, requested that approximately \$17.5 million of infrastructure be financed through the Clarksburg Town Center Development District, consisting primarily of road and other transportation infrastructure identified under the approved preliminary plan. Included within the infrastructure petition by Terrabrook Clarksburg LLC was also approximately \$4.5 million of infrastructure not directly required by the approved preliminary plan, including the improvements for a public park and a contribution towards a civic center to be owned and operated by Montgomery County.

The filing of the petition to request the County Council to establish the Town Center Development District was reported in the *Montgomery County Gazette* in an article written by staff writer Susan Singer-Bart, published on July 12, 2000.⁹ In addition to quoting representatives of Terrabrook and Linowes and Blocher in connection with the filing of the petition, the articles quoted the staff counsel to the County Council, Mike Faden, who stated, among other things, "The Development District is relatively new in Montgomery County, but the idea is used widely in other parts of the country, particularly in California." There were at least two other articles published in the *Gazette* concerning the County Council consideration of the proposed Clarksburg Town Center Development District, one article dated August 2, 2000, and the second dated September 20, 2000.

Following the filing of the petition for the Clarksburg Town Center Development District, a public hearing was held on August 1, 2000, before the Montgomery County Council to consider the initial resolution as required under Section 14-6 of the Montgomery County Code. This resolution declared the intent of the County Council to create the Town Center Development District, and found that intensive development of, and public interest in, the Town Center area during the term the District would benefit the public interest because certain public facilities and development would be provided in a more timely and coordinated fashion throughout the District. The Montgomery County Council adopted Resolution No. 14-648, the initial resolution for the Town Center Development District, on September 26, 2000.

ii. **PAPF Approval by Montgomery County Planning Board**

Following the adoption of the first Resolution by the Montgomery County Council, Terrabrook filed the required application with the Montgomery County Planning Board on November 14, 2000, to seek Provisional Adequate Public Facilities approval pursuant to Section 14-7 of the Montgomery County Code.

On November 27, 2000, the Clarksburg Civic Association invited representatives of Terrabrook and the County Finance Department to present information on the proposed Town Center Development District to their membership. Representatives of Terrabrook, Linowes and

⁹ This article and all other relevant articles printed in the Montgomery County Gazette are contained in full in Appendix M.

Blocher, the Montgomery County Planning Board staff, and Jennifer Barrett from the Department of Finance provided information to the Clarksburg Civic Association and answered questions over the course of the 2-hour meeting. Again, reporter Singer-Bart of the *Gazette* wrote an article which was published on November 29, 2000, describing the meeting and the plans for the Clarksburg Town Center Development District.

Following a work session with the Montgomery County Planning Board staff, a meeting of the Planning Board was held on March 8, 2001, to consider the application of the Clarksburg Town Center Development District. The staff of the Montgomery County Planning Board had reviewed the list of infrastructure originally contained in the petition for the Clarksburg Town Center and had indicated that certain of the internal streets which, while required to satisfy the adequate public facilities tests for the Preliminary Plan for the Town Center, would not be supported for purposes of inclusion within the Development District due to the fact that such infrastructure improvements were deemed to primarily serve the residents or occupants of the Town Center and were the sole responsibility of the Town Center developer under the Planning Board's site plan and APF requirements. The staff found that the remainder of the proposed infrastructure improvements did serve a larger area than Terrabrook's portion of the Clarksburg Town Center and appropriately should be included in the Town Center Development District. The staff further found that certain of the proposed infrastructure improvements, including construction of a local park and grading of a school site, were activities that traditionally were viewed as the responsibility of the public sector; however, if the inclusion of such improvements in the District could be achieved within the County's guidelines for an acceptable level of tax on the residents, the staff indicated that such improvements could be included within the Town Center Development District.¹⁰

The staff report further commented on the language of Section 14-3(g)(2) which provides that proposed infrastructure improvements should not be the responsibility of a single developer under the Planning Board's site plan and APF requirements. The report reiterated that it was the understanding of Planning Board staff that the County Executive would propose an amendment

¹⁰ See Staff Report dated March 2, 2001, set forth in Appendix N.

that clarifies that single developers, like Terrabrook, can form a development district as long as the infrastructure serves a larger area than its development.

Following public testimony on March 8, 2001, and the approval by the Montgomery County Planning Board, Planning Board Chairman, William Hussman, wrote letters to Douglas Duncan; County Executive, and Blair Ewing, President of the Montgomery County Council, dated March 22, 2001, indicating the unanimous approval of the application of the Clarksburg Town Center Development District and finding that the proposal met the adequate public facilities requirements in the Section 14-7, as modified by certain conditions. The conditions were essentially those stated in the staff report, including the recommendation that Section 14-3(g)(2) be amended, if necessary, to allow for improvements to be the responsibility of the single developer as long as the proposed improvements serve a greater public benefit than a single development. Further, the list of infrastructure originally proposed by Terrabrook had been modified to eliminate certain of the internal streets and to provide that the local parks and school site could be included within the District provided it was found to result in a financially acceptable tax burden on the residents.

The *Gazette* reported the recommendations of the Planning Board in an article which ran on March 14, 2001 entitled "Planners Pick Beneficiaries of Tax District Money." The article quoted William Hussman, chair of the Montgomery County Planning Board, among others, who was quoted as saying "The net effect of this is you're going to finance those improvements at public rates and pass the costs on to homeowners." The article concluded with the following: "Hussman complimented his staff and the developer for bringing about the vision conceived in the Clarksburg Master Plan. 'It's appropriate [the development district] get approved and implemented,' he said. A second County Council resolution will be needed to implement the development district and decide what infrastructure items the development district will fund."

During the time that the Planning Board was considering the application of the Clarksburg Town Center for PAPF approval pursuant to Section 14-7 of the Montgomery County Code, representatives of Terrabrook were meeting with Mr. Edgar Gonzales, the Deputy Director of the Montgomery County Department of Transportation, regarding a potential County participation project on Stringtown Road, which would include Terrabrook, and other developers

whose project abutted Stringtown Road, and the County. The Town Center Development District petition, as modified by the March 2001 Planning Board approval, contemplated that portions of Stringtown Road between Maryland Rt. 355 and Piedmont Road would be included in the Clarksburg Town Center Development District. Although a participation agreement was not formally entered into at that time, these discussions ultimately led to recommendations adopted in the Planning Board's consideration of the Clarksburg Skylark and Clarksburg Village Development Districts that portions of Stringtown Road between Maryland Rt. 355 and Piedmont Road would need to be constructed by the developers for those projects, by the County, or as part of the Clarksburg Town Center Development District in order for those development districts to achieve PAPF approvals. We submit that, in the case of Stringtown Road, the development district process worked in a very favorable fashion for the County due to the fact that it helped marshal the various County agencies considering Clarksburg projects to work in a more unified fashion to achieve a consistent plan of development.

iii. The County Executive's Fiscal Report

During the period of time between approval of the PAPF application by the Montgomery County Planning Board in March 2001 and early 2002, there were a series of meetings with various representatives of the County Executive branch and representatives of Terrabrook and counsel to discuss the process for the preparation of the County Executive's Fiscal Report as required by Section 14-8 of the Montgomery County Code. Initially, representatives of the Department of Finance, which had largely worked on the County Executive's Fiscal Report for the two Germantown Districts, indicated that they would be spearheading this effort. During the fall of 2001, staff members began preparing a list of infrastructure required under the Clarksburg Master Plan to determine the overall universe of public improvements needed to be constructed in Clarksburg. In early January 2002, the developer was informed through counsel that the Office of Management and Budget would be taking the lead for the County Executive branch, from the standpoint of reviewing the proposed infrastructure list and that the County Finance Department would play a lesser, albeit still important role, in the preparation of the final County Executive's Fiscal Report. In March 2002, a series of meetings commenced with Mr. Ed Daniel, a consultant hired by the Office of Management and Budget, to review the proposed infrastructure list, including review of cost estimates of the infrastructure and making a determination as to

their eligibility under the County's enabling laws. This process extended through October 2002 when the County Executive's Fiscal Report for the Clarksburg Town Center was finally issued.

During the consideration of the infrastructure by the County Executive branch, representatives of the County Finance Department had requested information from Terrabrook with respect to the real estate sales contract notices that were being provided to purchasers in the Town Center pursuant to Section 14-17 of the Montgomery County Code. Terrabrook provided samples of the real estate sales contract notices, which were reviewed by representatives of the Department of Finance and approved for use with the home purchasers. In an e-mail dated May 1, 2002, from Mr. Glenn Wyman of the County Finance Department to Ms. Tracy Graves, an executive with Terrabrook, Glenn wrote as follows:

Tracy:

Thank you for providing me with an electronic version of the disclosure. Attached is our recommendation. We essentially changed the format to make it easier to read and added a sentence about when the tax bills are mailed. If you have any issues with our draft, please call me at 240-777-8929.

Thanks, Glenn

In September 2002, Ms. Jennifer Barrett, of the Montgomery County Department of Finance, contacted Jack Orrick of Linowes and Blocher regarding the requirement in Section 20A-1(f)(2) of the Montgomery County Code that 80% of the property owners must approve the creation of a development district. She asked whether, in our opinion, the language in Section 20A-1(f)(2) required any additional consent of the property owners to be obtained to create the Town Center Development District. Following this request, a series of discussions took place with Jennifer Barrett, Ms. Cheryl Guth, of the law firm of McGuire Woods, which served as the County's outside bond counsel for the development district bonds in the Germantown Development Districts, and Mr. Jim Cumbie of the law firm of Venable, which served as the County's bond counsel for its general obligation debt, regarding the requirements of Section 20A-1. During these discussions, the arguments set forth in Section III.C. of this memorandum were presented to the County and its bond counsel. Both of the County's bond counsels expressed agreement that Section 20A-1(f)(2) was, in fact, satisfied by the filing of the initial petition under

Section 14-6 of the County Code by Terrabrook Clarksburg LLC and that no additional property owner consent was required.

During the course of the discussions with Mr. Ed Daniel and other representatives of the Office of Management and Budget, the County Department of Public Works and Transportation and the County Parks Department, each agency carefully reviewed the developer's cost estimates for the infrastructure. During the course of this review, due in part to changes in scope and in part due to later-stage engineering data, the cost estimate for the infrastructure items originally petitioned by the developer had increased from \$17.5 million to \$21.8 million, including a 30% contingency amount.

In the final County Executive's Fiscal Report issued on October 17, 2002, the County Executive made certain modifications to the proposed list of infrastructure to be financed by the Clarksburg Town Center Development District by adding some additional "general benefit" infrastructure, including a higher contribution towards the civic center (later replaced with a new County library project) of \$4.6 million (as compared to the original approximate \$3.5 million included in the petition) a contribution of \$1.6 million towards the construction of Stringtown Road on the west side of Maryland Rt. 355 running to Rt. I-270 (estimated as 25% of the total cost of such segment of road) and the construction of one lane of a 2-lane "gap" in Stringtown Road which ran between the projects owned by Elm Street to the east and Centex to the west, in addition to the two lanes of Stringtown Road which had already been determined to be a PAPF requirement of the Town Center.

The County then limited the total amount of infrastructure to be funded through the Clarksburg Town Center Development District to \$17 million based on its affordability guidelines. Accordingly, with the inclusion of the above-listed approximately \$6.8 million of general benefit infrastructure, only approximately \$10.2 million of the approximately \$18.3 million, or approximately 55% of the transportation and other public infrastructure actually required to be constructed by the developer for PAPF requirements, qualified for inclusion within the Town Center Development District. The County Executive's Fiscal Report did provide that \$3.5 million of the excluded infrastructure, including infrastructure which had been identified by

the Montgomery County Planning Board as priority infrastructure, could be funded through the Development District if there were cost savings on the initial list of infrastructure.¹¹

The County Executive's Fiscal Report analyzed the potential amount of special tax in relation to the then-prevailing level of real property taxes and determined that the projected initial *ad valorem* special tax be limited to an amount that was not more than 30% of the current property taxes in the affected location. Based upon the then-prevailing real property tax and the assumed market value of a single-family detached home of \$350,000, the County Executive recommended that the special tax burden not exceed \$1,200 per single-family detached home.

Again, as had been the case in the West Germantown Development Districts, the County Executive's Fiscal Report recommended the inclusion of additional "general benefit" infrastructure as enhancements to the package petitioned by the developers. However, the County Executive's Fiscal Report did not attempt to quantify the amount of general benefit infrastructure based upon the development impact tax credit, but instead indicated that the inclusion of such "non-required" improvements should be at a much higher level in order to help support the notion that growth should help "pay for itself." Given the more than \$500 million estimated cost of potential infrastructure needed to support the build-out of the Clarksburg area east of Rt. I-270 and with only about 15% of such infrastructure then under consideration to be funded through the Town Center Development District in combination with the Clarksburg Village and Clarksburg Skylark Development Districts currently under review, the County Executive deemed it important that the Town Center Development District include a higher level of general benefit infrastructure to help finance this needed infrastructure.

iv. Approval of the Second Resolution by the County Council

Following issuance of the County Executive's Fiscal Report, attention turned to the scheduling of the public hearing for the second County Council resolution to consider the creation of the Clarksburg Town Center Development District by the Montgomery County Council. As stated in Section III.F. of this memorandum, notices were placed in the newspapers and were sent by the County Council staff and by Terrabrook to all of the homeowners then listed on the

¹¹ A table showing the proposed list of infrastructure originally petitioned for by the developer alongside the final list of infrastructure recommended by the County Executive is contained in Appendix O.

tax assessment rolls for the proposed Clarksburg Town Center Development District in early November, and a public hearing was held on December 10, 2002, to consider the second County Council resolution. Following a work session held on February 6, 2003, by the Management and Fiscal Policy Committee of the Council (MFP), Resolution No. 15-87, the second County Council resolution, was adopted by the full Council on March 4, 2003, to create the Town Center Development District. The list of infrastructure proposed in the County Executive's Fiscal Report was carried forward into the second County Council resolution. As it had done in the case of the West Germantown Development District, the County Council approved a list of other infrastructure which included a "primary" list of \$17.0 million in infrastructure as recommended by the County Executive's Fiscal Report and a "secondary" list of infrastructure, which included other infrastructure required to be constructed by the developer for PAPF requirements, but which could only be funded through the development district if there were cost savings in the items listed on the primary list.

In an article published in the *Gazette* on March 5, 2003 under the headline "Clarksburg Residents Required to Pay for Local Projects," reporter Singer-Bart described the actions taken by the County Council to create the Town Center Development District. County Executive Doug Duncan was quoted in the article as saying "Creation of a town center district should be supported, consistent with my and council's view that new growth be expected to pay for a significant amount of the new public infrastructure needed to support it."

v. **Subsequent Events**

Since March 2003, Montgomery County has taken no further formal action with respect to the Clarksburg Town Center Development District. In October 2003, Terrabrook's interests in Clarksburg were purchased by Newland Communities as part of the acquisition of a much larger real estate portfolio. Newland has continued to serve as the developer of the Clarksburg Town Center. Although a meeting was held in November 2003 with representatives of the County, the underwriters selected by the County, the County's financial consultants, and representatives of the developer and its counsel to discuss a proposed timetable for a bond financing on behalf of the Town Center, such bond financing has yet to proceed primarily due to the fact that final site plans for the Town Center project are still under consideration by the M-NCPPC Planning

Board, most recently pursuant to the compliance program approved by it on August 17, 2006. In accordance with the compliance program, revised site plan applications have been filed by Newland for the commercial portion of the Town Center, along with amended Project and Preliminary Plans. It is the current intention of Newland Communities that, following the approval of such site plan applications, it will request the County to move ahead with the issuance of bonds on behalf of the Clarksburg Town Center Development District.

APPENDIX C

CLARKSBURG VILLAGE/CLARKSBURG SKYLARK (ELM STREET/ARTERY/ BEAZER)

I. CLARKSBURG VILLAGE/CLARKSBURG SKYLARK (ELM STREET/ARTERY/BEAZER)

A. Detailed History of Development Districts Creation and Development Approvals

The developments proposed for inclusion in the Clarksburg Village Development District, owned by affiliates of Elm Street Development, and the Clarksburg Skylark Development District (the underlying community was referred to initially as Greenway Village, and later as Arora Hills, in marketing literature), owned by a joint venture formed by the Artery Group and Beazer Homes, have been linked together since the adoption of the 1994 Clarksburg Master Plan by virtue of the fact that such properties are referred to collectively as the "Newcut Road Neighborhood" in the Clarksburg Master Plan. Accordingly, these properties have shared common infrastructure requirements and have coordinated their development schedules in order to ensure that each development has the ability to move forward under the County's Master Plan staging requirements.

Although the Clarksburg Village development commenced processing of its APF approvals with the Montgomery County Planning Board prior to those of the Clarksburg Skylark development, with its pre-preliminary plan application considered in late-1999 and its preliminary plan application considered in July 2001, the Clarksburg Skylark development soon caught up. The processing of the preliminary plan for Clarksburg Skylark was delayed pending the rezoning of the Clarksburg Skylark development from the R-200 zone to the PD-4 zone, which rezoning was approved on April 10, 2001.

i. Filing of Development District Petition and Approval of Initial Resolution by County Council

The owners of the properties comprising the Clarksburg Village and Clarksburg Skylark Development Districts jointly filed their petitions with the County Council to create the two independent Development Districts on July 17, 2001. In the transmittal letter to the County

Council, the County Council was requested to consider the petitions on a concurrent basis for purposes of public hearings, work sessions and other Council matters due to the commonality of the infrastructure to be funded through the two Development Districts. The petition filed by Clarksburg Village listed proposed infrastructure ranging in cost between \$38 million and \$44 million, including certain identified infrastructure which would be constructed on a participatory basis with the Clarksburg Skylark Development District. The estimated range for the infrastructure to be financed by Clarksburg Skylark Development District was between \$40 million and \$48 million, again including the common infrastructure.

In connection with the filing of the preliminary plan application on behalf of Clarksburg Village, which was approved by the Montgomery County Planning Board in late July 2001, several weeks after the filing of the joint petitions, a phasing plan was worked out with the Montgomery County Planning Board and Clarksburg Village / Clarksburg Skylark, that established a priority for the construction of the required transportation infrastructure linked to the release of designated number of building permits for the two combined developments.

The public hearing required by Section 14-6 of the Montgomery County Code for the Clarksburg Village / Clarksburg Skylark Development Districts was held on September 11, 2001. On October 2, 2001, following a work session of the MFP Committee of the Montgomery County Council, the Montgomery County Council approved Resolution No. 14-1009, stating that the creation of two Development Districts in the Newcut Road area of Clarksburg and public investment in those areas during the terms of those Development Districts would benefit the public interest.

The *Gazette* again reported the Council action in an article published on September 21, 2001. Reporter Susan Singer-Bart wrote "The creation of development districts, similar to one created for Clarksburg Town Center, will permit developers to use bonds to pay for the infrastructure of the community. A development district uses bonds to pay the costs of roads, sewer and other infrastructure amenities needed to create a new community. By using municipal bonds, the builder gets a better interest rate. The bonds are repaid through a special tax assessment on only the property owners within the special district."

ii. **PAPF Approval by Montgomery County Planning Board**

On October 31, 2001, each of the Clarksburg Village and Clarksburg Skylark Districts submitted a joint application to the Montgomery County Planning Board to seek District-wide PAPF approval pursuant to Section 14-7 of the Montgomery County Code. Although as noted, the preliminary plan application for Clarksburg Village was adopted by the Montgomery County Planning Board prior to the Planning Board's consideration of the district-wide PAPF requirements pursuant to Section 14-7 of the Montgomery County Code, the Montgomery County Planning Board actually considered the preliminary plan application for Clarksburg Skylark at the same time as it considered the District-wide PAPF application pursuant to Section 14-7. Therefore, the statement made in one of the reports that no development districts had been contemplated at the time of the preliminary plan approvals of any of the three pending Districts is in fact not correct, although as noted in Section III.A. of this memorandum, there is no such requirement under the Montgomery County planning and zoning laws. The *Gazette* published an article on November 21, 2001 which reported that the preliminary plan had been filed and that the County was creating development districts to help pay for the road infrastructure.

During the deliberations on the Clarksburg Village and Clarksburg Skylark Development Districts by the staff of the Montgomery County Planning Board, the issue was raised by the Planning Board staff as to whether the Planning Board had the authority to recommend additional infrastructure for inclusion within the Development Districts that was not contained in the original petitions, even though such additional infrastructure was not technically needed to satisfy the PAPF tests of Section 50-35(k) of the Montgomery County Code. The justification for the inclusion of such additional infrastructure used by the Planning Board staff was Section 14-3(g)(2) of the Montgomery County Code, that the infrastructure would be useful to the general public, not just the residents of one subdivision.¹²

The Montgomery County Planning Board approved the preliminary plan application for Clarksburg Skylark effective February 2, 2002, and less than two weeks later, on February 14, 2002, unanimously voted in favor of approving the PAPF applications of Clarksburg Skylark Development District and Clarksburg Village Development District pursuant to Section 14-7 of

¹² See discussion at Section III.B. of the response memo.

the Montgomery County Code. Reporter Singer-Bart wrote an article which ran in the *Gazette* on February 13, 2002 noting the approval of the preliminary plan of Clarksburg Skylark which again mentioned that the County was creating development districts for the infrastructure to be constructed on behalf of Clarksburg Skylark and Clarksburg Village.

The infrastructure listed by the Montgomery County Planning Board for inclusion within the two Districts, as evidenced by the March 5, 2002, letter from Planning Board Chairman, Mr. Arthur Holmes, Jr., to Council President, Mr. Steven A. Silverman, was identical to the list originally included within the petitions filed by the two Districts except for the addition of a portion of Stringtown Road not currently assigned to any adjacent development, the upgrading of the road and trail crossings over Little Seneca Creek from a culvert to a bridge in order to minimize environmental impacts, improvements to Skylark Road, improvements to a public local park along Newcut Road Extended and the furnishing of a privately maintained community meeting facility in the commercial area of the Clarksburg Skylark Development District (the latter of such obligation since transferred to Clarksburg Village).

In September 2002, the Planning Board approved the first phase of the site plan for Clarksburg Skylark. In an article published on September 18, 2002 which mentioned this approval, *Gazette* reporter Susan Singer-Bart wrote "Clarksburg Village and Greenway Village at Clarksburg, the two Newcut Road developments, are sharing the cost of building the roads in the two communities. The County Council has created special taxing districts that require homebuyers to pay for the road projects."

Each of the preliminary plans for Clarksburg Village and Clarksburg Skylark had contemplated the preparation of a detailed infrastructure site plan, which would address the complete package of transportation infrastructure needed to complete these developments. Each of the staff reports submitted by the Montgomery County Planning Board for each of the Clarksburg Village and Clarksburg Skylark infrastructure plans made reference to the pending development districts for those communities and identified the development districts as a source of funding for some of the recommended infrastructure.

iii. Subsequent Events

Discussions with the Office of Management and Budget and the Finance Department of the County Executive branch commenced shortly after approval of the PAPF requirements were completed for the two Districts by the Montgomery County Planning Board. Such discussions involved detailed review of anticipated costs and eligibility with various County planning agencies responsible for the necessary infrastructure, including the Department of Transportation and Public Works and the Montgomery County Department of Parks for each of the listed items of infrastructure proposed for inclusion within the ultimate Development Districts. These discussions were delayed for a substantial period of time pending the resolution of certain design issues involving stream crossings for roads and trails proposed to be constructed through the Development Districts.

Although the County Executive branch has released proposed lists of infrastructure which it would consider including within the County Executive's Fiscal Report on two occasions, the first in August 2003, and the second in December 2005, due to the extensive additional general public infrastructure requested by the County Executive (\$26,359,000 in the version issued in August 2003 and \$32,810,000 for the version issued in December 2005), and some differing interpretations between representatives of the County and the developers as to what items of infrastructure should be designated as "general benefit" infrastructure, the developers for Clarksburg Skylark and Clarksburg Village have not indicated their agreement with the proposed list. In February 2006, the developers submitted a letter to the County Executive branch seeking clarification of the County's policy for inclusion of so-called "general benefit" infrastructure. The County has never formally responded to this letter, and the County Executive's decision to suspend consideration of the Development District applications pending the receipt of the Residents Committee report has effectively suspended any further activity with respect to the Clarksburg Village and Clarksburg Skylark Development Districts.

Due to the length of time that had elapsed following the February 2002 Planning Board approval and the deliberations of the County Executive branch on the infrastructure list to be included within the County Executive's Fiscal Report, the developers for Clarksburg Village and Clarksburg Skylark decided to put in place a private infrastructure charge that would enable them to assess charges against the properties included within their respective developments as a means

of reimbursing them for the cost of the infrastructure required to be included if the County does not proceed to approve the Clarksburg Village and Clarksburg Skylark Development Districts. The Declaration to enable the assessment of these private infrastructure charges for the Clarksburg Skylark properties was filed on February 26, 2004, and a similar declaration was filed on August 31, 2004 for the Clarksburg Village properties. Home purchasers have, in each of these communities, signed notices at the time of entering into their sales contract fully disclosing the existence of the alternative private infrastructure charge.¹³

In late 2006, each of the developers for Clarksburg Village and Clarksburg Skylark sent letters to all of the property owners in their respective developments informing them that, while the developers intended to continue to work with the County in order to seek the creation of the Development Districts, neither developer was willing to continue these negotiations indefinitely. Accordingly, by December 31, 2007, each of the developers intended to decide whether or not to continue negotiations with the County or to commence assessing the private infrastructure charges pursuant to the recorded Declarations.

¹³ See Section III.G. of the response memorandum for a detailed discussion of the legal basis for the imposition of such private infrastructure charges.

APPENDIX D

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PA
/

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May 20, 1994

The Honorable William Donald Schaefer
Governor of Maryland
State House
Annapolis, Maryland 21401

Re: House Bill 895.

Dear Governor Schaefer:

We have reviewed and hereby approve for constitutionality and legal sufficiency House Bill 895 (Montgomery County - Special Obligation Debt). In doing so, we have concluded that the bill does not clearly constitute an impermissible public local law for a single charter home rule county on a subject covered by the Express Powers Act (Art. 25A, §5) and does not contravene one-person/one-vote requirements in violation of the Equal Protection Clause of the Fourteenth Amendment.

House Bill 895 provides for creation by Montgomery County of "development districts" that are special taxing districts or special assessment districts for new developments or redeveloped properties, where the costs of public infrastructure may be financed through issuance of bonds or other obligations "for which the principal, interest, and any premium shall be paid from special taxes, assessments, fees, or charges collected by the county in the development district." Before a district is created to finance special obligation bonds, the proposed action, inter alia, must be approved by 80% of the owners of real property located within the district. 1/

1. Charter Home Rule

The Legislature enacted the Express Powers Act, Art. 25A, §5 of the Annotated Code, in obedience to Article XI-A, §2 of the State Constitution, which mandated a grant by public general law of express powers for charter counties.

Once a particular power has been delegated to the county under the Express Powers Act, Article XI-A, §4 of the Constitution forbids the General Assembly from enacting any further public local laws within the scope of the express power so granted until such time as the Legislature withdraws the power by public general law. Ritchmount Partnership v. Board of Supvs. of Elections, 283 Md. 48 (1978).

We have reviewed House Bill 895 in light of certain bond issuing authority contained in the Express Powers Act under §5(P). The "special obligation bonds" or "other obligations" described in House Bill 895 appear to be neither pure "general obligation bonds" addressed by §5(P)(1), nor pure "revenue bonds" addressed in §5(P)(2), and it is the view of bond counsel for Montgomery County that the county is not presently authorized to issue such a form of debt under existing State law.

During the 1993 legislative session, Assistant Attorney General Richard E. Israel responded to a request for advice on the authority of Montgomery County to issue special obligation debt under existing law, in light of the opinion of bond counsel for Montgomery County that "special obligation bonds" of the sort contemplated by the 1993 legislation and now by House Bill 895, were not authorized under §5(P)(2) of Art. 25A, which grants to charter counties the authority to issue revenue bonds. See letter of advice to the Hon. Brian Frosh dated March 19, 1993, and opinion of Smith, Somerville & Case dated Oct. 2, 1992, addressed to Montgomery County Attorney Joyce Stern (the "Bond

1. We have also construed the title of the bill to be in compliance with Article III, §29 of the Maryland Constitution. Neither development districts nor a certain disclosure requirement for contracts of sale of real property within a development district are specifically mentioned in the purpose paragraph of the bill. The purpose paragraph does, however, include "providing certain limitations on the issuance of special obligation debt" and does state that it is "generally relating to the authority of Montgomery County to issue special obligation debt." Development districts are the mechanism under the bill for issuance of special obligation debt, and must be established by the County in accordance with procedures set forth in the bill. County legislation must also provide for the disclosure provisions required by the bill. We consider the title adequate to give notice of the nature of the bill for purposes of compliance with §29, which requires that the title not be misleading. Allied American Mutual Fire Insurance v. Commissioner of Motor Vehicles, 219 Md. 607 (1959), but does not require that the title include an abstract of the bill's contents. Mayor and City Council of Baltimore v. State of Maryland, 281 Md. 217 (1977).

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Counsel Opinion"), both of which were part of the legislative record of House Bill 895.

The Bond Counsel Opinion observed that revenue bonds have traditionally been understood to be bonds that are payable solely from revenues derived from the project financed with the proceeds of the bonds, and have been distinguished by some courts from special obligation bonds which are payable also from additional sources. It did not consider or construe §5(P)(1) of Art. 25A, which provides "... for the borrowing of moneys on the faith and credit of the county and for the issuance of bonds or other evidences of indebtedness therefor ..." subject to certain conditions, one of which could be construed to indicate existing charter county authority to issue bonds of the nature contemplated by House Bill 895. In particular, §5(P)(1)(l)(b) exempts from a certain bond restriction "bonds or other evidences of indebtedness issued or guaranteed by the county payable primarily or exclusively from taxes levied in or on, or other revenues of, special taxing areas or districts heretofore or hereafter established by law..." (Emphasis added). 2/

It is our understanding that County bond counsel agree that this exemption implies existing authority to issue special obligation debt, but that they do not consider this provision to be in itself a grant of such authority on which to base an approving legal opinion with respect to valid authorization of such bonds.

While in Mr. Israel's March 19, 1993 letter of advice, he found there to be "at least a reasonable doubt" that the County had the specific type of authority being sought, he noted that:

"Should a court subsequently conclude that the County already had this authority under the Express Powers Act, the local law would simply be regarded as a nullity." (p. 2).

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. See Bill Review Letter on S.B. 1157, dated May 12, 1975. 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 of its authority.

2/ Under House Bill 895, §(c)(4) of Chapter 20A-1 provides that "[t]his Section may not be construed to limit the power of the county to create development districts or issue special obligation bonds or other obligations under any other applicable law."

2. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides, in relevant part, that no state shall "deny to any person within its jurisdiction the equal protection of the laws." ^{3/} In a landmark Equal Protection Clause case, the Supreme Court held that the Fourteenth Amendment requires adherence to the principle of one-person/one-vote in certain elections (in that case the election of state legislators). Reynolds v. Sims, 377 U.S. 533 (1964).

We have considered whether the property owner approval requirements of House Bill 895 violate the one-person/one-vote principle.

The Reynolds rule requiring one-person/one-vote has been extended to cases in which elected officials exercised "general governmental powers over the entire geographical area served by the body." Avery v. Midland County, 390 U.S. 474 (1968) (officials of county government); and to election of community college trustees who "exercised general governmental powers" and "perform[ed] important governmental functions" that had significant effect on all citizens residing within the district." Ball v. James, 451 U.S. 355 (1981), citing Hadley v. Junior College District, 397 U.S. 50 (1970). The Supreme Court has declined, however, to apply the strict Reynolds rule where, despite exercise of some "typical governmental powers", including issuance of general obligation bonds, a district's "primary purpose, indeed the reason for its existence" is essentially to obtain a private benefit, and disproportionately affects the voting landowners. See e.g., Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719 (1973).

However, even if we assume that House Bill 895 concerns the exercise of general governmental powers that do not disproportionately affect the voting landowner, we do not believe the approval mechanism contained in the bill constitutes the elective enfranchisement only of property owners.

House Bill 895 calls for no secondary popular vote on the establishment of development districts. Hence the question arises whether the "approval" by property owners is itself to be understood to be a vote, triggering equal protection franchise rights, or as a mere request or petition to the county council. If the council is the ultimate actor, and the prior approval by property owners is merely a preliminary expression of encouragement, no election would exist to trigger equal protection

³ Article 24 of the Maryland Declaration of Rights embodies the concept of equal protection of laws to the same extent as the Equal Protection Clause of the Fourteenth Amendment. Murphy v. Edmonds, 325 Md. 342 (1992).

concerns. If, on the other hand, action by the county council is preliminary to the "favorable vote of the freeholders of the area ... and ma[akes] no provision for voting by the electors of that area" the legislation could violate the Equal Protection Clause. See Berry v. Bourne, 588 F.2d 422, 424 (4th Cir. 1978).

We are advised, however, 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. This proposed County legislation would conform the implementation of House Bill 895 with requirements of the Equal Protection Clause.

The companion legislation, would provide that:

"(a) After receiving a petition [by property owners as described in House Bill 895] located in a proposed development district, the County Council may, by resolution approved by the Executive Director, declare its intent to establish a development district....

* * *

(c) The adoption of a resolution under this Section does not obligate the Council to create a development district...." (Emphasis added)

It is our understanding that the intent of this proposed implementing legislation is to make clear that the Council retains discretion to create or not to create a development district approved by property owners, so that the governing body, and not the property owners, remains the crucial decision maker. Landowner "approval" under House Bill 895, as so implemented, would then be a genuinely preliminary matter and not an election subject to one-person/one-vote requirements.

In conclusion, it is our view that House Bill 895 may be signed into law.

Very truly yours,

J. Joseph Curran, Jr.
J. Joseph Curran, Jr.
Attorney General

JJC:SJC:maa

cc: Bonnie Kirkland, Esq.
F. Carvel Payne
Secretary of State
Hon. Brian E. Frosh
Benjamin Blalek, Esq.
Joyce Stern, Esq.

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motion to move 6-1 (Ewing)

APPENDIX E

MEMORANDUM

TO: County Council
FROM: Michael Faden, Senior Legislative Attorney
SUBJECT: Action: Bill 44/46-92, Development Districts

Bill 44-92, Development Districts, sponsored by the Management and Fiscal Policy Committee, was introduced on December 1, 1992. Bill 46-92, Development Districts, sponsored by the Council President at the request of the County Executive, was also introduced on December 1, 1992. A public hearing was held on both bills on February 2, 1993. Extensive Committee worksessions were held on March 22 and August 2, 1993.

At the August 22 worksession, staff was directed to redraft the bills in accordance with Committee amendments, merging both bills if possible. The result was a combined redraft which followed the general direction taken by Bill 44-92 while adding some elements of Bill 46-92. The Committee held worksessions to consider that redraft on October 22 and December 6, 1993, and at a final worksession on February 10, 1994, recommended the enactment of the Committee bill on 01-25.

Also attached is state legislation, House Bill 895, enacted in the 1994 session, which allows the County to issue special obligation debt for development districts. See 065-69. It responds to an opinion of bond counsel that state enabling authority must be expressly granted before a development district can issue special obligation bonds. See opinion, 077. Several provisions in Bill 44/46-92 were inserted to conform to House Bill 895.

Summary and Purposes

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.

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.

Limitations

Before describing what Bill 44/46-92 does, it is important to emphasize several things it does not do. It does not:

- create 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.

- adopt 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.

- distribute 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.

- specify 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.

In essence, the Committee concluded that all these decisions are more suitable for district-by-district consideration rather than Countywide rules or standards. This legislation instead answers generic questions and erects a common procedural framework for all development districts.

Section-by-section analysis

This analysis will summarize the major provisions in each section of new Chapter 14, Development Districts, added to the County code by Bill 44/46-92.

§14-1 designates the short title for Chapter 14.

§14-2 sets out the Chapter's purposes. Subsection (b) emphasizes that development districts are most useful in specific areas of the County where an approved master plan recommends significant development which the market will support and which requires extensive, long-term infrastructure facilities.

§14-3 defines the terms used in the Chapter.

In subsection (d), "cost" covers all expenses associated with a given infrastructure improvement.

In subsection (e), "development" includes redevelopment of underdeveloped land. This would allow a development district to be created in, for example, an urban renewal or revitalization area. The state special obligation debt law is slightly narrower; it allows a district to issue such debt for infrastructure to serve redevelopment of commercial or industrial properties. (We don't expect this distinction to pose any practical problem.)

Subsection (f) defines the legal nature of development districts. They are special taxing districts, which the County has full power to create and modify under state law.

In subsection (g), "infrastructure improvement" is defined broadly in terms of the kinds of facilities that can be funded. The intention was not to exclude any particular type of capital item. 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 part of a regional road or transit system, or a school or library which draws from a larger area.

Subsection (1) provides that a development district can be funded by an excise tax as well as a special property tax. However, as previously mentioned, this bill does not authorize any new form of tax; if the Council wishes in the future to apply an excise tax to a given development district, legislation authorizing that tax would be needed. Either kind of tax can be applied to a special district without raising uniformity issues. Councilmember Hanna preferred to have districts funded only by property taxes, but the Committee majority accepted this definition of "special tax". A district can also use tax increment financing under the state Tax Increment Financing Act.

§14-4 specifies the basic powers of the County to be exercised under this Chapter.

§14-5 sets out criteria for the location of any development district. A district may include land in a municipality, need not be contiguous, and should largely, if not entirely, consist of undeveloped or underdeveloped land. It can finance infrastructure improvements located outside the district if they relate to the development of land in the district.

§14-6 tells how to initiate a development district. A petition must be signed by at least 80% of the property owners in the proposed district and the owners of 80% of the property in the proposed district by value. The state law requires "approval" of the district by the specified number of property owners; the Attorney General interpreted the law so that this petition can function as approval, instead of making the Council, Executive, and Planning Board go through the entire process of creating a district without being sure that enough property owners will approve it. See letter, 970.

("Approval" of a district should not be confused with participation in it. Once a district is legally created, the owners of all property located in it must pay whatever tax or assessment is imposed. However, §14-10(f) allows landowners who are not ready to develop their land when a district is created to defer special property taxes until a subdivision or development plan is approved for their own property.)

The Committee, with Committee Chair Fraisner dissenting, decided not to give the Council the authority to create a district on the Council's own motion, or the Executive's request, when the district will not use the special obligation bonds authorized by state law.

The property owners' petition must include development ceilings; that is, it must list the maximum number of housing units and maximum amount of nonresidential space that the property owners intend to build in the district. After the petition is filed with the Council, the Council must give public notice and hold a hearing on it. The Council can then adopt a resolution, with the County Executive's approval, declaring its intent to establish a development district consisting of a specified geographic area, which need not be the area proposed by the petitioners. In the resolution the Council must explain why intensive development and public investment in that area will benefit the public.

The adoption of this first Council resolution does not obligate the Council to ultimately create the district it specifies or any district at all. But it is intended to signal that the Council will seriously consider doing so, and is likely to trigger a great deal of activity by the property owners, the Planning Board, and the Executive branch.

§14-7 spells out the relationship between the development district process and the County's growth control mechanisms, primarily the adequate public facilities requirements established under the subdivision regulations (Adequate Public Facilities Ordinance) and Annual Growth Policy (AGP).

Under this section one or more of the property owners in the proposed development district (as specified in the first Council resolution) may file a joint application for a provisional APF approval with the Planning Board. The application must cover the entire district, and show how all projected development in it will meet the APF requirements and other zoning and subdivision requirements. It must identify all infrastructure improvements necessary to create any capacity needed, and estimate the costs of those improvements.

The Board must then review the entire district for compliance with the APF and AGP, ~~using the same standards it would otherwise use for individual developments.~~ The Board can conditionally approve the property owners' application if, taken as a whole, the infrastructure improvements to be funded by the proposed development district will meet all APF and AGP requirements. The Board can condition its approval on creation and funding of the district and compliance with the development ceilings proposed in the joint application.

Subsection (c) clarifies that the owners of land in a development district retain the legal responsibility to provide the infrastructure improvements needed to comply with the adequate public facilities law. This means that if a development district fails for any reason, the responsibility for its share of any infrastructure improvements has not passed to the County. *

Subsection (c) complements subsection (e), which provides that after a district is created and its financing is arranged, the developers have satisfied all current APF requirements and any imposed during the next 12 years. (Councilmember Hanna initially preferred a longer vesting period, such as 20 years.) The bottom line for a developer is that it will have an unalterable 12-year APF approval but is legally committed to fund (through the development district or otherwise) the infrastructure improvements it assumed responsibility for when it received its APF approval.

Subsection (d) allows a property owner to withdraw from a district before it is finally created by a second Council resolution, but not after. When a property is withdrawn from a district, its conditional APF approval is cancelled. If the withdrawal of any individual property will impair the viability of the district, the Board can modify or cancel the APF approvals or impose new conditions on them.

Under subsection (f), the County may reallocate any excess development capacity created by the district but not used by its participants. This law does not spell out how that reallocation would occur; that is left to existing or future rules and procedures.

§14-8 delineates the role of the Executive branch in the creation of a development district. The Executive's primary function before the Council acts is to report to the Council, after the Planning Board has acted but before the Council's second public hearing, on the cost of the necessary infrastructure improvements and the revenues needed to fund the district. The Executive should also recommend whether and where to create a district, which infrastructure items it should fully or partly fund, and how to pay for them.

The Committee (with Committee Chair Praisner dissenting) deleted from this section the option for the Executive to submit a broader district buildout program, derived from Bill 46-92, which would outline the sequence, timing, and financing of all infrastructure improvements needed to support full buildout of that district rather than only the level of development sought by the applicants. Such a program could form the basis of a large, long-term development district which would finance all or most of the infrastructure needed to support full buildout, as the Executive originally proposed in Bill 46-92.

§14-9 outlines the procedure for final Council approval of a development district. The Council must hold a second public hearing, after due notice, not less than 45 days after the Planning Board acts. After the hearing, the Council can adopt a resolution, subject to Executive approval or Council override, creating a district and setting its boundaries. The resolution must list each infrastructure improvement to be funded through the district and specify the share of its cost which the County or another government agency will pay. The resolution must also set up a contingency account for cost overruns. *

Under subsection (e), this resolution can also (but is not required to) incorporate a staging plan for the district. More precisely, the resolution could condition the issuance of a building permit for any listed development on the start of construction of a certain infrastructure improvement, but not later than a specific date. The latter deadline will prod the County, as operator of the development district, to construct the necessary capital projects within a certain time, while the developers' waiting period is intended to avoid overloading existing facilities soon after a district is initiated.

§14-10 authorizes the Council to impose special taxes, assessments, fees, or charges to repay the debt issued by a district. It expressly retains the Council's authority to adjust the rates of taxes and assessments which fund a district. Without such language, it might be implied that the initial rate could not change during the district's life. Rate changes may be necessary, for example, to adjust the annual revenue to cover the costs of debt issued later in the district's life, when certain facilities begin construction, which because of federal arbitrage rules could not have been issued earlier. A rate change could also be necessary to reduce the district's tax rate if property values exceed the initial projections and costs do not. Because the resolution authorizing issuance of bonds must set a maximum tax or assessment applicable to any individual property, the Council will not have unlimited ability to raise the tax rates.

Subsection (b)(1) exempts fully-developed property located in a development district from any special tax or assessment, unless state law requires otherwise (which it would for a generally applicable property tax). This is necessary to assure that housing and commercial properties existing when a district is created are not required to pay for infrastructure improvements which they do not create the need for. Subsection (b)(2) is a recapture provision which requires a landowner who benefits from the exemption in subsection (1), and later develops its property more intensively and benefits from capacity created by the district, to pay any tax it would have otherwise had to pay.

Subsection (e) specifies that any development district special tax or assessment must be credited against the construction excise tax and development impact tax, and leaves to the resolution creating the district the decision on what other taxes or payments that finance infrastructure improvements, if any, they can be credited against.

Subsection (f) allows any property owner who did not sign the petition to create the district to defer, with interest, any special property tax imposed to pay for special obligation bonds until the Planning Board approves a development or subdivision plan for that property. This provision was required by House Bill 895.

§14-11 through §14-15 contain provisions necessary to implement the district's financing. These have been reviewed by bond counsel and staff has incorporated technical amendments they suggested.

§14-11 sets up the special fund that will segregate the district's funds from the County general fund. Subsection (d) prohibits the funding by a development district of any infrastructure improvement already funded in the first 4 years of the then-current Capital Improvements Program.

§14-12 provides for an adequate debt service reserve fund and limits the use of bond proceeds.

§14-13 spells out the contents of the bond resolution the Council must adopt before the County issues debt to finance a district.

Subsection (a)(6) prohibits any acceleration of, or any increase in the pre-set maximum amount of, assessments or taxes levied on an individual property in a development district. This provision, a major safeguard for property owners, is intended to avoid the shifting of onerous burdens to individual homeowners if revenue drastically declines because of delayed development. This kind of burden shifting led many underfunded development districts in Colorado to default on their bonds a few years ago after individual homeowners' tax payments were radically increased beyond their ability to pay. By restricting the district's ability to spread the cost of default by one taxpayer to others and by setting maximum assessments for individual taxpayers, this provision attempts to assure that the security for the district's bonds is the underlying value of the land on which a lien could be placed. In reviewing a district's financial analyses, bond underwriters would have to assess the value of the properties in the district to be sure that they could support the debt payments, either on an ongoing basis or through their foreclosure market value. Setting a maximum tax on each property would also require at the outset a more detailed forecast of the cost to individual taxpayers, another "reality check" for proponents of a district.

§14-14 contains technical provisions for debt issuance.

§14-15 expressly states that the County's credit is not pledged to pay a development district's debt.

§14-16 outlines the administration of the district and allows the County, subject to competitive procurement laws, to contract with other government agencies or private parties to build infrastructure improvements.

§14-17 requires advance notice to buyers of property in a district, including both a statement in the contract of sale for real estate and the filing of a declaration in the land records.

§14-18 is a liberal construction clause.

Other Issues

These are critical issues the Committee discussed extensively which are not discussed in the section-by-section analysis. They are explained here to show how the bill resolves them and to give the Council a clear opportunity to make changes if appropriate.

1) Should a development district future-fund longer term needs?

An important question not explicitly resolved in this bill is how to finance longer lead time, broader scope infrastructure items, such as transit systems. Should participants in a district pay some share of items that will not be built until later years? Should they set up a fund to contribute to

items which are not immediately necessary for them to meet APFO requirements, but which are in the master plan? This bill does not preclude the Council, in the resolution creating a district, from taking either of these steps, nor does it require them. If a district does fund long-term needs, the implementing resolution will have to decide how its share would be calculated or who would devise a formula.

2) What amendments, if any, to the Annual Growth Policy will be necessary to implement this legislation?

Several related issues involve the interaction of a development district, the Annual Growth Policy, and the Adequate Public Facilities Ordinance.

The Planning Board wants to be sure that the calculation of infrastructure needs which is done before a development district is approved will take into account all the infrastructure improvements needed for the district, not just those necessary for APFO compliance by those landowners who plan to develop their properties shortly after the district sells its bonds. In our view, the larger the proposed development district, the more acute the problems the Board is pointing to.

*goes beyond
ordinance
APF 1974*

To deal with this issue, the Management and Fiscal Policy Committee directed staff to work with the Planning Board, Office of Planning Implementation, and concerned private citizens (developers and community residents) to propose amendments. Revisions to §§14-6 through 14-9 presented to the Committee by this ad hoc working group and accepted in the Committee bill made more inclusive the Board's assessment of infrastructure needs.

The ad hoc working group also recommends an amendment to the Annual Growth Policy to specify what kinds of infrastructure improvements, in addition to those required to comply with the APFO, that a development district should finance in whole or part. The effect would be, for the land in a proposed development district, a substantial broadening of the scope of the APFO review to cover longer term school needs and such items not now covered as libraries, recreation facilities, and parks, as well as closer scrutiny of future 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, but this bill and the AGP amendment would create a framework for Planning Board and Executive branch reviews and advice to the Council.

Although the conforming AGP amendment has not yet been drafted, the parties who discussed it (particularly the Planning staff and OPI) envision the following elements:

a) The AGP would expressly allow the creation of a development district, alone or in combination with a specified level of additional government funding, to be the basis for a Planning Board finding of adequate public facilities under the APFO.

b) The AGP test would reflect the difference in size and timing between individual subdivision proposals (the current regulatory system) and development districts. The test for a development district would be expanded to include facilities which are not currently evaluated at the local area review level. The test would determine the level of infrastructure necessary to support build-out of the district and the timing of facility construction.

The Council would further determine which public facilities would be the immediate responsibility of the district (the adequate public facilities test), which facilities would receive only partial support from the district with the remainder coming from the County, or possibly another later district, and which would not be funded at all by the district.

c) The test should recognize the different priorities of the facilities needed to support a district. To show the kind of decisions this would require, a possible order of priority, for discussion purposes only, is:

First priority — facilities essential to public safety and welfare:

- transportation, including transit facilities
- schools
- water and sewer facilities
- police and fire stations

Second priority — facilities that provide public benefit and convenience:

- libraries
- health centers
- local parks
- social service centers

Third priority — facilities that provide amenities:

- greenways
- major recreational facilities

d) The AGP criteria for local area transportation review of development proposals would probably need to be amended. For all other facilities, functional plans prepared by the responsible agencies would be used to determine need and timing. Where the functional plan does not consider the area in question, the responsible agency would determine the facility needs based on the criteria used by that agency. A chart on @108 prepared by OPI lists the relevant functional plans.

To work best, this system will require participation by the school system and the Washington Suburban Sanitary System as well as the Planning Board and the Executive branch in an interagency infrastructure review for the proposed district. Ideally, the Board would prefer that property owners file complete subdivision plan applications, rather than only limited APF applications as the bill now envisions, before a district is created, but neither the bill nor the AGP amendment would require this.

3) Who should pay for a development district's cost overruns? How should the process be structured to produce the most accurate cost estimates for needed infrastructure?

The approach taken by the Executive in Bill 46-92 was to provide that if an infrastructure improvement is delayed because of court order, other government action, or "other circumstance beyond the County's control", the Council can either substitute an equivalent project or delay the schedule of infrastructure improvements. If it does the latter, it can reduce the ceiling

capacity allocated to the district and refund a proportionate share of taxes already collected. If "other circumstance beyond the County's control" includes cost overruns, then the use of this mechanism would cut short some development plans. If that possibility appears credible, it may effectively serve as an incentive for participating developers to monitor the County's cost estimates and speak up if they appear low.

The original Bill 44-92 had no similar mechanism. It essentially assumed that once the County has set the amount of infrastructure cost and the resulting development taxes, it will absorb any shortfall. This put the burden on the County to accurately estimate the cost of given infrastructure items — not always easy for projects to be built some years in the future.

The Committee bill tries to protect all parties by dividing the risks of delay and those of increased costs; the former are largely borne by the County, but the latter stay with the developers and their successors in interest. The Committee decided to require each development district to have a contingency fund for cost overruns. This bill also lets the County raise the district's tax rates, subject to the maximums set in the bond resolution, when an overrun occurs. Further it explicitly adopts the principle that the legal responsibility for providing the required infrastructure items stays with the developer once it receives its APF approval, rather than shifting to the County when the district is created. In turn, the developer has received advance APF approval and protection against new APF requirements. In addition, staging of major developments may mitigate the cash flow demands that accompany large cost overruns (while it does shift some risks of delay to developers).

All these provisions will reward, if not demand, careful financial planning before a district is created. In all likelihood, we have been told, groups of developers will commission their own engineering studies to produce reliable cost estimates for major items.

4) Should any special provision for affordable housing be inserted in this bill?

The Planning Board raised the question whether the availability of development districts will result in fewer units of affordable housing being built under the AGP's special ceiling allocation for affordable housing, and whether some countervailing mechanism could be found. The Committee consensus was that current MPDU requirements would mitigate any foreseeable disparity and no special provisions in Bill 44/46-92 are necessary.

This packet contains:

	<u>Circle #</u>
Bill 44/46-92 (staff redraft)	1
Bill 44-92 as introduced	26
Legislative Request Report	43
OLO Evaluation	44
Bill 46-92 as introduced	45
Legislative Request Report	59
Memo from County Executive	60
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Materials on both bills	
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State bill and related materials	65
Committee minutes	85
Functional plans chart	108

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APPENDIX F

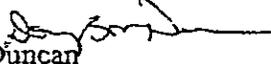
OFFICE OF THE COUNTY EXECUTIVE
ROCKVILLE, MARYLAND 20850

Douglas M. Duncan
County Executive

MEMORANDUM

September 29, 1997

TO: Marilyn J. Praisner, President
Montgomery County Council

FROM: Douglas M. Duncan 
County Executive

SUBJECT: West Germantown Development District

I am pleased to recommend to you the formation of a development district in West Germantown. This recommendation results from a cooperative effort between the public and private sectors, and incorporates agreement among the parties as to the amount and structure of the financing. This is particularly important because, as the first use of this financing tool, the West Germantown Development District will serve as a precedent for future development district applications.

In reviewing the application, my goal was to find a plan that allows significant and valuable development to move forward while at the same time assuring the appropriate balance of benefits and risks. The recommended development district, therefore, differs from the proposal submitted by the developers in several areas. For example, compared to the original application, the recommended district reduces by approximately one-third the amount of the financing and the tax burden on future homeowners in the district. Overall, the revised district better protects the needs and interests of the County while providing the developers a reasonable, fiscally-responsible framework within which they can proceed.

By way of background, on June 21, 1996, certain property owners and developers filed a petition with the County Council to create a development district to be known as the West Germantown Development District, in the West Germantown area of the County. The proposed district consisted of three developments known as King's Crossing, Hoyles Mill Village, and Kingsview Village Center. These three developments are composed of approximately 700 acres and would contain 1,545 residential housing units and 114,000 leasable square feet of commercial space. The petition identified \$19,640,434 in infrastructure and other costs

Marilyn J. Praisner, President

September 29, 1997

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proposed to be funded through development district financing; this compares with our estimated costs of \$22,337,056 for infrastructure improvements listed by the Planning Board, plus certain other costs proposed by the developers.

Based on our evaluation, we have reached the following conclusions about the original petition:

1. *The amount of the financing proposed by the developers would result in an unacceptable value-to-lien ratio.* The proposed infrastructure improvements would cost \$22,337,056, which would require a bond issue of \$29,139,752. The appraised value of the property in the proposed development district at the time of financing would be \$50,150,000, resulting in a value-to-lien ratio of 1.72 to 1. This value-to-lien ratio is too low and represents an unacceptable level of risk to the bondholders. The projected amount and duration of the developers' special tax payments, which would continue for a period of 4 to 5 years after issuance of the bonds, present additional unacceptable risk to the bondholders.
2. *The district as proposed by the developers would result in an unfair burden for other property owners in the Germantown Impact Tax Area.* This results from the credit of approximately \$2.9 million in impact tax payments that is not balanced by an equivalent amount of benefit.
3. *As proposed by the developers, the estimated tax burden on future property and home owners in the district required to fund the proposed infrastructure package is \$1,424 annually.* This represents 45 percent of the current property tax rates that apply and would result in an initial annual special tax burden of \$1,424 on a home with a market value of \$300,000 that sells for, and is assessed based upon, \$283,053 in the district.
4. *The developers assume that the County and M-NCPPC will participate in the district and contribute revenue to fund allocable shares of infrastructure.* Approximately \$1.5 million in infrastructure is included in the proposal based on this assumption.

Based on these conclusions, I directed my staff to explore the potential for funding a modified development district that meets the tests of reasonableness and fairness and that presents a prudent financial transaction for Montgomery County, without undue risk to the bondholders or undue benefit to the developers. In particular, I asked that they focus on an acceptable tax burden, primarily by reducing the amount of the financing and including appropriate measures to address risks. Based on that work, I have concluded that a development district for West Germantown could be structured in a manner that meets these fundamental requirements. The structure, form, and characteristics of this district should include the following:

Marilyn J. Praisner, President

September 29, 1997

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1. *A projected initial ad valorem tax rate for the district limited to an amount no more than 30 percent of the current property taxes that apply in the subject location. An initial annual special tax burden not to exceed \$950 for a single-family home, and a rate of approximately 82 cents per \$100 of assessed valuable, is acceptable.*

2. *A bond issuance of approximately \$19.9 million to fund \$15.5 million in infrastructure. Revenues to support the district would be based on the ad valorem tax noted above, as well as some form of special benefit assessment on commercial property in the district.*

3. *A major four-lane arterial road through the development, two local parks, a sewer pumping station, and other transportation improvements funded through the district. Approximately \$2.4 million in infrastructure improvements beyond those required by the Planning Board is included to provide additional general benefit.*

4. *Certain measures to address risks associated with this form of financing and this particular transaction. For example, to address the unique risks involved, the majority of the proceeds from the bond issue should be used for the purpose of acquiring substantially completed improvements that are advance-funded and constructed by the developers. In addition, there should be certain guarantees and assurances regarding the payment of taxes on the property before development has actually occurred.*

5. *The County and M-NCPPC should not participate in the district. The cost of this type of financing is unacceptably high and neither the County nor M-NCPPC should contribute revenues required to support the funded infrastructure.*

I am recommending this district only after a comprehensive review of the proposal, consideration of significant policy issues, and serious discussions with the developers. The resulting recommended district is a balanced, fair plan that meets the varied needs of the developers and the community, while also addressing and preserving the County's fiscal integrity. Any significant changes to this package should be approached with caution.

These recommendations mark a significant step in the process of approving and forming the West Germantown Development District. The complex financing that will be structured, the development of a new taxing methodology not previously used in the County, and the involved disclosure actions that will be pursued are all inherent to the ground-breaking nature of this project. I look forward to working with you to bring this first development district to fruition.

A detailed fiscal report is enclosed. Please direct any questions you may have to Mr. Timothy Firestine at 217-2792.

DMD: jp

F-3

4-84

Enclosure

COUNTY EXECUTIVE'S FISCAL REPORT
WEST GERMANTOWN DEVELOPMENT DISTRICT

September 29, 1997

EXECUTIVE SUMMARY

County Executive does not recommend the formation of a West Germantown Development District as proposed by the Petitioners. This recommendation is based on the following fundamental conclusions:

1. The County Executive's estimate of the cost of the proposed infrastructure improvements totals \$22,337,056. To finance this amount of infrastructure, a bond issuance of \$29,139,752 would be required, which when compared to the appraised value of the property at the time of financing of \$50,150,000, results in a value-to-lien ratio of 1.72 to 1. This value-to-lien ratio is too low, and presents an unacceptable level of risk to the bondholders. Additional, unacceptable risk results from the projection that the developers' special tax payments are substantial in the bond issue's early years and continue to be so beyond an acceptable 4-5 year time period after the bonds are issued.
2. As proposed, the development district would result in an unfair burden for other property owners in the Germantown Impact Tax Area. This is a result of the credit of approximately \$2.9 million in impact tax payments that is not balanced by an equivalent amount of benefit.
3. The estimated tax burden on typical future property and home owners in the district required to fund the proposed infrastructure package is \$1,424 annually. This represents 45 percent of the current property tax rates that apply in the subject location, and would result in an initial annual special tax burden of \$1,424 on a home with a market value of \$300,000 that sells for (and is assessed based upon) \$283,053 in the district. The County Executive views this amount to represent an unacceptable level of tax burden on those taxpayers.
4. As proposed, the petitioners included certain infrastructure items totaling almost \$1.5 million with the presumption that the County and M-NCPPC would be participants to the district and contribute to the revenues required to support the agencies' shares of the infrastructure funded. The Executive recommends that the County not participate in the district, as this form of financing is significantly more expensive than alternative forms of financing available to the County and would accelerate the timing of when the County would otherwise fund its improvements.

The County Executive believes that a development district for West Germantown could be structured that meets fundamental requirements regarding acceptable risk for the bond holders and an acceptable tax burden for the property owners affected. The County Executive supports formation of a West Germantown Development District having the characteristics summarized below and as further detailed in Part II of this report.

1. The County Executive recommends that the projected initial ad valorem tax rate for the district be limited to an amount that is no more than 30 percent of the current property taxes that apply in the subject location. The County Executive recommends an initial annual special tax burden not to exceed \$950, and a rate of about 82 cents per \$100 of assessed value on a home with a market value of \$300,000 that sells for (and is assessed based upon) \$289,948 in the district.
2. The total amount of infrastructure which would be financed is \$15.5 million. The amount of infrastructure which could be financed based on the resulting ad valorem tax revenues is \$13.2 million. To this could be added approximately \$2.3 million supported by a special benefit assessment on commercial property in the district. Included in these amounts is approximately \$2.4 million in infrastructure improvements that are beyond that required by the Planning Board. A total bond issue of approximately \$19.9 million would be required.

3. **Certain measures must be in place to address the particular risks involved in this form of financing, and in this financing in particular. These include using the majority of the proceeds from the bond issue for the purpose of acquiring substantially completed improvements that are advance funded and constructed by the developers, and requiring certain guarantees and assurances regarding the payment of taxes on the property before development has actually occurred.**

4. **The Executive recommends that the County and M-NCPPC not participate in the district and not contribute to the revenues required to support the infrastructure funded. The County and M-NCPPC owned land, after the land swap is accomplished, would be excluded from the Development District.**

CONTENTS OF EXECUTIVE FISCAL REPORT

PART I. EVALUATION OF PROPOSED WEST GERMANTOWN DEVELOPMENT DISTRICT

- A. PURPOSE AND BACKGROUND
- B. CONSULTATION WITH WSSC AND MCPS
- C. COMPARISON OF INFRASTRUCTURE COSTS
- D. REVENUES REQUIRED
- E. TAX RATES
- F. EXECUTIVE RECOMMENDATION ON DEVELOPMENT DISTRICT PETITION

PART II. RECOMMENDATION OF A MODIFIED DEVELOPMENT DISTRICT FOR WEST GERMANTOWN

- A. SUMMARY OF RECOMMENDATIONS
- B. STRUCTURE OF FINANCING AND MEASURES TO ADDRESS RISK
- C. ACCEPTABLE ADDITIONAL TAX BURDEN
- D. INCLUSION OF GENERAL BENEFIT IMPROVEMENTS
- E. AMOUNT OF INFRASTRUCTURE FINANCED
- F. ITEMS FOR FURTHER EVALUATION

APPENDICES

ATTACHMENTS

Report Prepared By:
Montgomery County Department of Finance
and
Offices of the County Executive, Planning Implementation Section

Assisted By:
Financial Advisory Team
Government Finance Group, Inc.
Keenan Rice
Delta Associates, Inc.

F-7 4-88

PART I. EVALUATION OF PROPOSED WEST GERMANTOWN DEVELOPMENT DISTRICT

A. PURPOSE AND BACKGROUND

The purpose of this report is to comply with Section 14-8 of the Montgomery County Code, Chapter 14 Development District Act. On June 21, 1996, certain property owners and developers filed a petition with the County Council to create a development district, to be known as the West Germantown Development District, in the Germantown West area of Montgomery County.

The proposed district consists of three developments on approximately 700 acres that would contain 1,545 residential housing units and 114,000 leasable square feet of commercial space. The three developments are known as King's Crossing, Hoyles Mill Village, and Kingsview Village Center. For information on the petitioners/property owners and a detailed description of the proposed development, the reader should refer to the original petition filed June 21, 1996, and an amendment thereto filed on July 30, 1997.

Preliminary engineering for most of the proposed infrastructure improvements was provided by the developers in Spring 1997, with the latest revision of cost estimates provided on May 12, 1997. Independent appraisals, funded by the County, were conducted on the King's Crossing and Hoyles Mill Village properties in March 1997, and on the Kingsview Village Center property in July 1997.

In January 1997, the County hired an independent financial advisor to assist in the review and analysis of the financial feasibility of the development district proposal. A Preliminary Feasibility Report addressing the former two developments was submitted to the County in April 1997, and one addressing all three developments, which is the source for the revenue requirements and tax rate discussion provided below, was submitted in August 1997, and further revised in September 1997.

In accordance with the Development District Act, Part I of this report addresses the specific requirements of Section 14-8 to:

1. Estimate the cost of each infrastructure improvement listed by the Planning Board, and compare these estimates to those submitted by the applicants;
2. Estimate the amount of revenue needed to cover the district's share of all infrastructure improvements funded, fully or partly, by a district;
3. Estimate the estimated tax rate for each form of taxation available to the district that would produce the necessary revenue; and
4. Recommend whether to create a district.

B. CONSULTATION WITH WSSC AND MCPS

In its review of the development district proposal, the County Executive has consulted with the Washington Suburban Sanitary Commission and the Montgomery County Public Schools. The comments from these agencies are attached to this report as Appendix A.

C. COMPARISON OF INFRASTRUCTURE COSTS

In the petition for the development district, the petitioners identified \$19,640,434 in infrastructure and other costs proposed to be funded through the development district financing. Detailed estimates of these costs were included as attachments to the petition. Table A on the following page compares those estimates with the latest estimates provided by the petitioners and reviewed by the Department of Public Works and Transportation, WSSC, M-NCPPC and County staff.

TABLE A
WEST GERMANTOWN DEVELOPMENT DISTRICT
COUNTY EXECUTIVE ESTIMATED INFRASTRUCTURE COSTS

BASED ON PETITION

(numbers refer to item numbers in petition)	ORIGINAL ESTIMATES OF IMPROVEMENTS PROPOSED BY PETITIONERS	CE ESTIMATE OF PLANNING BOARD REQUIRED AND PETITIONER PROPOSED IMPROVEMENTS
TRANSPORTATION IMPROVEMENTS		
1 Richter Farm Rd A-297 MD117 to Schaeffer (2 lanes)	\$3,953,349	\$4,124,866
Richter Farm Rd A-297 Schaeffer to MD118 (2 lanes)	1,798,570	1,791,098
KC and HMV reimbursement for 4 lane portion MD118 to GSH	605,000	605,000
4 Schaeffer Road	671,872	992,244
5 Hoyles Mill Rd and King's Crossing Blvd	1,580,401	1,663,762
A-298 Leaman Farm Road	1,728,299	1,691,479
6 Mateney Road	75,000	75,000
7 Clopper Road (MD117)	1,405,649	1,408,419
8 Great Seneca Highway (GSH) (a)	77,076	402,313
9 A-270 Kingsview Village Avenue	533,672	519,882
10 Park and Ride Lot	587,896	587,896
14 A-297 Lower Taper Extension (b)	0	156,967
Subtotal Transportation Improvements	\$13,016,784	\$14,018,926
OTHER IMPROVEMENTS AND COSTS		
12 Contribution to Off-site Stormwater Mgmt Facility	\$185,000	\$185,000
13 Local Parks	375,000	1,200,000
Professional Services (Legal and Engineering) (c)	600,000	600,000
WSSC Review Fees (d)	0	400,000
WATER AND SEWER		
2 Hoyles Mill Wastewater Pumping Station/Force Main	\$2,883,650	\$3,838,020
3 Interim Pumping Station	1,436,000	700,000
11 Outfall Sewer	1,144,000	1,395,110
TOTAL CONSTRUCTION FUNDS REQUIRED	\$19,640,434	\$22,337,056

- (a) CE estimate reflects additional improvements added by the Planning Board.
- (b) Added by Planning Board; no estimate provided with petition.
- (c) CE makes no estimate of this amount as insufficient documentation has been provided by petitioners.
- (d) Since Planning Board review, petitioners requested reimbursement for this item.

The County Executive's estimated cost of the infrastructure improvements listed by the Planning Board, plus certain other costs proposed by the developers, is \$22,337,056. The financial feasibility of the proposed alternative was based on this amount.

D. REVENUES REQUIRED

In order to estimate the amount of revenue needed to cover the district's share of all infrastructure improvements funded, certain assumptions regarding the financing structure of the proposed bond issue must be made. The structure assumed is similar to that originally proposed by the petitioners in discussions with the Department of Finance in Fall 1996, and is detailed in Special Tax Projection No. 21 which is provided as an attachment to this report. Key features of this financing structure are as follows:

- Two years of capitalized interest;
- Increasing debt service payments and special tax revenues;
- A debt service reserve fund equal to 10 percent of the par amount of the bonds;
- Debt service payments increasing two percent per year after the capitalized interest period;
- A 110 percent debt service coverage ratio; and
- A future refunding of the bonds at a presumed lower interest rate if development occurs as expected.

In accordance with these financing provisions, the total estimated amount of the bond issue necessary to provide for the \$22,337,056 in proceeds to fund the infrastructure noted above is \$29,139,752. This amount represents 58.1 percent of the value of the district at the time of bond issue (appraised at \$50,150,000), which equates to a value-to-lien ratio of 1.72 to 1.

Assuming a tax-exempt interest rate of 7.75 percent, the net annual debt service amount is \$2,164,584. This same amount is the total development district revenues required in FY01, the first year without capitalized interest. This amount grows approximately 2% annually through FY04, at which time a refunding is assumed at a lower interest rate. The revenue requirement in FY05 is \$2,386,089 and grows again annually, reaching \$3,457,015 in FY23. A detailed illustration of the proposed annual revenue requirement and tax rate or charge is provided by Special Tax Projection No. 21.

E. TAX RATES

In order to fund the required revenues of \$2,164,584 in the first year without capitalized interest, the following tax rates would apply:

1. An ad valorem tax rate on developed property of \$1.258 per \$100 of assessed value. This rate represents 45 percent of the current property tax rates that apply in the subject location, and would result in an initial annual special tax burden of \$1,424 on a home with a market value of \$300,000 that sells for (and is assessed based upon) \$283,053 in the district.
2. A benefit assessment or some other form of tax on undeveloped property sufficient to satisfy the appropriate portion of debt service requirements.

3. A benefit assessment, or some other form of tax on commercial property, whether developed or undeveloped, sufficient to satisfy the appropriate portion of debt service requirements.

It should be noted that the ad valorem tax rate would be set on an annual basis such that the revenues obtained would increase approximately two percent per year. The benefit assessment amount is also anticipated to increase approximately two percent per year. A detailed illustration of the proposed annual revenue requirement and tax rate or charge is provided by Special Tax Projection No. 21.

F. EXECUTIVE RECOMMENDATION ON DEVELOPMENT DISTRICT PETITION

Based upon the analysis and results cited above, and the conclusions reached in the Preliminary Feasibility Report prepared by the financial advisory team, the County Executive does not recommend the formation of a West Germantown Development District as proposed by the Petitioners. This recommendation is based on the following fundamental conclusions:

1. The County Executive's estimate of the cost of the proposed infrastructure improvements totals \$22,337,056. To finance this amount of infrastructure, a bond issuance of \$29,139,752 would be required, which when compared to the appraised value of the property at the time of financing of \$50,150,000, results in a value-to-lien ratio of 1.72 to 1. This value-to-lien ratio is too low, and presents an unacceptable level of risk to the bondholders. Additional, unacceptable risk results from the projection that the developers' special tax payments are substantial in the bond issue's early years and continue to be so beyond an acceptable 4-5 year time period after the bonds are issued.
2. As proposed, the development district would result in an unfair burden for other property owners in the Germantown Impact Tax Area. This is a result of the credit of approximately \$2.9 million in impact tax payments that is not balanced by an equivalent amount of benefit.
3. The estimated tax burden on typical future property and home owners in the district required to fund the proposed infrastructure package is \$1,424 annually. This represents 45 percent of the current property tax rates that apply in the subject location, and would result in an initial annual special tax burden of \$1,424 on a home with a market value of \$300,000 that sells for (and is assessed based upon) \$283,053 in the district. The County Executive views this amount to represent an unacceptable level of tax burden on those taxpayers.
4. As proposed, the petitioners included certain infrastructure items totaling almost \$1.5 million with the presumption that the County and M-NCPPC would be participants to the district and contribute to the revenues required to support the agencies' shares of the infrastructure funded. The Executive recommends that the County not participate in the district, as this form of financing is significantly more expensive than alternative forms of financing available to the County and would accelerate the timing of when the County would otherwise fund its improvements.

**PART II. RECOMMENDATION OF A MODIFIED DEVELOPMENT DISTRICT FOR
WEST GERMANTOWN**

A. SUMMARY OF RECOMMENDATIONS

The County Executive believes that a development district for West Germantown could be structured that meets fundamental requirements regarding acceptable risk for the bond holders and an acceptable tax burden for the property owners affected. The County Executive supports formation of a West Germantown Development District having the characteristics summarized below and as further detailed in the following section.

1. The County Executive recommends that the projected initial ad valorem tax rate for the district be limited to an amount that is no more than 30 percent of the current property taxes that apply in the subject location. The County Executive recommends an initial annual special tax burden not to exceed \$950, and a rate of about 82 cents per \$100 of assessed value on a home with a market value of \$300,000 that sells for (and is assessed based upon) \$289,048 in the district.
2. The total amount of infrastructure which would be financed is \$15.5 million. The total amount of infrastructure which could be financed based on the resulting ad valorem tax revenues is \$13.2 million. To this would be added approximately \$2.3 million supported by a special benefit assessment on commercial property in the district. Included in these amounts is approximately \$2.4 million in infrastructure improvements that are beyond that required by the Planning Board. A total bond issue of approximately \$19.9 million would be required.
3. Certain measures must be in place to address the particular risks involved in this form of financing, and in this financing in particular. These include using the majority of the proceeds from the bond issue for the purpose of acquiring substantially completed improvements that are advance funded and constructed by the developers, and requiring certain guarantees and assurances regarding the payment of taxes on the property before development has actually occurred.
4. The Executive recommends that the County and M-NCPPC not participate in the district. The boundaries of the district are recommended to be those proposed by the petitioners, but excluding the land owned by the County and M-NCPPC after the land swap is accomplished.

B. STRUCTURE OF FINANCING AND MEASURES TO ADDRESS RISK

As noted above, the typical financing structure for land secured bonds includes one or two years of capitalized interest and scheduled tax payments by the developers and builders before the property is improved and sold to the final owners. When these scheduled tax payments are significant in both amount and period, and when the total amount of debt incurred is very high in relation to the value of the property, an unacceptable risk to bondholders is present. The County Executive is willing to support a development district only when this risk can be reduced to acceptable levels.

The first recommended measure to achieve an acceptable level of risk is to place development district bond proceeds initially in escrow, and then use them only for the purpose of acquiring infrastructure improvements, or designated portions thereof, which have been advance funded and constructed by the developers. In this manner, there is greater assurance that development is proceeding before bond funds are disbursed, and there is a quantifiable improvement in value on which to base the disbursement. The County's target value-to-lien ratio of 4 to 1 will generally be met in accordance with the projected construction completion and acquisition schedule. This measure has the added benefit of reducing the risk of construction fund shortfalls since the improvements are already substantially completed when they are acquired with bond proceeds. A small amount of proceeds may be released initially to fund required permitting fees. In addition, completion bonds from the contractors constructing the improvements will provide assurance that the improvements will be fully completed and accepted by the County.

A second recommended measure to address the risk of non-payment of taxes is the requirement of some form of a liquidity deposit, such as a 12 to 15 month renewable reserve that rolls forward from year to year and is reduced as property develops. The details and form of this instrument are to be finalized with the developers to the County's satisfaction. It is recognized that the debt service reserve fund and the County's ability to take the property to tax sale provide an ultimate remedy for non-payment of taxes, but these remedies should be used only as a very last resort.

The County is considering a financing structure which separates into two series the bonds issued to fund the infrastructure improvements for 1) the Kingsview Village Center portion of the district and 2) the King's Crossing and Hoyles Mill Village portions. Some form of guarantee on the bonds obtained by the developer of the Kingsview Village Center portion should result in a lower level of risk and therefore a lower cost of debt for this series of bonds. The savings from such a structure and guarantee would be passed on to the property owners in this sub area via a lower special benefit assessment on the commercial property.

C. ACCEPTABLE ADDITIONAL TAX BURDEN

Creation of any special taxing district requires consideration of what is an acceptable tax burden relative to the services or facilities provide by the district. These considerations include:

- The extent to which the market truly will cause the initial price of the home to be less than similar homes outside the district;
- The extent to which the amount less will be sufficient to justify the additional tax burden;
- The sophistication of the home buying public, e.g., the ability to make comparisons of relative monthly burdens of home ownership, within and outside of the development district;
- The extent to which a potential home buyer views the additional tax burden as the "cost" of a lower home price;
- The extent to which a potential home buyer will be more comfortable with paying up front the full cost of the home and funding the infrastructure improvements through a mortgage;
- The extent to which it is certain that the initial savings in the price of the homes in the development district will indeed be passed along to future buyers of that home; and

- The community's overall acceptance of special taxes as a means of paying for specific benefits.

Pursuant to the considerations noted above, the County Executive recommends that the projected initial ad valorem tax rate for the district be limited to an amount that is no more than 30 of the current property taxes that apply in the subject location. The County Executive recommends an initial annual special tax burden not to exceed \$950, and a rate of about 82 cents per \$100 of assessed value on a home with a market value of \$300,000 that sells for (and is assessed based upon) \$289,948 in the district.

In considering the above factors, the County Executive insists that the additional tax burden must be an amount that will be viewed by potential home buyers as not overly burdensome or onerous. There is a risk in levying a tax that is viewed by property owners as onerous, in that the home buyers will eventually look to the County, which levies the tax, as responsible for the unacceptable burden. It must also be kept in mind that the revenues are structured to increase by 2 percent per year. To the extent that the home values, and therefore assessments, increase at a greater rate, reactions are anticipated to be minimal. Should home values not keep up with the increase in the special tax burden and the special tax rate must be increased, a greater probability exists that property owners would voice concern and discontent over the special tax. It should also be noted that the rates discussed are the initial projected rates, not the maximum rates that may be levied on the property in the district. These maximum rates would be imposed only if tax revenues collected fall short of expectations.

D. INCLUSION OF GENERAL BENEFIT IMPROVEMENTS

The discussion that prevailed during County Council deliberations on the Development District Act envisioned decisions on a case-by-case (district-by-district) basis regarding whether or not a development district should fund long-term infrastructure needs. Specifically contemplated was "a substantial broadening of the scope of the APFO review to cover longer term school needs and such items not now covered as libraries, recreation facilities, and parks, as well as closer scrutiny of future 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 . . ." (See June 21, 1994 memorandum from Senior Legislative Attorney Faden to County Council regarding Action: Bill 44/46-92 Development Districts.) Consistent with this concept is an objective of ensuring that developers do not unduly benefit from development district financing and that overall costs to future homeowners do not increase.

As noted in PART I above, the Development District Act provides a clear benefit to the petitioners of the West Germantown Development District in the form of the impact tax credit provided in the Development District Act. Table B provides an estimate of this amount, which, after credits for actual infrastructure improvements required of and funded by the district, totals \$2,895,248. As proposed by the developers, the list of infrastructure improvements does not provide sufficient benefit to the other taxpayers in the Germantown impact tax area to balance this benefit.

Therefore, the County Executive recommends that any package of infrastructure improvements funded through a West Germantown Development District include general benefit improvements in an amount at least approaching the amount of impact tax credit received by the developers. Specifically, the County Executive recommends including in the infrastructure package the funding and construction of A-297 as a four-lane, rather than two-lane roadway from MD117 to MD118, the construction of transportation infrastructure that would support future County government development adjacent to the Kingsview Village Center property, and the improvements to two local parks in the King's Crossing and Hoyle's Mill Village developments.

The County Executive notes that a requirement of general benefit infrastructure is consistent with the financing of the Woodview Village special assessment district in Prince George's County, the only development district implemented thus far in the State of Maryland. Under the terms of this financing, a

total of \$1.586 million, or almost 27 percent of the total \$5.915 million in improvements financed, was for a recreation facility and a contribution to schools. In addition, the development met an additional goal of achieving more up-scale housing (through a higher level of architectural standard) than what was typically occurring.

TABLE B

WEST GERMANTOWN DEVELOPMENT DISTRICT
CALCULATION OF IMPACT TAX CREDIT

Amount that would be paid if district is not formed

Type of Unit	Single Family	Times Rate	Multi-Family	Times Rate	Retail	Times Rate
Applicable Rate	No. of Units	\$2,084	No. of Units	\$1,389	GFA	4.249
Year						
1997	0	\$0	0	\$0	0	\$0
1998	202	\$420,968	0	\$0	125,400	\$532,825
1999	156	\$325,104	0	\$0	0	\$0
2000	156	\$325,104	0	\$0	0	\$0
2001	150	\$312,600	0	\$0	0	\$0
2002	126	\$262,584	0	\$0	0	\$0
2003	126	\$262,584	0	\$0	0	\$0
2004	108	\$225,072	0	\$0	0	\$0
2005	72	\$150,048	0	\$0	0	\$0
2006	72	\$150,048	0	\$0	0	\$0
2007	84	\$175,056	112	\$155,568	0	\$0
2008	built out		built out		built out	
Totals	1,252	\$2,609,168	112	\$155,568		\$532,825

TOTAL IMPACT TAXES AS CALCULATED: \$3,297,561

LESS CREDIT FOR IMPROVEMENTS: (\$402,313)

NET TOTAL IMPACT TAX CREDIT: \$2,895,248

Notes:

Assumes developers would receive credit for improvements to Great Seneca Highway.
Assumes FY97 Impact Tax Rates, actual rates may be greater.

E. AMOUNT OF INFRASTRUCTURE FINANCED

The total dollar amount of infrastructure financed affects a proposed financing in two important ways. First, as a key factor in projecting the value-to-lien ratio for the proposed financing, it is an indication of the overall risk inherent in the financing. The lower the value-to-lien ratio, the more overall risk in the financing. Second, the total amount of infrastructure being financed is the key determining factor in the financial burden placed on the parties who will pay the debt service. In the case of a development district financing, the amount of infrastructure being financed affects the revenues required and therefore the annual tax burden on a property owner in the district.

To achieve the acceptable additional tax burden amount stated above, the County Executive recommends that the maximum amount which could be financed for purposes of acquisition of developer funded and constructed infrastructure improvements is \$15.5 million. This amount includes \$13.2 million of improvements which are supported by the ad valorem tax applying to all the property in the district and on which the special benefit tax on undeveloped property is based. This amount is directly related to the County Executive's recommended ad valorem property tax rate of approximately 82 cents per \$100 of assessed value. Additional infrastructure, totaling \$2.3 million, will be financed through the special benefit assessment on commercial property in the district and has no bearing on the ad valorem tax rate.

Because the amount available for acquisition of infrastructure improvements is less than that originally proposed by the developers, the County Executive has worked with the developers to prioritize infrastructure items for financing through the district. A detailed list of infrastructure improvements recommended by the County Executive for financing through the development district and their most current cost estimates is presented at Table C. The Executive has insisted that A-297 be constructed at its four, rather than two-lane cross section consistent with the Master Plan for the Germantown West Policy Area, and that the local parks for King's Crossing and Hoyles Mill Village be improved at a standard consistent with other public use local parks implemented by M-NCPPC. These priorities are reflected in the recommended infrastructure list. To the extent that items cost less than estimated at the time of the bond issue, the proceeds would be available to fund other infrastructure items that were not included.

As an alternative, one of the developers has proposed using the development district bond proceeds for construction of additional sewer related improvements in exchange for a commitment by the developer to build the final portion of A-297 from Schaeffer Road to MD 118. The improvements proposed by the developer for bond funding include the outfall sewer as well as grading and clearing of the King's Crossing Boulevard right of way, where the force main would be located. The County Executive is willing to seriously consider this proposal, but for the outfall sewer only, subject to a legally binding commitment and adequate financial assurances by the developer to build the final portion of A-297 on its current schedule.

F. ITEMS FOR FURTHER EVALUATION

The above discussion and recommendations contain a number of outstanding items that should be resolved prior to the Council's final decision on these recommendations. Additionally, the Preliminary Feasibility Report cites numerous outstanding items or information requiring further verification that would have to be completed prior to any bond issue. A list of these outstanding items is provided below.

Other Outstanding Items and Issues

- Due Diligence must be conducted on the new owner of the Hoyles Mill Village property, in addition to an evaluation of the new developer's financial plans.
- The special tax methodology must be finalized.
- A Development Agreement should be executed which addresses a number of details relating to the disbursement of bond proceeds, the mechanics for reimbursements from other sources, and the agreed upon handling of SDC credits accruable to the district.

Requirements to be Met Prior to Bond Closing

- The Kingsview Village Center Land Swap Agreement must be executed.
- All Developers ownership, lease arrangements, and financing plans must be finalized, and financial resources identified.
- Site Plan approval must be obtained for the retail portion of Kingsview Village Center.
- Costs of improvements should be finalized pursuant to either bids for construction or definitive cost guarantee agreements with the developers.
- Firm commitments for private financing must be secured before bonds are sold and actual funding should be in place before the bond issue is closed.
- Developers must have signed contracts from builders to buy a substantial portion of the planned residential units.
- Bond counsel must have provided a tax opinion on tax exempt nature of the bonds.
- The County should conduct additional review of appraisal methodology and market absorption assumptions, and update the information prior to bond sale.
- Additional verification and analysis of developer information and development plan assumptions, including sensitivity analysis of scenarios in which sales pace and/or price projections vary negatively, should be obtained.

TABLE C
WEST GERMANTOWN DEVELOPMENT DISTRICT
COUNTY EXECUTIVE RECOMMENDED INFRASTRUCTURE COSTS TO BE FINANCED

(numbers refer to item numbers in petition)	COST
TRANSPORTATION IMPROVEMENTS	
1 Richter Farm Rd A-297 MD117 to Schaeffer (2 lanes)	\$4,124,866
Additional 2 lanes MD117 to Schaeffer	1,100,000
Richter Farm Rd A-297 Schaeffer to MD118 (2 lanes)	1,791,098
Additional 2 lanes Schaeffer to MD118	364,949
KC and HMV reimbursement for 4 lane portion MD118 to GSH	0
Less KV Reimbursement for A-297	-620,000
4 Schaeffer Road	992,244
5 Hoyles Mill Rd and King's Crossing Blvd	0
A-298 Leaman Farm Road	1,641,479
6 Mateney Road	0
7 Clopper Road (MD117)	1,117,440
8 Great Seneca Highway (GSH)	0
9 A-270 Kingsview Village Avenue	519,882
10 Park and Ride Lot	0
14 A-297 Lower Taper Extension	0
Subtotal Transportation Improvements	\$11,031,958
OTHER IMPROVEMENTS AND COSTS	
12 Contribution to Off-site Stormwater Mgmt Facility	0
13 Local Parks	\$620,000
Professional Services (Legal and Engineering)	0
WSSC Review Fees	0
WATER AND SEWER	
2 Hoyles Mill Wastewater Pumping Station/Force Main	\$3,838,020
3 Interim Pumping Station	0
11 Outfall Sewer	0
Clearing and Grading of right of way for Force Main	0
TOTAL CONSTRUCTION FUNDS REQUIRED	\$15,489,978
Amount included above which is for "general benefit"	\$2,404,624

APPENDIX G

Clarksburg Town Center Development District: Roads -- No. 500423

Category: Transportation	Date Last Modified: January 10, 2004	Previous PDF Page Number: 7-39(04 App)
Agency: Public Works & Transportation	Required Adequate Public Facility: YES	
Planning Area: Clarksburg		
Relocation Impact: None		

EXPENDITURE SCHEDULE (\$000)

Cost Element	Total	Thru FY03	Est. FY04	Total 6 Years	FY05	FY06	FY07	FY08	FY09	FY10	Beyond 6 Years
Planning, Design and Supervision	0	0	0	0	0	0	0	0	0	0	0
Land	0	0	0	0	0	0	0	0	0	0	0
Site Improvements and Utilities	9,521	0	4,521	5,000	5,000	0	0	0	0	0	0
Construction	0	0	0	0	0	0	0	0	0	0	0
Other	0	0	0	0	0	0	0	0	0	0	0
Total	9,521	0	4,521	5,000	5,000	0	0	0	0	0	0

FUNDING SCHEDULE (\$000)

Development District	9,521	0	4,521	5,000	5,000	0	0	0	0	0	0
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ANNUAL OPERATING BUDGET IMPACT (\$000)

DESCRIPTION

This project provides for acquisition of completed road improvements in the Clarksburg Town Center Development District that will be constructed by the developer and subsequently acquired by the County. Four road projects are to be acquired upon substantial completion by the developer: 1) Stringtown Road between Piedmont Road and MD 355 - two lanes will be constructed with dedicated right of way for an ultimate four-lane roadway. The ultimate four lanes will be provided in an 800-foot "gap" between adjacent developments on the south side of Stringtown Road, 2) MD 355 - vertical realignment of a 600-foot segment south of Stringtown Road to improve safety and visibility, 3) Piedmont Road will be constructed from Stringtown Road to Clarksburg Road as a two-lane road, 4) Clarksburg Road - the two-lane roadway will be widened to include turning lanes between MD 355 and Piedmont Road.

Any funds remaining from the total available development district funds would be applied to these improvements: 1) Town Center - new streets to provide circulation, on-street parking, and access to the planned retail center; Overlook Park Road, from Clarksburg Road to Stringtown Road, and Clarksburg Square Road from the current end of Redgrave Place to Overlook Park Road. 2) MD 355 at MD 121 in the Clarksburg Historic District - turn lanes will be added to improve intersection capacity. All improvements are in accordance with the Master Plan and will include streetlighting, street trees, sidewalks and/or paved bike paths.

Service Area

Clarksburg Policy Area.

JUSTIFICATION

Improvements are required as a condition of development approval.

Plans and Studies

Clarksburg Master Plan and Hyattstown Special Study Area 1994, and County Executive's Fiscal Report, Clarksburg Town Center Development District, October 17, 2002.

Cost Change

Not applicable.

STATUS

Various stages ranging from design, final design, and construction.

OTHER

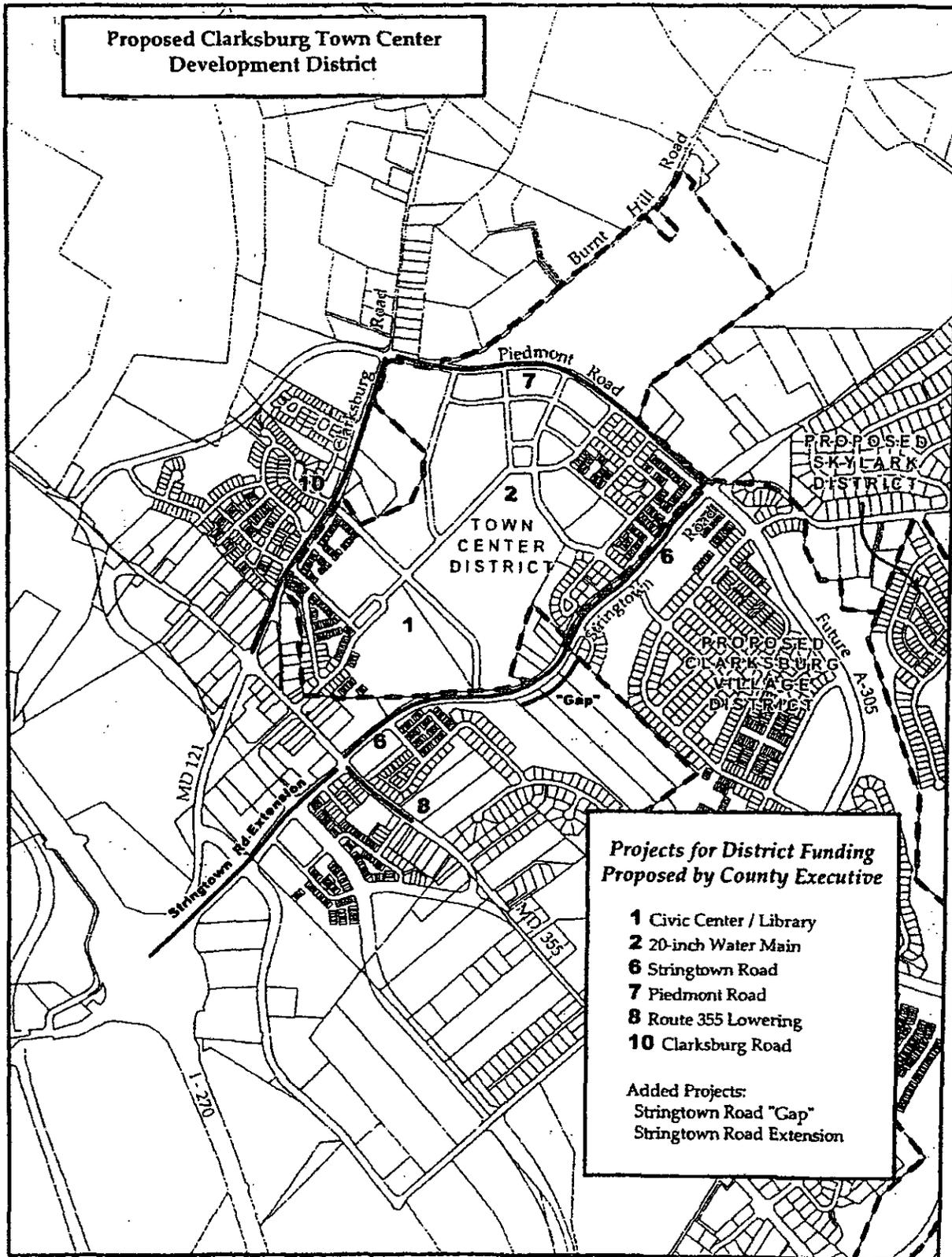
An Implementation Agreement between the County and the developer will set forth the conditions for disbursement of funds after inspection and acceptance by the County of substantially completed improvements. Amounts shown are the maximum that will be disbursed from development district funds for the improvements described.

FISCAL NOTE

The bonds to be issued for the district will be secured by, and the debt service on the bonds is to be paid from, the revenues of the special taxing district. The revenues of the special taxing district will primarily consist of an ad valorem tax on property within the district and a benefit assessment on undeveloped property.

APPROPRIATION AND EXPENDITURE DATA	COORDINATION	MAP
Date First Appropriation FY04 (\$000)	Department of Finance	See Map on Next Page
Initial Cost Estimate 9,521	Department of Public Works and Transportation	
First Cost Estimate	Department of Permitting Services	
Current Scope FY04 9,521	Office of Management and Budget	
Last FY's Cost Estimate 9,521	Maryland-National Capital Park and Planning Commission	
Present Cost Estimate 9,521	Council Approved Resolution 15-87	
Appropriation Request FY05 0	Maryland State Highway Administration	
Appropriation Request Est. FY06 0	Clarksburg Historic District	
Supplemental	WSSC	
Appropriation Request FY04 0	Stringtown Road Extension project	
Transfer 0	Upcounty Regional Services Center	
Cumulative Appropriation 9,521	Developers	
Expenditures/		
Encumbrances 0		
Unencumbered Balance 9,521		
Partial Closeout Thru FY02 0		
New Partial Closeout FY03 0		
Total Partial Closeout 0		

**Proposed Clarksburg Town Center
Development District**



Stringtown Road Extended -- No. 500403

Category Transportation
 Agency Public Works & Transportation
 Planning Area Clarksburg
 Relocation Impact None.

Date Last Modified
 Previous PDF Page Number
 Required Adequate Public Facility

January 10, 2004
 7-227(04 App)
 NO

EXPENDITURE SCHEDULE (\$000)

Cost Element	Total	Thru FY03	Est. FY04	Total 6 Years	FY05	FY06	FY07	FY08	FY09	FY10	Beyond 6 Years
Planning, Design and Supervision	1,646	66	1,019	561	44	200	317	0	0	0	0
Land	1,072	1	9	1,062	1,062	0	0	0	0	0	0
Site Improvements and Utilities	1,330	0	0	1,330	0	135	1,195	0	0	0	0
Construction	4,782	0	0	4,782	0	2,803	1,979	0	0	0	0
Other	0	0	0	0	0	0	0	0	0	0	0
Total	8,830	67	1,028	7,735	1,106	3,138	3,491	0	0	0	0

FUNDING SCHEDULE (\$000)

Development District	1,600	0	0	1,600	0	750	850	0	0	0	0
G.O. Bonds	4,804	0	333	4,471	756	1,814	1,901	0	0	0	0
Development Approval Payment	512	0	512	0	0	0	0	0	0	0	0
Impact Tax	1,905	58	183	1,664	350	574	740	0	0	0	0
Investment Income	9	9	0	0	0	0	0	0	0	0	0
Intergovernmental	0	0	0	0	0	0	0	0	0	0	0

ANNUAL OPERATING BUDGET IMPACT (\$000)

Maintenance				21	0	0	0	7	7	7	0
Energy				30	0	0	0	10	10	10	0
Net Impact				51	0	0	0	17	17	17	0

DESCRIPTION

This project provides for the final design, right-of-way acquisition and construction of 2,400 foot extension of Stringtown Road westward from MD 355 to I-270 ramps at existing MD 121. This road will be a four-lane divided closed section arterial highway with two lanes in each direction. It will include a 5-foot sidewalk on the south side, an 8-foot bike path on the north side, street trees and streetlights within a 120-foot right of way. Appropriate auxiliary lanes and traffic signals will be provided at the intersections with MD 355 and Gateway Center Drive. The project includes stormwater management facilities required for environmental permits.

Service Area

Clarksburg.

Capacity

The projected ADT for the year 2020 is 40,000 vehicles per day.

JUSTIFICATION

The Clarksburg Town Center and other developments are under construction and/or in the approval process. This arterial roadway is required to provide access to development in various stages in the pipeline. Stringtown Road Extended will also serve to redirect traffic away from the Clarksburg Historic District.

Plans and Studies

The project prospectus and the preliminary plans were completed and funded under the Facility Planning: Transportation project. The Clarksburg Master Plan and Hyattstown Special Study Area (June 1994) includes the extension of Stringtown Road from MD 355 to I-270 ramps as an arterial road that would connect MD 355 to the proposed Mid-County Arterial (A-305). DPWT report title, "Traffic Operations Study - proposed Stringtown Road Extension" May 2001. This project is a part of the Executive's Go Montgomery! program.

Cost Change

Not applicable.

STATUS

Final design stage.

OTHER

Preliminary design costs were funded under Facility Planning: Transportation project. The project scope has changed to eliminate WSSC water main relocation on Frederick Road (MD 355) which will be constructed by a developer.

FISCAL NOTE

Impact tax for this project is assumed at 26.7 percent of the project cost within the Clarksburg Impact Tax Area. The Town Center Development District participation reflects a pro-rated share of what otherwise would be G.O. bond funded. Town Center Development District participation would not exceed \$1,600,000. The Impact Tax share of the project has been adjusted accordingly.

APPROPRIATION AND EXPENDITURE DATA	COORDINATION	MAP
Date First Appropriation FY01 (\$000)	Department of Permitting Services	See Map on Next Page
Initial Cost Estimate 8,830	Department of Environmental Protection	
First Cost Estimate	WSSC	
Current Scope FY04 8,830	Maryland-National Capital Park and Planning Commission	
Last FY's Cost Estimate 8,830	Utilities	
Present Cost Estimate 8,830	Clarksburg Town Center Development District	
Appropriation Request FY05 0		
Appropriation Request Est. FY06 6,625		
Supplemental		
Appropriation Request FY04 0		
Transfer 0		
Cumulative Appropriation 2,205		
Expenditures/		
Encumbrances 880		
Unencumbered Balance 1,325		
Partial Closeout Thru FY02 0		
New Partial Closeout FY03 0		
Total Partial Closeout 0		

Expenditure Detail by Category, Sub-Category, and Project (\$000s)

Transportation

Project	Total	Thru FY03	Rem. FY04	6-Yr Total	FY 05	FY 06	FY 07	FY 08	FY 09	FY 10	Beyond 6-yr.	Approp.
Bridges												
500313 Bridge Preservation Program	5,387	153	1,497	3,737	1,217	504	504	504	504	504	0	700
509753 Bridge Renovation	3,264	0	744	2,520	420	420	420	420	420	420	0	420
500503 Brink Road Bridge (M-63) over Goshen Branch	1,689	0	0	1,689	491	1,198	0	0	0	0	0	1,689
*500104 Clarksburg Road Bridge No. M-007B	1,394	1,173	221	0	0	0	0	0	0	0	0	0
509132 Facility Planning: Bridges	7,457	5,383	193	1,881	399	482	250	250	250	250	0	806
*500105 Goshen Road Bridge No. M-061B	2,431	227	2,204	0	0	0	0	0	0	0	0	0
*509845 Howard Chapel Road Bridge No. 124	1,423	1,198	225	0	0	0	0	0	0	0	0	0
500404 Inwood Avenue Bridge No. M-139	834	0	156	678	678	0	0	0	0	0	0	0
500106 Mouth of the Monocacy Road Bridge No. M-135	1,793	33	1,064	696	696	0	0	0	0	0	0	696
500504 Nicholson Lane Bridge No. M-113	3,252	0	0	3,252	1,350	1,902	0	0	0	0	0	3,252
*509825 Stoneybrook Drive Over CSX #76	2,687	2,507	180	0	0	0	0	0	0	0	0	0
*500202 Wayne Avenue Bridge No. M-162	1,327	10	1,317	0	0	0	0	0	0	0	0	0
500505 White Ground Road Bridge No. M-138	1,371	0	0	1,371	0	0	300	1,071	0	0	0	0
Sub-Category Total	34,309	10,684	7,801	15,824	5,251	4,508	1,474	2,245	1,174	1,174	0	7,563
Highway Maintenance Section												
509928 Brookville Service Park	11,659	43	387	11,229	2,676	1,833	5,698	1,022	0	0	0	9,853
500522 North County Maintenance Depot	4,725	0	0	4,725	0	0	1,286	3,439	0	0	0	0
*509830 Pavement Rehabilitation	6,475	7,011	-536	0	0	0	0	0	0	0	0	0
508527 Resurfacing: Primary/Arterial	34,350	0	3,195	31,155	8,125	3,606	3,656	5,106	5,106	5,356	0	8,125
500511 Resurfacing: Rural/Residential Roads	12,667	0	0	12,667	1,333	1,667	1,667	2,333	2,667	3,000	0	1,333
509927 Seven Locks Technical Center Phase II	11,520	0	681	10,839	1,711	5,579	3,548	0	0	0	0	9,672
508182 Sidewalk & Infrastructure Revit.	35,502	0	4,952	30,550	5,750	3,250	3,500	5,750	6,000	6,300	0	5,750
Sub-Category Total	116,888	7,054	8,679	101,145	19,595	15,935	19,558	17,650	13,773	14,656	0	34,733
Mass Transit												
507658 Bus Stop Improvements	1,509	0	409	1,100	350	150	150	150	150	150	0	350
*500321 CNG Fueling Stations	4,479	133	4,346	0	0	0	0	0	0	0	0	0
*509951 Damascus Park & Ride	420	414	6	0	0	0	0	0	0	0	0	0
500433 Equipment and Maintenance Operations Center (EMOC)	1,970	0	0	1,970	610	1,360	0	0	0	0	0	1,970
*509952 Germantown Transit Center	1,913	1,617	296	0	0	0	0	0	0	0	0	0
500535 Ride On Fleet Expansion	21,385	0	0	21,385	3,385	0	2,000	3,000	6,000	7,000	0	3,385
509974 Silver Spring Transit Center	39,883	1,012	3,000	35,871	668	13,105	18,524	3,574	0	0	0	-34,000
500148 Silver Spring Transit Center ITS Component	993	0	0	993	0	100	402	491	0	0	0	-893

11-1 * Pending Close Out or Close Out
CIP230 - County Council

Expenditure Detail by Category, Sub-Category, and Project (\$000s)

Transportation

Project	Total	Thru FY03	Rem. FY04	6-Yr Total	FY 05	FY 06	FY 07	FY 08	FY 09	FY 10	Beyond 8-yrs.	Approp.
500534 Transit Park and Ride Lot Renovations	324	0	0	324	214	110	0	0	0	0	0	324
Sub-Category Total	72,876	3,176	8,057	61,643	5,227	14,825	21,076	7,215	6,150	7,150	0	-28,964
Parking Facilities												
*500107 Bethesda Cheltenham Garage 42	12,488	11,133	1,355	0	0	0	0	0	0	0	0	0
509525 Facility Planning: Parking	2,876	1,254	230	1,392	747	189	141	105	105	105	0	414
*509930 Pkg Beth Del Ray/Auburn Car 36	17,901	17,407	494	0	0	0	0	0	0	0	0	0
508255 Pkg Beth Fac Renovations	12,022	0	2,100	9,922	2,414	2,563	1,799	1,341	978	827	0	2,414
*509410 Pkg Beth Waste Water Quality	1,735	1,735	0	0	0	0	0	0	0	0	0	0
500329 Pkg Beth Wayfinding	373	0	182	191	191	0	0	0	0	0	0	0
500324 Pkg Beth Woodmont Corner Garage (11) Restoration	18,000	672	3,236	14,092	13,892	200	0	0	0	0	0	0
500328 Pkg Bethesda Elevator Modernization	1,272	0	40	1,232	29	257	601	345	0	0	0	0
508250 Pkg Sil Spg Fac Renovations	20,934	0	2,277	18,657	2,492	3,802	4,280	3,842	2,610	1,631	0	2,492
508408 Pkg Sil Spg Waste Water Quality	3,223	2,053	250	920	920	0	0	0	0	0	0	-60
500330 Pkg Sil Spg Wayfinding	977	0	337	640	329	311	0	0	0	0	0	320
509327 Pkg Sil Spr Elevator Modernization	2,641	1,122	157	1,362	362	484	340	176	0	0	0	23
*508908 Pkg Silver Circle (Wayne Ave) Garage (#80)	1,839	1,743	96	0	0	0	0	0	0	0	0	0
*509971 Pkg Town Square Garage (#61)	7,670	7,200	470	0	0	0	0	0	0	0	0	0
509709 Pkg Wheaton Fac Renovations	1,910	0	742	1,168	189	309	295	131	122	122	0	62
Sub-Category Total	105,861	44,319	11,966	49,576	21,565	8,115	7,465	5,940	3,815	2,685	0	5,665
Pedestrian Facilities/Bikeways & Trails												
509325 ADA Compliance: Transportation	16,789	0	2,057	9,732	1,622	1,622	1,622	1,822	1,622	1,622	5,000	1,922
507586 Annual Bikeway Program	2,944	0	854	2,090	553	357	295	295	295	295	0	472
508747 Annual Sidewalk Program	10,138	0	2,038	8,100	1,850	850	1,350	1,350	1,350	1,350	0	1,845
500119 Bethesda Bikeway and Pedestrian Facilities	3,340	1	188	3,151	559	426	722	1,444	0	0	0	965
*509972 Emory Lane Bike Path	602	529	73	0	0	0	0	0	0	0	0	0
508521 Falls Road Bike Path	954	268	226	460	460	0	0	0	0	0	0	0
509978 Forest Glen Pedestrian Bridge	7,709	784	2,710	4,215	2,650	1,655	0	0	0	0	0	33
500508 Greentree Road Sidewalk	1,788	0	0	1,788	0	0	0	0	0	0	0	0
500400 Matthew Henson Trail	4,444	0	202	4,242	677	1,770	1,795	278	1,510	0	0	0
509922 North Bethesda Trail	1,470	193	532	745	745	0	0	0	0	0	0	4,039
*509567 North Bethesda Trail Bridges	5,313	4,910	403	0	0	0	0	0	0	0	0	637
509975 Silver Spring Green Trail	6,060	387	777	4,916	481	2,832	1,603	0	0	0	0	0
*509977 Sweepstakes Road Sidewalk	596	160	436	0	0	0	0	0	0	0	0	703
*500153 Twinbrook Station Access	764	671	93	0	0	0	0	0	0	0	0	0

* Pending Close Out or Close Out

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Expenditure Detail by Category, Sub-Category, and Project (\$000s)

Transportation

Project	Total	Thru FY04	Rem. FY04	6-Yr Total	FY 05	FY 06	FY 07	FY 08	FY 08	FY 10	Beyond 5-yrs.	Approp.
509997 U.S. 29 Sidewalks	3,820	884	370	2,556	856	1,700	0	0	0	0	0	2,044
500513 U.S. 29 Sidewalks - West Side	3,592	0	0	3,592	0	0	0	250	325	3,017	0	0
Sub-Category Total	70,323	8,777	10,959	45,587	10,363	11,212	7,387	5,239	5,102	6,284	5,000	12,360
Roads												
500112 Advances Reforestation	450	216	134	100	100	0	0	0	0	0	0	0
500102 Bethesda CBD Streetscape	9,294	5	195	3,007	0	0	500	2,507	0	0	6,087	0
*509924 Bordly Drive Extended	3,107	1,266	1,841	0	0	0	0	0	0	0	0	0
*509942 Briggs Chaney Road East of US 29	6,800	612	6,188	0	0	0	0	0	0	0	0	0
500500 Burtonville Access Road	3,745	0	0	3,745	510	683	1,398	1,154	0	0	0	510
500310 Citadel Avenue Extended	3,855	93	260	3,502	1,409	2,093	0	0	0	0	0	805
500423 Clarksburg Town Center Development District: Roads	9,521	0	4,521	5,000	5,000	0	0	0	0	0	0	0
509337 Facility Planning-Transportation	40,185	14,184	4,359	20,902	4,815	4,036	4,272	3,689	2,605	1,475	740	2,640
500402 Fairland Road Improvement	10,536	34	844	9,658	848	1,229	3,228	4,353	0	0	0	0
500516 Father Hurley Blvd. Extended	15,852	0	0	15,852	398	730	1,160	2,644	6,170	4,750	0	1,488
*508715 Father Hurley Blvd/Ridge Road Extended	23,538	21,188	2,350	0	0	0	0	0	0	0	0	0
*509954 Germantown Road Extended	6,302	5,436	866	0	0	0	0	0	0	0	0	0
500100 Greencastle Road	2,819	97	168	2,554	125	1,821	608	0	0	0	0	289
500338 Highway Noise Abatement	12,440	10	246	12,184	834	2,350	1,000	4,000	2,000	2,000	0	2,740
*509998 Kingsview Village Center Dev District Roads	3,072	2,229	843	0	0	0	0	0	0	0	0	0
*509045 Life Sciences Cntr Rdwy Imprvmts	3,953	3,950	3	0	0	0	0	0	0	0	0	0
*508671 MD 118 Relocated	36,835	36,791	44	0	0	0	0	0	0	0	0	0
500311 Montrose Parkway West	68,175	7,311	9,832	50,932	15,145	5,954	7,430	12,195	10,208	0	0	50,086
500528 Montrose Road Extended (Land Acquisition)	2,716	0	0	2,716	0	0	2,716	0	0	0	0	0
509943 Muncaster Road Improvements	3,449	561	741	2,147	1,501	646	0	0	0	0	0	569
500401 Nebel Street Extended	11,252	0	350	10,902	232	4,228	6,442	0	0	0	0	4,328
*509321 Norbeck Road Extended	28,158	25,358	2,800	0	0	0	0	0	0	0	0	0
509953 Old Columbia Pike Phase 1, 2, & 3	3,488	2,042	805	641	140	501	0	0	0	0	0	553
*500147 Old Georgetown Road Improvements	2,600	1,117	1,483	0	0	0	0	0	0	0	0	0
500508 Park Lane	1,793	0	0	1,793	352	1,441	0	0	0	0	0	352
507310 Public Facilities Roads	4,158	0	1,316	2,842	1,083	559	300	300	300	300	0	867
500502 Quince Orchard Road	3,829	0	0	3,829	1,102	1,687	1,040	0	0	0	0	3,829
*508274 Robey Road	8,281	7,593	688	0	0	0	0	0	0	0	0	0
500434 Rockville Town Center	12,000	0	400	11,600	2,320	2,320	2,320	2,320	2,320	0	0	2,320

11-3 * Pending Close Out or Close Out
CIP230 - County Council

Expenditure Detail by Category, Sub-Category, and Project (\$000s)
 Transportation

Project	Total	Thru FY03	Rem. FY04	6-Yr Total	FY 05	FY 06	FY 07	FY 08	FY 09	FY 10	Beyond 6-yr.	Approp.
*500022 Schaeffer Road	2,965	2,570	395	0	0	0	0	0	0	0	0	0
*508810 Seven Locks Rd-River To Dwight	6,166	6,159	7	0	0	0	0	0	0	0	0	0
*509967 Shady Grove Road - Six Lanes	4,653	2,307	2,346	0	0	0	0	0	0	0	0	0
*509706 State Highway Noise Abatement	4,885	3,466	1,419	0	0	0	0	0	0	0	0	0
500403 Stringtown Road Extended	8,830	67	1,028	7,735	1,106	3,138	3,491	0	0	0	0	0
508000 Subdivision Roads Participation	6,691	0	2,577	4,114	1,919	535	415	415	415	415	0	0
509036 Transportation Improvements For Schools	2,043	0	773	1,270	270	200	200	200	200	200	0	270
500101 Travilah Road	10,198	709	1,489	7,020	1,724	2,325	2,971	0	0	0	1,000	0
509944 Valley Park Drive	3,082	173	306	2,603	739	1,864	0	0	0	0	0	2,478
*509874 West Germantown Dev. District - Roads	8,373	6,491	1,882	0	0	0	0	0	0	0	0	0
500151 Woodfield Road Extended	9,600	590	491	8,519	939	3,002	4,578	0	0	0	0	830
Sub-Category Total	409,689	152,825	54,070	195,167	42,611	41,342	44,069	33,787	24,218	9,140	7,827	74,934
Traffic Improvements												
509399 Advanced Transportation Management System	33,079	20,973	2,407	9,689	2,199	1,500	1,500	1,500	1,500	1,500	0	2,199
*500007 Christopher Ave and Midcounty at Mont. Village Ave	1,010	440	570	0	0	0	0	0	0	0	0	0
509995 Conference Center Intersection Improvements	1,380	146	706	538	148	390	0	0	0	0	0	-244
500204 Darnestown Road @ Shady Grove Road	1,660	2	198	1,460	840	620	0	0	0	0	0	0
500322 Friendship Heights Pedestrian-Transit Enhancement	880	0	10	870	0	0	70	335	465	0	0	-1,140
*500005 Great Seneca Hwy @ Muddy Branch and Sam Elg Hwy	1,750	457	1,293	0	0	0	0	0	0	0	0	0
508113 Guardrail Projects	1,450	0	120	1,330	355	355	155	155	155	155	0	355
507017 Intersection and Spot Improvements	10,877	0	4,142	6,735	1,567	2,019	630	1,299	560	660	0	1,567
*500140 Jones Bridge Rd @ Rockville Pike	885	159	726	0	0	0	0	0	0	0	0	-405
509523 Neighborhood Traffic Calming	2,186	0	326	1,860	310	310	310	310	310	310	0	310
500333 Pedestrian Safety Program	1,700	97	403	1,200	200	200	200	200	200	200	0	200
500010 Redland Rd from Crabbs Branch Way to Needwood Rd	3,410	269	250	2,891	84	1,143	1,664	0	0	0	0	482
*508716 Silver Spring Traffic Improvements	533	0	533	0	0	0	0	0	0	0	0	0
500512 Streetlight Enhancements-CBD/Town Center	1,470	0	0	1,470	220	250	250	250	250	250	0	220
507055 Streetlighting	6,631	0	1,457	5,174	1,162	1,012	750	750	750	750	0	1,162
507154 Traffic Signals	19,931	0	2,981	16,950	2,950	2,800	2,800	2,800	2,800	2,800	0	2,950

* Pending Close Out or Close Out
 CIP230 - County Council

Expenditure Detail by Category, Sub-Category, and Project (\$000s)

Transportation

Project	Total	Thru FY03	Rem. FY04	6-Yr Total	FY 08	FY 08	FY 07	FY 08	FY 09	FY 10	Beyond 6-yr.	Approp.
*500323 Transportation Management Center (TMC)	892	296	-596	0	0	0	0	0	0	0	0	0
Sub-Category Total	89,734	22,839	16,718	50,177	10,035	10,599	8,329	7,599	6,980	6,625	0	7,656
Category Total	899,690	249,474	119,250	519,139	114,647	108,534	109,347	79,675	61,222	47,714	12,827	113,947

Expenditure Detail by Category, Sub-Category, and Project (\$000s)

WMATA

Project	Total	Thru FY03	Rem. FY04	6-Yr Total	FY 05	FY 06	FY 07	FY 08	FY 09	FY 10	Beyond 6-yrs.	Approp.
Mass Transit (WMATA)												
500552 Glenmont Metro Parking Expansion	3,800	0	0	3,800	1,000	2,800	0	0	0	0	0	0
*500120 Grosvenor Metro Garage	28,485	17,154	11,331	0	0	0	0	0	0	0	0	0
*509957 Shady Grove Metro Garage	27,427	26,712	715	0	0	0	0	0	0	0	0	0
Sub-Category Total	59,712	43,866	12,046	3,800	1,000	2,800	0	0	0	0	0	0
Category Total	59,712	43,866	12,046	3,800	1,000	2,800	0	0	0	0	0	0

* Pending Close Out or Close Out
CIP230 - County Council

APPENDIX H



MCPB
Item #4
2/14/02

February 8, 2002

MEMORANDUM

TO: Montgomery County Planning Board

VIA: John A. Carter, Chief *JAC*
Community-Based Planning Division

Sue Edwards, I-270 Corridor Team Leader *Sue*
Community-Based Planning Division

FROM: Karen Kumm Morris, Clarksburg Planner *KKM*
Community-Based Planning Division

SUBJECT: Application for Adequate Public Facilities Approval
Clarksburg Village Development District

RECOMMENDATION: Approval to transmit comments to the Montgomery County Council.

The proposed Clarksburg Village Development District meets the requirements of the District Legislation as modified by the following conditions:

1. Provide the following improvements as shown on the approved Preliminary Plan No. 1-01030, to be included in the Clarksburg Development District:
 - a. Elementary School Site: Grade site, stabilize, provide utilities up to the property line, and satisfy reforestation and stormwater management requirements.
 - b. Elementary School/Park Site: Grade site, stabilize, provide utilities up to the property line, provide reforestation, provide stormwater management for quantity, and build park ball fields.
 - c. M-NCPPC Local Park: Grade site, stabilize, provide utilities up to the property line, satisfy reforestation and stormwater management requirements, and construct one softball field, one soccer field, a 50 space parking lot, one multi-age playground, and one basketball court, to park standards.

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- d. Greenway Trail: Build greenway paved trail on property owned by applicant.
- e. MD 27: Widen MD 27 to six lanes from Observation Drive in Germantown through the Brink Road intersection, and to four lanes through the A-305 intersection and continue two northbound lanes through the Skylark intersection.
- f. Relocated Newcut Road (A-302): Construct relocated Newcut Road as a two lane divided arterial between MD 27 and A-305 (Mid-County) intersection, and as a four lane divided roadway between A-305 and MD 355, utilizing bottomless arch culverts over streams.
- g. Mid County Arterial (A-305): Construct A-305 as a four lane divided arterial between MD 27 (Ridge Road) and Stringtown Road, including two roundabouts, one at the intersection of A-302 and the second at the intersection of Streets "W" and "BB." Construct the segment between the two roundabouts as a business district street in accordance with the Department of Public Works and Transportation (DPWT) standards.
- h. MD 355 (Frederick Road): Construct a second left turn lane from northbound MD 355 to westbound MD 27.
- i. Turn lanes on MD 27 (Ridge Road) and Brink Road: Construct additional turn/approach lanes on MD 27 and Brink Road at the intersection, and construct a separate left turn lane from southbound MD 355 to eastbound Brink Road and a separate left turn lane from westbound Brink Road to southbound MD 355.
- j. Foreman Boulevard: Extend Foreman Boulevard as a two lane arterial from its current terminus at Timber Creek Lane to A-305.
- k. Stringtown Road: Participate in the widening of Stringtown Road as a four lane arterial where the District's Property fronts Stringtown Road.

With the exception of constructing the park facilities in the Local Park, the above list of infrastructure improvements are the same infrastructure improvements as required by the Planning Board for Preliminary Plan No. 1-01030.

- 2. Consider including the following additional infrastructure improvements in the Development District in order to provide improvements that are not solely the adequate public improvements required of a single development as required by Chapter 14-3 (g) (2).
 - a. Construct two lanes of Stringtown Road that are not currently assigned to any adjacent development (south side of Stringtown Road between the Highland's of Clarksburg and the subject District).
 - b. Upgrade the crossing of Mid County Highway over Little Seneca Creek from a culvert to a bridge in order to minimize environmental impacts and improve pedestrian safety and enjoyment along the Greenway Trail.

3. Consider combining the Clarksburg Village Development District and the Clarksburg Skylark Development District into one district to improve coordination and administration, and meet the requirements of Chapter 14-3 (g) (2).

BACKGROUND

The applicant, Clarksburg Village Investments, L.C., Clark Meadow, L.C., and Clarksburg Village, L.C., propose to form a development district in the Newcut Road Neighborhood of Clarksburg for the purpose of achieving coordination of public infrastructure, construction in a timely manner, and a more attractive financing approach for the development. Creation of a development district is allowed under Chapter 14 of the Montgomery County Code. The purpose of a development district is to help enable a specific area of the County to meet its infrastructure needs through public financing of bonds payable by special taxing. *It is recommended for areas where a significant amount of development is occurring.*

In order to create a development district, a petitioner must submit a request to the County Council with the signatures of 80% of the affected property owners, or request the Council to hold a public hearing. The Council then adopts an initial resolution in order for the request for a district to proceed through its procedural reviews. The Planning Board is requested by the Council to review the proposal for compliance with the Adequate Public Facilities (APF) Ordinance and the Annual Growth Policy (AGP) Requirements. The Executive is requested to review the financial aspects of the proposal to ensure that the amount of infrastructure financed by the District is within an acceptable level of tax burden per residence. The Executive is required to issue a Fiscal Report to the Council. Finally, the Council must hold a public hearing and adopt a resolution to form the development district. This formation process is outlined in Chapter 14, Article II, Section 14-5 through 14-9. See Attachment A.

Purpose of Planning Board Review

The enabling legislation in Sec. 14-7 requires the Planning Board to evaluate the proposed district for compliance with APF and AGP requirements and make its recommendations to the County Council. The Planning Board must make the following findings:

1. The proposed district will comply with all applicable zoning and subdivision requirements.
2. The proposed infrastructure improvements satisfy the Annual Growth Policy's adequate public facilities requirements.
3. Cost estimates are provided and reviewed.

Applicant's Proposal for the Clarksburg Village Development District

The applicant proposes to establish a development district which encompasses the property within the Clarksburg Village and includes adequate public facilities that extend beyond the subject property as required by the approved Preliminary Plan No. 1-01030. See Exhibit E of the application, Attachment B. The applicant states that all proposed

infrastructure improvements comply with the zoning and subdivision requirements under Section 50-35(k), and the infrastructure improvements meet the APF requirements established by the Planning Board in the approval of Preliminary Plan No. 1-01030.

FINDINGS

Conformance to General Provisions of Development Districts

Staff wishes to bring to the Planning Board's attention that the proposed development districts do not appear to conform to the legislative requirements of the Development District legislation, Chapter 14. The issue is that a single developer requests public financing through a development district for the purpose of financing the adequate public facilities requirement to serve a single development. Chapter 14-3 (g) (1) and (2) states,

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. (See Attachment A.)*

After conversations with the Council staff, the understanding is that development districts are not intended to provide financing for a single development's adequate public facilities. This means that additional infrastructure improvements beyond those required of a single development should be included in the Development District in order to comply with Chapter 14-3 (g) (1) and (2). Staff recommends that the Council consider the additional improvements listed in Condition 2 in order to conform to the legislation, so long as they can be found a financially acceptable tax burden.

The Council may also need to amend 14-3 (g) (1) and (2) in order to allow for a single developer to apply for a development district. However, this statute could be satisfied if the two proposed districts are combined into one development district as recommended by staff.

The role of the Planning Board is to make findings of conformance to the zoning and subdivision regulations and APF requirements. The Planning Board may also advise the Council on the best manner in which to establish the districts and recommend additional infrastructure improvements that should be considered in order to comply with the legislation.

Conformance to Zoning and Subdivision Requirements

The proposed development district conforms to the Zoning and Subdivision requirements. The proposed infrastructure improvements have been reviewed and approved by the Planning Board during their review of the Clarksburg Village Preliminary Plan No. 1-01030, July 30, 2001, and ZMA, G-734 which covers a small

portion of area within the District. The approval required the proposed development to meet all subdivision and zoning requirements.

Conformance to the Annual Growth Policy's Adequate Public Facilities Requirements

The proposed infrastructure conforms to the required APF improvements required by the approved Preliminary Plan No. 1-01030. The Transportation Planning Unit confirms this in their memo. See Attachment C.

Conformance to Providing Cost Estimates for Proposed Infrastructure Improvements

The applicant has provided cost estimates for all proposed infrastructure improvements. Staff has not evaluated the accuracy of the proposed estimates given that this is the responsibility of the Department of Public Works and Transportation. The cost estimates will be evaluated by the Executive in their Fiscal Report to the County Council. The cost estimates are used to determine what will be the cost of the bonds and the taxing rate per household by the Department of Finance.

COMMENTS

Clarksburg is presently in a jobs and housing moratorium due to lack of adequate public facilities for roads and schools. Staff has worked diligently to identify needed infrastructure as preliminary plans are reviewed. With each preliminary plan, the Planning Board has required development to meet APF requirements resulting in a comprehensive network of roads, and dedications for schools and parks. See Attachment D for the comprehensive network of public improvements provided by development.

The Clarksburg moratorium seems likely to continue for some time given the state of the County's budget and Council's priorities. A development district represents a means to fund needed, additional public facilities so long as it is not used by a development to solely fund their APF requirements, and the individual tax burden to residents is acceptable.

In addition to the Clarksburg Village and the Greenway Village Preliminary Plans (totaling 3,863 residential units), the Commission has received within the last year five preliminary plan applications for residential development totaling another 1,683 residential units. Some of these applicants are also considering the possibility of applying for a development district as a means of financing their public improvements. The total number of development districts including the Town Center Development District, which has not yet been financially evaluated by the Executive, could be as many as eight separate districts. Consolidating all of these separate development districts into one Clarksburg Development District for the purposes of coordinating and administering the bonds, and tax collections would be desirable.

Public Comments

Staff has informed the Clarksburg Planning Committee of the proposed development district but has not received any comments or correspondence on the proposal. The understanding is that the Clarksburg Civic Association will provide comments directly to the Council at the time of the public hearing after the Executive prepares their fiscal report.

CONCLUSION

Staff finds that the proposed Clarksburg Village Development District meets the requirements of the zoning and subdivision regulations, the Adequate Public Facilities Ordinance and has provided cost estimates.

Staff recommends that the Planning Board convey these findings to the County Council with the additional infrastructure recommendations and concerns regarding compliance with the general provisions of the legislation.

KKM:ha: a:\kumm1\Clarksburg village development district report.doc
Attachments

APPENDIX I

Orrick, John R. - JRO

From: Faden, Michael [Mike.Faden@co.mo.md.us]
Sent: Thursday, November 07, 2002 3:28 PM
To: Barrett, Jennifer
Cc: Wyman, Glenn; Keenan Rice; kapland@publicfm.com; jecumbie@venable.com; JRO@linowes-law.com
Subject: RE: Clarksburg



notice.DOC

I sent the property-owners' notice out yesterday in the attached form, pretty much as recommended by Keenan and Jim. I didn't mention any term of years, for the reasons you noted. If anyone has any issues to raise, please let me and Glenn Orlin know soon so we can think about how to address them before the hearing and MFP worksession.

-----Original Message-----

From: Barrett, Jennifer
Sent: Thursday, November 07, 2002 9:20 AM
To: Faden, Michael
Cc: Wyman, Glenn; Keenan Rice; 'Dean Kaplan (kapland@publicfm.com)'; Jim Cumbie (jecumbie@venable.com)
Subject: FW: Clarksburg

Mike - Here is the revised notice as amended by the financial advisors and bond counsel, also showing a couple of minor edits by me. Let me know if you have any additional questions. Please also note the additional note from Ed Daniel below. I am not sure we should lock in the # of years yet until we actually structure the bonds, but you could probably say "up to 30 years" if you wish. (We generally would not have the tax payments extend longer than a traditional 30 year mortgage, as a matter of policy.)

Jennifer/Mike--I'm certainly not the expert in the financial details or public notice protocol, but if the rates are to be quoted for 03-04, with reference to possible increases of 2% per year, shouldn't the notice also indicate how many (or a range of) years that the special tax might be in effect??
Ed Daniel

Jennifer

-----Original Message-----

From: Keenan Rice [mailto:keeanansr@comcast.net]
Sent: Tuesday, November 05, 2002 7:38 PM
To: Barrett, Jennifer; jecumbie@venable.com; Daniel, Edward; Wyman, Glenn; kapland@publicfm.com; Faden, Michael
Subject: Clarksburg

I am sending you the letter noticing the hearing on the Clarksburg development district with my suggested changes.

Please do not hesitate to contact me with any comments or questions.

Dear property owner:

This letter will formally notify you that the County Council will hold a hearing on December 3, 2002, at 7:30 p.m. on a proposal to create a Development District in Clarksburg Town Center, as provided in Chapter 14 of the County Code. The hearing will be held in the 7th floor hearing room at the Council Office Building, 100 Maryland Avenue, Rockville. If you would like to testify at this hearing, please call Delphine Harriston, at 240-777-7931.

This District was initially authorized by Council Resolution 14-648, adopted on September 26, 2000. The Council will determine the boundaries of any district in its resolution creating the district, which may coincide with or differ from the proposed boundaries specified in the petition filed with the Council on July 5, 2000. As originally proposed, the district would include the property you own. A copy of the County Executive's fiscal report, which includes details of the infrastructure to be funded by the proposed District and the tax rates that would apply in the District, is available from the Council Office at 240-777-7910.

As required by law, a copy of the proposed resolution to establish the district is enclosed in the form in which it was introduced. Also as required by law, the rates of the taxes and special assessments proposed to fund infrastructure improvements for the district are as follows.

A special tax based on ad valorem value is proposed to be levied on all taxable property 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 in 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.

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

Please let us know if you have any question about the proposed district.

For the Council,

Michael Faden
Senior Legislative Attorney

APPENDIX J

TERRABROOK®

November 4, 2002

Addressee: Property Owners in Clarksburg Town Center

Re: Public Hearing on Clarksburg Town Center Development District

Dear Homeowner:

You will soon be receiving in the mail a Notice of Public Hearing before the Montgomery County Council scheduled for 7:30 p.m., Tuesday, December 3, 2002 at the Montgomery County Council offices, 100 Maryland Avenue, Rockville, MD 20850. This hearing is required under Montgomery County law as a precondition to the establishment of the Clarksburg Town Center Development District.

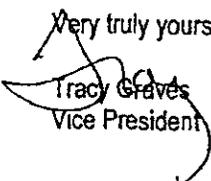
You signed a disclosure statement at the time of your purchase of a home in the Clarksburg Town Center describing the planned creation of the Clarksburg Town Center Development District. A copy of a form of such disclosure statement is enclosed for your information.

The purpose of the Development District is to provide funds for the purchase by Montgomery County of certain public infrastructure, including improvements to roads, extensions of a water line, and the establishment of a civic center and library building in the Clarksburg Town Center. Following the creation of the Development District, and the issuance of bonds by Montgomery County, a special tax will be set by the Montgomery County Council on each of the properties located in the Clarksburg Town Center Development District (which is roughly bordered by Piedmont Road to the northeast, Stringtown Road to the southeast, Clarksburg Road to the northwest, and the boundary of the Clarksburg Town Center project which stops behind the developed properties along Route 355 to the southwest).

The amount of these special taxes, which is still subject to change by action of the County Council, is currently anticipated to be in the neighborhood of twelve hundred dollars (\$1,200.00) on a single-family detached home with a market value of three hundred fifty thousand dollars (\$350,000.00), and would be less for townhomes and multi-family dwellings. Even if the County Council approves the District, these taxes would not likely commence for several years.

While you are, of course, welcome to attend the public hearing, in the meantime if you have any questions concerning the establishment of the Clarksburg Town Center Development District, please feel free to contact me at 703-467-3880, or our attorney, Jack Orrick at Linowes and Blocher LLP at 301-650-7013.

Very truly yours,


Tracy Graves
Vice President

One Discovery Square
1200 Sunset Hills Road • Suite 710
Reston, Virginia 20190
Phone 703.467.0448 • Fax 703.467.0965

APPENDIX K

Exhibit "K"

Notice of Special Taxing District

THIS ADDENDUM was executed simultaneously with and is an integral part of the New Home Sales Contract/Lot Sales Contract between Builder and Buyer dated SEPTEMBER 6, 2001 for the property known as LOT 12 BLOCK D (the "Property") within the Clarksburg Town Center development (the "Development").

The Development is proposed to be located within the Clarksburg Town Center Development District (the "Tax District"), a special taxing district which may be created by Montgomery County. Once the Development becomes subject to the Tax District taxing scheme, each owner of a lot in the Development will be liable to pay annually any special assessment and/or special tax imposed under Chapter 14 of the Montgomery County Code (the "Tax District Assessment"). As of the date of these disclosures, the rates or amounts of the Tax District Assessment have not yet been set by the County, but will be set at a fixed ad valorem rate each year, resulting in an average estimated Tax District Assessment for the initial year of the Tax District of between (i) \$1,000.00 and \$1,500.00 per year for each single family detached lot, (ii) \$750.00 and \$1,000.00 per year for each single family attached lot, and (iii) \$450.00 and \$800.00 per year for each unit in a multi-family building; however, such amounts are estimates only and are subject to change. Homes valued at more or less than the average value in the Development will bear, respectively, a relatively higher or lower Tax District Assessment. The County Council may increase the rate of any special tax or assessment on a yearly basis. Special taxes and assessments will be used to pay the principal of, interest on and any redemption premium on any bonds which are to be issued by the County for the Tax District and to replenish the debt service reserve fund for such bonds. The Tax District Assessment would commence in the amount specified above with respect to each lot on a specified date after the date the bonds are sold by the County for the Tax District (the "Commencement Date"). In the event that settlement on the initial sale of a home occurs after the Commencement Date, the Tax District Assessment for such home shall commence on the date of such settlement. The Tax District Assessment would terminate (except as to any unpaid Tax District Assessments, interest, costs, late fees, and/or attorneys' fees) on the date that the bonds issued in respect of the Tax District have been paid in full. For further information on the Tax District Assessment, a home buyer may contact the Montgomery County Department of Finance at (240) 777-8950.

Buyer has read and understands the above disclosure.

IN WITNESS WHEREOF, the undersigned have executed and delivered this Addendum as of the date first written above.

BUILDER:

By: _____
Name: _____
Title: _____

BUYER:

By: Timothy C. DeArros
Name: Timothy C. DeArros

By: Maria T. DeArros
Name: Maria T. DeArros

Notice of Special Taxing District
Clarksburg Town Center

THIS ADDENDUM was executed simultaneously with and is an integral part of the New Home Sales Contract dated April 17th, 2002 between PCI Clarksburg, LLC ("Builder") and GARY J. PRESLEY ("Buyer") for the property known as Lot 14, Block A, and having an address of 23506 Susan View Drive (the "Property") within the Clarksburg Town Center development (the "Development").

The Development is proposed to be located within the Clarksburg Town Center Development District (the "Tax District"), a special taxing district which may be created by Montgomery County. Once the Development becomes subject to the Tax District taxing scheme, each owner of a lot or living unit in the Development will be liable to pay annually any special assessment and/or special tax imposed under Chapter 14 of the Montgomery County Code (the "Tax District Assessment"). As of the date of these disclosures, the rates or amounts of the Tax District Assessment have not yet been set by the County, but will be set at a fixed ad valorem rate each year, resulting in an average estimated Tax District Assessment for the initial year of the Tax District of between (i) \$1,000.00 and \$1,500.00 per year for each single family detached lot, (ii) \$750.00 and \$1,000.00 per year for each single family attached (e.g., townhouse) lot, and (iii) \$450.00 and \$800.00 per year for each unit in a multi-family building; however, such amounts are estimates only and are subject to change. Homes valued at more or less than the average value in the Development will bear, respectively, a relatively higher or lower Tax District Assessment. The County Council may increase the rate of any special tax or assessment on a yearly basis. Special taxes and assessments will be used to pay the principal of, interest on and any redemption premium on any bonds which are to be issued by the County for the Tax District and to replenish the debt service reserve fund for such bonds. The Tax District Assessment would commence in the amount specified above with respect to each lot on a specified date after the date the bonds are sold by the County for the Tax District (the "Commencement Date"). In the event that settlement on the initial sale of a home occurs after the Commencement Date, the Tax District Assessment for such home shall commence on the date of such settlement. The Tax District Assessment would terminate (except as to any unpaid Tax District Assessments, interest, costs, late fees, and/or attorneys' fees) on the date that the bonds issued in respect of the Tax District have been paid in full. For further information on the Tax District Assessment, a home buyer may contact the Montgomery County Department of Finance at (240) 777-8950.

Buyer has read and understands the above disclosure.

IN WITNESS WHEREOF, the undersigned have executed and delivered this Addendum as of the date first written above.

BUILDER:
PCI Homes

By: _____
Name: _____
Title: _____

PCI Clarksburg, LLC
By: Posen Holdings, Inc.
Sole Member-Manager
By: Paul A. Posen
Its: President
4.10.02

BUYER:

By: Gary J. Presley
Name: GARY J. PRESLEY

By: Gary J. Presley
Name: GARY J. PRESLEY

Notice of Special Taxing District

This Addendum was executed simultaneously with and is an integral part of the New Home Sales Contract/Lot Sales Contract between Builder and Buyer dated 11/9/03, 2003, for the property known as _____ (the "Property") within the Clarksburg Town Center development (the "Development").

The Development is proposed to be located within the Clarksburg Town Center Development District (the "Tax District"), a special taxing district which may be created by Montgomery County. Once the Development becomes subject to the Tax District taxing scheme, each owner of a lot in the Development will be liable to pay annually any special assessment and/or special tax imposed under Chapter 14 of the Montgomery County Code (the "Tax District Assessment"). As of the date of these disclosures, the rates or amounts of the Tax District Assessment have not yet been set by the County, but will be set at a fixed ad valorem rate each year, resulting in an average estimated Tax District Assessment for the initial year of the Tax District of between (i) \$1,000.00 and \$1,500.00 per year for each single family detached lot, (ii) \$750.00 and \$1,000.00 per year for each single family attached lot, and (iii) \$450.00 and \$800.00 per year for each unit in a multi-family building; however, such amounts are estimates only and are subject to change. Homes valued at more or less than the average value in the Development will bear, respectively, a relatively higher or lower Tax District Assessment. The County Council may increase the rate of any special tax or assessment on a yearly basis. Special taxes and assessments will be used to pay the principal of, interest on and any redemption premium on any bonds which are to be issued by the County for the Tax District and to replenish the debt service reserve fund for such bonds. The Tax District Assessment would commence in the amount specified above with respect to each lot on a specified date after the date the bonds are sold by the County for the Tax District (the "Commencement Date"). In the event that settlement on the initial sale of a home occurs after the Commencement Date, the Tax District Assessment for such home shall commence on the date of such settlement. The Tax District Assessment would terminate (except as to any unpaid Tax District Assessments, interest, costs, late fees, and/or attorneys' fees) on the date that the bonds issued in respect of the Tax District have been paid in full. For further information on the Tax District Assessment, a homebuyer may contact the Montgomery County Department of Finance at (240) 777-8950.

Buyer has read and understands the above disclosure.

IN WITNESS WHEREOF, the undersigned have executed and delivered this Addendum as of the date first written above.

BUILDER:

BUYER:

Miller and Smith at Clarksburg

By: [Signature]
Name: S. Moore
Title: Authorized Agent

By: [Signature]
Name: Kimberly A. Staley

By: _____
Name: _____

Notice of Special Taxing District
Clarksburg Town Center

THIS ADDENDUM was executed simultaneously with and is an integral part of the New Home Sales Contract dated 4-26-03, 2003 between NV Homes ("Builder") and Ronald & Carol Smith ("Buyer") for the property known as Lot 119 Block A15, and having an address of 23601 Ge. Neal St. Dr. (the "Property") within the Clarksburg Town Center development (the "Development").

The Development is proposed to be located within the Clarksburg Town Center Development District (the "Tax District"), a special taxing district which may be created by Montgomery County. Once the Development becomes subject to the Tax District taxing scheme, each owner of a lot or living unit in the Development will be liable to pay annually any special assessment and/or special tax imposed under Chapter 14 of the Montgomery County Code (the "Tax District Assessment"). As of the date of these disclosures, the rates or amounts of the Tax District Assessment have not yet been set by the County, but will be set at a fixed ad valorem rate each year, resulting in an average estimated Tax District Assessment for the initial year of the Tax District of between (i) \$1,000.00 and \$1,500.00 per year for each single family detached lot, (ii) \$750.00 and \$1,000.00 per year for each single family attached lot, and (iii) \$450.00 and \$800.00 per year for each unit in a multi-family building; however, such amounts are estimates only and are subject to change. Homes valued at more or less than the average value in the Development will bear, respectively, a relatively higher or lower Tax District Assessment. The County Council may increase the rate of any special tax or assessment on a yearly basis. Special taxes and assessments will be used to pay the principal of, interest on and any redemption premium on any bonds which are to be issued by the County for the Tax District and to replenish the debt service reserve fund for such bonds. The Tax District Assessment would commence in the amount specified above with respect to each lot on a specified date after the date the bonds are sold by the County for the Tax District (the "Commencement Date"). In the event that settlement on the initial sale of a home occurs after the Commencement Date, the Tax District Assessment for such home shall commence on the date of such settlement. The Tax District Assessment would terminate (except as to any unpaid Tax District Assessments, interest, costs, late fees, and/or attorneys' fees) on the date that the bonds issued in respect of the Tax District have been paid in full. For further information on the Tax District Assessment, a home buyer may contact the Montgomery County Department of Finance at (240) 777-8950.

Buyer has read and understands the above disclosure.

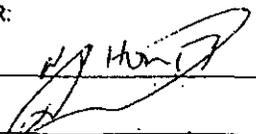
IN WITNESS WHEREOF, the undersigned have executed and delivered this Addendum as of the date first written above.

BUILDER:

By:

Name:

Title:



Name: David Deal
Title: V.P.

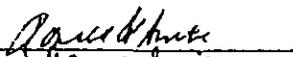
BUYER:

By:

Name:

By:

Name:



Name: Carol Smith
RONALD W. SMITH
CAROL SMITH

Notice of Special Taxing District :
Clarksburg Town Center

THIS ADDENDUM was executed simultaneously with and is an integral part of the New Home Sales Contract dated June 14, 2003 between NV Homes ("Builder") and Arnold Schottland & Susan Schottland ("Buyer") for the property known as Lot 27, Block AA, and having an address of 23606 Overlook Park Dr (the "Property") within the Clarksburg Town Center development (the "Development").

The Development is proposed to be located within the Clarksburg Town Center Development District (the "Tax District"), a special taxing district which may be created by Montgomery County. Once the Development becomes subject to the Tax District taxing scheme, each owner of a lot or living unit in the Development will be liable to pay annually any special assessment and/or special tax imposed under Chapter 14 of the Montgomery County Code (the "Tax District Assessment"). As of the date of these disclosures, the rates or amounts of the Tax District Assessment have not yet been set by the County, but will be set at a fixed ad valorem rate each year, resulting in an average estimated Tax District Assessment for the initial year of the Tax District of between (i) \$1,000.00 and \$1,500.00 per year for each single family detached lot, (ii) \$750.00 and \$1,000.00 per year for each single family attached lot, and (iii) \$450.00 and \$800.00 per year for each unit in a multi-family building; however, such amounts are estimates only and are subject to change. Homes valued at more or less than the average value in the Development will bear, respectively, a relatively higher or lower Tax District Assessment. The County Council may increase the rate of any special tax or assessment on a yearly basis. Special taxes and assessments will be used to pay the principal of, interest on and any redemption premium on any bonds which are to be issued by the County for the Tax District and to replenish the debt service reserve fund for such bonds. The Tax District Assessment would commence in the amount specified above with respect to each lot on a specified date after the date the bonds are sold by the County for the Tax District (the "Commencement Date"). In the event that settlement on the initial sale of a home occurs after the Commencement Date, the Tax District Assessment for such home shall commence on the date of such settlement. The Tax District Assessment would terminate (except as to any unpaid Tax District Assessments, interest, costs, late fees, and/or attorneys' fees) on the date that the bonds issued in respect of the Tax District have been paid in full. For further information on the Tax District Assessment, a home buyer may contact the Montgomery County Department of Finance at (240) 777-8950.

Buyer has read and understands the above disclosure.

IN WITNESS WHEREOF, the undersigned have executed and delivered this Addendum as of the date first written above.

BUILDER:

NV Homes

By: _____
Name: _____
Title: _____

BUYER:

By: Arnold Schottland 6/14/03
Name: Arnold Schottland
Print

By: Susan Schottland 6/14/03
Name: Susan Schottland
Print

Notice of Special Taxing District^U

This Addendum was executed simultaneously with and is an integral part of the New Home Sales Contract/L of Sales Contract between Builder and Buyer dated 12/14, 2001 for the property known as Lot 38 Block D (the "Property") within the Clarksburg Town Center development (the "Development").

The Development is proposed to be located within the Clarksburg Town Center Development District (the "Tax District"), a special taxing district which may be created by Montgomery County. Once the Development becomes subject to the Tax District taxing scheme, each owner of a lot in the Development will be liable to pay annually any special assessment and/or special tax imposed under Chapter 14 of the Montgomery County Code (the "Tax District Assessment"). As of the date of these disclosures, the rates or amounts of the Tax District Assessment have not yet been set by the County, but will be set at a fixed ad valorem rate each year, resulting in an average estimated Tax District Assessment for the initial year of the Tax District of between (i) \$1,000.00 and \$1,500.00 per year for each single family detached lot, (ii) \$750.00 and \$1,000.00 per year for each single family attached lot, and (iii) \$450.00 and \$800.00 per year for each unit in a multi-family building; however, such amounts are estimates only and are subject to change. Homes valued at more or less than the average value in the Development will bear, respectively, a relatively higher or lower Tax District Assessment. The County Council may increase the rate of any special tax or assessment on a yearly basis. Special taxes and assessments will be used to pay the principal of, interest on and any redemption premium on any bonds which are to be issued by the County for the Tax District and to replenish the debt service reserve fund for such bonds. The Tax District Assessment would commence in the amount specified above with respect to each lot on a specified date after the date the bonds are sold by the County for the Tax District (the "Commencement Date"). In the event that settlement on the initial sale of a home occurs after the Commencement Date, the Tax District Assessment for such home shall commence on the date of such settlement. The Tax District Assessment would terminate (except as to any unpaid Tax District Assessments, interest, costs, late fees, and/or attorneys' fees) on the date that the bonds issued in respect of the Tax District have been paid in full. For further information on the Tax District Assessment, a homebuyer may contact the Montgomery County Department of Finance at (240) 777-8950.

Buyer has read and understands the above disclosure.

IN WITNESS WHEREOF, the undersigned have executed and delivered this Addendum as of the date first written above.

BUILDER:

Miller and Smith at Clarksburg

By: [Signature]
Name: Richard Tiller
Title: VP

BUYER:

By: [Signature]
Name: _____

By: [Signature]
Name: _____

AN-0002

* *David E. Mc Dermott*
* *Kathleen A. Scholten*

Exhibit "E"

RECEIVED

Addendum to New Home Sales Contract - Notice to Purchaser of the
Clarksburg Skylark Development District or Private Infrastructure Charge Alternative

JUN 30 2003

THIS ADDENDUM was executed simultaneously with and is an integral part of the New Home Sales Contract dated 05/10, 2003 between David E. Mc Dermott ("Builder") and Kathleen A. Scholten ("Buyer") for the property known as Lot 002, Block C, and having an address of 23210 Linden Vale Drive, Clarksburg, MD 20811 (the "Property") within the Arora Hills development in Clarksburg, Montgomery County, Maryland (the "Development").

The Development is proposed to be located within the Clarksburg Skylark Development District (the "Tax District"), a special taxing district which may be created by Montgomery County to reimburse the cost of certain public infrastructure improvements which benefit the Development. Once the Tax District taxes are imposed by the County, each owner of a lot, home or condominium unit in the Development ("Living Unit") will be liable to pay annually any special assessment and/or special tax imposed under Chapter 14 of the Montgomery County Code (the "Tax District Assessment").

As of the date of these disclosures, the rates or amounts of the Tax District Assessment have not been set by the County, but will be set each year at a fixed ad valorem rate (in proportion to the value of the Living Unit). Amounts are estimates only and are subject to change, but it is likely that the Tax District Assessments for the initial year of the Tax District will range between \$600 and \$1,500 per Living Unit, depending on the assessed value of the Living Unit; however such amounts are estimates only and are subject to change.

Living Units assessed at more or less than the average assessed value in the Development will bear, respectively, a relatively higher or lower Tax District Assessment. Irrespective of changes in assessed value, it is anticipated that the Tax District Assessment will increase approximately 2% each year in real terms. The Tax District Assessment will be used to pay the principal of, interest on and any redemption premium on bonds which are to be issued by the County for the Tax District and to replenish the debt service reserve fund for such bonds. After the date the bonds are sold by the County for the Tax District (the "Commencement Date") the Tax District Assessment will commence in the amount specified above with respect to each Living Unit. In the event that settlement on the initial sale of a Living Unit occurs after the Commencement Date, the Tax District Assessment for such Living Unit shall commence on the date of such settlement.

The Tax District Assessment will terminate (except as to any unpaid Tax District Assessments, interest, costs, late fees, and/or attorneys' fees) on the date that the bonds issued in respect of the Tax District are paid in full. The Tax District Assessment is billed in July of each year with the County's annual real property tax bill. For further information on the Tax District Assessment, a home buyer may contact the Montgomery County Department of Finance at (240) 777-8950.

In the event that the Tax District is not created, the Tax District Assessments will not apply, and in the alternative, at the election of the Company (defined below) the Property will be subject to a private assessment secured by a recorded lien ("Infrastructure Charge") which is intended to cover or defray costs relating to the infrastructure costs that would otherwise be reimbursed through the Tax District Assessment. The annual amount of such Infrastructure Charge has not yet been established, but it is anticipated that during the initial year such amount will range between \$600 and \$1,500 per Living Unit. All of the Infrastructure Charges will increase by 2% per year commencing with the second year's payment and shall be due and payable every year on the first day of January to TBD (the "Company") at _____ Maryland _____ (or to such other payee and address as the Company may specify). The Infrastructure Charges are expected to commence on the later of January 1, 200 , or the date the Living Unit is conveyed to Buyer, and will continue each year until January 1, 20 .

CRAFTSTAR

**Notice to Buyer of the Clarksburg Village Development District
or Private Infrastructure Charge Alternative**

This Notice was previously set forth in Paragraph 12 of the Montgomery County Jurisdictional Addendum (Clarksburg Village) to the Sales Agreement between C Village LLC ("Seller") and Jorge Hernandez-Fujigaki ("Buyer") for the property known as Lot 012, Block C, and having an address of 23415 RAINBOW ARCH DRIVE (the "Property") within the Clarksburg Village development in Clarksburg, Montgomery County, Maryland (the "Development").

The Development is proposed to be located within the Clarksburg Village Development district (the "Tax District"), a special taxing district which may be created by Montgomery County to reimburse the cost of certain public infrastructure improvements which benefit the Development. Once the Tax District taxes are imposed by the County, each owner of a lot, home or condominium unit in the Development ("Living Unit") will be liable to pay annually any special assessment and/or special tax imposed under Chapter 14 of the Montgomery County Code (the "Tax District Assessment").

As of the date of these disclosures, the rates or amounts of the Tax District Assessment have not been set by the County, but will be set each year at a fixed ad valorem rate (in proportion to the value of the Living Unit). Amounts are estimates only and are subject to change. If the Tax District Assessments were set in calendar year 2004 on the basis of December, 2003 Living Unit values, the Tax District Assessments for the initial year of the Tax District would range between approximately \$600 and \$1,500 per Living Unit, depending on the assessed value of the Living Unit. However, it is possible that the Tax District Assessment may not be established for a number of years and, if the value of the Living Units increases between the date of this notice and the date on which the Tax District Assessment is established, the amounts of the Tax District Assessments will increase above the projected range as well.

Living Units assessed at more or less than the average assessed value in the Development will bear, respectively, a relatively higher or lower Tax District Assessment. Irrespective of changes in assessment value, it is anticipated that the Tax District Assessment will increase approximately 2% each year in real terms. The Tax District Assessment will be used to pay the principal of, interest on and any redemption premium on bonds which are to be issued by the County for the Tax District and to replenish the debt service reserve fund for such bonds. After the date the bonds are sold by the County for the Tax District (the "Commencement Date") the Tax District Assessment will commence in the amount specified above with respect to each Living Unit. In the event that settlement on the initial sale of a Living Unit occurs after the Commencement Date, the Tax District Assessment for such Living Unit shall commence on the date of such settlement.

The Tax District Assessment will terminate (except as to any unpaid Tax District Assessments, interest, costs, late fees, and/or attorneys' fees) on the date that the bonds issued in respect of the Tax District are paid in full. The Tax District Assessment is billed in July of each year with the County's annual real property tax bill. For further information on The Tax District Assessment, a home buyer may contact the Montgomery County Department of Finance at (240) 777-8950.

In the event that the Tax District is not created, the Tax District Assessments will not apply, and in the alternative, at the election of the Declarant, Clarksburg Village Investments, Inc., the Property will be subject to a private assessment secured by a recorded lien ("Infrastructure Charge") which is intended to cover or defray costs relating to the infrastructure costs that would otherwise be reimbursed through the Tax District Assessment. The annual amount of such Infrastructure Charge has not yet been established, but it is anticipated that, if calendar year 2004 was the initial year in which the Infrastructure Charge was collected, such amount would range between approximately \$600 and \$1,500 per Living Unit. The actual annual amount would be set in the initial year that the Infrastructure Charge is collected and, as such, the range set forth in the prior sentence is subject to increase. All of the Infrastructure Charges will increase by 2% per year commencing with the second year's payment and shall be due and payable every year on the first day of January to the Declarant, Clarksburg Village Investments, Inc., at 6820 Elm Street, Suite 200, McLean, Virginia 22101 (or to such other payee and address as the Declarant may specify). The Infrastructure Charges are expected to commence on the later

of January 1, 2007, or the date the Living Unit is conveyed to Buyer, and will continue each year for twenty-six (26) years.

By signing below, Buyer acknowledges that Seller has disclosed the information set forth in this Notice and Buyer further understands and agrees that a Tax District Assessment or private Infrastructure Charge may apply to the Property in the future.

Buyer _____
Date: 12/16/04

Buyer _____
Date: 12/16/04

267171 1271

APPENDIX L

DECLARATION OF PRIVATE INFRASTRUCTURE CHARGES

THIS DECLARATION OF PRIVATE INFRASTRUCTURE CHARGES ("Declaration") is made this 26th day of February, 2004, by CLARKSBURG SKYLARK LLC, a Maryland Limited Liability Company, (hereinafter referred to as "Clarksburg"), for the benefit of ARORA HILLS PRIVATE INFRASTRUCTURE COMPANY, a division of Artery-Beazer Clarksburg, LLC a Maryland Limited Liability Company, (hereinafter referred to as "Arora"), NVR, Inc., a Virginia Corporation, and Rocky Gorge Homes, LLC, a Maryland Limited Liability Company, (hereinafter collectively referred to as the "Builder Owners" or individually as a "Builder Owner") and consented to by Residential Funding Corporation, a Delaware Corporation.

WITNESSETH:

WHEREAS, Clarksburg is or was the owner (any owner of any Lot contained in the Property shall hereinafter be referred to as an "Owner") of certain real property located in Montgomery County, Maryland, in the subdivision titled "Arora Hills", (the "Property") as more particularly described on EXHIBIT "A" attached hereto and made a part hereof. The Property has been or will be divided into a number of separate subdivided Lots of record, which consist of single family lots, townhouse lots and condominium units, as shown upon the plats of subdivision for the Property recorded, or intended to be recorded, among the Land Records of Montgomery County, Maryland (the "Land Records"). Such Lots, whether single family lots, townhouse lots or condominium units, being hereinafter referred to individually as a "Lot" and collectively as the "Lots". The terms "Lot" or "Lots" shall include only those portions of the Property upon which the planned or actual improvements are primarily intended for use and occupancy as a residential dwelling and shall not include common areas or property dedicated for public use; and

RECORDING FEE	75.00
IMP FD STATE	20.00
TOTAL	95.00
PROP MORT	71.00
REC LG	211.00
REC LG	11.00

2004 MAR -2 AM 11:10

WHEREAS, certain Lots (the "Builder Owners Lots") as more particularly described in Exhibit "B" attached hereto and made a part hereof, of the Property have been conveyed in fee simple to the Builder Owners; and

WHEREAS, by their signatures hereto, the Builder Owners hereby consent to have the Builder Owners Lots subject to and bound by the terms and conditions of this Declaration; and

WHEREAS, Clarksburg has received Site Plan Approval #8-02036 from the Maryland-National Capital Park and Planning Commission for development of Phase I and Phase II of the Property, which shall contain approximately 328 single family lots and 158 townhouse lots which include the Builder Owners Lots; and

MONTGOMERY COUNTY, MD
APPROVED BY 

MAR - 2 2004

\$ N/A RECORDATION TAX PI
\$ N/A TRANSFER TAX P

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WHEREAS, Clarksburg intends to provide certain Lots (the "Benefited Lots") which include the Builder Owner Lots, as more particularly described on EXHIBIT "C" attached hereto and made a part hereof with certain infrastructure improvements (hereinafter referred to as the "Infrastructure Improvements"); and

WHEREAS, by the recordation of this Declaration, Arora desires to establish certain charges upon the Benefited Lots, to be paid to Arora, its successors and assigns, whereby costs related to the construction of the Infrastructure Improvements serving the Benefited Lots is to be covered or paid by the Owners of the Benefited Lots, excluding Clarksburg and any "Builder" (as defined below), in twenty-seven (27) equal installments over a period of twenty-six (26) years, except, if applicable, for the proration of the first and last installments as provided below, provided that Arora shall have the right to collect "Infrastructure Charges" (as defined below) in advance and to collect "Infrastructure Charges" in monthly, quarterly, bi-annual, or annual installments, as provided herein. Each such installment, whether or not prorated, is hereinafter referred to individually as an "Infrastructure Charge" and collectively as the "Infrastructure Charges." The term "Builder" as used herein shall mean and refer to the Builder Owners and any other person or other legal entity that acquires one (1) or more Benefited Lots from Clarksburg, its successors and assigns for the purpose of constructing residential dwelling units for sale or lease to others.

NOW, THEREFORE, Clarksburg hereby declares that all of the Benefited Lots including the Builder Owners Lots now or hereafter included within the Property shall be held, conveyed, hypothecated, encumbered, sold, leased, rented, occupied and used subject to the covenants, conditions, restrictions, obligations and charges set forth in this Declaration, which are for the purpose of reimbursing Arora for the costs relating to the Infrastructure Charges serving the Benefited Lots, and which shall run with such Benefited Lots and be binding on all parties having any right, title or interest in all or any portion of such Benefited Lots, their respective heirs, personal representatives, successors, transferees and assigns, and which shall inure to the benefit of Arora and its respective successors, transferees and assigns:

1. INCORPORATION OF RECITALS. The recitals set forth above are hereby incorporated in and made a material part of this Declaration.
2. ESTABLISHMENT OF LIEN AND PERSONAL OBLIGATION. Each Owner of any Benefited Lot, other than Clarksburg or any Builder, by acceptance of a deed therefor, whether or not it shall be so expressed in such deed; (a) covenants and agrees to pay to Arora all Infrastructure Charges, interest, costs, late fees and attorneys' fees which are due and unpaid as of the date such Owner accepts title to such Benefited Lot; (b) covenants and agrees to pay to Arora all future Infrastructure Charges established hereby for as long as such Owner shall be a record Owner of a fee simple interest in such Benefited Lot; (c) grants to Arora a lien to secure payment of the aforementioned Infrastructure Charges, together with interest, costs, late fees and attorneys' fees, which lien shall be a continuing lien upon the Benefited Lot

against which each such Infrastructure Charge is made; and (d) provided the requirements of the Maryland Contract Lien Act, if applicable, have been fulfilled, grants to Arora a power of sale, and assents to the entry of a decree and order for the sale of said Benefited Lot upon a default by the Owner under this Declaration. Each such Infrastructure Charge, together with interest, costs, late fees and attorneys' fees, shall also be the joint, several, personal obligation of the Owner of the Benefited Lot at the time when the Infrastructure Charge became due. In the event that any Owner shall fail to pay the Infrastructure Charge assessed to that Owner's Benefited Lot, Arora shall be entitled to all legal and/or equitable relief as may be available under applicable law, including without limitation, the right: (i) to accelerate and declare to be immediately due and payable the full amount of all future installments of the Infrastructure Charges assessed against the Owner's Benefited Lot (discounted to present value in accordance with paragraph 8 hereof); (ii) to bring an action at law against any Benefited Lot Owner personally obligated to pay the Infrastructure Charges; (iii) to foreclose on the lien against the Benefited Lot or Benefited Lots then belonging to said Owner in a manner now or hereafter provided for the foreclosure of mortgages, deeds of trust or other liens on real property in the State of Maryland containing a power of sale or consent to a decree, and subject to the same requirements, both substantive and procedural, or as may otherwise from time to time be provided by law; (iv) to foreclose on the lien against the Benefited Lot then belonging to said Owner in the manner now or hereafter provided for pursuant to the Maryland Contract Lien Act; and/or (v) to institute such other legal and/or equity proceeding as may otherwise from time to time be provided by applicable law in any of which events, interest, costs, late fees and attorneys' fees, equal to twenty percent (20%) of the sum claimed, shall be added to the amount of the Infrastructure Charges due. A certificate in writing, signed by a representative of Arora, (the "Certificate") shall be given promptly after receipt by Arora of a written Request for such certificate from any Owner of a Benefited Lot liable for the Infrastructure Charges, setting forth the amount of any accrued and unpaid Infrastructure Charges, interest, costs, late fees and attorneys' fees with respect to the Benefited Lot. Such Certificate shall be binding on Arora as of the date of issuance. A charge not to exceed Fifty Dollars (\$50.00) may be collected by Arora in advance for each such Certificate so issued. No purchaser from an Owner shall be liable for, nor shall any Lot be conveyed subject to a lien for, any accrued and unpaid Infrastructure Charges greater than the amount stated in the Certificate provided by Arora in accordance with this section of this Declaration. At such time as the Owner of any Lot which is subject to the terms of this Declaration conveys such Lot to another party, such Owner shall within fifteen (15) days of the date of such transfer notify Arora in writing of the name and address of the new Owner of the Lot (the "Notice"). Written notices to Arora should be directed to:

Arora Hills Private Infrastructure Company
 c/o Artery Development Company, L.L.C.
 7200 Wisconsin Avenue, Suite 1000
 Bethesda, Maryland 20814
 ATTN: Mr. Bernard J. Rafferty

An Owner's personal liability for payment of Infrastructure Charges shall not terminate unless and until the Notice is received by Arora. Upon timely receipt of the Notice, by Arora, an Owner's personal liability for payment of Infrastructure Charges shall terminate effective the date of the transfer of the Lot. All rights and remedies contained in this Declaration are cumulative, and Arora shall also have all other rights and remedies provided by law or in equity.

3. **COMMENCEMENT DATE.** The Infrastructure Charges described herein shall commence with respect to each Benefited Lot from the later to occur of the following: (i) the date of conveyance of said Benefited Lot by Clarksburg or any Builder to any other Owner, other than Clarksburg or another Builder; or (ii) the date that Montgomery County, Maryland advises Clarksburg that the Property will not be included within the Clarksburg Skylark Development District (the "Commencement Date"). The Infrastructure Charges for each of the Benefited Lots shall terminate (except as to any unpaid Infrastructure Charges, interest, costs, late fees and attorneys' fees) with respect to each Benefited Lot on the date which is approximately twenty-six (26) years following the Commencement Date for each Benefited Lot, unless sooner paid in full as hereinafter provided. The Infrastructure Charges shall be paid annually in advance by each Benefited Lot Owner (other than Clarksburg or any Builder) to Arora in equal installments of a maximum of One Thousand Five Hundred and No/100 Dollars (\$1,500.00) for single family lots, a maximum of One Thousand Two Hundred and No/100 Dollars (\$1200.00) for townhouse lots, and a maximum of Eight Hundred and No/100 Dollars (\$800.00) for Condominium Units where the Commencement Date occurs within the 2004 calendar year. The actual amount of the Infrastructure Charges will be increased by two (2%) percent per year commencing with the 2005 calendar year and may exceed the maximum amounts set forth above. The actual amount of the Infrastructure Charges subject to the aforesaid Infrastructure Assessments, shall be established by Arora prior to the Commencement Date for each type living unit described herein by written notice to all Owner's prior to the Commencement Date. Payments due hereunder shall be due and payable on February 1 of each year subsequent to the Commencement Date; provided however, that the first payment shall be prorated according to the number of days elapsed from the Commencement Date to January 31 of the next calendar year, unless the Commencement Date occurs prior to July 1 of the same calendar year, in which event it shall also be prorated according to the number of days elapsed from the Commencement Date to January 31 of the same calendar year, and the 27th and final payment shall be the applicable annual payment less the prorated amount paid as the first payment. Notwithstanding the foregoing, Arora, in its sole and absolute discretion, may allow or can require: (i) any Owner to pay the annual Infrastructure Charges in monthly, quarterly or bi-annual installments as determined by Arora; (ii) Owner's mortgagee to escrow and pay to Arora the Infrastructure Charges; or (iii) any home owner association (the "Association") which is established upon the Property to collect the Infrastructure Charges from any Owner subject to this Declaration and pay the same to Arora. Any Infrastructure Charges not paid within thirty (30) days after the due date shall

bear interest from the due date until paid at the rate determined by Arora not to exceed the maximum rate of interest permitted by law [or such lesser sum as the Department of Veterans Affairs ("VA") or the Federal Housing Administration ("FHA") may specify if any Benefited Lot subject to the Declaration is then encumbered by a deed of trust or mortgage which is guaranteed by the VA or insured by the FHA]. In addition to bearing interest, Arora may collect a reasonable late fee for any Infrastructure Charge which is thirty (30) days or more delinquent. No Owner may waive or otherwise escape liability for Infrastructure Charges provided for herein by non-use of the Infrastructure Improvements or abandonment of a Benefited Lot.

4. PRIORITY OF LIEN.

(a) Clarksburg and Residential Funding Corporation, a Delaware corporation, ("Lender") have entered into a Development Loan Agreement dated May 2, 2002, (as the same may be amended, supplemented or otherwise modified from time to time, including any other instruments executed and delivered in renewal, extension, rearrangement or otherwise in replacement of such Development Loan Agreement, the "Loan Agreement"), pursuant to which Lender is making a revolving loan to Clarksburg. The Loan is evidenced by a Promissory Note dated May 2, 2002, from Clarksburg to Lender (as the same may be amended, supplemented or otherwise modified from time to time, including any other instruments executed and delivered in renewal, extension, rearrangement or otherwise in replacement of such Promissory Note, the "Note") and is secured by a "Deed of Trust, Security Agreement and Fixture Filing with Assignment of Rents, Proceeds and Agreements" dated May 2, 2002 and recorded among the Land Records of Montgomery County, Maryland on May 6, 2002 in Liber 21050 at folio 517 *et seq.*, from Clarksburg, as trustor, to Lender, as beneficiary (as the same may be amended, supplemented or otherwise modified from time to time, including any other instruments executed and delivered in renewal, extension, rearrangement or otherwise in replacement of such deed of trust, the "Deed of Trust").

(b) Lender hereby acknowledges and agrees that the right to receive the Infrastructure Charges, as evidenced by the terms of this Declaration, is not subject to the lien of the Deed of Trust granted for the benefit of Lender by Clarksburg under the terms of the "Loan Documents" (as defined in the Loan Agreement), and the Lender hereby consents to the imposition of the lien for Infrastructure Charges established under the terms of this Declaration, provided, however, that the lien for Infrastructure Charges provided for herein shall be subordinate to the lien of the Deed of Trust, subject to the provisions of this Paragraph.

(c) Lender further acknowledges and agrees that, if following an "Event of Default" (as defined in the Loan Documents) Lender exercises its right to foreclose on its security interest in any of the Lots pursuant to the Deed of Trust or otherwise takes possession of any of the Lots, whether by virtue of foreclosure under the Deed of Trust or by virtue of a deed

or other conveyance in lieu of foreclosure, Lender shall not and such action by Lender shall not otherwise be deemed to operate to terminate this Declaration or to extinguish the lien of this Declaration with respect to any Infrastructure Charges which accrue prior to the time Lender comes into possession of such Lots, or which accrue thereafter; provided, however, that Lender shall not have any obligation to pay any Infrastructure Charges which accrue prior to or during the time that Lender is the Owner of such Lots.

(d) At such time as any Lots owned by Lender are transferred or conveyed by Lender to any successor Owner, including, without limitation, any Builder (referred to in this Paragraph as a "Successor Owner"), the Infrastructure Charges provided for herein shall automatically recommence; provided, however, that any provision of this Declaration to the contrary notwithstanding, the Infrastructure Charges payable with respect to the Lot or Lots owned by any such Successor Owner shall continue and shall not terminate until such time as the number of installments of Infrastructure Charges specified in Paragraph 3 of this Declaration have been paid in full with respect to each such Lot by the Successor Owner, and its successors, transferees and assigns (not including any interest, costs, late fees or attorneys' fees which accrue prior to conveyance of such Lot or Lots from Lender to the Successor Owner).

5. HOMEOWNER'S ASSOCIATION. Upon request by Arora, the Association shall be obligated to collect the Infrastructure Charges due from all Benefited Lot Owners of the Association; provided, however, that the Association shall not be obligated to pay any Infrastructure Charges on behalf of any individual Benefited Lot Owner.

6. COVENANT RUNNING WITH THE LAND. All provisions of this Declaration, including the benefits and burdens, shall: touch, concern and run with the land; be binding upon the Owners and their respective heirs, personal representatives, successors, transferees and assigns; and inure to the benefit of Clarksburg, Arora and their respective successors, transferees and assigns. Any sale, lease, mortgage, or other disposition or transfer of the Property or any Benefited Lot created therein shall be subject in all respects to the lien, operation and effect of this Declaration. The sale or transfer of any Benefited Lot shall not affect any lien imposed against such Benefited Lot pursuant to this Declaration. The purchaser of a Benefited Lot shall be jointly and severally liable with the selling Benefited Lot Owner for all unpaid Infrastructure Charges, interest, costs, late fees and attorneys' fees against the Benefited Lot, without prejudice to the purchaser's right to recover from the selling Benefited Lot Owner amounts paid by the purchaser therefor; provided, however, that no purchaser from an Owner, other than Clarksburg or any Builder, shall be liable for, nor shall any Benefited Lot be conveyed subject to a lien for, any accrued and unpaid Infrastructure Charges, interest, costs, late fees, or attorneys' fees greater than the amount stated in any written Certificate provided by Arora in accordance with Paragraph 2 of this Declaration. No sale or transfer shall relieve any Benefited Lot or the current Owner thereof from liability for

any Infrastructure Charges, interest, costs, late fees and attorneys' fees thereafter becoming due or from the lien thereof.

7. BILLING STATEMENT. All Infrastructure Charges, interest, costs, late fees and attorneys' fees payable in accordance with this Declaration shall be payable to Arora, its successors and assigns, in accordance with such billing statements as may be issued by Arora, or its designee. Failure to receive a bill for the Infrastructure Charges shall not relieve a Benefited Lot Owner of such Owner's liability to pay any Infrastructure Charges, interest, costs, late fees, or attorneys' fees due hereunder.

8. PREPAYMENT. Any Benefited Lot Owner may prepay at any time the Infrastructure Charges attributable to such Owner's Benefited Lot by paying the amounts as computed from time to time by Arora, on or before the next due date for that Benefited Lot; provided, however, that such Benefited Lot Owner is not then in default under this Declaration, and is then current in the payment of all then due installments, and any interest, costs, late fees and attorneys' fees. With respect to each Benefited Lot, the prepayment applicable to any given time shall be an amount equal to the present value of the sum of each then outstanding installment of the Infrastructure Charges applicable to the Benefited Lot, discounted at a rate of two percent (2%) per annum. In return for such prepayment and payment of all outstanding interest, costs, late fees and attorneys' fees, the Benefited Lot Owner shall receive a full release hereunder, in recordable form, from Arora certifying that all payments hereunder have been so prepaid. No Owner, or former Owner, shall be entitled to reimbursement from Clarksburg or Arora of any prepaid Infrastructure Charges.

9. ASSIGNMENT, TRANSFER. All or any portion of the rights, reservations, easements, interests, exemptions, privileges, or powers of Arora hereunder may be assigned and transferred (exclusively or non-exclusively) by Arora to any other individual or entity, without notice to the Benefited Lot Owners. Arora shall have the right to transfer, assign, pledge, or in any other fashion encumber its or their right to any or all of the Infrastructure Charges, interest, costs, late fees and attorneys' fees due hereunder.

10. SUBORDINATION. The lien for Infrastructure Charges provided for herein shall be subordinate only to the lien of the initial purchase money mortgage or deed of trust securing a loan from a third-party institutional Lender encumbering any Benefited Lot at the time such Lot is purchased by an Owner. The sale or transfer of any Benefited Lot shall not affect the lien. However, the sale or transfer of any Benefited Lot pursuant to the foreclosure of the mortgage or deed of trust to which this lien has been subordinated as proposed above, or any proceeding in lieu thereof, shall extinguish the lien (but not the personal obligation) as to Infrastructure Charges which became due prior to such sale or transfer. No sale or transfer shall relieve such Lot from liability for any Infrastructure Charges thereafter becoming due or from the lien thereof. At such time as any Lots owned by Lender are transferred or conveyed by Lender to any successor Owner, including, without limitation, any Builder

(referred to in this Paragraph as a "Successor Owner"), the Infrastructure Charges provided for herein shall automatically recommence; provided, however, that any provision of this Declaration to the contrary notwithstanding, the Infrastructure Charges payable with respect to the Lot or Lots owned by any such Successor Owner shall continue and shall not terminate until such time as the number of installments of Infrastructure Charges specified in Paragraph 3 of this Declaration have been paid in full with respect to each such Lot by the Successor Owner, and its successors, transferees and assigns (not including any interest, costs, late fees or attorneys' fees which accrue prior to conveyance of such Lot or Lots from Lender to the Successor Owner).

11. WITHDRAWAL AND ANNEXATION. For a period of Fifteen (15) years from the date of recordation of this Declaration, Clarksburg may withdraw any Benefited Lot from the operation and effect of this Declaration or annex into the operation and effect of the Declaration any additional Lots (individually "Annexed Benefited Lot" and collectively "Annexed Benefited Lots") within the Property, provided that: (i) Clarksburg is the Owner of such Benefited Lot and/or Annexed Benefited Lot at the time of withdrawal or annexation; or (ii) if Clarksburg is not the Owner of such Benefited Lot and/or Annexed Benefited Lot, Clarksburg withdraws such Benefited Lot or annexes such Annexed Benefited Lot with the written consent of the Owner thereof. Such withdrawn Benefited Lot shall no longer be subject to the covenants, conditions, restrictions, obligations and charges of this Declaration except for: (i) any rights, reservations, exemptions, powers, or privileges reserved to Clarksburg pursuant to this Declaration which affect the withdrawn Benefited Lot; and (ii) any other rights, reservations, exemptions, powers or privileges which are expressly reserved to Clarksburg in the instrument effectuating such withdrawal. Any Annexed Benefited Lot, shall be subject to the covenants, conditions, restrictions, obligations and charges of the Declaration as amended or supplemented. Clarksburg, however, specifically reserves the right to increase the amount of the Infrastructure Charges for any Annexed Benefited Lot. Such withdrawal or annexation shall be made by recording a Supplementary Declaration among the Land Records, withdrawing the effect of the covenants, conditions, restrictions, obligations and charges of this Declaration from the withdrawn Benefited Lot and/or subjecting the Annexed Benefited Lots to the covenants, conditions, restrictions, obligations and charges of the Declaration.

12. CLARKSBURG'S POWER OF ATTORNEY. Clarksburg and Arora hereby reserve for themselves (and their successors, transferees and assigns to whom such right has been specifically assigned by either of them in writing), for a period of fifteen (15) years from the date of the recordation of this Declaration among the Land Records, the right to execute on behalf of all contract purchasers, Owners, mortgagees, and other lienholders or parties claiming a legal or equitable interest in all or any portion of the Property any such agreements, documents, amendments and supplements to this Declaration which may be required by the Federal National Mortgage Association, the FHA, the VA, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation, Montgomery County,

Maryland, any governmental or quasi-governmental agency or authority having regulatory jurisdiction over the Property, any public or private utility company designated by either of them, any institutional Lender or title insurance company designated by either of them, or as may be required to comply with any applicable laws or regulations.

(a) By acceptance of a deed to all or any portion of the Property, or by the acceptance of any other legal or equitable interest in all or any portion of the Property, each and every such contract purchaser, Owner, mortgagee and other lienholder or party having a legal or equitable interest in all or any portion of the Property does automatically and irrevocably name, constitute, appoint and confirm Clarksburg and/or Arora (and its successors, transferees and assigns to whom such right has been specifically assigned by either of them in writing) as attorney-in-fact for the purpose of executing such Agreement, document, amendments, supplement and other instrument(s) necessary to effect the foregoing subject to the limitations set forth herein.

(b) No such Agreement, documents, amendment, supplement or other instrument which materially and adversely affects the value of the Property, or any portion thereof, or substantially increases the financial obligations of an Owner, shall be made without the prior written consent of the affected Owner(s) and all owners of any mortgage(s) encumbering the portion of the Property owned by the affected Owner(s). Any such Agreement, document, amendment, supplement or instrument which materially and adversely affects the priority or validity of any mortgage which encumbers the Property, or any portion thereof, shall not be made without the prior written consent of the owners of all such mortgages.

(c) The power of attorney aforesaid is expressly declared and acknowledged to be coupled with an interest in the subject matter hereof and the same shall run with the title to all and any portion of the Property, and be binding upon the heirs, personal representatives, successors, transferees and assigns of any of the foregoing parties. Further, said power of attorney shall not be affected by the death or disability of any principal and is intended to deliver all right, title and interest of the principal in and to said power of attorney. Said power of attorney shall be vested in Clarksburg and Arora (and their successors, transferees and assigns to whom such right has been specifically assigned by Clarksburg or Arora in writing) until the expiration of same.

13. WAIVER. No restriction, condition, obligation or provision of this Declaration shall be deemed to have been abrogated or waived by reason of any failure or failures to enforce the same.

14. SEVERABILITY. The terms and provisions of this Declaration are severable and in the event that any term or provision of this Declaration is invalid or unenforceable for any reason, the remaining terms and provisions hereof shall remain in full force and effect.

15. VOIDANCE. In the event that Montgomery County, Maryland includes the Property within the Clarksburg Skylark Development District (the "Tax District"), a special tax district which may be created by Montgomery County, Maryland to reimburse the cost of certain public infrastructure which benefits the Property, all tax charges created by this Declaration shall terminate and the lien created by this Declaration on the Property shall not apply, shall be null and void and shall be released.

16. CAPTIONS AND GENDER. The captions contained in this Declaration are for convenience only and are a part of this Declaration and are not intended in any way to limit or enlarge the terms and provisions of this Declaration. Whenever the context so requires, the male or female shall include all genders and the singular shall include the plural.

17. ENFORCEMENT AND RECORDATION. This Declaration shall be construed and enforced in accordance with the laws of the State of Maryland, and shall be effective upon recordation among the Land Records.

18. COUNTER PARTS. This Declaration may be executed in any number of counter parts, each of which shall be an original but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the undersigned, being Clarksburg herein, has executed this instrument this 24th day of February, 2004.

CLARKSBURG SKYLARK, L.L.C.
A Maryland limited liability company

BY: ARTERY-BEAZER CLARKSBURG, L.L.C.,
A Maryland limited liability company
Member

By: _____
B. Hayes McCarty, Co-Manager

By: [Signature]
David E. Carney, Co-Manager

STATE OF MARYLAND, COUNTY OF _____ :

15. VOIDANCE. In the event that Montgomery County, Maryland includes the Property within the Clarksburg Skylark Development District (the "Tax District"), a special tax district which may be created by Montgomery County, Maryland to reimburse the cost of certain public infrastructure which benefits the Property, all tax charges created by this Declaration shall terminate and the lien created by this Declaration on the Property shall not apply, shall be null and void and shall be released.

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IN WITNESS WHEREOF, the undersigned, being Clarksburg herein, has executed this instrument this 24th day of February, 2004.

CLARKSBURG SKYLARK, L.L.C.
A Maryland limited liability company

BY: ARTERY-BEAZER CLARKSBURG, L.L.C.,
A Maryland limited liability company
Member

By: B. Hayes McCarty
B. Hayes McCarty, Co-Manager

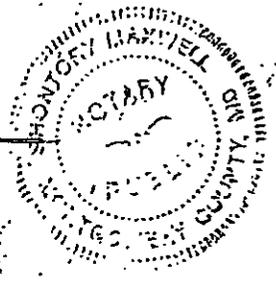
By: _____
David E. Carney, Co-Manager

STATE OF MARYLAND, COUNTY OF Montgomery

I HEREBY CERTIFY That on this 19th day of February, 2004, before me, a Notary Public in and for the State and County aforesaid, personally appeared B. Hayes McCarty, who acknowledged himself to be the Co-Manager of Artery-Beazer Clarksburg, LLC, a Maryland limited liability company (the "Company") and that he, as such authorized person, being authorized so to do, executed the foregoing instrument for the purposes therein contained by signing the name of the Company by himself as such authorized person and certified that this conveyance is not part of a transaction in which there is a sale, lease, exchange or other transfer of all or substantially all of the property and assets of the Company.

WITNESS my hand and Notarial Seal.

[Signature]
Notary Public



My Commission Expires: 5/29/06

STATE OF MARYLAND, COUNTY OF _____:

I HEREBY CERTIFY That on this _____ day of _____, 2004, before me, a Notary Public in and for the State and County aforesaid, personally appeared David B. Carney, who acknowledged himself to be the Co-Manager of Artery-Beazer Clarksburg, LLC, a Maryland limited liability company (the "Company") and that he, as such authorized person, being authorized so to do, executed the foregoing instrument for the purposes therein contained by signing the name of the Company by himself as such authorized person and certified that this conveyance is not part of a transaction in which there is a sale, lease, exchange or other transfer of all or substantially all of the property and assets of the Company.

WITNESS my hand and Notarial Seal.

Notary Public

My Commission Expires: _____

267171 1391

I HEREBY CERTIFY That on this _____ day of _____, 2004, before me, a Notary Public in and for the State and County aforesaid, personally appeared B. Hayes McCarty, who acknowledged himself to be the Co-Manager of Artery-Beazer Clarksburg, LLC, a Maryland limited liability company (the "Company") and that he, as such authorized person, being authorized so to do, executed the foregoing instrument for the purposes therein contained by signing the name of the Company by himself as such authorized person and certified that this conveyance is not part of a transaction in which there is a sale, lease, exchange or other transfer of all or substantially all of the property and assets of the Company.

WITNESS my hand and Notarial Seal.

Notary Public

My Commission Expires: _____

STATE OF MARYLAND, COUNTY OF Howard :

I HEREBY CERTIFY That on this 20 day of February, 2004, before me, a Notary Public in and for the State and County aforesaid, personally appeared David L. Carney, who acknowledged himself to be the Co-Manager of Artery-Beazer Clarksburg, LLC, a Maryland limited liability company (the "Company") and that he, as such authorized person, being authorized so to do, executed the foregoing instrument for the purposes therein contained by signing the name of the Company by himself as such authorized person and certified that this conveyance is not part of a transaction in which there is a sale, lease, exchange or other transfer of all or substantially all of the property and assets of the Company.

WITNESS my hand and Notarial Seal.

Laurene McIsaac
Notary Public

My Commission Expires: _____

LAURENE A. McISAAC
NOTARY PUBLIC STATE OF MARYLAND
My Commission Expires May 1, 2007

BUILDER OWNERS CONSENTS

The undersigned, the Builder Owners of the Lots set forth on Exhibit "B" to this Declaration, hereby consent to and agree to be bound by the terms and conditions contained within this Declaration and further acknowledge and agree that the Declaration shall be considered and construed as a covenant running with the land and binding upon their respective Lots.

Builder Owners

NVR, Inc., a Virginia Corporation

By: _____
Name: _____
Title: _____
Date: _____

Builder Owners

ROCKY GORGE HOMES, LLC,
A Maryland Limited Liability Company

By: 
Name: EUGENE J. LEONARD
Title: SR. VICE PRESIDENT - CFO
Date: FEBRUARY 24, 2004

STATE OF MARYLAND, COUNTY OF _____:

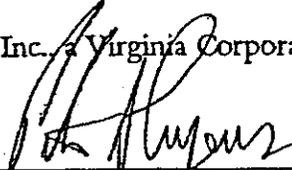
I HEREBY CERTIFY That on this _____ day of _____, 2004, before me, a Notary Public in and for the State and County aforesaid, personally appeared _____, who acknowledged himself/herself to be the _____ of NVR, Inc., a Virginia Corporation (the "Corporation") and that he/she, as such authorized person, being authorized so to do, executed the foregoing instrument for the purposes therein contained by signing the name of the Corporation by himself/herself as such authorized person and certified that this conveyance is not part of a transaction in which there is a sale, lease, exchange or other transfer of all or substantially all of the property and assets of the Corporation.

BUILDER OWNERS CONSENTS

The undersigned, the Builder Owners of the Lots set forth on Exhibit "B" to this Declaration, hereby consent to and agree to be bound by the terms and conditions contained within this Declaration and further acknowledge and agree that the Declaration shall be considered and construed as a covenant running with the land and binding upon their respective Lots.

Builder Owners

NVR, Inc., a Virginia Corporation

By: 
Name: Peter A. Lyons
Title: V.P.
Date: 2/23/04

Builder Owners

ROCKY GORGE HOMES, LLC,
A Maryland Limited Liability Company

By: _____
Name: _____
Title: _____
Date: _____

STATE OF MARYLAND, COUNTY OF Montgomery

I HEREBY CERTIFY That on this 23rd day of February, 2004, before me, a Notary Public in and for the State and County aforesaid, personally appeared Peter A. Lyons who acknowledged himself/herself to be the V.P. of NVR, Inc., a Virginia Corporation (the "Corporation") and that he/she, as such authorized person, being authorized so to do, executed the foregoing instrument for the purposes therein contained by signing the name of the Corporation by himself/herself as such authorized person and certified that this conveyance is not part of a transaction in which there is a sale, lease, exchange or other transfer of all or substantially all of the property and assets of the Corporation.

267171 1421

WITNESS my hand and Notarial Seal.

Iron Kemp
Notary Public

My Commission Expires: 6/1/05

STATE OF MARYLAND, COUNTY OF Montgomery

I HEREBY CERTIFY That on this 23rd day of February, 2004, before me, a Notary Public in and for the State and County aforesaid, personally appeared _____, who acknowledged himself/herself to be the _____ of Rocky Gorge Homes, LLC, a Maryland limited liability company (the "Company") and that he/she, as such authorized person, being authorized so to do, executed the foregoing instrument for the purposes therein contained by signing the name of the Company by himself/herself as such authorized person and certified that this conveyance is not part of a transaction in which there is a sale, lease, exchange or other transfer of all or substantially all of the property and assets of the Company.

WITNESS my hand and Notarial Seal.

Notary Public

My Commission Expires: _____

267171 1431

WITNESS my hand and Notarial Seal.

Notary Public

My Commission Expires: _____

STATE OF ^{Virginia} MARYLAND, COUNTY OF Fairfax :

I HEREBY CERTIFY That on this 24 day of February, 2004, before me, a Notary Public in and for the State and County aforesaid, personally appeared Eugene Leonard, who acknowledged himself/herself to be the SEVP CEO of Rocky Gorge Homes, LLC, a Maryland limited liability company (the "Company") and that he/she, as such authorized person, being authorized so to do, executed the foregoing instrument for the purposes therein contained by signing the name of the Company by himself/herself as such authorized person and certified that this conveyance is not part of a transaction in which there is a sale, lease, exchange or other transfer of all or substantially all of the property and assets of the Company.

WITNESS my hand and Notarial Seal.

Vivian B. Maginnis
Notary Public

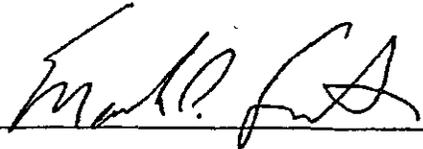
My Commission Expires: Sept 30, 2004

2007101 1441

LENDERS CONSENT

Residential Funding Corporation, a Delaware Corporation, hereby consents to the recordation of this Declaration pursuant to the conditions set forth herein.

Residential Funding Corporation,
A Delaware corporation

By: 

ATTORNEY'S CERTIFICATION

This instrument has been prepared by or under the supervision of the undersigned Maryland attorney or by one of the parties named in this instrument.


Russell D. Karpook, Attorney

Post Recording Return To:

Russell D. Karpook, Esquire
FRANCOMANO & KARPOOK, P.A.
20 S. Charles Street, 4th Floor
Baltimore, Maryland 21201-3217

EXHIBIT "A"

EXHIBIT "A"

The description of the Property consisting of 15,719,240.43 square feet or 360.86 acres is attached hereto as Exhibit "A"

Charles P. Johnson & Associates, Inc.

Planners Engineers Landscape Architects Surveyors

Silver Spring, MD

Frederick, MD

Fairfax, VA

CPJ
AssociatesDESCRIPTION OF
THE PROPERTY OF**CLARKSBURG SKYLARK, LLC**
A MARYLAND LIMITED LIABILITY COMPANY**CLARKSBURG (2ND) DISTRICT**
MONTGOMERY COUNTY, MARYLAND

Being part of the property acquired by Clarksburg Skylark, LLC, a Maryland limited liability company from Estelle DeMaio, et al. by deed dated March 26, 2001 and recorded among the land records of Montgomery County, Maryland in Liber 19158 at Folio 440 and being more particularly described in the Maryland State Plane Datum (NAD 83/91) as follows

Beginning for the same at a point at the beginning of the first (1st) or North 86°35'10" East, 1467.63 feet line of Parcel "A" as described in a conveyance from Oscar Wind and Estelle DeMaio, trustees, to Barbara Markwood, by deed dated November 25, 1991 and recorded among the aforesaid land records in Liber 10129 at Folio 345, said point being also at the end of the South 86°36'45" West, 1467.69 feet line as described in a conveyance from Hallie A. Wells to The Maryland-National Capital Park and Planning Commission by deed recorded in Liber 5738 at Folio 55 and running thence with and binding on the outline of said Parcel "A" the following twenty (20) courses and distances

1. North 86°34'35" East, 1469.48 feet to a point, thence
2. South 03°25'25" East, 9.00 feet to a point, thence
3. South 21°10'49" East, 195.83 feet to a point, thence
4. South 88°43'38" East, 986.90 feet to a point, thence
5. North 17°48'47" West, 330.24 feet to a point, thence
6. North 25°11'22" East, 460.67 feet to a point, thence
7. South 65°47'03" East, 609.50 feet to a point, thence
8. South 26°09'33" West, 610.30 feet to a point, thence
9. South 68°01'41" East, 290.61 feet to a point, thence

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4-147

DESCRIPTION OF
THE PROPERTY OF
CLARKSBURG SKYLARK, LLC
A MARYLAND LIMITED LIABILITY COMPANY

Page 2

10. South 26°08'22" West, 83.77 feet to a point, thence
11. 729.33 feet along the arc of a curve, deflecting to the left, having a radius of 1472.40 feet and a chord bearing and distance of South 11°56'57" West, 721.90 feet to a point, thence
12. South 34°12'57" West, 77.33 feet to a point, thence
13. North 81°40'04" West, 150.00 feet to a point, thence
14. South 08°19'46" West, 25.00 feet to a point, thence
15. North 81°41'57" West, 663.84 feet to a point, thence
16. North 81°56'23" West, 770.88 feet to a point, thence
17. 149.49 feet along the arc of a curve, deflecting to the left, having a radius of 4015.00 feet and a chord bearing and distance of North 83°00'23" West, 149.48 feet to a point, thence with a tangent line
18. North 84°04'23" West, 222.07 feet to a point of curvature, thence
19. 232.21 feet along the arc of a curve, deflecting to the right, having a radius of 425.74 feet and a chord bearing and distance of North 68°26'53" West, 229.34 feet to a point thence, with a tangent line
20. North 52°49'23" West, 60.98 feet to a point on the twelfth or South 19°01'05" East, 442.52 feet line of Parcel C as described in the aforesaid deed recorded in Liber 8567 at Folio 345 and running thence with and binding on the outline of said Parcel "C" the following course and distance:
21. South 19°47'53" East, 118.37 feet to a point at the beginning of the fifth (5th) or North 47°02'00" East, 37.24 feet line of Parcel "B" as described in the aforesaid deed recorded in Liber 10129 at Folio 345 and running thence with and binding on the outline of said Parcel "B" the following twenty-one (21) courses and distances
22. North 47°00'07" East, 37.25 feet to a point of curvature, thence

DESCRIPTION OF
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CLARKSBURG SKYLARK, LLC
A MARYLAND LIMITED LIABILITY COMPANY

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23. 203.87 feet along the arc of a tangent curve, deflecting to the left, having a radius of 455.74 feet and a chord bearing and distance of South 71°15'28" East, 202.18 feet to a point, thence with a tangent line .
24. South 84°04'23" East, 222.07 feet to a point of curvature, thence .
25. 148.38 feet along the arc of a tangent curve, deflecting to the right, having a radius of . 3985.00 feet and a chord bearing and distance of South 83°00'23" East, 148.37 feet to a point, thence with a tangent line
26. South 81.56'23 East, 770.81 feet to a point, thence .
27. South 81°41'57" East, 663.77 feet to a point, thence
28. South 08°19'46" West, 25.00 feet to a point, thence
29. South 81°40'04" East, 150.00 feet to a point, thence
30. South 51°42'33" East, 98.62 feet to a point of curvature, thence
31. 129.83 feet along the arc of a non-tangent curve, deflecting to the left, having a radius of 1472.40 feet and a chord bearing and distance of South 12°46'04" East, 129.79 feet to a point, thence with a tangent line
32. South 15°17'38" East, 392.28 feet to a point of curvature, thence
33. 259.01 feet along the arc of a tangent curve, deflecting to the right, having a radius of 2251.83 feet and a chord bearing and distance of South 11°59'55" East, 258.86 feet to a point thence, with a nontangent line
34. North 88°56°21" West, 282.93 feet to a point, thence
35. South 00°47'37" West, 149.92 feet to a point, thence
36. South 88°56'21" East, 302.09 feet to a point of curvature, thence
37. 132.40 feet along the arc of a non-tangent curve, deflecting to the right, having a radius of

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A MARYLAND LIMITED LIABILITY COMPANY

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- 2251.83 feet and a chord bearing and distance of South 03°09'56" East, 132.38 feet to a point of curvature, thence
38. North 89°14'23" West, 110.81 feet to a point, thence
39. South 02°22'38" West, 167.38 feet to a point, thence
40. South 77°53'20" West, 1287.75 feet to a point, thence
41. South 00°53'22" West, 149.41 feet to a point, thence,
42. North 58°55'58" West, 1442.29 feet to a point at the beginning of the eighteenth (18th) or North 58°38'37" West, 310.63 feet line of said Parcel "C" as described in the aforesaid deed recorded in Liber 10129 at Folio 345 and running thence with and binding on the outline of said Parcel "C" the following two (2) courses and distances
43. North 58°43'36" West, 310.63 feet to a point, thence
44. South 42°00'12" West, 509.51 feet to a point at the end of the ninth (9th) or South 49°01'24" East, 420.44 feet line as described in a conveyance from Clarksburg Skylark, LLC to Skylark Investments, LLC by deed dated April 5, 2002 and recorded among the aforesaid land records and running thence, reversely with and binding on the outline of said deed the following six (6) courses and distances
45. North 49°01'24" West, 420.44 feet to a point of curvature, thence
46. 215.81 feet along the arc of a non-tangent curve, deflecting to the right, having a radius of 181.00 feet and a chord bearing and distance of North 38°46'12" East, 203.25 feet to a point of curvature, thence
47. North 11°01'59" West, 170.51 feet to a point of curvature, thence
48. 24.30 feet along the arc of a tangent curve, deflecting to the left, having a radius of 15.00 feet and a chord bearing and distance of North 57°26'01" West, 21.73 feet to a point of curvature, thence
49. 921.92 feet along the arc of a tangent curve, deflecting to the left, having a radius of

DESCRIPTION OF
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CLARKSBURG SKYLARK, LLC
A MARYLAND LIMITED LIABILITY COMPANY

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1550.00 feet and a chord bearing and distance of South 59°07'36" West, 908.39 feet to a point on the twenty-first (21st) or North 47°57'50" West, 2288.35 feet line of said Parcel "C" as described in the aforesaid deed recorded in Liber 10129 at Folio 345 and running thence with and binding on the outline of said Parcel "C" the following ten (10) courses and distances

50. North 47°55'21" West, 2146.66 feet to a point, thence
51. North 01°42'26" East, 823.20 feet to a point, thence
52. North 18°46'41" West, 1650.00 feet to a point, thence
53. North 19°35'09" East, 1329.19 feet to a point, thence
54. North 32°06'02" West, 327.28 feet to a point, thence
55. North 33°05'29" West, 783.07 feet to a point, thence
56. North 57°29'54" East, 12.18 feet to a point, thence
57. South 40°58'36" East, 2635.17 feet to a point, thence
58. South 85°25'36" East, 207.90 feet to a point, thence
59. South 75°30'10" East, 300.86 feet to a point on the twenty-fifth (25th) or 239.22 feet arc line of said Parcel "A" as described in the aforesaid deed recorded in Liber 10129 at Folio 345 and running thence with and binding on the outline of said Parcel "A" the following two (2) courses and distances
60. 176.49 feet along the arc of a curve, deflecting to the left, having a radius of 316.56 feet a chord bearing and distance of North 62°27'48" West, 174.22 feet to a point, thence, with a non-tangent curve
61. North 03°56'43" West, 57.50 feet to a point, thence
62. North 03°26'43" West, 9.00 feet to the point of beginning, containing 15,868,776.38 square feet or 364.30 acres of land

DESCRIPTION OF
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CLARKSBURG SKYLARK, LLC
A MARYLAND LIMITED LIABILITY COMPANY

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SAVING AND EXCEPTING therefrom, the following two (2) parcels of land

PARCEL NO. 1

Beginning for the same at an iron pipe found, distant, North $14^{\circ}12'58''$ East, 601.04 feet from the end of the forty-third (43rd) or North $58^{\circ}43'36''$ West, 310.63 feet line as described above and running thence, in, through, over and across the above described parcel, the following four (4) courses and distances

1. North $10^{\circ}25'39''$ East, 149.72 feet to an iron pipe found, thence
2. South $79^{\circ}24'44''$ East, 348.06 feet to a point, thence
3. South $16^{\circ}54'07''$ West, 150.63 feet to a point, thence
4. North $79^{\circ}24'44''$ West, 331.08 feet to the point of beginning, containing 50,839.83 square feet or 1.17 acres of land

PARCEL NO. 2

Beginning for the same at a point, distant, North $52^{\circ}49'23''$ West, 94.05 feet from the end of the twentieth (20) or North $52^{\circ}49'23''$ West, 60.98 feet line as described above, and running thence, in, through, over and across the above described parcel, the following five (5) courses and distances

1. South $44^{\circ}58'41''$ West, 355.62 feet to a point, thence
2. North $44^{\circ}21'19''$ West, 291.68 feet to an iron pipe, thence
3. North $45^{\circ}38'41''$ East, 338.38 feet to a point of curvature, thence
4. 218.62 feet along the arc of a curve, deflecting to the left, having a radius of 939.93 feet and a chord bearing and distance of South $06^{\circ}09'35''$ East, 218.13 feet to a point, thence
5. South $52^{\circ}49'23''$ East, 70.29 feet to the point of beginning, containing 98,696.12 square feet or 2.27 acres of land

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A MARYLAND LIMITED LIABILITY COMPANY

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THE TOTAL AREA included in this description is 15,719,240.43 square feet or 360.86 acres of land.

SUBJECT TO easements and rights of way of record, including, but not limited to New Cut Road and Skylark Road, publically maintained roadways.



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26717 1531

DESCRIPTION OF
THE PROPERTY OF
CLARKSBURG SKYLARK, LLC
A MARYLAND LIMITED LIABILITY COMPANY

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THE TOTAL AREA included in this description is 15,719,240.43 square feet or 360.86 acres of land.

SUBJECT TO easements and rights of way of record, including, but not limited to New Cut Road and Skylark Road, publically maintained roadways.



EXHIBIT "B"BUILDER OWNERS LOTSNVR, INC.

LOTS 7 AND 8, BLOCK A AS SHOWN ON THE SUBDIVISION PLAT TITLED "SUBDIVISION RECORD PLAT, LOTS 1 THROUGH 16, AND PARCELS B&L, BLOCK A, GREENWAY VILLAGE", RECORDED AMONG THE PLAT RECORDS OF MONTGOMERY COUNTY, MARYLAND ON 6/27/03 AS PLAT NO. 22610;

LOTS 1, 2, 3, 11, 12, 17 AND 21, BLOCK B AS SHOWN ON THE SUBDIVISION PLAT TITLED "SUBDIVISION RECORD PLAT LOTS 1 THROUGH 21, BLOCK B, GREENWAY VILLAGE," RECORDED AMONG THE PLAT RECORDS OF MONTGOMERY COUNTY, MARYLAND ON 6/27/03 AS PLAT NO. 22611;

LOTS 1, 2, 7, 8, 9, 12, 13, 14, 21, 22 AND 23, BLOCK C AS SHOWN ON THE SUBDIVISION PLAT TITLED "SUBDIVISION RECORD PLAT, LOTS 1 THROUGH 23, AND PARCELS A&B, BLOCK C, GREENWAY VILLAGE", RECORDED AMONG THE PLAT RECORDS OF MONTGOMERY COUNTY, MARYLAND ON 6/27/03 AS PLAT NO. 22612;

LOTS 3, 4, 5, 6, 12, 13, 14 AND 15, BLOCK D AS SHOWN ON THE SUBDIVISION PLAT TITLED "SUBDIVISION RECORD PLAT LOTS 1 THROUGH 17, AND PARCELS A, B, AND C, BLOCK D, GREENWAY VILLAGE," RECORDED AMONG THE PLAT RECORDS OF MONTGOMERY COUNTY, MARYLAND ON 6/27/03 AS PLAT NO. 22613;

LOTS 19 AND 20, BLOCK A AS SHOWN ON THE SUBDIVISION PLAT TITLED "SUBDIVISION RECORD PLAT LOTS 17 THROUGH 24, AND PARCELS C, D, AND E, BLOCK A, GREENWAY VILLAGE" RECORDED AMONG THE PLAT RECORDS OF MONTGOMERY COUNTY, MARYLAND ON 6/27/03 AS PLAT NO. 22614;

ROCKY GORGE HOMES, LLC

LOTS 5 AND 6, BLOCK A AS SHOWN ON THE SUBDIVISION PLAT TITLED "SUBDIVISION RECORD PLAT, LOTS 1 THROUGH 16, AND PARCELS B&L, BLOCK A, GREENWAY VILLAGE", RECORDED AMONG THE PLAT RECORDS OF MONTGOMERY COUNTY, MARYLAND ON 6/27/03 AS PLAT NO. 22610;

LOTS 26, 27, 28, 29, 30, 43, 44, 45, 46 AND 47, BLOCK A AS SHOWN ON THE SUBDIVISION PLAT TITLED "SUBDIVISION RECORD PLAT LOTS 25 THROUGH 47, PARCELS F&G, BLOCK A, GREENWAY VILLAGE," RECORDED AMONG THE PLAT RECORDS OF MONTGOMERY COUNTY, MARYLAND ON 6/27/03 AS PLAT NO. 22615;

LOTS 48 AND 49, BLOCK A AS SHOWN ON THE SUBDIVISION PLAT TITLED "SUBDIVISION RECORD PLAT, LOTS 48 THROUGH 55, AND PARCELS I, J, K, M, N, Q & R, BLOCK A, GREENWAY VILLAGE", RECORDED AMONG THE PLAT RECORDS OF MONTGOMERY COUNTY, MARYLAND ON 6/27/03 AS PLAT NO. 22616;

LOTS 15 AND 16, BLOCK B AS SHOWN ON THE SUBDIVISION PLAT TITLED "SUBDIVISION RECORD PLAT LOTS 1 THROUGH 21, BLOCK B, GREENWAY VILLAGE," RECORDED AMONG THE PLAT RECORDS OF MONTGOMERY COUNTY, MARYLAND ON 6/27/03 AS PLAT NO. 22611;

Being part of the property acquired by Clarksburg Skylark, LLC, a Maryland Limited Liability Company, from Estelle DeMaio, et al, by deed dated March 26, 2001 and recorded among the Land Records of Montgomery County, Maryland in Liber 19158 at Folio 440.

EXHIBIT "C"BENEFITED LOTS

All those numbered Lots shown on the following plats of subdivision recorded among the Land Records of Montgomery County, entitled:

1. "SUBDIVISION RECORD PLAT, LOTS 1 THROUGH 16, AND PARCELS B&L, BLOCK A, GREENWAY VILLAGE", RECORDED AMONG THE PLAT RECORDS OF MONTGOMERY COUNTY, MARYLAND ON 6/27/03 AS PLAT NO. 22610;
2. "SUBDIVISION RECORD PLAT LOTS 1 THROUGH 21, BLOCK B, GREENWAY VILLAGE," RECORDED AMONG THE PLAT RECORDS OF MONTGOMERY COUNTY, MARYLAND ON 6/27/03 AS PLAT NO. 22611;
3. "SUBDIVISION RECORD PLAT, LOTS 1 THROUGH 23, AND PARCELS A&B, BLOCK C, GREENWAY VILLAGE", RECORDED AMONG THE PLAT RECORDS OF MONTGOMERY COUNTY, MARYLAND ON 6/27/03 AS PLAT NO. 22612;
4. "SUBDIVISION RECORD PLAT LOTS 1 THROUGH 17, AND PARCELS A, B, AND C, BLOCK D, GREENWAY VILLAGE," RECORDED AMONG THE PLAT RECORDS OF MONTGOMERY COUNTY, MARYLAND ON 6/27/03 AS PLAT NO. 22613;
5. "SUBDIVISION RECORD PLAT LOTS 17 THROUGH 24, AND PARCELS C, D, AND E, BLOCK A, GREENWAY VILLAGE," RECORDED AMONG THE PLAT RECORDS OF MONTGOMERY COUNTY, MARYLAND ON 6/27/03 AS PLAT NO. 22614;
6. "SUBDIVISION RECORD PLAT LOTS 25 THROUGH 47, AND PARCELS F&G, BLOCK A, GREENWAY VILLAGE," RECORDED AMONG THE PLAT RECORDS OF MONTGOMERY COUNTY, MARYLAND ON 6/27/03 AS PLAT NO. 22615;
7. "SUBDIVISION RECORD PLAT, LOTS 48 THROUGH 55, AND PARCELS I, J, K, M, N, Q & R, BLOCK A, GREENWAY VILLAGE," RECORDED AMONG THE PLAT RECORDS OF MONTGOMERY COUNTY, MARYLAND ON 6/27/03 AS PLAT NO. 22616;
8. "SUBDIVISION RECORD PLAT, LOTS 56 THROUGH 63, AND PARCEL O, BLOCK A AND LOTS 1 THROUGH 4 AND 16 THROUGH 19, BLOCK E, GREENWAY VILLAGE", RECORDED AMONG THE PLAT RECORDS OF MONTGOMERY COUNTY, MARYLAND ON 10/09/03 AS PLAT NO. 22691;

9. "SUBDIVISION RECORD PLAT LOTS 5 THROUGH 15, BLOCK E AND LOTS 16 THROUGH 20, BLOCK F, GREENWAY VILLAGE," RECORDED AMONG THE PLAT RECORDS OF MONTGOMERY COUNTY, MARYLAND ON 10/09/03 AS PLAT NO. 22692;
10. "SUBDIVISION RECORD PLAT, LOTS 64 THROUGH 68, BLOCK A AND LOTS 1 THROUGH 4, 20 THROUGH 34 AND PARCELS A&B, BLOCK G, GREENWAY VILLAGE," RECORDED AMONG THE PLAT RECORDS OF MONTGOMERY COUNTY, MARYLAND ON 10/09/03 AS PLAT NO. 22693;
11. "SUBDIVISION RECORD PLAT, LOTS 69 THROUGH 78, AND PARCEL P, BLOCK A AND LOTS 5 THROUGH 19, AND PARCELS C AND D, BLOCK G, GREENWAY VILLAGE," RECORDED AMONG THE PLAT RECORDS OF MONTGOMERY COUNTY, MARYLAND ON 10/09/03 AS PLAT NO. 22694;
12. "SUBDIVISION RECORD PLAT, LOTS 1 THROUGH 28, AND PARCELS A, B AND C, BLOCK H AND LOTS 35 THROUGH 41, PARCEL D, BLOCK I, GREENWAY VILLAGE," RECORDED AMONG THE PLAT RECORDS OF MONTGOMERY COUNTY, MARYLAND ON 10/09/03 AS PLAT NO. 22695;
13. "SUBDIVISION RECORD PLAT, PARCELS A&B, BLOCK J, GREENWAY VILLAGE," RECORDED AMONG THE PLAT RECORDS OF MONTGOMERY COUNTY, MARYLAND ON 10/09/03 AS PLAT NO. 22696;
14. "SUBDIVISION RECORD PLAT LOTS 1 THROUGH 37, AND PARCEL A, BLOCK L, LOTS 23 THROUGH 31 AND PARCEL B, BLOCK M, LOTS 1, 15 AND PARCEL B, BLOCK O, AND LOTS 54 THROUGH 57 AND PARCEL E, BLOCK P, GREENWAY VILLAGE," RECORDED AMONG THE PLAT RECORDS OF MONTGOMERY COUNTY, MARYLAND ON 10/09/03 AS PLAT NO. 22697;
15. "SUBDIVISION RECORD PLAT, LOTS 16 THROUGH 27, AND PARCELS A, B AND C, BLOCK K, GREENWAY VILLAGE", RECORDED AMONG THE PLAT RECORDS OF MONTGOMERY COUNTY, MARYLAND ON 10/09/03 AS PLAT NO. 22698;
16. "SUBDIVISION RECORD PLAT, LOTS 1 THROUGH 15, BLOCK F, GREENWAY VILLAGE," RECORDED AMONG THE PLAT RECORDS OF MONTGOMERY COUNTY, MARYLAND ON 11/13/03 AS PLAT NO. 22726;
17. "SUBDIVISION RECORD PLAT, LOTS 1 THROUGH 5, AND PARCELS A, B AND C, BLOCK Q AND PARCEL A, BLOCK R, GREENWAY VILLAGE," RECORDED AMONG THE PLAT RECORDS OF MONTGOMERY COUNTY, MARYLAND ON 11/13/03 AS PLAT NO. 22727;

18. "SUBDIVISION RECORD PLAT, LOTS 1 THROUGH 34, AND PARCELS A, B, C AND E, BLOCK I, GREENWAY VILLAGE," RECORDED AMONG THE PLAT RECORDS OF MONTGOMERY COUNTY, MARYLAND ON 11/13/03 AS PLAT NO. 22728;
19. "SUBDIVISION RECORD PLAT, LOTS 1 THROUGH 15, AND PARCELS D, BLOCK K, GREENWAY VILLAGE," RECORDED AMONG THE PLAT RECORDS OF MONTGOMERY COUNTY, MARYLAND ON 11/13/03 AS PLAT NO. 22729;
20. "SUBDIVISION RECORD PLAT LOTS 6 THROUGH 9, AND PARCELS D AND E, BLOCK Q, GREENWAY VILLAGE," RECORDED AMONG THE PLAT RECORDS OF MONTGOMERY COUNTY, MARYLAND ON 11/13/03 AS PLAT NO. 22730;
21. "SUBDIVISION RECORD PLAT, LOTS 1 THROUGH 22, AND PARCELS A AND C, BLOCK M, GREENWAY VILLAGE", RECORDED AMONG THE PLAT RECORDS OF MONTGOMERY COUNTY, MARYLAND ON 11/13/03 AS PLAT NO. 22731;
22. "SUBDIVISION RECORD PLAT, LOTS 1 THROUGH 5, BLOCK P AND LOTS 10 THROUGH 15, BLOCK Q, GREENWAY VILLAGE", RECORDED AMONG THE PLAT RECORDS OF MONTGOMERY COUNTY, MARYLAND ON 11/13/03 AS PLAT NO. 22732;

Being part of the property acquired by Clarksburg Skylark, LLC, a Maryland Limited Liability Company, from Estelle DeMaio, et al, by deed dated March 26, 2001 and recorded among the Land Records of Montgomery County, Maryland in Liber 19158 at Folio 440.

26717 1591

TAX ID NUMBERS

BLOCK A

Lot 1	16 02 03413226
Lot 2	16 02 03413237
Lot 3	16 02 03413248
Lot 4	16 02 03413250
Lot 5	16 02 03413261
Lot 6	16 02 03413272
Lot 7	16 02 03413283
Lot 8	16 02 03413294
Lot 9	16 02 03413306
Lot 10	16 02 03413317
Lot 11	16 02 03413328
Lot 12	16 02 03413330
Lot 13	16 02 03413341
Lot 14	16 02 03413352
Lot 15	16 02 03413363
Lot 16	16 02 03413374
Lot 17	16 02 03414072
Lot 18	16 02 03414083
Lot 19	16 02 03414094
Lot 20	16 02 03414106
Lot 21	16 02 03414117
Lot 22	16 02 03414128
Lot 23	16 02 03414130
Lot 24	16 02 03414141
Lot 25	16 02 03414174
Lot 26	16 02 03414185
Lot 27	16 02 03414196
Lot 28	16 02 03414208
Lot 29	16 02 03414210
Lot 30	16 02 03414221
Lot 31	16 02 03414232
Lot 32	16 02 03414243
Lot 33	16 02 03414254
Lot 34	16 02 03414265
Lot 35	16 02 03414276
Lot 36	16 02 03414287
Lot 37	16 02 03414298
Lot 38	16 02 03414301
Lot 39	16 02 03414312
Lot 40	16 02 03414323
Lot 41	16 02 03414334
Lot 42	16 02 03414345
Lot 43	16 02 03414356
Lot 44	16 02 03414367
Lot 45	16 02 03414378

TAX ID NUMBERS (Cont'd)

BLOCK A (Cont'd)

Lot 46	16 02 03414380
Lot 47	16 02 03414391
Lot 48	16 02 03414471
Lot 49	16 02 03414482
Lot 50	16 02 03414493
Lot 51	16 02 03414505
Lot 52	16 02 03414516
Lot 53	16 02 03414527
Lot 54	16 02 03414538
Lot 55	16 02 03414540

BLOCK B

Lot 1	16 02 03413385
Lot 2	16 02 03413396
Lot 3	16 02 03413408
Lot 4	16 02 03413410
Lot 5	16 02 03413421
Lot 6	16 02 03413432
Lot 7	16 02 03413443
Lot 8	16 02 03413454
Lot 9	16 02 03413465
Lot 10	16 02 03413476
Lot 11	16 02 03413487
Lot 12	16 02 03413498
Lot 13	16 02 03413501
Lot 14	16 02 03413512
Lot 15	16 02 03413523
Lot 16	16 02 03413534
Lot 17	16 02 03413545
Lot 18	16 02 03413556
Lot 19	16 02 03413657
Lot 20	16 02 03413578
Lot 21	16 02 03413580

BLOCK C

Lot 1	16 02 03413614
Lot 2	16 02 03413625
Lot 3	16 02 03413636
Lot 4	16 02 03413647
Lot 5	16 02 03413658
Lot 6	16 02 03413660
Lot 7	16 02 03413671
Lot 8	16 02 03413682
Lot 9	16 02 03413693

2000000 1000000

TAX ID NUMBERS (Cont'd)

BLOCK C (Cont'd)

Lot 10	16 02 03413705
Lot 11	16 02 03413716
Lot 12	16 02 03413727
Lot 13	16 02 03413738
Lot 14	16 02 03413740
Lot 15	16 02 03413751
Lot 16	16 02 03413762
Lot 17	16 02 03413773
Lot 18	16 02 03413784
Lot 19	16 02 03413795
Lot 20	16 02 03413807
Lot 21	16 02 03413818
Lot 22	16 02 03413820
Lot 23	16 02 03413831

BLOCK D

Lot 1	16 02 03413875
Lot 2	16 02 03413886
Lot 3	16 02 03413897
Lot 4	16 02 03413900
Lot 5	16 02 03413911
Lot 6	16 02 03413922
Lot 7	16 02 03413933
Lot 8	16 02 03413944
Lot 9	16 02 03413955
Lot 10	16 02 03413966
Lot 11	16 02 03413977
Lot 12	16 02 03413988
Lot 13	16 02 03413990
Lot 14	16 02 03414004
Lot 15	16 02 03414015
Lot 16	16 02 03414026
Lot 17	16 02 03414037

AS TO THE REMAINING LOTS 02-00019258

267171 162

State of Maryland Land Instrument Intake Sheet
 Baltimore City County: Montgomery

Information provided is for the use of the Clerk's Office, State Department of Assessments and Taxation, and County Finance Office Only.
(Type or Print in Black Ink Only—All Copies Must Be Legible)

Space Reserved for Circuit Court Recording Validation

Check Box if addendum Intake Form is Attached.

1 Type(s) of Instruments	<input type="checkbox"/> Deed	<input type="checkbox"/> Mortgage	<input type="checkbox"/> Other	<input type="checkbox"/> Other			
	<input type="checkbox"/> Deed of Trust	<input type="checkbox"/> Lease	<input checked="" type="checkbox"/> Declaration				
2 Conveyance Type Check Box	<input type="checkbox"/> Improved Sale	<input type="checkbox"/> Unimproved Sale	<input type="checkbox"/> Multiple Accounts	<input type="checkbox"/> Not an Arms-Length Sale [9]			
	Arms-Length [1]	Arms-Length [2]	Arms-Length [3]				
3 Tax Exemptions (if Applicable)	<input type="checkbox"/> Recordation						
	<input type="checkbox"/> State Transfer						
4a Cite of Explain Authority	<input type="checkbox"/> County Transfer						
4b Consideration and Tax Calculations	Consideration Amount		Finance Office Use Only				
	Purchase Price/Consideration	\$	Transfer and Recordation Tax Consideration				
	Any New Mortgage	\$	Transfer Tax Consideration	\$			
	Balance of Existing Mortgage	\$	X () % =	\$			
	Other:	\$	Less Exemption Amount -	\$			
	Other:	\$	Total Transfer Tax =	\$			
	Other:	\$	Recordation Tax Consideration	\$			
Full Cash Value	\$	X () per \$500 =	\$				
		TOTAL DUE	\$				
5 Fees	Amount of Fees		Doc. 1	Doc. 2			
	Recording Charge	\$	2.0	\$			
	Surcharge	\$	75	\$			
	State Recordation Tax	\$		\$			
	State Transfer Tax	\$		\$			
	County Transfer Tax	\$		\$			
	Other	\$		\$			
	Other	\$		\$			
6 Description of Property SDAT requires submission of all applicable information. A maximum of 40 characters will be indexed in accordance with the priority cited in Real Property Article Section 3-104(g)(3)(i).	District	Property Tax ID No. (1)	Grantor Liber/Folio	Map	Parcel No.	Var. LOG <input type="checkbox"/> (5)	
	Subdivision Name		Lot (3a)	Block (3b)	Sect/AR (3c)	Plat Ref.	SqFt/Acreage (4)
	Location/Address of Property Being Conveyed (2)						
	Other Property Identifiers (if applicable)				Water Meter Account No.		
	Residential <input type="checkbox"/> or Non-Residential <input type="checkbox"/>	Fee Simple <input type="checkbox"/> or Ground Rent <input type="checkbox"/>	Amount:				
	Partial Conveyance? <input type="checkbox"/> Yes <input type="checkbox"/> No	Description/Amt. of SqFt/Acreage Transferred:					
	If Partial Conveyance, List Improvements Conveyed:						
	Doc. 1 - Grantor(s) Name(s)			Doc. 2 - Grantor(s) Name(s)			
	Doc. 1 - Owner(s) of Record, if Different from Grantor(s)			Doc. 2 - Owner(s) of Record, if Different from Grantor(s)			
	Doc. 1 - Grantee(s) Name(s)			Doc. 2 - Grantee(s) Name(s)			
New Owner's (Grantee) Mailing Address							
Doc. 1 - Additional Names to be Indexed (Optional)							
Doc. 2 - Additional Names to be Indexed (Optional)							
10 Contact/Mail Information	Instrument Submitted By or Contact Person						
	Name:	<u>Hal J Besnick</u>					
	Firm:	<u>The Fundation Title Group Suite 400B</u>					
	Address:	<u>10025 Governor Winfield Pkwy Columbia MD 21044 Phone: (410) 561-5300</u>					
11 IMPORTANT: BOTH THE ORIGINAL DEED AND A PHOTOCOPY MUST ACCOMPANY EACH TRANSFER	Assessment Information	Return to Contact Person <input checked="" type="checkbox"/>					
	Yes <input type="checkbox"/> No <input type="checkbox"/>	Hold for Pickup <input type="checkbox"/>					
	Yes <input type="checkbox"/> No <input type="checkbox"/>	Return Address Provided <input type="checkbox"/>					
Assessment Use Only - Do Not Write Below This Line							
<input type="checkbox"/> Terminal Verification	<input type="checkbox"/> Agricultural Verification	<input type="checkbox"/> Whole	<input type="checkbox"/> Part	<input type="checkbox"/> Tran. Process Verification			
Transfer Number:	Date Received:	Deed Reference:		Assigned Property No.:			
Year	20	20	Geo.	Map	Sub	Block	
Land			Zoning	Grid	Plat	Lot	
Buildings			Use	Parcel	Section	Doc. Cd.	
Total			Town Cd.	Et. St.	Et. Cd.		
REMARKS:							

Space Reserved for Court Validation

Distribution: White - Clerk's Office
Canary - SDAT
Pink - Office of Finance
Goldwood - Preparer
ACC-CC-300 (8/95)

DECLARATION OF PRIVATE INFRASTRUCTURE CHARGES

THIS DECLARATION OF PRIVATE INFRASTRUCTURE CHARGES ("Declaration") is made this 31st day of August, 2004, by and among CLARKSBURG VILLAGE INVESTMENTS, INC., a Virginia corporation, CLARKSBURG VILLAGE, L.C., a Virginia limited liability company, formerly known of record as Clarksburg Village Partnership, and ELM STREET HOLDINGS, L.L.C., a Delaware limited liability company, formerly known of record as STRINGTOWN INVESTMENTS, L.L.C., (hereinafter collectively referred to as "Declarant"), for the benefit of C.V. PRIVATE INFRASTRUCTURE COMPANY, L.C., a Virginia limited liability company, or its assigns (hereinafter referred to as the "Infrastructure Company").

WITNESSETH:

WHEREAS, Declarant is or was the owner (any owner of any Lot contained in the Property shall hereinafter be referred to as an "Owner") of certain real property located in Montgomery County, Maryland, in the subdivision known as "Clarksburg Village", (the "Property") as more particularly described on Exhibit "A" attached hereto and made a part hereof. The Property has been or will be subdivided into a number of separate subdivided lots of record. Phase 1 of the Clarksburg Village Subdivision is currently planned to consist of 510 single family homes, 388 townhomes, 60 piggyback townhouse condominium units and 48 garden condominium units or apartments. The Property may or may not be expanded to include Phase 2. If the Property is expanded to include Phase 2, Phase 2 is currently projected to consist of 662 single family homes, 472 townhomes, 50 piggyback townhouse condominium units, 473 multi family units. As plans for the Property have not yet been finally approved, all of these projections are subject to change. Such lots, whether single family lots, townhouse lots, piggyback townhouse condominium units, garden condominium units, multi family units or apartments being hereinafter referred to individually as a "Lot" and collectively as the "Lots". The terms "Lot" or "Lots" shall include only those portions of the Property upon which the planned or actual improvements are primarily intended for use and occupancy as a residential dwelling and shall not include common areas or property intended for public use; and

RECORDING FEE 75.00
TIP FD SURE 28.00
TOTAL 103.00
Rest 10000 Rert # 58859
Per 17-100 Rert # 4855

WHEREAS, Declarant has received Site Plan Approval # 8-00002 from Maryland-National Capital Park and Planning Commission for development of the Clarksburg Village Subdivision; and

WHEREAS, Declarant intends to provide the Lots (the "Benefited Lots") with certain infrastructure improvements (hereinafter referred to as the "Infrastructure Improvements"); and

WHEREAS, by the recordation of this Declaration, the Declarant desires to establish certain charges upon the Benefited Lots, to be paid to the Infrastructure Company, its successors and assigns, whereby costs related to the construction of the Infrastructure Improvements serving the Benefited Lots is to be covered or paid by the Owners of the Benefited Lots, excluding Declarant and any "Builder" (as defined below),

2004 SEP 15 A 9:04

FILED
MOLLY Q. RUHL
CLERK'S OFFICE
MONTGOMERY COUNTY
M.D.

75
20.00

in twenty-six (26) equal installments over a period of twenty-six (26) years, except, if applicable, for the pro-ration of the first and last installments as provided below, provided that the Infrastructure Company shall have the right to collect "Infrastructure Charges" (as defined below) in advance and to collect "Infrastructure Charges" in monthly, quarterly, bi-annual, or annual installments, as provided herein. Each such installment, whether or not prorated, is hereinafter referred to individually as an "Infrastructure Charge" and collectively as the "Infrastructure Charges." The term "Builder" as used herein shall mean and refer to any person or other legal entity that acquires one (1) or more Benefited Lots from Declarant, its successors and assigns for the purpose of constructing residential dwelling units for sale or lease to others.

NOW, THEREFORE, Declarant hereby declares that all of the Benefited Lots now or hereafter included within the Property shall be held, conveyed, hypothecated, encumbered, sold, leased, rented, occupied and used subject to the covenants, conditions, restrictions, obligations and charges set forth in this Declaration, which are for the purpose of reimbursing the Infrastructure Company for the costs relating to the Infrastructure Charges serving the Benefited Lots, and which shall run with title to such Benefited Lots and be binding on all parties having any right, title or interest in all or any portion of such Benefited Lots, their respective heirs, personal representatives, successors, transferees and assigns, and which shall inure to the benefit of the Infrastructure Company and its respective successors, transferees and assigns:

1. INCORPORATION OF RECITALS. The recitals set forth above are hereby incorporated in and made a material part of this Declaration.

2. ESTABLISHMENT OF LIEN AND PERSONAL OBLIGATION. Each Owner of any Benefited Lot, other than Declarant or any Builder, by acceptance of a deed therefor, whether or not it shall be so expressed in such deed; (a) covenants and agrees to pay to the Infrastructure Company all Infrastructure Charges, interest, costs, late fees and attorneys' fees which are due and unpaid as of the date such Owner accepts title to such Benefited Lot; (b) covenants and agrees to pay to the Infrastructure Company all future Infrastructure Charges established hereby for as long as such Owner shall be a record Owner of a fee simple interest in such Benefited Lot; (c) grants to the Infrastructure Company a lien to secure payment of the aforementioned Infrastructure Charges, together with interest, costs, late fees and attorneys' fees, which lien shall be a continuing lien upon the Benefited Lot against which each such Infrastructure Charge is made; and (d) provided the requirements of the Maryland Contract Lien Act, if applicable, have been fulfilled, grants to the Infrastructure Company a power of sale, and assents to the entry of a decree and order for the sale of said Benefited Lot upon a default by the Owner under this Declaration. Each such Infrastructure Charge, together with interest, costs, late fees and attorneys' fees, shall also be the joint, several, personal obligation of the Owner of the Benefited Lot at the time when the Infrastructure Charge became due. In the event that any Owner shall fail to pay the Infrastructure Charge assessed to that Owner's Benefited Lot, the Infrastructure Company shall be entitled to all legal and/or equitable relief as may be available under applicable law, including without limitation, the right: (i) to accelerate and declare to be immediately due and payable the full amount of all future installments

of the Infrastructure Charges assessed against said Owner's Benefited Lot (discounted to present value in accordance with Paragraph 7 hereof); (ii) to bring an action at law against said Benefited Lot Owner personally obligated to pay the Infrastructure Charges; (iii) to foreclose on the lien against the Benefited Lot or Benefited Lots then belonging to said Owner in a manner now or hereafter provided for the foreclosure of mortgages, deeds of trust or other liens on real property in the State of Maryland containing a power of sale or consent to a decree, and subject to the same requirements, both substantive and procedural, or as may otherwise from time to time be provided by law; (iv) to foreclose on the lien against the Benefited Lot then belonging to said Owner in the manner now or hereafter provided for pursuant to the Maryland Contract Lien Act; and/or (v) to institute such other legal and/or equity proceeding as may otherwise from time to time be provided by applicable law in any of which events, interest, costs, late fees and attorneys' fees equal to twenty percent (20%) of the sum claimed, shall be added to the amount of the Infrastructure Charges then due. A certificate in writing, signed by a representative of the Infrastructure Company (the "Certificate") shall be given promptly after receipt by the Infrastructure Company of a written request for such certificate from any Owner of a Benefited Lot liable for the Infrastructure Charges, setting forth the amount of any accrued and unpaid Infrastructure Charges, interest, costs, late fees and attorneys' fees with respect to the Benefited Lot. Such Certificate shall be binding on the Infrastructure Company as of the date of issuance. A charge not to exceed Fifty Dollars (\$50.00) may be collected by the Infrastructure Company in advance for each such Certificate so issued. No purchaser from an Owner shall be liable for, nor shall any Lot be conveyed subject to a lien for, any accrued and unpaid Infrastructure Charges greater than the amount stated in the Certificate provided by the Infrastructure Company in accordance with this section of this Declaration. At such time as the Owner of any Lot which is subject to the terms of this Declaration conveys such Lot to another party, such Owner shall, within fifteen (15) days of the date of such transfer, notify the Infrastructure Company in writing of the name and address of the new Owner of the Lot (the "Notice"). Written notices to the Infrastructure Company should be directed to the following address or to such other address as the Infrastructure Company may specify:

C.V. Private Infrastructure Company, L.C.
6820 Elm Street, Suite 200
McLean, Virginia 22101

An Owner's personal liability for payment of Infrastructure Charges shall not terminate unless and until the Notice is received by the Infrastructure Company. Upon timely receipt of the Notice by the Infrastructure Company, an Owner's personal liability for payment of Infrastructure Charges shall terminate effective the date of the transfer of the Lot. All rights and remedies contained in this Declaration are cumulative, and the Infrastructure Company shall also have all other rights and remedies provided by law or in equity.

3. COMMENCEMENT DATE. The Infrastructure Charges described herein shall commence with respect to each Benefited Lot on the later to occur of the following: (i) the date of conveyance of said Benefited Lot by Declarant or any Builder to any other

Owner, other than Declarant or a Builder; (ii) the date on which Montgomery County, Maryland advises Declarant that the Property will not be within the Clarksburg Development District, or (iii) such later date as the Infrastructure Company shall determine (the "Commencement Date"). The Infrastructure Charges for each of the Benefited Lots shall terminate (except as to any unpaid Infrastructure Charges, interest, costs, late fees and attorneys' fees) with respect to each Benefited Lot on the date which is approximately twenty-six (26) years following the Commencement Date for each Benefited Lot, unless sooner paid in full as hereinafter provided.

Following the Commencement Date, the Infrastructure Charges shall be paid annually, in advance, on February 1, by each Benefited Lot Owner (other than Declarant or any Builder) to the Infrastructure Company in equal installments as established by the Infrastructure Company, depending upon the year in which the Commencement Date occurs. The actual amount of the Infrastructure Charges shall be established by the Infrastructure Company prior to the Commencement Date for each type of Lot described herein by written notice to all Owners prior to the Commencement Date. If the Commencement Date were to occur in calendar year 2004, and the Infrastructure Charges were established, based upon December 2003 living unit values, the Infrastructure Charge would be established within a range of between approximately Six Hundred Dollars (\$600.00) and One Thousand Five Hundred Dollars (\$1,500.00) depending upon living unit type. The actual amount of the Infrastructure Charge may exceed the foregoing amounts. The actual amount of the Infrastructure Charges will be increased by two (2%) percent per year commencing with the second calendar year of payment. Payments due hereunder shall be due and payable on February 1 of each year subsequent to the Commencement Date; provided however, that the first payment shall be prorated according to the number of days elapsed from the Commencement Date to January 31 of the current calendar year, and the 27th and final payment shall be the applicable annual payment less the prorated amount paid as the first payment. Notwithstanding the foregoing, the Infrastructure Company, in its sole and absolute discretion, may allow or can require: (i) any Owner to pay the annual Infrastructure Charges in monthly, quarterly or bi-annual installments as determined by the Infrastructure Company; (iii) Owner's mortgagee to escrow and pay to the Infrastructure Company the Infrastructure Charges; or (iv) the management company being utilized by the homeowners association for the Property (the "Management Company") to collect the Infrastructure Charges from any Owner subject to this Declaration and pay the same to the Infrastructure Company. Any Infrastructure Charges not paid within thirty (30) days after the due date shall bear interest from the due date until paid at the rate determined by the Infrastructure Company not to exceed the maximum rate of interest permitted by law [or such lesser sum as the Department of Veterans Affairs ("VA") or the Federal Housing Administration ("FHA") may specify if any Benefited Lot subject to the Declaration is then encumbered by a deed of trust or mortgage which is guaranteed by the VA or insured by the FHA]. In addition to bearing interest, the Infrastructure Company may collect a reasonable late fee for any Infrastructure Charge which is thirty (30) days or more delinquent. No Owner may waive or otherwise escape liability for Infrastructure Charges provided for herein by non-use of the Infrastructure Improvements or abandonment of a Benefited Lot.

4. MANAGEMENT COMPANY. The Infrastructure Company may engage the Management Company to collect the Infrastructure Charges due from all Benefited Lot Owners within the Property at the Infrastructure Company's expense.

5. COVENANT RUNNING WITH THE LAND. All provisions of this Declaration, including the benefits and burdens, shall touch, concern and run with the land; be binding upon the Owners and their respective heirs, personal representatives, successors, transferees and assigns; and inure to the benefit of Declarant, the Infrastructure Company and their respective successors, transferees and assigns. Any sale, lease, mortgage, or other disposition or transfer of the Property or any Benefited Lot created therein shall be subject in all respects to the lien, operation and effect of this Declaration. The sale or transfer of any Benefited Lot shall not affect any lien imposed against such Benefited Lot pursuant to this Declaration. The purchaser of a Benefited Lot shall be jointly and severally liable with the selling Benefited Lot Owner for all unpaid Infrastructure Charges, interest, costs, late fees and attorneys' fees against the Benefited Lot, without prejudice to the purchaser's right to recover from the selling Benefited Lot Owner amounts paid by the purchaser therefor; provided, however, that no purchaser from an Owner, other than Declarant or any Builder, shall be liable for, nor shall any Benefited Lot be conveyed subject to a lien for, any accrued and unpaid Infrastructure Charges, interest, costs, late fees, or attorneys' fees greater than the amount stated in any written Certificate provided by the Infrastructure Company in accordance with Paragraph 2 of this Declaration. No sale or transfer shall relieve any Benefited Lot or the current Owner thereof from liability for any Infrastructure Charges, interest, costs, late fees and attorneys' fees thereafter becoming due or from the lien thereof.

6. BILLING STATEMENT. All Infrastructure Charges, interest, costs, late fees and attorneys' fees payable in accordance with this Declaration shall be payable to the Infrastructure Company, its successors and assigns, in accordance with such billing statements as may be issued by the Infrastructure Company, or its designee, including the Management Company. Failure to receive a billing statement for the Infrastructure Charges shall not relieve a Benefited Lot Owner of such Owner's liability to pay any Infrastructure Charges, interest, costs, late fees, or attorneys' fees due hereunder.

7. PREPAYMENT. Any Benefited Lot Owner may prepay at any time the Infrastructure Charges attributable to such Owner's Benefited Lot by paying the amounts as computed from time to time by the Infrastructure Company, on or before the next due date for that Benefited Lot; provided, however, that such Benefited Lot Owner is not then in default under this Declaration, and is then current in the payment of all then due installments, and any interest, costs, late fees and attorneys' fees. With respect to each Benefited Lot, the prepayment applicable to any given time shall be an amount equal to the present value of the sum of each then outstanding installment of the Infrastructure Charges applicable to the Benefited Lot, discounted at a rate of two percent (2%) per annum. In return for such prepayment and payment of all outstanding interest, costs, late fees and attorneys' fees, the Benefited Lot Owner shall receive a full release hereunder, in recordable form, from the Infrastructure Company certifying that all payments hereunder have been so prepaid. No Owner, or former Owner, shall be

entitled to reimbursement from Declarant or the Infrastructure Company of any prepaid Infrastructure Charges.

8. ASSIGNMENT, TRANSFER. All or any portion of the rights, reservations, easements, interests, exemptions, privileges, or powers of the Infrastructure Company hereunder may be assigned and transferred (exclusively or non-exclusively) by the Infrastructure Company to any other individual or entity, without notice to the Benefited Lot Owners. the Infrastructure Company shall have the right to transfer, assign, pledge, or in any other fashion encumber its or their right to any or all of the Infrastructure Charges, interest, costs, late fees and attorneys' fees due hereunder.

9. SUBORDINATION. The lien for Infrastructure Charges provided for herein shall be subordinate to the lien of mortgages or deeds of trust as to which this lien has been expressly subordinated by written, recorded document only. The sale or transfer of any Benefited Lot shall not affect the lien. However, the sale or transfer of any Benefited Lot pursuant to the foreclosure of the mortgage or deed of trust to which this lien has been subordinated as provided above, or any proceeding in lieu thereof, shall extinguish the lien (but not the personal obligation) as to Infrastructure Charges which became due prior to such sale or transfer. No sale or transfer shall relieve such Lot from liability for any Infrastructure Charges thereafter becoming due or from the lien thereof. At such time as any Lots owned by Lender are transferred or conveyed by Lender to any successor Owner, including, without limitation, any Builder (referred to in this Paragraph as a "Successor Owner"), the Infrastructure Charges provided for herein shall automatically recommence; provided, however, that any provision of this Declaration to the contrary notwithstanding, the Infrastructure Charges payable with respect to the Lot or Lots owned by any such Successor Owner shall continue and shall not terminate until such time as the number of installments of Infrastructure Charges specified in Paragraph 3 of this Declaration have been paid in full with respect to each such Lot by the Successor Owner, and its successors, transferees and assigns (not including any interest, costs, late fees or attorneys fees which accrue prior to conveyance of such Lot or Lots from Lender to the Successor Owner).

10. WITHDRAWAL AND ANNEXATION. For a period of fifteen (15) years from the date of recordation of this Declaration, Declarant may withdraw any Benefited Lot from the operation and effect of this Declaration or annex into the operation and effect of the Declaration any additional Lots (individually "Annexed Benefited Lot" and collectively "Annexed Benefited Lots") within the Property, provided that: (i) Declarant is the Owner of such Benefited Lot and/or Annexed Benefited Lot at the time of withdrawal or annexation; or (ii) if Declarant is not the Owner of such Benefited Lot and/or Annexed Benefited Lot, Declarant withdraws such Benefited Lot or annexes such Annexed Benefited Lot with the written consent of the Owner thereof. Such withdrawn Benefited Lot shall no longer be subject to the covenants, conditions, restrictions, obligations and charges of this Declaration except for: (i) any rights, reservations, exemptions, powers, or privileges reserved to Declarant pursuant to this Declaration which affect the withdrawn Benefited Lot; and (ii) any other rights, reservations, exemptions, powers or privileges which are expressly reserved to Declarant in the instrument effectuating such withdrawal. Any Annexed Benefited Lot, shall be subject to the covenants, conditions,

restrictions, obligations and charges of the Declaration as amended or supplemented. Declarant, however, specifically reserves the right to increase the amount of the Infrastructure Charges for any Annexed Benefited Lot. Such withdrawal or annexation shall be made by recording a Supplementary Declaration among the Land Records of Montgomery County, Maryland, withdrawing the effect of the covenants, conditions, restrictions, obligations and charges of this Declaration from the withdrawn Benefited Lot and/or subjecting the Annexed Benefited Lots to the covenants, conditions, restrictions, obligations and charges of the Declaration.

11. RESERVATION OF POWER OF ATTORNEY. Declarant and the Infrastructure Company hereby reserve for themselves (and their successors, transferees and assigns to whom such right has been specifically assigned by either of them in writing), for a period of fifteen (15) years from the date of the recordation of this Declaration among the Land Records of Montgomery County, Maryland, the right to execute on behalf of all contract purchasers, Owners, mortgagees, and other lienholders or parties claiming a legal or equitable interest in all or any portion of the Property any such agreements, documents, amendments and supplements to this Declaration which may be required by the Federal National Mortgage Association, the FHA, the VA, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation, Montgomery County, Maryland, any governmental or quasi-governmental agency or authority having regulatory jurisdiction over the Property, any public or private utility company designated by either of them, any institutional lender or title insurance company designated by either of them, or as may be required to comply with any applicable laws or regulations.

(a) By acceptance of a deed to all or any portion of the Property, or by the acceptance of any other legal or equitable interest in all or any portion of the Property, each and every such contract purchaser, Owner, mortgagee and other lienholder or party having a legal or equitable interest in all or any portion of the Property does automatically and irrevocably name, constitute, appoint and confirm Declarant and/or the Infrastructure Company (and its successors, transferees and assigns to whom such right has been specifically assigned by either of them in writing) as attorney-in-fact for the purpose of executing such agreement, document, amendment, supplement and other instrument(s) necessary to effect the foregoing subject to the limitations set forth herein.

(b) No such agreement, documents, amendment, supplement or other instrument which materially and adversely affects the value of the Property, or any portion thereof, or substantially increases the financial obligations of an Owner, shall be made without the prior written consent of the affected Owner(s) and all owners of any mortgage(s) encumbering the portion of the Property owned by the affected Owner(s). Any such agreement, document, amendment, supplement or instrument which materially and adversely affects the priority or validity of any mortgage which encumbers the Property, or any portion thereof, shall not be made without the prior written consent of the owners of all such mortgages.

(c) The power of attorney aforesaid is expressly declared and

acknowledged to be coupled with an interest in the subject matter hereof and the same shall run with the title to all and any portion of the Property, and be binding upon the heirs, personal representatives, successors, transferees and assigns of any of the foregoing parties. Further, said power of attorney shall not be affected by the death or disability of any principal and is intended to deliver all right, title and interest of the principal in and to said power of attorney. Said power of attorney shall be vested in Declarant and the Infrastructure Company (and their successors, transferees and assigns to whom such right has been specifically assigned by Declarant or the Infrastructure Company in writing) until the expiration of same.

12. WAIVER. No restriction, condition, obligation or provision of this Declaration shall be deemed to have been abrogated or waived by reason of any failure or failures to enforce the same.

13. SEVERABILITY. The terms and provisions of this Declaration are severable and in the event that any term or provision of this Declaration is invalid or unenforceable for any reason, the remaining terms and provisions hereof shall remain in full force and effect,

14. VOIDANCE. In the event that Montgomery County, Maryland includes the Property within the Clarksburg Village Development District (the "Tax District"), a special tax district which may be created by Montgomery County, Maryland to reimburse the cost of certain public infrastructure which benefits the Property, all tax charges created by this Declaration shall terminate and the lien created by this Declaration on the Property shall not apply, shall be null and void and shall be released,

15. CAPTIONS AND GENDER. The captions contained in this Declaration are for convenience only and are a part of this Declaration and are not intended in any way to limit or enlarge the terms and provisions of this Declaration. Whenever the context so requires, the male or female shall include all genders and the singular shall include the plural.

16. ENFORCEMENT AND RECORDATION. This Declaration shall be construed and enforced in accordance with the laws of the State of Maryland, and shall be effective upon recordation among the Land Records of Montgomery County, Maryland.

17. COUNTERPARTS. This Declaration may be executed in any number of counterparts, each of which shall be an original but all of which together shall constitute one and the same instrument.

[SIGNATURES FOLLOW]

28281 068

IN WITNESS WHEREOF, the undersigned parties have executed this instrument
this 31st day of August, 2004.

DECLARANT:

CLARKSBURG VILLAGE INVESTMENTS,
INC.

By: Thomas E. Marshall
Thomas E. Marshall, Vice President

CLARKSBURG VILLAGE, L.C.

By: Thomas E. Marshall
Thomas E. Marshall, Manager

ELM STREET HOLDINGS, L.L.C.

By: Thomas E. Marshall
Thomas E. Marshall, Manager

[JURATS FOLLOW]

28281 069

STATE OF VIRGINIA, FAIRFAX COUNTY, to wit:

I HEREBY CERTIFY that on the 31st day of August, 2004, before me, the subscriber, a Notary Public in and for the jurisdiction aforesaid, personally appeared Thomas E. Marshall, who acknowledged himself to be the Vice President of Clarksburg Village Investments, Inc., a Virginia corporation, known to me (or satisfactorily proven) to be the person whose name is subscribed to the within instrument, and acknowledged that he executed the same for the purpose therein contained as the duly authorized principal of said company by himself as Vice President thereof.

WITNESS my hand and notarial seal the year and day first above written.

Claudine M. B. Thomas
NOTARY PUBLIC
Claudine M. B. Thomas
Printed Name

My Commission Expires: 3-31-07. I was commissioned a notary public as Claudine M. Thomas.

STATE OF VIRGINIA, FAIRFAX COUNTY, to wit:

I HEREBY CERTIFY that on the 31st day of August, 2004, before me, the subscriber, a Notary Public in and for the jurisdiction aforesaid, personally appeared Thomas E. Marshall, who acknowledged himself to be the Manager of Clarksburg Village, L.C., a Virginia limited liability company, known to me (or satisfactorily proven) to be the person whose name is subscribed to the within instrument, and acknowledged that he executed the same for the purpose therein contained as the duly authorized principal of said company by himself as Manager thereof.

WITNESS my hand and notarial seal the year and day first above written.

Claudine M. B. Thomas
NOTARY PUBLIC
Claudine M. B. Thomas
Printed Name

My Commission Expires: 3-31-07. I was commissioned a notary public as Claudine M. Thomas.

[JURATS CONTINUE ON FOLLOWING PAGE]

STATE OF VIRGINIA, FAIRFAX COUNTY, to wit:

I HEREBY CERTIFY that on the 31st day of August, 2000, before me, the subscriber, a Notary Public in and for the jurisdiction aforesaid, personally appeared Thomas E. Marshall, who acknowledged himself to be the Manager of Elm Street Holdings, L.L.C., a Virginia limited liability company, known to me (or satisfactorily proven) to be the person whose name is subscribed to the within instrument, and acknowledged that he executed the same for the purpose therein contained as the duly authorized principal of said company by himself as Manager thereof.

WITNESS my hand and notarial seal the year and day first above written.

Claudine M. B. Thomas

NOTARY PUBLIC

Claudine M. B. Thomas

Printed Name

My Commission Expires: 3-31-07. *I was commissioned a notary public as Claudine M. B. Thomas.*

[SIGNATURES CONTINUE ON FOLLOWING PAGES]

28281 071

C.V. PRIVATE INFRASTRUCTURE
COMPANY, L.C.

By: Thomas E. Marshall
THOMAS E. MARSHALL (Name)
MANAGER (Title)

STATE OF VIRGINIA, FAIRFAX COUNTY, to wit:

I HEREBY CERTIFY that on the 31st day of August, 2004, before me, the subscriber, a Notary Public in and for the jurisdiction aforesaid, personally appeared Thomas E. Marshall who acknowledged him/herself to be the Manager of C.V. Private Infrastructure Company, L.C., known to me (or satisfactorily proven) to be the person whose name is subscribed to the within instrument, and acknowledged that he/she executed the same for the purpose therein contained as the duly authorized principal of said company by him/herself as Manager thereof.

WITNESS my hand and notarial seal the year and day first above written.

Claudine M. Thomas
NOTARY PUBLIC
Claudine M. R. Thomas
Printed Name

My Commission Expires: 3-31-07. I was commissioned a
notary public as Claudine M. Blome.

28281 072

Exhibit A

Property Initially Subject to the Declaration

Lots 1 through 3 and Parcel A, Block A, in a subdivision known as "Clarksburg Village" as per plat thereof recorded among the Land Records of Montgomery County, Maryland as Plat No. 22925.

Lots 16 through 22 and Parcels C and D, Block D, Lots 1 through 4, 10 through 23, 52 and 53 and Parcels A, B and C, Block F, in a subdivision known as "Clarksburg Village" as per plat thereof recorded among the Land Records of Montgomery County, Maryland as Plat No. 22926.

Lots 13 through 15 and Parcel E, Block D, and Lots 24 through 33 and 45 through 51, Block F, in a subdivision known as "Clarksburg Village" as per plat thereof recorded among the Land Records of Montgomery County, Maryland as Plat No. 22927.

Lots 1 through 12, Block D, Lots 34 through 44, and Parcel D, Block F, and Lots 1 through 5, 20 through 24, and Parcels A, B and C, Block M, in a subdivision known as "Clarksburg Village" as per plat thereof recorded among the Land Records of Montgomery County, Maryland as Plat No. 22928.

Lots 16 through 24 and Parcels C and D, Block G, Parcel B, Block H, Lots 10 through 13 and Parcel A, Block K, and Lots 10 through 14 and Parcel A, Block L, in a subdivision known as "Clarksburg Village" as per plat thereof recorded among the Land Records of Montgomery County, Maryland as Plat No. 22929.

Lots 5 through 15, 25 through 37 and Parcels A and B, Block G, and Lots 11 through 13, Block I, in a subdivision known as "Clarksburg Village" as per plat thereof recorded among the Land Records of Montgomery County, Maryland as Plat No. 22930.

Lots 1 through 15, and Parcel A, Block H, Lots 14 through 16, Block I, Lots 8 through 11, Block J, and Lot 1, Block U, in a subdivision known as "Clarksburg Village" as per plat thereof recorded among the Land Records of Montgomery County, Maryland as Plat No. 22931.

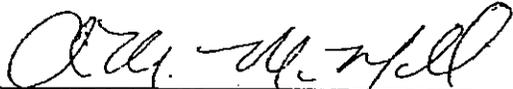
Lots 3 through 7, Lots 12 through 16 and Parcel A, Block J and Lots 2 through 7, Block U, in a subdivision known as "Clarksburg Village" as per plat thereof recorded among the Land Records of Montgomery County, Maryland as Plat No. 22932.

Lots 3 through 9, and Lots 14 through 19, Block K, and Lots 3 through 9, Block L, in a subdivision known as "Clarksburg Village" as per plat thereof recorded among the Land Records of Montgomery County, Maryland as Plat No. 22933.

28281 073

ATTORNEY'S CERTIFICATION

THIS IS TO CERTIFY that the within instrument was prepared by, or under the supervision of, the undersigned, a Member in good standing of the Bar of the Court of Appeals of Maryland.



Donna M. McMillan

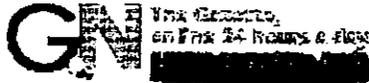
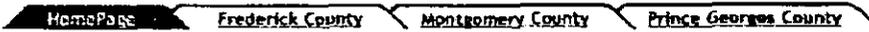
MASTER TAX IDENTIFICATION NUMBERS:

02-01497508 parcel 330
02-00028492 Lot 20, Brickley subdivision
02-00023331 Lot 19, Brickley subdivision
See attached list

AFTER RECORDATION, PLEASE RETURN TO:

Donna M. McMillan, Esq.
Samek, McMillan & Metro, P.C.
1901 Research Boulevard, Suite 500
Rockville, Maryland 20850
(301) 251-1180

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Developer asks for Clarksburg tax district

by Susan Singer-Bart
Staff Writer

July 12, 2000

Terrabrook, owner of the Clarksburg Town Center, is asking the County Council to create a development district to fund the infrastructure needed for the center.

The County Council took the first step Tuesday when it scheduled a public hearing for 1:30 p.m. Aug. 1. "This all undergoes an extensive review process," said Michael Faden, a County Council staff attorney.

A development district uses bonds to pay the costs of roads, sewer and amenities needed to create a new community. In this case the developer also wants to build a civic center and grade the school and ballfield sites, said Jim Richmond, development manager for Terrabrook.

"Often when you build a project, roads come later," Richmond said. "We'll just build it so it's done early on."

It also means funding the infrastructure for the new community is not a burden to the rest of the county.

"It's a useful tool for the developer and the county," said Jack Orrick, an attorney with Linowes and Blocher who represents Terrabrook.

The bonds are repaid through a special tax assessment on property owners within the district. Those property taxes are deductible from federal taxes.

"In effect, we get a federal subsidy for building this infrastructure," Faden said.

Without the development district, builders would fund the amenities and pass the costs on to buyers through higher prices or they would be built piecemeal as county funding was available, in which case all county residents absorb the costs.

The development district is relatively new in Montgomery County, but the idea is used widely in other parts of the country, particularly in California, Faden said.

The County Council created two development districts in Germantown in 1998. Only the Kingsview Village development district has been used since. The council approved a development district for West Germantown, but it has not yet been used.

Terrabrook requested \$17.5 million in funding, Orrick said. County Council staff will do studies and determine the amount of funding for the development district.

Much of the plan for the 268-acre Clarksburg Town Center has already been approved by the county.

The philosophy behind the town center is to put people close to their offices and other conveniences.

The master plan proposes a multi-use town center, compatible with the scale and character of the Clarksburg historic district. The town center is going to be adjacent and northwest of the existing town, which is now the historic district.

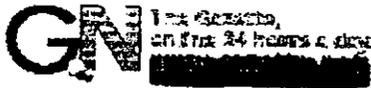
The plan calls for a dense mix of 768 homes -- including 295 townhouses and 398 apartments -- girdled by Clarksburg, Piedmont and Stringtown roads. A "neotraditional" site plan, approved by the county in 1998, calls for tightly woven streets fronting houses, brick sidewalks and clear wooded vistas, all within strolling distance to a new "Main Street" and town square, where founder John Clark will be memorialized.

Construction is starting later this month, Richmond said. Terrabrook plans to accelerate building to complete the Clarksburg Town Center in five years, he said.

"This is going to be our centerpiece for Maryland," Richmond said.

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Special tax districts might be unfair, organization says

by Susan Singer-Bart
Staff Writer

Aug. 2, 2000

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While County Council members heard about the advantages of a special tax district in Clarksburg from a developer, one organization cautioned such a system is not necessarily fair for other areas of the county.

Through bonds sold to support the development district, Terrabrook, the town center's developer, will build roads, a civic center and park that will be used by the entire community, lawyer Stephen Kaufman of Linowes and Blocher told council members Tuesday during a public hearing.

A development district uses bonds to pay the costs of roads, sewer and amenities needed to create a new community.

The bonds are repaid through a special tax assessment on only the property owners within the special district. Those property taxes are deductible from federal taxes.

Without the development district, builders would fund the amenities and pass the costs on to buyers through higher prices or they would be built piecemeal as county funding was available, in which case all county residents absorb the costs.

However, a county organization, the Montgomery County Taxpayers Union, testified that such plans can set a bad precedent.

"We're not necessarily for or against the project in question," said Cleo Tavani of the taxpayers union. "Our concern is for community equity. It's an unfair situation for other communities. Some communities pay fees for infrastructure, this community gets to deduct it from taxes."

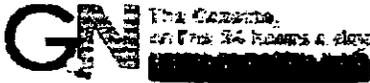
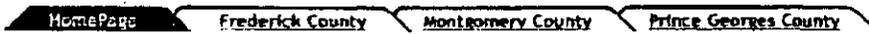
The development district is relatively new in Montgomery County, but the idea is used widely in other parts of the country, particularly in California, according to Michael Faden, a County Council staff attorney.

The County Council created two development districts in

Germantown in 1998. At this time, only the Kingsview Village development district has been used. The council approved a development district for West Germantown, but it has not yet been used.

The council will accept written testimony on the proposal until Aug. 11 and the Management and Fiscal Policy Committee will hold a work session on it Sept. 18.

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Committee recommends Clarksburg tax district

by Susan Singer-Bart
Staff Writer

Sep. 20, 2000

A special development district, which would use municipal bonds to pay for the infrastructure necessary to build the Clarksburg Town Center, should be created, a County Council committee recommended Monday.

The full council will vote on the resolution next week.

Only the property owners within the district will have to pay the tax, and in this case, it will be the homebuyers and businesses in the Clarksburg Town Center.

"I believe development districts are an appropriate tool for the county to have in its arsenal – it's in everybody's best interest to go forward," said Councilwoman Marilyn J. Praisner (D-Dist. 4) of Silver Spring.

The 263-acre Clarksburg Town Center is particularly suited to a development district because the area is undeveloped, owned by one company and the amenities funded by the district are recommended in the Clarksburg Master Plan, staff attorney Michael Faden told the Management and Fiscal Policy Committee.

The builder, Terrabrook, proposes building a 20,000-square foot civic center, extending the water main to all adjoining properties, grading the new elementary school and ballfield sites and constructing a main street and several other streets to connect the town center with outlying areas, Clarksburg Elementary School and the greenway park.

The bonds will also pay for hiker-biker trails, local parks and intersection improvements. Terrabrook's preliminary estimate of the cost of the improvements is \$17.5 million.

By using municipal bonds to fund the improvements, the builder gets a better interest rate.

Praisner and Councilman Howard A. Denis (R-Dist. 1) of Chevy Chase wanted to know the difference between a development district and the amenities the county expects of builders, such as

dedication of a future school site.

"It does not absolve a builder of normal infrastructure [construction]," Praisner said. "I want to be clear we are differentiating developer contribution responsibilities versus what we put into development district infrastructure."

Development district bonds are repaid through a special tax assessment on only the property owners within the special district. Those property taxes are deductible from federal taxes, so the federal government is actually paying for the infrastructure.

Without the development district, builders would fund the amenities and pass the costs on to buyers through higher prices, or they would be built piecemeal as county funding was available, in which case all county residents absorb the costs.

"I think the developer is paying for more than any developer would," Faden said after the meeting. "The great thing about a development district is the cost is self-contained."

The development district is relatively new in Montgomery County, but the idea is used widely in other parts of the country, particularly in California, according to Faden.

The County Council created two development districts in Germantown in 1998. At this time, only the Kingsview Village development district has been used. The council approved a development district for West Germantown, but it has not yet been used.

A second council resolution will be needed to implement the development district and decide what infrastructure items the development district will fund.

Dick Strombotne of the Clarksburg Civic Association attended the meeting to express concern about the size of the planned civic building.

"Four thousand square feet is a large house – it strikes me [20,000 square feet] is a small size for a public building," he said after the meeting. "The Clarksburg Civic Association will have to look more closely if 20,000 square feet is enough for the needs of the future community."

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Planners pick beneficiaries of tax district money

Mar. 14, 2001
 Susan Singer-Bart
 Staff Writer

Town center residents would pay for town hall and land, road development

The Montgomery County Planning Board recommended last week which portions of the Clarksburg Town Center should be funded by a special tax on residents of the Town Center.

The list includes a town hall, extension of the water main, grading an elementary school and ballfield site, hiker/biker trails, road and intersection improvements and street connections.

The arrangement, called a development district, will allow development to proceed in the town center, lawyer Stephen Kaufman of Linowes and Blocher, told the board.

"On the private side, you cannot raise the money needed for infrastructure and on the public side, you no longer have the resources to pay for infrastructure," he said. "Part of the county's policy is to have new growth pay for itself."

A development district uses bonds to pay the costs of roads, sewer and other infrastructure amenities needed to create a new community. By using municipal bonds to fund the improvements, the builder gets a better interest rate.

The bonds are repaid through a special tax assessment on only the property owners within the special district. Those property taxes are deductible from federal taxes.

Without the development district, builders would fund the amenities

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and pass the costs on to buyers through higher prices or they would be built piecemeal as county funding was available, in which case all county residents would absorb the

"The net effect of this is you're going to finance these improvements at public rates and pass the costs to homeowners," said William H. Hussmann, the board's chairman.

The County Council approved a development district for Clarksburg in September and asked the Planning Board county executive to suggest the projects that qualify for development district funding and the amount of

Terrabrook, the developer, wants to add three projects to the development district funding not on the budget: restriping Comus Road, acquiring right-of-way on Stringtown Road and developing a local park with 100 acres on Piedmont Road, said lawyer Jack Orrick of Linowes and Blocher.

That would be fine with the county, as long as taxes would be in the acceptable range.

"Development of local parks and elementary school sites are traditionally viewed as the responsibility of the public sector," wrote Planning Board staff in its report. "If the inclusion of such improvements in the district is within the county's guidelines for an acceptable tax burden, then these improvements could be included in the development district."

The infrastructure improvements in the development district will serve more than just the town center, Planning Board staff noted that other Clarksburg developers may want to be part of a development district. The Terrabrook proposal does not include them "due to their need to have a development district established to meet their proposed construction schedule."

Terrabrook estimates the improvements will cost \$17.5 million, Orrick said. The County Council will begin bond funding this summer.

The development district is relatively new in Montgomery County, but the idea is used widely in other parts of the country, particularly in California, according to Michael Faden, a County Council staff attorney.

The County Council created the first two development districts in Germantown in 1998.

Much of the plan for the 268-acre Clarksburg Town Center has already been reviewed and approved by the

The master plan proposes a multi-use town center, compatible with the scale and character of the Clarksburg district. The town center is going to be adjacent and northwest of the existing town, which is now the 100-acre

The plan calls for a dense mix of 768 homes -- including 295 townhouses and 398 apartments -- surrounding Clarksburg, Piedmont and Stringtown roads. A "neotraditional" site plan, approved by the county in 1998, features tightly woven streets fronting houses, brick sidewalks and clear wooded vistas, all within a strolling distance of "Main Street" and town square.

The Clarksburg Town Center is particularly suited to a development district because the area is undeveloped by one company and the amenities funded by the district are recommended in the Clarksburg Master Plan approved by the County Council committee last fall.

Hussmann complimented his staff and the developer for bringing about the vision conceived in the Clarksburg Master Plan.

"It's appropriate it [the development district] get approved and implemented," he said.

A second County Council resolution will be needed to implement the development district and decide infrastructure items the development district will fund.

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Clarksburg to get much needed roads

by Susan Singer-Bart
Staff Writer

July 18, 2001

Developers are taking to the streets to bypass Clarksburg's building moratorium.

Traffic already clogs much of the area's road system, but developers are moving ahead with major projects by agreeing to build the additional roads new residents will need.

For developers, building the roads is a worthy compromise for completing their projects.

"I started working on this 16 1/2 years ago," said David Flanagan, president of Elm Street Development, one of the developers of the 1,700-home Newcut Road neighborhood. "If I agree to this, I'll finish before I retire; if I don't it won't happen. The county doesn't have money for roads."

The county has a flexible ceiling on growth, said Glenn Orlin, an analyst with the County Council.

Developers can proceed with their projects as long as they build the roads needed to handle the traffic their projects generate, said Ron Welke, a transportation planner with the county Planning Board.

To build 250 homes, for example, a developer must provide the road capacity for those 250 new homes -- the developer is not responsible for taking care of an existing shortage, Orlin said.

"It's possible for a developer to build infrastructure more than he needs and for someone else to use it," said Ron Welke, a transportation planner with the county Planning Board.

Many of the roads in Germantown were built by a road club made up of developers, Orlin said.

Elm Street and DiMaio Joint Ventures, the other Newcut neighborhood developer, are jointly building many of Clarksburg's new roads.

But the property owner will ultimately pay the freight. The Newcut

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Road developers want the county to create a development district, much like the one the County Council created in the Clarksburg Town Center. Those owning property in the districts are assessed additional taxes to pay for their amenities, such as roads and civic buildings.

Without the development district, builders would pass their costs to buyers through higher prices. Or, developers would complete their projects piecemeal, as county funding became available.

The 1994 Clarksburg Master Plan details the road network that will eventually be built in the town.

Among the road work planned in the Newcut Road neighborhood is widening Md. 27 to six lanes from Observation Drive to Brink Road and widening it to four lanes from Brink Road to the new Piedmont Road (A-305). Md. 27 will be widened in many sections.

Flanagan estimates the roadwork will cost about \$30 million.

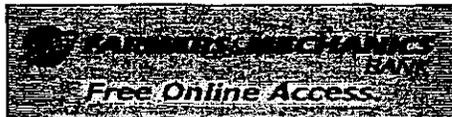
The Newcut Road area is adjacent to the Clarksburg Town Center. It is planned to be the site of houses and a commercial and business area.

Terrabrook, the Texas developer of Reston, Va., bought the Clarksburg Town Center property 18 months ago, after the zoning was approved and the required roadwork already specified.

The plan calls for a dense mix of 768 homes on 268 acres surrounded by Clarksburg, Piedmont and Stringtown roads.

Terrabrook is building two lanes of Stringtown Road plus turn lanes from Piedmont Road to Route 355, two lanes of Piedmont Road from Burnt Hills Road to the Greenway Road and improving Clarksburg Road from Route 355 north to Burnt Hills Road. Graves estimates the roadwork will cost \$6.5 million.

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Village project approved

by Susan Singer-Bart
Staff Writer

Aug. 1, 2001

Clarksburg plan to include 2,500 homes

The Montgomery County Planning Board unanimously approved a preliminary plan Monday for Clarksburg Village, the largest development in Clarksburg and one of the largest developments the board has ever reviewed.

Located in the Newcut Road neighborhood, Clarksburg Village is an approximately 700-acre parcel that will have more than 2,500 homes, 20,000 square feet of retail or office space and a daycare center.

"Overall this is an excellent plan," said Karen Kumm, lead planner for Clarksburg.

Clarksburg Village is adjacent to the DiMaio Joint Ventures property and Clarksburg Town Center. Piedmont Road and Ovid Hazen Wells Park border it to the north, Ridge Road to the east, Brink Road, Route 355 and Little Seneca Creek to the south and Stringtown Road to the west.

The plan complies with the 1994 Clarksburg Master Plan objectives, Kumm said. Apartments and townhouses are planned close to the commercial and transit area and single-family homes are planned closer to the agricultural buffers. It is designed to be pedestrian friendly.

"Overall this is a public benefit to the county and Clarksburg," Kumm said. "All the dedications are on the private sector."

Clarksburg Village L.L.C. will build 3.6 miles of road improvements, sidewalks and a hiker/biker trail system. It will also dedicate 8.5 acres for local parks, three miles for the Greenway park and land for two elementary schools.

The board spent a long time poring over the details of the plan and the 28 conditions for approval suggested by staff members.

"The project will establish the pattern and character of the Newcut Road neighborhood and set standards for future

development," Kumm wrote in her report.

The board wants the developer to submit an infrastructure plan at least 60 days prior to submitting a site plan. This will give a conceptual overview of how the different parts, including the roads, recreational areas, greenspace and storm water management, will fit together within the community and the surrounding area.

One of the major issues Monday was the number of Transfer Development Rights Clarksburg Village will buy.

The county created the TDR program in the 1970s as a way to compensate farmers when it changed the zoning of farmland to permit one house for every 25 acres of land instead of the previous one house per 5 acres.

The county gave landowners one TDR for every house a property owner would have been able to build before the county downzoned the land. Farmers could sell those rights to developers in other parts of the county to regain some of the money they were potentially losing. Clarksburg Village is a TDR receiving area.

Staff wants Clarksburg Village L.L.C. to buy 600 TDRs, which equates to saving 3,000 acres of farmland. Clarksburg Village proposed buying 555.

"This is premature at this time -- 600 TDRs is pulled out of thin air -- I can't do it," said David Flanagan, president of Clarksburg Village L.L.C. "I've got to have the ability to move things around."

The master plan sets a target of 740 TDRs on the property, Kumm said. Since Flanagan is achieving 97 percent of the density permitted in the master plan, he should be able to achieve more TDRs, she said.

"The master plan is pure guidelines -- they're making this density up," Flanagan replied.

"I do not think the staff is asking for something impossible," said Planning Board Chairman Arthur Holmes Jr.

The board adjusted the language of the conditions to read that a minimum of 600 TDRs should be provided based on the current number of proposed dwelling units. The final number of units and TDRs will be determined at site plan review.

Another contentious issue Monday was how much land will be needed for school sites. Flanagan proposes dedicating 9.3 acres for a school on the west side of the property and 8.9 acres for a school on the east side.

Montgomery County Public Schools' standard for an elementary

school is 12 useable acres, said Janice Turpin, a school system real estate specialist.

A 10-acre tract might be acceptable because Flanagan is offering to provide storm water management and reforestation off-site, she said.

"We use the size of the plot based on program requirements – play areas, parking, hard surface areas," Turpin said. "We have no confidence we could fit our program requirements."

"It will all fit," said an angry Flanagan.

He is concerned the school system may not build schools on the site. The school system's six-year plan does not include new Clarksburg elementary schools.

"I'm promising 2,500 families there will be schools," he said. "I refuse to give them a site without a condition it's a school, not surplus to be sold later or used to store buses."

The board decided to approve the preliminary plan without changing the size of the school sites. It asked Flanagan to work with the school system and warned it will look at the sites carefully at site plan review.

"When we get the plan, if MCPS says it won't work, I'll take that very seriously," said board member Wendy Collins Perdue.

The County Council began the process of creating a development district for Clarksburg Village yesterday, similar to one it created for the Clarksburg Town Center. This will permit the developer to use bonds to pay for the infrastructure of the community. The council will hold a public hearing on the proposed district on Sept. 11.

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Council to vote on new districts in Clarksburg

Sep. 26, 2001
 Susan Singer-Bart
 Staff Writer

The County Council will vote Tuesday on a proposal to create two new development districts in the Newcut Road neighborhood of Clarksburg. The council started the process of creating the districts at a public hearing Tuesday.

"Yesterday in [the Management and Fiscal Policy] Committee, we recommended we go forward," said Councilwoman Marilyn J. Praisner (D-Dist. 4) of Calverton.

The creation of development districts, similar to one created for the Clarksburg Town Center, will permit the developers to use bonds to pay for the infrastructure of the community.

A development district uses bonds to pay the costs of roads, sewer and other infrastructure amenities needed to create a new community. By using municipal bonds to fund the improvements, the builder gets a better interest rate.

The bonds are repaid through a special tax assessment on only the property owners within the special district. Those property taxes are deductible from federal taxes.

Without the development district, builders would pass their costs to buyers through higher prices or developers would complete their projects piecemeal as county funding became available.

One district will be on the 660-acre Clarksburg Village property and the other on the 374-acre Clarksburg Skylark property, formerly known as the DiMaio property. The properties are adjacent to the

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Clarksburg Town Center.

Clarksburg Village will have more than 2,500 homes, 20,000 square feet of retail or office space and a Clarksburg Skylark will have 1,000 homes and 89,000 square feet of commercial space.

The plan for the Newcut Road neighborhood complies with the objectives of the 1994 Clarksburg Master plan also details the road network that will eventually be built in the town.

Clarksburg Village and Clarksburg Skylark will build 3.6 miles of road improvements, sidewalks and a drainage system. It will also dedicate 8.5 acres for local parks, three miles for the Greenway park and land for two schools.

Among the road work planned in the Newcut Road neighborhood is widening Route 27 to six lanes from Drive to Brink Road and widening it to four lanes from Brink Road to the new Piedmont Road. Newcut extended from Route 355 to Route 27.

Route 27 will be widened in many sections, with the addition of acceleration and deceleration lanes, traffic signals and other intersection improvements. Trails will be built throughout the communities and the school sites.

The roadwork and other infrastructure costs will be \$45 million to \$60 million, lawyer John Orrick of Blocher, who represents both developers, told the County Council Tuesday.

The council will set the amount of bond funding.

The County Council created the first two county development districts in Germantown in 1998.

A second council resolution will be needed to implement the development districts and decide what in the development districts will fund.

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Developer proceeds with Greenway Village plans

Nov. 28, 2001
Susan Singer-Bart
Staff Writer

The new owners of the DiMaio property in the Newcut Road neighborhood have renamed their property Greenway Village at Clarksburg.

Bernie Rafferty, senior vice president of Artery Development Company, highlighted the changes his company and co-owner Beazer Homes are making to preliminary plans for the 374-acre tract Monday at a meeting of the Clarksburg Civic Association. Beazer will build most, but not all the homes, he said.

The property is south of Ovid Hazen Wells Recreational Park and north of Clarksburg Village. A greenway will bisect the property, connecting trails in Ovid Hazen Wells park to trails in Clarksburg Village.

Two separate neighborhoods will be built on either side of the greenway. They will each have a mix of single family homes, townhouses and multifamily units. About 40 percent to 45 percent of the 1,330 homes will be single-family homes, Rafferty said.

"Single family homes are now mixed more evenly through the site than before," he said.

Each neighborhood will have a pool and park.

A road will be built along the border with Ovid Hazen Wells park. One side of the road will have an open view of the park, the other side will have homes, he said.

An 89,000-square-foot retail center is planned for the southeast

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portion of the property, at the intersection of Newcut Road extended (A-302) and Midcounty Highway (A-305) bordering on a 20,000-square-foot retail center in Clarksburg retail area will be developed according to the staging recommended in the Clarksburg Master Plan.

"Retail cannot come aboard until the retail for the Clarksburg Town Center is built out," Rafferty said.

Clarksburg Village and the Greenways at Clarksburg are sharing the cost of building the roads in the t Roads and trails will connect the two communities. The County Council is creating special taxing dist road infrastructure.

Rafferty will be at the Clarksburg Planning Committee meeting Dec. 13 at 7:30 p.m. at the Hyattstowr Department, 25801 Frederick Road, to discuss details of the plan. He expects to present the plans to th Board early next year and build the first homes in 2003.

"Because we had filed a preliminary plan before Oct. 31, we're exempt from the moratorium [on build: Rafferty said.

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Artery's plans approved for Clarksburg housing development

Sep. 18, 2002
Susan Singer-Bart
Staff Writer

Artery Corporation will launch the next phase of new home construction in Clarksburg early next year in the Newcut Road neighborhood.

The Montgomery County Planning Board unanimously approved site and water quality plans Sept. 12 for the first two phases of Artery's Greenway Village at Clarksburg, known as the DiMaio property.

Phase one and two will construct 486 homes on 164 acres. The entire Greenway Village development will have 1,330 homes on 374 acres.

It will also have two areas of parkland, a middle school and commercial shopping area.

Greenway Village at Clarksburg is bound by Route 27, Ovid Hazen Wells Recreational Park, Piedmont Road and the Clarksburg Village development.

The first two phases of the development will be built on the west side of Little Seneca Creek, across Skylark Road from Ovid Hazen Wells park. The western border is a wooded area.

Phase one and two will have 328 single-family homes, 109 townhouses and 49 moderately priced townhouses.

The single-family homes will be neo-traditional style houses built close together. Planner Wynn Withans showed slides of homes under construction in the Clarksburg Town Center to illustrate how the development will look.

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The houses along Skylark Road will face Ovid Hazen Wells park, but a service roadway will reduce the number of driveway entrances on Skylark Road, she said. The single will be built on the edges of the property and the townhouses closer to the commercial area.

The entire project is designed to be pedestrian and bicycle friendly. Open spaces will connect with hike and the trails will connect to Ovid Hazen Wells park, Withans said.

The Clarksburg Civic Association sent the board a letter requesting native trees be used and lighting that doesn't create a glare. The board included these as conditions of approval.

Greenway Village is the eastern edge of residential development in Clarksburg. The master plan envisions development closer to the park and increased density near the commercial core.

Clarksburg Village and Greenway Village at Clarksburg, the two Newcut Road developments, are sharing building the roads in the two communities.

The County Council has created special taxing districts that require homebuyers to pay for the road project scheduled to be paved two years before the end of construction.

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On Clarksburg Tax**Terrabrook, County Agree**

The tax rate proposed for the planned Clarksburg town center development district would be scaled back from the original plan, but the developers and county have come to a final agreement on the package.

County exec Doug Duncan said in a letter to the County Council that he proposes to reduce by 25 percent the amount of the tax burden on future homeowners necessary to finance the proposed infrastructure in the 263-acre project at Clarksburg Road and Route 355. Developer Terrabrook plans to build 1,300 residential units and 250,000 square feet of office and retail space. By mid-September, according to a background report, 175 homes were built or put under contract, and 55 were occupied.

Terrabrook originally proposed an annual tax rate of \$1,528 on a \$350,000 house, which Duncan said represents 40 percent of the current property tax on such a home in Clarksburg. Instead, Duncan recommends a tax burden of no more than \$1,200 annually for the same home, or about 34 cents per \$100 of assessed value.

Terrabrook's Tracy Graves said the developer agrees with the new numbers, calling the negotiations that produced them a "cooperative effort." "We're comfortable with the package," said Graves.

Duncan and Terrabrook also agreed to reduce the proposed \$26 million bond offering - to fund improvements of \$21.8 million - because it was too high. Duncan said that because the estimated value of property in the district at the time of the financing would be about \$75.9 million, the \$26 million bond offering would result in a too-low value-to-lien ratio of 2.9 to 1. The new recommendation is for a \$20 million offering to support \$17 million in infrastructure, resulting in a more acceptable 3.7 to 1 ratio.

Additionally, the exec would prefer that three projects be added to the program: a permanent civic building/library in the town center, a contribution toward construction of the extension of Stringtown Road to I-270, and a share of funding to assure completion of the full four-lane width of Stringtown Road between Route 355 and Piedmont Road.

The package now goes before the full Council.

In brief...

The Miller property in Damascus should be rezoned to PD-5 to allow for a senior housing project, the Planning Board agreed recently.

It's a dramatic proposed upzoning, from RE-2C, and allowing for 125 units in a mix of single family and multi-family housing. But the 24.6 acre tract on Howard Chapel Drive north of Route 108 was recommended for the PD zone in the 1982 Damascus Master Plan, and developer Richard Koch has drafted several redesigned plans to meet Park and Planning's stringent impervious standards.

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October 16 - 25, 2002

Bethesda

Welty Homes, 5916 Johnson Avenue, Bethesda, Md. to build a \$275,000 unit at 5927 Anniston Road, Bethesda;

Potomac Valley Builders, LLC, 18929 Fisher Avenue, #A, Poolesville, Md. (301) 605-2803, to build a \$750,000 unit at 7204 Glenbrook Road, Bethesda, in "Edgemoor;"

Pollin Development, 10210 Democracy Lane, Potomac, Md. (301) 767-0970, to build a \$225,000 unit at 8210 Old Georgetown Road, Bethesda, in "Greenwich Forest;"

Kingsbridge Construction, 7220 Wisconsin Avenue, #401, Bethesda, Md. (301) 652-2768, to build a \$410,000 unit at 5117 Wessling Lane, Bethesda;

Germantown

Mohamad Shahdi, 11133 Rutledge Drive, North Potomac, Md. (301) 424-5752, to build a \$200,000 unit at 15009 Gretna Green Drive, Gaithersburg;

NVR Inc., 555 Quince Orchard Road, Gaithersburg, Md. (301) 258-0002, to build seven \$135,000 units in "Vistas at Woodcliffe," Germantown;

Toll Brothers, (410) 972-8105, to build four \$100,000 units in "Woodcliffe," Germantown;

Olney / Brookeville

Dav Development Company, 14900 Southlawn Lane, Rockville, Md. (301) 424-8336, to build a \$178,000 unit at 18534 Rushbrooke Drive, Olney, in "Norbeck Grove;"

Golden Builders, Annapolis, Md. (410) 573-4766, to build a \$240,000 unit at 1516 Brighton Dam Road, Brookeville, in "Brighton Farms;"

Atlantic Heritage Builders, 7616 Epsilon Drive, Rockville, Md. (301) 926-8177, to build an \$800,000 unit at 2713 Gold Mine Road, Brookeville;

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Clarksburg residents required to pay for local projects

Mar. 5, 2003
 Susan Singer-Bart
 Staff Writer

Residents of Terrabrook's new Clarksburg development will be required to pay for a new library, road improvements and an extension of the water main after the County Council voted unanimously to create a Clarksburg Town Center development district Tuesday.

The projects will be paid for by a special tax on property owners in the town center.

Only property owners within a development district have to pay the special tax, and in this case, it will be the homebuyers and businesses in the Clarksburg Town Center. Retail and commercial property owners pay a larger share of the tax than do homeowners.

The 263-acre town center is adjacent and northwest of the town's historic district. It will have 1,300 single-family homes, townhouses and condos; 150,000 square feet of retail space; and 100,000 square feet of office space.

Projects funded by a development district tax are intended to benefit the community at large and include amenities beyond those the county requires for development approval, such as intersection improvements and neighborhood parks.

By 2010, the Clarksburg development district will pay for: a library and meeting space; widening Stringtown Road to four lanes and extending it from Route 355 to Interstate 270; improving Piedmont Road; building a new section of Clarksburg Road; re-grading Route 355 at Stringtown Road; and extending the water main beyond the

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town center. The total cost of the projects is estimated at \$17 million. County staff worked with the developer to decide which projects to include.

This is a scaled down version of the development district proposed by Terrabrook.

County Executive Douglas M. Duncan (D) recommended modifying the developer's proposed development, stating it was too costly and would put too great a tax burden on property owners. Also, 68 percent of the developer proposed for inclusion in the development district were infrastructure improvements require developer.

"This constitutes too high a level of benefit to the developer at the expense of the homeowner," Duncan memo to the County Council.

The price tag was \$21.9 million for the developer's proposed development district projects. That would be an annual extra tax of \$1,528 for the owner of a \$350,000 house.

Development district taxes should be limited to 30 percent of residential property taxes, or \$1,200 for a \$350,000 house, Duncan wrote.

"The additional tax burden must be an amount that will be viewed by potential home buyers as not overburdening or onerous," he wrote.

Under this guideline, a maximum of \$17 million can be financed through the Clarksburg Town Center development district.

Without the development district, developers would build amenities and pass the costs on to buyers through higher prices, or amenities would be built piecemeal as county funding was available, in which case all county residents would absorb the costs.

In 1998 the County Council created two development districts in Germantown -- the only other development districts in the county. Establishing a special taxing district puts the burden of funding infrastructure on the new district, not the rest of the county.

"Creation of a town center district should be supported, consistent with my and council's view that developers should not be expected to pay for a significant amount of new public infrastructure needed to support it," Duncan wrote.

The Clarksburg Town Center is particularly suited to a development district because the area is undeveloped, owned by one company, and the amenities funded by the district are recommended in the Clarksburg Master Plan. County Council attorney Michael Faden.

The development district will use municipal bonds to pay for projects. The special tax on property owners would be levied on bondholders. By using municipal bonds to fund the improvements, the builder receives a better interest rate.

Development district taxes are deductible from federal income taxes, so the federal government will absorb a portion of the projects.

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Proposed Montgomery County community gets boost from County Council

Daily Record, The (Baltimore), Apr 4, 2003 by Robyn Lamb

The recently approved creation of a special tax district for a new Clarksburg community means \$17 million worth of infrastructure may get built sooner rather than later.

Last month, the Montgomery County Council unanimously approved legislation authorizing the creation of a special tax district for Clarksburg Town Center, a development that, when complete, will contain 1,300 houses and 250,000 square feet of commercial and retail space on 267 acres of land.

The community -- developed by Texas-based Terrabrook -- is the first major development in Clarksburg, an area that some say is the last bit of country along the I-270 corridor in Montgomery County.

"We see it as a win-win proposition. It is a way to make sure the infrastructure is done incrementally, in a much less piecemeal fashion," said Michael Faden, staff attorney for the Montgomery County Council.

Also known as a development district, the tax district is a relatively new public-private arrangement, which uses the county's favorable bond rate.

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The \$17 million bond, once approved, will be repaid with the increase in real property taxes expected to occur when assessments rise after the project is developed.

For home owners, that means no more than \$1,200 in special taxes on a single family home valued at \$350,000. Homes in the town center range from about \$200,000 for a condominium to more than \$500,000 for a single-family home.

About \$10 million of the funding will go toward community- specific infrastructure, such as road expansion, the construction of a 20-inch water main and the development of hiker/biker trails through the community.

The remaining \$7 million will be used to pay for road improvements and a library or civic center -- infrastructure that will benefit the broader Clarksburg area.

Most prominent on that list is an extension of Stringtown Road, west from its current end at Route 355 to I-270, providing better highway access.

The good thing about the special tax district, say county officials, is that it designates a specific package of infrastructure to be built according to a set schedule, avoiding the kind of stage building common in most new developments.

"It ties the funding for infrastructure for the community to that community. When we voted on this, we voted for six projects and we know exactly where it [the funding] is going. It is tied on the front end, which is a real benefit," said County Councilman Michael Knapp, D-District 2, which includes Clarksburg.

Two special tax districts in Germantown have been approved by the council since the law was established in the mid-1990s, said Faden.

They are rare because they are mostly used for larger developments requiring more than \$5 million in infrastructure and take a couple of years to make their way through the complex approval process, said Jack Orrick of Silver Spring-based Linowes and Blocher, the law firm that worked on the Town Center deal.

Two additional developers have since requested a special tax district for their projects in Clarksburg, which already has development approved for 8,000 homes.

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Residents flock to county's last large community

Sep. 22, 2004
 Susan Singer-Bart
 Staff Writer

This is the first part of a two-part series about growth in Clarksburg. The second story will appear next week.

A mix of young families, newlyweds and empty nesters have been buying their dream homes in Clarksburg since the first homes went on sale in the planned community a little more than three years ago.

More than 360 of the 550 homes sold in Clarksburg Town Center are occupied, the remaining 190 have been purchased and are under construction. More than 75 new homes are occupied in the Arora Hills development and dozens of homes in the Highlands of Clarksburg are occupied.

"This is the best neighborhood I've ever lived in for meeting people," said Jolieanne Shaw, who moved to the Clarksburg Town Center in March 2003 from Waters Landing in Germantown.

Shaw helped organize a Clarksburg chapter of Mothers Offering Mothers Support -- otherwise known as a MOMS Club -- and a book club for the community.

"We love the community," said Elizabeth Garofalo, who also moved into the town center development in March 2003. "We like that there are a lot of young families."

Families meet each other at the community's tot lot and while pushing strollers through the young community. One of the first families to move into the town center holds regular margarita parties for the entire community. The developer of the town center development, Newland Communities, holds periodic community coffees. It maintains an Internet site for residents to communicate



Rachael Golden/The Gazette
Tim DeArros walks his dog in
Clarksburg Town Center Sep

with each other and advertise community activities.

"People are more open to introducing themselves, open to meeting new people," Garofalo said.

Chase Jackson and her family moved into Clarksburg Town Center from Milwaukee after looking at homes throughout Montgomery County. They lived with their in-laws in Olney for a year while their house was being built. They moved in during August 2003.

"I love it, love the way it's set up," she said. "There's an immediate sense of community because everybody is looking to meet their neighbors."

The first families moved into Clarksburg Town Center at the end of March 2002. The Town Center is being build according to a "neotraditional" site plan, approved by the county in 1998, of tightly woven streets, sidewalks and clear wooded vistas, all within strolling distance to a new main street and town square.

A county approved streetscape plan recommends the types of sidewalks, lighting and landscaping appropriate for Clarksburg's historic district, commercial areas and neighborhoods. The entire streetscape plan is intended to give Clarksburg a unified appearance, but each area will be treated differently.

Kathleen Nolan and her husband, Camilo Correal, took turns sleeping in their car for days outside the Miller and Smith model home last December in order to be among the first in line to buy a home in Clarksburg Town Center. Miller and Smith and the other Clarksburg builders put just a few homes on the market at a time as lots become ready for building.

Nolan and Correal moved in June 4.

For the first month they lived there, they were without phone service. The Sears delivery truck took the found their house to deliver a washer and dryer they ordered because there was no street sign posted. It also found minor problems with the house that required fixing.

Their first reaction was to question whether moving into a community under construction was a good idea.

"I just moved into this beautiful new house but couldn't enjoy it because of the problems," Nolan said.

But, now that the problems are resolved, Nolan and Correal are very happy with their move.

"The neighborhood's beautiful," Nolan said. "I think Miller and Smith has done their best to take care of the neighborhood, love where I live. It's a cozy community, a great place to raise children."

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Within six years, Clarksburg Town Center will have 768 homes. Within 20 years, Clarksburg will grow to a community of 2,000 to almost 40,000, according to the 1994 Clarksburg Master Plan.

Clarksburg's development plan was laid out in the 1994 Master Plan, with development coming first to areas adjacent to the historic district, then radiating out to the edge of the county's Agricultural Reserve. Homes are clustered together in order to preserve environmentally sensitive streams and forests.

A greenway trail will connect Clarksburg to Little Bennett Regional Park, Black Hill Regional Park and Wells Park.

Communities under construction are Clarksburg Town Center, Arora Hills, Catawba Manor, Clarksburg Village and the Highlands of Clarksburg. All are east of Interstate 270.

The Cabin Branch Neighborhood, west of I-270, will be the final section of Clarksburg built. It will have 2.4 million square feet of office and commercial space, including 90,000 square feet of retail space, a school, a park, places of worship, a community building and a daycare center. Adventist HealthCare originally intended to use for a health care facility, possibly a hospital if the state determines a hospital is needed in the area.

Clarksburg is not quite urban, but it's also not country, said Annie Galloza, who moved into a condominium center in March.

"The neighborhood is constructed so you can just walk and meet your neighbors," she said.

Her 2-year-old and 4-year-old ride their bikes on the sidewalks and are making new friends.

Montgomery County Public Schools estimates Clarksburg will need four more elementary schools to keep up with the growing population. Clarksburg Elementary School has seven portable classrooms this year and is expected to have more students throughout the year.

The first new Clarksburg elementary school is scheduled to open in 2006 and the second in 2009. Each will have capacity for 738 students, said Bruce Crispell, a demographer for Montgomery County Public Schools.

The school board only plans new building projects for the next six years. Clarksburg may need a new elementary school every three years, Crispell said, but no other schools have been budgeted yet.

A new Rocky Hill Middle School opened this year with capacity for 990. It will need portable classrooms in the next few years, according to Principal Steve Whiting.

The temporary classroom shortage does not phase Galloza.

"Growing pains - you just deal with it," Galloza said.

Elm Street Development, the Clarksburg Village developer, is setting aside land for a second middle school. The school system has not set a date for building the school.

A Clarksburg high school is scheduled to open in the fall 2006.

First reactions

Dan and Susanne Jourabchi bought the first house in Clarksburg Town Center the day homes went on the market in July 2001. The house sold for \$442,500.

The Jourabchis liked the idea of living in a planned community, designed with sidewalks and neighborhood restaurants and shopping within walking distance.

They found in Clarksburg they could get more house for the money than in Lakelands, a Gaithersburg community they had considered.

"As far as the neighbors, we really have very nice neighbors," said Susanne Jourabchi.

But other aspects of their development are disappointing, said Dan Jourabchi.

After two years, their street still does not have its final layer of pavement, he said.

"The quality of the home hasn't been 100 percent to our satisfaction," he said.

When he talks to the builder's representatives, they downplay his complaints and point out how much is appreciated in value. Builders raise the price of homes in the town center by several thousand dollars a section they put on the market.

"We're waiting for services like a community pool and community center," Dan Jourabchi said.

Older children play in the street, someone's backyard or someone's houses, said Susanne Jourabchi. But in the planning stage.

The commute to Dan Jourabchi's Virginia office is worse than he expected and has been getting longer. They are thinking about moving.

"We love the neighborhood so much," he said. "We have a lot of hope for the community ... [but] we're not sure whether to live in Virginia, they have better planning for roads in the communities they're building."

The road home

The county is requiring each developer to build roads to handle the added traffic from their development by establishing special tax districts, which require residents to pay for roads and other community facilities. The districts include Town Center, Clarksburg Village and Arora Hills.

The 540-acre Cabin Branch neighborhood, on the west side of I-270, has also applied to create a special district. The Montgomery County Planning Board approved a preliminary plan for the property in July. Site work has been under way about a year, said Steve Nardella, Winchester Homes senior vice president for land.

Cabin Branch developers have to build a section of Newcut Road, upgrade West Old Baltimore Road, and build the 270 interchange at Route 121 and the intersection of Old Baltimore and Clarksburg roads.

Construction will begin on first homes in the Cabin Branch neighborhood in the summer of 2006, Nardella expects work on Route 121 to be done early in the building process, sometime in 2007 or 2008. The new interchange at Route 121 should be open by 2009, he said.

Newland Communities, and its predecessor Terrabrook, began realigning Piedmont Road last summer. The road will open by November, according to Newland spokesman Charlie Maier.

Newland will join with Centex Homes, developer of the Highlands of Clarksburg, to improve Stringtown. Centex is also responsible for adding access lanes on Route 355.

Arora Hills and Clarksburg Village, at the eastern edge of residential development in Clarksburg, are v on their road projects. Their road projects will cost \$40 million to \$50 million, said David Flanagan, pr Street Development, developer of Clarksburg Village. The developers are funding the project until the district is approved, said Bernie Rafferty, senior vice president of the Artery Development Company, c Arora Hills. They have already widened Father Hurley Boulevard to six lanes from Observation Drive. The next step of the project will widen Route 27 to Brink Road, then to the future extension of Midco just past the water tower on Route 27.

The two developers just started building Midcounty Highway, Flanagan said. The road will be built in Stringtown Road to Route 27 as needed.

Even though longtime Clarksburg residents expected more traffic when the new residents moved in, th roads would be built in time to ease the congestion. They also did not anticipate the damage heavy cor are causing to local roads.

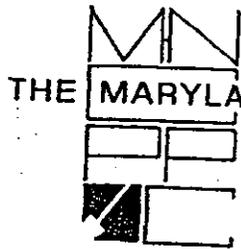
Interstate 270 is filled to capacity with cars from Clarksburg, Urbana, Frederick and points north, said former president of the Clarksburg Civic Association. Widening I-270 and building a transitway with Clarksburg are just ideas in the planning stage.

"I'm disappointed -- it looks like housing will precede the road network considerably," Howie said. "It going to have a lot of congestion."

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APPENDIX N

MCPB
Item # 4
3/8/01



THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION
8787 Georgia Avenue • Silver Spring, Maryland 20910-3760

March 2, 2001

MEMORANDUM

TO: Montgomery County Planning Board

VIA: John A. Carter, Chief *JAC*
Community-Based Planning Division

Sue Edwards, I-270 Corridor Team Leader *SE*
Community-Based Planning Division

FROM: Karen Kumm Morris, Clarksburg Planner *KKM*
Community-Based Planning Division

SUBJECT: Application for Adequate Public Facilities Approval
Clarksburg Town Center Development District

STAFF RECOMMENDATION: Approval to transmit comments to the Montgomery County Council.

Staff finds that the proposed Town Center Development District meets the requirements of the District Legislation as modified by the following conditions:

1. Amend Chapter 14-3 (g) (2) to allow for improvements to be the responsibility of a single developer so long as the proposed improvements serve a greater public benefit than a single development.
2. Limit proposed improvements to be included in the Development District to those serving the regional area, not just the residents of a single development, including:
 - a. Civic Building.
 - b. Twenty-inch water main, off-site.
 - c. Street Construction - Part of Main Street from MD 355 to Public Street K and Public Street K.
 - d. Stringtown Road Improvements
 - e. Piedmont Road Improvements.
 - f. Clarksburg Road Improvements contiguous to Town Center.
 - g. Redgrave Place connection to Main Street.
 - h. Acquisition of Right of Ways of regional roadways.
 - i. Regional Greenway Trail through public greenway park.
 - j. MD 355 Intersection Improvements including intersection with Stringtown Road.

Additional infrastructure improvements to the local parks and school sites may also be included in the district if found to result in a financially acceptable tax burden.

3. Maintain the required Public Hearing before County Council in accordance with Sec. 14-9 (a) to allow for public comment prior to Council action on the proposed Development District.

Background

The applicant, Terrabrook Clarksburg, LLC, proposes to form a development district in the Clarksburg Town Center for the purpose of achieving better coordination of public infrastructure, construction in a timely manner, and a more attractive financing approach for the development. Creation of a development district is allowed under Chapter 14 of the Montgomery County Code. The purpose of a development district is to help enable a specific area of the County to meet its infrastructure needs through public financing of bonds payable by special taxing. It is recommended for areas where a significant amount of development is occurring.

In order to create a development district, a petitioner must submit a request to the County Council with the signatures of 80% of the affected property owners or request Council to hold a public hearing. The Council must adopt an initial resolution to pursue the creation of the district. The Planning Board must review the proposal for compliance with Adequate Public Facilities and Annual Growth Policy Requirements. The Executive must review the financial aspects of the proposal, and issue a Fiscal Report to the County Council. Finally, the Council must hold a Public Hearing and adopt a resolution to form the development district. This formation process is outlined in Chapter 14, Article II, Sec. 14-5 through 14-9. See Attachment A.

Purpose of Planning Board Review

The enabling legislation in Sec. 14-7 requires the Planning Board to evaluate the proposed district for compliance with APF and AGP requirements and make its recommendations to the County Council. The Planning Board must make the following findings:

1. The proposed district will comply with all applicable zoning and subdivision requirements.
2. The proposed infrastructure improvements satisfy the Annual Growth Policy's adequate public facilities requirements.
3. Cost estimates are provided and reviewed.

Applicant's Proposal for the Clarksburg Town Center Development District

Terrabrook Clarksburg, LLC proposes to establish a development district which encompasses their property within Clarksburg's Town Center and proposes numerous infrastructure improvements that extend somewhat beyond the proposed development district's borders. See Exhibit C-1 of their application, Attachment B. The applicant's

proposed infrastructure improvements are shown on Exhibit G of their application and illustrated on C-2. The proposed infrastructure improvements are as follows:

1. Civic Building- 20,000 sf. located in the Town Square.
2. 20" Water Main extension - serving properties beyond the Town Center.
3. School/Ball Field site grading - local park/school site within Town Center.
4. Street Connections - Main Street, F, H, & K Streets - internal to Town Center.
5. Trails/Hiker Biker Path - includes Greenway Trail and local side trails.
6. Stringtown Road Improvements.
7. Piedmont Road Improvements.
8. Lowering Route 355 at Stringtown Road.
9. Route 355 Intersection Improvements.
10. Clarksburg Road Route 121 Improvements.
11. Redgrave Place/Route 355 Improvements.
12. Comus Road re-striping.
13. Acquisition of right-of-way.
14. Public Local Park development across Piedmont Road.

The Applicant states that all proposed infrastructure improvements comply with Zoning and Subdivision requirements under Section 50-35(k) and meet APF requirements as determined by previous approvals of Preliminary Plan (#1-95042) thus satisfying AGP concerns. The Applicant also intends to request that the Council accommodate a more "stream-lined" review process by eliminating the required Public Hearing prior to Council enactment of the district.

Staff Findings

Conformance to General Provisions of Development Districts

The legislative intent of the Development District legislation is to provide infrastructure improvements that serve a large area rather than a single development or subdivision. If public financing is utilized through a district approach, a greater public benefit should be achieved than just benefiting a single project. See Sec. 14-3(g)(1), Attachment A.

Staff finds that a substantial number of the proposed infrastructure improvements do serve a larger area than just Terrabrook's portion of the Town Center. The proposed civic building, for instance, will serve as a Town Hall or gathering place for the entire Clarksburg community. Other proposed improvements such as the 20" water main, surrounding arterial roadways, and internal roads to the civic building and commercial center are also considered to serve the larger Clarksburg community. Those infrastructure improvements that are required by the Preliminary Plan approval to meet APF requirements clearly satisfy the development district requirement's to serve a greater area than a single development.

However, in accordance with the intent of the district legislation, staff do not support including internal streets and other infrastructure that primarily benefits the single development. Specifically, the proposed improvements which should be excluded in the development district are:

1. Street Construction of Main Street east of Street K, Street F, and Street H.
2. Internal trails/Bikeways which may connect to regional systems but primarily serve the local development.

The proposed improvements also include construction of a local park and school site grading. Development of local parks and elementary school sites are traditionally viewed as the responsibility of the public sector. If the inclusion of such improvements in the district can be achieved within the County's guidelines for an acceptable tax burden, then these improvements could be included within the district.

The enabling legislation further states that all proposed infrastructure improvements should not be the responsibility of a single developer under the Planning Board's site plan and adequate public facilities requirements. Sec. 14-3 (g) (2). It is staff's understanding that the County Executive will be proposing an amendment that clarifies single developers, like Terrabrook, can be a development district as long as they provide infrastructure for the larger area. This will likely result in more single developer applications for districts. It could also possibly undermine the opportunity for several developers to coordinate various required infrastructure improvements. However, the opportunity for infrastructure coordination can still occur through preliminary plan review of subdivisions. Approval of the proposed development district must be contingent upon an amendment that allows for a single developer to provide for such improvements.

Conformance to Zoning and Subdivision Requirements

Staff finds that the proposed development district conforms to the Zoning and Subdivision requirements. The proposed infrastructure improvements have been previously reviewed and approved by the Planning Board during their review of the Town Center's Preliminary Plan, 1-95042, September 28, 1995. These approvals required the proposed development to meet all subdivision and zoning requirements.

Conformance to the Annual Growth Policy's Adequate Public Facilities Requirements

The proposed infrastructure conforms to the required APF improvements required by the approved Project Plan 9-94004 and Preliminary Plan 1-95042. The Transportation Planning Unit confirms that only the proposed roadway infrastructure that serves a larger, regional area can be financed through a district approach. This includes all arterial and major highways shown on the Clarksburg Master Plan and significant collector streets such as Redgrave Place, parts of Main Street and Public Street K (Greenway Street) that serve access to the commercial center and proposed town hall. See Transportation Memo, Attachment C.

Conformance to Providing Cost Estimates for Proposed Infrastructure Improvements

The applicant has provided cost estimates for all proposed infrastructure improvements. Staff did not evaluate the accuracy of the proposed estimates which is the responsibility of the Department of Public Works and Transportation. The cost estimates will be used primarily by the Department of Finance in determining the cost of the bonds and the taxing rate per household.

Other Issues of Concern

The proposed Clarksburg Town Center Development District raises questions regarding the coordination of needed infrastructure and timely construction of public facilities in general. Staff had originally viewed the proposed Development District as a means of comprehensively identifying needed infrastructure improvements and coordinating developer obligations to build the APF requirements of individual developments. It was envisioned that a larger development district including 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. However, 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.

It is possible, according to the Department of Finance, to have a series of development districts based upon separate applications and proposed infrastructure improvements that add up to a more comprehensive coverage of the Clarksburg community. Several other developers have already expressed interest in joining a development district or establishing their own. Terrabrook's proposal does not include these other potential developers due to their need to have a development district established in time for their proposed construction schedule.

The 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. This traditional approach coordinates private sector improvements during preliminary plan review and identifies needed Capital Improvement Projects can help to ensure that needed infrastructure and timely construction is achieved. Clarksburg is currently in jobs and housing moratorium for APF transportation capacity and is establishing capacity primarily through privately funded transportation improvements. Please refer to Private Sector Roadway Improvements in Clarksburg, Attachment D, to see the comprehensive network of roadways to serve the future community.

Public Comments

The applicant presented their proposal to the Clarksburg Civic Association. Staff has requested comments from the Association, but has not received any correspondence on this matter. It would be helpful to the community to be able to comment later on the proposal before Council, after the Executive prepares the fiscal report.

Conclusion

Staff finds that the proposed development district meets the requirements of the enabling legislation if Sec. 14-3 (g) (2) is amended to permit improvements by a single developer, and if the list of proposed infrastructure improvements is modified as per staff's recommendations to include only those improvements that have a more regional benefit beyond the local development. Staff recommends that a public hearing prior to Council's final resolution to enact the district should be held to permit the public adequate time to comment.

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Attachments

APPENDIX O

CLARKSBURG TOWN CENTER DEVELOPMENT DISTRICT

Detailed Schedule of Infrastructure Provided to Date and Identification of Infrastructure of
General Benefit Planned to be Funded Using Development District

Comparison of Infrastructure in Petition and in Approved Resolution

	<u>Original Estimate by Petitioner</u>	<u>Revised Estimate by Petition as Reviewed by County</u>	<u>Recommended by County Executive and Approved by County Council Resolution # 15-87</u>
TRANSPORTATION IMPROVEMENTS			
Clarksburg Sq. Rd. and Overlook Pk. Rd. (formerly Main, F, H, & K Streets)	\$ 4,617,556	\$ 2,970,000	\$ --
Stringtown Road	3,248,504	4,600,000	4,600,000
Piedmont Road	1,271,598	2,385,000	2,385,000
Lowering MD355 south of Stringtown Road	477,786	970,000	970,000
MD355 Intersec. Improv. (at Clarksburg Rd.)	545,273	70,000	-- *
Clarksburg Road	662,965	1,430,000	1,430,000
Redgrave Place (MD355 to Town Ctr. Bdry)	476,671	290,000	--
Comus Road Restriping	10,000	--	--
Acquisition of Rights-of-Way	501,188	Incl. in Above Projects	--
Stringtown Road 800-ft Gap	--	--	550,000**
Stringtown Road Extended (MD355 / I-270)	--	--	1,600,000**

* Represents infrastructure on secondary list which could be funded through the Clarksburg Town Center Development District provided that there is a cost savings on any of the primary items totaling \$17 million.

** Represents general benefit infrastructure requested by the County.

APPENDIX 

	<u>Original Estimate by Petitioner</u>	<u>Revised Estimate by Petition as Reviewed by County</u>	<u>Recommended by County Executive and Approved by County Council Resolution # 15-87</u>
Subtotal, Transportation Projects	\$11,811,541	\$12,715,000	\$11,535,000
OTHER IMPROVEMENTS			
Civic Center (20,000 sq ft.)	\$ 3,450,000	\$4,640,000	\$ 4,640,000**
20-Inch Water Main	326,951	827,000	827,000
School/Ball Field Site Grading	541,470	1,560,000	--
Hiker/Biker Trails	409,195	480,000	-- *
Public Local Parks (Piedmont Woods Park)	1,000,000	1,650,000	--
Subtotal Non-Transportation Projects	\$ 5,727,616	\$ 9,157,000	\$ 5,467,000
TOTAL COST, ALL PROJECTS	\$17,539,157	\$21,872,000	\$17,000,000 (Rounded)

LLC zoning



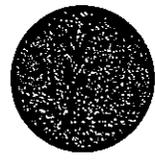
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May 24, 2007



The Honorable Leon Rodriguez
County Attorney
The Honorable Marc P. Hansen
Deputy County Attorney
Office of Montgomery County Attorney
101 Monroe Street, Third Floor
Rockville, Maryland 20850

Michael Faden
Senior Legislative Aid
Kathleen Boucher
County Council Attorney
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RECEIVED
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COUNCIL

Re: Clarksburg Town Center Development District

Dear Counsel:

We represent NNPII – Clarksburg LLC (“Newland”), the developer of the Clarksburg Town Center, and have been asked to review contentions made by the Clarksburg Development District Advisory Committee (“CDDAC”) and Clarksburg Town Center Advisory Committee (“CTCAC”) (collectively, the “Committees”) that the Montgomery County Council illegally created the Clarksburg Town Center Development District in Resolution No. 15-87 (March 4, 2003). For the reasons stated below, we believe that these contentions are without merit and that the development district was lawfully created.

1.

**State Enabling Legislation for the
Creation of Development Districts:
Chapter 20A of the County Code**

Chapter 20A (Special Obligation Debt) of the Montgomery County Code is a public local law initially enacted by the General Assembly in 1994 as House Bill 895 which authorizes the creation by the Montgomery County Council of development districts as special taxing districts. Section 20A-1(b) states that the County Council may enact a law to provide for the issuance of bonds to finance the costs of infrastructure for a development district the principal of and interest on which will be paid from a special tax collected by the County in the district. Section 20A-



The Honorable Leon Rodriguez
The Honorable Marc P. Hansen
May 24, 2007
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1(e) provides that debt issued under Chapter 20A must be used to finance the cost of public infrastructure to serve the development district, including public infrastructure that also provides benefits to the general public.

Additionally, § 20A-1(f)(2) states that the County Council may not create a new development district to finance Special Obligation Debt unless the proposed action is approved by:

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

the owners of at least 80% of the assessed valuation of the real property located within the proposed development district.

Hereafter, this approval requirement will be referred to as the "80% Approval Rule."

2.

The County Development District Act

The County Council enacted the Development District Act in Chapter 12, § 1 of the 1994 Laws of Montgomery County for the purpose of providing rules governing the creation of development districts and the imposition of special taxes to pay the principal of and interest on bonds issued to finance or reimburse the costs of infrastructure improvements. One of the express purposes of the Development District Act was to finance or reimburse the cost of public infrastructure where necessary for development areas established as a high priority for new development in the County. The Act was codified as Chapter 14 of the County Code.

A. The First Resolution

Under § 14-6 of the County Code, the creation of a development district may be initiated either by (1) a petition signed by a sufficient number of property owners in the proposed district to satisfy the 80% Approval Rule, or (2) the County Council at the request of the County Executive. The petition to create a development district must specify the proposed boundaries of the district and list the maximum number of residential units and nonresidential space to be constructed.

Further, under § 14-6, after a petition has been filed or the Council has initiated the creation of a development district, the Council must hold a hearing on the petition after giving public notice. Following this initial hearing, the Council may adopt a First Resolution under



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§ 14-6 in which it declares its intent to create a development district and explains why intensive development of the proposed district and public investment in the district will be in the public interest.

B. Planning Board Approval

After the Council has adopted the First Resolution under § 14-6, one or more owners of land located in the proposed district may submit an application to the Planning Board for provisional adequate public facilities approval for the proposed district. Under § 14-7(a), this application must, among other things (1) explain how the proposed district will comply with adequate public facilities requirements under § 50-35(k) of the County Code, (2) identify infrastructure improvements necessary to satisfy the adequate public facilities requirements for the development district set forth in the Annual Growth Policy adopted by the County Council, and (3) estimate the costs of each of the improvements.

Section 50-35(k) is the provision in the County subdivision regulations that sets forth the County's adequate public facilities ordinance. This section states that the Planning Board may not approve a preliminary plan of subdivision unless the Board finds that public facilities will be adequate to support the proposed subdivision. Section 50-35(k)(1) requires the County Council to adopt guidelines to determine the adequacy of public facilities and these guidelines may be set forth in a Growth Policy approved by the County Council. Section 50-35(k)(2) states that an applicant for preliminary subdivision plan approval must demonstrate the impact of the proposed subdivision on public facilities and demonstrate that they will be adequate.

Pursuant to Section 50-35(k), the Council has adopted Annual Growth Policies and guidelines for Local Area Review of road adequacy. The Annual Growth Policy establishes transportation policy areas with capacity limits for growth in each area based on the available capacity of the road network. The Local Area Review guidelines require a subdivider to mitigate its impact on intersections impacted by a proposed subdivision if, as a result of the subdivision, the intersections fail established capacity standards. Thus, to obtain preliminary plan approval a subdivision applicant must demonstrate that (1) the transportation area has available capacity, and (2) the subdivider will provide sufficient road improvements to satisfy Local Area Review requirements. If there is insufficient existing capacity in the transportation policy area, the Planning Board may require that the developer construct improvements to regional facilities in order to obtain approval for the development.

In reviewing the application for approval of a development district, the Planning Board must apply all otherwise applicable standards and procedures, and may approve an application if it finds that the proposed district will meet all adequate public facilities requirements under § 50-35(k) of the subdivision regulations and any added requirements that apply to a development district under the Annual Growth Policy. (§ 14-7(b)). Section 14-7(c) provides that applications



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for the approval of a development district “must commit the applicants to produce (through the funding of the proposed development district or otherwise) the infrastructure improvements needed to meet the applicant’s public facilities requirements in the proposed district and any added requirements which apply to an applicant under the Growth Policies.”

Finally, § 14-7(e) provides that, after a development district is created and the financing is in place, any development located in the district has for all purposes satisfied (1) the adequate public facilities requirements of § 50-35(k), (2) any added requirements under the Growth Policies, and (3) any other requirement to provide infrastructure improvements which the County adopts within 12 years after the district is created.

C. County Executive’s Fiscal Report

After the Planning Board has approved the development district, the County Executive is required under § 14-8(a) to submit a fiscal report estimating (1) the cost of each infrastructure improvement listed by the Planning Board as necessary to meet the adequate public facilities requirement of the district and any added requirements applicable under the Growth Policy, and (2) the amount of revenue needed to cover the district’s share of all infrastructure improvements to be funded, fully or partly, by the district and the estimated tax rate for the tax to be imposed in the district to produce the required revenue. Furthermore, § 14-8(b) provides that the Executive must recommend whether to create a district, its boundaries if one is created and the infrastructure improvements that should be funded in whole or in part through the district.

D. The Second Council Resolution

Section 14-9 governs the Second Council Resolution which must be adopted by the Council as the final resolution creating a development district. Under § 14-9(a), the Council must hold a public hearing on the Second Resolution not earlier than 45 days after the Planning Board has issued its decision as to whether to approve the district. Section 14-9(b) provides that, prior to the hearing on the Second Resolution, the Council must advertise the hearing and give notice of the hearing by mail to the record owner of each property located in the proposed development district at the address shown on the latest tax assessment roll. This notice must include a copy of the proposed Second Resolution and the estimated rate for the tax proposed to fund infrastructure improvements in the district.

Additionally, under § 14-9(c), if the Council intends to use special obligation debt to finance the district, and the district was initiated by the Council under § 14-6(b), as opposed to the property owner or property owners under § 14-6(a), the Council may adopt a Second Resolution only if it has received a petition signed by enough property owners to satisfy the 80% Approval Rule. As previously indicated, an initial petition submitted by a property owner or property owners under § 14-6(a) to create a development district must be signed by a sufficient



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number of property owners to satisfy the 80% Approval Rule. Thus, the 80% Approval Rule established in § 20A-1(f)(2), the State enabling law, must be satisfied whether the development district is initiated by a property owner petition under § 14-6(a) or by the Council under § 14-6(b). If the district is initiated by property owner petition, the 80% Approval Rule must be satisfied at the time of the initial petition. On the other hand, if the district is initiated by the Council, the 80% Approval Rule must be satisfied prior to the hearing on the Second Resolution.

Finally, § 14-9(e) provides that a Second Resolution adopted by the Council must, among other things, (1) define the development district by specifying its boundaries and listing the tax account number of each property in the district, and (2) list each infrastructure improvement that will be financed by the development district and the share of the costs which the County or another government agency will pay.

E. Infrastructure Improvements Which Are Eligible for Inclusion in a Development District

Section 14-3(g) defines the term "Infrastructure Improvement" and thus establishes the nature and scope of improvements that may be financed through a development district:

Infrastructure Improvement means 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, and the land where it is or will be located. 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.

Following the enactment of Chapter 14, the County Department of Public Works and Transportation ("DPWT") adopted guidelines for the funding of roads by development districts. The DPWT's guidelines stated that roads could be funded by development districts if two or more of the following criteria are satisfied: (1) the project is required under provisions of the Annual Growth Policy, (2) the project provides a regional benefit, (3) the project is identified on the adopted master plan, and (4) the project is one for which the ultimate cross-section will be provided by the development district developer or a combination of developers. Further, the



DPWT recommended that the following types of road projects not be funded by a development district: (1) roads that provide primarily internal circulation, and (2) road or intersection projects required under Local Area Review pursuant to § 50-35(k) of the subdivision regulations.

3.

The Creation of the Clarksburg Town Center Development District

On July 5, 2000, Terrabrook Clarksburg, L.L.C. ("Terrabrook" or the "Developer"), Newland's predecessor as the developer and owner of the Clarksburg Town Center, filed a petition, pursuant to § 14-6(a) to create a development district for the Clarksburg Town Center. Following receipt of the petition, the County Council, County Executive and Planning Board processed the petition pursuant to the procedures set forth in Chapter 14 which were described above.

A. The Developer's Petition

The Developer's petition proposed (1) to establish a development district which encompassed the entire Clarksburg Town Center, and (2) to finance numerous on-site and off-site improvements through the district. The infrastructure improvements proposed by the Developer to be financed through the district were as follows:

1. A Civic Building (20,000 sf. and located in the Town Square);
2. A 20" WSSC Water Main extension (also serving properties beyond the Town Center);
3. School/Ball Field site grading for a local park/school site within Town Center.
4. Street Connections – Main Street, F, H, & K Streets (internal to Town Center);
5. Trails/Hiker/Biker Paths (including a portion of a regional Greenway Trail and local side trails);
6. Stringtown Road Improvements;
7. Piedmont Road Improvements;
8. Lowering Route 355 at Stringtown Road;
9. Route 355 Intersection Improvements;
10. Clarksburg Road/Route 121 Improvements;
11. Redgrave Place/Route 355 Improvements (connecting the Town Center to Route 355 through the Historic Clarksburg Area);
12. Comus Road re-striping;
13. Acquisition of right-of-way;
14. Development of the Piedmont Woods public park.



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The petition stated that all adequate public facilities requirements under § 50-35(k) and the annual Growth Policy would be satisfied for the Clarksburg Town Center. The petition further stated that the adequate public facilities requirements for the Town Center, which comprised the entire proposed development district, had been determined in the Planning Board's approval of a preliminary subdivision plan (No. 1-95042) for the Clarksburg Town Center on March 26, 1996.

At the time the Developer filed the petition under § 14-6 requesting the Council to create a development district encompassing the Clarksburg Town Center, the Developer owned the entire area proposed for the development district and thus the 80% Approval Rule requirement in § 14-6(a) and Chapter 20A was satisfied.

B. The First Council Resolution

Following issuance of the required notice and a hearing, the Council adopted a First Resolution indicating its intention to establish the Clarksburg Town Center Development District.

C. The Planning Board Approval

After the adoption of the First Resolution by the Council, the Developer submitted an application, pursuant to § 14-7, to obtain the Planning Board's approval of the proposed development district. As explained above, under § 14-7, the Planning Board may approve an application for a development district only if it finds that all adequate public facilities requirements for the district will be satisfied under § 50-35(k) of the subdivision regulations and the County's Annual Growth Policy. Because the Clarksburg Town Center subdivision comprised the entire development district, the Developer's application relied on the preliminary plan approval for the Clarksburg Town Center to demonstrate that the development district would satisfy adequate public facility requirements established by § 50-35(k) and in the Annual Growth Policy. The Planning Board had already made this determination in approving the preliminary plan for the Clarksburg Town Center.

In a letter dated March 22, 2001, the Honorable William H. Hussmann, then Chairman of the Planning Board, informed the County Council that on March 8, 2001 the Planning Board had unanimously voted in favor of approving the application for the Clarksburg Town Center Development District. The Planning Board, however, applied the requirements of § 14-3(g)(1) and (2) to the Developer's list of proposed infrastructure improvements and eliminated certain items from the Developer's proposed list to insure that: (1) only improvements which served a regional purpose were funded through the development district; and (2) improvements which met only the needs of the Clarksburg Town Center subdivision were not funded through the district.



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The Developer did not object to the removal from the development district of infrastructure improvements that the Planning Board found did not serve a regional function.

The Planning Board recommended that only the following improvements be included in the development district, finding that these improvements would serve a regional area, not just the residents of the Clarksburg Town Center:

1. Civic Building.
2. WSSC 20-inch water main, off-site.
3. Street Construction – Part of Main Street from MD 355 to Public Street K.
4. Stringtown Road Improvements.
5. Piedmont Road Improvements.
6. Clarksburg Road Improvements contiguous to Town Center.
7. Redgrave Place connection to Main Street.
8. Acquisition of Right of Ways for regional roadways.
9. Regional Greenway Trail through public greenway park.
10. MD 355 Intersection Improvements, including intersection with Stringtown Road.

In paring down the infrastructure improvements to be financed through the development district, the Planning Board eliminated internal streets and other infrastructure that only benefited the Clarksburg Town Center development, including (1) street construction of Main Street east of Street K, Street F and Street H, and (2) internal trails and bikeways which connected to regional systems, but primarily served residents of the Clarksburg Town Center.

The Planning Board staff, in its recommendation, noted that development of local parks and elementary school sites are traditionally viewed as a responsibility of the County government. Accordingly, although these improvements were required of the Developer under the preliminary plan approval, the Staff recommended that the cost of these improvements be included in the development district if their inclusion would be consistent with the County's guidelines for an acceptable tax burden on residents. The Planning Board adopted this recommendation.

D. The County Executive Fiscal Report

On October 17, 2002, following the Planning Board's decision and in compliance with § 14-8, the County Executive issued a Fiscal Report in which he recommended the formation of a Clarksburg Town Center Development District. The Executive recommended, however, significant changes in the scope and nature of the infrastructure improvements to be financed through the district.



Initially, the County Executive noted that the current estimate of the cost of improvements proposed by the developer and approved by the Planning Board was \$21,872,000 and that to finance this amount, a bond issue of \$26 million would be required. The Executive found that the estimated annual tax burden on the owner of a single family detached home in the district would be \$1,528 which represented 40% of the then current property tax on a home with a market value of \$350,000. The County Executive concluded that this tax increase constituted an unacceptable additional burden on the taxpayers of the proposed district and recommended that the development district tax be limited to an amount that is no more than 30% of the current residential property taxes in the area. Thus, the Executive recommended that, no more than an annual additional tax burden of \$1,200 should be imposed on a home in the Clarksburg Town Center. Under this guideline, the Executive found that the total cost of infrastructure improvements that should be financed from the development district was \$17 million.

Additionally, the County Executive recommended significant changes in the nature of the improvements to be included in the district. The Executive explained that, in enacting the Development District Act, the Council envisioned that (1) adequate public facilities requirements were being expanded to include requirements that Developers meet long-term needs for schools, libraries, recreational facilities, parks and water and sewer facilities, and (2) that the inclusion of these facilities in a development district should be addressed on a case-by-case basis. Further, the Executive stated that he believed that, in the context of the policy that new development should pay for the infrastructure burdens generated by new development, the Clarksburg Town Center Development District should fund general benefit improvements at a higher level than proposed by the Developer. Accordingly, the Executive recommended the following two regional projects not proposed by the Developer or Planning Board be funded through the development district: (1) the construction of Stringtown Road as a full four-lane roadway in an 800 foot gap between two planned subdivisions, an improvement that had not been required or programmed for construction by the County or any developer; and (2) a contribution of \$1.6 million toward the County's cost of constructing Stringtown Road between MD 355 and I-270. The Executive noted that Stringtown Road extended was recommended in the Master Plan and will provide upgraded access from not only the Clarksburg Town Center, but also other nearby employment centers. Finally, the Executive recommended that a district expenditure of \$4.64 million that was originally proposed for the construction of a civic building by the Developer should be applied as a contribution toward the cost of the regional civic center and library to be constructed by the County.

To accommodate the reduction in the amount of infrastructure improvements to be financed through the development district from \$22 million to \$17 million and the addition of approximately \$3 million in "public benefit" improvements, the Executive recommended that the following projects proposed by the Developer be eliminated from the district: (1) site grading to accommodate a future elementary school and ball field (\$1.56 million), (2) the Redgrave Place



connection of the Town Center to MD 355 through Historic Clarksburg (\$300,000), and (3) Piedmont Woods Park (\$1.65 million). Further, the Executive recommended that three improvements, which were proposed by the Developer, be relegated to a "secondary list" and funded through the development district only if costs savings can be realized in connection with the \$17 million in infrastructure improvements approved for the district.

Consistent with the Planning Board's decision, and the DPWT's policy, the County Executive's proposed improvements for inclusion in the district eliminated internal roads or off-site improvements required of the Developer under the Local Area Review of road adequacy conducted by the Planning Board pursuant to § 50-35(k) of the subdivision regulations.

Accordingly, the Executive recommended only the following projects for inclusion in the development district:

<u>Improvement</u>	<u>Estimated Cost</u>
Civic Center/Library	\$ 4,640,000
Stringtown Road 800' gap	550,000
Stringtown Road Ext.	1,600,000
Stringtown Road	4,600,000
Piedmont Road	2,385,000
Lowering MD 355 at Stringtown	970,000
Clarksburg Road	1,430,000
WSSC 20" Water Main	827,000
TOTAL	\$17,000,000

It is important to note that, as a result of the paring down by the Planning Board and County Executive, the only improvements that remained in proposed development district were regional improvements. Further, none of the improvements constituted improvements that were the entire responsibility of Terrabrook, the single developer of the Clarksburg Town Center. For example, the road improvements, which generated most of the costs to be financed through the district, were improvements to State highways or arterial roads performing regional transportation functions and were so identified by the applicable Master Plan and Annual Growth Policy.

As previously indicated, the Executive identified certain other improvements as "secondary," but indicated that these improvements should be funded through the development district only to the extent that cost savings are realized in the construction of approved infrastructure improvements. We have been advised that, as a result of the passage of time and



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the resultant escalation of costs, there is no possibility that these secondary improvements will be financed by the Clarksburg Town Center Development District, and the Developer has abandoned any intention of including them. Accordingly, we have not further analyzed these improvements.

E. The Second Resolution

On March 4, 2003, after due notice and a hearing, the County Council adopted a Second Resolution (Resolution No. 15-87) in which it approved the creation of the Clarksburg Town Center Development District and the inclusion, with some minor modifications, of the infrastructure improvements and costs that had been recommended by the County Executive.

4.

**The Public Policy Considerations Supporting
the Development District Concept and
the Creation of a Development District
for the Clarksburg Town Center**

The Clarksburg Master Plan provides for the construction of numerous regional facilities, including roads, sewer and water facilities, parks and recreational facilities, libraries, transit facilities and schools necessary to accommodate the enormous growth projected for the region, and to be channeled to the region. The Master Plan also specifically envisions the use of development district financing as one of the tools, along with developer contributions and County capital improvement projects, to finance regional infrastructure required to serve this burgeoning growth. The central goal of the Master Plan is to have regional public infrastructure in place in a planned, coordinated and timely manner to prevent the largely undeveloped Clarksburg region from suffering the severe effects of unplanned and uncontrolled suburban growth that have been experienced by other parts of the State and region.

As the Executive noted in his Fiscal Report recommending the creation of the Clarksburg Town Center Development District, in order to meet the goals of the Clarksburg Master Plan and other regional planning initiatives, the County expanded adequate public facilities requirements imposed on developers through § 50-35(k) and the Annual Growth Policy. The County expanded adequate public facilities requirements to address long-term, regional needs for schools, parks, recreational facilities, sewer and water facilities. For example, adequate public facilities requirements imposed through the Annual Growth Policy often included the construction of through lanes for regional, arterial roads and State highways. That the adequate public facilities requirements imposed on the Clarksburg Town Center Developer exceeded requirements that were reasonably related to impacts of the Town Center itself was recently



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confirmed by the Honorable Royce Hanson, Planning Board Chairman, in a May 18, 2007 letter concerning the Clarksburg Town Center Development District. He stated (emphasis supplied):

For example, the Board's order approving the Clarksburg Town Center contemplated the possibility that a development district might be used to finance unspecified infrastructure. The approval was conditioned on the provision by the developer of those facilities required to meet the APF tests then in force. **These included not only projects that primarily served the development but also others that, while necessary for the development to proceed, were designed at a size sufficient to serve other users. Some projects, such as the civic center and library, were not included as part of the APF test.**

* * *

In its March 26, 1996 order approving the Clarksburg Town Center preliminary plan, the Board noted the absence of a development district, and, therefore, **required the developer to provide certain infrastructure projects beyond those strictly required for the Clarksburg Town Center.**

The Master Plan's stated policy of using development districts as one of a number of mechanisms for financing public infrastructure must be considered in light of the legal and constitutional limitations on the County's ability to require individual developers to dedicate and construct infrastructure improvements. In Dolan v. City of Tigard, 512 U.S. 374, 129 L.Ed. 2d 304 (1994) the Supreme Court described in detail the constitutionally required relationship between the nature and scope of exaction that can be imposed on a developer and the impact of the proposed development. In Dolan, a property owner applied to the City for a building permit to construct an expanded hardware store. As conditions to granting the permit, the City required the property owner to dedicate a portion of his property as a greenway and to dedicate a pedestrian/bicycle pathway. The Supreme Court explained that a two-step analysis must be applied in determining whether the nature and scope of these exactions are permissible. The first step focuses on the nature of the governmental action. It requires the government to demonstrate that there is an "essential nexus" between a "legitimate state interest" and the exaction.

The second, and often most important, step of the Supreme Court's analysis requires the government to demonstrate the existence of a requisite relationship between the degree and scope of the exaction and the impact of the proposed development. The Court ruled that the government must demonstrate that the degree of the exaction is "roughly proportional" to the impact of the proposed development. In describing the "rough proportionality" standard, the



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Court explained (129 L.Ed. 2d at 320): “the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”

The Supreme Court in City of Tigard gave important guidance as to the scope of the “rough proportionality” standard. It explained that many state court decisions in this area have adopted a “reasonable relationship” test under which the government must establish that the exaction has some reasonable relationship to the needs created by the development. In City of Tigard, the court ruled that the “reasonable relationship” test articulated by the state courts comports with the Federal constitutional rule. The Court adopted the term “rough proportionality,” as opposed to “reasonable relationship,” to describe the Federal constitutional test only because it thought that the term “reasonable relationship” was confusingly similar to the “rational basis” term used to describe a more lenient standard employed by some state courts.

Applying the “rough proportionality” or “reasonable relationship” test to the case before it in City of Tigard, the Supreme Court held that the City had failed to establish that the nature and scope of these exactions were related to the needs created by the proposed development project. In connection with the bicycle path, the Court explained that there was no showing that the additional number of vehicle and bicycle trips generated by the proposed development was reasonably related to the dedication of the pathway.

The Maryland Court of Appeals was among the state courts that had previously adopted the “reasonable relationship” test. In Howard County v. JJM, Inc., 301 Md. 256 (1984), the Court held that a decision by Howard County decision requiring a developer to reserve a right-of-way in a subdivision for a proposed state road in exchange for subdivision approval created an unconstitutional taking of the developer's property without compensation because there was no reasonable relationship shown between the need for the highway and the new subdivision.

The Development District Act is an innovative and imaginative mechanism for financing public infrastructure of a regional nature in circumstances where (1) the imposition of an exaction requiring a developer to finance the infrastructure may be problematic given the legal and constitutional constraints imposed by the Supreme Court and the Court of Appeals; and (2) the developer may be unable or unwilling to construct the required regional infrastructure in a timely manner. The development district mechanism is an effective tool to coordinate the timing of the construction of regional facilities. If the construction of public infrastructure is solely dependent on exactions imposed on individual developers, the infrastructure will be constructed only when the private developers have available resources and the incentive to proceed. As will be explained below, the Clarksburg Town Center Development District effectively served this goal of providing public infrastructure in a timely manner. The district included the construction of an 800-foot gap in Stringtown Road as a four lane road. This gap was caused by the fact that the realigned road fronted on property that was owned by an individual that did not seek to



further develop his land. The district also includes the lowering of MD Route 355 to create a safe intersection with Stringtown Road.

The language and structure of the Development District Act are directly aimed at serving these public policies. Under § 14-7 of the Development District Act, a property owner petitioning for the creation of a development district must (1) describe how the district will comply with the infrastructure improvements under § 50-35(k) and the Annual Growth Policy, and (2) provide the costs of all such improvements. Under § 14-7(c) the Planning Board's approval of the development district must commit the developers to produce (through development district funding or otherwise) the infrastructure improvements necessary to satisfy adequate public facilities requirements. Further, under the terms of § 14-3(g), only infrastructure improvements that are of a regional nature and not reasonably related only to one subdivision may be financed through the development district tax. Consistent with this requirement in the ordinance, the County DPWT has adopted a policy which excludes road improvements from the development district that provide primarily for internal circulation and off-site improvements required of the developer under Local Area Review. The Local Area Review requires developers to provide improvements to impacted intersections in the vicinity of the proposed subdivision which are sufficient to mitigate the traffic generated by the subdivision itself. Thus, the DPWT policy implementing § 14-3(g) seeks to ensure, in connection with roads, that the only facilities included in the development district are those that would be problematic for the County to impose on an individual developer. In short, § 14-3(g) and the DPWT policy implementing it effectively ensure that the development district mechanism is used for the purpose it was created: financing the timely and coordinated construction of regional public infrastructure described in the Master Plan and Annual Growth Policy as necessary to accommodate new development.

5.

**The Committees' Arguments Challenging the
Validity of the Development District**

The Committees have made five arguments in support of their position that the County Council acted illegally in creating the Clarksburg Town Center Development District. We believe that these arguments are without merit and will address each in turn.

***A. The Inclusion in the Development District of Infrastructure Improvements
Required by the Planning Board to Satisfy Adequate Public Facilities
Requirements***

The Committees argue that the County Council's creation of the development district was illegal because the Council included in the development district the costs of constructing



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infrastructure improvements that the Planning Board required the Developer to provide in granting preliminary plan and site plan approval. No provision in Chapter 20A, Chapter 14, the subdivision regulations or any other section of the County Code even remotely supports this proposition. To the contrary, the provisions of Chapter 14 indicate that, in enacting the Development District Act, the County Council specifically envisioned that development districts would be used to finance infrastructure improvements that a developer must provide in order to satisfy adequate public facilities requirements under § 50-35(k) and the Annual Growth Policy.

The plain language of Chapter 14 belies the Committees' argument. Section 14-7(a) requires that an application for Planning Board approval of a development district (1) explain how the development district will comply with all adequate public facilities under § 50-35(k) and the Annual Growth Policy, (2) identify with specificity infrastructure improvements necessary to satisfy adequate public facilities requirements under § 50-35(k) and the Annual Growth Policy, and (3) estimate the costs of such improvements. Likewise, § 14-7(b) provides that the Planning Board may approve an application for a development district only if it finds that the proposed district meets all adequate public facilities requirements under § 50-35(k) and the Annual Growth Policy. The language of these provisions can be given logical meaning only if infrastructure improvements required of the developer to satisfy adequate public facilities requirements may be included in the development district. Further, § 14-8 requires the County Executive's Fiscal Report to estimate the cost of improvements required to satisfy adequate public facilities requirements and calculate the tax rate on this basis. The requirements that the applicant and County Executive estimate the costs of improvements required to satisfy adequate public facilities requirements and that the County Executive calculate the tax rate based on such cost estimates would have no meaning if the Committees' argument that adequate public facilities improvements cannot be included in the district were accepted. Such a result would violate settled rules of statutory construction. In ascertaining the intention of the legislature, all parts of a statute are to be read together. Any one part and all parts are to be reconciled and harmonized, if possible. Sewell v. Norris, 148 Md. App. 122 (2002), appeal dismissed, 374 Md. 81 (2003). CTCAC's interpretation would gut large portions of the Act and render them nonsensical.

If this were not enough, § 14-7(c) expressly states that development districts may be used to finance improvements required of a developer under adequate public facilities requirements. This section states that an application for approval of a development district (emphasis supplied):

must commit the applicants to produce (through the funding of the proposed development district or otherwise) the infrastructure improvements needed to meet the applicant's public facilities requirements in the proposed district and any added requirements which apply to an applicant under the Growth Policies.



Section 14-7(e) provides that, once a development district is approved and the financing is in place, any development located in the district is deemed to have satisfied all public facilities requirements under § 50-35(k) and the Annual Growth Policy. This provision also expressly envisions that development districts will be used to find infrastructure improvements imposed on developers to satisfy adequate public facilities requirements and would be rendered meaningless by the Committees' interpretation.

Furthermore, if accepted, the Committees' argument that infrastructure improvements required to obtain adequate public facilities approval cannot be included in the development district would do violence to the important public policy purposes underlying the Development District Act. As discussed above, the Development District Act is an innovative and effective mechanism for financing public infrastructure of a regional nature as shown in the Master Plan and Annual Growth Policy. The Act contributes to the County's ability to provide for the construction of regional facilities in a planned and coordinated manner without being stymied by the timing and resources of individual developers or the legal constraints on imposing exactions on developers. These public policies would be defeated by the Committees' interpretation of the Act.

Finally, it should be noted that the Planning Board, the County Executive and the Council all concluded that infrastructure improvements required to satisfy adequate public facilities requirements to obtain preliminary plan and site plan approval could be included in the development district. These governmental bodies are bodies responsible for administering the Development District Act. It is settled under Maryland law that an agency's interpretation of the statute that it is required to administer is entitled to great weight. Maryland Aviation Admin. V. Noland, 386 Md. 556, 573 n.3 (2005) (quoting Bd. Of Physician Quality Assurance v. Banks, 354 Md. 59, 69 (1999)). ("The agency's interpretations and applications of statutory or regulatory provisions 'which the agency administers should ordinarily be given considerable weight by reviewing courts.'") This rule construction has a particularly compelling application in the present case because the County Council is the body which enacted the Development District Act.

B. The Clarksburg Town Center Development District Does Not Include Infrastructure Improvements that Primarily Relate to One Development

CTCAC argues that the County Council illegally created the Clarksburg Town Center Development District because it approved infrastructure improvements for inclusion in the district that were not eligible under § 14-3(g)(2). As previously indicated, § 14-3(g)(2) prohibits infrastructure improvements from being financed through the district if they are the sole responsibility of a single developer. CTCAC's argument is without merit. The facilities recommended by the County Executive and approved by the Council within the \$17 million limit



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for the development district are regional in nature and do not involve improvements that are the sole responsibility of a single developer.

To give effect to the Development District Act, the term "infrastructure improvement" in § 14-3(g)(2) must be construed to mean an entire facility or road, not merely (1) an addition to, or modification of, an existing facility, or road, or (2) a contribution to a new facility or road in which others are also making a contribution. Thus, under § 14-3(g)(2), an internal subdivision road would not be eligible for inclusion in a development district because it is the responsibility of a single developer under a site plan and adequate public facilities requirement. On the other hand, improvements to MD 355 would be eligible because this road is an arterial State road and cannot be said to be the responsibility of a single developer under a site plan or adequate public facilities requirement.

CTCAC's argument that § 14-3(g)(2) prohibits inclusion in a development district of any partial improvement to an existing facility or road which is required of a developer under a site plan or adequate public facilities determination, would prohibit the inclusion of any road or facility construction requirement imposed by the Planning Board to satisfy adequate public facilities requirements. As explained in Part 5.A above, this interpretation would be inconsistent with express language in Chapter 14 and render much of the ordinance nonsensical. The Planning Board staff in its recommendation that the Board approve the Clarksburg Town Center Development District recognized that § 14-3(g)(2) was possibly susceptible to the interpretation suggested by CTCAC and recommended that the Act be amended (if the Council believed it was necessary) to eliminate any such interpretation. The Council did not accept this invitation to amend the Act. The Council, however, adopted the Second Resolution and included in the district infrastructure that the Developer was required to provide under the Planning Board's adequate public facilities determination. The Council apparently concluded that the very narrow interpretation of § 14-3(g)(2) now espoused by CTCAC was not reasonable given the express language and structure of the Act, and it saw no reason to amend the Act.

None of the improvements included by the Council in the district were the sole responsibility of the Developer of the Clarksburg Town Center. We will briefly address each of the facilities that the County Council approved for inclusion as part of the \$17 million to be financed through the district.

Civic Center/Library. The Council approved the inclusion in the development district of \$4.64 million toward the cost of a 20,000 SF regional library, civic center and government office building. This is a regional facility that is not reasonably related in nature or scope to needs created solely by the Clarksburg Town Center. The library is not the sole responsibility of a single developer. The County is contributing to much of the construction costs. It is, therefore, appropriate for inclusion in the development district.



Clarksburg Road (MD Route 121). The Council approved the inclusion of \$1,340,000 in the development district to finance approximately 800 feet on the south half of this regional, arterial road that is part of the State highway system. It was necessary to complete the widening of this road which had already been widened by others at other places along its alignment. MD Route 121 cannot be said to be the sole responsibility of a single developer.

Stringtown Road. The Council approved the inclusion in the development district of \$4.435 million to finance the construction of two lanes of this ultimate four-lane cross section. The Developer was required to construct these lanes as a part of preliminary plan approval, and the Developer will be reimbursed for this improvement. It is a regional, arterial road which provides an important connection for this portion of the County to MD 355 and I-270. Further, the Council approved inclusion of an additional \$550,000 to construct two lanes of an 800-foot gap in the construction of Stringtown Road as a four lane road. This gap was caused by the fact that the realigned road fronted land which was owned by a party that was not seeking to further develop his property at the time while the remaining alignment of Stringtown Road was on property which was being developed. Stringtown Road, a County arterial road, cannot be said to be an improvement which was the responsibility of a single developer under a site plan or adequate public facilities determination.

Stringtown Road Extended. The Council approved the inclusion in the development district of a \$1.6 million contribution toward the cost of extending Stringtown Road from MD 355 to I-270. This amount was projected to provide for 25% of the cost of this project. The project involves a regional, arterial road and an important connection that will serve this area of the County, not just the Clarksburg Town Center. As previously indicated, Stringtown Road cannot be said to be the responsibility of a single developer

MD 355 Lowering. The Council approved the inclusion in the development district of \$905,000 for the lowering of MD 355 just south of its intersection with Springtown Road. This improvement was required for safety reasons to provide an adequate line of sight at this intersection of two arterial roads performing a regional transportation functions.

Piedmont Road. The Council approved inclusion in the development district of \$2.27 million for the construction of Piedmont Road. Piedmont Road is also an arterial road which connects to Mid-County Highway performing a regional function which was not the responsibility of a single developer under a site plan or adequate public facilities determination.

Washington Suburban Sanitary Commission Water Main. The Council approved inclusion in the development district of \$779,000 for a 20 inch WSSC water main extending 1.4 miles from MD 355 through the Clarksburg Town Center to a point east of the Piedmont Road/Stringtown Road intersection. This infrastructure improvement will serve not only the Clarksburg Town Center, but will also provide water supply and pressure to other areas of the



County. The water main is not the responsibility of a single developer under a site plan or adequate public facilities determination.

Greenway Trails. The Council approved the inclusion of \$460,000 for the construction of trails that will be part of a regional Greenway System that will ultimately connect Little Bennett, Ovid Hazen Wells and Black Rock Parks. This regional system is not the sole responsibility of the Developer. Further, the Council excluded from the district additional trails in areas not proposed for dedication as park land and not directly a part of the regional system.

C. There Is No Requirement that a Development District be Approved Before a Subdivider Obtains Preliminary Plan Approval

CTCAC argues that the creation of the Clarksburg Town Center Development District by the Council was illegal because it was created after the Planning Board's approval of the preliminary plan of subdivision for the Town Center. CTCAC argues that a development district can be created only prior to the approval of the preliminary plan.

The short answer to this argument is that there is no requirement in the subdivision regulations, Chapter 20A, Chapter 14 (the Development District Act) or any other provision in the County Code that a development district be created prior to the approval of a preliminary plan. To the contrary, the provisions of § 14-7 indicate that the most efficient procedure would be for a developer to obtain preliminary plan approval prior to filing an application for the Planning Board's approval of the creation of a development district. Section 14-7(a) requires the applicant for a development district to demonstrate, and the Planning Board find, that all adequate public facilities requirements in § 5-35(k) and the Annual Growth Policy will be satisfied for both the individual subdivision in the development district, as well as the development district as a whole. The determination of the adequate public facilities requirements to be imposed on a subdivision is one of the most critical and time consuming aspects of the processing of a preliminary plan of subdivision. This process involves receiving input from numerous County and State agencies. It is entirely logical for a developer to file and obtain approval of a preliminary plan of subdivision prior to submitting an application to create a development district, particularly where the development district encompasses one subdivision like the Clarksburg Town Center Development District.

D. Compliance with the 80% Approval Rule

The Committees argue that the 80% Approval Rule was not satisfied in the Clarksburg Town Center Development District. Section 20A-1(f)(2) of the County Code provides that a development district may be created to finance Special Obligation Debt only if the creation of the district is approved by (1) at least 80% of the owners of real property located within the



proposed development district, and (2) the owners of at least 80% of the assessed value of real property located within the district.

The County Council in Chapter 14 of the County Code specifically required that the 80% Approval Rule under § 20A-1(f)(2) be satisfied in the procedures it established. In the case of a developer initiated petition, § 14-6(a) requires that the 80% Approval Rule be satisfied at the time the initial petition for the creation of the development district is filed. The initial petition must be signed by the requisite property owners. Further in the case of a development district initiated by the Council, § 14-9(c) requires that the 80% Approval Rule be satisfied prior to the adoption of the Council's Second Resolution.

In the present case, the petition for the creation of the development district was initiated by the Developer under § 14-6(a). At the time of the filing of the initial petition, the Developer, Terrabrook, was the sole owner of the land proposed for inclusion in the development district and thus satisfied the 80% Approval Rule by its signing of the initial petition.

E. Compliance with Notice Requirements under §§ 14-9 and 14-17 of the County Code

The Committees also allege that the notice requirement set forth in § 14-9(b)(1) were not satisfied. This section requires that the County Council give notice of the public hearing on the Second Resolution by:

- (A) advertisement in at least two newspapers of general circulation in the County at least 21 days before the hearing; and
- (B) notifying by mail the record owner of each property located in the proposed district at the address listed on the latest tax assessment role.

We are advised that, in the present case, the Developer has maintained records which establish that each of these notice requirements were satisfied.

In conclusion, we believe that the County Council did not act illegally in creating the Clarksburg Town Center Development District. The development district financing system adopted in Montgomery County is an innovative and effective mechanism for ensuring that public infrastructure is provided in a coordinated, regional manner within the constraints imposed by the courts. The statutory construction arguments raised by the Committees are belied by the language, structure and purpose of the Development District Act. If accepted, the statutory construction arguments made by the Committees would effectively destroy the



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development district mechanism and make the regional planning goals of the Master Plan and Annual Growth Policy more difficult to achieve.

Very truly yours,

A handwritten signature in cursive script, appearing to read 'Kurt J. Jir'.

KJF/afp

Feb 2019

KB

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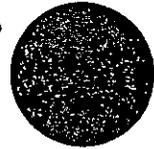
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June 5, 2007

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RE: Clarksburg Town Center Development District

Dear Counsel:

This letter is written of behalf of my client, The Clarksburg Town Center Advisory Committee, Inc. ("CTCAC") as a response to May 24, 2007 letters sent to you by Kurt J. Fischer, Esquire, counsel for the developer of Clarksburg Town Center (Fischer Letter), and by Stephen Z. Kaufman, Esquire and John R. Orrick, Jr., Esquire, counsel for the applicants for Development Districts in the Clarksburg Planning Area (Kaufman Letter). The Fischer and Kaufman Letters were submitted in response to the CTCAC Report of March 20, 2007 on implementation of Development Districts in Clarksburg.¹

Before turning to the developer responses to the CTCAC Report, a few preliminary observations are in order. First, this letter is addressed to the County Attorney and certain of the individuals assigned the responsibility of preparing an in-house assessment of the CTCAC Report. This tracks the format of the Fischer and Kaufman Letters, so as to ensure like distribution before the in-house assessment is concluded. The CTCAC Report (at 98) called for a "[t]horough, independent investigation and fact-finding to verify and publicly report on development district

¹ The Letters also respond to matters raised in a separate Report by the Clarksburg Development District Advisory Committee ("CDDAC"), also released in March 2007. The CDDAC Report raised issues not addressed in the CTCAC Report. The responses to those issues are outside the scope of the matters raised by CTCAC, and will not be addressed here. CTCAC's silence on these matters, however, should not be interpreted as agreement with the contentions set forth in the Fischer and Kaufman Letters on such matters.

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implementation.” It did so because of concern that there is a potential for the diversion--from developers to the taxpayers of this County—of the responsibility to pay for perhaps more than \$60 million in infrastructure associated with Clarksburg development. Nevertheless, the investigatory task was assigned to the addressees above, all of whom are County employees. CTCAC can only hope that these employees will, in good faith, attempt to objectively assess claims of improper action by Council and its staff, even though in the case of at least one staff member, he is “investigating” himself. But despite these hopes, an in-house investigation of such a substantial diversion of financial obligations cannot, almost by definition, provide the concerned public reason for confidence in its findings.

Second, it is especially unfortunate to the credibility of the investigation that the Fischer and Kaufman Letters read like a script that was prepared for adoption by the investigatory team, should the team perceive a commonality of interest with the developers in preparing a “whitewash” of the CTCAC Report’s findings and conclusions. For example, in one place the Fischer Letter (at 17) goes so far as to speculate on what the Council “apparently concluded” when it failed to heed the recommendation of the Planning Board that the Town Center Development District would require an amendment to Chapter 14 in order for the District to be lawfully created as requested. In fact, as explained in Part I.D., and nowhere mentioned by Mr. Fischer, there is no evidence of Council deliberation, anywhere in the legislative record of Resolution 15-87, that the Council gave this issue even a moment’s thought.

Third, the investigation’s chance to achieve credibility is further undermined by the apparent strategic sharing of information with the developers—information that is then used by the developers in a highly improper fashion in an apparent attempt to undermine the credibility and standing of CTCAC. Thus, the Kaufman Letter (at 22)² characterizes as “disingenuous” an argument that CTCAC never made in its Report, i.e., that Clarksburg residents who purchased fully developed homes in the Town Center before creation of the Development District in March 2003, are exempt from Development District taxation. The Kaufman Letter notes that it learned of this argument, not from either of the Development District Reports, but rather from “certain members of the staff.” *Id.* at 21. But whatever individual members of CTCAC may feel or have expressed to staff about this issue, CTCAC, as an incorporated entity, did not take a position on it, or even raise it, in its Report. The reason is obvious: to do so would needlessly drive a wedge between “before” and “after” Town Center residents, when the real issue is the legitimacy of the Development District for all Town Center residents.

² All citations to the Kaufman Letter are actually citations to the accompanying Memorandum.

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Why does the Kaufman Letter devote over a page of analysis to this non-issue? And why was it fed to the developers by the staff in the first place? The unfortunate appearance, at least to CTCAC, is a coordinated tactic of divide-and-conquer.

Finally, despite all these strikes against it, the investigative team can still achieve a high degree of credibility if it fully and fairly analyzes the key issues raised by the CTCAC Report and does not wander off into irrelevant discussion of point-after-point made by the developers in their lengthy submissions that have never been disputed by CTCAC. For example, the developers tout at length the legitimacy of Development Districts as a mechanism for financing public infrastructure, whereas the CTCAC Report (at 4) is very explicit in saying that the Report does not question the underlying policy decision by the Council to enact and make available this method of financing, only its "*implementation*" *id.* (emphasis in original) in this instance. And despite the length of their responses, the developers conveniently ignore key points made in the CTCAC Report that, shorn of developer obfuscation, repeatedly refute the tendentious and tortured analysis of statutory requirements presented by the developers. The remainder of this letter is addressed to a repetition of those points in light of developer claims.

I. IN THE CLARKSBURG CASE, THE COUNCIL HAS INAPPROPRIATELY OVERRIDDEN THE FUNDING OBLIGATIONS IMPOSED BY THE PLANNING BOARD IN DEVELOPMENT APPROVALS BY ALLOWING DEVELOPERS TO SHIFT THOSE OBLIGATIONS TO TAXPAYERS VIA THE CREATION OF DEVELOPMENT DISTRICTS.

The CTCAC Report tells what, in essence, is a fairly simple story: The Planning Board imposed, and the Town Center developer agreed to, certain specified infrastructure obligations, including funding of the infrastructure, in exchange for high-density, much-sought-after development approvals. Following these approvals, the successor developer, with the cooperation of the Council, has sought to shift much of that financial obligation to the taxpaying homeowners of the development, via the mechanism of Development District financing. The CTCAC Report details not only why this sounds inappropriate, it also explains why this is legally indefensible. The Fischer and Kaufman Letters obfuscate the story with strained argument as to the legality of each individual, successive step taken, with no regard for its inconsistency with prior actions, and with equal disregard for both inconvenient facts and the overarching big picture. In the end, their arguments boil down to what they see as a "clear" distinction between the Planning Board's imposition on developers of a requirement to **construct** required infrastructure, and a requirement to **fund** such construction. The reality is that there is no history of such a "clear" distinction in Board development approval obligations generally. In the

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specific case of the Clarksburg Town Center, the **funding** requirement was unambiguously imposed by the Board, in careful adherence to the stringent requirements spelled out in the Master Plan, and accepted by the developer without challenge to the Board's legal authority to do so. That should have been the end of the matter.

A. The Planning Board's Development Approvals for the Clarksburg Town Center Imposed Specific Public Infrastructure Construction and Funding Obligations That the Developer Unconditionally Agreed To In Order to Obtain Those Development Approvals

The CTCAC Report (at 23-25) quotes extensively from April 1994 planning documents that led to enactment of the Clarksburg Master Plan in June 1994. Those documents make plain that because of the dearth of public funds for public infrastructure in Clarksburg, one of the requirements for development to proceed was the conditioning of development approval on the willingness of "private developers to **fund** a significant portion of the infrastructure improvements." *Id.* at 24 (emphasis added). The Report also details that the Town Center developer, Klebanoff, was unhappy with an initial draft of the Master Plan, because it seemed to reflect, erroneously, that it was "the intention of the Council that a development district be the only possible **funding** mechanism." *Id.* at 26 (emphasis added). He sought broader language, and in a letter to the Council President, reminded the Council that "development districts were only one of any number of ways the private sector could choose to help **pay** the infrastructure shortfall...even the private sector simply writing a check!" *Id.* (emphasis added).³

As finalized, the Clarksburg Master Plan fully reflects Klebanoff's expectation that private developers could obtain development approvals conditioned on their willingness "to **fund** a significant portion of the infrastructure improvements called for in the Plan..." *Id.* at 28 (emphasis added). Specifically included among the anticipated private sources of funds were developer **contributions (in-kind or in-cash)**. *Id.* (emphasis added). And in order to ensure proper coordination in construction of public infrastructure along with private development, the Master Plan required that individual developments were not to be allowed to proceed unless "[o]ne or more development districts (or alternative **financing** mechanisms) that can provide public facilities ... are **implemented**." *Id.* at 30 (quoting from Clarksburg Master Plan Table 19 (p. 105) (emphasis added).

³ Throughout the development approval process, Klebanoff was represented by Steve Kaufman of Linowes and Blocher.

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Against this Master Plan backdrop, what did the Board do in approving the Clarksburg Town Center Preliminary Plan and subsequent Site Plans I and II? The CTCAC Report again lays out the undisputed facts. The Preliminary Plan staff report noted that, at the Project Plan stage, the Board had expressed “strong concern that there is a need for alternative infrastructure **financing** mechanisms to assure that the full Master Plan road network is provided in a timely fashion and is **financed** in an equitable a manner as possible...the Board members concluded that additional work was necessary to determine the Clarksburg Town Center’s ‘**fair share**’ of master planned infrastructure.” CTCAC Report 54 (emphasis added). The staff report also observed that the applicant recognized that it “must share in the **costs** of the master plan infrastructure.” Id. (emphasis added). The staff report also included a Transportation Planning Division analysis that particular roadway improvements “should represent [the developer’s] part of the total roadway construction **cost** for Clarksburg. Id. at 56 (emphasis added).

The Board’s March 26, 1996 Opinion approving the Preliminary Plan fully reflects the expectation of the developer “to **fund** a significant portion of the infrastructure improvements,” and notes a staff estimate of developer **funding** for its share of roadway improvements “to be approximately 10 percent, or \$12.5 million, with no County or State input.” CTCAC Report 58 (emphasis added). The Board approved the Plan, conditioned upon the developer’s agreement “to provide the necessary roadway improvements as identified in the ...Transportation Planning Division Memorandum” id. at 59, which, as detailed above, included a description of the applicant’s “proportional share of roadway construction.” Id.

The expectation of developer funding of required infrastructure carries through from Board approval of the Preliminary Plan through Board approval of the Phase I Site Plan, in an Opinion issued March 3, 1998. This Opinion specifies that if it becomes necessary for the County to exercise eminent domain to acquire any of the rights-of-way the developer is to provide, “the applicant will be responsible to **reimburse** the County for these reasonable **costs**.” CTCAC Report 62 (emphasis added). Thereafter, in the Phase I Site Plan Enforcement Agreement of March 12, 1999, the developer unconditionally agreed to execute and maintain all required features of that Phase. Id. at 68. Similarly, the Phase II Site Plan requirements unconditionally required the developer to construct required infrastructure. Id. at 69-72.⁴

⁴ Obviously, developer acceptance of development approval under the stated terms constitutes a waiver of any constitutional claim that the Board’s exactions were not reasonably related to its approvals. The Fischer Letter’s discussion of the reasonable relationship test (at 12-13) is just another red herring.

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B. In Order to Comply with the Subdivision Ordinance, a Financing Mechanism Had to Be, and Was, In Place for the Clarksburg Town Center at the Time of Preliminary Plan Approval

As detailed above, the Clarksburg Master Plan specifies that either a development district or an alternative financing mechanism must have been implemented for development in Clarksburg to be approved. In the course of Preliminary Plan review in 1995, other Clarksburg developers, concerned that Klebanoff, the Town Center developer, might not be required to fund his fair share of infrastructure, thereby leaving a disproportionately large share for them to shoulder later, submitted a letter to the Board that (a) acknowledged "the Master Plan's imposition of a private contribution requirement to help **fund** the designated package of roads," and (b) requested that the Board, in its approval of the Plan before it, "establish an equitable **funding** mechanism for the private share of roadway **costs** ..." CTCAC Report 33. The letter, from developer attorney Robert Harris, observed that under § 50-35(1), which requires preliminary plans to "substantially conform" to the applicable Master Plan, the Clarksburg Master Plan mandate of an implemented funding mechanism must be met before any Preliminary Plan can be approved, "absent a Planning Board finding that the two-fold Clarksburg Master Plan requirements for private sector infrastructure **funding** are 'no longer appropriate.'" *Id.* at 35 (emphasis added). Neither Klebanoff nor his counsel, Steve Kaufman, disputed the legal analysis in the Harris Letter, nor its inclusion in the staff report and subsequent incorporation into the Board's written opinion as an attachment. There is no finding by the Board in the Opinion that it was "no longer appropriate" to abide by the Master Plan requirement of an implemented financing mechanism and the requirement was met by imposing on Klebanoff what was determined to be his "fair share" of infrastructure improvements, as detailed above.

Today, years later, the successor to Klebanoff, Newland, via the same legal counsel that represented Klebanoff at the Preliminary Plan stage, disputes what its predecessor wanted and accepted for the same development. We are now told that the Harris analysis "is erroneous with respect to the force of law it assigns to Master Plan recommendations." Kaufman Letter 14. But not only is that claim without merit in the context of the recommendations in this case, it ignores the fact that any such objection to the Board's having ensured that a financing mechanism was "implemented" was waived by Klebanoff in accepting the Preliminary Plan approval, an action binding on his successors in interest, including, of course, Newland. Similarly, Newland's attempt to reinterpret the Master Plan's requirement of an implemented funding mechanism as having "no bearing" on development district reimbursement, Kaufman Letter 16, when, in fact, no development district was implemented at the time, is untimely and waived by its conduct. The simple fact is that under the Master Plan, before seeking Preliminary

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Plan approval, Klebanoff had the choice of either getting a development district created or implementing alternative financing methods. He quite plainly chose the latter, and his approval was based on his acceptance of those funding obligations.

C. Notwithstanding the Power of the Council to Create Development Districts, It Would Be Inconsistent With the Power and Responsibility of the Planning Board for the Council to Reassign to Taxpayers Infrastructure Funding Obligations That the Planning Board Has Imposed on Developers

The developers argue that CTCAC's legal analysis is flawed because it would make it "impossible to use a development district to fund any infrastructure which is identified as a developer requirement in a preliminary plan or site plan." Kaufman Letter 16. While, as will be explained below, this overstates CTCAC's position, it reveals an important point. It **should** be considered inappropriate for the Council to create a Development District that is comprised, in any significant part, of infrastructure that the Planning Board has decreed be funded by the developer, particularly in non-Euclidean, optional method zoning development situations such as Clarksburg. That is because the Board, and only the Board, is charged with and can exercise the responsibility to determine, what the appropriate trade-offs should be in terms of developer provided (and funded) public facilities, amenities and design features, in exchange for the requested density and layout of development. See, e.g., § 59-D-2.11, applicable to the Town Center. In optional method development, the Board is seeking to ensure that the result will be "a more efficient and desirable development than could be accomplished by the use of the standard method of development." § 59-D-2.12 (f). If the balance struck by the Board can subsequently be altered by the Council, regardless of the Board's findings and conclusions, by shifting Board-imposed infrastructure funding to taxpayers, the foundation for the Board's award of extra density is negated, to say nothing of the intrusion this represents on the jurisdiction, responsibility and expertise of the Board to make judgments on the appropriate site plan approval conditions.

Similarly, the Planning Board has exclusive jurisdiction under the Regional District Act, Art. 28, § 7-111(a), Md. Code Ann., and §§ 50-35 (a), (b), (c) and (k), of the Subdivision Ordinance to ensure that subdivisions have adequate public sites, open spaces and public facilities, and the power to condition subdivision approval on the requirement that the applicant, as appropriate under the circumstances, provide and fund for such sites, spaces and facilities. Again, the balance to be struck here should be a matter of Board judgment exclusively, not Council second-guessing by shifting financial responsibility elsewhere. In any particular case, depending on the circumstances, it may be immaterial to the decision of the Board whether certain infrastructure the developer is

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required to provide is subject to taxpayer reimbursement. Hence, CTCAC does not claim, contrary to the developer arguments, that infrastructure to be provided by a developer can never be included in a Development District. But that is simply not the situation presented by this case.

In this case, Terrabrook, again represented by Steve Kaufman, did an end-run around the Board by petitioning the Council for a resolution of intent to create a Development District, and included in the petition all of the Board-imposed infrastructure funding obligations and then some, but without ever mentioning to the Council that Terrabrook was already obliged to provide and fund listed infrastructure in accordance with prior Board development approvals. Such a petition should have been dismissed out of hand by the Council as in derogation of the Board's authority and responsibility, and its proper and faithful adherence to § 50-35(l), when it required an **implemented** funding mechanism at the time of Preliminary Plan approval, a requirement that had not been changed (or sought to be changed) at the time of Development District petitioning in 2000. For all that CTCAC has had access to in Council legislative files, it appears that the approval process went forward on the Town Center Development District with all relevant government officials oblivious to the infrastructure funding obligations imposed on the developer by the Board in development approvals, and, hence, oblivious to the fact that the Development District was intended to transfer those obligations, not from the larger County taxpaying public to Town Center residents, but rather from the developer to that subset of County residents. Indeed, until the CTCAC Report put two and two together, nothing in the public record evinces public awareness that this is what was intended and what in fact was approved.

In the next section, we explain why the Clarksburg Town Center Development District is unlawful under Chapter 14, based upon its limitations on what infrastructure improvements it may embrace. The point here, however, is different. In this case, the Board imposed funding obligations in order to conform to specific Master Plan requirements, and the developer accepted those obligations in exchange for development approval. In its letter commenting on the CTCAC Report, the Planning Board did not question either the legitimacy of those obligations or its power to impose them as a condition of approval. The Board also made clear that it would not be good policy for the Council to override such developer obligations, post-development approval, via creation of a Development District. Letter, Royce Hanson to Marilyn Praisner 5 (May 18, 2007). The Board, asked by Council President Praisner to comment on any errors in the CTCAC Report, did not disagree with (a) the claim in the CTCAC Report (at 9-12) that it would be inconsistent with the Board's subdivision authority for the Council to override those funding commitments, or (b) the CTCAC Report claim (at 97) that the Council lacked the authority to do so. Given the developer's acceptance of funding commitments imposed

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by the Board in this specific case according to the Master Plan, the abstract question of whether the Council can ever use Development Districts to modify development approvals in other, less clear-cut circumstances, is beside the point.

D. The Clarksburg Town Center Development District Violates Chapter 14 by Including Infrastructure For Which Responsibility to Provide and Fund Was Assigned by the Planning Board To a Developer in Subdivision and Site Plan Approvals

The CTCAC Report detailed that the infrastructure included in the Town Center Development District by the Executive, which became the final list included in Council Resolution 15-87, had been included in prior Planning Board development approvals for the Town Center as the responsibility of the Town Center developer. CTCAC Report 85. The developers do not dispute this conclusion. The plain language of § 14-3(g)(2) excludes these items from inclusion in a Development District as “infrastructure improvements”:

- (g) . . . Infrastructure Improvement does not include any improvement which:
 - (2) is the responsibility of a single developer under the Planning Board’s site plan and adequate public facilities requirements.

The simple and straightforward application of this provision is that **any** infrastructure improvement made the responsibility of a single developer as a site plan requirement is ineligible to be included in a subsequent Development District. Why should this be so? As detailed above, but for this rule, a Development District may, perhaps unintentionally, override the judgmental findings of the Planning Board regarding appropriate conditions and obligations to impose on that developer as a condition of site plan approval.

The Fischer and Kaufman Letters do their best to obfuscate the clarity and simplicity of this analysis, but they fail in the attempt. First, it is claimed that improvement actions that take place within the Development District area to an infrastructure that extends beyond that area – such as partial improvement to an existing arterial road--cannot be excluded under the (g)(2) limitation because the arterial “cannot be said to be the responsibility of a single developer under a site plan requirement.” Fischer Letter 17. The Kaufman Letter makes the same point by emphasizing that infrastructure found eligible for the Town Center Development District “served a regional purpose and was not singularly the responsibility of the Town Center development under APF.” *Id.* at 12. This is a nonsensical misreading of (g)(2). The

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term “responsibility” refers back to “improvement,” not “infrastructure.” The focus is not on the geographic scope of the item of infrastructure, but on the assignment of financial responsibility for its improvement. Whether the infrastructure does or will extend beyond the boundaries of a proposed district or not, the (g)(2) issue is whether responsibility for it within the district has been assigned to a single developer, in whole or in part. The developers focus on the geographic scope of the infrastructure, rather than responsibility for the improvement, based on the notion that (g)(2) must exclude infrastructure that is not “regional in nature,” Fischer Letter 17, or that does not “serve[] a regional purpose.” Kaufman Letter 12. In fact, § 14-3(g)(1), which precludes Development District financing of any improvement that “primarily serves the residents...of only one development...” separately ensures that only “regional benefit” improvements are eligible. Thus, (g)(2) is superfluous unless it was intended to serve some other purpose. But a statute must not be interpreted “so that no word, clause, sentence, or phrase is rendered surplusage, superfluous, meaningless or nugatory.” Department of Mental Health and Hygiene v. Kelly, 397 Md. 399, 918 A.2d 470, 482 (2007). In fact, the purpose underlying (g)(2) is manifestly clear from the terms of the statute: the Council has stated its intention to not reassign to taxpayers the responsibility for infrastructure funding already assigned by the Board to a developer. In this case, as detailed above, the Council was not made aware of those earlier assignments of responsibility by the Board when asked to create the Development District.

Second, the Fischer Letter (at 17) argues that (g)(2) does not really mean what it says because it would prohibit Development District financing of “any road or facility construction requirement imposed by the Planning Board to satisfy adequate public facilities requirements.” This argument is a clever attempt to ignore the facts of this case, in which there is no question that the Board imposed, and the applicant, Klebanoff, accepted, not just a **construction** requirement, but a **funding** obligation for providing specified public facilities. See Part I.A. above. In some other case, where the expectation is that the developer would not be shouldering financial responsibility for public facilities, all the Board would have to do in its site plan approval is state clearly that funding may be provided via a Development District. In such a case, (g)(2) would not preclude the inclusion of the required facilities in a Development District. Expressed more generally, CTCAC has never claimed that Development Districts cannot be utilized to pay for infrastructure improvements deemed by the Board necessary to satisfy adequate public facilities requirements, yet a whole section of the Fischer Letter (Part 5.A.) is devoted to disproving what CTCAC never claimed. Similarly, much of the extended discussion in the Kaufman Letter (Part III.A.) about the complementary nature of the County’s Development District and Development Review and Approval Laws is beside the point and does nothing but obfuscate the real issue here. The fundamental point is that if the Board has found it appropriate to require developer funding of certain

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APF requirements, and the applicant has accepted the funding obligation in exchange for development approval, (g)(2) operates to preclude reassignment of that financial responsibility from developer to taxpayers.⁵

Third, the Fischer Letter attempts to rewrite the history of the Planning Board's consideration of the Town Center Development District by stating that the Board's staff, "in its recommendation that the Board approve the Clarksburg Town Center Development District recognized that § 14-3(g)(2) was possibly susceptible to the interpretation suggested by CTCAC and recommended that the Act be amended (if the Council believed it was necessary) to eliminate any such interpretation." Fischer Letter 17. The staff memo referred to is Appendix N to the Kaufman Letter, and perusal of it makes plain that the characterizations in the Fischer Letter are simply false. The staff memo does not use the phrase "possibly susceptible" or anything of the sort. Rather, it evinces no doubt or ambiguity about what (g)(2) provides, and states that the County Executive will be proposing an amendment. Appendix N at 4. The discussion concludes, not with any observation that it was up to the Council to decide if an amendment to (g)(2) was necessary or not in order to eliminate a flawed interpretation of that provision, but rather with this unequivocal recommendation: "Approval of the proposed development district **must be contingent upon an amendment** that allows for a single developer to provide for such improvements." *Id.* (emphasis added). This recommendation was then carried forward to the front page of the memo in the following terms:

Staff finds that the proposed Town Center Development District meets the requirements of the District Legislation as modified by the following conditions:

1. Amend Chapter 14-3(g)(2) to allow for improvements to be the responsibility of a single developer so long as the proposed improvements serve a greater public benefit than a single development.

Appendix N at 1.

What happened when the staff recommendation came before the Board, while summarized in the CTCAC Report (at 82-85), is made more explicitly clear in the May 18, 2007 letter from the Planning Board to Council President Praisner, which described

⁵ This would include funding of roadway improvements. There is nothing inconsistent with having developers meet their roadway funding commitments to be found in the DPW&T Guidelines for Development District financing of road improvements.

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the circumstances surrounding issuance of the Board's March 22, 2001 letter to then-Council President Ewing that constituted the fulfillment of its review responsibility under § 14-7(b) with respect to the Town Center Development District application:

Because the developer's application . . . included improvements that it was required to provide under preliminary and site plan approvals, the Board also questioned whether the facilities the developer was required to provide to meet APF and site plan requirements qualified for inclusion in the development district. Thus, the Board conditioned its "approval" of the development district on the amendment of Chapter 14-3(g)(2), if necessary, to allow improvements to be the responsibility of a single developer so long as the proposed improvements serve a greater public benefit than a single development.

The Chairman's letter did not elaborate on this condition, but attached the staff memorandum, which was less qualified in recommending that it would be necessary for Chapter 14 to be amended to allow for a single developer to be reimbursed for facilities that it was solely responsible for providing under APF and site plan requirements. It appears that the Board added the "if necessary" language to the less qualified language proposed by its staff based upon the assertion by the developer's representatives that the Board did not have the authority to condition its "approval" of the Clarksburg Town Center development district on the amendment of the law, and more generally in deference to the Council's role as the body responsible for ultimately determining what facilities could be included in the development districts.

Letter, Royce Hanson to Marilyn Praisner 4 (May 18, 2007).

To put the matter in only slightly more blunt terms, in 2001 the Board agreed with its staff that the Town Center application could not lawfully be approved without first amending § 14-3(g)(2) to legitimize the inclusion of infrastructure the developer was already obligated to provide under existing plan approval conditions and commitments. Ignoring both the contemporaneous record and the foregoing more recent recount of the 2001 events by the Board, the Fischer Letter goes on the state that the "Council did not accept this invitation to amend the Act," *id.* at 17, offering the following conjecture as explanation for why the Council ignored the Board's advice: "The Council apparently concluded that the very narrow interpretation of § 14-3(g)(2) now espoused by CTCAC

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was not reasonable given the express language and structure of the Act, and it saw no reason to amend the Act.” *Id.* But examination of the publicly available legislative files relating to the hearing and approval of Resolution 15-87 reveals that this statement is, at most, pure conjecture. There is no record of any consideration of the necessity (or not) of an amendment to § 14-3(g)(2) in connection with, or parallel to, approval of that Resolution. Indeed, there is no evidence that this was even considered an issue worthy of mentioning by the staff in anticipation of the Council’s consideration of the approval Resolution, or that the matter was in fact raised in the Resolution hearing on December 10, 2002. Nor is there any mention of it in the Executive’s Fiscal Report, issued in the interim between the Board’s “approval” and the Council hearing on Resolution 15-87. In addition, the conjecture game is a double-edged sword. CTCAC’s conjecture is this: having successfully pressured the Board into slightly watering down the staff’s unequivocal conclusion that amendment of § 14-3(g)(2) was necessary for the Town Center Development District to be lawful as proposed, developer counsel worked behind the scenes within the government to ensure that the amendment issue was suppressed, at least until the Development District was approved, because the last thing the developer wanted to happen was for anyone to inadvertently stumble on the realization that every single Town Center infrastructure improvement the developer had proposed for reimbursement by County taxpayers was already subject to explicit developer obligation to both construct and fund, by virtue of pre-existing Board approvals and developer commitments.

Lastly (and in part what has fueled the foregoing CTCAC conjecture), the Kaufman Letter alludes to and makes selected disclosure of apparently extensive letters, memoranda and meetings with government officials regarding the applicability of § 14-3(g)(2) in the Town Center Development District context. Kaufman Letter 17-18. The point of this exercise is to demonstrate consistent staff-level agreement that (g)(2) “should not be used to restrict the availability of development districts to fund otherwise eligible infrastructure which may be the responsibility of a single developer under an approved preliminary plan...” Kaufman Letter 18. Several points are in order in response. First and foremost, as explained above, in general, CTCAC sees nothing wrong with Development District infrastructure reimbursement to a single developer, where the Board, at the time of development approval, is aware that specified infrastructure is targeted for reimbursement via a Development District and the developer does not make a funding commitment in exchange for approval. Thus, the whole discussion is non-responsive to the facts of this case, which does involve explicit developer funding obligations and commitments.

Second, what staff said or believed cannot be reliably gleaned from partial quotations from emails, where the complete record of exchange and deliberation remains

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undisclosed. Indeed, the readily available public record, as well as the documentation supplied with the Kaufman Letter, demonstrate anything but the claimed unanimity of position. As disclosed in the recent Board letter to the Council President, discussed above, on March 15, 2002, a year after the Board sent its Town Center Development District "approval" letter to the Council, it sent the Council its "approval" letter for the Clarksburg Village and Greenway Village Development Districts. Letter, Hanson to Praisner 5 (May 18, 2007). In that 2002 letter, which post-dates emails quoted at length in the Kaufman Letter (at 18), Board Chairman Holmes was, if anything, more emphatic than his predecessor in concluding that, the proposed districts ran afoul of § 14-3(g)(2) in precisely the way the Kaufman letter claims there is a consensus that it does not:

The Planning Board also discussed at some length the issue of whether the proposed development plans complied with the legislation's statute 14-3(g)(2). The issue is whether or not a single developer can utilize public financing through a development district for the sole purpose of financing their adequate public facilities requirement for a single development. **Our legal counsel has advised that the proposed development districts do not appear to comply with the statute.** It is not the Planning Board's role as defined in Chapter 14 to make a finding on compliance with this legislation; therefore we are raising this as an issue for the Council to resolve in reviewing the applications.

Letter, Hanson to Praisner 5 (May 18, 2007) (quoting from Holmes to Silverman Letter) (emphasis added). In the same vein, the Kaufman Letter relies on Appendix H, the Board staff memorandum on the Clarksburg Village Development District that led to the Holmes letter quoted above. The staff memo on its face states unambiguously that "[a]fter conversations with the Council staff, the understanding is that development districts are not intended to provide financing for a single development's adequate public facilities." Id. at H-4.

Third, this whole strained exercise to demonstrate that § 14-3(g)(2) does not really mean what it says, even if it were not riddled with exceptions to the claimed unanimity of interpretive agreement, would fall of its own weight as a matter of common sense. What is the relevance of "a willingness to pursue an amendment to either delete Section 14-3(g)(2) or to clarify its interpretation," Kaufman Letter 17, if, as it is claimed, it is already clear that it means what the developers say it means? The reality is that what is touted as "[c]larifying legislation," id., is in fact designed to ensure much more than the right of single developers to fund APF infrastructure through Development Districts; it is designed to ensure that outcome even in the face of Board-approved developer

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commitments to fund such infrastructure, made in order to secure development approvals in the first place.

II. THE CLARKSBURG TOWN CENTER DEVELOPMENT DISTRICT DOES NOT COMPLY WITH THE 80% PROPERTY OWNER APPROVAL REQUIREMENT AND IS FOR THAT REASON INVALID UNDER STATE LAW

The CTCAC Report, as pertinent to the Town Center Development District, describes the procedural requirements relating to property owner approval of the creation of the Development District, as set forth under State Law (Chapter 20A of the County Code) and under County Law (Chapter 14). CTCAC Report 41-50. The Report concludes that, in enacting Resolution 15-87, creating the Town Center Development District, the Council had not attempted to ensure that its creation was approved by 80% of the property owners in the District (in number and by assessed valuation) contemporaneously (or reasonably contemporaneously) with creation of the District. CTCAC Report 90.

The Fischer and Kaufman Letters dispute this claim, but they do not dispute that a significant number of individuals (CTCAC's estimate was 75) became property owners in the area embraced by the Town Center Development District before the District was created. Nor do they dispute CTCAC's claim that none of these property owners were solicited (whether by Council, Council staff, or the developer or its agents) for approval of the creation of the Development District at any point, including the months leading up to the December 10, 2002 hearing on Resolution 15-87, or thereafter. Both Letters argue that 80% approvals from the property owners for the creation of the District were not necessary in 2002 because the District was developer-initiated under § 14-6(a), and the 80% approval requirement was met at the time of initiation, as required under that section to trigger Council consideration of the request. Fischer Letter 19-20; Kaufman Letter 19-21.

The claim that the District was developer-initiated under § 14-6(a) is hardly as free from doubt as the developers claim. The text of Resolution 14-648 (September 26, 2000), states that the Council was taking action "[a]s authorized by County Code § 14-6(b)..." That is the provision authorizing the Council to initiate Development Districts. Is this merely a typographical error? One reason to think not is that when the District was actually created, it included infrastructure that the developer had not voluntarily included in its petition, and excluded infrastructure the developer had voluntarily included. With these alterations, the District can be readily characterized as one initiated by the Council rather than the developer. As the Fischer Letter details (at 6-11), there were

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significant changes to the Town Center Development District as a result of the review and approval process between initial petition in 2000 and actual creation in 2003. If the Town Center Development District is understood to be Council-initiated under § 14-6(b), either because the Council said so or because of subsequent involuntary changes to the District imposed by the Council, then the resolution creating the District was unambiguously subject to the requirement of receipt of a petition signed by 80% of the property owners at the time of actual creation, as specified in § 14-9(c).

CTCAC's principal argument, however, simply assumes that the District was developer-initiated as claimed, and further assumes that the 80% petitioning requirement in § 14-6(a) was met. Such compliance is simply insufficient to honor the mandate of State law applicable in this specific situation, which states:

A new development district may not be **created** to finance special obligation debt under this section unless the **proposed action** is approved by:

- (i) 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 one owner; and
- (ii) the owners of at least 80% of the assessed valuation of the real property located within the proposed development district.

§ 20A-1(f)(2) (emphasis added). This statute could hardly be more clear. The 80% property owner approval requirements apply to the "proposed action." What is that action? The creation of a Development District. When does this happen? Not at the initial petitioning stage, but only after Planning Board, under § 14-7, and the Executive, under § 14-8, have exercised their statutory responsibility to recommend the boundaries of the District and the infrastructure improvements to be included within it. At that point, the matter comes before the Council for a hearing on creation of the District, a hearing for which notice must, in addition to newspaper publication, go out to every property owner in the proposed District, to include a copy of the proposed Council resolution and an estimate of the tax rate to be imposed. § 14-9(b).

In theory, the time between the initial petition of property owners and the time of the hearing on the creation of the District could be short, such that the changes in the

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composition of infrastructure to be included in the District, or the changes in property ownership, or both, are so insignificant that a failure to reconfirm property owner approval of the District for the creation hearing can be dismissed as harmless error at most. But in the converse situation, as here, where there were 2 ½ years between resolutions, a great deal of the subject property had changed ownership, and there were admittedly major changes in the composition of the infrastructure to be funded by the Development District in the interim, there is no justification to write off the lack of confirmation of 80% property owner approval of the **creation** resolution as mere harmless error.

Freezing property owner approval at the initial petition stage is also senseless in light of the explicit statutory review and approval scheme in Chapter 14. As the Fischer Letter (at 4) acknowledges, under §14-8(b), the Executive may recommend a change in the boundaries of the proposed Development District. Such a change could, by itself, trigger a significant shift in property owners who would be subject to the District, *not as petitioned*, but as actually **created**. It is only when these matters are resolved, at the creation resolution stage, that a reliable indication of 80% property owner approval is obtainable.

To fully appreciate the importance of this requirement, it is necessary to understand how the 80% approval requirement came to be incorporated into Chapter 20A. When Development District legislation was first contemplated by the County in 1991, in two distinct bills, i.e. 44-92 and 46-92, it was anticipated that the County would not need additional State legislation for the County to be empowered to issue Development District bonds. But after receipt of contrary advice from bond counsel, efforts were initiated to secure passage of appropriate State authorization legislation. This effort ended in a failure of enactment in the 1992 legislative session, and resubmission of a revised bill, MC 419-94, in October 1993, following an April 26, 1993 letter from the Chairman of the Montgomery County Delegation to Council President Praisner outlining deficiencies in the original bill, including its failure to address "the level of participation by property owners that should be required." Exhibit 1. A much-revised bill, MC 419-94, was submitted by the County's Director of the Office of Intergovernmental Relations. Accompanying the resubmission was a memorandum noting that

MC 419-94 addresses many of the concern issues that arose last year. The following changes are incorporated in the legislation: *provision is made for the protection of minority property owners; a specified property owner participation level is required that is consistent with the law applicable to municipalities....*

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Exhibit 2 at 2. Elsewhere, the memorandum explicitly notes that “[i]n 1990, the General Assembly granted municipalities express authority to issue special obligation debt. See Art. 23A, Sec. 44A, et seq.” Id. at 1.

As is relevant here, it is quite clear that the drafters of MC 419-94 used Art. 23A, Sec. 44A (c)(1) as its model for the property owner approval requirement. The wording of *Montgomery County authorization for Development District creation upon property owner approval* is, in all material respects, based upon the requirements of property owner approval of special obligation debt for Maryland municipalities generally. The only meaningful difference between the property owner supermajority requirements of the two provisions is that it is two-thirds for municipalities in Art. 23A, Sec. 44A (c)(1), and 80% for Montgomery County in §20A-1(f)(2). With immaterial minor modification, the language in MC- 419-94 became §20A-1(f)(2). The shift from two-thirds to 80% is also readily explained; MFP Committee consideration of the two alternative Development District bills to that point had resulted in a consensus that property owner approval at a two-thirds level was simply not high enough. Exhibit 3.⁶

The principle underlying the supermajority property owner approval requirement, be it two-thirds, 80%, or some other number well in excess of 50%, is both fundamental and self-evident. Taxes are to be imposed with the knowledge and consent of the governed.⁷ An especially high level of consent is warranted when those being taxed are going to be taxed at a greater rate than their similarly situated fellow citizens. Equally plainly, the power of the County to impose a Development District on a subset of County property owners is expressly dependent upon full and complete compliance with the supermajority requirement that the State legislature has imposed on such action.

Whether the Council that enacted Chapter 14 in 1994, imposing the 80% requirement at only the initial petition stage, had a real appreciation of the democratic—indeed, pre-Revolution—foundation for it, is another question entirely. After the State law proposal was resubmitted in 1993, Michael Faden, the legislative counsel who shepherded Chapter 14 into law, submitted to the MFP Committee a revised proposed Chapter 14, which increased the proper owner petition percentage requirement at the

⁶ Exhibit 3 includes relevant excerpts from the staff memo for the August 2, 1993 MFP Committee meeting as well as the excerpt from the minutes of that meeting dealing with the property owner percentage issue.

⁷ Among the tyrannies of the King of England against the Colonies enumerated in the Declaration of Independence is that the King gave his assent to “Acts of Pretended Legislation...for Imposing Taxes on us without our Consent.”

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initial petition stage (First Council Resolution) from two-thirds to 80%, but added no approval requirement at the creation stage (Second Council Resolution). His explanatory memo advised that he was

not sure that a petition submitted at the beginning of the process can function as approval, instead of making the County Council, County Executive, and Planning Board go through the entire process of creating a district without being sure that enough property owners will approve it.

Exhibit 4, an excerpt from a memorandum, Faden to MFP Committee 2 (February 10, 1994). He went on to say that the County bill “may need further amendment to insert a property owner approval process after the Council adopts the resolution creating a district.” Id.

Needless to say, this “further amendment” never materialized, and, as the Kaufman Letter (at 21) reveals, at the time Chapter 14 was enacted, Faden reiterated the concern about subsequent property owner disapproval. Given Faden’s remarks, a fair inference is that the reason there is no further 80% approval requirement is that Faden believed that the legislators for whom he was in service did not want Chapter 14 to allow for a situation where all the governmental work that had gone into reviewing and fashioning the final size and scope of a Development District could then be vetoed by the property owners, at or after the time of Development District creation. Thus, from the outset, Chapter 14 appears to have been conceived and enacted in a fashion that pays only lip service to the democratic notions of taxation without representation that underlie §20A-1(f)(2). As long as the developer wants a Development District, which will be at the time it is 100% owner of the property, and the Council initially concurs, then regardless of what happens to the shape of the District and the infrastructure slated for inclusion thereafter, and whatever the change in property ownership, the issue of property owner approval is closed.

Any doubt about the anti-democratic motivation underlying the failure of Chapter 14 to meet the minimum requirements of § 20A-1(f)(2) is swept away when one considers the baseless statement Faden made to the Council at the time of enactment (as reproduced in the Kaufman Letter 21). He said, or sought to imply, that he had obtained an interpretation of Chapter 14 from the Attorney General that the amendment he thought might be necessary in February 1994 for a confirmation of property owner approval of the Development District, once its composition had been fully vetted and defined, was not necessary. In actuality, the Attorney General’s letter, Exhibit 5, does not at all address the question of whether the draft chapter 14 was in compliance with the

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companion State enabling legislation in respect of the 80% property owner approval requirement. The letter addresses an Equal Protection issue not raised by the County: does the property owner approval requirement in § 20A-1(f)(2) violate the one-person/one-vote principle? The letter concludes that whether a Development District will be created is, ultimately, a legislative decision that could go either way, despite property owner approval. Accordingly, such an “approval” is “a genuinely preliminary matter and not an election subject to one-person/one-vote requirements.” Exhibit 5 at 5. Of course, an assessment that property owner approval is a “preliminary matter,” is not an assessment that it is a dispensable matter. Nowhere does the Attorney General letter state or imply that the approval requirement may be dispensed with at the time of Development District creation or that an approval at the initial petition stage is sufficient to function as such approval. Indeed, the claim in the Kaufman Letter (at 20) that the Attorney General’s letter concluded that the intent of Chapter 14 was to satisfy the 80% approval requirement only at the time of the initial petition, and the implication that such an intention was acceptable in light of § 20A-1(f)(2), are as false and misleading as the earlier Faden representations regarding the Attorney General’s letter.

The Kaufman Letter’s last-ditch attempt to justify the Council’s failure to obtain the property owner approvals mandated by § 20A-1(f)(2) is by reliance on § 20A-1 (j)(2), which, in certain instances, specifies that a successor in interest to an owner of land in the development district acquires the same rights and obligations as the person’s predecessor in title. Kaufman Letter 19. Apparently, the notion is that the subsequent purchasers of developed properties in the district should be considered bound by the actions of the petitioning developer. As the Kaufman Letter put it, “[t]he fact that there may have been a change in ownership between the date of the initial petition and the date of the creation of the development district does not provide a successor in interest rights beyond those of the predecessor.” *Id.* at 20. This statement is as breathtakingly arrogant as it is frivolous. It has such obvious flaws that it is almost beyond imagination that it would be taken seriously, and correspondingly astonishing that its authors would believe it would be taken seriously by any informed reader. First, by its very terms, (j)(2) applies only to land “in a development district.” That means property owners post-development district creation. We are concerned here with the approval requirement to get to that point. Second, (j)(2) applies only within subsection (j), which deals only with payment of taxes arising from creation of the district. Thus, the “rights and obligations” referred to in (j)(2) relate only to payment of taxes. Third, wholly apart from the erroneous reliance on (j)(2), the very most that a successor property owner might or ought to be stuck with, in terms of his predecessor’s actions, is the quantitative validity of the initial petition. In other words, it may be reasonable to argue that any erosion of the petitioning property owners’ ability to demonstrate continuing compliance with the 80% requirement—on account of property transfers after the initial petition is filed and accepted--should not

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invalidate the initial petition. But even so, this in no way undermines the intuitive necessity and reasonableness of applying the 80% property owner approval requirement at the time specified in § 20A-1(f)(2) -- development district creation --to the persons who are in fact property owners contemporaneously with that action.

III. THE COUNCIL RESOLUTION CREATING THE CLARKSBURG TOWN CENTER DEVELOPMENT DISTRICT IS INVALID FOR FAILURE TO COMPLY WITH CHAPTER 14 NOTICE REQUIREMENTS

The CTCAC Report (at 90) concludes that Council Resolution 15-87, creating the Town Center Development District was procedurally invalid for failure to comply with the notice requirements in §14-9(b), precluding the issuance of bonds based upon it. This is perfunctorily disputed in the Fischer Letter (at 20), and in greater detail in the Kaufman Letter (at 24-28).

The Kaufman letter makes a partial disclosure of relevant facts, leaving many additional relevant facts undisclosed. At the same time, the Letter highlights a number of irrelevant facts that only obfuscate the issue. Before separating the wheat from the chaff, it is necessary to state precisely what was required in order to comply with §14-9(b). Under §14-9(a), the Council was required to hold a public hearing on the final resolution to create the Town Center Development District. That hearing took place on December 10, 2002. The notice requirements for that hearing were as follows:

- (b) (1) The Council must give notice of the hearing by:
 - (A) advertisement in at least two newspapers of general circulation in the County at least 21 days before the hearing; and
 - (B) notifying by mail the record owner of each property located in the proposed district at the address shown on the latest tax assessment roll.
- (2) Each notice mailed under this subsection must include:
 - (A) a copy of the proposed resolution to establish a district; and

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- (B) an estimated rate for any tax, assessment, fee, or charge proposed to fund infrastructure improvements for the district.

§14-9(b).

As this letter is being written, CTCAC is undertaking to further investigate the facts disclosed in the Kaufman Letter regarding compliance with the foregoing. Preliminarily, however, it bears emphasis that much of the discussion of purported compliance in the Kaufman Letter is an irrelevant diversion from the actual issue. First, the Letter attaches and discusses a Terrabrook letter that was ostensibly sent to property owners regarding the hearing. That notice cannot serve to displace the requirement of notice from the Council itself, as required under §14-9(b)(1). Moreover, the Terrabrook letter, Appendix J to the Kaufman Letter, erroneously states that the Council hearing will take place on December 3, 2002, when in fact the hearing was held on December 10, 2002.

Second, the Kaufman Letter (at 25-26) devotes more than half of its factual analysis of the notice issue to the wholly irrelevant question of what disclosures were made to homeowners about a Development District at the point of sale, and whether those disclosures were in compliance with the homebuyer disclosure requirements of §14-17. CTCAC has made no claim of a violation of §14-17, and whether there is a viable disclosure compliance question or not, it simply has no bearing on hearing notice compliance under §14-9(b). Inclusion of a discussion of §14-17 compliance in the section discussing §14-9(b) compliance is simply more obfuscation.

The bare facts disclosed in the Kaufman Letter regarding the hearing notice leave many questions unresolved. The Letter states that the notices were sent out by Michael Faden, and that they referenced a hearing date of December 3, 2002. *Id.* At 5. Did he actually stuff and mail envelopes? Did the letter include, as required by §14-9(b)(2)(A), a copy of the Resolution, as introduced on October 29, 2002? What proof of mailing exists? Appendix I discloses that Faden states he mailed out the notices on November 6, 2002. Which property owners in the proposed Development District were on "the latest tax assessment roll," §14-9(b)(1)(B), on that date? Where is the list of addressees? When the hearing date was subsequently changed, were the individual notices supplemented with a second letter, notifying property owners of the changed date? There were evidently only two published notices. Kaufman Letter 25. If either of them contained the wrong date, were at least two notices with the correct hearing date published, at least 21 days before the hearing, as required by §14-9(b)(1)(A)?

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Kathleen Boucher, Esq.
June 5, 2007
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These are not mere niggling questions. Three officers of CTCAC, Amy Presley, Lynn Fantle and Tim De Arros, were on the tax assessment roll well in advance of the November 6, 2002 notice date. All have confirmed that they did not receive the notice. CTCAC has yet to find any then-current homeowner who received the notice, and is continuing to investigate the matter. Until such time as this process is complete, CTCAC can only assume that if a notice was sent, the mailing list was based upon a long-outdated snapshot of the SDAT property tax roll that, just as today, was also then maintained on-line. According to the Director of the Montgomery County SDAT Office, the tax rolls at that time were updated within 1-2 days of deed recordation. Hence, any reasonable, good faith effort to comply with §14-9(b)(1)(B) on Wednesday November 6, 2002, would entail pulling owner data that was current at least through the prior work week, i.e., November 1, 2002. The need for current records is highlighted by the fact that this was a time when property ownership changes – from developer/builder to homeowner – were extensive and ongoing in Clarksburg Town Center. On the other hand, Council or its staff, having engineered Chapter 14 to deny such property owners a right to participate in the decision whether to create the Development District, as detailed in Part II, may have reflected similar lack of concern for their hearing notice rights.

In short, absent a much more definitive factual demonstration than has been disclosed to date, CTCAC stands by and reaffirms its claim that Resolution 15-87 is procedurally invalid, and of no force and effect, for failure to fully comply with §14-9(b). See Cassidy v. County Board of Appeals, 218 Md. 418, 146 A.2d 896, 898 (1958):

It has been stated so frequently and so generally that the failure of an administrative official or board to give a proper notice of a hearing, required by law, is fatal to the jurisdiction of the official or the board to conduct the hearing that it requires no citation of authority to support the proposition....

CONCLUSION

The foregoing constitutes CTCAC's initial response to the Fischer and Kaufman Letters, which CTCAC obtained late last week. There is more to be said, particularly regarding efforts to take issue with some of the more peripheral points in the CTCAC Report. E.g., Kaufman Letter, Part III.E. (at 23-24). When the information is available, CTCAC will further assess the record on the notice issue discussed in Part III. above. For now, however, CTCAC wanted the investigatory team to have the benefit of its appraisal of the primary issues as soon as possible, given the team's apparent June 15th report deadline.

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The Honorable Marc P. Hansen
Michael Faden, Esq.
Kathleen Boucher, Esq.
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CTCAC also wishes to convey its serious concern that it has not been contacted by the investigators to engage in a fruitful discussion of information put forth in its Report. The investigatory team has a public interest obligation to pursue the truth and a just and proper resolution of the claims made in the CTCAC Report. CTCAC has no other agenda, and its perspective is one that, without naiveté, CTCAC would expect public employees to welcome. In fact, CTCAC feels that it should have been contacted much earlier, because even a quick perusal of the CTCAC Report should reveal to anyone that its findings are both serious and well-documented, whether one agrees with CTCAC's ultimate conclusions or not. Moreover, CTCAC's findings are, by and large, not based on what is considered traditional investigation--the excavation of hidden facts and documents. Rather, they are drawn from the public record, as should be the case for the findings of the investigatory team. CTCAC agrees with the Kaufman Letter when it says that what happened in this case occurred transparently. But even what occurs in the open can be profoundly wrong if no public officials are minding the store.

CTCAC believes that it is not too late for a productive meeting with the investigatory team, prior to issuance of its report. CTCAC would be happy to discuss its Report, the supporting material CTCAC has relied upon, and, of course, any of the points made in this letter. In addition, in connection with that meeting, CTCAC should be provided the opportunity to examine any information, documents and records not disclosed in the CTCAC Report or this letter that the team believes have relevance to the matters being discussed. This last step is particularly essential for the integrity of the investigation if, as it would appear, the team has been sharing such materials with the authors of the Fischer and Kaufman Letters. Please understand, however, that CTCAC does not believe that the proper resolution of any of the matters discussed above turns on as yet undisclosed facts or records. CTCAC looks forward to hearing from you soon.

Respectfully,



David W. Brown

/enclosures (Exhibits 1-5)

MONTGOMERY COUNTY
DELEGATION

BRIAN E. FROSH
CHAIRMAN
GENE W. COUNIHAN
VICE-CHAIRMAN
KUMAR P. BANYE
LEON G. BILLINGS
JOEL CHASNOFF
DANA LEE DEMEROW
ROBERT L. FLANAGAN

RECEIVED COUNCIL

93 APR 29 AID

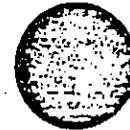


HOUSE OF DELEGATES
ANNAPOLIS, MARYLAND 21401-1991

JENNIE M. FOREHAND
PETER FRANCHOT
GILBERT J. GINN
MICHAEL R. GORDON
HENRY B. HELLER
SHEILA ELLIS HIXSON
JOHN A. HURSON
ROBERT H. KITTLEMAN
NANCY K. KOPP
RICHARD A. LA VAY
CAROL S. PETZOLD
JEAN W. ROESSER
LEONARD H. TEITELBAUM
CHRISTOPHER VAN HOLLEN, JR.

RUD, FIN, EC, DEVEL

April 26, 1993



*CHS
CC
SBF*

The Honorable Marilyn Praisner
President, Montgomery County Council
100 Maryland Avenue
Rockville, MD 20850

Dear Councilwoman Praisner:

Marilyn

018164

The Montgomery County House Delegation gave an unfavorable report on Senate Bill 388 authorizing special obligation bonds for Montgomery County. Members of the delegation felt that there were too many important issues to resolve regarding the issuance of such bonds that could not adequately be examined in the short time remaining before the end of session.

The delegation, however, would like to encourage the council to pursue appropriate legislation next year. Such legislation should address the following issues that were raised during discussions of the bill:

- 1) the protection of minority property owners;
- 2) the level of participation by property owners that should be required;
- 3) whether there should be a prohibition against acceleration of bond payment in the event of default;
- 4) the dissolution of development districts after bonds are fully paid;
- 5) the protection of property owners when other owners fail to pay their share of the tax or fee;
- 6) whether to include residential property;
- 7) whether to limit the infrastructure financed by the bonds to transportation improvements only;
- 8) whether to limit the infrastructure to county rather than state roads;
- 9) the protection of the county's bond rating;
- 10) public notice of the creation of any special district;
- 11) the effect on the incentive of developers to participate in road funds;
- 12) the feasibility of partial payoffs or curtailments at the time of individual unit settlements; and
- 13) the adverse impact of special taxes when comparing Montgomery County with other jurisdictions regarding the county's tax base.

Page Two
The Honorable Marilyn Praisner
April 26, 1993

To summarize, the delegation feels that the magnitude and complexity of these issues, both conceptual and technical, warrant careful study. Delegation members would be very willing to provide any further input you may request on this matter.

Sincerely,



Gene W. Counihan
Chairman

GC:PF
cc: Neal Potter
Ben Bialek



Montgomery County Government

Office of Intergovernmental Relations

ROCKVILLE - 217-2551

ANNAPOLIS, TOLL FREE - 261-2461

BILL NO: MC 419-94 DATE: October 14, 1993
SUBMITTED BY: Mont. Co. Govt. CONTACT PERSON: Ben Bialek
ASSIGNED TO: County Affairs POSITION: Support

The purpose of this legislation is to authorize Montgomery County to issue special obligation debt to finance the costs of public infrastructure within development districts. Special obligation debt is debt that is secured solely by special taxes or similar charges collected within the development district. County government believes that the authority granted by the bill may provide a useful financing mechanism for providing public infrastructure to accommodate population growth.

Bond counsel to the County, Smith, Somerville & Case, advised that express statutory authority is required for the County to issue special obligation debt. The Attorney General's Office concluded that bond counsel's advice on the matter was reasonable. Copies of both opinions are attached. In 1990, the General Assembly granted municipalities express authority to issue special obligation debt. See, Art. 23A, Sec. 44A, et seq.

County Council legislation authorizing the establishment of development districts is pending with many of its provisions dependent upon action by the General Assembly on MC 419-94. Development districts have been discussed in connection with assuring adequate public facilities for the Clarksburg, Germantown, and Shady Grove areas.

Last session, the County had introduced Senate Bill 388 to authorize the issuance of special obligation debt by all charter counties. The bill ran into problems related to the applicability of the referenda provisions in the Prince George's County charter. The legislation was amended to be a Montgomery County local bill and passed the Senate on that basis. Members of the House Delegation expressed concerns about the legislation and the bill was not reported favorably. Nonetheless, the Chairman of the House Delegation, by letter to the County Council President, encouraged the County to resubmit the legislation and indicated the issues that should be addressed in the legislation. A copy of that letter is attached. In addition, Council President Marilyn Praisner met with County Affairs Committee Chairman Len Teitlebaum during the summer to further discuss the need for the bill and ways to address last year's concerns.

MC 419-94 addresses many of the concern issues that arose last year. The following changes are incorporated in the legislation: provision is made for the protection of minority property owners; a specified property owner participation level is required that is consistent with the law applicable to municipalities; a prohibition against acceleration of bond payment in the event of default is included; protection is included for property owners when others default; public notice is required; financing may occur only for public infrastructure intended to serve new development; provision is made for the protection of the county bond rating; and provision is made for the dissolution of development districts after the bonds are fully repaid. A copy of a letter from bond counsel concerning the relationship of special obligation debt to the County's credit rating is attached.

The bill does not limit development districts to commercial properties or the infrastructure to be financed to transportation improvements only. Similarly, it does not limit the roads to be financed to county roads only. Although the County Council agrees with the general premise that the County should not front-end finance improvements to State roads (and has passed a resolution to that effect), there may be instances where it is in the public interest to do so.

I look forward to working with the Delegation on this legislation.

M E M O R A N D U M

TO: Management and Fiscal Policy Committee

FROM: *MF* Michael Faden, Senior Legislative Attorney

SUBJECT: Worksession: Bill 44-92, Development Districts
Bill 46-92, Development Districts

Bill 44-92, Development Districts, sponsored by the Management and Fiscal Policy Committee, was introduced on December 1, 1992. Bill 46-92, Development Districts, sponsored by the Council President at the request of the County Executive, was also introduced on December 1, 1992. A public hearing was held on both bills on February 2, 1993. A brief worksession of this Committee was held on March 1, and a more extensive worksession (see minutes, 988) was held on March 22.

Staff suggests that today's worksession be used to discuss some or all of the remaining issues not covered on March 22. (See issues list in March 22 Committee minutes, 991-92.) We can then redraft either or both bills to reflect the Committee's initial positions and bring them to the Committee for further review in the fall.

Remaining Issues

1) Can the law deal with the concern that a County commitment to the funding of capital facilities in a development district may reduce the funding for capital projects in other parts of the County?

Staff cannot think of any legislative mechanism that would effectively balance CIP funding between regions of the County. Perhaps a percentage limit on the share of the CIP which could be allocated to development districts could be put in the law, but such a rigid approach would itself distort funding decisions and virtually invite end running. In our view, the CIP process itself will remain the proper mechanism to allocate public capital investment.

2) Should the Council review any implementing regulations before the bills are enacted?

While requiring the regulations to be drafted before the bills are enacted would be useful, we don't see it as very practical for a complex new law with no administrative track record and little precedent in the County. If the Council wants to maintain close control over the implementing regulations, you could require that they be adopted under method (1).

But more to the point, the critical issues for each development district will be resolved in the resolution creating that district. Under both bills, this resolution must be approved by the Council.

The approach taken by OPI in Bill 46-92 is to provide that if an infrastructure improvement is delayed because of court order, other government action, or "other circumstance beyond the County's control", the Council can either substitute an equivalent project or delay the schedule of infrastructure improvements. If it does the latter, it can reduce the ceiling capacity allocated to the district and refund a proportionate share of taxes already collected. If "other circumstance beyond the County's control" includes cost overruns, then the use of this mechanism will cut short some development plans. If that possibility appears credible, it may effectively serve as an incentive for participating developers to monitor the County's cost estimates and speak up if they appear low.

Bill 44-92 has no similar mechanism. It essentially assumes that once the County has set the amount of infrastructure cost and the resulting development taxes, it will absorb any shortfall. This puts the burden on the County to accurately estimate the cost of given infrastructure items, not always easy for projects to be built some years in the future.

At the March 22 worksession, the Committee tentatively decided to require each development district to have a contingency fund for cost overruns. Councilmember Hanna preferred to assess the district's properties when an overrun occurs.

10) What is the minimum number or percentage of property owners who must agree to participate in a proposed district?

Bill 44-92 specifies that 2/3 of the property owners or the owners of 2/3 of the property by value are needed to petition to create a development district. See 5-6, lines 107-119. However, the Council can also begin the process on its own motion, presumably with the support of fewer property owners. See line 107. Bill 46-92 allows the Council to begin the process on its own, at the request of the Executive, or after receiving an application by "a landowner". See 24, lines 64-69.

Under both bills, after the process is initiated all decisions are made by the Council and the consent of property owners is not required.

Under Bill 46-92 participation in the district (and payment of taxes or fees) is mandatory for any developer subject to the APFO. The landowner's significant financial commitment is triggered by its development plans. Under Bill 44-92 participation is intended to be voluntary; landowners can participate as one way of meeting APFO requirements.

The Committee will also need to decide the extent to which the district's special taxes can be levied on those landowners whose property will not be developed, or those whose property will be developed but who fulfill their APFO requirements at a later time or in other ways, and whether those who don't pay the district's taxes can benefit from the capacity created.

11) Should the resolution creating a district require the approval of 6 Councilmembers? Should it be subject to Executive veto?

Under both bills all Council actions are by simple majority vote, and none are subject to Executive veto.

With regard to Issue 10 concerning the participation by property owners in the development district, Ms. Davison clarified that Bill 46-93 would require that in order for the property owners to develop their land, they must belong to the district. Mr. Hanna stated his opinion that participation should be voluntary, but that after 80% of the property owners within the boundaries of the district have agreed to participate, it would be mandatory for the remaining 20% to belong to the district in order to develop their property. He said that the two-thirds limit that is contained in Bill 44-92 is not high enough. Mr. Bialek pointed out that the concept supported by the County Affairs Committee of the Delegation is that the family farm should not have to belong if the owner does not want to develop their property, but to join later would involve some kind of reimbursement. Ms. Praisner said that she could support the 80% level because it would make creation of the district more stringent. Mr. Subin expressed concern that some property owners will be pulled into the district involuntarily. Mr. Hanna reiterated that it would be mandatory for those who want to develop. It was pointed out that even those who do not want to develop will experience an increase in the value of their property through improved infrastructure.

ACTION: Agreed with the 80% participation rate, but requested further information on experience in other jurisdictions with regard to how to deal with the issue of reimbursement by owners who join after the district has been established and developed.

Clarified that the 80% can be calculated as either a percentage of land area or value.

With regard to Issue 11, Ms. Praisner expressed the opinion that there is no need for a vote by a supermajority of the Council to create a development district, but that there should be an opportunity for Executive veto. Mr. Hanna disagreed with the proposal for an Executive veto, noting that the Executive has the opportunity to veto the enabling legislation. Mr. Subin expressed support for the veto power.

ACTION: Recommended approval of the proposal for a simple majority vote to approve creation of a development district.

Recommended approval of a requirement that the creation of a district be subject to Executive veto, Mr. Hanna voting in the negative.

Agreed with staff comments and recommendations on the remaining issues set forth in Mr. Faden's memorandum of August 2, 1993.

Ms. Praisner said that, before the legislation is redrafted, she would discuss the revisions with the Delegation to assure that its concerns have been addressed. In response to her concern about property owners being able to avoid participation by seeking municipal annexation, Mr. Faden and Mr. Lowhr assured the Committee that the legislation as drafted resolves this issue. Another issue raised was that APFO review is not required within a municipality; however, Mr. Hanna pointed out that the application for a

(93)

M E M O R A N D U M

TO: Management and Fiscal Policy Committee

FROM: *MF* Michael Faden, Senior Legislative Attorney

SUBJECT: Worksession: Bill 44-92, Development Districts
Bill 46-92, Development Districts

Bill 44-92, Development Districts, sponsored by the Management and Fiscal Policy Committee, was introduced on December 1, 1992. Bill 46-92, Development Districts, sponsored by the Council President at the request of the County Executive, was also introduced on December 1, 1992. A public hearing was held on both bills on February 2, 1993. Extensive Committee worksessions were held on March 22 and August 2, 1993.

Staff was directed to redraft the bills in accordance with the Committee amendments, combining both bills if possible. The result was the attached combined redraft, included at 1-24. It follows the general direction taken by Bill 44-92 while adding some elements of Bill 46-92. The Committee held worksessions on October 22 and December 6, 1993, to consider this redraft; see October 22 minutes, 106-110.

Also attached is proposed state legislation, House Bill 895. See 85. It responds to an opinion of bond counsel that state enabling authority must be expressly granted before a development district can issue special obligation bonds. See opinions attached to County testimony, 90. Several provisions in Bill 44/46-92 were inserted to conform to House Bill 895. The County legislative delegations have approved this bill, and the General Assembly's standing Committees will consider it soon.

This memo will summarize the major Committee amendments and show where in this redraft they are found. It will not cite the many clarifications, organizational changes, and stylistic improvements which are also included, although staff will be pleased to answer questions about all parts of the draft. Finally, it will highlight a few remaining issues the Committee may want to consider.

October 22 and December 6 Committee worksessions

At your October 22 and December 6 worksessions, the Committee discussed the following previously-adopted amendments and modified some of them as indicated:

- 1) 5, lines 89-95 clarify that a development district can only fund infrastructure improvements which (1) serve the residents or occupants of more than one development or subdivision; and (2) are not the responsibility of any single developer under the site plan and adequate public facilities processes. 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.

2) ¶6, line 110 provides that a development district can be funded by an excise tax as well as a special property tax. In previous drafts this was assumed but not explicitly stated. However, this bill does not authorize any new form of tax. Councilmember Hanna preferred to have districts funded only by property taxes, but the Committee majority accepted this definition of "special tax".

3) ¶7, lines 138-139 clarify that a development district should largely, if not entirely, consist of undeveloped land or underdeveloped land which needs to be redeveloped, rather than already-developed areas.

4) ¶7, lines 145-147 increase the percentage of property owners needed to sign a petition to initiate a development district from 2/3 to 80% of the owners of property in the proposed district and (rather than or) the owners of 80% (rather than 2/3) of the property by value. This conforms to the proposed state law, MC 419-94. House Bill 895 requires "approval" of the district by the specified number of property owners; staff is not sure that a petition submitted at the beginning of the process can function as approval, instead of making the County Council, County Executive, and Planning Board go through the entire process of creating a district without being sure that enough property owners will approve it. Bill 44/46-92 may need further amendment to insert a property owner approval process after the Council adopts the resolution creating a district; staff will review House Bill 895 further and bring a recommendation to the Council when it takes up this bill.

The Committee, with Committee Chair Praisner dissenting, voted to delete the authority of the Council to create a district on the Council's own motion or the Executive's request if the district will not use the special obligation bonds authorized by MC 419-94.

(Approval of a district should not be confused with participation in it. Once a district is legally created, all property owners in it must pay whatever tax or assessment is imposed. A later provision would allow those not ready to develop their land to defer special property taxes until development is approved.)

5) ¶8, lines 162-166, as well as two later places in the draft, insert an Executive veto, with Council override by 6 votes, of a resolution creating or terminating a district.

6) ¶9, lines 204-211 clarify that the developers of land in a development district assume and retain the legal responsibility to provide the infrastructure improvements needed to comply with the adequate public facilities law. This means that if a development district fails for any reason, that responsibility has not passed to the County. This provision complements ¶10, lines 223-233, which provides that after a district is created and its financing is arranged, the developers have satisfied all current APFO requirements and any imposed during the next 12 years. (Councilmember Hanna preferred a longer vesting period, such as 20 years, while Councilmember Subin supported the bill's 12-year limit. Committee Chair Praisner was not present for this discussion.) The bottom line for a developer is that it will have an unalterable APF approval but is responsible for funding (through the development district or otherwise) the infrastructure improvements it has assumed responsibility for.

*He was with
it at this
meeting*

JOSEPH CURRAN, JR.
ATTORNEY GENERAL
RALPH S. TYLER
DEPUTY ATTORNEY GENERAL



ROBERT A. ZARNOCH
ASSISTANT ATTORNEY GENERAL
COUNSEL TO THE GENERAL ASSEMBLY

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May 20, 1994

The Honorable William Donald Schaefer
Governor of Maryland
State House
Annapolis, Maryland 21401

Re: House Bill 895

Dear Governor Schaefer:

We have reviewed and hereby approve for constitutionality and legal sufficiency House Bill 895 (Montgomery County - Special Obligation Debt). In doing so, we have concluded that the bill does not clearly constitute an impermissible public local law for a single charter home rule county on a subject covered by the Express Powers Act (Art. 25A, §5) and does not contravene one-person/one-vote requirements in violation of the Equal Protection Clause of the Fourteenth Amendment.

House Bill 895 provides for creation by Montgomery County of "development districts" that are special taxing districts or special assessment districts for new developments or redeveloped properties, where the costs of public infrastructure may be financed through issuance of bonds or other obligations "for which the principal, interest, and any premium shall be paid from special taxes, assessments, fees, or charges collected by the county in the development district." Before a district is created to finance special obligation bonds, the proposed action, inter alia, must be approved by 80% of the owners of real property located within the district. 1/

1. Charter Home Rule

The Legislature enacted the Express Powers Act, Art. 25A, §5 of the Annotated Code, in obedience to Article XI-A, §2 of the State Constitution, which mandated a grant by public general law of express powers for charter counties.

Once a particular power has been delegated to the counties under the Express Powers Act, Article XI-A, §4 of the Constitution forbids the General Assembly from enacting any further public local laws within the scope of the express power so granted until such time as the Legislature withdraws the power by public general law. Ritchmount Partnership v. Board of Supvs. of Elections, 283 Md. 48 (1978).

We have reviewed House Bill 895 in light of certain bond issuing authority contained in the Express Powers Act under §5(P). The "special obligation bonds" or "other obligations" described in House Bill 895 appear to be neither pure "general obligation bonds" addressed by §5(P)(1), nor pure "revenue bonds" addressed in §5(P)(2), and it is the view of bond counsel for Montgomery County that the county is not presently authorized to issue such a form of debt under existing State law.

During the 1993 legislative session, Assistant Attorney General Richard E. Israel responded to a request for advice on the authority of Montgomery County to issue special obligation debt under existing law, in light of the opinion of bond counsel for Montgomery County that "special obligation bonds" of the sort contemplated by the 1993 legislation and now by House Bill 895, were not authorized under §5(P)(2) of Art. 25A, which grants to charter counties the authority to issue revenue bonds. See letter of advice to the Hon. Brian Frosh dated March 19, 1993, and opinion of Smith, Somerville & Case dated Oct. 2, 1992, addressed to Montgomery County Attorney Joyce Stern (the "Bond

¹ We have also construed the title of the bill to be in compliance with Article III, §29 of the Maryland Constitution. Neither development districts nor a certain disclosure requirement for contracts of sale of real property within a development district are specifically mentioned in the purpose paragraph of the bill. The purpose paragraph does, however, include "providing certain limitations on the issuance of special obligation debt" and does state that it is "generally relating to the authority of Montgomery County to issue special obligation debt." Development districts are the mechanism under the bill for issuance of special obligation debt, and must be established by the County in accordance with procedures set forth in the bill. County legislation must also provide for the disclosure provisions required by the bill. We consider the title adequate to give notice of the nature of the bill for purposes of compliance with §29, which requires that the title not be misleading, Allied American Mutual Fire Insurance v. Commissioner of Motor Vehicles, 219 Md. 607 (1959), but does not require that the title include an abstract of the bill's contents, Mayor and City Council of Baltimore v. State of Maryland, 281 Md. 217 (1977).

Counsel Opinion"), both of which were part of the legislative record of House Bill 895.

The Bond Counsel Opinion observed that revenue bonds have traditionally been understood to be bonds that are payable solely from revenues derived from the project financed with the proceeds of the bonds, and have been distinguished by some courts from special obligation bonds which are payable also from additional sources. It did not consider or construe §5(P)(1) of Art. 25A, which provides "... for the borrowing of moneys on the faith and credit of the county and for the issuance of bonds or other evidences of indebtedness therefor ..." subject to certain conditions, one of which could be construed to indicate existing charter county authority to issue bonds of the nature contemplated by House Bill 895. In particular, §5(P)(1)(1)(b) exempts from a certain bond restriction "bonds or other evidences of indebtedness issued or guaranteed by the county payable primarily or exclusively from taxes levied in or on, or other revenues of, special taxing areas or districts heretofore or hereafter established by law..." (Emphasis added). ^{2/}

It is our understanding that County bond counsel agree that this exemption implies existing authority to issue special obligation debt, but that they do not consider this provision to be in itself a grant of such authority on which to base an approving legal opinion with respect to valid authorization of such bonds.

While in Mr. Israel's March 19, 1993 letter of advice, he found there to be "at least a reasonable doubt" that the County had the specific type of authority being sought, he noted that:

"Should a court subsequently conclude that the County already had this authority under the Express Powers Act, the local law would simply be regarded as a nullity." (p. 2).

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. See Bill Review Letter on S.B. 1157, dated May 12, 1975. 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 of its authority.

² Under House Bill 895, §(c)(4) of Chapter 20A-1 provides that "[t]his Section may not be construed to limit the power of the county to create development districts or issue special obligation bonds or other obligations under any other applicable law."

2. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides, in relevant part, that no state shall "deny to any person within its jurisdiction the equal protection of the laws." ^{3/} In a landmark Equal Protection Clause case, the Supreme Court held that the Fourteenth Amendment requires adherence to the principle of one-person/one-vote in certain elections (in that case the election of state legislators). Reynolds v. Sims, 377 U.S. 533 (1964).

We have considered whether the property owner approval requirements of House Bill 895 violate the one-person/one-vote principle.

The Reynolds rule requiring one-person/one-vote has been extended to cases in which elected officials exercised "general governmental powers over the entire geographical area served by the body." Avery v. Midland County, 390 U.S. 474 (1968) (officials of county government); and to election of community college trustees who "'exercised general governmental powers' and 'perform[ed] important governmental functions' that had significant effect on all citizens residing within the district." Ball v. James, 451 U.S. 355 (1981), citing Hadley v. Junior College District, 397 U.S. 50 (1970). The Supreme Court has declined, however, to apply the strict Reynolds rule where, despite exercise of some "typical governmental powers", including issuance of general obligation bonds, a district's "primary purpose, indeed the reason for its existence" is essentially to obtain a private benefit, and disproportionately affects the voting landowners. See e.g., Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719 (1973).

However, even if we assume that House Bill 895 concerns the exercise of general governmental powers that do not disproportionately affect the voting landowner, we do not believe the approval mechanism contained in the bill constitutes the elective enfranchisement only of property owners.

House Bill 895 calls for no secondary popular vote on the establishment of development districts. Hence the question arises whether the "approval" by property owners is itself to be understood to be a vote, triggering equal protection franchise rights, or as a mere request or petition to the county council. If the council is the ultimate actor, and the prior approval by property owners is merely a preliminary expression of encouragement, no election would exist to trigger equal protection

³ Article 24 of the Maryland Declaration of Rights embodies the concept of equal protection of laws to the same extent as the Equal Protection Clause of the Fourteenth Amendment. Murphy v. Edmonds, 325 Md. 342 (1992).

concerns. If, on the other hand, action by the county council is preliminary to the "favorable vote of the freeholders of the area ... and ma[kes] no provision for voting by the electors of that area" the legislation could violate the Equal Protection Clause. See Berry v. Bourne, 588 F.2d 422, 424 (4th Cir. 1978).

We are advised, however, 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. This proposed County legislation would conform the implementation of House Bill 895 with requirements of the Equal Protection Clause.

The companion legislation, would provide that:

"(a) After receiving a petition [by property owners as described in House Bill 895] located in a proposed development district, the County Council may, by resolution approved by the Executive Director, declare its intent to establish a development district....

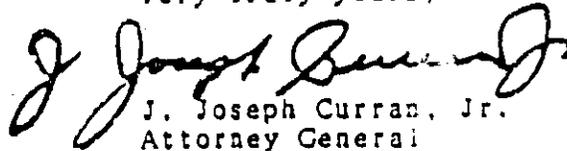
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(c) The adoption of a resolution under this Section does not obligate the Council to create a development district...." (Emphasis added)

It is our understanding that the intent of this proposed implementing legislation is to make clear that the Council retains discretion to create or not to create a development district approved by property owners, so that the governing body, and not the property owners, remains the crucial decision maker. Landowner "approval" under House Bill 895, as so implemented, would then be a genuinely preliminary matter and not an election subject to one-person/one-vote requirements.

In conclusion, it is our view that House Bill 895 may be signed into law.

Very truly yours,


J. Joseph Curran, Jr.
Attorney General

JJC:SJC:maa

cc: Bonnie Kirkland, Esq.
F. Carvel Payne
Secretary of State
Hon. Brian E. Frosh
Benjamin Blalek, Esq.
Joyce Stern, Esq.

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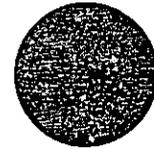
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DAVID W. BROWN

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August 3, 2007

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Via Hand Delivery

Marilyn J. Praisner, Council President
Montgomery County Council
100 Maryland Ave, 6th Floor
Rockville, MD 20850

Re: Clarksburg Development Districts

Dear Council President Praisner:

On July 26, 2007, the County Attorney sent the County Executive a Memorandum assuring the Executive that the Clarksburg development districts are "legal." I write on behalf of the Clarksburg Town Center Advisory Committee ("CTCAC") to point out the the County Attorney Memorandum ("Memorandum") is factually and legally erroneous on many fronts.

The Memorandum patronizingly conveys the false impression that CTCAC simply made a series of uninformed, unfounded claims in its original Report of March 2007. CTCAC will submit a detailed response later this month confirming its prior claims and identifying how and why the Memorandum attempts to legalize serious prior misjudgments by the Council and the Executive. For immediate purposes, a preliminary, circumscribed summary of the points CTCAC will make is attached.

One of the County Attorney's most remarkable claims deserves special attention. The CTCAC Report disclosed that the Clarksburg Town Center development district had been created without the required contemporaneous approval of 80% of the affected property owners. This "supermajority" approval was mandated by a State law enacted 13 years ago by the General Assembly, at the request of the County, to authorize the County to use development districts. The County Attorney claims that the required 80% consent to taxation was achieved two years before the development district was created, when the developer owned all the property to be taxed. This is nonsense. The many who owned property in the development district at the time of its creation would be the affected taxpayers, and it was their 80% consent that was required under State law. It is undisputed that their consent was neither sought nor obtained.

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Understandably, the County Attorney does not place primary reliance on this fanciful developer-consent claim. He instead relies on an equally far-fetched and especially arrogant argument, alleging that the 80% property owner approval requirement is inoperative because it is part of a State law that is superfluous and therefore an unconstitutional “nullity.” But three simple, undisputed facts thoroughly repudiate this claim: (1) it is contrary to the views expressed by bond counsel at the time the law was passed that the County needed a State law authorizing it to impose development district taxes; (2) it is contrary to a finding of constitutionality of the State law by the Maryland Attorney General at that time; and (3) it sets Montgomery County completely apart from other chartered counties in the State, as well as all municipalities, all of which may create localized taxing areas within their jurisdictions **only** by complying with authorizing State law that includes a supermajority taxpayer consent requirement.

On the heels of the County Attorney’s “not illegal” pronouncements, the County Executive has recommended that the Council move forward with Clarksburg development district bonds. These bonds, however, are the means by which money will be stripped from the pockets of Clarksburg residents (for each resident equivalent over the life of the bonds to approximately one year’s pay for someone with an above-average salary) to line the pockets of the developer. This is the reverse of Robin Hood—taking from the poor to increase the profits of the wealthy. Why? The County Attorney identifies no contractual or moral obligation to the developers. Nor is there any dispute that subdivision and site plan development approvals by the Planning Board contain both lawfully imposed developer obligations to provide certain infrastructure and the financial reward for doing so: authorization to develop the land at much higher density than would ordinarily be allowed. **So why is there a taxpayer-funded handout to developers for something they were already obligated to provide?** Neither the County Attorney nor the County Executive attempts to answer this fundamental question raised by the CTCAC Report, except to say that the handout is “legal.”

The explanation for the County Attorney’s silence is buried in a footnote: he says he was not charged with evaluating whether implementing any of the Clarksburg development districts would be sound public policy. Yet, immediately upon public disclosure of the Memorandum, the County Executive announced that he wanted the County Council to move forward with the implementation of all three Clarksburg development districts. The public interest justification for what amounts to government-mandated highway robbery of a targeted group of County property taxpayers is nowhere to be found in his explanation. “Not illegal” is not a policy justification for taking from the affected taxpayers what would, over time, amount to a year’s salary. The County Executive reportedly said to *The Washington Post* that the taxes would ensure that residents elsewhere in the County would not wind up paying for Clarksburg development. This misinformed statement serves only to instill fear and pit one group of taxpayers against another. The reality is that eliminating giveaway payments to

developers for infrastructure they agreed to provide will not add to any taxpayer's burden. The public will not be fooled: if the Clarksburg development districts are given the burial they deserve, the only change will be a few disgruntled developers who will be held to pre-existing obligations rather than receive supplemental profits via the development district taxing scheme.

In a similar vein, your July 26th press release, thanking the County Attorney and County Executive for their recommendations, expressed the view that their actions "should help enhance progress of the development of the new upcounty town Clarksburg." This, too, is a diversion from reality – developers already unconditionally agreed to development approval conditions that guarantee the development of Clarksburg and its required infrastructure. The Council could and should rather "enhance the progress of the development" by not interfering with the ordinary execution of the developers' pre-existing obligations. An informed public will not be fooled by barely veiled, unfounded threats that completion of development in Clarksburg is at risk.

When the Council takes up Clarksburg development districts in September, CTCAC anticipates that the Council will first review CTCAC's more complete response to the excuses offered by the County Attorney before taking any action. CTCAC expects the Council to act in a lawful manner rather than blindly follow the illegal path he has laid out. There is serious risk to the government in imposing oppressive, illegal taxes on citizens without their consent, as the history of America makes plain—a history in which the citizens of Maryland played no small part. In October 1774, just months after the Boston Tea Party, an angry mob gave Annapolis merchant Andrew Stewart the choice of a lynching or putting the torch to his beloved ship, the *Peggy Stewart*, named after his daughter. His crime? The *Peggy Stewart* had entered Annapolis laden in part with tea on which Mr. Stewart had paid, or intended to pay, a tax imposed by the King of England without the consent of the Colonists' elected representatives in the provincial General Assembly. His conversion to the fight against oppression is immortalized in a painting that has hung for decades in the Maryland State House, *The Burning of the Peggy Stewart*.

Should the Council approve bonds that will send developers funds plundered from unconsenting taxpayers, for what the developers were already legally and lawfully obligated to provide on their own, the outraged citizens of Clarksburg, who will be footing the bill for many years, may have a stronger set of grievances than those 1774 Maryland patriots who foreshadowed the outbreak of the Revolutionary War not long afterwards in Lexington and Concord.

Marilyn J. Praisner, Council President
August 3, 2007
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Sincerely yours,

A handwritten signature in black ink that reads "David W. Brown". The signature is fluid and cursive, with a long horizontal line extending to the right.

David W. Brown

cc: The Honorable Leon Rodriquez, County Attorney
Marc Hansen, Chairman, Montgomery County Planning Board
Ike Leggett, Montgomery County Executive
Councilmember Phil Andrews Montgomery County Council
Roger Berliner, Montgomery County Council
Marc Elrich, Montgomery County Council
Valerie Ervin, Montgomery County Council
Nancy Floreen, Montgomery County Council
Mike Knapp, V.P, Montgomery County Council
George Leventhal, Montgomery County Council
Duchy Trachtenberg, Montgomery County Council

**PRELIMINARY OUTLINE OF
CTCAC RESPONSE TO
COUNTY ATTORNEY MEMORANDUM
OF JULY 26, 2007**

1. **Clarksburg Master Plan.** For the Town Center development, the legal requirement of substantial compliance with the Clarksburg Master Plan in Chapter 50 could only be met with either a development district or alternative financing mechanisms in place at the time of development approval. It was in fact met in the Town Center via alternative financing mechanisms, as requested by the developer. A switch in the financing method to development districts would require the developer to seek and obtain a plan amendment from the Board, which was never done.
2. **Development district bonds issued after construction.** Chapter 14 requires development district bonds to be issued **before**, not **after**, construction of the infrastructure to be financed by the bonds. Issuance after construction is also inconsistent with the mandate of competitive bidding in both Chapter 14 and Chapter 11B. All three Clarksburg development districts are headed toward violation of these requirements.
3. **Single developer rule.** Using development districts to force taxpayers to pay for infrastructure installed by a single developer as a condition of development approval violates the limitations in Chapter 14 on what infrastructure improvements are eligible for financing by the district. Apart from mere illegality, it is nonsensical to use development districts to finance what developers are obligated to provide, yet that is what is proposed for all three Clarksburg development districts.
4. **Planning Board authority to impose exactions on developers.** The Planning Board has, and has long utilized, unquestioned authority to impose on developers, as a condition of plan approval, reasonable exactions that require the developer to install and pay for development-related infrastructure. Whether the County Council in theory has or does not have the power to interfere with such exactions, and to redirect the funding obligation to the taxpaying public (or a subset thereof), is beside the point. Such action, in the form of a development district or otherwise, undermines the jurisdiction and responsibility of the Planning Board, and is bad policy from every perspective.
5. **Town Center Development District Infrastructure.** The list of infrastructure items approved for the Clarksburg Town Center development district is comprised almost entirely of infrastructure the developer was required to install as a condition of plan approvals. The developer has no contractual, moral or legal entitlement to payment from the County or the residents of the Town Center for fulfilling this obligation.
6. **Asserted Conflict Among Chapters of the County Code.** Properly understood, there is no conflict among Chapters 11B, 14, 50 and 59. As Chapter 14 is proposed to be applied in Clarksburg, there is severe conflict. It can be readily eliminated if the County

Council recognizes it can utilize development districts only for future infrastructure improvements that are not exactions imposed on the developer by the Planning Board.

7. **Lack of Notice of Hearing on the Town Center Development District.** Many, if not most or all, property owners within the Town Center development district on the tax rolls as of November 1, 2002, were not properly notified of the County Council's December 2002 hearing that led to creation of that development district. Council Resolution 15-87 creating the Town Center development district is defective for this and other reasons. If it takes seriously the implications of having acted without providing affected citizens a meaningful opportunity to be heard, the Council should recognize this defect and rescind the Resolution on its own motion. If there were a present-day court challenge to the Resolution, the Council would be free to waive a claim of undue delay in bringing that challenge, or the court may decide that the challenge is not untimely, given the long period of delay in issuance of bonds.

8. **The State Law 80% Property Owner Approval Requirement.** Chapter 20A, State enabling legislation for passage of Chapter 14, is not in violation of the Home Rule Amendment of the Maryland Constitution, either generally or as to the 80% supermajority property owner approval requirement contained therein for development district creation. Thus, any development district lacking the required property owner approval violates State law. Under the Express Powers Act, the Council has authority to finance road construction via a special taxing area, in which benefited property owners are assessed for the construction, in some lawful apportionment method relating to the benefit provided. This power may not be construed expansively to apply to the creation of development district special obligation debt, which may be used to fund a broad array of improvements that provide general community benefit. Many of these are well beyond traditional objects of special taxing areas, including schools, police stations, fire stations and government centers.

9. **Lack of 80% Property Owner Approval.** The 80% property owner approval requirement in Chapter 20A refers to property owners at a time contemporaneous with development district creation, not some earlier time before the County Council has the required information and recommendations it needs to determine the boundaries of the district and what infrastructure it will fund. Any earlier property owner approval will be insufficient unless during the interim there has been no material change in property ownership within the district. In the Town Center case, the interim period was about 2 and ½ years – September 2000 – March 2003. During this time, there were substantial sales of developer property to others. Resolution 15-87 creating the Clarksburg Town Center development district was introduced in October 2002 and became effective in March 2003. At no time during that period did the Council receive, or even seek to obtain, the contemporaneous approval of the then-current property owners within the development district. Resolution 15-87 is accordingly unlawful and cannot legally be the basis for issuance of development district bonds.