Montgomery County Council

Staff: Craig Howard, Deputy Director
Purpose: Review – straw vote expected
Keywords: FY21 Operating Budget

AGENDA ITEM #28
May 5, 2020
Worksession

SUBJECT

FY21 Operating Budget: Productivity Improvements NDA

EXPECTED ATTENDEES

TBD

EXECUTIVE RECOMMENDATION

FY21 Executive Recommendation	**($10,000,000)**	**0 FTE**
Increase (Decrease) from FY20	n/a	n/a

COUNCIL STAFF RECOMMENDATION – CONTINUITY OF SERVICES BUDGET

FY21 Council Staff Recommendation	**$0**	**0 FTE**
Increase (Decrease) from FY20	n/a	n/a
Increase (Decrease) from CE FY21 Rec	$10,000,000	n/a

EXECUTIVE RECOMMENDED ITEMS NOT INCLUDED IN CONTINUITY OF SERVICES

The budget funds the NDA at negative $10 million and provides the following description: "This NDA recognizes cost efficiencies identified by Montgomery County Government staff through the evaluation of service delivery models, supervisory/management and workforce structures, relevant tools, equipment, and technologies, operating budgets, and contracts with outside vendors. The critical assessment of these factors and formulation of strategies to maintain, increase, or improve service delivery at a lower cost is a pillar of good government, especially in a fiscally challenging environment. The productivity and performance improvement effort is a collaborative initiative that involves County leadership, management, and represented employees."

Council staff notes that the County Attorney has previously concluded that the Council is not allowed to approve a negative appropriation and therefore does not recommend approval.

This report contains:

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Productivity Improvements

This NDA recognizes cost efficiencies identified by Montgomery County Government staff through the evaluation of service delivery models, supervisory/management and workforce structures, relevant tools, equipment, and technologies, operating budgets, and contracts with outside vendors. The critical assessment of these factors and formulation of strategies to maintain, increase, or improve service delivery at a lower cost is a pillar of good government, especially in a fiscally challenging environment. The productivity and performance improvement effort is a collaborative initiative that involves County leadership, management, and represented employees.

FY21 Recommended Changes	Expenditures	FTEs
FY20 Approved	**0**	**0.00**
Decrease Cost: Productivity Improvements	(10,000,000)	0.00
FY21 Recommended	**(10,000,000)**	**0.00**

Public Elections Fund

Article IV of Chapter 16 of the County Code requires the Director of Finance to create a Public Election Fund to provide public campaign financing for qualified candidates for County Executive or County Council. The law is intended to encourage more candidates who do not have access to large contributions from interest groups or individuals to run for County elective offices. This NDA provides for the distribution of public contributions to qualified candidates in a contested election. This funding level was recommended by the Committee to Recommend Funding for Public Election Fund.

FY21 Recommended Changes	Expenditures	FTEs
FY20 Approved	**0**	**0.00**
Increase Cost: Public Election Fund (2022 Elections)	1,500,000	0.00
FY21 Recommended	**1,500,000**	**0.00**

Public Technology, Inc.

The Public Technology Institute (PTI) actively supports local government executives and elected officials through research, education, executive-level consulting services, and national recognition programs. As the only technology organization created by and for cities and counties, PTI works with a core network of leading local officials - the PTI membership - to identify research opportunities, provide thought leadership and professional development opportunities, share solutions, provide technology support services, recognize member achievements and address the many technology issues that impact local government.

Funds are budgeted each year to continue membership in PTI.

FY21 Recommended Changes	Expenditures	FTEs
FY20 Approved	**20,000**	**0.00**
FY21 Recommended	**20,000**	**0.00**

Retiree Health Benefits Trust

Consolidated Retiree Health Benefits Trust: Beginning in FY08, the County implemented a plan to set aside funds for retiree health benefits, similar to the County's 50 year-old practice of prefunding for retiree pension benefits. Due to exponential growth

OFFICE OF THE COUNTY ATTORNEY

Isiah Leggett
County Executive

Leon Rodriguez
County Attorney

MEMORANDUM

TO: Isiah Leggett
County Executive

Timothy Firestine, Chief Administrative Officer
Office of the County Executive

VIA: Leon Rodriguez
County Attorney

FROM: Marc P. Hansen Marc Hansen
Deputy County Attorney

DATE: May 5, 2009

RE: Negative Appropriation; Savings Plan

The Council approved the FY-09 Operating Budget for the County Government in Resolution 16-577. Through this resolution the Council approved specific appropriations for personnel costs for each department and office in the County government. For example, the Council approved an appropriation of $3,876,830 in personnel costs for the Office of Management and Budget. The total appropriation for personnel costs for all County departments was $571,013,140.

Although the resolution appropriates specific amounts to cover personnel costs for each department, Condition 25 of the Resolution requires the Executive to reduce at least $5,000,000 in "County personnel costs through retirement incentives" and an additional $8,000,000 in savings through reduced personnel costs, or by implementing other productivity improvements and increased efficiencies in County government operations.[1]

[1] Condition 25 provides: "In FY 2009, the County Executive must implement the retirement incentive program authorized in County Code Section 33-42 (j) and take any other legally authorized actions necessary to reduce at least $5 million in County personnel costs through retirement incentives. In FY 2009, the Executive must also take

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In order to reduce the total operating budget appropriations for the County government, the Council approved a negative non-departmental account in the amount of $13,000.000.[2] We have coined the term "negative appropriation" to describe the action taken by the Council in Condition 25 and the negative non-departmental account.

You have asked for an opinion concerning the legality of including in the annual operating budget a negative appropriation.

Short Answer

A negative appropriation is not consistent with the Charter. A negative appropriation acts as a generalized command to the Executive to reduce appropriations made elsewhere in the budget. This is not consistent with the Charter, because the Charter requires the Council to adopt a budget that includes appropriations of specific amounts for specific purposes for the ensuing fiscal year.

Our conclusion does not impact the Executive's ability to impound appropriated funds (known colloquially as a "savings plan"). The Executive's ability to impose a savings plan must be: 1) subject to Council approval or made under appropriate guidelines established in legislation; and 2) made in response to matters that arise after adoption of the budget.

Analysis

The Negative Appropriation—In General.

Under Charter Section 303, the Executive must recommend a capital and operating budget "for the **ensuing fiscal year**." Under Charter Section 305, the Council may "add to, delete from, increase or decrease any **appropriation item** in the operating or capital budget" recommended by the Executive. Under Charter Section 306, the Executive may "disapprove or delete any **item**" in the budget approved by the Council.

The terms "ensuing fiscal year", "appropriation", and "item" are highlighted because they embody two important concepts relative to understanding the reasoning behind this opinion:

1. The annual budget adopts the plan of expenditures for an entire fiscal year—a plan the Executive is entitled to rely on.

2. The fiscal plan must be expressed in terms of appropriations for specific items.

other legally authorized actions to reduce County personnel costs, or implement other productivity improvements and increased efficiencies in County government operations, that in the aggregate will reduce appropriated expenditures by at least $8 million"
[2] See attached Resolution 16-577, pages 6-7 and 6-17.

The Charter's expectation that a fiscal plan will be adopted for a fiscal year has been recognized in County Attorney opinions spanning nearly 40 years. In 1971 County Attorney David L. Cahoon observed that, "the approval of a capital budget item and the making of an appropriation for budget item established the fiscal policy of the legislative body for that fiscal year."[3] In 1984 County Attorney Paul A. McGuckian stated, "It is quite clear from the Charter language that the County Council must act on an annual basis through the budget and appropriation process to express its fiscal policy for the coming fiscal year."[4] The Council does not, therefore, have the authority to change the annual spending plan once it is adopted—except to grant additional expenditure authority to the Executive by way of a supplemental or special appropriation under Charter Sections 307 and 308.

The expectation that the fiscal plan must be expressed through appropriation of items stems from the nature of an appropriation and the meaning of the term "item". As we will see in the following discussion, the concept of appropriation and item are overlapping and conterminous—perhaps even redundant.

An appropriation is made by "a lawful legislative act whose primary object is to authorize the withdrawal from the state treasury of a certain sum of money for a specified public object or purpose to which such sum is to be applied."[5] McQuillin observes that "an appropriation must, of course, fix the amount, and annual appropriation bills are sometimes required by statute or charter to specify the amount appropriated for each purpose. Appropriation bills are generally required to specify the objects and purposes for which the appropriation is made." [6] Blacks Law Dictionary defines appropriation as a, "legislative body's act of setting aside a sum of money for a public purpose."

The Charter's concept of appropriating by item has been in place at least since the current Charter was adopted in 1968. The operative language of Charter Sections 305 and 306 have remained unchanged since that time. In a 1981 opinion County Attorney Paul McGuckian concluded, after surveying Maryland and other state case law, that a budgetary item "is the separate monetary amount that attaches to it. Without a separate monetary amount, it is not an 'item'."[7] The County operating budget, including the FY-09 operating budget, appropriates monies using the following "item" categories: personnel costs, operating expense, and capital outlay.

[3] This 1971 opinion of the Office of the County Attorney concluded that the Council may not approve capital appropriations contingent on later Council approval during the same fiscal year.
[4] This 1984 opinion concluded that "when the Council approves an item in the budget and appropriates the funds the Executive must consider that this funding is for the entire fiscal year, even where there is a gross under appropriation.... The action of the Council on the budget is final and unconditional. The Council has no authority to approve items in the budget, subject to its taking some future action."
[5] *Bayne v. Secretary of State*. 283 Md. 560, 570 (1978).
[6] McQuillin, Municipal Corporations (3rd Ed.) § 39:88.
[7] This 1981 opinion concluded that, "the County Council may re-approve only items contained in the budget which the Executive has vetoed. Furthermore, re-approval of any item may not take the form of restoration of only a portion of the item, but must be re-approval by the Council of the vetoed item in toto."

A negative appropriation is contrary to these Charter principles. The negative appropriation calls into question each amount appropriated for each item/category. For example the negative appropriation appearing in the FY-09 Annual Operating Budget leaves in doubt the Council's intent with respect to the amount to be appropriated for personnel cost for each department in the County government. With each appropriated item in doubt, the budget fails to articulate a fiscal plan with sufficient detail to qualify as an annual budget with appropriations by item as required by the Charter.

The Problem of a Retirement Savings Plan—A Proposed Solution.

The FY-09 Annual Operating Budget contained a negative appropriation in the amount of $13,000,000. Of the $13,000,000 the County Executive was instructed to reduce personnel costs of $5,000,000 through a retirement incentive program.

We understand that the retirement incentive program has been proposed in the past as a means of closing projected budget gaps and that, at the time of the budget adoption, the number of retirees and the positions to be abolished through the program are known only in a general sense. Thus, the savings associated with a retirement savings plan cannot be determined with precision at the departmental level.

This problem can be resolved by reducing appropriate departments' personnel costs by estimated amounts and then using the authority to transfer funds under Charter Section 309 to make final adjustments after the results of position reductions become known by department.

The Negative Appropriation and a Savings Plan—Distinguished.

The negative appropriation used in the FY-09 Annual Operating Budget is conceptually different than the Executive adopting, with Council consent, a savings plan that proposes to reduce expenditures because of unforeseen events occurring after adoption of the budget. Historically, savings plans have been proposed when it becomes apparent that revenue projections used as the basis for adoption of the budget will not be achieved. A savings plan is significantly different than the negative appropriation in the following ways:

1. The savings plan is premised on events that were not (and could not be) factored into the annual budget when adopted; and

2. The Executive proposes a savings plan which is then subject to Council approval.[8]

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[8] A savings plan must be initiated by the Executive, because the Council cannot on its own initiative condition or reduce an appropriation already made. *See* County Attorney opinion to Robert Kendal, Director, Office of Management an Budget, dated April 7, 1999. Under the Charter it is important to keep the concept of impoundment (or savings plan), which is permitted, separate from the concept of dis-appropriation by the Council, which is not permitted.

The savings plan process, which has developed informally over the last several years to address revenue short falls experienced by the County, has become a means acceptable to both branches of government for the Executive to impound funds in order to address issues that arise after adoption of the budget.

Generally the Executive may not impound funds if impoundment would compromise the underlying purpose of the appropriation—except to avoid a needless expenditure of public funds. The Massachusetts Supreme Judicial Court, in an often relied upon opinion, addressed the constitutionality of a proposed Massachusetts statute that would require the Governor to expend the entire amount of an appropriation. In determining that this proposed state law was unconstitutional, the Court observed:

> "[H]owever minutely appropriations are itemized, some scope is left for the exercise of judgment and discretion by Executive or administrative officers or boards in the expenditure of money within the limits of the appropriation." [Citation omitted] We think there is a constitutional basis for such an assumption, in that the exercise of judgment in discretion in the implementation of legislative policy is necessary to the efficient and effective operation of government. Inasmuch as it is the function of the executive branch to expend funds, it must be implied that the "supreme executive magistrate," as head of one of the three coequal branches of government, is not obliged to spend the money foolishly or needlessly. The executive branch is the organ of government charged with the responsibility of, and is normally the only branch capable of, having detailed and contemporaneous knowledge regarding spending decisions. The constitutional separation of powers and responsibilities, therefore, contemplates that the Governor be allowed some discretion to exercise his judgment not to spend money in a wasteful fashion, **provided that he has determined reasonably that such a decision will not compromise the achievement of underlying legislative purposes and goals."** (Emphasis added)[9]

The Maryland General Assembly has authorized the Governor to impound funds within certain carefully crafted parameters. Section 7-213 of the State Finance and Procurement Article authorizes the Governor to reduce by not more than 25% "any appropriation that the Governor considers unnecessary." The Governor may not reduce an appropriation to the legislative branch or judicial branch of the State government nor reduce an appropriation for: (1) payment of principle or interest on state debt; (2) public schools; or (3) the salary of a public officer during the term of office. In addition, the Governor may not, except as provided under the State merit system law, reduce an appropriation for the salary of an employee in the classified or unclassified service of the State. The Court of Appeals upheld this state statute, turning away a

[9] *Opinion of the Justices to the Senate*, 375 Mass 827 (1978)

challenge to its constitutionality on the grounds that it violated the separation of powers doctrine. The Court stated,

> The General Assembly, in the statutory scheme for the administration of the budget, has provided sufficient safeguards with respect to the Governor's exercising of authority. For example, in order for the Governor to reduce an appropriation under Section 7-213, he must obtain the approval of the Board of Public Works. In addition, Section 7-210 provides that the Governor may not make any substantive changes to the budget bill pursuant to Section 7-213. Furthermore, Section 7-213 (b) delineates various types of appropriation which the Governor may not reduce. As to the other appropriations, the statute itself provides that the Governor may only reduce items which he deems "unnecessary." Finally, the statute only allows a reduction of 25%. These provisions circumscribe the Governor's exercise of authority while allowing a necessary degree of flexibility."[10]

Applying the principles delineated in these two cases to the County, it is clear that: 1) Normally, the Executive must expend appropriated funds in order to implement the legislative policy that motivated the appropriation, but the Executive has an inherent executive power to impound funds to the extent necessary to avoid expending funds "needlessly or foolishly". This power of impoundment is narrow. 2) The Executive may propose a savings plan in response to events that arise after adoption of the annual budget. The savings plan must, however, be approved by the Council in order to avoid having the Executive exercising a *de facto* veto over the Council's policy decisions embodied in the annual budget.

Given the informal nature of the County's current savings plan process, the Executive and Council may wish to consider adoption of legislation to regulate the process. In 1982, the Council considered legislation, in the form of Bill 49-82, to establish a process for executive reduction of appropriations. The bill required that the Executive submit a periodic revenue report and, within certain time frames, the Executive was to propose to the Council expenditure reductions associated with the revenue report. The Executive's proposed decreases would take effect within 30 days unless disapproved by the Council.[11] Section 7-213 authorizing impoundment by the Governor may also serve as another model for the Executive and Council to consider.

Conclusion

A negative appropriation is not consistent with the Charter because it fails to propose an expenditure plan by item for the ensuing fiscal year. A savings plan, however, is distinguishable from a negative appropriation. A savings plan is premised on events that arise after the adoption

[10] *Judy v. Schaffer*, 331 Md. 239, 264 (1993).

[11] Bill 49-82 was proposed in connection with a proposed Charter amendment to permit the Council to dis-appropriate funds. Neither was approved by the Council.

of the budget and only permits the Executive to impound appropriated funds with the consent of the Council. A savings plan, therefore, is consistent with the Charter, although we recommend that consideration be given to regularizing the savings plan through adoption of appropriate legislation.

CC: Philip M. Andrews, President
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