

MEMORANDUM

TO: Planning, Housing and Economic Development Committee

FROM: *MF* Michael Faden, Senior Legislative Attorney

SUBJECT: **Worksession:** Bill 37-12, Housing – Capital Improvements Program – Affordable Housing Assessment

Bill 37-12, Housing – Capital Improvements Program – Affordable Housing Assessment, sponsored by then Council President Berliner and Councilmembers Riemer, Ervin, Floreen, Leventhal, and Andrews, Council President Navarro and Council Vice-President Rice, was introduced on November 27, 2012. A public hearing was held on January 15, at which Department of Housing and Community Affairs Director Richard Nelson, representing the County Executive, was the only speaker (see testimony, ©12-13).

Bill 37-12 would require the Office of Management and Budget to submit an affordable housing assessment with certain capital projects proposed in the County Capital Improvements Program. The purpose of the assessment is to advise the Council whether each proposed project should include an affordable housing element.

Cost The OMB fiscal impact statement (see ©5-9), received on January 15, concluded that implementing this Bill would cost about \$163,000 annually. Most of that amount is for 85% of a full-time OMB budget analyst, in addition to staff time at the Department of General Services (DGS) and Department of Housing and Community Affairs (DHCA). Since the impact statement (on ©6) assumes that 5 projects a year will be reviewed, Council staff is skeptical that this workload would by itself warrant the hiring of another budget analyst and some of the other claimed expenses. In any case, if this Bill is enacted the necessary funding will be decided in the operating budget.

Technical amendment The County Attorney (see memo, ©10-11) raised questions about the provision on ©3, lines 27-29, which would let the Council by resolution exempt from the assessment requirement “a category of capital projects which by their nature do not require an affordable housing analysis”. The County Attorney concluded that any exemption must be done by legislation, rather than Council resolution not signed by the Executive, despite a similar provision in County Code §31-68(d) (enacted in Bill 8-07, bicycle and pedestrian impact analysis) having been passed without Executive branch objection. While Council staff doesn't

completely accept the County Attorney's legal analysis, we **recommend** that this issue be easily resolved by adopting the amendment the County Attorney suggested, which would let the Executive exempt classes of projects by a Method 1 regulation that would be subject to Council approval.

This could be done by amending ©2, line 27:

(e) The [[Council]] County Executive may by [[resolution]] Method 1 regulation exempt from this Section a category of capital projects which by their nature do not require an affordable housing analysis.

This packet contains:	<u>Circle #</u>
Bill 37-12	1
Legislative Request Report	4
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Bill No. 37-12
Concerning: Capital Improvements
Program – Affordable Housing
Assessment
Revised: 11-15-12 Draft No. 4
Introduced: November 27, 2012
Expires: May 27, 2014
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: _____
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

By: Councilmembers Berliner, Riemer, Ervin, Floreen, Leventhal, Andrews, Council President
Navarro and Council Vice-President Rice

AN ACT to:

- (1) require the Office of Management and Budget to submit affordable housing assessments with certain capital projects in the Capital Improvements Program;
- (2) authorize the Council to require other County departments and agencies to supplement the assessments furnished by the Office of Management and Budget;
and
- (3) generally amend County law regarding the analysis of capital projects.

By amending

Montgomery County Code
Chapter 25B, Housing Policy
Section 25B-7

Boldface	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

The County Council for Montgomery County, Maryland approves the following Act:

1 **Sec. 1. Section 25B-7 is amended as follows:**

2 **25B-7. [Reserved] Affordable housing assessment.**

3 (a) For each applicable capital project in the Capital Improvements
4 Program, the Office of Management and Budget must include in or
5 transmit with the CIP an analysis of:

6 (1) the feasibility of including a significant amount of affordable
7 housing in the project;

8 (2) the effect of the project on the supply of affordable housing in the
9 immediate area; and

10 (3) what capital or operating modifications, if any, would promote
11 and maximize affordable housing in the project and the
12 immediate area.

13 (b) The affordable housing analysis submitted by OMB should discuss at
14 least the following issues related to the capital project:

15 (1) compatibility of affordable housing with the underlying project;

16 (2) conformity of affordable housing to applicable zoning and land
17 use plans;

18 (3) proximity to public transit, and availability of other transportation
19 options; and

20 (4) proximity to other community services.

21 (c) As used in this section, applicable capital project means any building
22 project administered by the Department of General Services or the
23 Parking Management Division of the Department of Transportation.

24 (d) In performing its analysis, OMB should consult the Department of
25 Housing and Community Affairs, the Planning Board, and any other
26 County department or agency with expertise in affordable housing.

LEGISLATIVE REQUEST REPORT

Bill 37-12

Housing – Capital Improvements Program – Affordable Housing

DESCRIPTION:	Requires the Office of Management and Budget to submit an affordable housing assessment with certain capital projects proposed in the County Capital Improvements Program. The purpose of the assessment is to advise the Council whether each proposed project should include an affordable housing element
PROBLEM:	The potential for including an affordable housing element in each County Capital Improvements Program projects is not routinely assessed.
GOALS AND OBJECTIVES:	To find more County projects that could feasibly include an affordable housing element.
COORDINATION:	Office of Management and Budget, Department of Housing and Community Affairs, Planning Board
FISCAL IMPACT:	To be requested.
ECONOMIC IMPACT:	To be requested.
EVALUATION:	To be requested.
EXPERIENCE ELSEWHERE:	To be researched.
SOURCE OF INFORMATION:	Michael Faden, Senior Legislative Attorney, 240-777-7905
APPLICATION WITHIN MUNICIPALITIES:	Applies only to County Capital Improvements Program.
PENALTIES:	Not applicable

Fiscal Impact Statement
Council Bill 37-12 Housing – Capital Improvements Program – Affordable Housing
Assessment

1. Legislative Summary.

This Bill requires the Office of Management and Budget to submit an affordable housing analysis with certain capital projects proposed in the County Capital Improvements Program to be included in, or transmitted with, the CIP for projects administered by DGS or the Parking Management Division of DOT. The purpose of the analysis is to advise the Council whether each proposed project should include an affordable housing component.

2. An estimate of changes in County revenues and expenditures regardless of whether the revenues or expenditures are assumed in the recommended or approved budget. Includes source of information, assumptions, and methodologies used.

No additional revenues are expected to be generated from this bill. The bill would result in a three step process; (1) An initial assessment of projects; (2) those identified in the initial screening process will move forward into the facility planning process where a more detailed assessment of the programmatic feasibility of including affordable housing will be done; and (3) an assessment of the financial feasibility for inclusion as a component of the project. Expenditures would relate to the staff time required by each department involved in the analysis including the Department of General Services, Department of Housing and Community Affairs, Department of Transportation and the Office of Management and Budget. Expenditures would also include an increase in resources available to the Capital Budget for facility planning to accommodate feasibility assessments. The following chart depicts the estimated costs.

Table 1: Estimated Costs of Affordable Housing Facility Assessment

Department Activity	Assumptions	Estimated Cost
I. Costs related to analyze the feasibility of including affordable housing in the project		
DGS staff review of the feasibility of affordable housing	<ul style="list-style-type: none"> • Work with DHCA and OMB to provide an initial assessment of candidate projects for affordable housing. • Facility planning activities: Development of Program of Requirements (POR), feasibility study to include a test fit, traffic study, parking study, and building height feasibility. • Coordinate with consultants and monitor consultant activities. • Development of preliminary cost estimates used by DHCA to determine likely gap financing needs. 	The \$50,000 estimate in the Facility Planning project includes both DGS staff and consultant costs.

	<p><i>Facility Planning CIP:</i></p> <ul style="list-style-type: none"> Assuming an average of five projects in facility planning per year (based on likely candidate projects currently in the Facility Planning PDF) 	<p>\$10,000 per project; total of an additional \$50,000 in the Facility Planning PDF for each of the six years. (currently \$260,000; would increase to \$310,000 per year)</p>
<p>DHCA staff review and assessment of public facilities for inclusion of affordable housing</p>	<p>Initial Review Phase:</p> <ul style="list-style-type: none"> Obtain and review information from DGS/DOT regarding the proposed project to assess the feasibility and desirability of affordable housing on the project site. Neighborhood and site visit for overall feasibility. Obtain and evaluate neighborhood demographic information. In concert with DGS, develop an estimate of housing construction and operating costs and likely affordable housing project revenue in order to determine estimated gap funding needed to make the project financing work. Internal DHCA discussions and drafting recommendations. 	<p>\$1,040 per project (\$43.30 per hour @ 24 hrs per project) (Costs assumptions are based on a Sr. Planning Specialist position, Grade 25 @ \$90,000. Average 5 projects per year - \$5,200). The work associated with determining gap financing will be done through the routine review process thus not needing additional expenditures associated with the assessment.</p>
<p>OMB staff review the assessment conducted by DGS and DHCA</p>	<p>This requires:</p> <ul style="list-style-type: none"> Development of a review process. Coordination of participating departments or agencies. Review and analysis of assessments and assumptions. Program of requirements (POR) development and review to include the affordable housing components. Analysis of the complex financing components that fund affordable housing. 	<p>1 FT Management and Budget Specialist (\$126,930 = 1 FTE; includes estimate for retirement, FICA/Medicare, life insurance, and health insurance); 1,768 hours per year, \$126,930 @ 85% = \$107,891.</p>
<p>DOT, Parking Management Division</p>	<p>DOT has generally developed affordable housing units in conjunction with private partners which helps control County project costs. If the Department of Transportation builds its own affordable housing, the non-parking component will need to be funded with non-parking resources.</p>	<p>There currently are no projects in facility planning that do not already contain affordable housing. It is not envisioned that future projects will rebuild a free standing garage with out offering the property to the private sector for redevelopment with a caveat of requiring affordable housing. Assuming that current level of</p>

		effort garage maintenance projects are exempt from this analysis, there are no planned additional expenditures.
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Sources: Department of General Services, Department of Housing and Community Affairs, Department of Transportation and Office of Management and Budget

3. Revenue and expenditure estimates covering at least the next 6 fiscal years.

Expenditure estimates covering the next six fiscal years is \$163,091 annually; x 6 = \$978,546.

In order to achieve the ultimate goal of including an affordable housing component in a County capital project, funding for the Affordable Housing Acquisition and Preservation project must be budgeted when including affordable housing to assure the availability of gap funding when the project is built. A firm estimate of the County gap financing cost will be determined during the facility planning phase; however, at the initial submission, \$5 million should be generally considered as a place holder.

4. An actuarial analysis through the entire amortization period for each bill that would affect retiree pension or group insurance costs.

Not Applicable

5. Later actions that may affect future revenue and expenditures if the bill authorizes future spending.

This Bill does not authorize future spending.

6. An estimate of the staff time needed to implement the bill.

- DHCA activities and staff time for a typical project: 24 hours; 1% of 1 FTE
- OMB staff time: 1,768 hours; 85% of 1 FTE (to encompass all likely candidate CIP projects)
- DGS staff time: 32 hours per project; 1.2% of 1 FTE

7. An explanation of how the addition of new staff responsibilities would affect other duties.

Per project staff time estimated in #6 above needs to be multiplied by the number of projects annually submitted for funding to determine the full extent of staff time required. If additional staffing is not provided for this function, other work will need to be reprioritized.

8. An estimate of costs when an additional appropriation is needed.

See items #2 and 3 above.

9. A description of any variable that could affect revenue and cost estimates.

The costs for providing the requested analysis will vary based on the number of projects considered along with the project complexity will be large costs drivers.

In order to achieve the ultimate goal of providing more affordable housing, financing gap subsidies and/or operating subsidies are likely to be needed. The total number of residential units, the number of below market affordable units, the depth of subsidy (60% of area median income, 50% AMI and/or 30% AMI), and the federal or state subsidy available at time of construction, all affect estimates of the County share of costs.

10. Ranges of revenue or expenditures that are uncertain or difficult to project.

Not Applicable

11. If a bill is likely to have no fiscal impact, why that is the case.

Not Applicable

12. Other fiscal impacts or comments.

Not Applicable

13. The following contributed to and concurred with this analysis:

Richard Y. Nelson, Director, DHCA

Tim Goetzinger, Budget and Finance Manager, DHCA

Jay Green, Division of Housing, DHCA

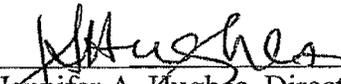
Angela Dizelos, Central Services Division, DGS

Greg Ossont, Deputy Director Planning and Development, DGS

Al Roshdich, Parking Management Division, DOT

Rick Siebert, Parking Management Division, DOT

Jennifer Bryant, Office of Management Budget



Jennifer A. Hughes, Director
Office of Management and Budget

1/15/13
Date

Economic Impact Statement

Council Bill 37-12, Housing – Capital Improvements Program – Affordable Housing Assessment

Background:

Council Bill 37-12 requires the Office of Management and Budget to submit an affordable housing assessment for projects administered by the Department of General Services or the Parking Management Division of the Department of Transportation. The purpose of the bill is to advise the County Council about which projects should include affordable housing.

1. The sources of information, assumptions, and methodologies used.

See #3 below.

2. A description of any variable that could affect economic impact statements.

See #3 below.

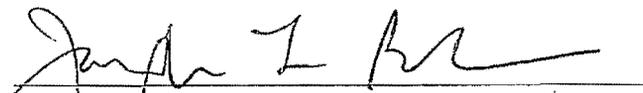
3. The bill's positive or negative effect, if any on employment, spending, saving, investment, incomes, and property value in the County.

Not applicable. The subject legislation does not have an economic impact because it only requires that the Executive branch advise the Council on the suitability of including affordable housing in certain County projects.

4. If a bill is likely to have no economic impact, why is that the case?

See #3 above.

5. The following contributed to and concurred with this analysis: David Platt and Mike Coveyou, Finance.



Joseph F. Beach, Director
Department of Finance

12/12/12
Date



OFFICE OF THE COUNTY ATTORNEY

Isiah Leggett
County Executive

Marc P. Hansen
County Attorney

MEMORANDUM

January 2, 2013

TO: Mary Beck
Office of Management and Budget

VIA: Marc P. Hansen *MPH*
County Attorney

FROM: Clifford L. Royalty *CLR*
Chief, Division of Zoning, Land Use, & Economic Development

RE: Bill 37-12, Housing - Capital Improvements Program - Affordable Housing Assessment

The County Executive's office has requested our comments on Bill 37-12. As is discussed more fully below, we have a substantive legal concern about the Bill.

Background

Bill 37-12 proposes to amend Chapter 25B ("Housing Policy") with a new § 25B-7. The new section would, *inter alia*, require the Office of Management and Budget to "transmit with the CIP" an "analysis" of the affordable housing impacts of any "applicable capital project." An "applicable capital project" means "any building project administered by the Department of General Services or the Parking Management Division of the Department of Transportation." The Bill would authorize the Council, "by resolution," to "exempt from" the new section "a category of capital projects which by their nature do not require an affordable housing analysis."

Discussion

Article XI-A of the Maryland Constitution "authorizes counties to adopt home rule charters which . . . function as 'constitutions' for the counties adopting them." *Montgomery County, Maryland v. Anchor Inn Seafood Restaurant*, 374 Md. 327, 331 (2003). As described by the Court of Appeals, a charter "is the organic, the fundamental law, establishing basic principles governing relationships between the government and the people, and among the various governmental branches and bodies." *Cheeks v. Cedlair*, 287 Md. 595, 607 (1980). The Charter is the local equivalent of a constitution.

Pursuant to Article XI-A, the County, in 1968, adopted a charter that divides the County government into legislative and executive branches and delineates the authority of each. See *Charter of Montgomery County, Maryland, §§ 101 and 201*. Section 101 vests legislative power in the County Council and § 201 vests executive power in the County Executive. Legislative enactments are subject to § 208 of the Charter which states that any legislative enactment of the Council must be "delivered" to the County Executive "who . . . shall approve or disapprove it."

A legislative enactment makes law or prescribes policy. See *Scull v. Montgomery Citizens League*, 249 Md. 271, 282 (1968); *McQuillin, Municipal Corporations*, § 10:6. A resolution, by contrast, "denotes something less solemn or formal . . . [and] generally speaking, is simply an expression of opinion or mind concerning some particular item of business coming within the legislative body's official cognizance . . ." *Inlet Associates v. Assateague House Condominium Association*, 313 Md. 413, 428 (1988).

The Bill permits the Council, by resolution, to exempt certain undefined projects from the Bill's requirements. Determining the scope of a law is a legislative act. Under the Charter, a legislative act must be effected through the enactment of legislation under § 208 of the Charter. The Bill circumvents that process by allowing the Council to, in effect, amend the law by resolution. The Bill thus violates § 208 of the Charter.

This legal infirmity may, however, be remedied by amending the bill to authorize the Executive to adopt a Method (1) or (2) regulation to exempt from the scope of the bill defined classes of projects that would have a *de minimis* impact on affordable housing.

Please contact us if you would like to discuss our opinion.

Cc: Kathleen Boucher, Assistant Chief Administrative Officer
Michael Faden, Senior Legislative Attorney

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TESTIMONY OF RICHARD Y. NELSON, JR.
DIRECTOR, DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS
MONTGOMERY COUNTY COUNCIL PUBLIC HEARING
BILL 37-12, HOUSING –
CAPITAL IMPROVEMENTS PROGRAM – AFFORDABLE HOUSING ASSESSMENT

Good afternoon. My name is Rick Nelson. I am the Director of the Montgomery County Department of Housing and Community Affairs (DHCA). I am testifying on behalf of County Executive Isiah Leggett.

Affordable Housing has been a priority of the County Executive during his entire tenure as County Executive. He is supportive of this bill and its intent to ensure an analysis is performed regarding the appropriateness and feasibility of including affordable housing with projects submitted to the Council.

The increasing unavailability of buildable land for housing makes it imperative that we explore all avenues for expanding the supply of affordable housing. This process has begun. At the direction of the Executive, DHCA consults with other departments about the co-location of housing with other governmental facilities. For example, we are working with a developer for the development of affordable housing adjacent to the new Silver Spring Library. Affordable housing was part of the requirements for the redevelopment of parking lots 3, 16 and 31. We are currently exploring the development of affordable housing at the site of the new Fire Station (#23) to be located in White Flint. Similarly, plans are being developed for affordable housing to be co-located with the proposed parking facility at the Conference Center.

While supportive of the Bill and its intent, I should point out there are some costs, both staff time and money, involved in the preparation of the required analyses. In addition, a major issue, I am concerned about is funding and timing of funding for the financing gap and/or operating funding shortfalls due to reduced rental income from the affordable units. The inability to forward fund such shortfalls might make, what would otherwise be a feasible and appropriate project, financially impractical at the time of the CIP construction.

We will work with your staff to provide some suggested changes to the Bill's language aimed at improving clarity and conforming with the Charter.

In conclusion, I repeat the support of the County Executive of this Bill and all steps we can take to add affordable housing to the inventory of housing in the County. We stand ready to work with Councilmembers during your subsequent worksessions.

DHCA: 1/10/2013

MEMORANDUM

TO: Planning, Housing and Economic Development Committee

FROM: *M* Michael Faden, Senior Legislative Attorney

SUBJECT: **Worksession:** Bill 37-12, Housing – Capital Improvements Program – Affordable Housing Assessment

DHCA Director Nelson requested the attached amendments to this Bill.

Council staff concurs with the amendment on line 6, but is not sure what effect is intended by the amendments on lines 3 and 10. The amendment deleting lines 27-29 differs from the amendment to that provision that the County Attorney suggested, which is described in the main packet, and Council staff continues to recommend the County Attorney's amendment.

We expect Mr. Nelson to attend this worksession and explain the purposes of these amendments.

1 **Sec. 1. Section 25B-7 is amended as follows:**

*New construction or
New Renovation*

2 **25B-7. [Reserved] Affordable housing assessment.**

3 (a) For each applicable ~~capital~~ project in the Capital Improvements
 4 Program, the Office of Management and Budget must include in or
 5 transmit with the CIP an analysis of:

6 (1) the feasibility^{and appropriateness} of including a significant amount of affordable
 7 housing in the project;

8 (2) the effect of the project on the supply of affordable housing in the
 9 immediate area; and

10 (3) what capital or operating^{budget} modifications, if any, would promote
 11 and maximize affordable housing in the project and the
 12 immediate area.

13 (b) The affordable housing analysis submitted by OMB should discuss at
 14 least the following issues related to the capital project:

15 (1) compatibility of affordable housing with the underlying project;

16 (2) conformity of affordable housing to applicable zoning and land
 17 use plans;

18 (3) proximity to public transit, and availability of other transportation
 19 options; and

20 (4) proximity to other community services.

21 (c) As used in this section, applicable capital project means any building
 22 project administered by the Department of General Services or the
 23 Parking Management Division of the Department of Transportation.

24 (d) In performing its analysis, OMB should consult the Department of
 25 Housing and Community Affairs, the Planning Board, and any other
 26 County department or agency with expertise in affordable housing.

27 (e) ~~The Council may by resolution exempt from this Section a category of~~
28 ~~capital projects which by their nature do not require an affordable~~
29 ~~housing analysis.~~

30 *Approved:*

31

Roger Berliner, President, County Council

Date

32 *Approved:*

33

Isiah Leggett, County Executive

Date

34 *This is a correct copy of Council action.*

35

Linda M. Lauer, Clerk of the Council

Date