Agenda Item 10
June 14, 2011
Public Hearing

MEMORANDUM

June 10, 2011

TO: County Council

FROM: Robert H. Drummer, Senior Legislative Attorney

SUBJECT: **Public Hearing:** Expedited Bill 17-11, Personnel – Other Post Employment Benefits Trust – County – funded Agency

Expedited Bill 17-11, Personnel – Other Post Employment Benefits Trust – County – funded Agency, sponsored by Council President Ervin, Councilmembers Navarro, Floreen, Andrews, Riemer, Rice, Leventhal, Elrich, and Council Vice President Berliner was introduced on May 26, 2011. A Government Operations and Fiscal Policy Committee worksession is tentatively scheduled for June 27 at 9:30 a.m.

Bill 17-11 would amend the Retiree Health Benefits Trust (RHB) to provide a funding mechanism to pay for other post employment benefits (OPEB) for employees of Montgomery County Public Schools (MCPS) and Montgomery College (College). The Council President described the purpose of the Bill at ©16-17.

Background

The RHB was established by Bill 28-07, enacted on April 1, 2008, to secure funding for all or a portion of certain County benefit plans providing retiree health and life insurance benefits. The RHB resulted from the implementation of Government Accounting Standards Board (GASB) Statement 45, *Accounting and Financial Reporting by Employers for Post-employment Benefits Other than Pensions.* Prior to the issuance of Statement No. 45 by GASB (GASB 45), government financial statements reported the effect of these other retiree benefits when they were paid. Since these retiree benefits are consideration for employee services rendered, GASB 45 directs state and local governments to recognize the cost of these benefits when the related employee services are received instead of when they are paid. GASB 45 became effective for jurisdictions with more than $100 million in revenue in FY08.

GASB 45 does not require funding the accrued expense, but credit rating agencies expect state and local governments to do so. The Council adopted Resolution 16-87 on April 10, 2007, committing to fund the difference between the Other Post Employment Benefits (OPEB) pay-as-you-go contributions and the annual required contribution on an amortized even basis over a five-year period beginning in FY08. The Council appropriated $31.9 million in FY08 for the RHB. However, due to growing fiscal pressures in FY09, the Council changed the phase-in schedule to eight years. In FY10, the only tax supported OPEB appropriation was $12 million for MCPS. In FY11, there was no tax supported contribution for any agency. The RHB fund is managed by the Board of Investment Trustees (BIT) in the same manner as the Board manages investments for the County retirement plans. The BIT has broad authority to manage the investments of the RHB trust fund through the use of investment managers consistent with the Uniform Management of Public Employee Retirement Systems Act (UMPERSA). The funds placed into the trust fund are held for the exclusive benefit of the participants in the County retiree benefit plans.

Both MCPS and the College created their own separate OPEB Trusts, but funding is subject to Council appropriation. The Bill would expand the RHB to enable funding for retiree benefit plans operated by MCPS and the College. This consolidated approach to pre-funding retiree benefit plans to achieve economies in administration and investment of funds has been adopted in other jurisdictions, including Baltimore, Frederick, and Howard Counties. The Bill would permit the Council to appropriate OPEB funding to the RHB on behalf of MCPS and the College for the exclusive use of their retirees. The County Government Approved FY12 Operating Budget appropriated, in non-departmental accounts (NDA), $20 million for MCPS OPEB funds and $1 million for College OPEB funds. These funds would be placed into the consolidated RHB fund if the Bill is enacted.

The Bill would create a new Board of Trustees to manage the consolidated RHB consisting of the existing 13 member BIT and 1 representative nominated by MCPS and 1 nominated by the College. The 2 additional trustees would be appointed by the Executive subject to Council confirmation.

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Expedited Bill No. 17-11
Concerning: Personnel – Other Post Employment Benefits Trust – County-funded Agency
Revised: 5-23-11 Draft No. 8
Introduced: May 26, 2011
Expires: November 26, 2012
Enacted: ______
Executive: ______
Effective: ______
Sunset Date: None
Ch. ____, Laws of Mont. Co. ______

COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND

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

AN EXPEDITED ACT to:
(1) amend the Retiree Health Benefits Trust to provide a funding mechanism to pay for other post employment benefits for employees of certain County-funded agencies; and
(2) generally amend the law governing post employment benefits.

By amending
Montgomery County Code
Chapter 33, Personnel and Human Resources
Sections 33-158, 33-159, 33-160, 33-161, 33-162, 33-165, 33-166, and 33-168

By adding
Montgomery County Code
Chapter 33, Personnel and Human Resources
Section 33-169

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

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

Sec. 1. Sections 33-158, 33-159, 33-160, 33-161, 33-162, 33-165, 33-166, and 33-168 are amended and Section 33-169 is added as follows:

33-158. Definitions.

In this Article, the following words and phrases have the following meanings:

[(a)] *Board*: The Consolidated Retiree Health Benefits Trust Board [of Investment Trustees] established under [Article III] Section 33-160.

[(b)] *Contribution*: payment made to the Trust Fund by the County to pay benefits for County retiree benefit plans or a County-funded agency retiree benefit plan.

County: Montgomery County Government.

County-funded agency: Montgomery College and Montgomery County Public Schools.

[(c)] *Custodian*: The County Director of Finance.

[(d)] *Investment manager*: a person or entity who exercises discretion to manage all or part of the assets of an institutional investor.

[(e)] *Participating Agency*: an agency eligible to participate in County benefit plans under Section 20-37(b) which elects to participate in any County retiree benefit plan.

[(f)] *Retiree benefit plan*: any retiree medical plan, dental plan, vision plan, or life insurance plan maintained by the County and administered by the Chief Administrative Officer. Depending on the context, *retiree benefit plan* may also refer to a retiree medical plan, dental plan, vision plan, or life insurance plan established and maintained by a County-funded agency.

[(g)] *Trust Fund*: the Consolidated Retiree Health Benefits (RHB) Trust Fund established to pay all or part of the benefits provided under any retiree benefit plan, including a County-funded agency retiree benefit plan.

33-159. Establishment of Trust.

(a) *County Retiree Benefit Plans*. The Chief Administrative Officer must include the terms of any County retiree benefit plan, including eligibility and benefits, including those benefits collectively bargained, in a plan document. All benefits must meet any applicable Federal or State requirement. Subject to the County's obligations under collective bargaining agreements and the collective bargaining laws, to the extent applicable, the Chief Administrative Officer may amend a plan document at any time. Subject to the County's obligations under collective bargaining agreements and the collective bargaining laws, to the extent applicable, any retiree benefit plan may be terminated at any time for any reason. No retiree benefit is guaranteed, except as expressly provided by a contract entered into by the County.

(b) *Establishment of Trust*. An Other Post Employment Benefits Trust, known as the Consolidated Retiree Health Benefits (RHB) Trust, [effective July 1, 2007,] is established to fund all or a portion of benefits provided under the County retiree benefit plans or a County-funded agency retiree benefit plan. The Trust is intended solely as a funding mechanism to pay for County or County-funded agency retiree benefits provided under the terms of any applicable retiree benefit plan, and does not create any obligation by the County to provide any benefit listed in any County or County-funded agency retiree benefit plan. Any participant in a retiree benefit plan, any current or former County or a County-funded agency employee, or any current or former participating agency employee, has no right to any asset in the Trust fund. The Trust Fund may be, but is not required to be, the sole source of funding for any County or County-funded agency retiree benefit plan.

(c) *Type of Trust.* The County intends that the Trust Fund:

(1) be used to perform its essential government function of providing benefits, including health and life insurance benefits, to participants and eligible dependents; and

(2) qualify as a tax exempt trust under Internal Revenue Code Section 115.

(d) *Assets of Trust Fund.* All contributions and all earnings and other additions, less payments, constitute the assets of the Trust Fund.

(e) *County-funded agency Participation.* A County-funded agency may participate in the Trust Fund as a funding mechanism for its retiree benefit plans. A participant in any County-funded agency retiree benefit plan, or any current or former employee of a County-funded agency, has no right to the assets in the Trust Fund. The County is not responsible for establishing, maintaining, or providing any benefit for any County-funded agency retiree benefit plan.

[(e)] (f) *Exclusive Benefit.* The Trust Fund must be held for the exclusive benefit of participants in retiree benefit plans and eligible dependents, and used only to provide benefits and defray reasonable expenses of administering retiree benefit plans. Trust Fund assets must not revert to the County or a County-funded agency unless the County or the County-funded agency terminates all retiree benefit plans. Some funds may partially revert to the County if at least one benefit plan is terminated under Section 33-166.

33-160. Board of Trustees.

(a) *Establishment.* The Consolidated Retiree Health Trust Board of Trustees is established to manage the Trust. The Board has 15 members.

(b) *Membership.*

(1) Each member of the Board of Investment Trustees established under Section 33-59 is also a member of the Board.

(2) The County Executive must appoint, subject to County Council confirmation, 1 voting member nominated by the Montgomery County Board of Education, who must serve indefinitely while remaining the designee of the Montgomery County Board of Education.

(3) The County Executive must appoint, subject to County Council confirmation, 1 voting member nominated by the Board of Trustees of Montgomery College, who must serve indefinitely while remaining the designee of Montgomery College.

(c) *Vacancies.*

(1) A trustee who is absent from more than 25 percent of the scheduled meetings of the Board during any 12-month period has resigned from the Board. Scheduled meetings mean meetings held at least 7 days after notice of the meeting.

(2) A vacancy on the Board must be filled for the unexpired term in the same manner as the previous trustee was appointed.

(d) *Compensation.* The trustees must serve without compensation from any source for service rendered to the Board, except that an active employee trustee may receive administrative leave to serve on the Board. The Board must reimburse a trustee for any expense approved by the Board. A trustee must not receive reimbursement for expenses from any other source.

(e) *Written policies.* The Board must establish written policies to administer and invest the funds created by this Article and to transact the business of the Trust Fund.

(f) *Officers.* The Board must select a chair, vice chair, and secretary from the Board's members.

(1) The chair must preside at meetings of the Board and may take administrative action, including executing an instrument, on behalf of the Board. A person may rely in good faith on an act of the chair as legally valid.

(2) The vice chair must perform the duties and exercise the powers of the chair when the chair is absent from the County or disabled, or the Board determines is otherwise unable to perform the duties of the chair.

(3) The secretary must record the proceedings and actions of the Board and may certify a document or action of the Board. A person may rely in good faith on the secretary's certification as proof of the document or action.

(g) *Meetings and actions.*

(1) The Board must meet at least once during each calendar quarter. The chair, or 8 members of the Board, may call a meeting of the Board, in the manner and at times and places

provided under the policies of the Board. The Board is a public body under the State Open Meetings Act.

(2) A. Eight trustees constitute a quorum.

B. Each trustee has one vote.

C. Eight trustees must agree for the Board to act.

(3) The Board may act without a meeting. All of the trustees must concur in writing for the Board to approve any action the Board takes without a meeting.

(4) The Board may adopt procedures consistent with this Section.

(5) The Board may authorize a trustee to execute instruments on behalf of the Board. The authority must be in writing and specifically describe the instrument and how the trustee must execute the instrument.

(h) *Records*.

(1) The Board must keep investment accounts and records necessary to calculate the value of each retiree health benefit trust fund and evaluate the experience and performance of the Trust Fund.

(2) The Board may designate a person to maintain the records.

(3) Accounts and records are subject to State law on public records.

(i) *Removal of trustee.* With the Council's approval, the County Executive may remove a trustee for violating this Article or other good cause.

(j) *Legal adviser.* The County Attorney is the legal adviser to the Board.

(k) *Management*. [The Board of Investment Trustees established under Section 33-59 is responsible for managing the Trust Fund.] The Board must hold legal title to all assets of the Trust Fund, but may transfer some incidents of ownership to the Board's agents as provided in this Article. The powers and duties of the Board under this Article are not effective until the Board members have accepted the Trust Fund in writing. Within 10 days after the Council confirms a Board member, the member must certify in writing to the Chief Administrative Officer that the member accepts the Trust Fund and will administer its affairs with care, skill, prudence, and diligence.

33-161. Contributions and payments.

(a) *County Contributions*. The County may contribute to the Trust Fund those amounts that the Council appropriates. The County is not required to make any contribution to the Trust Fund unless a written contract with one or more beneficiaries so requires.

(b) *County-funded Agency Contributions.* The County may contribute to the Trust Fund, on behalf of a County-funded agency, those amounts that the County Council appropriates. A County-funded agency may also make contributions to the Trust Fund in its discretion. Notwithstanding the preceding sentence, the County must make any contribution necessary to pay a County-funded agency's pro rata cost of the expenses of the Trust Fund. Contributions to the Trust Fund made on behalf of a County-funded agency or by a County-funded agency must be attributed to the County-funded agency for actuarial valuation and financial reporting.

[(b)] (c) *Acceptance of Contributions*. The Board must accept all contributions deposited in the Trust Fund and held by the custodian as Trust Fund property. The Board is not responsible for calculating or collecting any contribution, but is only responsible for contributions deposited to the Trust Fund and amounts held in the Trust Fund. The

Board must separately account for any contribution made on behalf of a County-funded agency and earnings and expenses attributable to that contribution.

[(c)] (d) *Payments.*

(1) *Payments for County Retiree Benefit Plans.* Payments may be made from the Trust Fund attributable to the County in those amounts directed by the Chief Administrative Officer only to pay for all or part of the benefits provided by any County retiree benefit plan, administrative expenses relating to a retiree benefit plan, and expenses of the Trust Fund. The Board is not liable for any payment directed by the Chief Administrative Officer and is not required to confirm compliance with any retiree benefit plan.

(2) *Payments for a County-funded Agency Retiree Benefit Plan.* The Chief Administrative Officer may direct that payments be made from the Trust Fund attributable to a County-funded agency as authorized by a County Council appropriation resolution. Payments from the Trust Fund must be used to pay for all or part of the benefits provided by a County-funded agency retiree benefit plan and expenses of any County-funded agency retiree benefit plan. The Board is not liable for any payment made under the direction of the Chief Administrative Officer and has no responsibility to confirm compliance with any retiree benefit plan.

[(d)] (e) *Expenses.* The Board must be reimbursed for expenses solely incurred in the administration of the Trust Fund and must pay from the Trust Fund expenses reasonably incurred by the Chief

Administrative Officer to administer any County retiree benefit plan to the extent that those expenses have not been paid by the County. The Board may pay expenses incurred under Section 33-162(h)(11) without direction of the Chief Administrative Officer. The Chief Administrative Officer may direct the Board to pay expenses reasonably incurred by a County-funded agency to administer its retiree benefit plans.

33-162. Trust Fund management.

* * *

(i) Prohibited Transactions. The Board must not engage in any transaction between the Trust and the County or any entity controlled by the County, including a County-funded agency, or a participating agency in which the Board:

(1) lends any part of its income or corpus without receiving adequate security and a reasonable rate of interest;

(2) pays any compensation more than a reasonable allowance for salaries or other compensation or services actually rendered;

(3) makes any service available on a preferential basis;

(4) makes any substantial purchase of securities or other property for more than adequate consideration;

(5) sells any substantial part of its securities or other property for less than adequate consideration; or

(6) engages in any transaction which results in a substantial diversion of its income or corpus.

(j) To comply with Section 315 of the County Charter, a firm of certified public accountants, under contract with the Council, must complete an annual independent audit of the Trust Fund. The complete audit must be filed with the Council <u>and each County-funded agency</u>, and copies made available for public inspection.

33-165. Indemnification of Board Members.

* * *

(h) *County Attorney.*

(1) The County Attorney must determine whether a Board member is eligible for indemnification with respect to any matter and the reasonableness of any fee, expense, or settlement.

(2) Unless the County Attorney approves the settlement, a Board member cannot settle a claim against another Board member using:

(A) County funds;

(B) funds of a participating agency;

<u>(C) County-funded agency funds;</u>

[(C)] <u>(D)</u> funds provided by a self-insurance program of the County; or

[(D)] <u>(E)</u> funds provided under a policy the County has with an insurance company.

33-166. Amendment and Termination.

(a) *Termination.* Except on termination, no part of the Trust Fund may revert to the County or a participating agency or be used for any purpose other than the exclusive benefit of participants of a retiree benefit plan. If all County retiree benefit plans are terminated and all benefit claims and expenses are paid, any remaining assets in the Trust Fund relating to contributions made by the County and participating agencies must revert to the County and the participating agencies. The Trust Fund must terminate in its [entirely] <u>entirety</u> on the earlier of the termination of all County retiree benefit plans or the depletion of the Trust Fund. Funds may partially revert to the County or participating agencies if one or more retiree benefit plans is terminated. When a County or a County-funded agency retiree benefit plan is terminated, the assets in the Trust Fund attributable to that plan after expenses and benefits have been paid must revert to the County and the participating agencies as provided in the adoption agreement. If the County terminates all of its retiree benefit plans and a County-funded agency continues to maintain at least one retiree benefit plan, the assets attributable to each County-funded agency retiree benefit plan must be transferred to a trust which meets the requirements of Internal Revenue Code Section 115.

(b) *Amendments*. Any provision of this Article may be amended at any time. No amendment may:

(1) authorize any part of the Trust Fund to be used for any purpose other than the exclusive benefit of participants of retiree benefit plans and eligible dependents; or

(2) cause or allow any part of the Trust Fund to revert to or become the property of the County or a County-funded agency, except as provided in Sections 33-166(a), [or] 33-167, or 33-169.

* * *

33-168. Protection from Creditors.

Any asset held by the Trust Fund is not subject to any creditor of the County or a County-funded agency and is exempt from execution, attachment, prior assignment, or any other judicial relief or order for the benefit of any creditor or third person.

33-169. County-funded Agency Participation.

(a) *County Liability.* Except for any obligation to refund or transfer assets under subsection (b) or (c), no legal liability for benefits must accrue to the County by including a County-funded agency in the Trust Fund.

(b) *Termination of Participation by a County-funded Agency.* Any Trust Fund assets must not revert to a County-funded agency. Assets may partially revert to the County if a County-funded agency terminates at least one retiree benefit plan. Only funds attributable to the terminated retiree benefit plan, after benefits and expenses have been paid, may revert to the County.

(c) *Transfer of Trust Fund*: If the County decides to terminate a County-funded agency's participation in the Trust Fund, the County must notify the County-funded agency in writing. If the County-funded agency continues to maintain a retiree benefit plan, assets must be transferred to a trust which meets the requirements of Internal Revenue Code Section 115. Any transfer of assets from the Trust Fund resulting from the termination of participation in the Trust Fund must comply with the Internal Revenue Code.

Sec. 2. Transition.

The Consolidated Health Benefits Trust Fund mentioned in County Code §33-159, as amended by Section 1 of this Act, does not create a new trust. The Trust Fund is the same legal entity first created in County Code §33-159 and inserted by Chapter 3, Laws of Montgomery County 2008. Any reference to the Retiree Health Benefits Trust in any document produced before the effective date of this Act must be treated as referring to the Consolidated Retiree Health Benefit Trust referenced in County Code §33-159, as amended by Section 1 of this Act.

Sec. 3. Expedited Effective Date.

The Council declares that this legislation is necessary for the immediate protection of the public interest. This Act takes effect on July 1, 2011.

Approved:

Valerie Ervin, President, County Council Date

Approved:

Isiah Leggett, County Executive Date

This is a correct copy of Council action.

Linda M. Lauer, Clerk of the Council Date

LEGISLATIVE REQUEST REPORT

Expedited Bill 17-11
Personnel – OPEB Trust – County-funded Agency

DESCRIPTION:	Amend the Retiree Health Benefits Trust to provide a funding mechanism to pay for other post employment benefits for employees of the Montgomery County Public Schools and Montgomery College.
PROBLEM:	Small OPEB Trust funds created by each County-funded agency require a duplication of effort to manage. Each separate OPEB Trust is funded by Council appropriation.
GOALS AND OBJECTIVES:	To consolidate the separate OPEB Trusts created by the County, MCPS and the College to achieve economies in administration and management.
COORDINATION:	Finance, County Attorney, OMB, OHR
FISCAL IMPACT:	To be requested.
ECONOMIC IMPACT:	To be requested.
EVALUATION:	To be requested.
EXPERIENCE ELSEWHERE:	Baltimore, Frederick, and Howard Counties created similar consolidated OPEB Trusts.
SOURCE OF INFORMATION:	Robert H. Drummer, Senior Legislative Attorney
APPLICATION WITHIN MUNICIPALITIES:	Not applicable.
PENALTIES:	Not applicable.

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MONTGOMERY COUNTY COUNCIL
ROCKVILLE, MARYLAND

OFFICE OF THE COUNCIL PRESIDENT

MEMORANDUM

May 16, 2011

TO: County Council

FROM: Valerie Ervin, Council President

SUBJECT: Pre-funding Retiree Health Benefits

Starting in 2003, the Council has focused on the importance of pre-funding retiree health benefits, or OPEB (Other Post Employment Benefits). Actuarial advisers for the four County tax supported agencies have estimated the total liability associated with providing these benefits for current and future retirees at $3.6 billion. As both health care costs and the number of retirees continue to rise sharply, the agencies will not be able to cover the annual expense on a pay-as-you-go basis, as they have done to date.

To meet the Annual Required Contribution (ARC) needed to meet future obligations, pre-funding through a trust vehicle is essential. The agencies have all established retiree health benefits trusts, but the severe fiscal pressures of the past several years have sharply restricted funding for the trusts. For FY08 the Council set a five-year schedule for the agencies to phase in their pre-funding and budgeted $31.9 million for the first year. For FY09, in view of growing fiscal pressures, the Council extended the phase-in schedule to eight years. For FY10 the only tax supported OPEB appropriation was $12 million for MCPS. For FY11, an extremely difficult year, there was no tax supported contribution for any agency.[1]

For FY12 the Executive proposed to resume tax supported funding at a total level of $49.8 million: $26.1 million for County Government, $20.0 million for MCPS, $1.0 million for Montgomery College, and $2.7 million for M-NCPPC. This funding would represent a start toward returning to a clear phase-in schedule for all agencies.

[1] If the County had followed the five-year phase-in schedule that was approved four years ago, the total FY11 tax supported contribution for all four agencies would have been $149 million. Non-tax supported contributions from proprietary funds and participating outside agencies, however, have consistently been made. On May 9 the Council supported $12.1 million in FY12 funding for this purpose.

Based on the Council's recent discussions of this issue, I suggest two steps:

First, to provide a more coherent and consistent approach to pre-funding retiree health benefits starting in FY12, I will introduce legislation to enable MCPS and Montgomery College to participate in a consolidated County retiree health benefits trust.[2] Many jurisdictions, including Baltimore, Frederick, and Howard County, have adopted a consolidated approach to achieve economies in administration and investment of funds, including lower fees and access to investment managers with minimum asset requirements. Such an approach will also make the Council's annual OPEB funding decisions clearer and more transparent. This will benefit both the agencies and their retirees.

Second, I suggest that we place the proposed FY12 OPEB contributions for MCPS ($20.0 million) and the College ($1.0 million) in separate County Government Non-Departmental Accounts, one on behalf of each agency, for transfer to the consolidated trust after the bill has been enacted.

I believe that these steps will help all agencies meet their commitments to their retirees in a fiscally responsible way.

[2] The legislation would provide representation on the consolidated trust's governing board and would base each agency's share of trust assets on its contributions and on earnings on the contributions. The existing trusts of both agencies would continue to be a source of future funding of retiree health benefits. Since M-NCPCC is a bi-county agency, its participation would require collaboration with Prince George's County.