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 synopsizes 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.

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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.

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[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
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> 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

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[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

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[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

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[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 Act[15] 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

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[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.

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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."