CR102-2016 - Authorization to Sell Long Reach Village Center

joelhurewitzaug2010@gmail.com on behalf of Joel Hurewitz [joelhurewitz@gmail.com]
Sent: Sunday, July 24, 2016 2:39 PM
To: CouncilMail
Attachments: Howard County's Urban Ren~1.pdf (343 KB)

Dear Council Members,

As requested, please find this written reply as supplement to my oral testimony on July 18, 2016 regarding CR102-2016.

Generally, the resolution omits a recitation of the prior Long Reach urban renewal history, Council resolutions and community involvement. Thus, the "Reimagine Long Reach Village Center Draft Plan" clause is without context to its place in the urban renewal process.

Furthermore, by ignoring the urban renewal history, the resolution fails to address the powers already given to the County Executive in Sec. 13.1103 (s) to sell the property. Perhaps, the authorization under the general code provision to sell surplus property in Sec. 4.201 is unnecessary, except for the waiving of advertising and bidding.

Therefore, I believe that the resolution should include references to the prior urban renewal steps and any applicable code provisions in the urban renewal law.

In addition, as noted by others as well, the title of the bill refers only to the address at "8775 Cloudleap Court." Transparency to the public would be served by including "Long Reach Village Center" in the title. See http://howcome.md/support-hughes-plan-get-a-free-t-shirt/

Lastly, Step 9 in the flow chart inaccurately states that "approval" is required by the Planning Board. The urban renewal law states that the Planning Board should provide "its review and recommendations only."

My memorandum "Howard County's Urban Renewal Law is Constitutionally Defective" written in response to Gary Kuc's letter of December 8, 2015 is attached for your information regarding the error in the Code regarding the Planning Board and for your future discussion to request legislation from the General Assembly to reenact and clarify Howard County's Urban Renewal Law.

Sincerely,

Joel Hurewitz

HOWARD COUNTY'S URBAN RENEWAL LAW IS CONSTITUTIONALLY DEFECTIVE

ABSTRACT

The Howard County Urban Renewal Law as codified in the Howard County Code is constitutionally defective. It was initially adopted by the General Assembly pursuant to a special grant of power found in the Maryland Constitution. Local governments cannot amend urban renewal laws as enacted by the General Assembly—a principle expressed in an opinion of the Maryland Attorney General. The Constitution has an ambiguity and an unanswered question regarding what to do with the references to county commissioners when a county adopts a charter subsequent to the enactment of a public local law for urban renewal. Howard County has amended the urban renewal law several times, beginning after the adoption of the County Charter in 1968. On at least two instances, these amendments have been substantive in nature: transferring review of the urban renewal plan from the Planning Commission to the Office of Planning and Zoning and removing the interest rate cap on bonds. Anne Arundel County has had a similar history regarding its urban renewal authorization and adoption of a charter, however, the county subsequently received legislative relief and clarification by the General Assembly.

I. THE MARYLAND ATTORNEY GENERAL HAS RECOGNIZED THE UNIQUE STATUS OF THE URBAN RENEWAL PROVISION IN THE MARYLAND CONSTITUTION

The authority for any local government in Maryland to carry out urban renewal projects is found in Article III, Section 61 of the Maryland Constitution. The power provision begins "(a) The General Assembly may authorize and empower any county or any municipal corporation, by public local law: (1) To carry out urban renewal projects . . ." Similarly, the additional powers provision begins "b) The General Assembly may grant to any county or any municipal corporation, by public local law . . ."

The Maryland Attorney General considered these provisions in a 1995 Attorney General Opinion. Though, the question at issue there dealt with municipal corporations, because Section 61 applies equally to counties and municipalities, the analysis should be analogous.

To paraphrase the Attorney General

> Our opinion is as follows: Although all [home rule charter counties] in the State have home rule, an express provision of the Maryland Constitution reserves to the General Assembly alone the power to enact, amend, and repeal urban renewal laws for specific [counties]. In our opinion, therefore the laws in question are still valid as enacted by the General Assembly.

80 OAG 232 (1995). To further paraphrase the opinion:

> [Counties] previously authorized by the General Assembly by public local law to carry out urban renewal projects continue to have this authority. The authority under which these laws were enacted, the Urban Renewal Amendment, expressly provides that it prevails over [Article XI-A]. Therefore, a [county] may not in purported exercise [of] its home rule powers, amend or repeal through [code] amendment the urban renewal provisions enacted by the General Assembly.
>
> To the extent that [county charters or codes] have been amended in this respect, these [charters or codes] should be republished by the [county] to restore the urban renewal provisions enacted by the General Assembly.

80 OAG 232, 234. See also 47 OAG 40, 43 (1962) recognizing the limitations on the powers of home rule local governments when acting under Article III, Section 61.

II. THE CONSTITUTION HAS AN UNANSWERED AMBIGUITY REGARDING THE REFERENCES TO COMMISSIONERS IN A PUBLIC LOCAL LAW AUTHORIZING URBAN RENEWAL AFTER ADOPTION OF A COUNTY CHARTER

The Constitution has an ambiguity regarding how to handle the public local law authorizing urban renewal in a commissioner county subsequent to the adoption of a county charter. While a charter county has power to amend or repeal its public local laws, as discussed above urban renewal is the exception to the rule. In the absence of re-authorization of urban renewal by the General Assembly, neither available option is entirely proper. To do nothing leaves outdated, confusing, and perhaps irrelevant references to commissioners in the county code. On the other hand, amending the law to divvy up the executive, legislative, and administrative responsibilities to the county executive, council, staff and boards usurps the constitutional authority of the General Assembly as expressed in the Attorney General Opinion. Perhaps unaware of this conundrum and with more than a quarter century before the Attorney General Opinion clearly showed that the urban renewal law occupies a special place in the Maryland Constitution, the codifiers of the first Howard County Code chose the later option. Along with all other public local laws, they divided up the responsibilities of the Urban Renewal Law in a *cy presesque* fashion. Without conceding that this overall approach was lawful, this option will be accepted for the sake of further argument here. Yet, in the transition the codifiers erred in a substantive detail which is at issue today with regard to the Long Reach Village Center (LRVC) Urban Renewal.

III. THE CODIFIERS OF THE FIRST COUNTY CODE ERRED AFTER ADOPTION OF THE CHARTER IN 1968 REGARDING REVIEW AND RECOMMENDATION OF THE URBAN RENEWAL PLAN

In 1961, Howard County was granted urban renewal authority pursuant to Article III, Section 61 by the General Assembly with the passage of Chapter 877. In 1968, the County adopted its Charter and transitioned from a commissioner government to a council and executive government. Therefore, it was necessary to draft the County Code.

In the Preface to the 1970 Edition, the Editors of the Code described in detail the guidelines that they used in revising the Howard County Code (1972 Edition):

> The transitional provision of the Charter in Article XI, Section 1107 provide: "All references in the Constitution and the laws of this State to the County Commissioners shall, at such time as the elected members of the first Council and first Executive take office, be construed to refer to the Council and the Executive whenever such construction would be reasonable. The Council and Executive shall succeed to all powers vested heretofore in the County Commissioners by the Constitution and laws of this State." In those instances where the reference to County Commissioners would not reasonably refer to both the County Council and County Executive, your Editors have construed the meaning to be either the Council or the Executive as the context of the law would require. In making this determination, a distinction was made between legislative, executive or quasi-judicial functions.
>
> When the term "County Commissioners" in the former Code of Public Local Laws refers to duties which are executive in character, your Editors have inserted the word "County Executive." In those instances where the term refers to duties which are legislative or quasi-judicial in character, the term "County Council" has been inserted except in a few instances where the Charter would require that the "Board of Appeals" would be inserted for quasi-judicial functions.

As stated above, this general approach was acceptable for the regular public local laws. For the Urban Renewal Law, this approach while it may or may not be entirely constitutional for the most part it appears to have created a reasonable law; yet, this does not apply to the provision for approval of the project.

The Preface also states:

> In this the first Howard County Code, the Public Local Laws of Howard County, rules regulations, all resolutions of the former County Commissioners and the County Council, having the force and effect of law have been compiled and codified. ***Minimum efforts were made to change the existing law except where required by the transitional provisions of Charter, as stated above, or required by coherence and clarity.***

Howard County Code – Preface to 1970 Edition (emphasis added). As will explained below, regarding the approval provision of the Urban Renewal Project, the Editors in fact made a substantive change. The Preface also described the guidelines regarding boards and commissions that were abolished under the new charter:

> Many of the provisions of the 1965 Code of Public Local Laws of Howard County made reference to certain Offices, Boards and Commissions under the former County Commissioners government, which were specifically abolished by Article XI, Section 1112 of Charter. ***In such cases, your Editors have deleted the references to the abolished Office, Board or Commission and incorporated in the new text the appropriate Office, Department or Board, which under Charter exercises the powers and duties of the abolished Office, Board, or Commission, whenever such construction would be reasonable.***

Howard County Code – Preface to 1970 Edition (emphasis added).

Chapter 877 as enacted by the General Assembly and as set out in the Code of Public Local Laws of Howard County (1965 Edition) regarding public hearing and review of the project appears in relevant part as follows:

> **330. Public hearing; approval of project.**
>
> (a) Prior to final approval of an urban renewal project, the County Commissioners shall:
>
> (b) Submit the plans to the Howard County Planning Commission for its review and recommendation only.

The Planning Commission's recommendations shall be submitted within 60 days after receipt of the plans.

(c) Hold a public hearing on the proposed urban renewal project after 15 days' notice by publication in a newspaper having general circulation in the County, giving the time, place, and date of the hearing, and an opportunity for the public to review the plans.

(d) Make such change or modification as the Commissioners deem desirable in the urban renewal project.

(e) Approve the project by resolution. Upon approval by resolution of such urban renewal project, such plan shall be deemed to be in full force and effect.

Similarly, as the section appears in Chapter 877:

174F. Public Hearing—Approval of Project.

(a) Prior to final approval of an urban renewal project, the County Commissioners shall:

(b) Submit the plans to the Howard County Planning ~~Board~~ **COMMISSION** ***for its review and recommendation only. The Planning ~~Board's~~*** **COMMISSION'S** ***recommendations shall be submitted within 60 days after receipt of the plans.***

(c) Hold a public hearing on the proposed urban renewal project after 15 days' notice by publication in a newspaper having general circulation in the County, giving the time, place and date of the hearing, and an opportunity for the public to review the plans.

(d) Make such change or modification as the Commissioners deems desirable in the urban renewal project.

(e) Approve the project by resolution. Upon approval by resolu-

Note that both have the erroneous placement of "(a)" which applies to all subsequent subsections and was corrected as now laid out in the Howard County Code:

Sec. 13.1106. - Public hearing; approval of project.
Prior to final approval of an urban renewal project, the County Council shall:
(a) Submit the plans to the Office of Planning and Zoning, for its review and recommendations only. The Office of Planning and Zoning's recommendations shall be submitted within 60 days after receipt of the plans.

In amending then subsection (b) the Editors failed to follow their own guidelines to make "minimum effort to change the existing law" and to properly incorporate in "the new text the appropriate Office, Department or Board, which under Charter exercises the powers and duties of the abolished [Planning Commission]." The Charter provided in relevant part:

Section 1112. ABOLITION OF CERTAIN OFFICES, BOARDS AND COMMISSIONS. Subject to the conditions, if any, specified in this Section, the following offices, boards, and commissions are abolished:

* * * *

(d) THE HOWARD COUNTY PLANNING COMMISSION. Members of the Howard County Planning Commission in office at the time this Charter becomes effective, except the County Commissioner service ex officio, shall continue in office as members of the Planning Board established by Article IV, Section 407 of this Charter, for the remainder of their term and until their successors are appointed. Not later than May 1, 1969, the Executive and the Council shall take necessary action to appoint a fifth member to the Planning Board as provided for in Article IV, Section 407(a) of this Charter.

Therefore, it is quite clear that the Planning Board succeeded and assumed the responsibilities of the Planning Commission. The Editors should have transferred review of the the urban renewal project to the Planning Board and not to the Office of Planning and Zoning; the Planning Board is the appropriate new board in keeping with the Editors' transition guidelines. Moreover, such a transfer also would be in keeping with the apparent legislative intent by the General Assembly to give another body with other members of the County an opportunity for reflection, a separate public meeting of the Planning Board, and recommendation before the elected officials—then the Commissioners and now the Council—vote on the final plan.

In addition, the language as now part of the County Code is illogical and superfluous. It is generally self-evident that when Planning and Zoning sends matters to the Council it comes with their review and staff recommendations. See for example Howard County Code Sec. 16.801 which provides a non-exclusive list of Duties and Responsibilities of the Department of Planning and Zoning and the relationship with the Council: (c)(2) Subdivision rules and regulations; (c)(3) Zoning map; zoning regulations; (c)(4)(ii) Text amendments; and (c)(8) Sites for public facilities. Thus, the LRVC Urban Renewal Plan is also by its very nature a staff recommendation to the Council.

Finally, the provision as it appears in the Howard County Code is actually circular and illogical. In the case of the LRVC Urban Renewal Project, the Plan was developed by Planning and Zoning. The Urban Renewal Law as actually written would have Planning and Zoning send the Plan to the Council, only to have the Council send it back to Planning and Zoning to review its own plan for up to 60 days to then go back to the Council with a recommendation. Such a scenario does not fulfill the original legislative intent of the General Assembly and serves no real purpose and is in fact generally pointless. On the other hand, as stated review and recommendation by the Planning Board would give the opportunity for valuable input on the Plan to the Council.[1]

IV. HOWARD COUNTY UNCONSTITUTIONALLY AMENDED CHAPTER 877 TO DELETE THE SIX PERCENT CAP ON BONDS

Returning to the additional powers provision of Article III, Section 61 (b) which states:

> (b) The General Assembly may grant to any county or any municipal corporation, by public local law, any and all additional power and authority necessary or proper to carry into full force and effect any and all of the specific powers authorized by this section and to fully accomplish any and all of the purposes and objects contemplated by the provisions of this section, provided such additional power or authority is not inconsistent with the terms and provisions of this section or with any other provision or provisions of the Constitution of Maryland.

1 It should also be noted the Councilman Ball's Resolution 2-2015 which would have transferred rights to 201 parking spaces at the LRVC would also have been unlawful. It seemingly would have skipped the review enumerated in Section 330 by transferring rights to the parking area to the purchasers of the Safeway Site It was designated as Phase One of the Urban Renewal Plan. The corollary to this is if there can be Phase One, there could be Phase Two, Phase Three, etc. so that in the end there would be no "final" plan for the Council to actually approve.

Pursuant to this authority, the General Assembly gave Howard County the authority to sell bonds in order to carry out an urban renewal project. These provisions as they appear in the Code of Public Local Laws (1965 Edition) comprise "Section 331. Bonds; general obligation.," "Section 332. Bonds; revenue bonds," "Section 333. Revenue bonds; tax exempt; security.," "Section 334. Bonds; how issued.," "Bonds 335. Bonds; how sold.," "Section 336. Bonds; signature.," "Section 337., Bonds; validity.," and "Section 338. Bonds; investments." In fact, eight of the fourteen sections of the Urban Renewal Law relate to bonds.

Furthermore, the Constitution also permits the General Assembly to clarify and limit these powers in subsection (d): "The General Assembly may place such other and further restrictions or limitations on the exercise of any of the powers provided for in this section, as it may deem proper and expedient." One such restriction which the General Assembly chose to place upon Howard County and its authority to sell bonds was a six percent cap on the interest rate. "Section 334. Bonds; how issued." stated in part that any revenue or general obligation bonds issued "bear interest at such rate or rates, ***not exceeding six per centum per annum***." (emphasis added).

When initially enacted in 1961, a six percent interest rate cap probably did not give anyone a second thought. However, in 1980 with interest rates approaching 20% understandably a six percent cap was an impediment to urban renewal. However, rather than ask the General Assembly for legislative relief, the Howard County Council usurped the General Assembly's Constitutional authority and deleted the six percent limitation. The Council passed CB120-1980. In the prefatory provisions the Bill stated in part:

> WHEREAS, it is necessary to clarify the rate of interest at which these bonds may be sold; and
> WHEREAS, in order to avoid any confusion as to a legal limit on the interest rates for any Urban Renewal bonds, it is necessary to delete references to a maximum rate of interest.

Thus, the legislative intent was clear: remove the bond cap.

In addition, the first legislative basis for the bill stated:

> WHEREAS, the sale of Urban Renewal bonds before the end of 1980 is necessary to the public health, safety and welfare of the County.

The original bill before amendment was also declared to be an emergency measure to take effect at the date of enactment. These last two elements were apparently in an attempt to justify the County's authority under the health and welfare provision of the Express Powers Act for Charter Counties. The Express Powers Act has been enacted pursuant to Article XI-A, Section 2 of the Constitution for Charter Counties. Yet, as discussed above regarding the Attorney General Opinion, Article III, Section 61 (e) clearly states "Also, the power provided in this section for the General Assembly to enact public local laws authorizing any municipal corporation or any county to carry out urban renewal projects prevails over the restrictions contained in Article XIA 'Local Legislation.'" Thus, the attempt by Howard County to justify the Council Bill upon the Express Powers Act was ultra vires and unconstitutional.[2]

Having lifted the interest rate cap, the Council proceeded with establishing the Ellicott City Historic District Urban Renewal Area. CR101-1981. Like the amendment deleting the bond cap, the Council justified the urban renewal as being "necessary in the interest of the public health, safety, morals and welfare of the residents of the County." CR101-1981 page 1. In addition, the urban renewal project included an Assignment and Security Agreement between the County and the Equitable Trust Company for the sale of $750,000 in industrial development revenue bonds.

2 Resolution 2-2015 like CB120-1980 before it erroneously sought to justify its authority under the Express Powers Act by stating: "AND BE IT FURTHER RESOLVED, that the actions authorized by this Resolution are declared to be in the interest of the public health, safety and welfare of the residents of Howard County." The authority for any urban renewal is under Article III of the Maryland Constitution, not Article XI-A. In fact, CR22-2014 establishing the LRVC Urban Renewal Project also includes the standard reference to it being "necessary in the interest of the public health, safety and welfare."

Regarding the interest rate, the Security Agreement included the following excerpted provisions:

> or any amounts been paid with respect thereto, be automatically increased (i) to a fluctuating rate of interest per annum equal at all times to the commercial prime rate of interest in effect at The Equitable Trust Company, a Maryland banking corporation, plus two (2) percentage points above such commercial prime rate of interest as the same may be in effect from time to time with respect to any of such payments made prior to the Permanent Financing Date, and (ii) to seventeen per centum (17.00%) per annum with respect to all such payments made after the Permanent Financing Date. Any amount of interest past due by reason of such determination shall thereupon become immediately due and payable as provided in the Agreement.
>
> Until the Permanent Financing Date, the Bond shall bear interest on the unpaid principal amount thereof at a fluctuating rate of interest per annum which is at all times equal to 75% of the commercial prime rate of interest in effect from time to time at The Equitable Trust Company, a Maryland banking
>
> On and after the Permanent Financing Date, the Bond shall bear interest on the unpaid principal amount thereof at the rate of thirteen per centum (13.00%) per annum, except as hereinafter provided in Section 204 in the event
>
> Prior to the Permanent Financing Date, in the event any payment on the Bond is not paid within fifteen (15) days from the date on which the same is due and payable, such payment shall continue as an obligation of the Issuer with interest thereon at a fluctuating rate of interest per annum equal at all times to the commercial prime rate of interest in effect at The Equitable Trust Company, a Maryland banking corportion, plus two (2) percentage points above such commercial prime rate of interest as the same may be in effect from time to time. In addition, the Issuer shall pay a late charge in an amount equal to five percent (5.00%) of the amount of any payment of interest or principal as set forth above which is made more than fifteen (15) days after the date on which the same is due and payable.

This is not what was envisioned when the General Assembly limited the interest to six per centum: floating interest rates, 13% rates, 17% rates, and a late charge of 5%--on top of the inflated base rate. If the General

Assembly had intended to permit such high interest rates, they would not have limited Howard County to only 6 *per centum*. In spite of the poor economic conditions extant in 1981, Howard County should have sought an amendment to the Urban Renewal Law from the General Assembly, not unilaterally deleting the interest rate limitation.

V. ANNE ARUNDEL COUNTY RECEIVED LEGISLATIVE ACTION FROM THE GENERAL ASSEMBLY TO CLARIFY AND CORRECT THE URBAN RENEWAL LAW AFTER TRANSITION FROM A COMMISSION COUNTY TO A CHARTER COUNTY

Anne Arundel County had a similar history regarding the adoption of a Charter and the General Assembly's authorization for urban renewal to that of Howard County. Anne Arundel County was first granted urban renewal authority in 1963 with the adoption of Chapter 791, and then the County, like Howard, subsequently adopted its Charter in 1964. http://msa.maryland.gov/msa/mdmanual/36loc/an/html/an.html. Thus, like Howard County the references in the urban renewal law were to "Commissioners." Yet, apparently recognizing the constitutional ambiguities and concerns about the legality of the County's urban renewal projects, Anne Arundel County received legislative action from the General Assembly in 1975 which amended Chapter 791 with the passed of Chapter 803, "An Act concerning Anne Arundel County – Urban Renewal Law" which was "For the purpose of clarifying the codification of the Anne Arundel County Urban Renewal Law." Chapter 803 recognized that the Council and Executive succeeded to the powers of the Commissioners:

> 2 A. ANNE ARUNDEL COUNTY, MARYLAND, SUCCEEDED TO ALL POWERS HERETOFORE VESTED IN THE COUNTY COMMISSIONERS OF ANNE ARUNDEL COUNTY BY THIS SUBHEADING ON THE EFFECTIVE DATE OF THE ANNE ARUNDEL COUNTY CHARTER ADOPTED PURSUANT TO ARTICLE XI-A OF THE CONSTITUTION OF MARYLAND. ACCORDINGLY, WHENEVER THE TERMS "BOARD OF COUNTY COMMISSIONERS" OR "BOARD" OR "COUNTY" ARE USED OR REFERRED TO IN THIS SUBHEADING AS ENACTED BY CHAPTER 791 OF THE LAWS OF MARYLAND OF 1963, THEY SHALL BE DEEMED TO REFER TO ANNE ARUNDEL COUNTY, MARYLAND. LEGISLATIVE POWERS OF ANNE ARUNDEL COUNTY, MARYLAND CONFERRED BY THIS SUBHEADING SHALL BE VESTED IN AND EXERCISED BY THE COUNTY COUNCIL IN ACCORDANCE WITH THE ANNE ARUNDEL COUNTY CHARTER. NO REFERENCE IN THIS SUBHEADING TO THE ACCOMPLISHMENT OF ACTIONS BY ORDINANCE OR RESOLUTION IS INTENDED TO MODIFY ANY REQUIREMENTS OF THE ANNE ARUNDEL COUNTY CHARTER THAT ACTION BE TAKEN BY ORDINANCE. EXECUTIVE OR ADMINISTRATIVE POWERS OF ANNE ARUNDEL COUNTY, MARYLAND CONFERRED BY THIS SUBHEADING SHALL BE VESTED IN AND EXERCISED BY THE COUNTY EXECUTIVE.

Chapter 803, Section 1. In addition, the law provided "That the provisions of this Act shall control over erroneous references contained in The Code of Anne Arundel County, Maryland and appropriate changes to reflect the provisions of this Act shall be made in The Code of Anne Arundel County, Maryland as presently codified." Chapter 803, Section 2. Finally, the Act ratified the constitutionality and legality of the urban renewal activities taken by the County Executive and County Council and defined Urban Renewal Area One and Urban Renewal Area Two. Chapter 803, Section 1.

CONCLUSION

Howard County's Urban Renewal Law legally remains as it was enacted by the General Assembly in 1961. The County's past amendments to the provisions for review of projects and the tax cap were without authority and unconstitutional. Nevertheless, to ratify Howard County's urban renewal activities and the changes to the Urban Renewal Law, a request should be made to the General Assembly to reenact Howard County's urban renewal authority similar to that done for Anne Arundel County. In addition, to make clear its status under the Constitution, the public local law should contain a provision stating that it was enacted pursuant to "Article III, Section 61 of the Maryland Constitution and may not be amended or repealed by the Howard County Council."

Joel Hurewitz
Columbia, MD
January 2016
Updated July 2016