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MEMORANDUM

PERSONAL AND CONFIDENTIAL/SUBJECT TO ATTORNEY-CLIENT PRIVILEGE

TO: Bowie City Council
FROM: Elissa D. Levan *edl*
CC: David J. Deutsch, City Manager
Robert H. Levan, City Attorney
DATE: July 9, 2010
SUBJECT: Supermajority requirement for issuance of TIF bonds

At the Council meeting on July 7, 2010, a question was raised as to whether the City Council could include in its Tax Increment Financing ("TIF") policy a requirement for a supermajority vote of Council for the issuance of TIF bonds.

In *Mossburg v. Montgomery County, Maryland*, 329 Md. 494, 620 A.2d 886 (1993), the Court of Appeals considered whether Montgomery County had validly adopted an ordinance requiring a supermajority of its Board of Appeals to grant a special exception. The Court held that the County was not authorized to impose such a requirement, saying:

Provisions such as these [citing various zoning enabling statutes] indicate that where the General Assembly has intended to authorize a supermajority requirement, it has done so expressly. This Court has regularly held that where the Legislature in a statute expressly authorizes a particular action under certain circumstances, the statute ordinarily should be construed as not allowing the action under other circumstances. *See, e.g., Office & Prof. Employees Int'l v. MTA*, 295 Md. 88, 96, 453 A.2d 1191, 1195 (1982); *Montgomery v. State*, 292 Md. 155, 162-163, 438 A.2d 490, 493 (1981); *In re Appeal No. 653*, 277 Md. 212, 218, 352 A.2d 845, 849 (1976).

We have found no cases that discuss the imposition of a supermajority requirement by the governing body of a local government upon itself, nor have we found any cases that discuss the imposition by such a governing body upon its agencies, outside of the context, as discussed above, of a zoning ordinance.

Consequently, although we cannot say with certainty that the language of *Mossburg* prohibits this sort of supermajority requirement under discussion by the Council, it is the only guidance we have found in the case law relating to the subject. The implication of the holding in *Mossburg* is that such a requirement would be impermissible. The conclusion is not entirely clear, however, because there is some language in *Mossburg* that indicates its holding was predicated, at least in part, on the premise that the Board of Appeals in granting a special exception performs a quasi-judicial function, which is not the case with respect to the supermajority requirement under discussion here. The Court said,

In light of the inherent difficulty of reconciling a supermajority requirement with an adjudicatory administrative proceeding and judicial review, authorization for a supermajority requirement in such a proceeding should be clearly set forth by the General Assembly. It should not be implied from a general authorization to adopt rules and regulations

Nevertheless, the statement by the Court that “where the Legislature in a statute expressly authorizes a particular action under certain circumstances, the statute ordinarily should be construed as not allowing the action under other circumstances,” seems broadly applicable to circumstances that would include the creation of TIF Districts. In the adoption of the Tax Increment Financing Act, the Legislature specified that TIF bonds require the adoption of an ordinance and did not authorize the creation of TIF Districts by supermajority vote. Given that such a requirement would be in derogation of the general authority of the City Council to act by simple majority, we suspect that such a provision would not withstand a challenge.

We note further that the City Charter provides in Section 9 that “[a] majority of the members of the Council shall constitute a quorum for the transaction of business, but no ordinance shall be approved without the favorable recorded votes of a majority of the of members elected to the entire Council.” Consequently, we believe that the supermajority requirement under discussion would have required a Charter amendment to create an exception for the adoption of ordinances required for the issuance of bonds; however, that issue is moot if, as we conclude, you cannot adopt the supermajority requirement in any event.

