ANNUAL REPORT

AND

OFFICIAL OPINIONS

OF THE

ATTORNEY GENERAL

OF

MARYLAND

1982

STEPHEN H. SACHS
ATTORNEY GENERAL

CONTENTS

ATTORNEYS GENERAL OF MARYLAND

This office was permanently separated from that of Secretary in 1657. Under royal government (1690–1715) there were two Attorneys General, one for the Proprietary and one for the King. The office was continued under the Constitution of 1776. Other places held by any Attorney General during his incumbency are indicated in each case.

Lt. Richard Smith, Sr., of Calvert County (Prot.), appointed by the Provincial Court, 28 Sept. 1657.

Capt. Thomas Manning of Calvert County (Prot.), com. by the Lt. Gen., 20 Feb. 1660/1.

Col. William Calvert of St. Mary's City (Cath.), sworn 12 June 1666.

Col. Vincent Lowe of Talbot County (Cath.), sworn 13 Dec. 1670. Resigned after appointed Sheriff of Talbot County.

Kenelm Cheseldyne of St. Mary's City (Prot.), sworn 6 April 1676.

Thomas Burford of Charles County (Prot.), appointed by His Lordship and sworn 4 Oct. 1681; died in office in March, 1686/7.

Robert Carvile of St. Mary's City (Cath.), com. by Chancellor Henry Darnall, pursuant to Lord Baltimore's instructions, 3 April 1688. Superseded by Carroll.

Charles Carroll of St. Mary's City and Anne Arundel County (Cath.), formerly of the Inner Temple, London; com. by the Proprietary, to hold office during good behavior, 18 July 1688; arrived in Maryland 1 Oct. and was confirmed in office by the Deputy Governors, 13 Oct. 1688. After 1 Aug. 1689 he continued as Lord Baltimore's Attorney General until the restoration of Proprietary government. On the death 17 June 1711, of Col. Henry Darnall I, his father-in-law, he succeeded to the offices of Agent and Receiver General and Keeper of His Lordship's Great Seal.

Col. George Plater I of St. Mary's County (Prot.), appears as acting Attorney General, for the crown, as early as 23 April 1691; superseded by Wynne.

Edward Wynne of St. Mary's County (Prot.), sworn crown Attorney General, 5 April 1692; died in office shortly before 8 Sept. 1692.

Col. George Plater I, sworn 8 Sept. 1692; resigned to be Naval Officer of Patuxent shortly before 21 Oct. 1698. He was Receiver of Patuxent and, until Nov. 1696, Collector of the Same. He married, about 1694, Anne, dau. of Thomas Burford above.

Maj. William Dent of Charles County (Prot.), com. by Gov. Nicholson, 22 Oct. 1698, resigned 8 May 1702. He was again commissioned by Gov. Seymour, 16 May 1704, and continued to serve until his death in Nov. 1704. He was also Naval Officer of North Potomac, and in May, 1704, he became joint Commissionary General.

Col. William Bladen of Annapolis (Prot.), wife (Cath.), com. by Gov. Seymour as Her Majesty's Attorney General, succeeding Dent, 4 Dec. 1704; sworn His Lordship's Attorney General, succeeding Carroll, 1 May 1716; died in office 1 Aug. 1718. He was Naval Officer of Annapolis, and in Aug., 1708, he became sole Commissary General.

Thomas Bordley of Annapolis (Prot.), sworn 6 Sept. 1718; dismissed in September, 1721. He was sole Commissary General. He died 11 Oct. 1726.

Daniel Dulany, Sr., of Annapolis (Prot. protege and former clerk of George Plater above), succeeded Bordley, 10 Oct. 1721. Until July, 1724, he was joint Commissary General. He resigned in 1725.

Michael Howard of Talbot County (Prot.), sworn 19 Oct. 1725. He was appointed Surveyor General of the Eastern Shore in June, 1726, and Naval Officer of Oxford about 1727. He resigned in 1734.

Daniel Dulany, Sr., succeeded Howard in Oct 1734, and was also sole Commissary General; resigned in 1744.

Henry Darnall III of Prince George's County (Prot. convert, wife and children Cath.), com. and sworn 19 April 1744; appointed Naval Officer of Patuxent, 24 May 1755; persuaded to resign early in 1756.

Stephen Bordley of Annapolis (Prot. son of Thomas Bordley above), com. 26 March and sworn 26 May 1756; suffered a paralytic stroke and resigned in Dec. 1763; died 6 Dec. 1764. He was Naval Officer of Annapolis until March, 1762, when he became sole Commissary General.

Edmund Key of Annapolis (Prot., mother Cath.), com. 26 Dec. 1763 and sworn 10 April 1764; resigned shortly before his death on 4 May 1766.

Robert Goldsborough II of Dorchester County (Prot.), sworn 8 April and com. 4 June 1766. Resigned in 1768; died 30 April 1777.

Thomas Jennings of Annapolis (Prot.), sworn 18 Oct. and com. 27 Oct. 1768; recom. 29 April 1773. He was appointed State Attorney General in April 1777, but was succeeded, on 6 Jan. 1778, by Benjamin Galloway. He was a relative of former Deputy Secretary Edmund Jennings.

(Reprinted from "His Lordship's Patronage", pages 132–34, by permission of the author, Professor Donnell M. Owings, Department of History, University of Oklahoma.)

Luther Martin	1778
William Pinkney	1805
John Thomas Mason	1806
John Johnson	1806
John Montgomery	1811
Luther Martin	1818
[1]Nathanial Williams, Assistant Attorney General	1820
Thomas B. Dorsey	1822
Thomas Kell	1824
Roger B. Taney	1827
Josiah Bayley	1831
George R. Richardson	1845
Robert J. Brent	1851
[2]Alexander Randall	1864
Issac D. Jones	1867
Andrew K. Syester	1871
Charles J. M. Gwynn	1875
Charles B. Roberts	1883
William Pickney Whyte	1887
John P. Poe	1891
Harry M. Clabaugh	1896
George R. Gaither, Jr.	1899
Isidor Rayner	1900
William S. Bryan, Jr.	1904
Isaac Lobe Straus	1908
Edgar Allan Poe	1912
Albert C. Ritchie	1916
[3]Ogle Marbury	1918
Alexander Armstrong	1920
Thomas H. Robinson	1924
William Preston Lane, Jr.	1930
Herbert R. O'Conor	1934
William C. Walsh	1938
William Curran	1945
[4]Hall Hammond	1946
[5]J. Edgar Harvey	1952
[6]Edward D. E. Rollins	1952
[7]C. Ferdinand Sybert	1954
[8,9,10]Thomas B. Finan	1961
[11]Robert C. Murphy	1966
[12]Francis B. Burch	1966
Stephen H. Sachs	1979

[1] During the physical incapacity of Luther Martin, 1820–1822, the Governor appointed Nathanial Williams, Assistant Attorney General, to act as Attorney General.

[2] The office of Attorney General was abolished by the Constitution of 1851, but was re-established by the Constitution of 1864 (Art. V. Sec. 1).

[3] During Mr. Ritchie's absence, June 1918–January 1919, while serving as General Counsel of the United States War Industries Board, Ogle Marbury became Acting Attorney General.

[4] [5] On September 30, 1952, Mr. Hammond resigned as Attorney General to accept an appointment to the Court of Appeals of Maryland. Mr. Harvey was designated by Governor McKeldin to be Acting Attorney General until the new Attorney General qualified.

[6] Mr. Edward D. E. Rollins qualified as Attorney General on the 14th of November, 1952.

[7] Resigned January 12, 1961, to accept an appointment to the Court of Appeals of Maryland.

[8] Appointed January 13, 1961, to serve unexpired term of former Attorney General.

[9] Elected at election of November, 1962.

[10] On October 13, 1966, Mr. Finan resigned as Attorney General to accept an appointment as an Associate Judge of the Court of Appeals of Maryland.

[11] October 13, 1966, Mr. Robert C. Murphy was sworn in as Attorney General to serve for Mr. Finan's unexpired term.

[12] Mr. Francis B. Burch was elected Attorney General in the November, 1966 election and was sworn in on December 16, 1966.

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**Deceased

ANNUAL REPORT FOR 1982

December 31, 1982

The Honorable Harry Hughes
Governor of Maryland
State House
Annapolis, Maryland 21401

DEAR GOVERNOR HUGHES:

In accordance with Section 10 of Article 32A of the Maryland Code, I am submitting this report of the business of the Department of Law for the calendar year 1982. A detailed financial statement of the Department as well as caseload statistics and the official Opinions of the Attorney General follow this report.

Introduction

Four years ago, when I was first elected Attorney General, I promised that the Office would become an effective law enforcement agency; that it would see to it that the State itself, as well as its citizens, obeyed the law, and that it would be a place of uncompromising excellence.

During the past year, it has become increasingly clear that we are achieving those goals and that the Attorney General's Office has become not only a strong, constructive force in State government, but a positive, pro-competitive force in Maryland's marketplace.

In 1982, for example, our Antitrust Division continued its pioneering efforts to bring the benefits of free and open competition to the medical profession, persuading hospitals in Baltimore and Harford Counties to discontinue their anti-competitive methods of awarding physician privileges. The Division also took the lead this past year in pursuing its suit on behalf of more than 60,000 Toyota purchasers, whom we allege were injured by a massive price-fixing scheme by Toyota dealers in five states and the District of Columbia. Clearly, it is not only consumers who stand to benefit from this action, but also the many thousands of other car dealers who are try-ing to make an honest profit without engaging in such unlawful schemes.

Lawyers with the Department of Licensing and Regulation, with the active cooperation of the Real Estate Commission, acted swiftly and decisively to devise an unprecedented plan which will save nearly four million dollars invested by some 1500 consumers in an Ocean City time-sharing venture. Their effective lawyering benefitted not only those consumer investors, but also all Maryland real estate brokers, who would otherwise have been called upon to reimburse the Real Estate Guaranty Fund for the amount of these claims.

Our Consumer Protection Division, which this year obtained more than $650,000 in refunds, court orders, fines and settlements for consumers, has also greatly expanded the use of arbitration, an important tool that lies between mediation and legal action. Businesses as well as consumers have been quick to realize and take advantage of the prompt, free, and flexible resolution of disputes this program offers. Last year the arbitration unit resolved some 219 disputes, compared to 209 the previous year, and the number of businesses pre-committed to submit all claims lodged against them to binding arbitration jumped from 53 to 115.

By a constant effort to rout out those who attempt to misappropriate funds from State programs, evade State taxes, or lower their costs by defiling the environment, the criminal enforcement arms of the Attorney General's Office are also doing their part to assure the free and honest operation of Maryland's marketplace, as well as its government.

In addition to recouping nearly one-half million dollars in misappropriated State funds during 1982, our newly combined Criminal Investigations and Medicaid Fraud Division has, for the first time in Maryland history, entered the previously neglected field of State tax violations and put tax evaders on notice that cheating on Maryland taxes does not pay.

In its second year of operation, our Hazardous Waste Strike Force has shown that those who willfully dispoil the State's land and waters will be dealt with swiftly and decisively. The Strike Force this year secured the first prison sentence ever levied under Maryland's Hazardous Waste Law, and the first conviction of a licensed hazardous waste disposal firm.

Antitrust Division

Preparation of the price fixing suit brought on behalf of more than 60,000 Toyota purchasers in the five-state mid-atlantic region continued in 1982 under the direction of the Antitrust Division. As lead counsel, the Division is coordinating the efforts of five plaintiff States and the District of Colombia, in the numerous pre-trial proceedings and massive discovery effort required to prepare for the trial set to begin in October, 1983. More than 500,000 documents have been reviewed and scores of witnesses interviewed or deposed.

Settlement of the Justice Department's antitrust suit against AT&T was undoubtedly the single biggest national antitrust development in 1982. Maryland played an important role in raising issues and organizing the States behind unified positions. The Division prepared and submitted a comment identifying the troublesome areas of the proposed consent decree on behalf of the coalition of 26 States and the National Association of Utility Consumer Advocates. The Division was named co-lead counsel to address issues concerning the impact of state law on the settlement. The Federal District Court subsequently adopted many of the States' suggestions in its opinion commenting on the settlement.

In addition, Maryland questioned the authority of the court to enter the settlement without the consent of the States. Maryland appealed the entry of the consent decree, raising this issue of authority, and petitioned the United States Supreme Court to review the issue on behalf of 14 States.

Anti-competitive practices in the health care industry are coming under increased scrutiny, and the Division is in the vanguard of the movement to bring the benefits of free and open competition to the medical professions. In 1982 the Division took action to rectify anti-competitive effects arising from the manner in which doctors obtained the right to practice at Greater Baltimore Medical Center. The matter was resolved when the hospital's Board of Directors amended their bylaws in accordance with the recommendations of the Division. This case follwed closely on the heels of a similar case in which the Division accepted an Assurance of Discontinuance from Harford Memorial Hospital in Bel Air, Maryland.

Continuing its review of State occupational licensing and regulatory boards for antitrust liability, the Division issued a report on the Maryland State Board of Public Accountancy. The Board subsequently adopted all the changes recommended in the Division's report, the most import of which was the elimination of anti-competitive restrictions on advertising and promoting accounting services. Moreover, counsel to the National Association of State Boards of Public Accountancy suggested that the Association's model code be amended to incorporate several of the Division's recommended changes.

Maryland consumers and governmental agencies have a big stake in the Department of Energy oil refund cases. DOE is bringing enforcement actions against nearly 100 oil companies alleging violations of price and allocation controls between 1973 and 1981. Consumers who were overcharged as a result of the violations are entitled to refunds. The Division is filing refund claims in the proceedings on behalf of both Maryland consumers and governmental entities. The State has already recovered more than four million dollars in overcharges through DOE's prosecution efforts. Further substantial recoveries are anticipated.

In 1982, Maryland concluded its civil prosecution of sixteen demolition contractors in the so-called Buzz Berg case. The Division collected nearly $300,000 in civil penalties and damages on behalf of the State and Baltimore City from contractors convicted of rigging publicly-awarded demolition contracts.

Finally, the Division is assuming a new role as advisor to the State agencies and political subdivisions on matters of antitrust liability. In fact, for the first time, the Division is defending a governmental entity in an antitrust action. The case, *Glen H. Mumford, et al. v. Wicomico Soil Conversation District, et al.*, was brought against five Eastern Shore Soil Conservation Districts by a group of land improvement contractors alleging monopolization and restraint of trade by the Soil Conservation Districts. Trial is set to begin in September, 1983.

Consumer Protection Division

During 1982 the Consumer Protection Division expanded the scope of its enforcement activities, applying the Consumer Protection Act to a nursing facility for the first time; successfully intervening in the personal bankruptcy proceedings of two businessmen who allegedly violated the State's consumer protection laws; launching a more sophisticated attack on consumer problems in auto repair—the area in which the most complaints are received—by adding a certified auto mechanic to the staff, and initiating its first action under the Mobile Home Parks Act, over which it obtained enforcement power in July.

Administrative and court actions were pursued in 26 cases, and an order for a record $227,646 in fines, restitution and costs was obtained in the suit against Hal K. Snyder, owner of Florist Communications, a defunct toll-free long distance telephone service which widely advertised services it could not provide. Among other significant cases the Division concluded in 1982 was the proceeding againt Century Home, a Baltimore nursing facility. It signed a consent decree providing for refunds totalling $15,417 to 167 current and former patients or their estates from which it allegedly had obtained money illegally by double-billing both them and the State's Medicaid program for the services of nursing aides. The Division also persuaded the Federal bankruptcy court to allow it to intervene in the personal bankruptcy cases of two Baltimore-area men who allegedly defrauded their mail-order tennis supply firm of over $144,100, which they were claiming as a debt they cannot pay. The Division argued in its petition that the men should not be excused from their debts to Maryland Tennis, Inc., a defunct mail-order sports equipment company, since they allegedly violated the Consumer Protection Act by advertising goods they could not supply and should be liable for pending claims under the law.

Automobiles remained the major source of consumer dissatisfaction in Maryland, again leading the list of complaint categories compiled by the Division. In 1982, transportation difficulties accounted for 30.10 percent of the formal written complaints received by the Division, compared to 26.02 percent of the complaints filed in 1981. Statistics show that 93 percent of the transportation complaints filed in 1982 dealt with automobiles, with repair problems, which account for the biggest source of consumer woes, being involved in almost 60 percent of all complaints against new and used car dealers and in 63 percent of all complaints against repair shops.

With the addition of an experienced, certified auto mechanic to its staff, the Division's investigative unit now is equipped to combat suspected wrongdoing by engaging in undercover investigations, a number of which have proven fruitful. The first such case resulted in a court-ordered settlement providing for the payment of $15,000 in fines, restitution and costs by Brake and Transmission Clinic, a Baltimore-area auto repair shop that allegedly performed unnecessary and unauthorized repairs on cars over a four-year period. In that case, the Division used an undercover car to document the shop's alleged illegal activities, receiving a bill for $130 in unnecessary repairs.

The severe recession appears to have been a factor in the growing number of consumer problems stemming from business failures in 1982. The Division initiated several legal proceedings as a result of questionable practices connected with "going-out-of-business" sales and intensified its monitoring of layaway sales, which are especially appealing in times of tight money. It negotiated 10 Assurances of Discontinuance from businesses whose layaway sales practices failed to comply with Maryland law and obtained agreements promising thousands of dollars in refunds to consumers.

The Division also significantly increased its consumer education activities in 1982. It released two extremely successful consumer protection booklets, *The Maryland Consumer Protection Guide* and *The Small Merchant's Guide to Consumer Protection*, as well as four new pamphlets dealing with contracts, warranties, door-to-door sales and landlord-tenant rights. It launched a 30-minute slide show for use by schools, community groups and consumer organizations around the State; addressed over 76 workshops and audiences; contributed to the completion of a teachers' manual for the Baltimore City Public Schools, and distributed nearly 30,000 pamphlets.

The Division obtained a total of $651,830 in refunds, court orders, fines and settlements for Marylanders in 1982. Of that amount, $393,277 in refunds or savings were obtained for consumers promptly by means of the office's arbitration, mediation and court actions. The remainder was awarded through court rulings or administrative proceedings, which may be subject to pending appeals, or will be returned to consumers through negotiated settlement payments extending over some time.

Finally, as part of our continuing effort to streamline the Attorney General's Office and increase its efficiency, the activities of the Consumer Protection Division and the Securities Division will be consolidated in 1983 under a newly appointed Director of Consumer and Investor Affairs, Steven J. Cole, a specialist in public interest law from Washington, D.C.

Securities

The Securities Division plays a unique role in the State Law Department, acting not only as an enforcer of the legislation over which it is given authority but also serving in the watchdog capacity typically associated with State regulatory agencies and licensing boards. It is charged with the administration and enforcement of the Maryland Securities Act, the Maryland Franchise Law, and the Business Opportunities Sales Act. Its enforcement efforts in 1982 paid off in each of the three areas it oversees.

For example, in the securities field, the Division issued a Cease and Desist Order against a Canton, Ohio-based oil company, its owner and its local agent, forbidding them from offering or selling any form of security in Maryland. The firm, which had not registered here, as required by law, was selling "fractional interests"—in some cases as little as 1/64—in oil wells to investors. In the franchising area, the Division obtained a Consent Order under which a Philadelphia company, Humphrey's Pest Control Franchise, Inc., offered refunds totaling $113,945 to two Marylanders who had purchased franchises from the firm that it was not registered to sell here. In the business opportunity field, Worldwide Energy Systems, Inc., an Atlanta-based company that was selling opportunities to market a potentially dangerous home or office energy-saving device, signed a Consent Order agreeing to refund $20,000 to a Maryland buyer. The device had not been approved by the Underwriters Laboratory and therefore could not be sold here.

In its regulatory role, the Division continued its work on a lengthy project with the Maryland State Bar Association to draft rules and procedures that will enable small businesses seeking to raise capital by selling stock to avoid the complex registration requirements that major firms must meet. Simplifying the compliance burden for the small entrepreneur will not diminish the enforcement powers the Division requires to deal with fraudulent investment schemes.

Last fiscal year, the Division processed over 2,000 separate registrations of securities offerings, gathering more than $1.2 million in licensing and registration fees for the State, an increase of some 51% over Fiscal Year 1981. Registration filing increased about 37%. It also obtained refund offers of approximately $1.3 million for Maryland purchasers of securities, franchises or business opportunities that were sold in violation of the registration requirements of the three statues the Division enforces.

The Maryland Attorney General's Office has been combating fraud in the securities market since 1919—well before the Federal government's first involvement in 1933. It has been keeping an eye on the sellers of franchises since 1978 and on the marketers of business opportunities since 1980. Many fine, honest business people are engaged in each of these fields, and they—as well as investors—benefit from the aggressive and effective law enforcement work of the Securities Division.

Criminal Investigations Division

The Criminal Investigations Division continued its efforts to investigate and prosecute instances of complex criminal activity across the State of Maryland. Criminal charges such as bribery, theft, tax evasion, misconduct in office and violations of Maryland's Securities Laws were filed against 15 individuals in five different jurisdictions in 1982. Including defendants charged in previous years but brought to trial in 1982, prosecutors of the Division convicted 14 individuals. As the new year began, charges were pending against eight individuals.

The persons convicted by the Division in 1982 included four Baltimore City plumbing inspectors who received bribes from a plumbing company; the administrator of a Baltimore County housing program who misappropriated over $187,000; four water and sewer construction contractors for tax evasion; a Harford County councilman for tax evasion; a person who obtained by fraud over $45,000 from the State Retirement System; a computer consultant who obtained by fraud $36,000 from the University of Maryland at Baltimore; an employee of the State's Bureau of Vital Records who received bribes to provide phony birth certificates, and a police lieutenant who misappropriated the proceeds of sales of confiscated firearms. In these cases, courts ordered defendants to pay restitution, fines, taxes, penalties and interest totalling over $400,000. In addition, despite the apparent reluctance of many State judges to sentence while-collar criminals to jail, eight of the 14 defendants convicted in 1982 were incarcerated.

The Division also continued to provide formal and informal assistance to local State's Attorneys who lacked the necessary resources or investigative expertise to deal with labyrinthine criminal schemes. The assistance provided ranged from informal advice to the active commitment of major prosecutorial, investigative and accounting resources to gubernatorially authorized joint efforts with State's Attorneys.

Medicaid Fraud Unit

During 1982, the Medicaid Fraud Unit's investigations covered a broad spectrum of health care providers, ranging from opticians to radiology technicians, but its primary focus was on more complex probes of medical institutions.

Perhaps the most significant aspect of the Unit's prosecutions in 1982 was the incarceration of three defendants. One nursing home owner was sentenced to two years in prison and ordered to pay $8,970 in restitution for including approximately $17,000 in personal expenses on nursing home reports submitted to Medicaid. Among the items for which the defendant sought Medicaid reimbursement were the maintenance of his swimming pool; the rental of an airplane; flying lessons, and veterinary care for his dog. In another case, a physician convicted of submitting bills to Medicaid for office visits that never occurred and laboratory services that were not performed was given a 5-year sentence, all but 60 days of which was suspended; fined $5,000; ordered to pay $5,305 in restitution; placed on four years' probation, and directed to perform 400 hours of community service. In a third case, a dentist was sentenced to 89 days in jail for contempt of court for failing to turn over subpoenaed patient records to a grand jury. He also was charged with failing to file Maryland State Income Tax returns for 1979, 1980 and 1981.

In all, 12 defendants were prosecuted in 1982, the fourth full year of the Unit's operation, and sentences imposed during the year included $45,114 in fines and $82,087 in restitution. Since its inception, the Unit has recovered $1,023,776 in fines, restitution and overpayments, and identified $47,049 in taxes due the State. Successfully prosecuted defendants have been ordered to perform a total of 11,092 hours of community work, providing a substantial savings to the State for professional services.

The Unit works closely with the Department of Health and Mental Hygiene and receives excellent support from it. Close liaison also is maintained with the law enforcement community throughout the State, and with the entire health care community. The number of violations uncovered is relatively small when compared to the performance of the 14,000 health care providers in Maryland.

Legislative Office

The staff of the legislative office completed an unusually heavy bill review in 1982, studying over 1,000 bills and sending more than 150 letters to the Governor pointing out and frequently resolving legal and constitutional questions raised by the proposed legislation.

Among the legislation approved were bills that:

- create a Maryland Legal Services Corporation to provide legal assistance for the poor (S.B. 894);
- form a Maryland Higher Education Supplemental Loan Authority to supply loans for students who lose federal support for education (H.B. 1617);
- revise the State's adoption and guardianship laws (S.B. 336, H.B. 978);
- suspend a teenager's driver's license for simple possession of alcoholic beverages (H.B. 85);
- enable State employees about to be laid off to move into lower level jobs for which they are qualified, "bumping" workers with less seniority (H.B. 503);
- raise the interest rate on most consumer loans to 24% (H.B. 1853).

Among the bills vetoed for constitutional and substantive defects were those that:

- authorized the General Assembly to modify court fees set by the State Court Administrator by resolution rather than law (S.B. 408);
- imposed tort liability on the owner of emergency vehicles even when the operator of the vehicle has exercised reasonable care (S.B. 240 and H.B. 155);
- reduced the fuel tax for gasohol produced in Maryland (S.B. 624)
- exempted from taxation property owned by the State or Federal government and leased to private businesses (S.B. 78);
- permitted fire departments and farmers to burn used oil without regard to Federal and State air pollution controls (H.B. 1277).

The three full-time attorneys in the legislative office responded to hundreds of inquiries from members, committees and task forces of the General Assembly, their staff and support agencies, and also advised legislative committees on the conduct of their proceedings, including open meetings, and requirements and procedures for election contests. The attorneys also wrote or assisted in writing twenty-five of the 57 published and unpublished Opinions of the Attorney General for 1982; served as counsel to the Judicial, Gubernatorial and Legislative Compensation Commissions, and were involved in a wide variety of litigation.

Each election year is bound to bring an abundance of litigation and 1982 was no exception. Foremost among these cases was the State's defense of the legislative reapportionment plan adopted by the General Assembly in February, 1982 and subsequently upheld by the Court of Appeals. The office was involved in several election-related lawsuits, including a residency challenge (*Bonvegna v. Santoni*); an attack on a same-name candidate (*McDonough v. McDonough*); filing deadline and independant candidate cases (*Schneider v. Morris; Rothenhoefer v. Morris*), and a suit to disqualify a convicted person as a candidate and a voter (*Board v. Spry*). Even more significant were two suits alleging unfair campaign practices, *Duffy v. Conaway* and *Moylan v. LaMotte*, which were the first in which a court found that a violation had occurred under Maryland's 75-year-old Fair Election Practices Law. The *Duffy* case also marked the first time that the House of Delegates has been called upon to adjudicate an election contest on the grounds that the fair campaign law had been broken. There was more election-year litigation in 1982 than in previous balloting years, exposing some troublesome areas of the law that are in need of revision. The General Assembly has created an election task force on which the Attorney General's Office serves, and we are making a determined effort to keep it fully informed of the election law problems we have uncovered.

The legislative office also was involved in litigation in 1982 that involved employment discrimination; constitutional challenges to legislation enacted in the 1982 session of the General Assembly concerning the drinking age and lien priorities; constitutional challenges to the charitable solicitation law; the University of Maryland's policy of charging certain foreign students out-of-state tuition; the Baltimore City Court consolidation constitutional amendments, and the Maryland bankruptcy law. There also were attacks on the policy of the General Assembly's Budget Conference Committee to meet in executive session, and on the right of Baltimore City to collect and retain court costs.

Educational Affairs Division

In 1982, attorneys in the Educational Affairs Division handled an increasing load of litigation. There were 75 Federal and State Court cases on the Division's 1982 docket, compared to 69 cases in 1981. A total of 40 major new cases were filed during the year. In 65% of the cases resolved in 1982, the State prevailed on the merits; another 26% of the pending litigation was voluntarily dismissed or settled. There were unfavorable rulings in only four cases, which accounted for 9% of the cases resolved.

The Division's Preventive Counseling Program, begun in 1981 and designed to help our client agencies avoid legal problems, now has held counseling sessions for 1,645 public college and school administrators on a wide variety of topics. In 1982, the seminars covered over 50 subjects, including student affairs; faculty personnel matters; effective use of counsel; liability of administrators, and home instruction of elementary level pupils.

In addition to litigation and the day-to-day counseling of our clients in the State Department of Education, the University of Maryland, eight State universities and colleges and a half dozen governing boards and coordinating commissions, the Educational Affairs Division also engaged in numerous administrative proceedings in 1982, representing clients before the Equal Employment Opportunity Commission; the Maryland Commission for Human Relations; the U.S. Department of Education; the U.S. Department of Labor; the Maryland State Board of Contract Appeals, and other agencies and groups.

The Division was especially active in assisting major client agencies with several important legislative proposals, including the principal bills pertaining to budgetary and management flexibility for all higher education institutions; an alternate governance structure for University Hospital; removing University College, the University's self-supporting education branch, from costly budget procurement and personnel rules; revising the surrogate parent program for handicapped children, and providing scholarships for future teachers. Division attorneys also prepared formal Opinion letters dealing with the Federal funding implications of merging the University of Maryland Eastern Shore with the rest of the system; the disbursement of $650,000 recovered in an embezzlement case; prayer in the public schools; scientific creationism, and the funding programs for children in State institutions.

Finally, Division attorneys negotiated many important agreements in 1982, including ones involving the sale of University property to Litton industries to enable the firm to enlarge its Prince George's County plant; licensing of genetic engineering discoveries to major chemical conglomerates, and lease purchase arrangements for multi-million dollar computer equipment and software. The Division also successfully negotiated a settlement between the State Department of Education and the Federal Department of Education regarding a program audit dispute, reducing the amount requested from $268,784 to $2,687.84—a "one cent on the dollar" settlement.

Economic and Community Development

During 1982, the Assistant Attorneys General assigned to the Department of Economic and Community Development played a major role in preparing the legal framework for the implementation of the State's development programs. These included the sale of some $330 million in bond or note issues of the Community Development Administration for the construction or permanent financing of about 5,600 units in multi-family and single-family residences; the drafting and closing of 23 loans totalling $75 million for multi-family developments containing 1,800 rental units, and the closing of 24 loans approved by the Maryland Industrial Development Financing Authority (MIDFA) for $39.2 million designed to produce significant economic benefits and new jobs throughout the State.

In addition, the attorneys worked on 20 loans and grants totalling $4.9 million for new jobs and industrial and community development. These loans were made through such programs as the Maryland Industrial and Commercial Redevelopment Fund, the Maryland Industrial Land Act, the Maryland Small Business Development Financing Authority, and the Maryland Appalachian Housing Fund. In addition, there were nine loans and grants totalling $389,000 awarded by the Maryland Historical Trust for historic preservation.

Finally, the attorneys assigned to the department played an active role in devising the new enterprise zones program; the new Maryland Energy Financing Administration program to finance energy production and energy conservation projects, and MIDFA's new umbrella bond program, which is designed to allow a large number of smaller loans to be financed more efficiently.

Department of Health and Mental Hygiene

In 1982, the Hazardous Waste Strike Force obtained the first prison term levied against a person convicted of violating Maryland's anti-pollution laws in the case of *State of Maryland v. Diggs*. The Allegany County Circuit Court imposed a one-year sentence on Diggs, the owner of a sanitation company in Cumberland, suspended a second 12-month term, and fined him $10,000, for illegally dumping tons of hazardous materials at two unlicensed sites in Cumberland, polluting area streams in the process. In addition, the defendant's wife received a suspended one-year term and the company was fined an additional $25,000.

A 23-count conviction also was obtained in 1982 against Multichem Corporation, the first licensed hazardous waste disposal firm to face criminal prosecution, and its two principal officers. The company and its officers were found guilty of conspiracy and violating their permit by illegally storing, treating and incinerating toxic substances they were not authorized to handle. A $35,000 fine was imposed on the defendants, who were placed on probation. The fines in the Diggs and Multichem cases were the heaviest since the creation of the Hazardous Waste Strike Force in 1981.

In response to a request from the Department for an opinion, the Department was advised that it is illegal for nursing homes to subject Medicaid eligible patients to private-pay obligations before qualifying for Medicaid. Several nursing homes and their trade associations have filed suit challenging that advice.

We assisted the Department of Health and Mental Hygiene in resolving a dispute involving the provision of services to mentally retarded persons with emotional and behavioral problems. New services were created and funds made available as a result of our efforts.

We are developing a Juvenile Law Manual to be used to help guide court personnel, professionals and judges involved in the juvenile justice system. We also helped the Medical Assistance Program establish an outreach project (EPSDT) mandated by Federal law to benefit poor infants and improve their physical development.

We also played a lead role in establishing and implementing Maryland's new health planning law, which has become a national model.

Human Resources

"Reaganomics" has had a substantial impact on the State, and thus on the State's legal business. For example, the unit assigned to the Department of Human Resources assisted the department in making major regulatory changes to bring its Food Stamp and Public Assistance programs into compliance with new Federal requirements imposed by the Omnibus Budget Reconciliation Act of 1981. Some of these changes have resulted in litigation against the State. In *Bell v. Hettleman*, for example, the United States District Court for the District of Maryland upheld the State's interpretation of the 1981 Budget Reconciliation Act that AFDC grants are to be calculated based on a recipient's gross, rather than net, income.

The State has resisted the Federal government's increasingly aggressive program of "disallowing" allegedly misspent public welfare funds. The State has filed and awaits decision in several lawsuits which raise important issues regarding the authority of Federal agencies to disallow funds allocated to the States by Congress.

In a related area, the State has asked the Supreme Court to reverse the decision of the U.S. Court of Appeals for the Fourth Circuit in *Hettleman v. Block*, in which the State challenges the authority of the U.S. Department of Agriculture to hold the State strictly liable for stolen Food Stamps without first providing any due process protection and without determining that the funds are due.

The AFDC and Food Stamp Programs are subject to "quality control" requirements to assure that Federal reimbursement is made only for proper expenditures. The Attorney General's Office has taken an active role in representing the State in administrative proceedings to challenge alleged error findings which have a significant impact on program error rates.

Licensing and Regulation

Late in the summer of 1982, the discovery of irregularities involved in the sale of time-share intervals at the Seatime condominium buildings in Ocean City set in motion an intensive investigation by the Real Estate Commission and the Attorney

General's Office which resulted in an unprecedented resolution of problems that could have devastated the Real Estate Guaranty Fund.

Under the guidance of Assistant Attorney General Francis X. Pugh, the Commission and the Consumer Protection Division of the Attorney General's Office determined that the developers of Seatime had sold timeshare intervals in condominium units they did not own or to which they could not convey clear title.

In September, an order was obtained from Worcester County Circuit Court Judge Edward Thomas appointing retired Circuit Court Judge Daniel T. Prettyman as receiver for the insolvent Seatime firm in an effort to save the investments of some 2,000 buyers.

Under a plan worked out by Judge Prettyman and Pugh, the Commission approved a $900,000 payment—the largest ever—from its $1.25 million Real Estate Guaranty Fund in December in order to obtain clear title to the units in which Seatime did not have title because company officials allegedly misappropriated the purchase money instead of placing it in an escrow account. A second plan also was worked out in an effort to accommodate some 200 purchasers who were sold timeshare intervals already belonging to someone else, or purchased intervals in units that Seatime did not own in its own buildings or in another Ocean City condominium called Oceantime, which it did not own.

If these agreements are successfully carried out, all affected consumers will receive clear title or will otherwise be accommodated. In addition, potential claims against the Guaranty Fund in an amount approaching $4 million, which would have bankrupted the fund several times over, will be averted by the expenditure of $900,000, less the amount of any restitution. This case represents a classic example of the favorable results that can occur when private citizens, business and government work together.

Department of Transportation

Proceedings before the Maryland State Board of Contract Appeals have added significantly to the caseload of the Department of Transportation, with 32 new claims totalling some $33.1 million being added to the 31 claims that were pending when 1982 began. Eleven contract claims against the Mass

Transit Administration alone were closed in 1982, with only $1.9 million of the $17.4 million sought in claims actually paid in settlement.

Several important court cases also were dealt with in 1982 by the Assistant Attorneys General assigned to the Department. *In Maryland Transportation Authority v. M/V Blue Nagoya, etc., in rem.*, a settlement was reached providing for the payment of $763,930.46 to the State to cover the damages to the Francis Scott Key Bridge when it was struck by the Blue Nagoya on August 29, 1980. The settlement of this case, which was filed in Admiralty in the U.S. District Court in Baltimore, represents over 95 percent of the Authority's claimed damages.

In *Bender, et al. v. Secretary of Transportation, et al.*, the State assumed representation for 190 defendants added to the case following the Court of Appeals's affirmation of a Court of Special Appeals ruling that vacated an earlier judgment by the Circuit Court of Baltimore City. The Circuit Court had ruled in favor of the Maryland Classified Employees Association's 1974 request for declaratory and injunctive relief on the grounds that the Secretaries of Transportation and Personnel have unlawfully created unclassified positions of State employment and abolished classified positions of State employment in violation of Maryland's Merit System Law.

The appellate courts found that certain necessary parties had been omitted from the proceedings by mistake and remanded the case to the Circuit Court, which has ordered the plaintiffs to join the necessary parties, who are some 350 State employees occupying the unclassified positions that allegedly were created unlawfully.

During 1982, the Assistant Attorneys General assigned to the Department of Transportation also rendered legal services in connection with a $40 million issue of Consolidated Transportation Bonds, which provide a portion of the funds needed for the Department's Consolidated Transportation Program. We also assisted in the sale of $34.9 million in County Transportation Bonds on behalf of Caroline, Charles, Dorchester, Prince George's and St. Mary's Counties and Baltimore City. In addition, legal services were provided in connection with a $300,000 contract for the sale-leaseback of 81 buses for the Mass Transit Administration under the Economic Recovery

Act of 1981. In connection with a proposed expansion of the Baltimore/Washington International Airport to accommodate a major airline's "hub" operation, legal services also were provided in arranging and drafting the documents for a $20 million investment of Maryland Transportation Authority funds with the Department in order to finance the expansion.

Finally, the Assistant Attorneys General assigned to the Department rendered legal advice in connection with the promulgation of emergency Department regulations to deal with the suspension and debarment of contractors convicted of bid rigging on Department contracts, and in the conduct of hearings held under those regulations. These regulations now have been superseded by statewide regulations.

Department of General Services

As part of this Office's continuing education program, four of the five Assistant Attorneys General assigned to the Department of General Services cooperated with the deputy counsel of the Department of Transportation in 1982 to present a program that dealt with the handling of bid protests before the Maryland State Board of Contract Appeals.

The three-member Board presided over a mock presentation of a contract appeal, and both Lewis Baker, chairman of the Board, and Assistant Attorney General Allan B. Blumberg, counsel to the Department of General Services, delivered lectures to the 65 attorneys attending the program.

There is no question that contract litigation is on the rise and that the reviews of contracts in which millions of dollars are in dispute are growing in number. The Maryland State Board of Contract Appeals is absorbing most of the contract litigation affecting both the Department of General Services and the Department of Transportation, and the continuing education program on the procedures before it was deemed especially significant in 1982, since new rules governing the Board became effective July 1.

Conclusion

I am especially proud of the increased professionalism of the office. My first act as Attorney General was to prohibit full-time Assistants from engaging in the private practice of law. We have initiated an almost continuous series of in-house training and educational sessions to sustain and sharpen our legal skills. The recruitment and retention of first-rate lawyers is our highest priority. Our efforts to attact qualified women and black attorneys continue at an accelerated rate. Outstanding lawyers will come to the service of the State, and remain even at financial sacrifice, if they can be given a sense of high purpose and high standards. We think we offer that opportunity. It may be difficult to measure, but I am positive that we are succeeding and that the Attorney General's Office is not only Maryland's largest law firm, but is fast becoming its best.

Many challenges remain before us, but I am pleased at the shape and direction the Office has begun to take. We are grateful to you and to your staff for the many courtesies extended to us, and look forward to working with you during the next four years.

Sincerely,

Stephen H. Sachs

Attorney General

CASES IN WHICH THE STATE LAW DEPARTMENT HAS PARTICIPATED
For Calendar Year 1982 *

Supreme Court of the United States (Includes Petitions for Certiorari)	64
United States Court of Appeals for the Fourth Circuit	117
Other United States Courts of Appeal	3
Total	120
United States District Court for the District of Maryland	738
Other United States District Courts	6
Total	744
Court of Appeals of Maryland (Includes Petitions for Certiorari and Answers to Petitions)	
Civil Appeals	120
Criminal Appeals	84
Total	204
Court of Special Appeals of Maryland	
Civil Appeals	126
Criminal Appeals	907
Total	1,033
Circuit Court and Supreme Bench	2,426
District Court of Maryland	5,496
Maryland Tax Court	3,650
Workmen's Compensation Hearings	10,115
Miscellaneous Administrative Hearings	2,026

* *Some of these cases have been completed, others are in the process of trial, and some are still pending.*

FINANCIAL STATEMENT
of the State Law Department
FOR THE FISCAL YEAR BEGINNING JULY 1, 1981
AND ENDING JUNE 30, 1982

Appropriations and Budget Credits

Program .001	$ 3,060,694.00
Program .004	211,614.00
Program .005	914,672.00
Program .006	386,473.00
Program .008	79,036.00
Program .009	850,568.00
Total	$ 5,503,057.00

Program .001

Legal Counsel and Advice

Appropriation	$ 2,755,783.00
Budget Credits	304,911.00
Net Appropriation plus Budget Credits	$ 3,060,694.00

Salaries:

Attorney General	$ 50,000.00
Deputy Attorney General (2)	122,604.00
Executive Associate Attorney General (4)	166,313.00
Principal Counsel (4)	74,433.00
Division Director II (4)	163,656.00
Assistant Attorney General VII	6,130.00
Assistant Attorney General VI (11)	414,481.00
Assistant Attorney General V (13)	368,049.00
Assistant Attorney General IV (7)	159,317.00
Legal Assistant II (2)	32,391.00
Fiscal Specialist III (2)	29,354.00

First Administrative Assistant		20,598.00
Second Administrative Assistant		19,119.00
Personnel Specialist I		17,646.00
Fiscal Accounts Supervisor II		16,111.00
Associate Librarian II		19,677.00
Administrative Aide II (3)		50,377.00
Administrative Aide I (8)		119,984.00
Office Secretary III		14,274.00
Office Secretary II (5)		56,633.00
Stenographer, Law & Legislative (12)		133,100.00
Supply Clerk		9,930.00
Total Salaries	$	2,064,177.00

Expenses (Exclusive of Salaries):		
Technical & Special Fees	$	186,547.00
Communication		204,913.00
Travel		18,432.00
Motor Vehicles Operations & Maintenance		4,940.00
Contractual Services		199,749.00
Supplies		39,486.00
Equipment—Additional		107,213.00
Grants, Subsidies & Contributions		1,429.00
Fixed Charges		233,721.00
Total Expenses		996,430.00
Salaries		2,064,177.00
Total Expenditures	$	3,060,607.00

Original General Fund Appropriation	$	2,755,783.00
Transfer of General Fund Appropriation		304,911.00
Total Funds Available		3,060,694.00
Less: General Fund Reversion		87.00
Net General Fund Expenditure	$	3,060,607.00

Program .004

Securities Division

Appropriation		$ 211,614.00

Salaries:		
Division Director II	$ 41,400.00	
Administrator II	18,894.00	
Assistant Attorney General VI	34,736.00	
Assistant Attorney General V (2)	44,638.00	
Administrative Aide I	14,659.00	
Office Secretary II	10,639.00	
Stenographer Clerk III	9,864.00	
Typist Clerk IV	7,541.00	
Total Salaries	$ 182,371.00	
Expenses (Exclusive of Salaries):		
Technical & Special Fees	$ 5,571.00	
Communication	28.00	
Travel	1,465.00	
Contractual Services	14,727.00	
Supplies	1,977.00	
Equipment—Additional	1,925.00	
Fixed Charges	3,550.00	
Total Expenses	29,243.00	
Salaries	182,371.00	
Total Expenditures	$ 211,614.00	
Original General Fund Appropriation		$ 211,614.00
Net General Fund Expenditure		$ 211,614.00

Program .005

Consumer Protection Division

General Fund Appropriation	$ 874,808.00
Special Fund Appropriation	20,000.00
Federal Fund Appropriation	19,864.00
Total Funds Available	$ 914,672.00

Salaries:		
Division Director II	$	41,400.00
Assistant Attorney General VI (2)		64,760.00
Assistant Attorney General V (4)		114,911.00
Chief Investigator		21,321.00
Consumer Affairs Supervisor		19,008.00
Consumer Affairs Specialist II (5)		78,758.00
Consumer Affairs Specialist I (3)		33,482.00
Public Affairs Officer II		25,590.00
Legal Assistant II		16,451.00
Administrative Specialist II (2)		36,574.00
Administrative Specialist I (2)		33,125.00
Administrative Officer II		23,293.00
Administrative Officer I		22,494.00
Administrative Aide II		17,646.00
Office Clerk II (2)		22,822.00
Office Secretary III		14,134.00
Office Secretary II (4)		45,903.00
Stenographer, Law & Legislative (2)		18,049.00
Services Supervisor III (2)		36,760.00
Total Salaries	$	686,481.00
Expenses (Exclusive of Salaries):		
Technical & Special Fees	$	88,656.00
Communication		591.00
Travel		11,732.00
Motor Vehicles Operation & Maintenance		4,969.00
Contractual Services		97,791.00
Supplies		7,450.00
Equipment—Additional		3,369.00
Grants, Subsidies & Contributions		9,557.00
Fixed Charges		4,076.00
Total Expenses		228,191.00
Salaries		686,481.00
Total Expenditures	$	914,672.00

Original General Fund Appropriation	$	874,808.00
Special Fund Appropriation		20,000.00
Federal Fund Appropriation		19,864.00
Total Fund Appropriation		914,672.00
Net Expenditure	$	914,672.00

Program .006

Antitrust Division

General Fund Appropriation	$	249,320.00
Federal Fund Appropriation		137,153.00
Total Funds Available	$	386,473.00

Salaries:

Division Director II	$	41,400.00
Assistant Attorney General V (5)		145,467.00
Assistant Attorney General IV		24,032.00
Accountant Auditor IV		3,248.00
Accountant Auditor III		18,269.00
Administrative Aide I		15,264.00
Office Secretary II (2)		25,953.00
Total Salaries	$	273,633.00

Expenses (Exclusive of Salaries):

Technical & Special Fees	$	29,478.00
Travel		15,759.00
Contractual Services		42,961.00
Supplies		4,111.00
Equipment—Additional		1,308.00
Grants, Subsidies & Contributions		13,213.00
Fixed Charges		6,010.00
Total Expenses		112,840.00
Salaries		273,633.00
Total Expenditures	$	386,473.00

Original General Fund Appropriation	$	249,320.00
Federal Fund Appropriation		137,153.00
Total Fund Appropriation		386,473.00
Net Fund Expenditure	$	386,473.00

Program .008

State's Attorneys' Coordinator

General Fund Appropriation	$	74,036.00
Federal Fund Appropriation		5,000.00
Total Funds Available	$	79,036.00

Salaries:		
State's Attorneys' Coordinator	$	33,400.00
Stenographer, Law & Legislative		14,274.00
Total Salaries		47,674.00
Expenses (Exclusive of Salaries):		
Technical & Special Fees	$	13,476.00
Communication		5,892.00
Travel		2,926.00
Contractual Services		6,722.00
Supplies		1,503.00
Equipment—Additional		301.00
Fixed Charges		542.00
Total Expenses		31,362.00
Salaries		47,674.00
Total Expenditures	$	79,036.00

Original General Fund Appropriation	$	74,036.00
Federal Fund Appropriation		5,000.00
Total Funds Available		79,036.00
Net Expenditures	$	79,036.00

Program .009

Medicaid Fraud Control Unit

General Fund Appropriation	$	127,968.00
Federal Fund Appropriation		722,600.00
Total Funds Available	$	850,568.00

Salaries:

Division Director I	$	35,300.00
Assistant Attorney General VII		42,711.00
Assistant Attorney General V (3)		85,010.00
Principal Counsel		6,766.00
Fiscal Administrator I (2)		46,216.00
Fiscal Administrator IV		7,429.00
Fiscal Specialist III (3)		65,516.00
Legal Officer II		19,119.00
Chief Investigator Medicaid Fraud		29,400.00
Madicaid Fraud Investigator III		21,410.00
Medicaid Fraud Investigator II (4)		71,128.00
Operations Specialist		16,999.00
Administrative Aide		15,264.00
Office Assistant III		7,107.00
Stenographer, Law & Legislative (3)		38,552.00
Total Salaries	$	507,927.00

Expenses (Exclusive of Salaries):

Technical & Special Fees	$	95,368.00
Communication		8,617.00
Travel		10,484.00
Motor Vehicles Operation & Maintenance		41,366.00
Contractual Services		33,783.00
Supplies		7,869.00
Equipment—Additional		10,833.00

Grants, Subsidies & Contributions	89,639.00	
Fixed Charges	29,350.00	
Total Expenses	327,309.00	
Salaries	507,927.00	
Total Expenditures	$ 835,236.00	

Original General Fund Appropriation	$ 127,968.00
Federal Fund Appropriation	722,600.00
Total Fund Appropriation	850,568.00
Less: Federal Fund Reversion	15,332.00
Net Expenditure	$ 835,236.00

Summary

Total Net Appropriation and Transfers:

Program .001	$ 3,060,694.00	
Program .004	211,614.00	
Program .005	914,672.00	
Program .006	386,473.00	
Program .008	79,036.00	
Program .009	850,568.00	
Total	$ 5,503,057.00	
Total General Fund Reversion	(87.00)	
Total Federal Fund Reversion	(15,332.00)	
Total		$ 5,487,638.00

Total Expenditures:

Program .001	$ 3,060,607.00	
Program .004	211,614.00	
Program .005	914,672.00	
Program .006	386,473.00	
Program .008	79,036.00	
Program .009	835,236.00	
Total		$ 5,487,638.00

OFFICIAL OPINIONS

of the

ATTORNEY GENERAL

of

MARYLAND

OPINIONS PUBLISHED IN FULL

See also page 419 for synopses of additional Opinions.

ATTORNEY GENERAL

PUBLIC OFFICERS—SHERIFFS—COUNSEL—ATTORNEY GENERAL HAS ULTIMATE RESPONSIBILITY TO ACT AS COUNSEL TO SHERIFFS

May 27, 1982

The Honorable Harry Hughes
Governor

We have reviewed House Bill 1685 (Cecil County—Attorney to the Sheriff—Compensation), which authorizes the Sheriff of Cecil County to appoint an attorney to be paid "such amounts and at such times as may be approved by the County Commissioners".

Although the bill may be signed into law, it is our view that, to be constitutional, House Bill 1685 and the existing law it amends (§1-4 of the Public Local Laws of Cecil County) must be administered in accordance with Article 32A, §5(a) of the Maryland Code and the constitutional prerogatives of the Attorney General.

I

Background

In *Murphy v. Yates*, 276 Md. 475, 492 (1975), the Court of Appeals explained that:

> "If an office is created by the Constitution, and specific powers are granted or duties imposed by the Constitution, although additional powers may be granted by statute, the position can neither be abolished by statute nor reduced to impotence by the transfer of *duties characteristic of the office* to another office created by the legislature[.]" (Emphasis added.)

In this regard, Article V, §3(a)(1) and (2) of the Maryland Constitution provides as follows:

> "The Attorney General shall:
>
> (1) Prosecute and defend on the part of the State all cases pending in the appellate courts of the State,

in the Supreme Court of the United States or the inferior Federal Courts, by or against the State, or in which the State may be interested, except those criminal appeals otherwise prescribed by the General Assembly.

(2) Investigate, commence, and prosecute or defend any civil or criminal suit or action or category of such suits or actions in any of the Federal Courts or in any Court of this State, or before administrative agencies and quasi legislative bodies, on the part of the State or in which the State may be interested, which the General Assembly by law or joint resolution, or the Governor, shall have directed or shall direct to be investigated, commenced and prosecuted or defended."

II

Discussion

There are certain State agencies that, because of their unique characteristics or distinctly local orientation, may be represented by counsel designated by the General Assembly. This is because the Attorney General is not being deprived of a duty "characteristic of" his or her office, and, for this narrow class of agencies, the General Assembly can reasonably determine that the State does not have a sufficient interest in representing the agency. *See* Bill Review Letter (Senate Bill 1128) from Stephen H. Sachs, Attorney General, to Harry Hughes, Governor (May 24, 1979).[1]

In our opinion, however, a sheriff does not fall into this category. A sheriff is a State constitutional officer [Article IV, §44 of the Maryland Constitution], subject to control of the State judicial system [*Green v. State*, 122 Md. 288 (1914)] as well as independently responsible for the enforcement of the criminal laws and the administration of certain correctional facilities in

[1] For example, the General Assembly has established general counsel for a number of specialized State agencies. *See* Article 78, §12 (Public Service Commission); Article 49B, §2 (Human Relations Commission); Transportation Article, §7-209 (Mass Transit Administration); Article 40A, §2-102(i) (State Ethics Commission). It has similarly acted with respect to certain agencies having a distinctly local orientation. *See, e.g.*, Education Article, §4-104 (County Boards of Education); Article 2B, §158 (County Liquor Boards).

a number of counties.[2] And, significantly we believe, the sheriffs have been longstanding clients of the Attorney General.

For these reasons, we believe that the General Assembly cannot deprive the Attorney General of the constitutional responsibility for representing a sheriff, even in the apparently limited manner contemplated by House Bill 1685. Representation of such an officer is in the State interest and is characteristic of the duties of the Attorney General.

Nevertheless, there is a way that House Bill 1685 and §1-4 of the Public Local Laws of Cecil County may be construed and implemented so as to be constitutional and not violative of Article V, §3 of the Constitution. That is, the bill must be administered in accordance with Article 32A, §5(a) of the Maryland Code, which gives the Attorney General the power to appoint "special counsel" for a State officer or agency.

> "*It is unlawful for any* board, commission, department, *officer* or institution of the State government *to retain or employ* or to continue the employment of *any counsel or legal adviser* whatever, in connection with the performance of their, its or his duties, or to be represented, in the performance of any of the duties imposed upon them, it or him, by any counsel or legal adviser whatever, *other than the Attorney General,* his deputies or assistants, *or a special attorney or counsel appointed by the Attorney General.*"[3]

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[2]Thus, representation of a sheriff is vastly different from representation of the Police Commissioner of Baltimore City, who we concluded could be constitutionally represented by independent counsel. *See* Bill Review Letter (Senate Bill 1128) from Stephen H. Sachs, Attorney General, to Harry Hughes, Governor (May 24, 1979). The Baltimore City Police Commissioner is appointed by and answerable to the Mayor of Baltimore City, a home rule subdivision. The Police Commissioner is not a State constitutional officer with duties of a distinct and substantial interest to the State. *Id.*

[3]*See also* Article 32A, §12E, which provides:

> "The Attorney General may employ special counsel whose compensation shall be fixed by the Attorney General and approved by the Board of Public Works, if he determines that it is impracticable or uneconomical for such legal service to be rendered by him or one of his assistants.
>
> The compensation for special counsel shall be paid out of the funds appropriated for the administration of the agency, board, commission, or department employing the officers and employees defended."

III

Conclusion

In our opinion, if the bill is administered in this fashion—by having the Attorney General authorize the employment of special counsel under Article 32A, §5(a) of the Code—the Attorney General would not be deprived of ultimate constitutional responsibility for the representation of the Sheriff of Cecil County.

STEPHEN H. SACHS, *Attorney General*

ROBERT A. ZARNOCH, *Assistant Attorney General*

AVERY AISENSTARK
Principal Counsel,
Opinions and Advice

Editor's Note: On June 1, 1982, House Bill 1685 was signed into law as Chapter 898, Laws of Maryland 1982, effective July 1, 1982. The preceding Opinion was originally written as a bill review letter; it is published here in a slightly revised format.

ATTORNEYS

UNAUTHORIZED PRACTICE OF LAW—HEALTH CLAIMS ARBITRATION—ADMINISTRATIVE PROCEEDINGS—ADMISSIONS *PRO HAC VICE*—OUT-OF-STATE LAWYERS MAY NOT BE ADMITTED *PRO HAC VICE* AS COUNSEL IN ADMINISTRATIVE PROCEEDINGS

June 21, 1982

Mr. Walter R. Tabler
Director
Health Claims Arbitration Office

You have requested our opinion on whether a lawyer admitted to the Bar of another state, but not admitted to practice in Maryland, may be admitted *pro hac vice* (i.e., for a particular occasion only) to participate in the arbitration of a health care malpractice claim and, if so, who has the authority to grant that admission.

For the reasons given below, it is our opinion that an out-of-state lawyer may not be specially admitted, *pro hac vice* or otherwise, to participate as counsel in the arbitration of a health care malpractice claim or, for that matter, any other "contested case" or similar quasi-judicial proceeding before an administrative agency.[1]

I

Appearance in Arbitration as "Practice of Law"

Your question assumes—quite correctly in our view—that representation of a client in the arbitration of health claims under Title 3, Subtitle 2A ("Health Care Malpractice Claims") of the Courts and Judicial Proceedings Article involves the practice of law. *See, e.g., Public Service Commission v. Hahn Transportation, Inc.*, 253 Md. 571, 580–81 (1969) ("We have no doubt that when an individual on behalf of his employer or

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[1] The Administrative Procedure Act, in Article 41, §244(c), defines "contested case" as being "a proceeding before an agency in which the legal rights, duties, statutory entitlements, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing".

another prepares and files pleadings in a contested case before the [Public Service] Commission and appears at and engages in its trial by the examination or cross-examination of witnesses, in light of the law he has determined to be applicable or controlling and by arguing the case in writing or orally he engages in the practice of law."); *Lukas v. Bar Ass'n of Montgomery Co.*, 35 Md. App. 442, 448, *cert. denied*, 280 Md. 733 (1977) ("[T]he general rule is: '[Even w]here trial work is not involved but the preparation of legal documents, their interpretation, the giving of legal advice, or the application of legal principles to problems of any complexity, is involved, these activities are still the practice of law . . . .' "). *See also* 65 *Opinions of the Attorney General* 28 (1980) (representing claimants or employers at hearings before Workmen's Compensation Commission constitutes practice of law).

The Court of Appeals has concluded that "[u]nder our constitutional system of separation of powers, the determination of what constitutes the practice of law and the regulation of the practice and of its practitioners is, and essentially and appropriately should be, a function of the judicial branch of government". *Public Service Comm'n v. Hahn Transportation*, 253 Md. at 583. *See also Attorney General v. Waldron*, 289 Md. 683, 692 (1981) ("[T]he regulation of the practice of law . . . [is] essentially judicial in nature and, accordingly, [is] encompassed in the constitutional grant of judicial authority to the courts of this State."). Except as provided in a few statutes relating to various aspects of the unauthorized practice of law, the Court of Appeals regulates the admission of lawyers to practice law in Maryland. *See generally* Article 10 of the Maryland Code; Maryland Rules Governing Admission to the Bar; *Attorney General v. Waldron*, 289 Md. at 692–703.

Although the Health Claims Arbitration Office has general authority to adopt rules and regulations governing health claims arbitration procedures [§3-2A-03(b)(3) of the Courts Article], neither the Court of Appeals nor the General Assembly has acted to confer on the Office or any arbitration panel the authority to specially admit out-of-state lawyers for the handling of health claims. Indeed, in this context, the Maryland Administrative Procedure Act makes it clear that administrative agencies have no independent authority to regulate practitioners before them: Article 41, §245(a) expressly provides that administrative agencies may not construe their rules to "grant the right to practice law to anyone not authorized to do so".[2]

II

Practice by Out-of-State Lawyers

Admission to the Bar of another state does not automatically carry with it the constitutional or other right to practice law in this State, even on a *pro hac vice* basis. *See, e.g., Leis v. Flynt*, 439 U.S. 439, 443 (1979); *In re Rappaport*, 558 F.2d 87, 89 (2nd Cir. 1977); *Smith v. Brock*, 532 P.2d 843, 849–50 (Okl. 1975). Rather, as in the case of the practice of law by non-lawyers, the practice of law by out-of-state lawyers is a matter for regulation by the forum jurisdiction. In this regard, the authority of out-of-state lawyers to practice law in Maryland has been specifically addressed by both the General Assembly and the Court of Appeals.

In Article 10 of the Maryland Code, the General Assembly has addressed this matter to a somewhat limited extent. For example, §32(b) authorizes an out-of-state lawyer to act as "corporate house counsel" in this State, provided that the lawyer's activities in this capacity "do not include appearances in the courts, State agencies, or commissions of this State".[3] Section 7(a) speaks to the general admission on special examination of out-of-state practitioners with at least 5 years' recent experience in another jurisdiction. Finally, §7(b) provides for the special *pro hac vice* admission of out-of-state lawyers to participate in cases pending before the courts of this State.

The Court of Appeals' Rules Governing Admission to the Bar supplement and expand on these statutory provisions. Rule 14 generally provides for the procedures by which an out-of-state lawyer may apply for general admission to the Maryland Bar. Rule 19 contains a limited authorization that permits

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[2] A like rule evidently applies even to those agencies that have been expressly excluded from the APA. *See Public Service Comm'n v. Hahn Transportation* 253 Md. at 584.

[3] The proviso's specific reference to "State agencies . . . or commissions" indicates a legislative understanding that participation in administrative proceedings may well involve the practice of law and, further, that such practice is to be limited to those who have been admitted to the Bar of this, and not merely any other, State.

certain out-of-state lawyers—those employed by or associated with an "organized legal services program" that is "sponsored, approved or recognized by the Legal Aid Bureau, Inc."—to practice in Maryland under specified conditions. Finally, Rule 20 provides for the special *pro hac vice* admission of out-of-state lawyers to participate in cases pending before the courts of this State.

As to admissions *pro hac vice*, Article 10, §7(b) specifically provides as follows:

> "A member of the bar of any other state, district or territory of the United States, who may be employed as counsel *in any case pending before any of the courts of this State, may be admitted for all the purposes of the case in which he is so employed by the court before which the case is pending*, without examination. This subsection does not deprive the courts of this State of the power of disbarring or otherwise punishing members of the bar." (Emphasis added.)

Not dissimilarly, Rule 20 specifically provides, in relevant part, as follows:

> "An attorney of record *in any case pending in any court of this State* may file a written motion to admit to practice an attorney who is a member of the Bar in good standing of another State, . . . *for the limited purpose of appearing and participating in the case* as co-counsel with the movant. . . .
>
> *The court may by order* admit specially or deny the special admission of an attorney. . . . " (Emphasis added.)

Section 7(b) thus authorizes a "court" to specially admit an out-of-state lawyer for purposes of a "case . . . pending" before that court. Rule 20, in turn, is similarly limited to authorizing a "court" to specially admit an out-of-state lawyer "for the limited purpose" of participating in a "case pending in [that] court". Neither the statute nor the rule authorizes any out-of-state lawyer to appear and participate in a proceeding before any administrative agency—whether by order of that agency or even, for that matter, by order of a court.

We can find no other authority or acceptable procedure by which an out-of-state lawyer may be admitted in this State to participate in a health care malpractice claim or similar quasi-judicial proceeding. Hence, we must conclude that any rule or procedure adopted by an administrative agency to permit such a practice is invalid.[4]

III

Conclusion

We realize that there may well be sound policy reasons for establishing some procedure by which administrative agencies—or, possibly, a designated court on special motion—could specially admit out-of-state lawyers to participate *pro hac vice* in specific contested cases or similar matters pending before those agencies.[5] In the context of health care malpractice claims especially, a somewhat anomalous situation now exists: although an out-of-state lawyer may be admitted by a court to participate in that court's review of a health claims arbitration award, that same lawyer—who may well have a special expertise in the particular matter for which he or she has been engaged—will have been precluded from participating in the underlying arbitration proceeding that was itself an exclusive statutory prerequisite to the subsequent litigation.

There are equally compelling—albeit somewhat different—reasons for considering possible reform in this area of the law with regard to most of the various other types of administrative proceedings held in this State. Such proceedings are generally designed to promote the resolution of controversies in an informal, inexpensive, and expeditious manner. Moreover,

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[4] We recognize that, in *Public Service Comm'n v. Hahn Transportation*, the Public Service Commission rule reviewed by the Court of Appeals contained a provision for special admission of out-of-state lawyers on motion to the Commission. Nevertheless, the validity of that specific provision was not an issue before—and was not at all addressed by—the Court. Rather, in *Hahn*, the Court simply approved the rule's general requirement that all practitioners before the Commission be members of the Maryland Bar.

[5] The *pro hac vice* admission of nonresident lawyers before administrative bodies is not unprecedented. Oklahoma, for example, has both a statute and a court rule providing for the same. *See Smith v. Brock*, 532 P.2d 843, 847–48 (Okl. 1975).

as we previously noted in the context of hearings before the Workmen's Compensation Commission, it is likely that, in many instances, parties might well be able to pursue their interests in such proceedings "quite competently, and perhaps more economically, with *nonlegal* assistance". 65 *Opinions of the Attorney General* 28, 33 (1980) (emphasis added). Even more so, then, it seems anomalous to us that a party to such a proceeding should be precluded from having the *legal* assistance of an out-of-state lawyer simply because the relevant law—albeit, we suspect, by inadvertence—has failed to provide a formal mechanism for such representation.

Nevertheless, present Maryland law simply does not allow us to reach any other conclusion but that which we have expressed above: an out-of-state lawyer who is not a member of the Maryland Bar may not be admitted *pro hac vice* to participate as counsel in a health care malpractice claim proceeding or to participate as counsel in any similar quasi-judicial proceeding before an administrative agency. We do, however, urge the General Assembly and the Court of Appeals to review this matter and seriously consider an appropriate remedy.

STEPHEN H. SACHS, *Attorney General*

Susan K. Gauvey, *Assistant Attorney General*

AVERY AISENSTARK
Principal Counsel,
Opinions and Advice

Editor's Note: Since the issuance of this Opinion, the Court of Appeals amended Rule 20 of the Rules Governing Admission to the Bar, effective January 1, 1983, to provide for special admission of out-of-state lawyers in cases pending "in any agency or commission of this State or any political subdivision thereof ". Also, the General Assembly amended Article 10, §7(b) of the Maryland Code, effective July 1, 1983, to similar effect.

CONDOMINIUMS

LOCAL GOVERNMENT—CONSUMER PROTECTION—PREEMPTION—CONFLICT—LOCAL LEGISLATION REGULATING MEETING AND VOTING PROCEDURES OF COUNCIL OF UNIT OWNERS NOT PREEMPTED BY STATE LAW

December 22, 1982

Sondra Harans Block, Esq.
Assistant City Attorney
City of Rockville

On behalf of the Mayor and City Council of Rockville, you have asked for our opinion on the validity of certain county legislation, recently enacted by the Montgomery County Council, which governs the meetings and election procedures of "home owners' associations": Chapter 54 of the Laws of Montgomery County 1982 ("Chapter 54") [to be codified as Chapter 24B, Montgomery County Code]. This legislation regulates the meeting and voting procedures of the governing entities of such forms of housing as cooperatives, condominiums, and planned unit developments. A substantially similar municipal ordinance is currently under consideration by the Mayor and Council of Rockville.[1] You inquire specifically whether such local legislation, to the extent that it regulates councils of unit owners of condominiums, is preempted by the Maryland Condominium Act, Title 11 of the Real Property Article of the Maryland Code ("Condominium Act" or "Act").

For the reasons given below, it is our opinion that the Condominium Act does not preempt the authority of local jurisdictions to regulate the meeting and voting procedures of the councils of unit owners of condominiums if—as here—the local regulation is "for the protection of a consumer" within the meaning of, and does not "conflict with", the Condominium Act. Chapter 54 is, therefore, not preempted.

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[1] Chapter 54 provides that it "shall not be effective in any incorporated municipality which by law has authority to enact a law on the same subject [unless the] incorporated municipality adopts this Chapter and requests the County to enforce the adopted provisions thereof within its corporate limits". §24B-8 of the Montgomery County Code.

I

County Home Owners' Association Law

Chapter 54, which became effective on July 26, 1982, added provisions to the County Code that regulate the meeting and electoral procedures of "home owners' associations" and their subdivisions (for example, a board of directors). The term "home owners' association" is defined as follows:

> " '*Home owners' association*' means any private organization of persons owning or occupying residential units which has the authority, by virtue of its organizational documents, to impose on such units, or upon their owners or occupants, any fee or fees in connection with the provision of services for the benefit of all or some of the units, owners or occupants. A home owners' association *includes any council of unit owners of a condominium*, a cooperative housing corporation, the organization of owners of a planned unit development, or the organization of owners of a town sector-zoned community, whether any of the above is a nonprofit or for profit corporation or unincorporated association, but does not include any organization in which membership is strictly voluntary and not a condition of owning or occupying the unit." §24B–1 of the Montgomery County Code (emphasis added).

Chapter 54 imposes several restrictions on the meeting procedures of these home owners' associations. For example, all of an association's meetings—as well as the meetings of its subdivisions, such as a board of directors—must be "[o]pen to all owners or occupants of units of the association, their guests and any representative of the news media", unless any of several specified grounds for closing a meeting is satisfied. §24B–3(a)(2) and (4) of the Montgomery County Code.[2]

The legislation also regulates the associations' voting procedures in certain respects. For example, one provision sets conditions for the validity of absentee ballots. §24B–4(b).

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[2] In this respect Chapter 54 bears a marked resemblance to the State Open Meetings Law. *See* Article 76A, §§10, 11, and 12 of the Maryland Code. *See also* note 3 below.

Under the "Penalties" section of the legislation, an association that violates any of these requirements "shall be subject to injunctive or other appropriate action or proceeding". §24B–6. Moreover, Chapter 54 creates a cause of action for damages "for an injury or loss sustained as the result of a violation of this Chapter". §24B–7.

II

State Condominium Act

A. *Introduction*

The Condominium Act (Title 11 of the Real Property Article) provides the framework within which condominiums in this State are established and operated. In particular, a condominium's "council of unit owners" is a legal entity constituted and defined by §11–109 of the Condominium Act.[3] The council of unit owners, in turn, is authorized to "delegat[e] . . . any power of the council of unit owners to a board of directors, officers, managing agent, or any other person for the purpose of carrying out the responsibilities of the council of unit owners". §11–109(b).

While there are no provisions specifically applicable to the meetings or election of these other entities, their powers and procedures necessarily are set by and derive from the underlying powers and procedures of the council of unit owners itself. In this regard, the Condominium Act does contain provisions that specifically concern the meeting and electoral procedures of the council of unit owners. For example, a council meeting "may not be held on less than 10 nor more than 90 days written notice delivered or mailed to each unit owner". §11–109(c)(3). The Act, however, contains no restriction on the

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[3] It has been suggested that, because State law "creates" each council of unit owners and assigns it a governance role, a council is a "public body" within the meaning of the State Open Meetings Law and, consequently, its meetings may be regulated by local governments in accordance with that law. *See* Article 76A, §§8(g) and 15 of the Maryland Code. However, the Open Meetings Law applies only to entities that conduct public business, not to those—such as a condominium's council of unit owners or, for another example, a corporation's board of directors—that merely superintend private property and private interests.

discretion of a council or its delegated entity to meet in closed session. With respect to voting procedures, the Act provides that proxy ballots may be used, but generally limits their effectiveness to 180 days. §11–109(c)(5).

There is no direct conflict or inconsistency between these provisions and any of the more extensive requirements in Chapter 54. Nevertheless, §11–109(c) of the Condominium Act and Chapter 54 do concern the same subject matter. Therefore, as your inquiry suggests, we must examine those provisions of the Condominium Act that govern the extent to which the Act preempts local law. Until 1981, the Act generally allowed localities to regulate condominiums, if the local law applied equally to comparable types of property. However, a 1981 amendment to the Act expanded the Act's preemption of local law.

B. *Provisions Before 1981*

Until the 1981 amendment, the Condominium Act contained three provisions that, together, delineated the permissible scope of local legislation. Former §11–120(b) [now §11–122(b)] read as follows:

> "No county, city, or other jurisdiction may enact any law, ordinance, or regulation which would impose a burden or restriction on a condominium that is not imposed on all other property of similar character not subjected to a condominium regime. Any such law, ordinance, or regulation is void."

Another section, former §11–127(a) [now §11–141(a)], provided that:

> "The provisions of this title are in addition and supplemental to all other provisions of the public general laws, the public local laws, and any local enactment in the State."

Finally, former §11–127(c) [now §11–141(c)] provided as follows:

> "If the application of the provisions of this title conflict with the application of other provisions of the public general laws, public local laws, or any lo-

> cal enactment, in the State, the provisions of this title shall prevail."

In *Rockville Grosvenor, Inc. v. Montgomery County,* 289 Md. 74 (1980), the Court of Appeals construed these provisions to "reject [the] contention that the [Act] has resulted in a total preemption of the subject matter". 289 Md. at 93. Instead, the Court noted, "there are conceivably many nondiscriminatory local laws which could apply to condominiums", and such laws were not preempted by the Act. 289 Md. at 92–93. The Court then analyzed whether the provisions of the county enactment in question conflicted with provisions of the Condominium Act. 289 Md. at 93–100.

C. *The 1981 Amendment*

At the 1981 Session of the General Assembly, the Condominium Act was amended by Chapter 246, Laws of Maryland 1981, to add two new sentences to the end of former §11–120(b)—redesignated as §11–122(b):

> "Except as otherwise expressly provided in §§11–130, 11–138, 11–139, and 11–140 of this title, the provisions of this title are statewide in their effect. Any law, ordinance, or regulation enacted by a county, city, or other jurisdiction is preempted by the subject and material of this title."[4]

In our opinion, this language unmistakably expands the scope of State preemption. Prior to the 1981 amendment, the Condominium Act generally *permitted* local legislation concerning condominiums; such legislation need only have been nondiscriminatory and nonconflicting. Now, however, after the 1981 amendment, the Condominium Act generally *preempts* local legislation. It is no longer sufficient that local law be nondiscriminatory and nonconflicting. If the local law concerns a "subject" or "material" addressed by a provision in the Condo-

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[4] Despite the fact that §11–122 as a whole is captioned "Zoning and building regulations", only subsection (a) of that section specifically applies to local zoning and building regulations. Subsection (b) of the section, on the other hand, applies to other kinds of regulation as well. *See Rockville Grosvenor v. Montgomery County,* 289 Md. at 89–92.

minium Act, the local law is preempted, unless it is also within one of the four enumerated exceptions.[5]

As we have discussed above, the Condominium Act contains provisions on the subject of meetings and voting procedures. Thus, Chapter 54, on the same subject, is preempted unless one of the exceptions applies.

D. *Exceptions from Preemption/Consumer Protection*

Three of the enumerated exceptions are plainly inapplicable to the legislation at issue here: §11–138 authorizes a local government to provide itself with a right of first refusal to purchase rental facilities that would otherwise be converted to condominiums; §11–139 authorizes a local government to provide itself with a right of first refusal to purchase up to 20% of the units in rental facilities that are undergoing conversion to condominiums; and §11–140 authorizes local governments to declare rental housing emergencies during which tenants in buildings undergoing conversion have certain additional rights. None of these sections is applicable to Chapter 54 or the proposed Rockville ordinance.

The only potential authorization for the local legislation in question is §11–130, which, in subsection (d), provides as follows:

> "A county or incorporated municipality, or an agency of any of those jurisdictions, may adopt laws or ordinances for the protection of a consumer to the extent and in the manner provided for under §13–103 of the Commercial Law Article."

[5] The bill ultimately enacted as Chapter 246 originally contained an additional clause in the last sentence of §11–122(b): "Any law, ordinance, or regulation enacted by a county, city, or other jurisdiction is preempted by the subject and material of this title, *unless the local law, ordinance, or regulation is not inconsistent with the provisions of this title*." (Emphasis added.) Had the emphasized clause survived, §11–122(b) would merely have preserved preexisting law, for the Act has from its inception declared that the Condominium Act prevails in the event of conflict with other State or local laws. §11–141(c). However, the emphasized clause was deleted by amendment. This change underscores the General Assembly's intention that §11–122(b) preempt any local law, even if not inconsistent with the Act, unless one of the enumerated provisions applies.

Title 13 of the Commercial Law Article is the Consumer Protection Act. Under §13–103 of that Act, a locality "may adopt, within the scope of its authority, more stringent provisions not inconsistent with the provisions of [the Consumer Protection Act]".

Thus, Chapter 54 is a permissible exception under §11–130 of the Condominium Act only if (i) it is "for the protection of a consumer" within the meaning of §11–130 and (ii) it is "more stringent" in its protection than the Consumer Protection Act.[6]

For purposes of §11–130, " 'consumer' means an actual or prospective purchaser, lessee, assignee or recipient of a condominium unit". §11–130(b). This definition plainly applies at least to the *initial acquisition* of a unit: a "consumer" is one who is acquiring—whether by purchase, lease, or otherwise—an interest in "a condominium unit". The harder question is whether the definition of "consumer" in §11–130(b) also applies to transactions that occur *after* the individual has acquired his or her interest in the unit and are not part of the acquisition process itself.

We believe that the term "consumer" may fairly be understood as having been intended to encompass unit owners and residents of a condominium to the extent that their transactions are, in effect, a continuing consequence of the acquisition of "a condominium unit". That is, when someone acquires a condominium unit, he or she, as a direct and inevitable result of the acquisition, enters into a continuing relationship, involving a series of transactions, with one entity: the council of unit owners.

Acquisition of a condominium unit—the act that defines a "consumer" under §11–130(b)—entails a commitment to acquire a range of goods and services from or through the council of unit owners.[7] We think that the General Assembly can reasonably be understood to have recognized this fact and to have intended, in §11–130, to permit local consumer protection regulation of this aspect of condominium acquisition.

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[6] Under §13–103 of the Consumer Protection Act, the local regulation must also be "not inconsistent with" the Consumer Protection Act. Chapter 54 raises no issue in this respect.

[7] These goods and services might affect enjoyment of the individual unit (e.g., hot water), of the common elements (e.g., landscaping), or of both (e.g., security).

Chapter 54 protects these consumers primarily through the device of disclosure. Much as the Condominium Act itself relies on required disclosures to protect a potential purchaser of a condominium unit (*see*, *e.g.*, §11–126), so Chapter 54 requires disclosure, through an open meetings requirement, of the council of unit owners' various activities—including in particular its decision-making regarding the provision of services and the use of the owners' fees. Likewise, we take it that the provisions of Chapter 54 on voting procedures are intended to protect "consumers" in a condominium by assuring that decisions affecting them are made by officers who have been elected fairly and openly.[8]

Finally, the provisions of Chapter 54 are "more stringent" than the provisions of the Consumer Protection Act. Nothing in the Consumer Protection Act affords to unit owners or condominium residents the kind of disclosure about condominium transactions that Chapter 54 requires.

Accordingly, we conclude that local legislation such as Chapter 54, which is designed for the protection of individual unit owners in a relationship that is an integral element of their acquisition of a unit—i.e., in their relationship with the council of unit owners—is "for the protection of a consumer" within the contemplation of §11–130(d). Chapter 54, a more stringent form of consumer protection than is contained in the Consumer Protection Act, is therefore within the exception found in §11–130 of the Condominium Act and, as such, is not preempted.

III

Conclusion

In summary, it is our opinion that the Maryland Condominium Act does not preempt the authority of local jurisdictions to regulate the meeting and voting procedures of councils of unit

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[8] Chapter 54 contains the following statement of legislative findings and purpose: "The County Council finds that numerous home owners' associations deliver services and exercise powers which correspond in many respects to municipal service and that there exists a need for clear procedures to assure the open conduct of such bodies." §24B–2.

owners if—as in the case of Chapter 54 of the Laws of Montgomery County 1982—the local regulation is "for the protection of a consumer" within the meaning of the Condominium Act and the local regulation does not "conflict with" that Act.

STEPHEN H. SACHS, *Attorney General*

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Opinions and Advice

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APPENDIX

[*Editor's Note:* Since the issuance of this Opinion, the General Assembly enacted Chapter 562 (S.B. 893), Laws of Maryland 1983, for the purposes of, among other things, requiring advance notice of certain meetings of councils of unit owners and boards of directors, requiring all meetings of councils of unit owners to be open, and permitting meetings of boards of directors to be closed only for specified purposes. These new provisions are codified in §§11–109(c) and 11–109.1 of the Condominium Act (Title 11 of the Real Property Article).

The impact of this legislation on existing local laws is discussed in Bill Review Letter (S.B. 893) from Stephen H. Sachs, Attorney General, to Harry Hughes, Governor (May 17, 1983). That letter, with minor editorial corrections, is reproduced below:]

May 17, 1983

The Honorable Harry Hughes
Governor of Maryland
State House
Annapolis, Maryland 21401

Re: Senate Bill 893

Dear Governor Hughes:

We have reviewed and hereby approve Senate Bill 893 for constitutionality and legal sufficiency. In so doing, we wish to point out the impact of this legislation on existing public local law.

Senate Bill 893 expressly requires meetings of a condominium's board of directors or its council of unit owners to be open. In specified circumstances, closed meetings of a board of directors are authorized—for example, during the discussion of matters concerning employees and personnel; consultation with legal counsel; or during investigation into possible criminal misconduct. With regard to all other meetings, the bill provides that all unit owners be (i) notified in a timely fashion and (ii) allowed access to the governing board's deliberative and decision-making process.[1]

In 67 *Opinions of the Attorney General* 13 (1982), we evaluated similar local legislation enacted by the Montgomery County Council. The local law, Chapter 54 of the Laws of Montgomery County 1982 ("Chapter 54"), regulates the meeting procedures of homeowners' associations, including the meetings of any condominium board of directors or council of unit owners. We observed in our Opinion that, if local legislation concerns a "subject" or "material" addressed by a provision in the Condominium Act, the local law is preempted, unless it is within one of the four exceptions enumerated in §11–122(b) of the Real Property Article ("RP" Article). 67 *Opinions of the Attorney General* at 17–18.[2] We then found Chapter 54 to be within one such exception, because the local legislation was, within the meaning of that exception, both (i) "for the protection of a consumer", and (ii) "more stringent" in its protection than the Consumer Protection Act. *Id.* at 19–20.[3]

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[1] Senate Bill 893 also specifies various items to be included in the annual proposed condominium budget, and it details the procedure for budget adoption and amendment.

[2] Section 11–122(b) states, in relevant part:

> "Except as otherwise expressly provided in §§11–130, 11–138, 11–139, and 11–140 of this title, the provisions of this title are statewide in their effect. Any law, ordinance, or regulation enacted by a county, city, or other jurisdiction is preempted by the subject and material of this title."

[3] RP §11–130(d) provides:

> "A county or incorporated municipality, or an agency of any of those jurisdictions, may adopt laws or ordinances for the protection of a consumer to the extent and in the manner provided for under §13–103 of the Commercial Law Article."

Under CL §13–103, a locality "may adopt, within the scope of its authority, more stringent provisions not inconsistent with the provisions of [the Consumer Protection Act]".

Thus, we concluded, the extensive disclosure requirements of Chapter 54 were not preempted by the Maryland Condominium Act.

At the time we rendered that Opinion, the Condominium Act contained no restriction on the discretion of a board of directors or council of unit owners to meet in closed session. However, as amended by Senate Bill 893, the Condominium Act now would place significant restrictions on the meetings of condominium boards or councils. These restrictions differ from those of Chapter 54 in several salient respects.

For example, proposed RP §11–109(c) would require notification of a meeting to be sent to each unit owner at least 10 days before the meeting. Chapter 54, on the other hand, merely requires 72 hours of public notice. Similarly, proposed RP §11–109.1 lists certain situations in which closed meetings would be permitted; these exceptions concern activities unrelated to the routine provision of condominium services or use of the unit owners' fees. Chapter 54, on the other hand, allows a condominium board or council to close its meetings under other circumstances as well—i.e., for reasons that would not be permitted by the proposed public general law.[4] Here, the legislative policy behind an open meetings requirement—that business affecting a given community should be performed in an open and public fashion—would be contravened by additional local justifications for closure.

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[4] Specifically, Senate Bill 893 and Chapter 54 each authorize closed meetings for purposes of: (i) discussing matters pertaining to employees and personnel; (ii) protecting the privacy or reputation of individuals in matters not related to the council of unit owners' business; (iii) consulting with legal counsel; (iv) consulting with staff personnel, consultants, attorneys, or other persons in connection with pending or potential litigation; (v) investigative proceedings concerning possible or actual criminal misconduct; (vi) complying with a specific constitutional, statutory, or judicially imposed requirement protecting particular proceedings or matters from public disclosure; or (vii) on an individually recorded affirmative vote of two-thirds of the board members present, for some other exceptional reason so compelling as to override the general public policy in favor of open meetings.

In addition, Chapter 54 authorizes closed meetings for: acquisition of capital items previously specifically approved as part of a published budget adopted in an open meeting; short-term investments of funds of the home owners' association in liquid assets, if authorized by an investment policy previously adopted in an open meeting; conducting collective bargaining negotiations or considering associated matters; or discussions concerning public security, including the deployment of personnel and the development and implementation of emergency plans.

The Montgomery County ordinance in effect permits that which State law would prohibit with regard to the meeting procedures of a condominium's governing entity. To that extent, the ordinance conflicts with the public general law. In such cases, the local law is inapplicable. *See Rockville Grosvenor, Inc. v. Montgomery County,* 289 Md. 74, 96–99 (1980); *City of Baltimore v. Sitnick,* 254 Md. 303, 317 (1969); *Rossberg v. State,* 111 Md. 394, 416 (1909).[5] The Condominium Act is similarly explicit. RP §11–141(c) states:

> "If the application of the provisions of this title conflict with the application of other provisions of the public general laws, public local laws, or any local enactment, in the State, the provisions of this title shall prevail."[6]

The legislative history of Senate Bill 893 also indicates the General Assembly's intent to supersede local legislation in this particular area. In response to a suggestion that local governments be permitted to have discretion in requiring notice, the Chairman of the Governor's Commission on Condominiums answered: "The Commission should try to make the law as uniform as possible statewide." *See* Governor's Commission on Condominiums, Cooperatives and Homeowners' Associations, Proposed Minutes (Feb. 8, 1983). This concern reflects an ongoing effort to legislate for the protection of Maryland citizens as a whole. *See* Report of the Governor's Commission to Study

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[5] We do not address here whether or to what extent local legislation may adopt more stringent provisions than those specified in the public general law—e.g., whether a county may require open meetings where the General Assembly has authorized closure.

[6] We note, however, that Chapter 54 contains a severability clause. In pertinent part, Section 2 reads:

> "The provisions of this Act are severable and if any provision, sentence, clause, section, word or part thereof is held . . . invalid . . . or inapplicable to any person or circumstance, such . . . invalidity. . . or inapplicability shall not affect or impair any of the remaining provisions, sentences, clauses, sections, words or parts of the Act or their application to other persons or circumstances."

Thus, the remainder of Chapter 54 is viable, notwithstanding any invalidation of that portion concerning the meeting procedures of a condominium board of directors or council of unit owners.

the Laws Covering Condominiums (1981) at 8, 9; Report of the Condominium Revision Committee of the Real Property, Planning and Zoning Section of the Maryland State Bar Association, *reprinted in* the 1980 Cumulative Supplement to the Real Property Article at 98.

In conclusion, we believe Senate Bill 893 is constitutional and legally sufficient. If signed into law, this public general legislation will supersede conflicting public local laws of the type discussed above.

Very truly yours,

Stephen H. Sachs
Attorney General

CONSTITUTIONAL LAW

FIRST AMENDMENT—ESTABLISHMENT CLAUSE—"SCIENTIFIC CREATIONISM"—REQUIRING THE TEACHING OF "CREATION-SCIENCE" IN PUBLIC SCHOOLS WOULD VIOLATE ESTABLISHMENT CLAUSE

February 23, 1982

The Honorable Patrick C. Scannello
Maryland House of Delegates

You have asked us to review for constitutionality House Bill 1078, concerning the teaching of "creation-science" and "evolution-science" in the public schools of Maryland. In particular, you have asked whether, if enacted, this bill would violate the First Amendment to the United States Constitution, which prohibits government from making any "law respecting an establishment of religion or prohibiting the free exercise thereof".

For the reasons given below, we have concluded that House Bill 1078 would violate the separation between Church and State that is required by the "Establishment Clause" of the First Amendment.[1]

I

House Bill 1078

House Bill 1078 has a number of components, but its key feature provides that public schools are required to give a "reasonably unbiased" presentation of "creation-science" and "evolution-science" in classroom lectures, textbook materials, and library volumes. §7-111(c).[2]

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[1] We have recently discussed at some length the meaning and scope of the "religious clauses" of the First Amendment. *See* 65 *Opinions of the Attorney General* 186 (1980) (distributing Gideon Bibles to public elementary school students violates the Establishment Clause); 64 *Opinions of the Attorney General* 134 (1979) (teaching ethical values in the public schools is constitutionally permissible).

[2] Statutory citations are to proposed new provisions of the Education Article of the Maryland Code.

"Reasonably unbiased presentation" in classroom lectures is defined in pertinent part as the presentation of "evolution-science" and "creation-science" by the "time or length balance provided by an equal number of class periods or course hours to the nearest hour in a school year". §7-111(b)(5)(i)(2). For textbook materials, "reasonably unbiased" treatment requires the same "content balance" as in classroom lectures but, additionally, mandates "the length balance provided by an equal number of pages . . . to the nearest 10 percent of the total pages in assigned textbook materials", to the extent such materials are available. §7-111(b)(5)(ii). The "content balance" required in library volumes is that "provided by an equal number of library volumes" in the humanities and sciences presenting evolution and creation science, to the extent such volumes are available. §7-111(b)(5)(iii).

II

The Establishment Clause

A. *Purpose of Clause*

As the Supreme Court has stated:

> "[The] first and most immediate purpose [of the Establishment Clause] rest[s] on the belief that a union of government and religion tends to destroy government and to degrade religion. . . . Another purpose of the Establishment Clause rest[s] upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand." *Engel v. Vitale*, 370 U.S. 421, 431-32 (1962).

The Court has given a broad meaning to the Establishment Clause and has held that it means, at the very least, that "neither the States nor the Federal government can pass laws which aid one religion, aid all religions, or prefer one religion over another". *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947). Its effect has been "to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business", 330 U.S. at 26, "by comprehensively forbidding every form of public aid or support for religion", 330 U.S. at 31-32.

Because the public schools have been characterized "as a most vital civic institution for the preservation of a democratic system of government", the Establishment Clause has encountered its severest tests when it has been applied to practices and policies within the classroom. *School District of Abington Township, Pennsylvania v. Schempp,* 374 U.S. 203, 230 (1963). *See, e.g., Stone v. Graham,* 449 U.S. 39 (1980) (posting copy of Ten Commandments, purchased with private contributions, on public classroom wall is unconstitutional); *Epperson v. Arkansas,* 393 U.S. 97 (1968) (criminal statute prohibiting teachers in state schools from teaching "the theory or doctrine that mankind ascended or descended from a lower order of animals" struck down); *School District of Abington Township, Pennsylvania v. Schempp,* 374 U.S. 203 (1963) (daily reading of Bible in public schools banned); *Engel v. Vitale,* 370 U.S. 421 (1962) (recitation of a "denominationally neutral" prayer contravenes Establishment Clause); *McCollum v. Board of Education,* 333 U.S. 203 (1940) (public school program in which students are released temporarily from their secular studies to attend religious classes held invalid).[3]

Separation of religion in the field of education was not something imposed upon unwilling states; rather, it was the democratic response of the American community to the particular needs of harmonizing "multiform creeds". "Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogenous democratic people, the public schools must keep scrupulously free from entanglement in the strife of sects." *McCollum v. Board of Education,* 333 U.S. 203, 216-17 (1940).

B. *Application of Clause*

The Supreme Court has enunciated a three-part test for determining whether a challenged state practice or policy is permissible under the Establishment Clause:

> "First, the statute must have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster 'an excessive government

[3] *See also* 65 *Opinions of the Attorney General* 186, at n. 3 (1980) for cases dealing with the provision of public aid to religious educational institutions.

> entanglement with religion.'" *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (citations omitted).

If a statute violates any one of these three principles, it must be struck down under the Establishment Clause. *Stone v. Graham*, 449 U.S. 39, 40-41 (1980).

Of particular relevance here, the Supreme Court has been called upon to deal with the teaching of evolution in the public schools and its alleged conflict with the Biblical version of creation in Genesis. In *Epperson v. Arkansas*, 393 U.S. 97 (1968), a school teacher challenged the constitutionality of an Arkansas "anti-evolution" statute, which made it a criminal offense "to teach the theory or doctrine that mankind ascended or descended from a lower order of animals". 393 U.S. at 98-99.[4]

The Supreme Court in *Epperson* struck down the Arkansas statute as violating the Establishment Clause:

> "The overriding fact is that Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group." 393 U.S. at 103.[5]

The Supreme Court majority found that there was "no doubt" that the Arkansas statute prohibited the teaching of evolution "because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man", and that this "fundamentalist sectarian" conviction was the basis of the law's existence. 393 U.S. at 107-08. Such an intention was found to be "plainly" contrary to the mandates of the First Amendment.

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[4] This statute was an adaptation of the famous Tennessee "monkey law", upheld decades before by Tennessee's Supreme Court. That court nevertheless had reversed the conviction of a teacher found guilty of violating the law, because "nothing [is] to be gained by prolonging the life of this bizarre case". *Scopes v. State of Tennessee*, 289 S.W. 363, 367 (Tenn. 1927).

[5] As the *Epperson* opinion points out, the defense in the *Scopes* trial had contended that the Tennessee anti-evolution law gave a "preference" "to religious establishments which have as one of their tenets or dogmas the instantaneous creation of man". 393 U.S. at 104 n. 11.

III

Creationism in Arkansas

Recently, Arkansas once again faced a controversy over the teaching of evolution. In March, 1981, that state enacted a statute requiring the "balanced treatment of creation-science and evolution-science in public schools". Ark. Stat. Ann. §80-1663 *et seq.* (1981 Supp.).

That statute, substantially akin to the one proposed by House Bill 1078, was subject to a court challenge on the grounds that it constituted an establishment of religion, violated the rights of students and teachers to academic freedom, and was impermissibly vague in violation of the Due Process Clause of the Fourteenth Amendment. It is noteworthy that the challengers included bishops of the United Methodist, Episcopal, Roman Catholic, and African Methodist Episcopal churches, an official of the Arkansas Presbyterian churches, the American Jewish Congress, the American Jewish Committee, and the Union of American Hebrew Congregations.

After a ten-day trial, Judge William R. Overton of the United States District Court for the Eastern District of Arkansas issued an opinion finding the statute to be unconstitutional under the Establishment Clause. *McLean v. Arkansas*, 529 F.Supp. 1255 (E.D. Ark. 1982). (We understand that the State of Arkansas has no plans to appeal this decision.)

Having carefully reviewed the Court's opinion in *McLean*, we find its reasoning to be sound and particularly appropriate to a consideration of the constitutionality of House Bill 1078. We of course recognize that, unlike the Court considering the Arkansas statute, we do not have before us the benefit of an evidentiary record concerning House Bill 1078. Nevertheless, given the substantial similarity in substance and effect of House Bill 1078 to the Arkansas statute, we believe it to be entirely appropriate to look for guidance to the findings of the District Court in *McLean*.

Such an approach is not without respectable precedent. Indeed, in *Epperson v. Arkansas*, the Supreme Court itself, in deducing the purpose of an Arkansas statute, relied in great part on the stated purpose of the Tennessee "monkey law", enacted three years before the Arkansas statute. As the Supreme Court noted:

> "[Arkansas] eliminated Tennessee's reference to 'the story of the Divine Creation of man' as taught in the Bible, but there is no doubt that the motivation for the law was the same: to suppress the teaching of a theory which, it was thought, 'denied' the divine creation of man." *Epperson*, 393 U.S. at 109.

The trial before the United States District Court for the Eastern District of Arkansas, therefore, provides us with a valuable laboratory in which scientific creationism, as a mandated subject of public school instruction, has recently been tested against the Establishment Clause of the First Amendment.

IV

Analysis

A. *Purpose*

Judge Overton found that the Arkansas statute "was simply and purely an effort to introduce the Biblical version of creation into the public school curricula" and "passed with the specific purpose by the General Assembly of advancing religion". 529 F.Supp. at 1264.

An important element considered by Judge Overton was the motivation of the bill's actual author, the head of a scientific creationist organization called "Citizens for Fairness in Education".[6] The evidence adduced at the Arkansas trial revealed that the author's efforts in preparing model acts providing for the teaching of creationism and crusading for their adoption were motivated by his opposition to the theory of evolution and his desire to see the Biblical version of creationism taught in the public schools. 529 F.Supp. at 1263.

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[6] We have learned that the author of the Arkansas bill, Paul Ellwanger, supplied the model bill that was the basis for House Bill 1078. As mentioned in the *McLean* opinion, Mr. Ellwanger began in 1977 to collect and propose "model state acts" requiring the teaching of scientific creationsim. He believed that "evolution is the forerunner of many social ills, including Nazism, racism and abortion" and that the crusade to teach creationism in the schools is a "battle . . . between God and anti-God forces". 529 F.Supp. at 1261.

It is inescapably clear that religious concerns are at the heart of the creationist movement. For example, Judge Overton quoted the following from one creationist publication:

> "Evolution is thus not only anti-Biblical and anti-Christian, but it is utterly unscientific and impossible as well. But it has served effectively as the pseudo-scientific basis of atheism, agnosticism, socialism, fascism, and numerous other false and dangerous philosphies over the past century." 529 F.Supp. at 1260 (quoting Morris and Clark, *The Bible Has the Answer*).

House Bill 1078 is substantially based upon—and, in several aspects, virtually identical with—the Arkansas statute invalidated in *McLean.* Despite certain changes in style, tone, and language, both share the same ultimate purpose. This is apparent whether one considers the source of the bill, sponsor statements in published reports [*see, e.g.*, "Teachers fight bill on creationism", *Baltimore News American*, Oct. 16, 1981, at 1A] or, most importantly, the language contained in the bill's Preamble.

For example, the Preamble to House Bill 1078 emphasizes that evolution-science is contrary to the "religious . . . beliefs" of many students and parents . . . (lines 93-98); that failing to teach creation-science abridges freedom of "religious exercise" and undermines "religious . . . beliefs" (lines 99-107); and that the teaching of only evolution-science discriminates against religions that profess creationist beliefs (lines 109-115). It is impossible for us to read such statements without perceiving a religious purpose behind the bill.

It is true that a stated purpose of House Bill 1078 is to permit a "reasonably unbiased presentation of creation-science and evolution-science" (line 47), as well as "insuring academic freedom", "keeping public schools neutral toward students' and parents' diverse philosophical beliefs", and "ceasing any establishment of religions" (lines 185-195). But such lofty disclaimers cannot wish away what to us is the plain fact that religious conviction is the preeminent purpose of House Bill 1078, just as it was found to be the purpose of the Arkansas statute:

> "[A]n 'avowed' secular purpose is not sufficient to avoid conflict with the First Amendment." *Stone v. Graham*, 449 U.S. 39, 41 (1980).

B. *Effect*

House Bill 1078 also fails under the second prong of the Establishment Clause test in that its language leaves no doubt that the effect of the bill would be to promote the advancement of religion in the public schools.

First, like the definition of "creation-science" in the Arkansas statute invalidated by Judge Overton, the definition of "creation-science" in House Bill 1078 unequivocally reflects the influence of the Book of Genesis. The Arkansas bill described creation-science as "sudden creation of the universe, energy and life from nothing"; and, as the Court concluded, the statement could only imply a supernatural creation by God. Although House Bill 1078 does not use the words "life from nothing", it still necessarily conveys the religious concept of *creatio ex nihilo*, sudden creation from nothing. And, as Judge Overton stated:

> "The argument that [the] creation from nothing [referred to] in [the Act] does not involve a supernatural deity has no evidentiary or rational support. To the contrary, 'creation out of nothing' is a concept unique to Western religions. In traditional Western religious thought, the conception of a creator of the world is a conception of God. Indeed, creation of the world 'out of nothing' is the ultimate religious statement because God is the only actor. As Dr. Langdon Gilkey noted, the Act refers to one who has the power to bring all the universe into existence from nothing. The only 'one' who has this power is God." 529 F. Supp. at 1265.

Second, House Bill 1078, consistent with the general position of creationists, takes the approach that there are only two explanations for life as it presently exists—the theory of evolution or the Biblical creationist belief. The Preamble to House Bill 1078 states:

> "WHEREAS, Creation-science is an alternative to evolution-science as an explanation for origins, and *creation-science like evolution-science can be presented from a strictly scientific standpoint without any religious doctrine* because there are qualified scientists who conclude that scientific evidence better supports creation-science, just as there are qualified scientists who reach similar conclusions

> about evolution-science, and because scientific evidence and related inferences have been presented by qualified scientists for creation-science just as they have been presented for evolution-science. . . ." Lines 133-41 (emphasis added).

However, the evidence at the Arkansas trial simply does not support the proposition that creation-science *is* a scientific theory or *can* be presented from a scientific viewpoint. The emphasis on "origins" as a theory of evolution is peculiar to creationist literature, and the scientific community does not consider the actual origins of life as part of the evolutionary theory. "The theory of evolution assumes the existence of life and is directed to an explanation of *how* life evolved." 529 F.Supp. at 1266 (emphasis in the original).

Furthermore, as the *McLean* opinion points out, creation-science, with its emphasis on creation rather than evolution, "is not science because it depends upon a supernatural intervention which is not guided by natural law. It is not explanatory by reference to natural law, is not testable and is not falsifiable". 529 F.Supp. at 1267. No scientific journal has ever published an article espousing the creation-science theory. Indeed, House Bill 1078 itself states that "creation-science is not an unquestionable fact of science" and acknowledges that it cannot be "experimentally observed, fully verified, or logically falsified" (lines 87-91). It makes the same assertions concerning the theory of evolution, but they are rhetorical statements *without* the support of the scientific community.

Third, the bill does not avoid constitutional infirmity by substituting "reasonably unbiased" presentation for the Arkansas requirement of "balanced" treatment. Reasonably unbiased presentation, as defined, clearly is intended to provide that "equal treatment" will be given creation-science and evolution. Under the First Amendment, however, "[s]eparation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally". *McCollum v. Board of Education*, 333 U.S. at 227.

Thus, the lack of scientific authority and the inherent religious nature of "creation-science" lead us to conclude that requiring its teaching in the public schools would not only have the effect of advancing religion but would promote one religious belief over another.

C. *Entanglement*

Finally, we believe that implementation of the bill would cause serious problems under the entanglement prong of the Establishment Clause test.

The bill requires "content balance" and "reasonably unbiased presentation" of the theory of evolution and creation-science. As defined, this means equal time, equal number of class periods or hours, equal number of pages in texts, and equal number of library volumes dealing with both of these theories. With regard to text pages and library volumes, the bill purports to require equality only to the extent of availability. However, there might well be great difficulties in finding any materials on creation-science that would be appropriate for school use. In Arkansas, the individual assigned the duty of preparing a curriculum guide on creationism found that all of the available materials were unacceptable, because "they were permeated with religious references". 529 F. Supp. at 1270.

Such legislation necessarily involves an enormous potential for government entanglement with religion. For example, supervisors will have difficulties ensuring that teachers devote exactly the same number of hours to the teaching of evolution-science and creation-science. And, as Judge Overton observed:

> "The State Department of Education, through its textbook selection committee, school boards and school administrators will be required to constantly monitor materials to avoid using religious references. The school boards, administrators and teachers face an impossible task. How is the teacher to respond to questions about a creation suddenly and out of nothing? How will a teacher explain the occurrence of a worldwide flood? How will a teacher explain the concept of a relatively recent age of the earth? The answer is obvious because the only source of this information is ultimately contained in the Book of Genesis." 529 F.Supp. at 1272.

One might also ask: How could we justify mandating the teaching of "creation-science" in our public schools and not, for example, also mandate the counterpart teachings of traditions such as Hinduism, Confucianism, and Islam? And, if those teachings are to be taught, what of the more controversial teachings of the Reverend Sun Myung Moon and the Unification Church, or the teachers of the Science of Creative Intelligence-Transcendental Meditation (SCI/TM)?

All of this is the essence of religious entanglement. And that is precisely what is forbidden by the First Amendment. As we have previously noted:

> "The strain placed on school authorities by requiring them to make such religious judgments and to monitor their enforcement would entangle them in conflicts among religious groups, with the schoolhouse as the field of battle." 65 *Opinions of the Attorney General* 186, 196 (1980).

V

Conclusion

In summary, it is our opinion that House Bill 1078 has as its purpose and effect the advancement of religion and would foster an excessive governmental entanglement with religion.

Because we are "a religious people", *Zorach v. Clauson*, 343 U.S. 306, 313 (1952), the notion of government neutrality toward religion is often difficult to accept. But we must remember that many of our forebearers came to these shores to escape religious persecution at the hands of hostile government and that we are today a nation of diverse, frequently conflicting, religious faiths. Then, perhaps, we can better understand that the bond that unites us all is our agreement that government should be neutral in matters of religion. The price of religious liberty, in short, is official neutrality.

STEPHEN H. SACHS, *Attorney General*

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Opinions and Advice

CONSTITUTIONAL LAW—FIRST AMENDMENT—ESTABLISHMENT CLAUSE—REQUIRING PUBLIC ELEMENTARY SCHOOL STUDENTS TO PARTICIPATE IN PERIOD OF PRAYER, BIBLE READING, OR MEDITATION WOULD VIOLATE ESTABLISHMENT CLAUSE

March 12, 1982

The Honorable Howard A. Denis,
Senate of Maryland

You have requested our opinion on the constitutionality of Senate Bill 2 (Public Schools—Mandatory Prayer, Meditation, or Holy Scripture Reading), which proposes to amend §7–104 of the Education Article of the Maryland Code, pertaining to a daily period of silent meditation in the school system.

Presently, §7–104 reads as follows:

"§7–104. **Daily period of silent meditation.**

(a) Principals and teachers in each public elementary and secondary school in this State may require all students to be present and participate in opening exercises on each morning of a school day and to meditate silently for approximately 1 minute.

(b) During this period, a student or teacher may read the holy scripture or pray."

If Senate Bill 2 were to pass in its present form, it would amend this section to read:

"§7–104. **Daily period of silent meditation.**

(a) Principals and teachers in each public elementary and secondary school in this State shall require all students to be present and participate in opening exercises on each morning of a school day.

(b) During this period, each of the students shall participate in one of the following:

(1) Prayer;

(2) Reading of the Holy Scripture; or

(3) Meditation."

In effect, the amendments would remove the discretion afforded teachers and principals under §7–104 and would require a morning "opening exercise" during which each student, without an opportunity to be excused, must choose to pray, read the Bible, or meditate.

For the reasons given below, it is our opinion that if §7–104 were altered in this way, it would be unconstitutional under the Establishment Clause of the First Amendment to the United States Constitution.

I

The Establishment Clause

The Establishment Clause prohibits Congress and the states from enacting any law "respecting an establishment of religion".[1]

In order not to contravene the mandates of the Establishment Clause, a statute must satisfy three principles:

> (1) It must have a secular purpose;
>
> (2) It must have a principal or primary effect that neither advances nor inhibits religion; and
>
> (3) It must not foster an excessive government entanglement with religion.

See, e.g., Widmar v. Vincent, 454 U.S. 263, 271 (1981); *Stone v. Graham,* 449 U.S. 39, 40 (1980). If any of these three principles are violated by a statute, it will be struck down as being unconstitutional. *Id.*[2]

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[1] The Establishment Clause has been made applicable to the states through the Fourteenth Amendment. *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940).

[2] On three recent occasions, we have examined the history and interpretation of the Establishment Clause. *See* 67 *Opinions of the Attorney General* 26 (1982) (statute requiring "balanced" presentation of "creation-science" and "evolution-science" would violate Establishment Clause); 65 *Opinions of the Attorney General* 186 (1980) (distributing Gideon Bibles to public elementary school students violates the Establishment Clause); 64 *Opinions of the Attorney General* 134 (1979) (teaching ethical values in the public schools is constitutionally permissible).

II

Relevant Decisions

A. *The Supreme Court*

The Supreme Court has twice discussed at length the role of prayer and Bible reading in public schools.

In *Engel v. Vitale*, 370 U.S. 421 (1962), the State of New York had adopted a program by which a brief, denominationally neutral prayer was to be said aloud by each class in the presence of a teacher at the beginning of each school day. Justice Black, speaking for the Court, concluded that there could be "no doubt that New York's state prayer program officially establishes the religious beliefs embodied in the Regent's prayer". 370 U.S. at 430. It was irrelevant that the prayer was nondenominational or that the program did not require all pupils to recite the prayer but permitted those who wished to remain silent or be excused from the room to do so. "Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause". *Id.*

One year later, in *School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203 (1963), the Supreme Court held that state laws requiring schools to begin each day with readings from the Bible and a recitation of the Lord's Prayer were violative of the Establishment Clause. The Court found that these exercises were part of the prescribed curricular activities of students who were required by law to attend school. Further, the exercises were held in school buildings under the supervision and with the participation of teachers employed in those schools. These circumstances, as well as "the religious character of the exercises", were sufficient to find such practices to be unconstitutional. 374 U.S. at 223. In so finding, the Court commented:

> "The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to

> advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality." 374 U.S. at 226.

B. *Other Cases*

Notwithstanding the principles set forth by the Supreme Court in these cases, efforts to have some type of prayer or scripture readings in the public schools have continued. Indeed, three very recent cases dealing with prayer are highly pertinent to the present inquiry.

In *Brandon v. Board of Education of Guilderland Central School District*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981), a student group, "Students for Voluntary Prayer", had initiated action against public school authorities because of their refusal to allow communal prayer meetings in school immediately before school commenced. The students argued that, by not permitting communal prayer meetings prior to school, their rights to free exercise of religion were infringed. The Second Circuit disagreed and found that, if such prayer meetings were to be permitted, there would be an Establishment Clause violation. The Court stated:

> "Our nation's elementary and secondary schools play a unique role in transmitting basic and fundamental values to our youth. To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic interference is too dangerous to permit." 635 F.2d at 978.

The Ninth Circuit, in *Collins v. Chandler United School District*, 644 F.2d 759 (9th Cir. 1981), *cert. denied*, 454 U.S. 863 (1981), relied in good part on the *Brandon* decision in refusing to sanction a student council's recitation of prayers and Bible verses of its choosing at exercises held prior to school assemblies. The students had emphasized that participation in these sessions was voluntary and that a student who wished to be could be excused. Nevertheless, the Court found that the selection amounted to a choice between listening to prayer or foregoing the opportunity to attend a major school function. It stated: "It is difficult to conceive how this choice would not coerce a student wishing to be part of the social mainstream and, thus, advance one group's religious beliefs." 644 F.2d at 762.

In *Brandon* and *Collins*, the Supreme Court denied certiorari, thus leaving these decisions intact. However, the Court unanimously affirmed the Fifth Circuit's decision in *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982), which struck down a Louisiana statute and regulation permitting students and teachers who so desired to observe a period of silent meditation, during which teachers could ask whether any student wished to offer a prayer and, if no student volunteered, the teacher could pray. The statute limited any prayer offered to no longer than five minutes and provided that no student or teacher could be compelled to pray. The Fifth Circuit found the statute inconsistent with the Establishment Clause because it promoted prayer, an inherently religious practice: "Prayer is an address of entreaty, supplication, praise, or thanksgiving directed to some sacred or divine spirit, being, or object. That it may contemplate some wholly secular objective cannot alter the inherently religious character of the exercise." 653 F.2d at 901.

As we indicate in the more detailed analysis that follows, we believe the principles discussed in these cases compel a finding that the amendments to §7–104 proposed by Senate Bill 2 are unconstitutional.

III

Purpose of Bill

The stated purpose of Senate Bill 2 is to *require* public school students "to participate in either prayer, meditation, or the reading of the Holy Scripture during a certain school period".

At the outset, we note that current case law suggests no constitutional problem posed by a period of silent meditation, as now permitted under §7–104. As Justice Brennan has written:

> "It has not been shown that readings from the speeches and messages of great Americans, for example, or from the documents of our heritage of lib-

> erty, daily recitation of the Pledge of Allegiance, or even the observation of *a moment of reverent silence at the opening of class*, may not adequately serve the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government." *Abington School Dist. v. Schempp*, 374 U.S. at 281 (emphasis added).

The act of meditating does not necessarily have to be a religious exercise and may connote "serious reflection or contemplation on a subject which may be religious, irreligious, or nonreligious". *Gaines v. Anderson*, 421 F. Supp. 337, 342 (D. Mass. 1976). Thus, a state statute mandating a period of silence "is not *per se* an invalid exercise of legislative power". *Id.*[3]

Nor is a statute that, like present §7–104, permits a required meditation period during which a student or teacher may silently pray or read the Holy Scripture necessarily invalid. As previously observed, §7–104(b) "reflects nothing more than a concern that no student or teacher, by virtue of this statute, be denied the free exercise of his or her religion". Letter of Advice (Senate Bill 1) from George A. Nilson, Deputy Attorney General, to James Clark, Jr., President of the Senate (February 7, 1977).[4]

However, Senate Bill 2 would not merely accommodate a student's constitutional right under the Free Exercise Clause; rather, by mandating that *all* students must affirmatively

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[3] The Court in *Gaines v. Anderson* upheld a statute that the Court construed as providing, in a manner similar to present §7–104, for a period of silence during which one could meditate or pray. That statute—like present §7–104—mandated a moment of silence; but—unlike Senate Bill 2—"there [was] no command that [the students either] meditate or pray". 421 F. Supp. at 344.

[4] The February 7, 1977 advice was a legislative letter—which is customarily concerned with the facial constitutionality of a bill and thus does not ordinarily focus on motivation or application of the legislation. It concluded that the existing meditation law could be constitutionally amended to require principals and teachers to require students to participate in silent meditation. That letter, however, did not speak to a proposal as broad as that contemplated by Senate Bill 2 and, moreover, was written before the Supreme Court's decision in *Treen* and its denial of certiorari in *Brandon* and *Collins*.

make a conscious and deliberate choice as to whether or not to pray or read the Holy Scriptures, it would encroach on the separation between church and State required by the Establishment Clause. Thus, in our opinion, the proposed provision for a "compulsory choice" could only have as its primary purpose the promotion of prayer and Bible reading, essentially religious exercises, in the public schools. It is significant that there is no stated or apparent secular purpose for the proposed changes. Indeed, one publicized discussion of the bill indicates that its purpose is to bring prayer and the Bible back into the school system. *Baltimore Evening Sun*, Feb. 10, 1982, at F3.

In this regard, we also note that Senate Bill 2 would delete the present reference in §7–104(a) to "silent" meditation, suggesting that the required prayer or Bible reading could be done aloud. It is beyond dispute that any such open expression of religious views or practices would be unconstitutional under *Engel* and *Abington*. However, as discussed more fully below, even an amendment to the bill that would limit its scope to "silent" prayer or Bible reading would not cure the constitutional infirmities of the bill.

In *Stone v. Graham*, 449 U.S. 39 (1980), the Supreme Court declared unconstitutional the posting of a copy of the Ten Commandments, purchased with private contributions, on the wall of each classroom in the state. The Court reasoned that, despite an avowed secular purpose by school authorities for the posting of the Commandments, it was "undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact". 449 U.S. at 41. Thus, the Court found that the "purpose" test for constitutionality under the Establishment Clause was not met, and the statute was stricken. Of special relevance to this inquiry, the Court observed that it did not matter that the Bible verses were "merely posted on the wall, rather than read aloud as in *Schempp* and *Engel*, for 'it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment' ". 449 U.S. at 42.

Similarly, in the *Treen* case, the Fifth Circuit, affirmed by the Supreme Court, pointed out that the plain language of the Louisiana statute "makes apparent their predominantly religious purpose". *Karen B. v. Treen*, 653 F.2d at 901. It found that, since prayer was a "primary religious activity in itself, its observance in public school classrooms has, if anything, a more obviously religious purpose than merely displaying a copy of a religious text in the classroom". *Id.*

In this instance, we believe there can be no other purpose for Senate Bill 2 than to encourage two unquestionably religious activities—prayer and Bible reading. Thus, the bill must fail under the "purpose" test alone.

IV

Effect of Bill

There is a long history of efforts to place Bible reading and daily prayer in the public schools, efforts that have been marked by debate, criticism, and proscription by courts and legislative councils. *Abington,* 374 U.S. at 267. Although legislators and educators have indicated that such practices serve certain secular aims (teaching the principles of virtue, morality, and patriotism), there is no doubt that their origins were "unambiguously religious, even where the educator's aim was not to win adherents to a particular creed or faith". *Abington,* 374 U.S. at 271. Indeed, there can be no question that both prayer and Bible reading "have always been designed to be, and have been regarded as, essentially religious exercises". *Abington,* 374 U.S. at 278. Therefore, in light of the fact that Senate Bill 2 would affirmatively require students to choose either to pray, read the scriptures, or meditate, we think it inevitable that it will have the effect of promoting inherently religious practices.

Additionally, we note that the bill would permit the reading of "the Holy Scripture" as an alternative choice, but makes no reference to holy books of other religions.[5] It would, therefore, have the effect of showing preference for those religions with a Judeo-Christian heritage over others with different holy books—e.g., Confucianism, Islam, Hinduism. Even if the statute would permit the reading of these other holy books, however, there would still remain the basic flaw that "the subject matter of the exercise is sectarian in character". *Abington,* 374 U.S. at 283. Consequently, the bill fails the second prong of the test because the neutrality and separatism required by the Establishment Clause "is a requirement to abstain from fusing

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[5] *See* note 6 below and accompanying text.

functions of Government and of religious sects, not merely to treat them all equally". *McCollum v. Board of Education*, 333 U.S. 203, 227 (1948).

Finally, the "choice" presented to students under Senate Bill 2 in the "institutionally coercive" setting of the public schools may not be a wholly free one:

> "That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and nonconformity is not an outstanding characteristic of children." *McCollum*, 333 U.S. at 227 (Frankfurter, J., concurring).

Thus, Senate Bill 2 can reasonably be expected to result in the advancement of religious beliefs. *Id.* It is no response that students may voluntarily choose to meditate rather than pray; nor would the bill's infirmity be corrected if students were permitted to leave the room during the required opening exercises. Unlike an alleged violation under the Free Exercise Clause of the First Amendment, it is not necessary under the Establishment Clause to show the coercive effect of an enactment in order to find a violation. *Abington*, 374 U.S. at 223; *Engel*, 370 U.S. at 430.

V

Entanglement

In addition to failing the "purpose" and "effect" tests, we believe that Senate Bill 2 will inevitably result in inappropriate governmental involvement in religious affairs.

The required opening exercises are held in school buildings under the supervision and with the participation of school teachers after the normal school day has begun. Even if the statute were interpreted as requiring private, silent prayer or Bible reading (although Senate Bill 2 would eliminate the "silent" prerequisite of §7–104(a)), teachers would still have an obligation to supervise the implementation of the program to make sure each student chooses one of the three alternatives and does so voluntarily.

Serious questions of administration could arise. Will teachers have to ask each student to publicly tell them if they have prayed, meditated, or read the Holy Scriptures? Will school authorities have to make available one or more versions of the "Holy Scriptures"? Will State funds be used for these purchases? Will holy books of all faiths be represented?[6]

It seems clear that "the very restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role give rise to entanglement between church and state". *Lemon v. Kurtzman,* 403 U.S. 602, 620–21 (1971); *Treen,* 653 F.2d at 902.

VI

Conclusion

In the words of Justice White, there is no "litmus-paper test" to distinguish the permissible from the impermissible under the Establishment Clause. Such cases are not easy, and they stir deep feelings. *Committee for Public Education v. Nyquist,* 413 U.S. 756, 821 (1973). It is essential to American public education that students be permitted to be schooled "in an atmosphere free of parochial, divisive, or separatist influences of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions". *Abington,* 374 U.S. at 242. Matters of personal

[6] As we have stated before:

> "[School authorities] would have to accommodate the several versions of the Bible accepted by Roman Catholics (the Douay-Rheims, the New American Bible, A New Translation from the Latin Vulgate, the Jerusalem Bible); Eastern Orthodox (the Revised Standard Version); Protestants (the King James Bible and its revisions, such as the English Revised Version, the American Revised Version, the Revised Standard Version, and the New English Bible); and Jews (the Torah, in numerous translations). *See* L. Rosten, Religions of America 353 (1975). Assistance in the distribution of the holy books of other religions could not be denied; these would include copies of the Vedas (Hinduism), the Koji-ki and Nihon-gi (Shinto), the Avesta (Zoroastrianism, Parsi Religion), the Tao-teh-king (Taoism), the Angas (Jainism), the Tripitaka (Buddhism), the Classics (Confucianism), the Koran (Islam), and the Granth (Sikhism). *See* R. Hume, The World's Living Religions 2 (1959)." 65 *Opinions of the Attorney General* 186, 195 (1980).

conscience—whether or how one prays, reads the Bible, or meditates—should not be open to public scrutiny or public mandate.

"The heart of the matter," as we have recently had occasion to point out, "is the simple proposition that 'both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere'. *McCollum,* 333 U.S. at 212. Because we are 'a religious people', *Zorach,* 343 U.S. at 313, this notion of neutrality is sometimes difficult to accept. But when we remember that many of our forebears came to these shores to escape religious persecution at the hands of hostile government, and that we are today a nation of over two hundred million citizens of diverse, frequently conflicting religious faiths, we can begin to understand that the common bond that unites us all is the agreement that government should be neutral in matters of religion. The price of religious liberty, in short, is official neutrality." 65 *Opinions of the Attorney General* 186, 196–97 (1980).

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CONSTITUTIONAL LAW—FIRST AMENDMENT—FREE SPEECH CLAUSE—CRIMINAL LIBEL—PROPOSED GROUP DEFAMATION STATUTE VIOLATES FREE SPEECH CLAUSE

March 18, 1982

The Honorable Luiz R. S. Simmons
Maryland House of Delegates

You have requested our opinion on the constitutionality of House Bill 1018 (Crimes and Punishments—Group Defamation), which, among other things, would make it a crime to disseminate written material that defames the members of racial or religious groups.

House Bill 1018 would add the following new §267A to Article 27:

> "(a) In this section, the following words have the meanings indicated.
>
> (1) 'Defamatory matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or recording which holds the citizens of any race, color, creed, or religion up to public contempt, shame, disgrace, or obloquy, or causes the citizens of any such group to be shunned, avoided, or injured in occupation and which matter, taken as a whole, arouses, and is intended to arouse, hatred or contempt for the citizens of any such group.
>
> (2) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity.
>
> (3) 'Distribute' means to transfer possession of, whether with or without consideration.
>
> (4) 'Knowingly' means having knowledge of the character and content of the subject matter.
>
> (5) 'Maliciously' means having knowledge that the content of the defamatory matter contains false statements or representations or, with the reckless disregard as to the truth or falsity of the statement or representations in the content of the defamatory matter.

(b) Any person who knowingly and maliciously sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any defamatory matter is guilty of a misdemeanor, and on conviction shall be subject to:

(1) For a first offense, a fine of not more than $1,000 or imprisonment for not more than 1 year, or both; and

(2) For any subsequent offense, a fine of not more than $5,000 or imprisonment for not more than 3 years, or both."

We understand that one stimulus to your proposal is the advent of hate literature, distributed by such groups as the American Nazi Party and the Ku Klux Klan and directed at racial and religious minorities. Although we share your disgust with such materials and recognize that your bill was drafted with an eye towards meeting the constitutional objections inherent in any attempt to legislate in this area, we nevertheless think House Bill 1018 would violate the First Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment.

I

Criminal Libel and Evolution of the First Amendment Doctrine

The notion that a person can be criminally prosecuted for defamation has its roots in the common law. *See State v. Browne*, 206 A.2d 591, 594-95 (N.J. Sup. 1965); Kelly, *Criminal Libel and Free Speech*, 6 Kan. L. Rev. 295 (1958). In Maryland, criminal libel was a common law offense. *Robinson v. State*, 108 Md. 644 (1908). For some time, it remained viable in this State [*see Norvell v. Safeway Stores, Inc.*, 212 Md. 14, 22 (1957)]—at least until the last two decades, when Supreme Court decisions effectively precluded enforcement of the common law crime [*see Garrison v. Louisiana*, 379 U.S. 64 (1964); *Ashton v. Kentucky*, 384 U.S. 195 (1966)].

Group libel or group "villification" is a type of criminal libel that is of more recent vintage, and it has its source in statutory law rather than the common law. Although Maryland has never had such a statute, a few states have.

About 30 years ago, in *Beauharnais v. Illinois*, 343 U.S. 250 (1952), the Supreme Court, by a 5–4 decision, upheld the constitutionality of an Illinois group defamation law.[1] Justice Frankfurter, speaking for the majority, identified the gravamen of the offense to be the prohibition of words "liable to cause violence and disorder"; he noted that the statute thus mirrored the traditional justification for criminally punishing libels—namely, their "tendency to cause breach of the peace". 343 U.S. at 254. Such utterances, he said, were outside the protection of the First Amendment because they "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality". 343 U.S. at 257. He added:

> "[I]f an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group, unless we can say that this is a wilful and purposeless restriction unrelated to the peace and well-being of the State." 343 U.S. at 258.

The majority opinion, after examining the history in Illinois of racial rioting and extreme racial and religious propaganda, concluded that the Illinois legislature was not without reason "in seeking ways to curb false or religious defamation of racial and religious groups made in public places and by means calcu-

[1] The Illinois statute provided, in relevant part:

> "It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots".

lated to have a powerful emotional impact on those to whom it was presented". 343 U.S. at 261.[2]

Four justices dissented, most notably Justice Black, who argued that the law of criminal libel had never been permitted to punish defamation against groups, as distinct from individuals, and that the majority's concern for breach of peace could not be extended beyond the face-to-face name-calling of "fighting words" to justify restriction on the various forms of speech. 343 U.S. at 272–73. In addition, Justice Black noted:

> "This Act sets up a system of state censorship which is at war with the kind of free government envisioned by those who forced adoption of our Bill of Rights. The motives behind the state law may have been to do good. But the same can be said about most laws making opinions punishable as crimes. History indicates that urges to do good have led to the burning of books and even to the burning of 'witches'.
>
> No rationalization on a purely legal level can conceal the fact that state laws like this one present a constant overhanging threat to freedom of speech, press and religion . . . [T]he same kind of state law that makes Beauharnais a criminal for advocating segregation in Illinois can be utilized to send people to jail in other states for advocating equality and nonsegregation." 343 U.S. at 274.[3]

Twelve years after *Beauharnais*, the Supreme Court started a revolution in the law of libel by declaring, in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), that "libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." 376 U.S. at 269. Comparing defamation of official reputation to punishment for seditious libel and libel on govern-

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[2] In addition to holding that the Illinois statute did not offend the First Amendment, the majority also concluded that the legislation was not vague or otherwise violative of due process.

[3] The other dissenters were Justice Douglas, who argued that the speech at issue presented no clear and present danger; Justice Reed, who thought the statute to be impermissibly vague; and Justice Jackson, who attacked the purported lack of safeguards in the statute. 343 U.S. at 277–305.

ment, the Court fashioned a constitutional rule requiring the showing of knowing or reckless falsity before a defamation judgment could be obtained for criticism of a public official. 376 U.S. at 276, 279–80, and 291–92.[4]

Eight months later, the Court applied this new constitutional rule to criminal libel. In *Garrison v. Louisiana*, 379 U.S. 64 (1964), the justices reversed a conviction for the criminal libel of public officials where that conviction had been obtained without a showing of knowing or reckless falsity. The Court said that, although "calculated falsehood" did not enjoy constitutional protection, if freedom of expression was to have breathing space, even erroneous statements about public officials had to be safeguarded. 379 U.S. at 74–75. In reversing the conviction, the Court noted that a preference for civil libel "had substantially eroded the breach of the peace justification for criminal libel laws", that "except as a weapon against seditious libel, [such] criminal prosecution [had fallen] into virtual desuetude", and that, under modern conditions, "it can hardly be urged that the maintenance of peace requires a criminal prosecution for private defamation". 379 U.S. at 69.[5]

Two years after *Garrison*, in *Ashton v. Kentucky*, 384 U.S. 195 (1966), the Court did more than merely criticize the law of criminal libel: it effectively eviscerated both the common law offense and its primary rationale. It concluded that, by defining the offense as speech "calculated to create disturbances of the peace", the state had established too vague a standard to sustain a criminal conviction.

The effect of the *Ashton* decision on group libel and on *Beauharnais* is especially dramatic. If, as post-*Beauharnais* cases indicate, group libel is not automatically immune from the protection of the First Amendment and could only be justified as involving regulation of speech tending to breach of the peace, how could anyone ever be prosecuted for such defamation if, as declared in *Ashton*, the central element of the of-

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[4] In *New York Times Co.*, the Court characterized *Beauharnais* as a case involving a publication that was "both" defamatory of a racial group and liable to cause violence and disorder. 376 U.S. at 268.

[5] In *Garrison*, the Court described *Beauharnais* as involving speech "especially likely to lead to public disorder". 379 U.S. at 70.

fense is unconstitutionally vague?[6] Thus, in our view, *Beauharnais* has been substantially undermined even if not expressly overruled.[7]

This overview of the Supreme Court treatment of criminal or group libel would be incomplete without a discussion of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), even though that case involved a civil action for defamation of a private individual. In *Gertz*, the Court held that a state was not prohibited from permitting civil defamation liability of a private individual to be imposed on the basis of negligence, as long as presumed or punitive damages were awarded only on the basis of a showing of knowing or reckless falsity. In so doing, however, the Court significantly narrowed the reach of its former assertion that "calculated falsehood" deserved no constitutional protection.[8] The Justices said that only "false statements of fact" are without constitutional value; ideas and opinions were a different matter.

> "We begin with the common ground. Under the First Amendment there is no such thing as a false

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[6] In 1969, the Supreme Court dealt a further blow to prosecutions for speech related to breach of the peace when it held that the First Amendment did not permit a state "to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action". *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

[7] Indeed, a growing number of courts have suggested that *Beauharnais* has failed to survive *New York Times, Garrison*, and *Ashton*. *See, e.g., Collin v. Smith*, 578 F.2d 1197, 1205 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978) (Court doubts that *Beauharnais* "remains good law at all after the constitutional libel cases"); *Tollett v. United States*, 485 F.2d 1087, 1094 (8th Cir. 1973) ("[W]ith the advent of *Garrison* and *Ashton*, a strong argument may be made that there remains little constitutional vitality to criminal libel laws"); *Anti-Defamation League of B'nai B'rith v. F.C.C.*, 403 F.2d 169, 174 n. 5 (D.C. Cir. 1968) (concurring opinion of Judge Wright), *cert. denied*, 394 U.S. 930 (1969) ("[F]ar from spawning progeny, *Beauharnais* has been left more and more barren by subsequent First Amendment decisions, to the point where it is now doubtful that the decision still represents the views of the Court"); *United States v. Handler*, 383 F.Supp. 1267, 1277 (D.Md. 1974) (Court agrees with the views of the 8th Circuit in *Tollett, supra*). *See also Report on Proposed Federal Group Libel Legislation*, H.Jud.Comm., 88th Cong., 1st Sess. (1963) (Committee staff expresses "serious doubt" as to the importance of *Beauharnais* as precedent).

[8] *Cf. Garrison v. Louisiana*, 379 U.S. at 75; *Time, Inc. v. Hill*, 385 U.S. 374, 390 (1965).

idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." 418 U.S. at 339–40.

In addition, the Court engaged in a rigorous analysis of the state interests purportedly served by defamation actions to determine if those interests were "strong and legitimate". 418 U.S. at 348. The Court recognized that the state had an interest in establishing a mechanism for compensating private individuals for the harm inflicted by defamatory falsehood. 418 U.S. at 341. Unlike public officials and public figures, private individuals do not ordinarily have "a realistic opportunity to contest false statements" and, as a consequence, are "more vulnerable to injury". *Id.* However, the Court held, the state interest extended no further than compensation for actual injury. 418 U.S. at 348–49. Stiffer penalties, such as punitive or presumed damages, are "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence". 418 U.S. at 350. As such, they exacerbate "the danger of media self-censorship" and are "wholly irrelevant" to any legitimate state interest. *Id.*

II

Analysis of House Bill 1018

In light of these principles, we turn to an examination of House Bill 1018. Unlike the statute at issue in *Beauharnais*, House Bill 1018 does not purport to be concerned with breaches of the peace, nor does it incorporate such a standard into the proposed statute. *See Collin v. Smith*, 578 F.2d 1197, 1204 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978).[9] Rather, it attempts to resolve First Amendment problems by punishing only group defamation that is knowingly or recklessly false.[10]

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[9] If the bill did incorporate such a standard, it would suffer from the same constitutional problems as the criminal libel offense invalidated in *Ashton*.

[10] The bill also attempts to circumscribe its scope by specifying a "scienter" requirement and incorporating some of the limitations normally found in obscenity statutes.

The rationale of the bill hinges on the notion that "calculated falsehood" is not part of the "exposition of ideas" protected by the First Amendment. This premise, however, is not entirely true. At best, only the deliberately false *statement of fact* is constitutionally unprotected, not ideas and opinions. *See Gertz v. Robert Welch*, 418 U.S. at 339–40; *Collin v. Smith*, 578 F.2d at 1203.

In this regard, the type of speech that would be reached and affected by House Bill 1018 is more aptly characterized as opinion or ideology. As the courts have indicated, the line between statements of facts and the expression of ideas and opinions is a fine one at best. *See Anti-Defamation League of B'nai B'rith v. F.C.C.*, 403 F.2d 169, 174 (D.C. Cir. 1968) (concurring opinion of Judge Wright), *cert. denied*, 394 U.S. 930 (1969) ("[T]his kind of speech, detestable as some of its antisemitic and racist aspects may be, approaches the area of political and social commentary. To this extent, it makes a stronger claim for First Amendment protection."); *Collin v. Smith*, 578 F.2d at 1203 (Court disagrees that a group defamation ordinance can be said to be limited to "statements of fact", false or otherwise: "To the degree that the symbols in question can be said to assert anything specific, it must be the Nazi ideology, which cannot be treated as a mere false 'fact' ".).

These cases suggest what we also perceive. In a republic that prides itself on being a "nation of nations"—in a pluralistic society in which, for many, ethnic, religious, and racial identification plays a respected part—it is difficult, if not impossible, to quarantine racial and religious commentary from political discourse generally.

Hence, in the context of social, religious, and political group commentary especially, "statements of fact" cannot in any realistic sense be segregated from the constitutionally protected ideas, opinions, and beliefs with which they are necessarily interwoven. All opinion purports in some sense to be derived from putative "facts"—be they true or false, impartial or biased, expressed or implied. It is impossible, in our view, to censor the former in a manner such as proposed by House Bill 1018 without effectively censoring or, at best, unduly stifling the latter. Even a legitimate narrow attempt to reach and prevent only the expression of "false facts" necessarily will have a chilling effect on the constitutionally-protected free public exchange of ideas, opinions, beliefs, and, especially, political debate.[11]

In attempting to separate legitimate from illegitimate speech, legislators may use only the "most sensitive tools". *See Speiser v. Randall*, 357 U.S. 513, 525 (1957). House Bill 1018, in contrast, employs the bludgeon of a criminal sanction to attempt such a separation. Because of the fine distinction between—and the resultant inability to separate—the expression of "facts" from the expression of "opinion", and because the method of criminal sanction proposed by House Bill 1018 to attempt that separation is so harsh, we believe that the bill would, to borrow from the Supreme Court, unnecessarily and unconstitutionally "exacerbate . . . the danger of . . . self-censorship". *Gertz v. Robert Welch*, 418 U.S. at 350.

Thus, the speech prohibited by House Bill 1018 is not outside constitutional protection. The question then becomes whether, given the broad reaches and effect of the bill, there exist compelling reasons justifying such an abridgment of speech. In other words, are the interests served by House Bill 1018 sufficiently strong and compelling to outweigh the protections and rights guaranteed by the First Amendment? *See Gertz v. Robert Welch*, 418 U.S. at 348. We think not.

In our view, House Bill 1018 cannot be justified as a mechanism to compensate individual members of racial or religious groups for the harm of defamatory falsehood.[12] Indeed, no member of a large class or group presently has an individual right of action for group defamation. *See* Annot., *Right of Individual Member of Class or Group Referred to in a Defamatory Publication to Maintain Action for Libel or Slander*, 70 A.L.R.2d 1382, §3 (1960). And, as detestable as the speech sought to be prohibited by House Bill 1018 may be, groups, as distinguished from individuals, cannot be said to be without a

[11] It is noteworthy that, in the past, criminal libel has often been used to punish political speech. *See State v. Browne*, 206 A.2d 591, 596 (N.J.Sup. 1965) (According to a study of criminal libel cases, "[d]uring the period from 1920 to 1955, there were 91 reported cases that charged criminal libel, and approximately half of that number were classified as distinctly political"); *Norvell v. Safeway Stores, Inc.*, 212 Md. 14, 22 (1957) ("[W]e have found no Maryland case where criminal libel has been brought except in cases of public officials".).

[12] As indicated earlier, it is apparent that House Bill 1018 cannot be justified on any breach of the peace theory.

realistic opportunity to contest such false statements. *See Gertz v. Robert Welch*, 418 U.S. at 341. A group, and its supporters, is far more able than an individual to defend itself in the war of ideas, by marshalling public opinion and ultimately directing listeners to the truth.[13]

III

Conclusion

In summary, even when calculated falsehoods about groups emerge from political, racial, and religious controversies, the First Amendment requires that the resolution of such issues be left to the public forum of ideas rather than to the criminal courts.[14] For these reasons, we believe House Bill 1018 would violate the First Amendment.

It should go without saying that the knowingly false disparagement of the race or creed of others is despicable. We have an obligation to fight it. Indeed, our great strength as a free people is our ability to fight such hateful distortions with the truth—and to win. But we have another obligation as well: to remember that freedom of speech and expression is the cornerstone of our liberties.

STEPHEN H. SACHS, *Attorney General*

ROBERT A. ZARNOCH, *Assistant Attorney General*

AVERY AISENSTARK
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Opinions and Advice

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[13] A 1979 Yale Law Journal note suggests that a group defamation statute could still be viable if it only punished false assertion of facts not appealing to the conscious faculties of the listener and causing serious harm to racial, ethnic, or religious groups. *See* Note, *Group Villification Reconsidered*, 89 Yale L.J. 308, 325–26 (1979). However, this student note does not make clear how the bludgeon of the criminal law will separate protected "false opinion" from prohibited "false fact".

[14] It is noteworthy that in another sensitive area—commentary about government—"knowing or reckless falsity" would not justify civil or criminal punishment of a libel on government. *See Louisiana v. Time, Inc.*, 249 So.2d 328 (La.App. 1971); Annot., *Right of Government Entity to Maintain Action for Defamation*, 45 A.L.R.3d 1315 (1972).

Constitutional Law—First Amendment—Establishment Clause—Free Exercise/Free Speech Clauses—"Official Public School Recognition" of Christian Athletic Group Would Violate Establishment Clause

April 23, 1982

Edward J. Gutman, Esquire
Counsel to the Board of
Education of Carroll County

On behalf of the Board of Education of Carroll County, you have requested our opinion on whether Westminster High School may grant "official school recognition" to the Westminster Fellowship of Christian Athletes, a religious and social group.

For the reasons given below, we believe that such "official recognition"—taking the form described below—would violate the Establishment Clause of the First Amendment.

I

Background

We understand that the Westminster Fellowship of Christian Athletes ("Westminster FCA") is now using school facilities under the authority of §7-108 of the Education Article ("Ed" Article). This statute provides that "the county board shall provide for the use of a public school facility for . . . civic, educational, social, or recreational purposes or church affiliated civic purposes" [Ed §7-108(b)(1)(iv)] and, further, that the county board may permit the use of school facilities for "religious or other lawful purposes" [Ed §7-108(d)].

The Westminster FCA sought and received the approval of the school board to use the facilities in precisely the way any other nonschool affiliated organization would: it meets after the end of the school day, it has purchased insurance covering its use of the facilities, and it posts its meeting notices on a separate bulletin board used by other community organizations.

In its request for recognition of January 13, 1982, the Westminster FCA sought the following additional privileges: recognition as a school organization; inclusion of a group photograph in the school year book; announcement of meetings and fund raising events over the school public address system; posting of announcements on the school bulletin boards in the same manner as other school activities; use of a classroom for meetings after regular school hours; use of the school gymnasium for dances; use of the school lobby for bake sales.

In addition to these benefits, school recognition would include listing in the school handbook, the assignment of a faculty member to serve as advisor for the group, and, we understand, coverage under the school's own liability insurance policy.

II

Analysis

In our view, the present use of facilities by the Westminster FCA is permissible under §7-108. However, it is also our view that an avowed religious group such as the Westminster FCA cannot be granted the further "official" recognition that it seeks without violating the Establishment Clause of the First Amendment.[1]

A. *Religious Nature of Fellowship*

There is little doubt that the Westminster FCA is a religious group. It is a part of a national organization, the Fellowship of Christian Athletes, which exists to "present to athletes and coaches, and all whom they influence, the challenge and adventure of receiving Jesus Christ as Savior and Lord, serving him in their relationships and in the fellowship of the church".

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[1] We have previously discussed the meaning and application of the "religious clauses" of the First Amendment in a variety of contexts. *See* 67 *Opinions of the Attorney General* 26 (1982) (statute requiring "balanced" presentation of "creation-science" and "evolution-science" in public schools would violate Establishment Clause); 67 *Opinions of the Attorney General* 37 (1982) (statute requiring public elementary school students to participate in period of prayer, Bible reading, or meditation would violate Establishment Clause); 65 *Opinions of the Attorney General* 186 (1980) (distributing Gideon Bibles to public elementary school students violates the Establishment Clause); 64 *Opinions of the Attorney General* 134 (1979) (teaching ethical values in the public schools is constitutionally permissible).

The national organization's literature states:

> "The Fellowship of Christian Athletes' approach might well be termed 'evangelism through fellowship'—centering on the person of Jesus Christ, the Bible, and the institution of the Church. In its ministry to the greats and unsung heroes of the sports world, FCA is a fellowship through which ordinary people help each other become better persons, and better examples of what God can do with a yielded life." *Fellowship of Christian Athletes*, Pamphlet, at 2.

The Westminster group, in its Constitution and Bylaws, states that one of its purposes is "to provide a forum for the exchange of ideas, concepts and beliefs pertaining to religion". In addition:

> "[T]he Westminster Fellowship of Christian Athletes will serve to broaden the members' religious views and to provide a better understanding of their beliefs. It will also serve as a fraternal organization aimed at meeting to discuss contemporary issues of interest among its members."

B. *First Amendment Considerations*

Recently, the Supreme Court let stand a decision of the U.S. Court of Appeals for the Second Circuit, upholding a local school board's refusal to allow a student group to hold voluntary prayer meetings at the start of the school day, before classes began. *Brandon v. Board of Education of the Guilderland Central School District*, 635 F.2d 971 (2nd Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981).

That case is very pertinent to this situation. There, as here, the student group challenged the denial on free speech and free exercise grounds; it asserted that it was not seeking supervision or faculty involvement and that its activities were voluntary and would not conflict with other school functions.

Notwithstanding these arguments, the Second Circuit found that the group's use of the facilities would have the impermissible effect of advancing religion and creating excessive government entanglement: "[T]he state's compelling establishment clause interest in removing from the school any indication of sponsoring religious activity leads to the inescapable conclusion that no alternative accommodations were possible." 635 F.2d at 979.

It is noteworthy that, while *Brandon* involved mere passive permission to use school facilities, the Westminister FCA's request contemplates for more—namely, use of the school name and active participation in school activities, in the same manner as the basketball team, French club, or other "official" school organizations. It is evident that official school recognition of the Westminster FCA, an organization with an avowed religious purpose, would, even more so than the informal prayer sessions disallowed in *Brandon*, have the impermissible effect of advancing religion and creating excessive government entanglement.[2]

With regard to free speech and free association claims, the Second Circuit in *Brandon* stated that a high school is not a public forum where religious views can be freely aired. The court thus distinguished this set of facts before it from those in

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[2] In *Brandon*, the Second Circuit noted that:

> "Our nation's elementary and secondary schools play a unique role in transmitting basic and fundamental values to our youth. To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit." 635 F.2d. at 978 (citations omitted).

And, in 65 *Opinions of the Attorney General* 186 (1980), we noted how assisting one religious group in the distribution of its teachings would necessitate similar assistance to all religious groups, requiring school officials to decide what constitutes a bona fide religion:

> "The strain placed on school authorities by requiring them to make such religious judgments and to monitor their enforcement would entangle them in conflicts among religious groups, with the schoolhouse as the field of battle." 65 *Opinions of the Attorney General* at 196.

Assuming it were constitutional for the School Board to recognize a Christian organization, the Board would then be bound to recognize *all* religious groups—from established religions to controversial cult groups to non-theistic teachings—a result that would clearly threaten the constitutionally mandated separation between Church and State.

another recent case, *Chess v. Widmar,* 480 F.Supp. 907 (W.D. Mo. 1979), *rev'd*, 635 F.2d. 1310 (8th Cir. 1980), *aff'd sub nom. Widmar v. Vincent*, 454 U.S. 263 (1981), which challenged a university regulation banning religious groups from using its facilities. In *Widmar,* the Eighth Circuit found that the university had established, by practice, a public forum; it concluded that the university must open this forum to all groups, without discrimination or distinction. In affirming this decision, the Supreme Court stated that its decision was not based on Free Exercise Clause grounds but, rather, on free speech and free association grounds.

As explained in *Brandon*, there are several distinctions between high schools and universities that make the *Widmar* holding inapplicable to the instant case. The chief distinctions are that university students are less impressionable than younger students, university students often have no alternative facilities available to them, and public elementary and secondary schools have never been viewed as public forums. Therefore, the speech rights of religious groups may be limited in non-university or non-college settings.

In any event, it seems evident to us that the free speech/free exercise rights of the Westminster FCA members already have been fully met by their present ability to use the premises after school hours. Even read broadly, *Widmar* does not suggest that denying a group access to the yearbook, insurance coverage, a faculty advisor, or other benefits of school recognition would constitute a denial of free exercise rights.

III

Conclusion

In summary, we agree with the position taken by the Board of Education of Carroll County to deny the request for "official school recognition" of the Westminster Fellowship of Christian Athletes. On the other hand, we do believe that the group's current use of school facilities, in the same manner as any other civic, educational, social, recreational, or religious group, is constitutionally acceptable.

In our view, the value our government places upon official neutrality toward religion requires such a result. In the words of James Madison, a just government "will be best supported by protecting every citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another." J. Madison, "Memorial and Remonstrances Against Religious Assessments" ¶8, *reprinted in Everson v. Board of Education*, 330 U.S. 1, 63 app. (1947).

STEPHEN H. SACHS, *Attorney General*

CHRISTINE STEINER, *Assistant Attorney General*

AVERY AISENSTARK
Principal Counsel,
Opinions and Advice

Editor's Note: The preceding Opinion was originally written as a letter of advice. Because of the importance of the issues addressed, it is published here in a slightly revised format.

CONSTITUTIONAL LAW—PROPERTY LAW—CRIMINAL TRESPASS—MIGRANT FARM WORKERS—OWNERS OF MIGRANT LABOR CAMPS MAY NOT PREVENT ACCESS BY OTHERS TO MIGRANTS RESIDING IN CAMPS

July 19, 1982

Mr. Leon Johnson, Chairman
Governor's Commission on Migratory and Seasonal Farm Labor

On behalf of the Governor's Commission on Migratory and Seasonal Farm Labor, you have requested our opinion on whether migrant workers, while residing in housing provided by farmers or growers on privately-owned migrant labor camps in this State, have a legal right to receive guests and to be visited by clergy, medical and other service personnel, lawyers, and the press.

For the reasons given below, we have concluded that migrant workers have the legal right to receive guests in their living quarters and to be visited there by clergy, medical and other service personnel, lawyers, and the press—subject only to such reasonable and necessary rules established by the camp owners as are designed to protect the owners' legitimate business and security interests and do not deny or seriously infringe upon the legal rights of migrants.[1]

I

The Controversy

The Commission advises us that as many as 7,500 migrants come into Maryland each year to harvest crops and to work in orchards, in the tobacco fields, and on nursery farms. Generally, local farmers or growers contract with "crew leaders", who in turn hire the migrants to provide agricultural labor.

[1] Our conclusion here applies to the right of migrants to receive visitors in the living quarters where they reside. We do not here address the right of farmers or growers to reasonably restrict access to the fields and other work areas where the migrants are actively employed. As discussed below, the right of access to migrants' living quarters does not carry with it a right to interfere with the harvest of crops and other agricultural work.

The workers often travel with their families, including infants and children, and often work the entire growing season in various states along the eastern seaboard, moving from one area to another as work becomes available. These migrants stay in Maryland for relatively short periods of time, generally less than two months, and are most usually housed in migrant camps provided for them by farmers or growers. The housing may be provided at no cost to the migrant or for a nominal fee, sometimes denoted as a "utilities fee".[2]

We understand that these camps are generally in isolated rural areas and that the migrants living in these camps often have no form of public or private transportation. You have explained to us that some camp owners have posted their camps with "no trespassing" signs and have prohibited the migrants from receiving visitors. Other camp owners have limited the migrants to certain types of visitors or have permitted visitors to enter the camps only at certain prescribed times.

II

Judicial Background

There is neither Maryland case law nor Maryland statutory law that is fully dispositive of this issue.[3] There is, however, a substantial body of case law on point in other jurisdictions.

We have examined decisions by state appellate courts in California, Florida, New Jersey, New York, and Washington; Opinions of the Attorneys General of Michigan and New Jersey; and a number of federal court decisions. The decisions and opinions that have addressed the issue have been consistent in finding that migrants have a legal right to receive vis-

[2] Farmers and growers must obtain a permit from the Department of Health and Mental Hygiene to operate a migrant labor camp and must comply with the Department's health and safety regulations governing these camps. *See* COMAR 10.16.01. In addition, camp owners in Dorchester County must also obtain a permit to operate from the Dorchester County Commissioners. *See* Article 25, §27A of the Maryland Code.

[3] However, as discussed below in Part IV of this Opinion, there is strong evidence that, at a minimum, this State's criminal trespass laws may not be used to bar access to migrant camps.

itors. Although the conclusions reached have been uniform, the theories undergirding those conclusions have been varied.[4]

For the most part, the decisions and opinions have examined and balanced the various rights of the migrants, visitors, and camp owners in arriving at their conclusion. Typically, these cases involve: (i) migrants asserting their constitutional rights

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[4] In some jurisdictions, access has been predicated on the migrants' status as tenants, and the courts have held that they enjoy the rights of free ingress and egress associated with that status. *See, e.g., State v. Fox*, 510 P.2d 230, 232 (Sup. Ct. Wash. 1973); *Franceschina v. Morgan*, 346 F. Supp. 833 (S.D.Ind. 1972); *Folgueras v. Hassle*, 331 F. Supp. 615, 625 (W.D.Mich. 1971).

At least one court has held that federal and state statutes establishing programs to benefit migrants confer a right to access. *Lee v. A. Duda & Sons, Inc.*, 310 So.2d 391 (Fla. App. 1975), *cert. denied*, 311 So.2d 669 (Sup.Ct.Fla. 1975). This theory was rejected in *Illinois Migrant Council v. Campbell Soup Company*, 574 F.2d 374 (7th Cir. 1978), and *Petersen v. Talisman Sugar Corp.*, 478 F.2d 73 (5th Cir. 1973). *See also* Attorney General of Michigan, *Report of Attorney General*, No. 4727, filed April 13, 1971; and *N.L.R.B. v. Lake Superior Lumber Corp.*, 167 F.2d 147 (6th Cir. 1948).

Federal jurisdiction has been predicated on the denial of constitutional rights (freedom of speech and association) by those standing in the shoes of the state. *Marsh v. Alabama*, 326 U.S. 501 (1946). In *Marsh*, the court found that, because a "company-town" had all the indicia of a municipality, the constitutional guarantees of freedom of speech and religion precluded enforcement of a state trespass statute against one who distributed religious literature on the streets of the company-owned town. Federal and state cases relying on *Marsh* have examined the characteristics of individual migrant camps to determine whether the camp in question has sufficient indicia of a municipality such that the denial of these rights can be deemed to be "state action". *See, e.g., Petersen v. Talisman Sugar Corp.*, 478 F.2d 73 (5th Cir. 1973) (particular camp has indicia sufficiently similar to *Marsh* "company-town" so that owners cannot deny constitutional rights); *Asociacion de Trabajadores Agricolas de Puerto Rico v. Green Giant*, 518 F.2d 130 (3rd Cir. 1975) (not enough facts in the record to find that particular camp was a *Marsh* "company-town"); *Illinois Migrant Council v. Campbell Soup Company*, 574 F.2d 374 (7th Cir. 1978) (Prince Crossing migrant camp not a "company-town" under the *Marsh* doctrine); *Folgueras v. Hassle*, 331 F. Supp. 615 (W.D. Mich. 1971) (sum total of cases applying *Marsh* compels the holding that the owner of the camps in question may not constitutionally deny migrant laborers living in the camps access to members of assistance organization or mere visitors). *See also* Attorney General of Michigan, *Report of Attorney General*, No. 4727, filed April 13, 1971.

At least one other court found requisite "state action" in the fact that the camps were licensed by the state and that the owners were using the state criminal trespass statute and state courts to deny access. *Franceschina v. Morgan*, 346 F. Supp. 833 (S.D. Ind. 1972).

of freedom of speech, religion, and association, their rights as tenants, and their rights to enjoy all the liberties exercised by other citizens; (ii) farmers and growers asserting their constitutional right to privacy and to hold their property free from unwarranted intrusion; and (iii) visitors asserting their constitutional rights of free speech, religion, and association and their statutory obligation to provide services to migrants.

III

The *Shack* Case

Based on our review of the law, we find the New Jersey Supreme Court's approach in *State v. Shack*, 277 A.2d 369 (N.J. 1971), to be particularly sound—an approach that, we believe, Maryland courts are likely to follow in achieving a fair accommodation of these competing rights and interests.

In *Shack*, a field worker for a non-profit organization funded by the Office of Economic Opportunity and a staff attorney from the Farm Worker Division of Camden Regional Legal Services, Inc., were convicted of criminal trespass after refusing to leave a privately-owned migrant labor camp. In overturning these convictions, the New Jersey Supreme Court weighed the property rights of the farm owner against the rights of the migrant farm workers and found the balance to be tipped in favor of the fundamental rights of the farm workers. Specifically the court found that:

> "Property rights serve human values. They are recognized to that end, and are limited by it. Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises. Their well-being must remain the paramount concern of a system of law. Indeed the needs of the occupants may be so imperative and their strength so weak, that the law will deny the occupants the power to contract away what is deemed essential to their health, welfare, or dignity." 277 A.2d at 372.

The court then catalogued the unique characteristics of migrant farm workers. The court discussed their disadvantaged status, their relative isolation, and their lack of economic and political power. Further, the court listed the government programs established to remedy the "plight" of migrants and concluded that "[t]hese ends would not be gained if the intended beneficiaries could be insulated from efforts to reach them." *Id.* It was within this framework that the court decided that camp operators' rights in their lands may not stand between the migrant workers and those who would aid them.[5]

The policy reasons on which the New Jersey court based its decision are equally valid in Maryland: The migrant workers who harvest Maryland crops are as powerless and disadvantaged as those who harvest New Jersey crops. Often, they are the same individuals.

Property rights are not absolute.[6] It is beyond question that the ownership of real property does not grant the owner of the property dominion over the lives and rights of those living within its borders. As the court in *Shack* pointed out, "[i]t was a maxim of the common law that one should so use his property as not to injure the rights of others." 277 A.2d at 373. The court explained that this maxim expresses "the inevitable proposition that rights are relative and there must be an accommodation when they meet." *Id.*

We concur with the conclusion in *Shack* that, as a matter of property law, mere ownership of a labor camp does not carry with it the right to cut off the fundamental rights of those who live in the camp.[7]

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[5] Similar policy considerations and holdings are found in other state and federal decisions, as well as in scholarly discussions of access to migrant workers. *See, e.g., Illinois Migrant Council v. Campbell Soup Company,* 519 F.2d 391 (7th Cir. 1975); *Petersen v. Talisman Sugar Corp.,* 478 F.2d. 73 (5th Cir. 1973); *Mid-Hudson Legal Services, Inc. v. G. & U., Inc.,* 437 F.Supp. 60 (S.D.N.Y. 1977); *Velez v. Amenta,* 370 F.Supp. 1250 (D. Conn. 1974); *Franceschina v. Morgan,* 346 F.Supp. 833 (S.D. Ind. 1972); *Folgueras v. Hassle,* 331 F.Supp. 615 (W.D. Mich. 1971); *Vasquez v. Glassboro Service Ass'n, Inc.,* 83 N.J. 86 (1980); *People v. Medrano,* 78 Cal. App. 3d 198, 144 Cal. Rptr. 217 (1978); *People v. Rewald,* 318 N.Y.S.2d 40 (Cayuga County Ct. 1971); Spriggs, *Access of Visitors to Labor Camps on Privately Owned Property,* 21 U. Fla. L.Rev. 295 (1969); Note, *Poverty Law—Criminal Trespass—Representatives of Federal and Local Service Organizations Granted Right of Access onto Farmer-Employer's Property,* 46 N.Y.U.L.Rev. 834 (1971).

[6] *Marsh v. Alabama,* 326 U.S. 501 (1946); *See also Folgueras v. Hassle,* 331 F. Supp. 615, 624 (W.D. Mich. 1971).

[7] We note that the Attorney General of Michigan reached a similar conclusion. *See* Attorney General of Michigan, *Report of the Attorney General,* No. 4724, filed April 13, 1971, in which the Attorney General opined as follows:

(cont'd)

By the nature of their work, migrant workers are particularly vulnerable to infringement of these rights. They are invariably poor, usually uneducated, and frequently not fluent in English. They lack significant ties to the various communities in which they reside for but a few weeks each year. They are, almost by definition, politically powerless. They can thus become easy prey for those who seek to take advantage of their fragile condition. It is important that the law protect the rights of those who are least able to protect themselves. We know of no principle of law that would argue otherwise.

IV

Criminal Trespass Statutes

As noted above, the issue of access to migrant camps was before the New Jersey Supreme Court on appeal from a criminal trespass conviction. In Maryland, there are three criminal trespass statutes that, arguably, might be invoked to bar access to persons attempting to visit or communicate with workers residing in migrant camps: Article 27, §576, trespass on posted property; Article 27, §577, wanton trespass on private land; and Article 27, §579B, trespass on cultivated land.

The last of these, Article 27, §579B, was enacted just recently by Chapter 739, Laws of Maryland 1980. It provides as follows:

> "(a) A person, without permission from the owner or agent of the owner, who enters upon the cultivated land of another is guilty of a misdemeanor and on conviction may be fined not more than $500.

"The owner or operator of a migrant agricultural labor camp by permitting occupation and movement of migrant agricultural workers and their families on the premises of the agricultural labor camp has thereby made the use of the agricultural labor camp premises, including ingress and egress therefrom, public. The freedoms of religion, speech, press and assembly guaranteed by the First and Fourteenth Amendments to the United States Constitution are operative throughout the length and breadth of the land. They do not become suspended on the threshold of an agricultural labor camp. The camp is not a private island or an enclave existing without the full breath and vitality of federal constitutional and statutory protection."

'Cultivated land' means land which has been cleared of its natural vegetation and is presently planted with a crop or orchard.

(b) It is intended that this section is only to prohibit any wanton entry upon cultivated land, and therefore this section shall not be construed:

(i) To prevent persons who reside on cultivated land from receiving any person who seeks to provide a lawful service; or

(ii) To apply to persons entering cultivated land under color of law or color of title."[8]

The legislative history of Chapter 739 reveals that the General Assembly was concerned about potential restrictions on persons who provide lawful services to migrants. As introduced, the bill consisted only of the portion now contained in subsection (a). The bill passed the Senate on March 29, 1980, without amendments, and it was referred to the House Committee on the Judiciary. That Committee received two letters concerning the bill. One was from Dr. Charles R. Buck, Jr., Secretary of Health and Mental Hygiene, recommending addition of the language now incorporated in subsection (b). Secretary Buck expressed his concern that the bill, as passed by the Senate, "could be used to prevent the entrance of State officials into these [migrant] camps to perform the necessary inspections [required by law to protect the health of migrants]". The Committee also received a letter from the Legal Aid Bureau, Inc., stating its concern that, as drafted, the bill would "restrict legitimate access of state officials, social services, legal services and health care personnel to agricultural workers living in camps." The Legal Aid correspondence suggested language that was nearly identical to that suggested by Secretary Buck and, ultimately, adopted by the Judiciary Committee and the General Assembly.

At the very least, the language and history of subsection (b) is an indication of legislative policy to facilitate communications between migrants and those who seek to serve them. Inasmuch as §579B, in relation to the other trespass statutes

[8] Although this section refers to trespass on "cultivated land", it was clearly the intention of the General Assembly to cover living quarters adjacent to cultivated land; obviously, no one can "reside" on property that, as defined by the statute, is "cultivated land".

(§§576 and 577), is both the more specific and later enacted statute, it would appear to supersede those sections with respect to migrant camps.[9] It thus seems clear that the General Assembly did not intend our criminal trespass statutes to be used to deny migrant workers access to governmental and charitable organizations serving their social, health, and legal needs.[10]

V

Analysis

Although camp owners are precluded from denying access to migrant workers residing in their camps, they are not precluded from establishing reasonable rules or restrictions neces-

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[9] Moreover, the very enactment of a new prohibition in §579B(a) suggests that trespass on cultivated land was not considered to be covered by preexisting §§576 and 577. Similarly, then, the countervailing exceptions and rights established in §579B(b) must have been understood as at least implicitly applying to those other sections as well.

[10] Even without exceptions such as those found in §579B(b), courts in other jurisdictions have uniformly overturned criminal trespass convictions on the basis that the camp owners cannot legally deny access to the migrant. *See, e.g., People v. Rewald*, 318 N.Y.S.2d 40 (Cayuga County Ct. 1971); *State v. Fox*, 510 P.2d 230 (Sup. Ct. Wash. 1973); *State v. Shack*, 277 A.2d 369 (N.J. 1971); Attorney General of Michigan, *Report of Attorney General*, No. 4727, filed April 13, 1971.

In response to an inquiry from the Superintendent of the State Police as to the effect of the *Shack* decision on the prospective enforcement of the New Jersey general trespass statute, the Attorney General of New Jersey, in Formal Opinion No. 11 (1975), explained as follows:

> "The result [no trespass violation within the meaning of the statute] is predicated on the following policy considerations. Property rights are relative and must serve, not disparage, human values. Assuredly, they should not be the basis for exercising oppressive control over the lives of a rootless, isolated and disadvantaged class of citizens who the owner admits to his property to further his own pecuniary gain. Accordingly, the impotent group's fundamental and fragile right of communication can be neither stifled nor emasculated by erecting a trespass statute barrier, founded on minimal intrusions, thereby insulating migrants from services and edification proffered by a solicitous government . . . The conclusion is the unavoidable realization that itinerant farm help is entitled to the very same opportunity to live with dignity and to enjoy the private associations which are customary among all citizens of our society."

sary to protect their legitimate business and security interests. What is required is a fair accommodation of the competing interests, not the abrogation of one set of interests to benefit the other. However, under no circumstances could reasonable rules include a regulation that denies, or even seriously restricts, the legal right of migrants to receive guests and to be visited by those who seek to serve them.[11]

The camp owner's primary interest and concern is in ensuring that the owner's crops be harvested and its business operations proceed in a safe and uninterrupted fashion.[12] To protect this interest, camp owners may reasonably require that visits take place in a manner that does not interfere with the harvesting of crops or with the need to protect the security of employees, migrants, and property.[13] To this end, we agree with the *Shack* court's statement that the camp owner "may reasonably require a visitor to identify himself, and also to state his general purpose if the migrant worker has not already informed him that the visitor is expected"; but, in so doing, the camp owner "may not deny the worker his privacy or interfere with his opportunity to live with dignity and to enjoy associations customary among our citizens." 277 A.2d at 374. Once the camp owner has been informed that a visitor is expected, the camp owner may not invade the migrant's privacy by inquiring into the specific nature or purpose of the visit.[14]

We can perceive no legitimate business or security interest, however, that would justify denying the migrant workers the opportunity to receive aid and other services offered by gov-

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[11] For instance, camp owners may not limit the frequency or duration of visits, except in the unlikely event that such restrictions are necessary to protect legitimate business or security needs.

[12] We are aware that migrants are also employed during other stages of the growing cycle and in the tobacco, orchard, and nursery industries. Our conclusion obviously applies to all migrants and is not limited to those who harvest crops.

[13] *See* note 1 above. As a general rule, there is no absolute right of access by private individuals to fields, orchards, tobacco barns, and other work sites.

[14] *See also* Letter from James R. Zazzali, Attorney General of New Jersey, to Superintendent of the State Police (December 14, 1981), in which the Attorney General opined that a request for identification sufficiently protects the camp owner's security interests and, therefore, a requirement of advance notice of a visit does not constitute a reasonable rule.

ernmental and private service agencies and organizations. Therefore, representatives of these groups may enter the camps to seek out migrant workers who might benefit from their services, and they may remain on the premises as long as their services are needed or desired. The migrant has the right to receive these and other visitors in the privacy of the migrant's living quarters without the presence of the camp owner or any other person.[15]

We believe that the above constitutes a fair accommodation of the competing interests and rights of the camp owners and migrants. Other courts have arrived at similar conclusions. *See e.g., Lee v. A. Dudo & Sons, Inc.*, 310 So.2d 391 (Fla.App. 1975), *cert. denied*, 311 So.2d 669 (Sup.Ct.Fla. 1975); *Petersen v. Talisman Sugar Corp.*, 478 F.2d 73 (5th Cir. 1973); *Velez v. Amenta*, 370 F. Supp. 1250 (D.Conn. 1974).

VI

Conclusion

In summary, it is our opinion that the migrant workers residing in housing provided by farmers or growers on privately-owned migrant labor camps have a legal right to receive guests in their living quarters and to be visited there by clergy, medical and other service personnel, lawyers, and the press—subject only to such reasonable and necessary rules established by the camp owners as are designed to protect the owners' legitimate business and security interests and do not deny or seriously infringe upon the legal rights of migrants.

STEPHEN H. SACHS, *Attorney General*

DENNIS M. SWEENEY, *Chief General Counsel*

CATHERINE M. SHULTZ, *Assistant Attorney General*

AVERY AISENSTARK
Chief Counsel,
Opinions and Advice

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[15] Conversely stated, it is the right of the migrant, not the camp owner, to refuse to receive uninvited visitors. While the migrant may assert his or her own personal right to privacy and, in doing so, refuse to admit into the migrant's living quarters clergy, lawyers, social workers, nurses, politicians, news reporters, and other uninvited individuals, the camp owner may not purport to exercise this personal right "on behalf of" the migrant.

CONSTITUTIONAL LAW—CRIMINAL LAW—INSANITY DEFENSE—BURDEN OF PROOF—DUE PROCESS—REQUIRING DEFENDANT TO PROVE INSANITY NOT NECESSARILY UNCONSTITUTIONAL—NEED TO DISTINGUISH BETWEEN "CRIMINAL INTENT" (*Mens Rea*) AND "CRIMINAL RESPONSIBILITY" (*Sanity*)

December 23, 1982

The Honorable Thomas W. Chamberlain, Sr.
Maryland House of Delegates

You have requested our opinion on whether, as to issues of insanity in a criminal case, it would be constitutional to impose the "burden of persuasion" on the defendant—rather than, as is now the rule, on the prosecution. Under current State law, if a criminal defendant presents evidence of his or her insanity, *the prosecution* has the burden of rebutting that evidence by affirmatively proving, beyond a reasonable doubt, that the defendant in fact was *sane* when the criminal act was committed. You ask whether it would be constitutional to amend State law so as to require instead that, in such a case, *the defendant* must affirmatively prove that he or she in fact was *insane* when the criminal act was committed.

For the reasons given below, we believe that it would be constitutional to so amend State law. To do so, however, requires a careful assessment of—and the development of specific standards that would distinguish between—two related and somewhat overlapping concepts. The first concept involves the specific standard to be applied in this State in evaluating any insanity defense: "criminal responsibility" or, in the words of governing State law, the capacity to "appreciate the criminality of [one's] conduct" and to "conform that conduct to the requirements of law". The second, more general concept, involves one of the basic underlying elements of a crime that, constitutionally, must always be proven by the State: "criminal intent" or *mens rea*. The difficulty is how best to reassign the burden of persuasion as to the first—the insanity defense or "criminal responsibility"—in a way that does not undercut or compromise the State's clear and continuing constitutional obligation to prove, as part of its case, the latter—the necessary "criminal intent".

I

Due Process Considerations

The Supreme Court has interpreted the Due Process Clause of the Fourteenth Amendment to require the prosecution to prove beyond a reasonable doubt all elements of a crime. *Mullaney v. Wilbur*, 421 U.S. 684 (1975). There is, however, wide latitude afforded the states to define what those elements are; and, within some limits, states may place a burden on a defendant to prove an affirmative defense. *Patterson v. New York*, 432 U.S. 197 (1977).

In *Patterson*, the Supreme Court unequivocally stated that the United States Constitution permits a state "to burden the defendant with proving his insanity defense". 432 U.S. at 205 (citing *Rivera v. Delaware*, 429 U.S. 877 (1976) and *Leland v. Oregon*, 343 U.S. 790 (1952)). In essence, according to the Court:

> "[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here." 432 U.S. at 210.

In Maryland as well, the State courts have explicitly recognized the "unique prerogative" of the General Assembly "to balance the interests of the community and the individual accused" in defining the insanity defense. *Johnson v. State*, 292 Md. 405, 424–25 (1982).

Thus, the General Assembly may define the insanity defense so as to place the burden of persuasion on the defendant, and the Due Process Clause of the United States Constitution presents no absolute bar to doing so. However, before drafting any legislation, it is important to examine any overlap that may exist between the mental element of a crime ("criminal intent"), on the one hand, and the insanity defense ("criminal responsibility"), on the other hand, to insure that a reassignment of the burden of persuasion as to the latter (sanity or criminal responsibility) does not unconstitutionally relieve the State of its continued, constitutionally-imposed, burden of proving the former (the mental element or criminal intent).

II

Elements of Guilt

Every crime contains two distinct "elements of guilt": (i) the physical element, or *corpus delicti;* and (ii) the mental element, or *mens rea*. The State must prove *both* of these elements beyond a reasonable doubt. *Mullaney v. Wilbur.* The mental element can range from simply intending to do an act without regard to the consequences (called "general intent") to intending to do an act in order to achieve a particular result (called "specific intent"). In addition, if a state recognizes the insanity defense, then—in order to give rise to punishment—the act must have been committed by an individual who was then sane.

Because most individuals are in fact sane, there is, at the outset of every criminal case, a presumption of sanity. This means that, unless the defendant challenges his or her sanity by bringing in some evidence of insanity, the State need not produce any evidence on that issue and the factfinder, be it judge or jury, does not consider it.

On the other hand, if the defendant raises the issue of insanity, the presumption of sanity no longer applies and the factfinder must decide the issue. Thus, in every case in which sanity is an issue, there are two determinations to be made: First, is the defendant guilty or not guilty of committing the particular criminal act? Second, if so guilty, was he or she sane or insane at the time of the commission of the act?

III

The Insanity Defense

As indicated above, the Supreme Court has held that the State must always prove the guilt of the defendant beyond a reasonable doubt. The second inquiry, that of responsibility, is left to the states to formulate as they wish. Maryland has, at least since 1964, required the State to prove sanity, in addition to the elements of guilt, beyond a reasonable doubt.

The present statutory provisions governing the insanity defense are found in Title 12 of the Health-General Article ("HG" Article). HG §12–107 contains the test of responsibility for criminal conduct:

> "A defendant is not responsible for criminal conduct if, at the time of that conduct, the defendant, because of mental retardation or a mental disorder, lacks substantial capacity:
>
> (1) To appreciate the criminality of that conduct; or
>
> (2) To conform that conduct to the requirements of law."[1]

HG §12–108 sets forth the requirements of pleading insanity and of a special verdict; HG §12–109 specifies procedures for examination of the defendant; and HG §12–110 *et seq.* govern the case of "an individual [who has been] found not guilty of a crime by reason of insanity".[2] Nowhere in the statute is a burden of persuasion allocated. Nor do the Maryland Rules of Procedure specify any burden: Rule 731b.1 and 2, for example, merely governs the method and timing of interposing a defense of insanity. Rather, the present allocation of the burden of persuasion derives entirely from case law.

The present requirement that the State must prove sanity beyond a reasonable doubt once a defendant rebuts the presumption of sanity was first elaborated upon in *Bradford v. State*, 234 Md. 505 (1964). In that case, the Court stated that "insanity involves the *mens rea* or intent which is an essential element of the offense which the State must prove". 234 Md. at 514.

If that statement continued to be entirely correct today—if proving a defendant's sanity remains "an essential element of the offense"—it would follow that the present burden on the State of proving a defendant's sanity would be constitutionally

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[1] The term "mental disorder" is defined in HG §12–101(f). The term "mental retardation", however, is not defined for purposes of Title 12; *see* Revisor's Note to HG §12–101.

[2] The term "insane" is defined in HG §12–101(d) as meaning "not responsible for criminal conduct under the rule set forth in §12–107 of this title".

required and, as such, not subject to legislative change. That statement, however, has recently been recognized as no longer wholly accurate. Thus, in *Langworthy v. State*, 284 Md. 588 (1979), the Court of Appeals said:

> "We do not subscribe to the theory of the Court of Special Appeals that a finding that a defendant was insane at the time of the commission of the crime means that '[t]here is no crime.' Langworthy v. State, 39 Md. App. 559, 561, 387 A.2d 634 (1978). Its reasoning was that the finding of insanity establishes a lack of the *mens rea*. *Id.* We do not think that this is so in light of the conditions prescribed for a finding of insanity, namely 'as a result of mental disorder, [a defendant] lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.' Code (1957, 1972 Repl.Vol.) art. 59, §25(a).[3] Neither of these tests is necessarily at variance with a general intent to commit a crime. *See* Gardner v. State, 41 Md. App. 187, 396 A.2d 303 (1979)." 284 Md. at 599 n. 12.[4]

In the last case referred to in this quote, *Gardner v. State*, 41 Md. App. 187 (1979), Judge Lowe pointed out that the test for insanity at the time *Bradford* was decided had since been significantly amended:

> "[The premise that an insane person is mentally incapable of forming criminal intent], while true under the *McNaughten* test for insanity used at the time *Bradford* was written, is only a half truth under the current Maryland substitution of the American Law Institute test. . . . Under the *McNaughten-Spencer* test (*see Spencer v. State*, 69 Md. 28 (1888)), the only question for the factfinder was the ability of the offender 'to distinguish between right and wrong and understand the nature and consequences of his act as applied to himself. . . .' *Rowe v. State*, 234 Md. 295, 305 (1964), *cert. denied*, 379 U.S. 924 (1954).

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[3] Article 59, §25(a) has since been revised, "without substantive change", as HG §12–107. *See* Revisor's Note to HG §12–107.

[4] The crime in *Langworthy* was rape, a "general intent" crime.

> Obviously, under that test, the *Bradford* Court was correct in pointing out that an insanity issue involved 'the *mens rea* or intent which is an essential element of the offense which the State must prove,' *Id.*[, 234 Md.] at 514, or, as broadly translated by Chief Judge Murphy for our Court in *Regle* [*v. State*, 9 Md. App. 346, 355 (1970)], 'an insane person is mentally incapable of forming a criminal intent.' [However, s]ince the 1967 modified adoption of the American Law Institute test by the Legislature [now, HG §12–107], that is no longer necessarily true." 41 Md.App. at 194.

Two principles emerge from the foregoing: First, as presently defined, neither prong of the insanity defense—either the lack of capacity "[t]o appreciate the criminality of [one's] conduct" [HG §12–107(1)] or the lack of capacity "[t]o conform that conduct to the requirements of law" [HG §12–107(2)]—is necessarily inconsistent with *general* criminal intent. Second, the volitional prong—the lack of capacity "[t]o conform [one's] conduct to the requirements of law" [HG §12–107(2)]—does not necessarily affect the person's ability to form a particular *specific* criminal intent.

A problem arises, however, because proof of either insanity prong may involve factual determinations necessary to the proof of a particular specific criminal intent. This problem is discussed in Note, *Constitutional Limitations on Allocating the Burden of Proof of Insanity to the Defendant in Murder Cases*, 56 B.U.L. Rev. 499, 510–18 (1976).[5] For example, in a first degree murder case, the prosecution must prove beyond a reasonable doubt that the defendant's intentional killing of another person (i) was willful, deliberate, and premeditated and (ii) was without justification, excuse, or mitigation. To require a defendant to prove that his or her mental disorder prevented the defendant from appreciating the criminality of that conduct or from conforming that conduct to the requirements of law might well involve disproving some of those same elements.

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[5] This Note was written before the Supreme Court, in *Patterson v. New York*, reaffirmed *Leland v. Oregon*.

IV

Conclusion

In summary, the Supreme Court's explicit reaffirmation of *Leland v. Oregon* (permitting placement on the defendant of the burden of persuasion as to his or her insanity)—especially after its decision in *Mullaney v. Wilbur* (requiring the State to prove all elements of the offense beyond a reasonable doubt)—would appear to indicate that a state statute placing the burden of persuasion as to insanity on the defendant is not of itself constitutionally defective.

Nevertheless, we should not rush to effect such a change without carefully analyzing the possible resulting inconsistencies between requiring the State to prove the necessary elements of the crime—including the *mens rea* or mental element—while, at the same time, permitting the State to require the defense to prove insanity.

We would be happy to review with you any specific legislative proposals in light of the foregoing discussion.

STEPHEN H. SACHS, *Attorney General*

DEBORAH K. HANDEL, *Chief, Criminal Appeals*

AVERY AISENSTARK, *Chief Counsel,*
Opinions and Advice

CREDIT REGULATION

OPEN-END CREDIT—CREDIT CARD TRANSACTIONS—CHANGE IN TERMS—CONSUMER CREDIT RESTRAINT REGULATION

January 22, 1982

The Honorable Luiz R. S. Simmons
Maryland House of Delegates

You have requested our opinion on the ability of a bank to increase the rate of interest imposed on certain credit card obligations that were incurred prior to the enactment of Chapter 691, Laws of Maryland 1980—which raised the usury ceiling on cash advances exceeding $3,500 from 12% to 18%.

Your concerns are illustrated by the following hypothetical situation: Before the enactment of Chapter 691, a cardholder takes a cash advance of $4,000, subject to an interest rate of 12%. Shortly after July 1, 1980—the effective date of Chapter 691—the bank sends the cardholder a notice that it will be increasing the interest rate on such transactions to 18%, effective 30 days from the date of notice. The notice advises the cardholder that he or she may nevertheless continue to pay off the existing $4,000-balance at 12%, as long as the cardholder does not use the credit card after the effective date of the change; however, if the cardholder does use the account after that date—whether for a further cash advance or for a credit purchase—any unpaid portion of the $4,000-balance will then begin to bear interest at the new increased rate of 18%. You ask whether the bank can make this adjustment in the interest rate and, if so, pursuant to what authority.

For the reasons given below, it is our opinion that, because the notice of the increase was given to the cardholder between April 2, 1980, and September 5, 1980, the bank's action was permitted by then governing federal law: the Consumer Credit Restraint Regulation adopted by the Board of Governors of the Federal Reserve System pursuant to the Credit Control Act of 1969. For a specified period, this federal regulation specifically authorized these kinds of changes in credit terms and, by doing so, the regulation effectively preempted the terms of any credit agreement and the provisions of any state law to the contrary.[1]

I

History of the Federal Act and Regulation

Under the terms of the Credit Control Act of 1969, 12 U.S.C. §1901 *et seq.*, Congress authorized the President to delegate broad regulatory powers to the Federal Reserve Board "[w]henever the President determines that such action is necessary or appropriate for the purpose of preventing or controlling inflation generated by the extension of credit in an excessive volume". 12 U.S.C. §1904(a). On such a delegation, the Board would be authorized "to regulate and control any or all extensions of credit". *Id.*[2] Notwithstanding the relative breadth of this authority, the Attorney General of the United States has ruled that the Act does not transgress the constitutional prohibition against excessive delegation of legislative power. *See* 43 Op. [U.S.] Att'y Gen. ___ (1980) [Opinion No. 20 (March 13, 1980)].

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[1] A modification of credit terms outside of the referenced period would be required to comply with other applicable requirements of both State and federal law, as well as the terms and conditions of the underlying contract between the cardholder and the bank. We do not here address or express any opinion on the legality of such a change in terms occurring outside of this period. It would be extremely difficult—if not impossible—for us to do so in the abstract. As you are no doubt aware, the various credit card programs available in this State are subject to different "master agreements", which set forth the contract terms and conditions governing the use of their cards. For such an inquiry, therefore, we would have to review the several terms and conditions of each particular master agreement in order to determine whether, under applicable principles of contract law and the specific statutory requirements of the Commercial Law Article, a particular action was permitted. *See also* note 6 below.

[2] For purposes of the Act, the term "credit" is broadly defined as "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment". 12 U.S.C. §1901(e). The term "creditor", in turn, is defined as referring to "any person who extends, or arranges for the extension of, credit, whether in connection with a loan, a sale of property or services, or otherwise". 12 U.S.C. §1901(f).

On March 14, 1980, the President issued an executive order authorizing the Federal Reserve Board "to exercise all the authority under the [Act] to regulate and control consumer credit". Executive Order 12201, 45 Fed. Reg. 17123 (March 18, 1980).[3] The specific powers thus given to the Board by the President included the authority to adopt regulations that would:

> "(7) prescribe the maximum rate of interest, maximum maturity, minimum periodic payment, maximum period between payments, and any other specification or limitation of the terms and conditions of any extension of credit.
>
> . . .
>
> (11) prohibit or limit any extensions of credit under any circumstances the Board deems appropriate." 12 U.S.C. §1905.

Pursuant to this authorization, the Board amended 12 CFR Part 229, Subpart A, effective April 2, 1980, by adding a new section, §229.6, which permitted covered creditors to change certain terms relating to their credit accounts—including an increase in the finance or other charge imposed—if two conditions were met. First, the creditor would have to mail or deliver a written notice of the proposed change to each affected accountholder at least 30 days before the effective date of the change. Second, the creditor would have to allow the accountholder to repay any balance outstanding on the effective date of the change, under existing account terms, as long as the customer did not use the credit account after that date; if, however, the consumer used the account after the effective date of the change, under existing account terms, as long as the

[3] On July 3, 1980, the President amended Executive Order 12201, effective July 28, 1980, to read as follows: "The [Board] is authorized to exercise authority under the [Act] to establish uniform requirements for changes in terms in open-end credit accounts for consumer credit; provided however, such authorization is revoked as of October 31, 1980." Executive Order 12225, 45 Fed. Reg. 45571 (July 7, 1980).

outstanding balance plus the new credit. *See* 45 Fed. Reg. 24444 (April 10, 1980).[4]

Section 229.6 was subsequently amended by the Board, effective July 24, 1980, to limit the authority granted by it to notices "mailed or delivered on or before September 5, 1980". *See* 45 Fed. Reg. 46064 (July 9, 1980).

For purposes of our analysis here, we assume that the notice sent to the cardholder in the hypothetical described above complied with the specific requisites of §229.6.

II

Application of the Regulation

A. *Federal Preemption*

In your inquiry, you suggest that "State law governs the answer to [the questions raised by the hypothetical] since the Federal Reserve has deliberately avoided tampering with State Usury Laws". We disagree.

The Board's regulation clearly preempted State law during the period of its effectiveness. The general legal principle enunciated in federal preemption cases is that any conflict between state law and federal law must be resolved in favor of the federal law under the Supremacy Clause of the United States Constitution. For example, in *Fry v. United States*, 421 U.S. 542 (1975), the United States Supreme Court considered an Ohio salary increase for government workers that conflicted with a 7% maximum authorized by the Pay Board under the Economic Stabilization Act of 1970. The Court struck down the state law:

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[4] The Board later adopted two technical amendments to §229.6, effective April 14, 1980. The first amendment clarified the application of this section not only to "open-end credit accounts", where the consumer pays in installments, but also to "open accounts" (such as so-called "30-day accounts"), where the consumer may make credit purchases or obtain credit advances from time to time, yet is expected to pay in full on being billed. The second amendment clarified that the change-in-term provisions of the section did not affect the maximum rate allowed by either state law or, for depository institutions, federal law. *See* 45 Fed. Reg. 26318 (April 18, 1980). As to the effect of the section's reference to state usury limits, *see* Part II C of this Opinion.

> "Since the Ohio wage legislation conflicted with the Pay Board's ruling, under the Supremacy Clause the State must yield to the federal mandate." 421 U.S. at 548.[5]

In this instance, §229.6(a) specifically provides that its terms shall apply "[n]otwithstanding the terms of any credit agreement or the provision of any other law". The comments published with §229.6 reiterate this obvious preemptive intent:

> "The Board believes that the goals of the Credit Control Act and its implementing regulation may be significantly frustrated by prohibition of certain term changes, or by lengthy advance notice requirements before terms of open-end credit accounts can be changed. . . .
>
> . . .
>
> The amendment set forth below establishes a uniform, national requirement that advance notice of certain changes must be given at least 30 days before the date that the change is implemented." 45 Fed. Reg. at 24445.

B. *Preexisting Balances*

The staff of the Federal Reserve Board has responded to specific inquiries in which the application of §229.6 would constitute a clear violation of state usury laws. In an interpretive letter dated June 17, 1980, the staff summarized the conflict between state usury laws and §229.6 as follows:

> "Recently, several states have raised interest rate ceilings on open-end consumer credit. However, under the revised statutes, creditors are not permitted to impose the higher rates on account balances that were in existence prior to the effective date of the new rates. The laws of several other states impose

[5] The Economic Stabilization Act was very similar to the Credit Control Act in that it authorized the President to create a board that, in turn, was authorized to issue orders and regulations designed to stabilize wages and salary levels. The constitutional authority to enact such legislation is found in the Commerce Clause. *See Fry v. United States*, 421 U.S. at 547.

> similar, but more general, prohibitions with regard to application of new credit terms to balances in existence at the time of the effective date of the change in terms."[6]

In the staff's opinion, the issue was governed by federal law and not state usury statutes:

> "We interpret §229.6 as permitting creditors to impose new credit terms on existing balances, even in those states that prohibit that action. As indicated by the *Federal Register* material accompanying that section, the Board adopted §229.6 not only in response to varying state notice laws, but also in response to state laws that prohibit creditors from imposing new terms on existing balances (45 FR 24445, April 10, 1980)."

Thus, according to the staff of the Board, the application of the new interest rates to existing balances could be accomplished pursuant to §229.6, regardless of any state law to the contrary:

> "[W]e believe that the Board's clear intent was to permit creditors to apply new credit terms to out-

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[6] Your inquiry does not present such a clear-cut violation of State law. When the General Assembly enacted Chapter 691, Laws of Maryland 1980, to raise the interest rate, it was completely silent concerning the application of the higher rate to debts existing before the effective date of the legislation. In significant contrast, however, on the two recent occasions when the General Assembly raised the interest rate on loans secured by first mortgages or deeds of trust on residential real property, the governing legislation contained express provisions that clearly precluded these higher rates from applying to renewals of preexisting loans or to loans made pursuant to certain preexisting commitments. *Cf.* Chapter 420, Laws of Maryland 1974; Chapter 1, Laws of Maryland 1979.

Here, we do not have a similar situation in which the charging of a higher interest rate on a preexisting debt has been clearly prohibited by an express provision of law. Nor have we found any reported authority for the suggested proposition that—even absent such an express provision of law—a state's usury law would generally prevent a voluntary renegotiation of a cardholder's existing balance where that renegotiation does not violate any applicable principles of contract or statutory law and the new rate of interest charged is not in excess of the legal rate of interest allowable at the time of the renegotiation.

> standing balances, *notwithstanding any state law to the contrary.*" (Emphasis added.)

This construction of §229.6 was reiterated by the Board's staff in a subsequent interpretive letter dated August 19, 1980:

> "The staff interprets §229.6 as permitting [creditors] to impose new credit terms on existing balances, even in those states that prohibit that action. The fact that the prohibition is contained in a state's usury law does not, in the staff's view, affect this conclusion."

Indeed, the application of higher interest rates to preexisting balances—the basic issue raised by your inquiry—was one of the underlying principles of §229.6. The comments accompanying the regulation clearly indicate that its provisions were intended to reach preexisting as well as subsequently incurred debts:

> "The amendment also established rules about whether term changes can be applied to existing account balances. . . .
>
> . . .
>
> Consequently, the amendment requires that consumers be permitted to choose either to pay off outstanding account balances under the existing terms, or *to accept the new terms as to both existing and new balances by the use of the account after the effective date of the change.*" 45 Fed. Reg. at 24445 (emphasis added).

The Comptroller of the Currency, the official charged under federal law with regulating national banks, has also interpreted §229.6 as authorizing the application of higher interest rates to preexisting balances. In an interpretive letter dated June 17, 1980, the Comptroller advised as follows:

> "You also expressed concern about the retroactive application of the higher rates to unpaid balances if the cardholder uses the card after [a specified date]. The permissibility of this action is governed by an amendment to a Federal Reserve Board regulation, 12 CFR 229, which implements the Board's consumer credit restraint program."

C. *State Usury Ceilings*

We recognize that §229.6(b)(1) acts to preserve the integrity of state usury ceilings. It provides, in relevant part:

> "This section does not authorize a covered creditor to impose a rate of interest or finance charge in excess of the maximum permitted by state law".

Thus, in our hypothetical, for example, the bank clearly could not have used §229.6 to impose any rate of interest in excess of the new statutorily-set 18% maximum. It does not necessarily follow from this, however, that the new 18% rate was impermissibly imposed on preexisting balances.

As indicated above, the staff of the Federal Reserve Board reviewed the various state statutes that had raised interest rate ceilings but that, in doing so, had also expressly prohibited the imposition of these higher rates on preexisting balances. (Significantly, this is not even the case in Maryland, where we find no similar express prohibition.[7]) The staff advised that the application of higher rates to preexisting balances was permitted under §229.6, notwithstanding the reference in §229.6(b)(1) to state interest ceilings. In its interpretive letter of June 17, 1980, the staff analyzed §229.6(b)(1) as follows:

> "[I]n our view, the reference in §229.6(b)(1) to state interest ceilings does not extend to those portions of the law that are not directly related to maximum rate limits. We believe that the prohibition you describe, even though contained in a state's rate law, would not prevent a creditor from applying new credit terms to preexisting balances, so long as all of the conditions in §229.6 are met."

In view of the consistent interpretations by the staff of the Board, as well as the comments published with the regulation itself, it is our opinion that the reference in §229.6(b)(1) to a "rate of interest or finance charge in excess of the maximum permitted by state law" was intended to refer only to the maximum rate of interest existing and applicable as of the effective date of the change being implemented under §229.6.

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[7] *See* note 6 above.

D. *Cash Advances and Credit Purchases*

The remaining issue raised by your inquiry concerns the application of the higher interest rate to a preexisting cash advance balance when, after the effective date of the notice, the consumer only uses the purchase portion of his or her account. Again, we believe that §229.6 permitted this action.

The express language of §229.6 draws no distinction between a cash advance and a credit purchase. Under §299.6, the consumer is given the opportunity "to repay, under the existing account terms, *any debt* incurred prior to the effective date of the change, unless the accountholder incurs *additional debt* on or after that date". Section 229.6(a) (emphasis added).

The form notice contained in the regulation is equally broad and undifferentiating. The accountholder is informed, in part, as follows:

> "You may make charges on your account on or after [effective date of change], in which case the new terms described in this notice will apply to what you then owe us and to future charges." §229.6(c)(2).

The comments accompanying the April 14, 1980 amendment to §229.6[8] militate against any reading of the section that would treat the cash advance balance as being separate and distinct from the purchase balance. In summarizing the original regulation, as adopted on April 2, 1980, the Board described the effect of §229.6 as follows:

> "On April 2, 1980, the Board amended its consumer credit restraint regulation . . . to permit covered creditors to change certain terms relating to certain credit accounts if two conditions are met. . . . [The second condition is that] the creditor would have to allow the accountholder to repay the balance outstanding on the effective date according to the existing terms unless the consumer *made a credit purchase or obtained a credit advance* on or after the date; in which case, the new terms would apply to the outstanding balance plus new credit." 45 Fed. Reg. at 26318 (emphasis added).

Similarly, in his interpretive letter of June 17, 1980, the Comptroller made no distinction between the type of transac-

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[8] *See* note 4 above.

tion effected with the card. Rather, the new terms applied to existing unpaid balances if the cardholder "uses the card" after the effective date in the notice.

E. *Agency Rulings*

In analyzing the issues presented by your inquiry, we have relied in large part on interpretive rulings by various federal agencies. This approach is necessary given the absolute dearth of case law on these issues.

Nevertheless, it is an established principle that "considerable respect is due ' "the interpretation given [a] statute by the officers or agency charged with its administration." ' " *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980). This "traditional acquiescence" in administrative expertise is "particularly apt" where the officers or agency "has played a pivotal role in 'setting [the statutory] machinery in motion.' " *Id.* Thus, as the Supreme Court has indicated, an Act of Congress is "best construed by those who gave it substance in promulgating regulations thereunder". *Id.*

Even more so here, in seeking to determine the intent and scope of an administrative regulation, we are constrained to give considerable respect and deference to the construction placed on that regulation by the very agency that adopted it.

III

Conclusion

In summary, it is our opinion that the actions of the bank described in your hypothetical fact situation were authorized by federal law, assuming that proper notice was given to the cardholder between April 2, 1980, and September 5, 1980, in accordance with former §229.6 of the Federal Reserve Board's Consumer Credit Restraint Regulation.

STEPHEN H. SACHS, *Attorney General*

ROBERT DEV. FRIERSON, *Assistant Attorney General*

AVERY AISENSTARK
Principal Counsel,
Opinions and Advice

CREDIT REGULATION—EQUAL CREDIT OPPORTUNITY ACT—CREDIT UNIONS—JOINTLY/INDIVIDUALLY-OWNED PROPERTY—SIGNATURES REQUIRED TO MAKE PROPERTY AVAILABLE TO SATISFY DEBT

February 18, 1982

Mr. Charles R. Georgius
Deputy Bank Commissioner

You have requested our opinion on when Maryland law would require a second signature on a loan instrument to preserve a judgment creditor's ability to satisfy the debt from property owned by the debtor and another person. Your inquiry stems from a communication you received from the National Credit Union Administration (the "NCUA") concerning possible violations by credit unions of the Federal Equal Credit Opportunity Act (15 U.S.C.A. §§1691 through 1691f) and Regulation B of the Federal Reserve Board (12 C.F.R. §202.7(d) (1981)), which prohibit lenders, under certain circumstances, from seeking the signature of a debtor's spouse or other persons on a loan instrument.

I

Background

A. *Equal Credit Opportunity Act.*

Under 15 U.S.C.A. §1691(a), it is unlawful for a creditor to discriminate against a credit applicant on the basis of such factors as sex or marital status. However, §1691d(a) provides that:

> "A request for the signature of both parties to a marriage for the purpose of creating a valid lien, passing clear title, waiving inchoate rights to property, or assigning earnings, shall not constitute discrimination under this subchapter: *Provided, however,* That this provision shall not be construed to permit a creditor to take sex or marital status into account in connection with the evaluation of creditworthiness of any applicant."

Regulation B implements the federal statute. It states in relevant part that:

> "*If an applicant requests unsecured credit and relies in part upon property to establish creditworthiness,* a creditor may consider State law; the form of ownership of the property; its susceptibility to attachment, execution, severance, and partition; and other factors that may affect the value to the creditor of the applicant's interest in the property. If necessary to satisfy the creditor's standards of creditworthiness, *the creditor may require the signature of the applicant's spouse or other person on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable State law to make the property relied upon available to satisfy the debt in the event of default.*" 12 C.F.R. §202.7(d)(2) (emphasis added).

Regulation B further states that:

> "*If an applicant requests secured credit, a creditor may require the signature of the applicant's spouse or other person on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable State law to make the property being offered as security available to satisfy the debt in the event of default,* for example, any instrument to create a valid lien, pass clear title, waive inchoate rights, or assign earnings." 12 C.F.R. §202.7(d)(4) (emphasis added).

B. *Questions Presented*

The NCUA specifically has asked what signatures would be required under Maryland law to secure a loan in the following situations:

(1) An applicant who is the sole owner of either real or personal property requests unsecured credit and wishes to rely in part on that property to establish creditworthiness. Under the creditor's standards, this would require making the property available to satisfy the debt in the case of default. Would the signature of a person other than the debtor be necessary to make the property available and, if so, on what kind of instrument?

(2) The same facts and question as in (1), except that the property is jointly owned with the applicant's spouse or some other person.

(3) A sole owner of real or personal property wishes to make that property available as collateral for a secured loan. Would any other party's signature be needed to make that property so available and, if so, on what kind of instrument?

(4) The same facts and question as in (3), except that the property is jointly owned with the applicant's spouse or some other person.

Questions (1) and (3) will be dealt with summarily in Part II of this Opinion. We will then respond to questions (2) and (4) in Part III below.

II

Individually-Owned Property

The general rule is that "the law concedes to every person of sound mind the right to dispose of his property in any lawful manner that he may deem proper". *William v. Robinson*, 183 Md. 117, 122 (1944). Although, formerly, a spouse's right to dower or curtesy constrained a married person from individually conveying property, even if not jointly owned, dower and curtesy have now been abolished in Maryland. Estates and Trusts Article, §3-202.

Therefore, a person who owns property individually has the right to subject it to encumbrances in any lawful fashion that he or she desires, including conveying it to a lender as security for a debt. It follows that State law would not require another signature to preserve a creditor's rights against the property under the circumstances outlined in questions (1) and (3) above.

III

Jointly-Owned Property

A. *Tenants by the Entireties*

Under Maryland law, when property is transferred to a husband and wife, a tenancy by the entireties is created, unless an intention to the contrary is clearly expressed. *M. Lit, Inc. v. Berger*, 225 Md. 241 (1961); *Masterman v. Masterman*, 129 Md. 167 (1916). This general rule applies to transfers of both personal and real property. *M. Lit, Inc. v. Berger, supra; Whitelock v. Whitelock*, 156 Md. 115 (1928); *Brewer v. Bowersox*, 92 Md. 567 (1901).

Property held by a husband and wife as tenants by the entireties cannot be charged with the separate debt or obligation of either spouse. *State v. Friedman*, 283 Md. 701 (1978); *Annapolis Banking and Trust Co. v. Nelson*, 164 Md. 8 (1932). *See also* Article III, §43 of the Maryland Constitution; Article 45, §1 of the Maryland Code. Moreover, during the joint lives of the spouses, a judgment against one spouse cannot create a lien on the entireties property. *State v. Friedman, supra; Hertz v. Mills*, 166 Md. 492 (1934). If the husband and wife are jointly obligated to a creditor, however, the creditor may impose a lien on the entireties property if the creditor reduces its claim to a joint judgment against the husband and wife. *Lake v. Callis*, 202 Md. 581 (1952); *Ades v. Caplin*, 132 Md. 66 (1918).

From the above, it is apparent that it would be necessary for a lender to obtain the signature of both spouses on the promissory note or other debt instrument in order to make the entireties property available to satisfy the debt in the event of default.

Moreover, for real property held as tenants by the entireties to become security for a loan, both the husband and wife must consent to the encumbrance of the property, because one spouse acting unilaterally cannot give a valid mortgage or deed of trust on that property. *Masterman v. Masterman*, 129 Md. 167 (1916). Therefore, the instrument that creates the mortgage lien must be executed and acknowledged by both the husband and wife. *See* Real Property Article, §§1-101(c), 4-101(a), 5-101, and 5-103.

It would not be necessary, however, for a spouse to sign the note that is secured by the mortgage in order to encumber the entireties property. As one commentator on the Maryland law of mortgages has stated:

> "No note or other collateral paper is necessary to the validity of the mortgage debt. The mortgage instrument is enforceable without such paper. But

> where the mortgage does not contain a covenant by the mortgagor to pay the mortgage debt and where there is no collateral note, bond, or other instrument which is secured by the mortgage, a personal action cannot be maintained against the mortgagor but the property alone is charged with the lien and must be looked to [to] satisfy the mortgage. A personal action may be maintained against the mortgagor where there is a collateral note, bond or other instrument." Ginsberg and Ginsberg, *Mortgages and Other Liens in Maryland* 116 (1936) (footnotes omitted).

See also Boyd v. Goldstein, 223 Md. 255 (1960); *Barrell v. Glover*, 2 Gill 171 (1844); *Dougherty v. McColgan*, 6 G. and J. 275 (1834).

Therefore, a spouse's signature is not needed on an underlying note or contract in order to give the creditor a security interest in the real proprety held as tenants by the entireties, if both spouses' signatures appear on the mortgage.[1]

As to personal property, security interests in personal property are enforceable only if a proper security agreement is signed by the "debtor", unless the secured party has posssesion of the collateral. Commercial Law Article, §9-203. The question of whether the signatures of both husband and wife are required to create an enforceable security interest in entireties personal property is not governed by the Uniform Commercial Code, but instead by the common law. White and Summers, *Uniform Commercial Code* 913 (2nd Ed. 1980). *See also* Commercial Law Article, §1-103.

Thus, it appears that the common law of Maryland, under which no entireties property may become security for a debt without the signature of both spouses, requires that the se-

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[1] *See* Mitchell & Hudson, *Equal Credit Quandry: Whether a Bank May Require Spouse's Signature as a Condition to Making a Loan*, Maryland Banking Quarterly (Fall 1978) 2, 7: "Although Maryland appellate courts have not addressed in a reported decision the precise question of whether a mortgage or deed of trust on real property is valid and enforceable in the absence of a supporting debt instrument signed by the party granting the security interest, other authorities have generally agreed that a loan to one spouse at the request of both spouses is sufficient consideration to support a mortgage by both spouses."

curity agreement be signed by both the husband and wife in order for the property to be available to a judgment creditor.[2]

B. *Joint Tenancy and Tenancy in Common*

A joint tenant may mortgage his or her own interest without the consent of the other joint tenant(s). *Eder v. Rothamel*, 202 Md. 189 (1952); Ginsberg and Ginsberg, *supra*, at 27. Of course, a joint tenant cannot unilaterally encumber *more* than his or her own interest in the joint property.

The above rules apply as well to a tenant in common who wishes to mortgage his or her interest in the common property. *Reinicker v. Smith*, 2 H. and J. 421 (1806); Ginsberg and Ginsberg, *supra*, at 27.

It also would appear that a joint tenant or a tenant in common could create a valid lien on his or her individual interest in personal property by his or her sole signature on the security agreement. Similarly, as for unsecured loans, joint tenants and tenants in common can make their interests in the property available to satisfy the debt in the case of default without the consent or participation of any other co-tenant.

IV

Conclusion

In summary, it is our opinion that State law does not require a lender to obtain a spouse's signature on a loan instrument in order to make individually-owned property available to a judgment creditor. A second signature would be required, however, to make entireties property available in the event of default on an obligation of one spouse. As to property held jointly or in common, an individual's interest in the property could be avail-

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[2] *See* Mitchell & Hudson, *Equal Credit Quandry: Whether a Bank May Require a Spouse's Signature as a Condition to Making a Loan*, Maryland Banking Quarterly (Fall 1978) 2, 5: "If the property relied upon is owned by the applicant and non-applicant spouse as tenants by the entireties, however, Maryland law would not permit the judgment-creditor of only one of the owners to subject the property to severance or partition, and thus the creditor would be unable to execute absent the spouse's signature."

able to satisfy his or her individual obligation without the co-tenant's signature, but the co-tenant's signature would be necessary in order to make the entire property available for satisfaction of a debt.

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BONNIE A. TRAVIESO, *Assistant Attorney General*

AVERY AISENSTARK
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CREDIT REGULATION—SECONDARY MORTGAGE LOAN LAW—TITLE INSURANCE—TITLE EXAMINATION FEES

July 15, 1982

The Honorable Laurence Levitan
Senate of Maryland

You have asked for our opinion on several questions relating to the application of §12-410 of the Commercial Law Article ("CL" Article). Your questions are directed to the following facts, as described in your letter: In securing a second deed of trust loan from a savings and loan association, the borrower requests the lender to make all the arrangements for the loan closing. The lender in turn arranges for a closing agent and, further, requires that the borrower furnish a title insurance policy to the lender. Under the facts you present, a title insurance policy would be issued only after an examination of the title.

You pose the following specific questions:

> (1) If the borrower authorizes the lender to obtain the required title insurance policy for him, may the lender require the borrower to pay for the title examination cost in addition to the title insurance premium?
>
> (2) In view of §12-304(b)(2)(i) of the Financial Institutions Article, would it affect the assessment of fees for examination of title if the savings and loan association arranged with its general counsel to furnish the title insurance on behalf of the borrower?
>
> (3) When a lender is willing to accept an attorney's certification of title, rather than requiring title insurance, may the borrower be assessed charges for an examination of title incident to that certification?

For the reasons given below, we believe that the answers to your inquiries are as follows:

> (1) If the lender arranges for title insurance at the borrower's request, the borrower may be required to pay the cost of the title examination as part of the cost of the title insurance.

(2) A lender may require the borrower to pay this cost, without violating §12-304(b)(2)(i) of the Financial Institutions Article, if its general counsel, as agent for a title insurance company, furnishes title insurance on the borrower's behalf.

(3) The lender may not require the borrower to pay the cost of a title examination incident to an attorney's certification of title, even if the lender chooses to accept such a certification in place of a title insurance policy.

I

Background

Your questions seek a clarification of a 1967 Opinion of the Attorney General—52 *Opinions of the Attorney General* 27 (1967)—in which the following conclusions were reached:

> "What the law permits is that the lender may require, as a condition to making the loan, that a title insurance policy be procured by the borrower. If the issuance of a title policy requires a title examination, then the borrower must either (1) arrange for a title examination and pay any attorney's fees resulting therefrom directly to the attorney of his own choosing or (2) authorize the lender to obtain a title insurance policy for him. Should the borrower adopt the latter alternative, the cost of the insurance would remain the borrower's responsibility." *Id.* at 31.

In a more recent letter to you, we noted that, had we been writing on a "clean slate", we would have not drawn all of the same distinctions as those drawn in the 1967 Opinion, and, but for that Opinion, we would have concluded that title examination charges may not be charged to a borrower in addition to or in place of the title insurance premiums expressly permitted by CL §12-410. Nevertheless, we recognized that the distinctions made in the 1967 Opinion and the conclusions there reached were not unreasonable. Accordingly, we deferred to that Opinion as authority for the allowance of title examination fees in the circumstances there described. *See* Letter from

Stephen H. Sachs, Attorney General, to Laurence Levitan, State Senator (January 28, 1980).[1]

II

Title Insurance Obtained by Lender

Your first question clearly addresses the second alternative situation described in the 1967 Opinion: that in which a title insurance policy is obtained by the lender at the borrower's request. You ask whether, in such a situation, the lender may require the borrower to pay for the title examination cost in addition to the title insurance premium.

Although the 1967 Opinion, in its discussion of this alternative situation, did not explicitly denote a title examination fee as being a "cost of the insurance", we believe that the rationale and language of that Opinion would allow a lender to require the borrower to pay for the cost of a title examination as part of the cost of the title insurance.

In summarizing the specific rule applicable to this situation—i.e., where the borrower authorizes the lender to obtain the insurance for the borrower—the Opinion concluded that "the cost of the insurance *would remain* the borrower's responsibility". 52 *Opinions of the Attorney General* 27, 31 (1967) (emphasis added). The phrase "would remain" evidently refers back to that which immediately precedes it: the Opinion's discussion of the first alternative situation in which the borrower

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[1] As we explained in that letter, the 1967 Opinion was issued in the same year in which the Secondary Mortgage Loan Law was enacted by Chapter 390, Laws of Maryland 1967—some 15 years ago. The Court of Appeals has stated that a contemporaneous construction of the law of the State, not annulled by the General Assembly, "has the force of law". *Popham v. Conservation Commission*, 186 Md. 62, 71 (1946). Thus, for example, when a statute is reenacted without substantive modification during the years between a contemporaneous construction and the development of a controversy, the General Assembly "has impliedly acquiesced in the correctness of the construction placed on it by the Attorney General". *Twinbrook Swimming Pool Corp. v. Comptroller of the Treasury*, 274 Md. 88 (1975). In this context, we note that the statutory provisions discussed in the 1967 Opinion were subsequently repealed and recodified in 1975, without substantive change, as part of the Commercial Law Article.

must "arrange for a title examination and pay any attorney's fees resulting therefrom directly to the attorney of his own choosing". *Id.* With regard to this first alternative, the Opinion explicitly concluded that the borrower is responsible for all costs of insuring the title, including a title examination fee. By then using the phrase "the cost of insurance *would remain* the borrower's responsibility" in its discussion of the second alternative, the 1967 Opinion implicitly concluded that, in this latter situation as well, a fee for examination of title could likewise be charged to the borrower.

Therefore, under the circumstances you describe—and based on the 1967 Opinion—we conclude that a lender may require the borrower to pay for the title examination.

III

Title Insurance Furnished by Lender's Counsel

Your second question directs our attention to §12-304(b)(2)(i) of the Financial Institutions Article ("FI" Article) and asks if this section would affect the lender's right to charge a borrower for a title examination if the lender has "arranged with its general counsel to furnish the title insurance on behalf of the borrower".[2]

The provisions of FI §12-304(b)(2)(i), referred to in your question, restrict the locations at which a licensee under the secondary mortgage loan law may receive loan applications and conduct settlements. The lender you describe in your fact situation is a savings and loan association, a type of lender that, under FI §12-302(1), is specifically exempted from the coverage of FI §12-304.

Therefore, we must conclude that any prohibition contained in FI §12-304(b)(2)(i) would have no application to a savings and loan association.

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[2] Although you do not specify the relationship between the general counsel and the savings and loan association, we assume for the purposes of this Opinion that, when the general counsel furnishes the title insurance, he does so as an agent of a title insurance company.

IV

Attorney's Certification of Title

Your third question asks whether a lender, who is willing to accept an attorney's certification of title in place of title insurance, may charge a borrower for an examination of title incident to the certification.[3]

To require the borrower to pay this charge would, we feel, require the addition of language not found in the statute. This conclusion is supported by the General Assembly's specific allowance in the Consumer Loan Law, under CL §12-307, of charges for *either* "title insurance premiums" *or* "reasonable attorney's fees paid for searching and insuring the title to any real property securing a loan". Thus, CL §12-307—in sharp contrast to CL §12-410—expressly permits a consumer loan borrower to be charged for either title insurance or attorney's fees incident to insuring the title of real estate. Had the General Assembly intended the same result with respect to secondary mortgage loans, then, we believe, it would have expressly said so in §12-410, as it did in §12-307.[4]

We therefore conclude that CL §12-410 should be interpreted as only allowing the lender to require the borrower to pay the cost of title insurance, and not the costs of an attorney's certification of title.

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[3] You suggest in your letter that an attorney's certification of title might cost the borrower less than title insurance. This may not always be the case, however, especially when the first mortgage is already insured by a title company. Moreover, in some circumstances, the attorney's certification of title may provide a significantly lesser degree of protection to the borrower than a normal title policy.

[4] We also note that CL §12-410 refers specifically to "insurance"; technically speaking, an attorney's certification is not "insurance". Therefore, the charge for such a certification would be prohibited under CL §12-411, which prohibits additional charges even if not retained by the lender. *See* 57 *Opinions of the Attorney General* 53 (1972). Moreover, even to the extent that an attorney's certification of title might be viewed as constituting a form of "insurance", CL §12-410(c) refers only to insurance that is obtained (1) from an insurance company qualified to do business in Maryland and (2) at rates not to exceed those approved by the Insurance Division of the Department of Licensing and Regulation.

V

Conclusion

In summary, based on the precedent of 52 *Opinions of the Attorney General* 27 (1967), we conclude that, in connection with a secondary mortgage loan: (1) a savings and loan association may require the borrower to pay the costs of a title examination incident to title insurance if the borrower has authorized the lender to secure the title insurance; but (2) a savings and loan association may not require a borrower to pay for a title examination incident to an attorney's certification of title.

STEPHEN H. SACHS, *Attorney General*

ROBERT DEV. FRIERSON, *Assistant Attorney General*

AVERY AISENSTARK
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Credit Regulation—Residential Mortgages—Escrow Accounts—Right to Interest—Assignment by Exempt Lender to Nonexempt Lending Institution Does Not Create Obligation to Pay Interest

November 22, 1982

Mr. Joseph R. Crouse
Bank Commissioner

You have asked us to reconsider a prior Opinion of the Attorney General—60 *Opinions of the Attorney General* 403 (1975)—which involved the application of the interest-on-escrow-account law, now codified at §12-109 of the Commercial Law Article ("CL" Article). Specifically, you have asked us to reconsider that portion of the 1975 Opinion which concluded that the assignment of an escrow account in connection with the sale of a residential mortgage by an "exempt lender" to a nonexempt "lending institution" would obligate that lending institution to pay interest on funds maintained in the escrow account.[1]

For the reasons given below, it is our opinion that the 1975 Opinion was wrong in its conclusion that the lending institution must pay interest on the assigned escrow account. Generally speaking, if the lender assigning the escrow account is itself beyond the purview of CL §12-109, the assignment of that escrow account in conjunction with a sale of a mortgage does not obligate the assignee to begin paying interest on that account.[2]

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[1] CL §12-109(a)(2) defines "lending institution" to mean "a bank, savings bank, or savings and loan association doing business in Maryland". In this Opinion, the term "exempt lender" is used to describe a lender that is not also a "lending institution" subject to §12-109—e.g., an insurance company.

CL §12-109(a)(3) defines "escrow account" to mean "an expense or escrow account which tends to protect the security of a loan by the accumulation of funds for the payment of taxes, insurance premiums, or other expenses".

[2] We should emphasize that we are not here addressing the well-established principle that—subject only to the exception discussed in Part III of this Opinion—a borrower who is entitled to interest on his or her escrow account cannot be divested of his or her right to that interest by a subsequent assignment.

In 63 *Opinions of the Attorney General* 438, 439 (1978), this principle was stated as follows:

(cont'd)

I

The 1975 Opinion

The 1975 Opinion addressed the following inquiry:

> "If a mortgage created after [May 31, 1974] by [an exempt lender] is sold to a [lending institution] in Maryland and the [lending institution] services the loan[,] would the [lending institution] then be required to commence the payment of interest on an escrow account?" 60 *Opinions of the Attorney General* 403, 403 (1975).[3]

Then Article 49, §13(b) provided, in relevant part:

> "[A]ny . . . lending institution . . . which lends money to a borrower secured by real property and which lending institution creates or is the assignee of an expense or escrow account . . . shall pay the borrower interest on the funds accumulated in the ex-

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> "[A]s to any mortgage loan made after May 31, 1974, the creation of an escrow account in connection with the loan also creates a duty to pay interest if the lender is a lending institution as defined in the statute. The right of the borrower to interest on the escrow funds is not extinguished by an assignment of the loan. On the contrary, the right to interest is a continuing right and survives the assignment of the loan, whether or not the assignee is a lending institution. Nor does the residence of the assignee, whether Maryland or out of state, affect the borrower's right to escrow account interest once he has acquired it."

See also 59 *Opinions of the Attorney General* 458, 464 (1974). The 1975 Opinion itself referred to this principle and elaborated:

> "Once the mortgagor has acquired the right to payment of interest on his escrow funds[,] he ought not be divested of that right without his consent. . . . [On assignment of the mortgage to a third party,] the primary obligation remains with the original lender for the duration of the escrow account." 60 *Opinions of the Attorney General* 403, 406 (1975).

We do not here at all question this oft-repeated conclusion. Rather, our inquiry here is limited solely to issues involving a borrower's right—in the first instance—to receive interest on an escrow account.

[3] In the 1975 Opinion, the phrase "services the loan" was assumed to mean that the lending institution had become the assignee of the escrow account and subsequent holder of the escrow deposits. *Id.* at 403-04.

> pense or escrow account in accordance with the procedure provided below."[4]

According to the 1975 Opinion, the mere assignment of the escrow account, in and of itself, required the lending institution to commence interest payments on the account:

> "[U]nder the terms of [the statute], if a 'lending institution' such as a bank doing business in Maryland, becomes the 'assignee of an expense or escrow account' relating to a loan created after [May 31, 1974], it must commence the payment of interest on the escrow account." *Id.* at 404.

We believe that this conclusion was wrong.

II

Statutory Construction of CL §12-109

According to CL §12-109(b), a lending institution is required to pay interest on an escrow account only if, after May 31, 1974, that lending institution "lends money secured by a first mortgage or first deed of trust on any interest in residential real property and creates or is the assignee of [the] escrow account" in question. The prerequisites of §12-109(b)—"lends money . . . *and* creates or is the assignee of [the] escrow account"—are clearly conjunctive in nature. Two events must occur in order for a borrower to be entitled to interest on his or her escrow account: (1) a lending institution must lend money; and (2) that lending institution must create or be the assignee of an escrow account in connection with that loan.

This reading of the statute is consistent with prior Opinions of this Office. For example, in 59 *Opinions of the Attorney General* 458, 463 (1974), the Attorney General concluded:

> "The [s]ection refers to a qualified lending institution which lends money to a borrower 'and' is the creator or assignee of an escrow or expense account in con-

[4] Former Article 49, §13(b) (1972 Repl. Vol., 1974 Cum. Supp.) has since been recodified without substantive change as §12-109 of the Commercial Law Article. As recodified, CL §12-109 clarifies the scope of this law as being limited to loans "secured by a first mortgage or first deed of trust on any interest in residential real property". *See* Revisor's Note to §12-109.

> nection therewith . . . . Both acts have to occur . . . to bring into play the operative provisions of [the section]."

Applying this construction to the inquiry addressed in the 1975 Opinion, it seems evident that a lending institution, on taking an assignment of an escrow account from an exempt lender, is not thereby required to commence interest payments on that account. This is so because, according to the facts presented in that Opinion, the lending institution did not itself extend any new credit or make any new loan secured by the underlying mortgage to which the escrow account relates.

As a general rule, then, when an exempt lender assigns both a mortgage and the related escrow account to a lending institution, the lending institution is not subject to the interest payment requirements of CL §12-109.[5]

III

Exception to General Rule

An exception to this general rule might arise, however, if the original mortgage were made by a lending institution otherwise subject to CL §12-109, but the transaction itself is nevertheless exempt from the interest payment requirement by virtue of CL §12-109(d).

Section 12-109(d)—which was added to the law by Chapter 106, Laws of Maryland 1977—provides:

> "This section does not apply if the loan is purchased by an out-of-state lender through the Federal National Mortgage Association, the Government National Mortgage Association, or the Federal Home Loan Mortgage Corporation and the out-of-state lender as a condition of purchase elects to service the loan. However, this section shall apply if the out-

[5] We caution, however, that our conclusion presupposes a bona fide transaction and not a subterfuge where, for example, in order to avoid the requirements of §12-109, a lending institution refers a mortgage applicant to an exempt lender and then arranges to take an assignment of the resulting mortgage.

> of-state lender sells the loan to a Maryland lender or places the loan with a Maryland lender for servicing."

Thus, a lending institution is statutorily exempt from the interest payment requirement if the loan is purchased and serviced by an out-of-state lender through one of certain specified government programs.

However, even this exemption is lost if "the out-of-state lender [later] sells the loan to a Maryland lender or places the loan with a Maryland lender for servicing". Under these circumstances, the mere assignment of the loan would obligate the ultimate assignee—the "Maryland lender"—to comply with CL §12-109(b) and commence payment of interest on the escrow account.[6]

IV

Conclusion

In summary, it is our opinion that 60 *Opinions of the Attorney General* 403 (1975) was wrong in its conclusion that a lending institution must pay interest on an escrow account assigned to it by any lender, even if that lender was itself exempt from paying that interest.

As a general rule, if an escrow account has been created in connection with a mortgage made by an exempt lender, the

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[6] In passing, we note that the use in subsection (d) of the term "lender" instead of "lending institution" is ambiguous. The term "lender" is broader than the term "lending institution": As defined in CL §12-101(f), "lender" refers to "a person who makes a loan under this subtitle"—i.e., one who makes a loan under Title 12, Subtitle 1, of the Commercial Law Article. Thus, under the loan purchases described in CL §12-109(d), the referenced assignees are not "lenders" because they were not themselves persons who lent money under the subtitle.

On the other hand, the title of Chapter 106, Laws of Maryland 1977—which enacted this subsection—indicates the purpose of CL §12-109(d) to be that of "exempting certain ~~persons~~ leading institutions from paying interest in [sic] escrow accounts under certain conditions".

For purposes of this Opinion, we need not resolve this ambiguity.

subsequent assignment of that mortgage and escrow account to a non-exempt lending institution does not obligate the lending institution to pay interest on that escrow account.

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AVERY AISENSTARK
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Opinions and Advice

CRIMINAL LAW

CRUELTY TO ANIMALS—EUTHANASIA OF DOGS AND CATS—"T-61 EUTHANASIA SOLUTION" NOT A PROHIBITED "CURARIFORM DRUG"

May 6, 1982

The Honorable Idamae Garrott
Maryland House of Delegates

You have requested our opinion about the use of a proprietary euthanasia agent known as T-61 Euthanasia Solution ("T-61") by veterinarians and animal control officers in Maryland.[1] Specifically, you ask whether the use of this agent violates Article 27, §59A of the Maryland Code, which prohibits the killing of a dog or cat by use of "curariform drugs".[2] You have advised us that the State Board of Veterinary Medical Examiners has informally concluded that §59A does not proscribe the use of T-61, even though certain scientific literature indicates that this euthanasia agent contains a "curariform" component. To help resolve this controversy, you have requested our advice.

For the reasons discussed below, we believe that T-61 is not a "curariform drug" within the meaning of §59A and that its use is consonant with the underlying policy of that statute—the humane killing of dogs and cats.

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[1] "T-61" is the registered trademark of the American Hoechst Corporation, Somerville, New Jersey 08876, which distributes this drug under the trade name "T-61 Euthanasia Solution".

[2] Article 27, §59A, enacted in 1979, provides:

> "(a) A person may not kill or permit to be killed a dog or cat by the following means:
>
> (1) Use of the high-altitude, low-pressure chamber (commonly known as decompression chamber);
>
> (2) Use of carbon monoxide gas;
>
> (3) Curariform drugs.
>
> (b) A person violating this section is guilty of a misdemeanor and subject to a fine of not more than $500."

I

Definition of "Curariform Drug"

To determine whether T-61 is a "curariform drug" within the meaning of §59A and, therefore, whether its use as a euthanasia agent for dogs and cats is prohibited in Maryland, the term "curariform drugs" must be defined.

The cardinal rule in the construction of statutes is to effectuate the real and actual intention of the General Assembly, and statutes are to be construed reasonably with reference to the purpose to be accomplished. *E.g.*, *Mauzy v. Hornbeck*, 285 Md. 84, 92 (1979); *State v. Fabritz*, 276 Md. 416, 421 (1975), *cert. denied*, 425 U.S. 942 (1976). As the Maryland Court of Appeals observed in *State v. Fabritz:*

> "[A]s stated in *Maguire v. State*, 192 Md. 615, 623, 65 A. 2d 299, 302 (1949), '[a]dherence to the meaning of words does not require or permit isolation of words from their context "*** [since] the meaning of the plainest words in a statute may be controlled by the context. . . .'" In construing statutes, therefore, results that are unreasonable, illogical or inconsistent with common sense should be avoided whenever possible consistent with the statutory language, *with the real legislative intention prevailing over the intention indicated by the literal meaning.*
>
> . . . *In the final analysis, in construing any statute requiring construction, courts must consider not only the literal or usual meaning of words, but their meaning and effect in light of the setting, the objectives and purposes of the enactment, with the real intention prevailing over the literal intention even though such a construction may seem to be contrary to the letter of the statute.*" 276 Md. at 422 (emphasis added) (citations omitted).

A corollary rule of construction to be considered here involves the use of technical terms or "terms of art" in a statute. In the absence of a legislative intent to the contrary, a technical term or term of art in a statute is presumed to have been used with its technical meaning. 2A *Sutherland, Statutory Construction* §47.29 (C. Sands 4th ed. 1973). Recently, the Court of Appeals defined "words of art" to mean:

> "'The vocabulary or terminology of a particular art or science, and especially those expressions which are idiomatic or peculiar to it.'" *Health Servs. Cost Review Comm'n v. Holy Cross Hosp. of Silver Spring, Inc.*, 290 Md. 508, 516 (1981) (quoting *Black's Law Dictionary* 1439 (rev. 5th ed. 1979)).

In *Holy Cross*, the Court of Appeals observed that until an alleged trade or commercial meaning of a term is proven, it is presumed to be the same as the common meaning. *Id. See also* 2A *Sutherland, Statutory Construction, supra*, §47.31. For a technical meaning of a term to prevail,

> "'it must appear that such commercial meaning is the result of established usage in commerce or trade, and that, at the time of the passage of the act, such usage was definite, uniform, and general, and not partial, local, or personal.'" *HSCRC v. Holy Cross*, 290 Md. at 516 (quoting 2A *Sutherland, Statutory Construction, supra*, §47.31, at 156).

Applying these principles to §59A, it must be determined whether the phrase "curariform drugs" is a term of art and, if so, whether its technical meaning should prevail over its common meaning. Because the statute does not define "curariform drugs", we must consider other sources to ascertain its intended meaning.

The root of the word "curariform" is "curare", which is defined in *Webster's New World Dictionary* 346 (2d college ed. D. Guralnik 1978) as

> "a black, resinous substance prepared from the juices of certain S. American plants and used by some Indians for poisoning arrows: *it causes motor paralysis when introduced into the bloodstream and is used in medicine to relax muscles, as during surgery.*" (Emphasis added.)

Stedman's Medical Dictionary 343 (23d ed. 1976) adds:

> "Used intravenously or intramuscularly, it produces muscular paralysis by preventing motor nerve impulses from causing normal contraction of skeletal muscles. *Death results from paralysis of the respiratory muscles.*" (Emphasis added.)

See also Dorland's Illustrated Medical Dictionary 389 (25th ed. 1974). The adjective ["curariform"] is unhelpfully defined as "[d]enoting a drug having an action like curare". *Stedman's Medical Dictionary, supra,* at 343. *See also Dorland's Illustrated Medical Dictionary, supra,* at 389.

Thus, "curariform drugs" denotes drugs that produce muscular paralysis by preventing motor nerve impulses from causing the normal contraction of skeletal muscles. If such a drug is administered in sufficiently large quantities, death results from a lack of oxygen due to paralysis of the respiratory muscles (i.e., hypoxia).

Based on the scientific literature available prior to the enactment of §59A in 1979, the term "curariform drugs" apparently had a more specific and technical meaning than that suggested by the preceding dictionary definitions. The latest report of the American Veterinary Medical Association Panel on Euthanasia ("AVMA Panel"), issued in 1978, defines "curariform drugs" as follows:

> "*Curariform Drugs*—Drugs such as curare, succinylcholine, pancuronium, glyceryl fenesin, and other neuromuscular blocking agents produce death by immobilizing the respiratory muscles, causing fatal suffocation. *There is no depressant action on the brain. . . . Human patients given these drugs have described periods of full consciousness accompanied by complete muscular immobility and intense anxiety.*" American Veterinary Medical Association, *Report of the AVMA Panel on Euthanasia,* 173 J. Am. Vet. Med. Ass'n 59, 69 (1978) (emphasis added) (footnote omitted) [cited below as "*AVMA Report*"].[3]

Another veterinary medical authority, written in 1977, offers a similar definition:

> "Drugs such as *d*-tubocurarine, gallamine, decamethonium, and succinylcholine cause rapid collapse due to neuromuscular paralysis. *Consciousness is not affected.* Death is due to anoxemic anoxia,

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[3] Regarding the curare-like effects of succinylcholine, see *Reed v. State,* 283 Md. 374, 438 (1978) (Smith, J., dissenting).

> which results from inability of the respiratory muscles to function. These agents should not be used to kill animals." Hatch, "Euthanatizing Agents", *Veterinary Pharmacology and Therapeutics* 1289, 1294 (4th ed. L. Jones, N. Booth & L. McDonald eds. 1977) (emphasis added).

These definitions of "curariform drugs" reveal that the term, as used both prior to and since the enactment of §59A, is a "term of art". That is, for the relevant scientific community, the "definite, uniform, and general" usage of the term connotes a drug having a curare-like effect *that does not affect consciousness.* Because §59A is most likely to be enforced against veterinarians and animal control officers, it is reasonable to assume that the General Assembly intended the language of this penal statute to inform that group of persons about which euthanasia methods are prohibited. Hence, veterinarians' understanding and interpretation of this term of art ought to be accorded significant weight.

In summary, the scientific literature reveals that when veterinarians refer to "curariform drugs" they mean euthanasia agents that do not immediately affect consciousness prior to death due to respiratory paralysis and, ultimately, lack of oxygen. The unsuitability of pure curariform drugs (e.g., succinylcholine, gallamine) lies in the fact that the animal is conscious while it literally suffocates to death. Although the common usage of the term "curariform drugs" might not reflect this crucial distinction, we nevertheless are persuaded, for the reasons set forth below, that the General Assembly intended to adopt the technical and narrower meaning of "curariform drugs" in the context of §59A.

II

Attributes and Effects of T-61

T-61 is a combination drug consisting of three chemically and pharmacologically different components. Each milliliter contains the following active ingredients: (1) 200 milligrams ("mg") of N-[2-(m-methoxy-phenyl)-2-ethyl-butyl-(1)]-gama-hydroxybutyramide—a general anesthetic that induces rapid and deep anesthesia, followed by respiratory arrest, cerebral death, and circulatory collapse; (2) 50 mg of 4, 4′-methylene-bis (cyclohexyl-trimethyl-ammonium iodide)—a neuromuscular blocking agent that induces skeletal muscular relaxation by blocking the transfer of stimuli from nerve endings to muscle fibers; and (3) 5 mg of tetracaine hydrochloride—a local anesthetic that permits completion of the injection without local pain or struggling. *See* Package Insert for T-61 Euthanasia Solution, American Hoechst Corporation, Animal Health Division (1980).[4]

The manufacturer describes T-61's pharmacodynamic effect as follows:

> "The sequence of neurological effects of T-61®, when properly administered, produces a general anesthesia including first an analgesic stage, *followed by deep anesthesia with suppression of consciousness*, respiratory paralysis, cerebral death and circulatory collapse. The stage of involuntary excitation that normally occurs between the analgesic and deep anesthesia stages is omitted when the recommended dosage of T-61® is properly injected. . . . *The cortical encephalographic changes are typical of the anesthetic component alone. They occur almost immediately following proper administration and advance rapidly to cerebral death. The second component exerts its effect during the deep anesthesia stage*, augmenting skeletal muscle relaxation and respiratory paralysis. Cerebral death occurs prior to circulatory collapse.
>
> *Animals euthanized with T-61®*, when it is properly administered, *do not experience anoxic pain, since the neural pharmacologic action of the anesthetic component is evident prior to apneusis." Id.* (Emphasis added.)

According to the manufacturer, animals euthanatized with T-61 do not experience any pain associated with an inability to breathe because they are already unconscious as a result of the general anesthetic component. T-61 is intended exclusively for

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[4] Each milliliter of T-61 also contains 0.6 milliliters of dimethylformamide in distilled water.

use as an euthanasia agent for dogs, cats, horses, mink, small laboratory animals, and birds. *Id.* The preferred method of administering T-61 is by intravenous injection. However, intrapulmonary or intracardiac injections may also be used under certain circumstances. *Id.* T-61 is not a controlled dangerous substance subject to extensive federal and state regulation because it does not contain regulated drug components. *See, e.g.*, 21 U.S.C. §801 *et seq.;* Art. 27, §276 *et seq.* of the Maryland Code; *AVMA Report, supra,* at 68.

The veterinary medical literature describes T-61 as follows:

> "T-61 is an injectable nonbarbiturate, nonnarcotic mixture of 3 drugs used to induce euthanasia. These drugs provide a combination of general anesthetic, curariform, and local anesthetic actions. *Death results from severe CNS depression, hypoxia, and circulatory collapse.* T-61 has been used in Germany since 1962 and became available in the United States soon thereafter. Because it is not currently listed as a controlled substance under federal drug regulations, it has gained popularity in recent years.
>
> * * *
>
> Advantages— . . . (2) the terminal gasp which may accompany pentobarbital euthanasia is not evident with T-61.
>
> Disadvantages— . . . (3) except in the horse, if T-61 is injected *at a rapid rate,* the animal may appear to experience pain or discomfort immediately prior to becoming unconscious. . . . " *AVMA Report, supra,* at 68 (emphasis added) (footnotes omitted).[5]

See also Hatch, supra, at 1292; Lumb, Doshi & Scott, *A Comparative Study of T-61 and Pentobarbital for Euthanasia of Dogs,* 172 J. Am. Vet. Med. Ass'n 149, 152 (1978). A review of the recent veterinary medical literature reveals relatively few references to T-61. Of the two scientific publications discussing

[5] The manufacturer specifically warns against the rapid injection of T-61, adding: "The correct injection technique is a prerequisite to effect euthanasia without excitation or pain". Package Insert for T-61 Euthanasia Solution, American Hoechst Corporation, Animal Health Division (1980).

this drug in conjunction with other euthanasia agents, it is significant that neither one classified T-61 as a "curariform drug". *Compare AVMA Report, supra,* at 68 and *Hatch, supra,* at 1292 *with AVMA Report, supra,* at 69 and *Hatch, supra,* at 1294.

Based on the manufacturer's package insert and the veterinary medical authorities cited above, 4, 4′-methylene-bis (cyclohexyl-trimethyl-ammonium iodide) has a curare-like effect insofar as it produces respiratory paralysis. However, T-61 contains another component that induces deep anesthesia *prior to* respiratory failure. Hence, the animal is unconscious before the curariform component takes effect. According to the scientific literature discussed above, the animal does not experience the sensation of suffocation and the intense anxiety that accompanies the administration of pure curariform drugs such as succinylcholine. *See* Hicks & Bailey, Jr., *Succinylcholine Chloride as a Euthanatizing Agent in Dogs,* 39 Am. J. Vet. Res. 1195, 1197 (1978).

III

Legislative Intent as Applied to T-61

Additional support for our conclusion that T-61 is not a "curariform drug", at least as that term is used in §59A, is found in the title of the legislation that enacted this statute. It is well-settled in Maryland that the title of an act may be considered to ascertain the legislative intent and purpose when the statute is of doubtful meaning. *E.g., State Farm Mut. Auto. Ins. Co. v. Insurance Comm'r,* 283 Md. 663, 674 n.3 (1978); *Commission on Human Relations v. Mayor & City Council of Baltimore,* 280 Md. 35, 41 (1977); *State v. Wagner,* 15 Md. App. 413, 422 (1972).

Section 59A was enacted by Chapter 342, Laws of Maryland 1979. The title of Chapter 342 describes that act as being:

"AN ACT concerning

Euthanasia of Dogs and Cats

FOR the purpose of prohibiting the killing of dogs and cats by certain methods; providing a penalty for

> violations; and *generally relating to the humane killing of dogs and cats.*" (Emphasis added).

The title's references to "euthanasia" and "humane killing" suggest that the General Assembly intended only to prohibit those certain methods of killing dogs and cats that it considered inhumane.[6] Thus, for example, the statute does not proscribe the use of euthanasia agents that induce immediate unconsciousness by depressing the central nervous system prior to death due to hypoxia (e.g., anesthetic gases, carbon dioxide, barbituric acid derivatives, chloral hydrate); these euthanasia agents are thus considered legal and, by implication, humane. Similarly, in our view, the use of T-61 is consistent with the statutory intent that euthanasia be induced by humane means.

When euthanasia is indicated for an animal, the predominant consideration is inducing a painless death. *See AVMA Report, supra,* at 60. According to veterinary medical authorities, animals do not experience pain if they are unconscious. As the AVMA Panel on Euthanasia observed in its latest report:

> "The sensation of pain is initiated by damage to or intense stimulation of almost any part of the body. In tissues, pain receptors react to substances released when tissue is damaged. . . .
>
> . . . Recognition of pain by an animal depends on impulses from pain receptors traversing pain pathways leading to the thalamus and cerebral cortex. For pain to be experienced, the cerebral cortex and subcortical structures must be functional. *An unconscious animal does not experience pain because the cerebral cortex is not functioning. If the cerebral cortex is rendered nonfunctional by any means such as hypoxia, depression by drugs,* electric shock, or concussion, *pain is not experienced.*
>
> In an unconscious animal, stimuli that evoke pain will elicit reflex responses manifested by motor movement. For this reason, purposeful or nonpurposeful movements of an animal are not reliable indi-

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[6] The word "euthanasia" is derived from the Greek roots *eu-* meaning "well" and *thanatos* meaning "death" and is defined as "an easy and painless death." *Webster's New World Dictionary* 484 (2d college ed. D. Guralnik 1978).

cators of cerebral pain reception. Conversely, an animal can experience pain, even though no body movements occur in response to painful stimuli, if the animal is given muscle paralyzing agents such as curare, succinylcholine, gallamine, pancuronium, nicotine, or decamethonium. *These muscle paralyzing agents do not depress the cerebral cortex or thalamus.*" *AVMA Report*, *supra*, at 60 (emphasis added).

Although determining whether an animal is "conscious" poses some difficulties, veterinarians believe that measurement of electrical activity in the brain by means of an electroencephalogram ("EEG") can reveal whether an animal is experiencing pain:

> "The humaneness of the euthanasia procedure has been related to the duration of consciousness; however, the state of consciousness is difficult to ascertain in animals. Investigations have shown that the electroencephalogram (EEG) of a conscious dog has a dominant frequency of 25 to 30 cycles per second (cps), whereas that of a deeply anesthetized dog is almost flat, with occasional bursts of 5 to 10 cps. Other work has shown that low-voltage fast activity (LVFA) or an 'activated EEG' is predominant during apprehension and periods of pain in the dog." Hicks & Bailey, Jr., *supra*, at 1195 (footnotes omitted).

Regarding the unsuitability of succinylcholine—a curariform drug—for euthanasia purposes, Hicks and Bailey, Jr. concluded:

> "Comparison of events in anesthetized and nonanesthetized dogs revealed that cessation of cortical activity could be attributed to respiratory failure (apnea). Paralysis of the respiratory muscles, due to the depolarizing-blocking activity of succinylcholine chloride, has been shown to be the cause of death in these experimental animals. . . . *Electroencephalograms did not indicate loss of consciousness as the waveform progressed from the normal awake waveform to activated EEG.* The EEG became isoelectric from periods ranging from 360 to 540 [seconds] after injection. *This response of the EEG indi-*

cates that the dogs dying in this matter are conscious for long periods, but the exact point of unconsciousness could not be ascertained from the data collected." *Id.* at 1197 (emphasis added) (footnote omitted).

In contrast, the authors of a comparative study of T-61 and pentobarbital—a barbituric acid derivative and widely accepted euthanasia agent for dogs[7]—observed:

> "A significant difference was not found between the 2 agents in the time necessary for the EEG to become isoelectric. *However, pentobarbital-treated dogs had a mean time of 12 seconds longer than T-61-treated dogs before activity ceased.*" Lumb, Doshi & Scott, *supra*, at 150-51 (emphasis added).

The study states that the EEG was isoelectric (i.e., showing no variation in electric potential) after five minutes, indicating that the animal was dead. *Id.* at 150. Although pentobarbital is considered to be an "ideal" euthanasia agent for dogs, *id.* at 149, this study concluded:

> "[B]oth *T-61* and pentobarbital sodium *induced euthanasia smoothly and without undesirable reactions. They thus fulfilled the prime requirement of such an agent, which is painless death.*
>
> T-61-treated dogs were injected more slowly and thus collapsed during the injection process. Pentobarbital was administered in a bolus at a faster

[7] The AVMA Panel summarized the effects of barbituric acid derivatives when used as euthanasia agents as follows:

> "*Barbiturates depress the entire central nervous system*, but quantitatively, various areas are affected differently. *Within seconds of intravenous administration, unconsciousness is induced which progresses to deep anesthesia.* . . . Breathing stops from depression of the respiratory center, and cessation of heart action quickly follows. Direct action on the medulla accounts for respiratory depression when high dosages are given. Several barbiturates are acceptable, but pentobarbital sodium is most commonly used for euthanasia." *AVMA Report* at 68 (emphasis added).

Pentobarbital is a Schedule II controlled dangerous substance in Maryland. Art. 27, §279(b)d.4. Thus, it is subject to a number of restrictions governing its purchase and use.

> rate than T-61; therefore, the dogs given pentobarbital collapsed after the injection was complete. *The most striking difference in the effects of the 2 agents was the fact that pentobarbital did not maintain cardiac and respiratory arrest in 3 of the 12 dogs. Whether these dogs would have survived the initial injection alone is a matter for conjecture. Certainly, in clinical practice such a phenomenon does occasionally occur and is undesirable.*
>
> T-61 contains 3 chemically and pharmacologically different substances to provide a combination of general anesthetic, curariform, and local anesthetic actions. *Euthanasia results from severe CNS depression, hypoxia, and circulatory collapse. It is probable that the general anesthetic alone . . . is administered in sufficient quantity to cause euthanasia by CNS depression. Addition of the muscle relaxant . . . further assures that respirations cannot resume, as occurred with pentobarbital.* Without testing each component of T-61 individually, the contributive action of each drug cannot be determined. *In any event, the combination of drugs was highly effective and did not allow resumption of respiration." Id.* at 151-52 (emphasis added).

Thus, T-61 appears to offer a slight advantage over pentobarbital in terms of preventing the resumption of respiration. Furthermore, there was no indication that the animals were conscious or experienced any pain when T-61 was administered.

Based upon the scientific literature discussed above, T-61 should not be considered a "curariform drug", as that term of art is used by the relevant scientific community, merely because it contains a curariform component. The manufacturer of T-61 and veterinary medical authorities agree that T-61 contains a curariform component; however, the overall effect of T-61 is not typical of pure curariform drugs. The distinction is that pure curariform drugs (e.g., succinylcholine, gallamine) do not immediately affect consciousness, and the animal is thus capable of experiencing pain or intense anxiety prior to death due to respiratory paralysis. The scientific literature quoted above reveals that T-61 immediately depresses the central nervous system causing loss of consciousness. The adjunct curariform component of T-61 does not take effect until *after* the animal is unconscious. Moreover, the anesthetic component alone may be lethal. Lumb, Doshi & Scott, *supra*, at 151. If euthanasia agents that depress the central nervous system are considered humane, then a combination agent such as T-61, whose immediate effect is virtually indistinguishable from other central nervous system depressants, should similarly be acceptable.

IV

Consequences of a Contrary Statutory Construction

The rules of statutory construction also permit us to examine the consequences flowing from choosing one interpretation of the statute over another and to adopt a construction that is in harmony with the general scheme of the enactment and that will assist in effectuating the legislative purpose. *E.g.*, *State v. Berry*, 287 Md. 491, 496 (1980). Results that are unreasonable, illogical, or inconsistent with common sense should be avoided, and an interpretation should be given that will not lead to absurd or anomalous results. *E.g.*, *Kindley v. Governor*, 289 Md. 620, 625 (1981); *State v. Berry*, *supra*, 287 Md. at 496; *Comptroller v. John C. Louis Co., Inc.*, 285 Md. 527, 539 (1979). This rule applies to penal statutes, such as §59A. *See Cider Barrel Mobile Home Court v. Eader*, 287 Md. 571, 583 (1980).

Banning T-61 would lead to an illogical result for at least three reasons. First, if §59A were interpreted to preclude the use of T-61, the General Assembly would be prohibiting a euthanasia agent that (1) does not act in a manner typical of pure curariform drugs and (2) has the same immediate effect as other permissible euthanasia agents that depress the central nervous system and rapidly induce unconsciousness. Our interpretation, however, avoids this result while preserving the section's prohibition on the use of curariform drugs that do not depress the central nervous system prior to causing death (e.g., succinycholine, gallamine).

Second, T-61 meets most of the criteria established by the AVMA Panel for evaluating methods of euthanasia. These criteria are as follows:

"(1) Ability to produce death without causing pain;
(2) time required to produce loss of consciousness;

> (3) time required to produce death; (4) reliability; (5) safety of personnel; (6) potential for minimizing undesirable psychologic stress; (7) compatibility with requirement and purpose; (8) emotional effect upon observers or operators; (9) economic feasibility; (10) compatibility with histopathologic evaluation; and (11) drug availability and abuse potential." *AVMA Report, supra,* at 64.

The scientific literature indicates that T-61 fulfills points (1), (2), (3), (4), (7), (8), (10),[8] and (11) of the AVMA criteria. (None of the authorities reviewed discussed points (5), (6), or (9).) If T-61 is prohibited by §59A, it would place the General Assembly in the anomalous position of banning a euthanasia agent that meets most, if not all, of the AVMA's evaluation criteria.

Third, the General Assembly would be in the illogical position of prohibiting the use of one of only two drugs specifically recognized by the Bureau of Veterinary Medicine of the U.S. Food and Drug Administration as effective "for the humane euthanasia of animals *without excitation or pain*". 46 Fed. Reg. 23,232 (April 24, 1981) (amending 21 C.F.R. §522.900) (emphasis added).[9] The rules of statutory construction dictate that such incongruous results be avoided.

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[8] If administered in larger than recommended doses, T-61 may adversely affect histopathologic evaluations. *AVMA Report* at 69.

[9] A new animal drug application ("NADA") for T-61 received final approval from the Bureau of Veterinary Medicine of the U.S. Food and Drug Administration ("FDA") on October 15, 1976. 41 Fed. Reg. 45,547 (Oct. 15, 1976). An NADA must be approved by the FDA before the drug can be administered to animals in the United States.

Because we conclude that the underlying legislative intent of §59A was not to prohibit euthanasia agents such as T-61, we do not need to reach the issue of, nor need we express an opinion about, whether this statute would be unconstitutional under the Supremacy Clause, U.S. Const. art. VI, cl. 2, insofar as state legislation affecting the use of euthanasia agents like T-61 might have been preempted by federal regulation in the field. *Cf. Pharmaceutical Soc'y of the State of N.Y., Inc. v. Lefkowitz,* 454 F. Supp. 1175, 1178-80 (S.D.N.Y.), *aff'd,* 586 F.2d 953 (2d Cir. 1978) (preemption analysis applied to state statutes regarding generic drugs and drug labeling); *Cosmetic, Toiletry & Fragrance Ass'n, Inc. v. Minnesota,* 440 F. Supp. 1216, 1220-25 (D. Minn. 1977), *aff'd per curiam,* 575 F.2d 1256 (8th Cir. 1978) (preemption analysis applied to conflicting state legislation and federal regulation of aerosol product labeling). Nor do we express an opinion about whether §59A would unreasonably burden interstate commerce—violative of the Commerce Clause, U.S. Const. art. I, §8, cl. 3—if it were construed to prohibit the use of T-61 as a euthanasia agent. *See generally* 2 Am. Jur. 2d *Administrative Law* §219 (1962).

V

Conclusion

In summary, although the issue is not altogether free from doubt, it is our opinion that T-61 is not a "curariform drug" within the ambit of §59A for four reasons:

First, "curariform drugs", as that term of art is used by the relevant scientific community, connotes a class of euthanasia agents that are inhumane because they paralyze the animal's respiratory function without affecting consciousness. However, when T-61 is administered as prescribed, there is no evidence that the animal experiences any sensation of suffocation or intense anxiety that usually accompanies the administration of pure curariform drugs such as succinylcholine and gallamine.

Second, the effect of T-61 is not typical of pure curariform drugs, even though it contains an adjunct curariform component. However, T-61's general anesthetic component immediately induces unconsciousness *before* the curariform component takes effect to prevent the resumption of respiration.

Third, consonant with the express legislative purpose of advocating the humane killing of dogs and cats, the immediate effect of T-61 is virtually indistinguishable from other humane and widely accepted euthanasia agents that depress the central nervous system.

Fourth, banning T-61 would lead to absurd and illogical results because (1) the overall effect of this combination drug is not typical of pure curariform drugs, (2) it meets most, if not all, of the AVMA's criteria for acceptable euthanasia agents and is approved by that association for euthanasia purposes, and (3) T-61 is one of only two euthanasia agents specifically approved by the Bureau of Veterinary Medicine of the U.S. Food and Drug Administration as humane and effective.

Stephen H. Sachs, *Attorney General*

Ronald S. Gass, *Assistant Attorney General*

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CRIMINAL LAW—GAMING—RAFFLES—REAL PROPERTY—EFFECT OF LAW PERMITTING RAFFLES OF REAL PROPERTY

May 25, 1982

The Honorable Harry Hughes
Governor

We have reviewed and approve for constitutionality and legal sufficiency House Bill 1885 (Raffles of Real Property). In doing so, however, we wish to point out certain ramifications of the bill that may have been unanticipated by its sponsors and the General Assembly.

I

Purpose of Bill

The obvious purpose of House Bill 1885, as indicated by its title, is to permit "any bona fide charitable organization in this State to conduct a raffle if the prize is real property under certain circumstances".

As passed, House Bill 1885 would add a new §236 to the subtitle "Gaming" in Article 27, to provide as follows:

> "(a) This subtitle may not be construed to make it unlawful for any bona fide charitable organization in this State to conduct a raffle for the exclusive benefit of the charitable organization, where the prize awarded is real property to which the organization holds title, or as to which the organization has the ability to convey title. An organization may not conduct more than 2 raffles of real property in any calendar year.
>
> (b) The Secretary of State may adopt regulations governing raffles of real property by charitable organizations under this section."

We assume that this new law was primarily intended to overcome certain limitations, contained in other sections of the same subtitle, that have been construed to prevent the holding of a raffle if the prize is real property. For example, §257 authorizes certain organizations in Baltimore City and Baltimore County to hold a "carnival, bazaar or raffle" and, "at such carnival, bazaar or raffle", to award "prizes . . . in merchandise and cash". We understand that Baltimore City and Baltimore County authorities have read the statute's limited reference to "merchandise and cash" as excluding real property. Similar limiting language appears in other sections of the subtitle as well. *See, e.g.*, §255, which applies to some 16 counties.

II

Exemption from Local Regulation

The language of House Bill 1885, however, is far broader than would be necessary to avoid just this one limitation. If the sole purpose of the new law were to override the limited references to "merchandise and cash", it would have been sufficient to word the new statute to provide, for example, that "a person or organization otherwise authorized to conduct a raffle under any provision of this subtitle may not be precluded from doing so merely because the prize to be offered is real property. . . . "

Proposed §236, however, is not worded as an addendum to or modification of other existing authority. Rather, it is couched as a broad, unqualified and independent grant of authority to hold real property raffles, notwithstanding any of the prohibitions, limitations, conditions, or qualifications otherwise applicable to raffles conducted in this State.

As such, this section would permit a charitable organization to hold a raffle for real property in any county or counties, wholly free of the licensing or other restrictions that otherwise govern raffles in that county or counties. In various counties, for example, a raffle may be conducted only if one or more of the following conditions have been met:

(1) a permit is first obtained from and a fee paid to the county [e.g., §§251B, 254, 255(b), 256, 257, and 258];

(2) the raffle is conducted in accordance with regulations adopted by the county government [e.g., §§250A and 251B];

(3) the raffle is conducted without the assistance of professionals [e.g., §§251B, 253, 254, and 256];

(4) the charitable organization "spend[s] the greater part of [its] funds for . . . charitable purpose in" the political subdivision [e.g., §257];

(5) persons below a certain age do not participate in the raffle [e.g., §§255(b) and 256];

(6) the organization has operated in the county for a specified time [e.g., §256];

(7) no more than "one major prize" is offered per raffle [e.g., §258];

(8) the raffle is not conducted on a Sunday [e.g., §258(b)]; and

(9) the prize does not exceed a specified value [e.g., §§254(b)(3), 258B, and 259].[1]

In sum, then, the various conditions, limitations, and local oversight otherwise governing a charitable organization that, for example, holds a raffle for a television set would not apply if the same organization instead chose to raffle off real property. Whether this broad result was in fact intended by the General Assembly is uncertain. It is, however, the effect of House Bill 1885.

In this regard, however, §236 specifically authorizes the Secretary of State to adopt regulations "governing raffles of real property . . . under this section". In exercising that broad authority, it would appear possible for the Secretary of State to adopt regulations that require adherence to local licensing and similar requirements.

III

Meaning of "Bona Fide Charitable Organization"

We also note that, in at least one respect, House Bill 1885 may be somewhat narrower in scope than anticipated. Unlike the many other raffle sections appearing in the same subtitle, new §236 applies only to a "bona fide charitable organization".

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[1] It is unclear whether these and similar county requirements apply only to those raffles actually held in the particular county or, also, to any raffle—even if held elsewhere—for which chances are sold in that county.

In the context of the "Gaming" subtitle of Article 27, the term "charitable organization" is generally used to describe something *other than* such entities as, for example, a volunteer fire company, a fraternal organization, a veterans' organization, or a religious organization. *See, e.g.*, present §255, which refers to "any volunteer fire company or bona fide fraternal, civic, war veterans', religious *or charitable* organization or corporation".

Given the new statute's reference to the Secretary of State—who is also charged with administering the State's Charitable Organizations Law—it may be that the General Assembly intended that Law's broad statutory definition of "charitable organization" [Article 41, §103A(b)] to apply here as well. The General Assembly did not, however, express this intent anywhere in the statute itself.

Again, however, §236 specifically authorizes the Secretary of State to adopt regulations "governing raffles of real property by charitable organizations under this section". In exercising that authority, it would be appropriate for the Secretary of State to adopt specific regulations further defining the statutory reference to a "bona fide charitable organization in this State".

IV

Prohibition of Private Gain or Profit

Finally, we note that most of the existing sections authorizing raffles contain express limitations against any individuals' benefiting financially from the holding of the raffle. Thus, for example, present §255 authorizes a raffle only "for the exclusive benefit of [the] charitable organization . . . , if no individual or group of individuals benefits financially from the holding of . . . [the] raffle or receives or is paid any of the proceeds from . . . [the] raffle, for personal use or benefit". (*See also, e.g.*, §§248, 250A, 251B, 253, 257, 258, 258A, and 261.) Proposed §236 contains the caveat that the raffle be "for the exclusive benefit of the charitable organization", but does not contain the additional clause quoted above.

The relevancy of such language is perhaps most apparent in the context of the following example: A homeowner agrees to sell his or her home to a charitable organization for a specified price, but that sale is conditioned on the organization's ability to sell a certain number of chances, or its receipt of a specified minimum amount of money, and the consequent holding of a raffle for that home.

Language such as that appearing in present §255 has been read by some State's Attorneys—correctly, we believe—to preclude such a conditional arrangement if the purchase price to be received by the homeowner from the charitable organization is anything greater than the current bona fide fair market value of the home—i.e., if the homeowner stands to receive anything in excess of the price that the owner would have been able to receive had the property been offered for sale on the open market. For example, if the fair market value of a home is $50,000 and a charitable organization nevertheless agrees to pay the homeowner $75,000 for the property, but only if it sells, say, $100,000-worth of tickets, the homeowner is obviously "benefit[ing] financially" and "receiv[ing] . . . proceeds" from the raffle in violation of the law.

Although greater specificity in §236 would be helpful, the general rule is that exceptions to the gambling laws, of which §236 would be one, are to be narrowly construed. *See, e.g.*, Article 27, §246; *Clerk v. Chesapeake Beach Park*, 251 Md. 657, 667 (1968); 54 *Opinions of the Attorney General* 161 (1969). Consequently, we believe, even the more limited language of §236 can and should be read to prohibit such obvious subterfuges as those described above. That is, if a property owner obtains a special price or other benefit from the holding of the raffle—as distinct from a bona fide arm's length sales transaction between the owner and the charitable organization—the raffle arguably is not being held "for the exclusive benefit of the charitable organization".

We note that, based on statutory language even less express than that used here, the Attorney General of Virginia has ruled that any conditional sale of property to a charitable organization for use as a prize in a raffle—presumably, even if the property is sold to the organization at or below its fair market value—is prohibited by Virginia law. Opinion from Marshall Coleman, Attorney General, to Anthony P. Giorno, County Attorney (November 17, 1981), at note 2 and accompanying text.[2] We would not go so far as to suggest that *all* conditional sales are similarly prohibited by Maryland law—particularly in light of the reference in House Bill 1885 to property "to which the organization holds title, *or* as to which the organization has the ability to convey title". The latter clause seems designed specifically to accommodate conditional sales.

Nevertheless, we do caution against transactions in which—pursuant to a conditional sales agreement, an option, or a similar arrangement that is dependent on the charitable organization's ability to sell enough chances to warrant the holding of the raffle—the property owner stands to receive something more than he or she would have received from any other willing buyer—i.e., something more than the then true fair market value of the property. (In cases of doubt, a current, independent appraisal of the property might be warranted.)

And, again, it might well be appropriate for the Secretary of State to adopt regulations under §236 to delineate more specifically the manner and extent to which a real property raffle must be "for the exclusive benefit of the charitable organization".

STEPHEN H. SACHS, *Attorney General*

AVERY AISENSTARK, *Principal Counsel, Opinions and Advice*

Editor's Note: On June 1, 1982, House Bill 1885 was signed into law as Chapter 908, Laws of Maryland 1982, effective July 1, 1982. The preceding Opinion was originally written as a bill review letter; because of the special problems and issues noted, it is published here in a slightly revised format.

The regulations subsequently adopted by the Secretary of State to govern raffles of real property are now codified at COMAR 01.02.07.

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[2] Ironically, Virginia is the state from which local interest in real property raffles first arose.

EDUCATION

Colleges and Universities—"Land Grant" Funds—Personnel and Tenure—Effect of Closure or Consolidation of Public Institutions

January 13, 1982

William S. Ratchford, II
Director
Department of Fiscal Services
Maryland General Assembly

You have requested our opinion concerning the legal ramifications of closing or consolidating public institutions of higher education in response to fiscal and enrollment constraints. Specifically, you ask whether closure or consolidation of certain institutions "could jeopardize federal funding such as that provided under the 1890 Land Grant (Morrill-Nelson) Act". As a corollary, you also ask whether the General Assembly, if it decides to close or consolidate a college currently receiving Morrill-Nelson funds, may designate another institution as a land grant college so as to entitle that institution to receive these federal funds.

For the reasons related below, it is our opinion that the closure or consolidation of a land grant institution would have no impact on the funding that the State receives under the Morrill-Nelson Act, so long as the General Assembly designates another institution as a land grant college in accordance with the terms of the federal statute. We also offer below some observations and advice on paramount personnel considerations that will warrant the General Assembly's attention if it decides to close or consolidate any State institution of higher education.

I

History of the Morrill-Nelson Act

The federal statute authorizing financial aid for the so-called "land grant" colleges in the several states and U.S. possessions is commonly known as the "Morrill-Nelson Act", codified at 7

U.S.C. §301 *et seq.* The stated purpose of the Morrill-Nelson Act has been, since its genesis in 1862, to support:

> "at least one college [in each State] where the leading object shall be, without excluding other scientific and classical studies and including military tactics, to teach such branches of learning as are related to agriculture and the mechanical arts, in such manner as the legislatures of the States may respectively prescribe, in order to promote liberal and practical education of the industrial classes in the several pursuits and professions in life." 7 U.S.C. §304.

The original congressional enactment in 1862 (then characterized as the "Morrill Act") granted to each state 30,000 acres of public land "for each Senator and Representative in Congress to which the States are respectively entitled by the apportionment under the census of 1860"—thus the colloquial reference to "land grant" institutions. The original grant apportioned the dedicated public land and conveyed shares of land scrip to the states, which in turn sold the scrip and invested the proceeds to create a perpetual fund that served as the source of financial support for the "land grant" colleges. 7 U.S.C. §§302 and 303. Additionally, the 1862 statute stipulated a series of conditions dealing with management and use of the fund.[1]

Subsequent amendments, to the Morrill Act in 1890, 1935, 1952, 1960, 1966, and 1972, while preserving the basic grant features and conditions, expanded the coverage to encompass ancillary "instruction in the English language and the various

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[1] The principal conditions, contained in §305, are as follows: if any part of the fund or its interest is "diminished or lost", it is to be replaced by the state so that the capital of the fund remains "forever undiminished"; the annual interest is to be applied "without diminution" to the maintenance of the agricultural college—except that a sum, not exceeding 10% of the amount received by the state, may be expended to purchase land for experimental farms, whenever authorized by the legislature of the state; no portion of the fund may be used "directly or indirectly, under any pretense whatever", to purchase, preserve, erect, or repair any building; each state that accepts a grant must establish at least one agricultural college or the grant to the state "shall cease"; an annual report on the progress of the college shall be made to the federal agency administering the grant.

branches of mathematical, physical, natural and economic science", and augmented federal financial support by authorizing additional annual appropriations to the several states.[2] Currently, the statute authorizes an annual allocation of $8,100,000, to be divided equally among the several states, as well as an additional amount of $4,360,000, to be divided proportionately in relation to the respective states' populations. 7 U.S.C. §329.[3]

II

History of Maryland Land Grant Institutions

In 1856, the State of Maryland established and endowed an agricultural college. *See* Chapter 97, Laws of Maryland 1856. Under this enactment, creating the "Maryland Agricultural College", the General Assembly provided for incorporation, sale of stock, election of trustees vested with managerial powers, and an annual appropriation of $6,000. The General Assembly also expressly reserved the right to revoke the in-

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[2] August 30, 1890, c. 841, §1, 26 Stat. 417; June 29, 1935, c. 338, §22, 49 Stat. 439; June 12, 1952, c. 419, §§1-4, 66 Stat. 135; July 14, 1960, Pub. L. 86-658, 74 Stat. 525; Nov. 7, 1966, Pub. L. 89-791, Title I, §108(a), as added June 20, 1968, Pub. L. 90-354, §1, 82 Stat. 241; June 23, 1972, Pub. L. 92-318, Title V, §506(d), 86 Stat. 350.

[3] During the budget cutting process that preoccupied Congress this past Spring, the House proposed to eliminate the entire land grant program while the Senate proposed a reduction of $1.8 million (or $32,000 per state). The Morrill-Nelson funding survived intact, however, following amendments to the budget reconciliation bill in committee sessions. *See* "The Green Sheet", June 29, 1981, published by The National Association of State Universities and Land Grant Colleges ("NASULGC").

We recently learned from a NASULGC representative, however, that funding under another federal agricultural program, which also substantially benefited State land grant institutions, ceased as of October 1, 1981. Specifically, at the Reagan Administration's behest, Congress did not appropriate any money in federal fiscal year 1982 for distribution to the states under "The Bankhead-Jones Farm Tenant Act of 1933", 7 U.S.C. §1000 *et seq.* [c.517, 50 Stat. 522]. Under that Act, approximately $11.5 million annually had been appropriated to the various states; the State of Maryland's share of $215,000 was, like the land grant funds, distributed to the University of Maryland's College Park campus ($189,000) and Eastern Shore campus ($26,000).

corporation or, as it later did, to withdraw any endowment appropriations.[4]

In 1864, the General Assembly declared its acceptance of the provisions of the Morrill Act of 1862. *See* Chapter 90, Laws of Maryland 1864. In its next Session, the General Assembly devoted the investment proceeds from the sale of land scrip to the Maryland Agricultural College, with the explicit condition that "nothing herein contained shall be construed to prohibit or preclude the General Assembly, at any time hereafter, from making any other disposition of said funds, not inconsistent with the Act of Congress making said donation". *See* Chapter 178, Laws of Maryland 1865.[5]

Following an amendment to the Morrill-Nelson Act in 1890 (26 Stat. 417)—which stipulated that the money was to be used for education "without distinction of race or color"—the trustees of the Maryland Agricultural College granted approximately one-fifth of its Morrill-Nelson funds to Morgan College of Baltimore, to be spent for its Normal and Industrial Branch at Princess Anne on the Eastern Shore. *Report of the Maryland Agricultural College* (1890). In 1935, the State of Maryland acquired from Morgan College full title to the Princess Anne Academy and made the Academy a part of the University of Maryland system. *See* Chapter 548, Laws of Maryland 1935. In 1948, the State changed the name of the Academy to Maryland State Academy.

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[4] Section 11 of Chapter 97, Laws of Maryland 1856, states:

> "[T]he General Assembly of Maryland hereby expressly reserves the right at any future session to withdraw any part or all of said endowment of $6,000 hereinbefore appropriated, or to repeal, vacate, and make void all and every part of the incorporation aforesaid, and all rights, privileges, and immunities hereinbefore mentioned and the endowment and donation of the $6,000 to be paid out of the Treasury, as hereinbefore provided for, shall cease to be paid."

See also note 8 below.

[5] In 1866, the General Assembly supplied a lump sum of $45,000 to the Maryland Agricultural College in order to stave off insolvency. *See* Chapter 53, Laws of Maryland 1866. This "bail-out" appropriation was subject to two key conditions. First, the college was required to make the State of Maryland an equal joint owner of all college property. Second, the 1866 Act provided that 10% of the Morrill Act land grant funds be reserved to reimburse the State for part of the $45,000 appropriation.

In 1916, the Maryland Agricultural College became the "Maryland State College of Agriculture". *See* Chapter 372, Laws of Maryland 1916. In 1920, the General Assembly "merge[d] and consolidate[d] the University of Maryland, incorporated by the Act of 1812, Chapter 159, as supplemented and amended by the Act of 1882, Chapter 88, with the Maryland State College of Agriculture, incorporated by the Act of 1916, Chapter 372". *See* Chapter 480, Laws of Maryland 1920. This merger conferred on the Regents of the University of Maryland all of the powers, rights, and privileges of the Board of Trustees of the Maryland State College of Agriculture, including the entitlement to Morrill-Nelson and other federal funds.

At present, the land grant institutions in Maryland are the University of Maryland College Park and University of Maryland Eastern Shore.[6]

III

Ability of State to Redesignate Land Grant Institutions

Having explained the purpose, history, and principal features of the Morrill-Nelson Act, and this State's actions in relation to the federal grant program, we now turn to the legal implications of closing or consolidating a college that currently receives land grant funding. It is apparent from the statutory text and history, as well as pertinent case law, that the Maryland General Assembly has the authority to designate—and to redesignate—a college or colleges to receive land grant funding.

Several sections of the Morrill-Nelson Act support this proposition by clear implication. As pointed out above, the land grant aid is furnished to the several states themselves [§§301,

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[6] According to the National Association of State Universities and Land Grant Colleges: (i) the College Park campus last year received $44,000 in conventional land grant funds, while (ii) the Eastern Shore campus received $6,000 in conventional land grant funds, plus an additional allocation of almost $1,000,000 under the Food and Agricultural Act of 1977, Pub. L. 95-113, §§1444 and 1445, 91 Stat. 1007, 1009 (codified at 7 U.S.C. §§3222 and 3223), a special supplemental funding program. As to the potential effect of closure or consolidation on the continued receipt of funds under this special supplemental program, *see* note 9 below.

322, 324, and 329], and is subject to several conditions explicitly imposed on the states [§§303, 305, 308, 323, and 325]. Section 305 prescribes that each state participating in the land grant program "shall express its acceptance [of the Morrill-Nelson Act provisions] by its legislature" and "shall provide, within five years of its acceptance . . . , at least not less than one [agricultural] college" as the recipient(s) of the land grant funds supplied to the state.

Several court decisions reviewing the land grant statutory scheme confirm that the grants are conveyed to the states and neither confer nor implicate a continuing expectation of funding on the institutions designated by the states. In *State of Wyoming ex rel. Wyoming Agricultural College v. Irvine*, 206 U.S. 278 (1907), the Supreme Court analyzed the wording and operation of the Morrill Act of 1862 and the Morrill-Nelson Act of 1890. It declared that "the grant made in this statute is clearly to the state, and not to any institution established by that state". The Court continued: "It is so obvious that these appropriations are made to the state, and not to any institutions within the state, and that the states, acting through their legislatures, are to expend the appropriations in accordance with the trust imposed upon them, that it is unnecessary to quote the numerous expressions in this act which support that view." 206 U.S. at 283. The Court concluded that the fund, its interest, and the annual appropriations are the property of the state, not of any institution within it, and that it is the duty of the state legislature to select the beneficiary entitled to receive and expend the funds. "The agricultural college shows no title or right to this money under these statutes." *Id.*

In *State v. Bryan*, 39 So. 929 (Fla. 1905), the court reviewed a challenge to a Florida enactment that abolished the Florida Agricultural College, closed and consolidated other institutions within the state, created a board of control to manage all of the several institutions, and provided that they be supported by funding under the Morrill-Nelson Act. The court affirmed that the legislature had the power, at any time: to prescribe which college or colleges would be the recipient or recipients of the interest of the federal land grant funds; to withdraw the interest of this fund from one institution; and to designate another institution as the recipient of that interest. The court stated specifically:

"There is not and never was any private property in the trustees in the funds. They were derived from the government. The founder of this institution was the government of the state of Florida and the property which constituted its basis was public moneys of the state of Florida derived by it from the government of the United States in trust for the establishment of an institution of this character.

It never was the purpose of the state of Florida to give these trustees any private right to this property. Throughout the whole legislation they are shown to be simple public agents to manage a public property. The only right they have to it is by the legislation of the state, and every section of these acts shows that it was founded by public funds and for a public purpose. *Trustees of University v. Winston*, 5 Stew. & P. (Ala.) 23; *Trustees of Dartmouth College v. Woodward*, 4 Wheat 518, 4 L. Ed. 629." 29 So. at 950.[7]

Furthermore, both the text and history of this State's legislative measures—creating the Maryland Agricultural College [Chapter 97, Laws of Maryland 1856], designating it as the recipient of federal land grant funds [Chapter 178, Laws of Maryland 1865], providing it with a fiscal "rescue" appropriation [Chapter 53, Laws of Maryland 1866], establishing it as a State institution [Chapter 372, Laws of Maryland 1916], and

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[7] It is also illuminating to note that a relatively recent merger of an agricultural college into a larger state university system was accomplished without affecting funding under the Morrill-Nelson Act. Specifically, in 1971 the Arkansas legislature converted the Arkansas Agricultural, Mechanical and Normal College ("AM&N"), a predominately black state-supported school, into a campus of the University of Arkansas system. *See Russell v. Board of Trustees*, 502 F. Supp. 916 (D.C. Ark. 1980). This merger appears to parallel the consolidation of the Maryland State Academy (predecessor of the University of Maryland Eastern Shore) into the University of Maryland system.

In a telephone conservation, the general counsel for the University of Arkansas related that the land grant funding issue never arose—presumably because the AM&N successor campus continued to receive a portion of the Morrill-Nelson Act funds. This again is apparently similar to Maryland's distribution between the College Park and Eastern Shore campuses of the University of Maryland.

merging it with the University of Maryland [Chapter 480, Laws of Maryland 1920]—fortify the view that the Maryland General Assembly has the discretionary authority to designate or to redesignate the recipient(s) of Morrill-Nelson Act funds.

Indeed, the General Assembly explicitly reserved this discretionary authority in the 1865 Act that first identified the Maryland Agricultural College as the land grant designee: "nothing herein shall be construed to prohibit or preclude the General Assembly, at anytime hereafter, from making any other disposition of said funds, not inconsistent with the Act of Congress making said donation". [Chapter 178, Maryland Laws of 1865.].[8]

In other words, should the General Assembly decide to redesignate the recipient of the land grant funds—either as part of or independent of the closure or consolidation of the college

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[8] In 1882, the General Assembly reduced its own annual appropriation to the Maryland Agricultural College from $6,000 to $5, prompting a court challenge by the college. In *Maryland Agricultural College v. Keating*, 58 Md. 580 (1882), the Court of Appeals held that the General Assembly, in founding the college in 1856, had reserved the right in any future session to withdraw any or all of the endowment appropriated. The Court stated:

> "The eleventh section of the charter having reserved, in express terms, the right to withdraw, 'at any future session', all or any part of the endowment granted by the charter, it is very clear, that the purpose of the Legislature was to keep the matter of the appropriation to the College under the constant supervision of the Legislature; so that at any subsequent session the same might be lessened or entirely withdrawn, as the condition of the College, or the exigencies of the State Treasury, might justify or require. It was intended to keep the institution under the eye of the Legislature, that its usefulness might be the subject of the inquiry and consideration at each session of that body; that the endowment might be continued or withdrawn, in whole or in part, as the institution met, or failed to meet, the expectations of its benefactors. The intent of the Legislature to withdraw the whole donation except the $5 given, is so unmistakeably expressed, that appellant's counsel admit that to be beyond controversy." 58 Md. at 583.

See also Jackson v. Walsh, 75 Md. 304 (1892), which decided that the State of Maryland, as equal joint owner of the Maryland Agricultural College, could realign the representation of the board of trustees because these governing matters were clearly under the control of the General Assembly.

concerned—it is our view that a court would affirm the General Assembly's discretionary authority to do so.[9]

IV

Personnel Considerations Arising Out of Closures and Consolidations

A. *Introduction*

Aside from the land grant funding issue, there are other considerations that must be anticipated and addressed by the General Assembly if it contemplates closing or consolidating particular public institutions of higher education.

The closure or consolidation of colleges and universities promises to be a complex and controversial undertaking, requiring resourceful planning and meticulous implementation. Of course, the General Assembly will have to attend to the basic business-oriented issues of providing for the transfer of

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[9] There are, however, other special grant programs that must be evaluated if the General Assembly decides to redesignate the recipient of land grant funds. Most notably, provisions of the Food and Agricultural Act of 1977, Pub. L. 95-113, §§1444 and 1445, 91 Stat. 1007, 1009 (codified at 7 U.S.C. §§3222 and 3223), authorized annual appropriations of special funds "to support continuing agricultural research" and "the acquisition and improvement of research facilities and equipment" at 1890 land grant institutions—i.e., predominantly black institutions providing agricultural programs and engaging in agricultural research. The University of Maryland Eastern Shore is a recipient of these special funds. *See* note 6 above.

To the extent that the U.S. Secretary of Agriculture deems allocations under this particular Act to be grants to the eligible institutions, rather than to the states, the General Assembly's ability to redesignate a land grant institution, without jeopardizing this special funding, would be limited. In other words, although the General Assembly has the inherent power to close or consolidate an 1890 land grant institution, outright closure could conceivably jeopardize the special funding received under the Food and Agricultural Act of 1977. On the other hand, a consolidation or merger of an 1890 land grant institution with another predominately black institution conceivably would not affect this funding, assuming agricultural programs and facilities were maintained.

property assets and the disposition of contractual obligations.[10] Even more problematical from a planning standpoint, however, are issues dealing with faculty and staff.[11]

The central personnel consideration is the treatment of faculty and staff who have acquired tenure or related rights of continuous employment. For example, would tenured employees be terminated along with non-tenured employees? Would tenured employees be granted a priority in an overall position-elimination scheme? Would tenured employees be transferred to the surviving institution or reassigned to other public colleges in the State's higher education system?

Although the particular approach adopted will no doubt depend on whether closure or consolidation is contemplated, on the size and nature of the institutions involved, and on the nature of the underlying fiscal and enrollment situation prompting closure or consolidation, it is important to appreciate the legal definition of "tenure" and the grounds on which tenure may be abrogated.

B. *Acquisition of Tenure Rights.*

Individuals in certain categories of faculty and staff positions in the Maryland public higher education system, after satisfactorily serving a prescribed period of probationary employment, acquire a legally protected interest in their jobs. Specifically, tenured employees are protected from termination on arbitrary

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[10] The State Procurement Law (Article 21 of the Maryland Code) and related regulations (COMAR Title 21) afford considerable latitude for terminating an agency's contractual obligations, based both on reasons of convenience and failure of funding. Nevertheless, it may be prudent for the General Assembly to specify in any enactment closing or consolidating public institutions of higher education the manner in which outstanding institutional contracts for supplies, services, and construction are to be handled. This could be done by either reinforcing or qualifying the discretionary termination provisions reflected in the State Procurement Law and its regulations.

[11] Consider this observation in a recent publication, focusing on closure and consolidation of colleges:

> "When a college undergoes major corporate changes, when it merges or closes, one of the most time-consuming and difficult areas is invariably dealing with faculty and staff. Legal, moral, and psychological issues are all closely entwined in virtually every decision which affects staff." O'Neill and Barnett, *Colleges and Corporate Change* 81 (1980).

grounds or by unreasonable means.[12] Thus, tenure compels the college or university to demonstrate "just cause" in dismissing a tenured faculty member.

Tenure rights may arise in several ways. First, tenure may be contractual, arising from an express provision in the employment contract or from a set of rules and regulations incorporated into the contract. This is the source for faculty tenure in the University of Maryland system.

A second way in which tenure may arise is by State statute or agency personnel regulations. This is the basis for tenure for (i) faculty members in all State colleges and universities other than the University of Maryland, (ii) certain associate staff members in the University of Maryland system, and (iii) non-probationary classified personnel in all of these institutions.

A third way in which tenure may arise is when a public employee has been continuously employed for a significant period of time so as to indicate from the circumstances that "de facto" tenure exists.[13] However, the employee must demonstrate that he or she has a legitimate claim of entitlement to that employment, as a property interest; more than a unilateral expectation or abstract need or desire must exist.[14] Contracts that are for an express number of years or that are probationary or provisional contracts do not create such an expectancy, because a property interest in *continued employment* is lacking.[15] Although the courts have not definitively resolved the issue, it is our position that "de facto" tenure does not exist within the Maryland higher education system because the governing contractual, statutory, and regulatory provisions are explicit re-

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[12] *See, e.g., Johnson v. Board of Regents of University of Wisconsin System,* 377 F. Supp. 227, 235, 239 (D. Wis. 1974).

[13] *Perry v. Sindermann,* 408 U.S. 593, 602 (1972); *Bignall v. North Idaho College,* 538 F.2d 243, 246 (9th Cir. 1976); *Johnson v. Fraley,* 470 F.2d 179, 181 (4th Cir. 1972); Ronald C. Brown, *Tenure Rights in Contractual and Constitutional Context,* 6 J. of Law and Educ. 279, 312 (1977) (referred to below as *"Tenure Rights"*).

[14] *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 577 (1972).

[15] *Id. See also Ring v. Schlisinger,* 502 F.2d 479 (D.C. Cir. 1974); *Parker v. Board of Educ. of Prince George's County,* 348 F.2d 464 (4th Cir. 1965); *Tenure Rights,* 6 J. of Law and Educ. at 302.

garding duration and qualitative requirements for attaining tenure.

C. *Termination of Tenured Employees*

As noted above, before employees in the Maryland higher education system acquire tenure, they must satisfactorily complete a probationary period, which will vary depending on the applicable rules. Thereafter, tenured employees may only be discharged for "just cause"—i.e., in accordance with substantive grounds for dismissal and procedural due process protections stipulated in the contract, statute, or personnel rules. Usually, dismissal "for cause" relates to a tenured employee's job performance, such as neglect of duty, insubordination, misconduct, or incompetence. However, stipulated grounds for termination may also include bases having nothing to do with an employee's job performance: for example, loss of salary support, program discontinuance, or staff reorganization.[16]

It is noteworthy that, even where the applicable tenure rules do not explicitly provide for termination for financial reasons, courts have generally considered financial exigency to constitute valid (although implied) grounds for terminating tenured positions.[17]

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[16] The University of Maryland, for example, has adopted the following rule for associate staff employees:

> "None of the above shall be construed to nullify the ability of the University to lay off an associate staff member from his position for reason of a demonstrably bona fide lack of supporting funds or change in program requirements. A minimum of a 30-day notice with pay shall be given any person laid off because of fund curtailment or change in program requirements, and the University shall make every effort to find substitute employment for a person losing salary support. Any such person laid off shall have the right to return to his position upon the restoration of a funding source for the position within a year of his termination. Individuals shall be informed of layoffs or prospective layoffs at the earliest possible time." *Personnel Policies and Rules for Associate Staff Employees of the University of Maryland*, §5 (p. 19).

[17] *See, e.g., Krotkoff v. Goucher College*, 585 F.2d 675, 680 (4th Cir. 1978); *Chung v. Park*, 514 F.2d 382, 387 (3rd Cir. 1975); *Graney v. Board of Regents of University of Wisconsin System*, 286 N.W. 2d 138, 149 (Wis. 1979). *See also Tenure Rights*, 6 J. of Law and Educ. at 288.

Financial exigency, a more exacting standard than program discontinuance or staff reorganization, has been defined as an imminent financial crisis that threatens the survival of the institution as a whole and that cannot be alleviated by less drastic means.[18] An imminent financial crisis is tantamount to "an urgent need to reorder the nature and magnitude of financial obligations", and is usually prompted by declining student enrollment and shrinking financial resources.[19] The adequacy of the institution's operating funds, not merely its capital assets, must be examined, and there must be more than a temporary or minor shortage.[20]

Case law dealing with termination of tenured employees by reason of financial exigency typically involves "individual" faculty terminations prompted by abolishing or restructuring particular instructional departments or programs, rather than by institution-wide closures or consolidations. In such individual terminations, the courts have generally imposed an obligation on the institution, first, to employ reasonable standards in selecting which faculty to terminate and, second, to take reasonable measures to find alternative employment for the employees.[21] In other words, in individual terminations for financial reasons, an institution need not observe the full panoply of procedural due process elements governing conventional dismissals "for cause"—e.g., dismissals involving alleged incompetence, insubordination, or other performance-related grounds.[22]

D. *The Russell Case*

As pointed out above, there is a paucity of court decisions that delineate the rights of tenured employees when the institution itself ceases to exist. There is, however, a recent case

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[18] *See* authorities cited in note 17 above.

[19] Note, *The Dismissal of Tenured Faculty for Reasons of Financial Exigency*, 51 Ind. L.J. 417, 422 (1976) (referred to below as "*Financial Exigency*").

[20] *Krotkoff v. Goucher College*, 585 F.2d 675, 681 (4th Cir. 1978); *Financial Exigency*, 51 Ind. L.J. at 420.

[21] *See* note 16 above.

[22] *See, e.g., Krotkoff v. Goucher College*, 585 F.2d 675 (4th Cir. 1978).

involving legislative consolidation of public institutions: *Russell v. Board of Trustees*, 502 F. Supp. 916 (D.C. Ark. 1980), *aff'd*, 657 F.2d 1008 (8th Cir. 1981).[23]

The *Russell* case involved the Arkansas legislature's merger of the Agricultural, Mechanical and Normal College, a predominantly black institution, into the University of Arkansas system. The Court reviewed this merger specifically in the context of the successor institution's lowered mandatory retirement age. It sanctioned the application of flexible standards to tenured employees who might claim abridgement of employment rights as a consequence of a merger:

> "The Court concludes that where, as here, an institution-wide policy is being changed by a quasi-legislative action, the notice and opportunity to be heard need not be as personal or as individualized as would be required if one or more individuals were being denied a property interest which still remained generally available to a class of similarly situated individuals. The Court holds that the Board of Trustees was not required to give the plaintiff personalized notice of the contemplated change in the retirement age or give him a personal hearing in which he could be heard individually by the Trustees regarding the change." 502 F. Supp. at 921.

The Court in *Russell* did discuss the need to provide general notice to the faculty that a change in policy was being considered, as well as a reasonable opportunity for those affected to comment concerning the contemplated change. The Court considered the interests of the faculty to have been adequately accommodated by the following features of the merger:

— a state statute was passed providing for the merger;
— faculty members from both institutions were appointed to the merger committee;

[23] For a recent case involving court ordered consolidation of two public university campuses, *see Geier v. Blanton*, 427 F.Supp. 644 (D.C. Tenn. 1977), *aff'd* 597 F.2d 1056 (6th Cir. 1979), *cert. denied*, 444 U.S. 886 (1979). However, in directing the merger of the predominantly white campus of the University of Tennessee at Nashville into the predominantly black Tennessee State University, the Court in that case did not directly address tenure or employment issues.

— the committee developed and discussed at length a comprehensive merger plan;
— faculty meetings were held at both institutions at which all aspects of the merger were open to discussion;
— all faculty received a copy of the merger committee's recommended plan.

Although, in *Russell*, the Court was specifically concerned with a challenge to a policy of the successor institution reducing the retirement age, the case does provide general guidelines that may serve as a suitable framework for a Maryland legislative enactment providing for the closure or consolidation of a public institution of higher education and any consequent measures affecting tenured positions.[24] Also potentially useful for reference purposes is the Maryland enactment in 1973, merging the previously private University of Baltimore into the Maryland State Colleges and Universities system: Chapter 694, Laws of Maryland 1973.[25]

E. *Additional Authorities*

Finally, we suggest consulting two pertinent publications for legislative planning purposes: O'Neill, Joseph P., and Barnett, Samuel, *Colleges and Corporate Change* (Conference-University Press, 1980); and Millett, John D., *Mergers in Higher Education: An Analysis of Ten Case Studies* (American Council on Education, 1976).

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[24] The Arkansas "Act of Merger" contained this provision:

> "The Presidents of [AM&N] and [UA], other officials, faculty and staff members of each institution shall develop plans to provide for an orderly transition of [AM&N] into the University of Arkansas. The Presidents of each institution shall be responsible for designating officials or others of their respective institutions to develop such plans and the Presidents shall be responsible for the coordination of the planning by the two institutions to provide for a smooth and orderly transition. All final plans and agreements shall be in written form. The final plan of merger shall provide for the accomodation [sic] by the University of Arkansas of the employment contracts, tenure rights and academic rank of the faculty and staff of Arkansas Agricultural, Mechanical and Normal College in effect during the 1970-71 academic year." 1971 Arkansas Act 1138 (1971).

[25] *See also* Chapter 480, Laws of Maryland 1920, which merged the Maryland State College of Agriculture with the University of Maryland.

The authors of both publications, while advocating their particular point of view, nevertheless note pivotal and peripheral personnel issues deserving attention: e.g., notice to employees, severance pay, unemployment insurance, transitional health and pension plans, and the like.[26]

V

Conclusion

In summary, it is our opinion that the closure or consolidation of a land grant institution will have no impact on the funding that the State receives under the Morrill-Nelson Act, so long as the General Assembly designates another institution as a land grant college in accordance with the terms of the federal statute.

There are, however, several other issues that the General Assembly should address in any act providing for the consolidation or closure of public institutions of higher education. Principal among them is the manner in which personnel, particularly tenured employees, are to be treated. In our view, it would be prudent for the General Assembly to deal with this paramount issue in the legislative enactment, whether by choosing to delineate precisely how personnel are to be treated or by deferring to institutional governing boards for the crystallization of concrete plans. Of course, the resources of this Office will be available to you and the General Assembly for further guidance and assistance.

STEPHEN H. SACHS, *Attorney General*

JAMES J. MINGLE, *Assistant Attorney General*

AVERY AISENSTARK
Principal Counsel,
Opinions and Advice

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[26] Mr. Millett notes that, because of legislative consideration, mergers of public institutions (or consolidation of a public college with a private college) take considerably longer than do mergers of private institutions—even absent the politically sensitive issues surrounding closure or consolidation of black colleges. Messrs. O'Neill and Barnett, in addition to identifying major personnel issues, advocate that the institution should assist in outplacement efforts, ranging from letters of reference to complete career counselling and placement services.

EDUCATION—CONSTITUTIONAL LAW—CRIMINAL LAW—STUDENT SEARCHES—FOURTH AMENDMENT—STATUTE MAY AUTHORIZE SEARCHES BASED ON "REASONABLE BELIEF"

May 18, 1982

The Honorable Harry Hughes
Governor

We have reviewed and approve for constitutionality and legal sufficiency House Bill 1514 (Public Schools—Student Search). In so doing, we recognize and have affirmatively resolved the question of whether it is constitutionally permissible to substitute a lesser standard than probable cause for student searches.

I

The Proposed Amendment

House Bill 1514 would amend §7-307(a)(1) of the Education Article as follows:

> "A principal, assistant principal, or school security guard of a public school may make a reasonable search of a student on the school premises if he: [has] HAS [probable cause to believe] A REASONABLE BELIEF that the student has in his possession an item, the possession of which is a criminal offense under the laws of this State."[1]

Case law suggests that the term "reasonable belief" often is considered to be synonymous with "probable cause". *See Riley v. State*, 179 Md. 304 (1941). Arguably, therefore, the amended statute would continue, in effect, to require that probable cause be present before a school official may conduct a student search.

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[1] Brackets indicate matter deleted from existing law. Capitals indicate matter added to existing law. Underlining indicates amendments to bill.

The colon following the word "he" should have been deleted when the bill was amended.

Nevertheless, the history of the bill—indeed, its very enactment—makes it clear that the legislative intent was to permit student searches where less than probable cause exists. *See, e.g.*, 1A *Sutherland, Statutory Construction*, §22.30 (C. Sands 4th ed. 1972) ("mere fact that the legislature enacts an amendment indicates that it thereby intended to change the original act by enacting a new right or withdrawing an existing one").

Therefore, we must address the question of whether it is constitutionally permissible to substitute a standard less than probable cause for student searches.

II

Discussion

The case of *In re Dominic W.*, 48 Md. App. 236 (1981), is the only reported decision in Maryland concerning §7-307. In that case, the Court of Special Appeals held that the Fourth Amendment exclusionary rule applied to evidence impermissibly seized by a school official.

In its decision, the Court of Special Appeals found that there had been no probable cause for the search in question; therefore, the search and seizure was impermissible. It is not altogether clear from the opinion whether the Court believed that the probable cause standard was constitutionally required by the Fourth Amendment or was merely a statutory requirement imposed by then §7-307. The Court's opinion, however, suggests the latter to have been the case: in applying the Fourth Amendment exclusionary rule, the Court based its decision, at least in part, on the fact that "the legislature itself required probable cause to exist before the search could be made". 48 Md. App at 239. Therefore, the question remains whether the General Assembly may in effect overrule the decision by providing for a lower standard for student searches.

It is well settled that public school students do not shed their constitutional rights when they are on school property. *See Goss v. Lopez*, 419 U.S. 565 (1975); *Tinker v. Des Moines School District*, 393 U.S. 503 (1969); *In re Gault*, 387 U.S. 1

(1967). Among those rights are the Fourth Amendment's guarantee of freedom from unreasonable searches and seizures.

Nevertheless, the extent to which the Fourth Amendment applies to student searches is not entirely settled. As discussed in *Bellnier v. Lund*, 438 F.Supp. 47, 52 (N.D.N.Y. 1977):

> "The cases which have dealt with the issue have reached diverse results, relying upon various theories, which can be generally placed into the following categories: 1) the Fourth Amendment does not apply, as the school official acted *in loco parentis* (private search); . . . 2) the Fourth Amendment applies, but the Exclusionary Rule does not; . . . 3) the Fourth Amendment applies, but the doctrine of *in loco parentis* lowers the standard to be applied in determining reasonableness of the search; . . . 4) the Fourth Amendment applies in full, requiring a finding of probable cause in order for a search to be reasonable." (Citations omitted.)

The majority position appears to be that the Fourth Amendment applies, but that a lesser standard than probable cause is permissible: "The courts have generally approved searches conducted in schools on the basis of 'reasonable cause to believe' that contraband would be found, rather than requiring that the stricter standard of probable cause be met." *Jones v. Latexo Independent School District*, 499 F.Supp. 223, 236 (E.D. Tex. 1980). *Accord M.M. v. Anker*, 607 F.2d 588, 589 (2d Cir. 1979); *Bilbrey v. Brown*, 481 F.Supp. 26, 28 (D.Or. 1979); *State v. Young*, 216 S.E.2d 586 (Ga. 1975).

The rationale for this position is that, under the *in loco parentis* doctrine, school teachers and administrators are responsible for the health, safety, and conduct of students during school hours, which gives them authority to impose discipline and maintain order. *See Picha v. Wielgos*, 410 F.Supp. 1214 (N.D.Ill. 1976). These interests justify greater flexibility in applying the Fourth Amendment in a school setting. *See, e.g. Bellnier v. Lund*, 438 F.Supp. at 53.

III

Conclusion

For these reasons, therefore, we conclude that the "reasonable belief" standard adopted by Home Bill 1514 is constitutional.[2]

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AVERY AISENSTARK
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Opinions and Advice

Editor's Note: On June 1, 1982, House Bill 1514 was signed into law as Chapter 724, Laws of Maryland 1982, effective July 1, 1982. The preceding Opinion was originally written as a bill review letter; because of the importance of the issues addressed, however, it is published here in a slightly revised format.

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[2] In order to give guidance to school officials, however, we suggest that §7-307 be clarified at the next legislative session to more precisely indicate what is required by the "reasonable belief" standard.

EDUCATION—COMMUNITY COLLEGES–STATE AID–SUPPLEMENTAL APPROPRIATIONS–STATE BOARD FOR COMMUNITY COLLEGES HAS BROAD DISCRETION IN ASKING FOR AND ALLOCATING SUPPLEMENTAL STATE AID

September 29, 1982

Ms. Mary G. Williams
President
Board of County Commissioners of Frederick County

On behalf of the Board of County Commissioners of Frederick County, you have requested our opinion on the legality of the formula used by the State Board for Community Colleges ("State Board") to distribute a deficiency appropriation in the State's Fiscal Year 1983 Budget for additional aid to community colleges.

For the reasons given below, it is our opinion that the distribution was a reasonable exercise of the discretion vested in the State Board and did not violate State law.

I

The Community College System and the State Board for Community Colleges

Until 1961, local—i.e., county and Baltimore City—boards of education operated community colleges under their general authority over public education. In that year, the General Assembly gave formal recognition to a new State system of community colleges, with each local board of education also constituting a college board of trustees. Chapter 134, Laws of Maryland 1961.

The State Department of Education and the State Superintendent of Schools were given power to approve the creation of a college and to set entrance requirements and minimum standards for curriculum. [Former Article 77, §300(a) and (h) of the Maryland Code.] Each community college was to be financed "on the general basis" of receiving reimbursement for its current expenses equally from the State, the locality that supported it, and student tuition and fees. [Former §304(a).] However, the State's participation was (and continues to be) subject to a statutory ceiling, with the locality and the students responsible for any difference between a college's current expenses and the State's maximum contribution. [Former §304(b).]

Perhaps the most significant change in this system was the later creation of the State Board for Community Colleges. Chapter 454, Laws of Maryland 1968. In addition to certain coordinating functions, the State Board is specifically charged with (1) "full statewide responsibility for the community colleges", (2) establishing "general policies for their operation", and (3) administering the program of State financial support to the colleges. §16-104 of the Education Article of the Maryland Code.

Although each college retains considerable autonomy in its own governance and in matters of local concern, the cumulative effect of these grants of authority to the State Board has been to vest it with broad regulatory power, considerably greater than had formerly been reposed in the State Department of Education and State Superintendent of Schools.[1] Thus, for example, this Office has advised that the State Board has general authority to make and enforce rules and regulations in furtherance of its statutory obligations. Opinion No. 76-188 (October 11, 1976) (unpublished). More particularly, the State Board's obligation to administer the State aid program "empower[s it] to prescribe methods by which the amounts of State aid to community colleges shall be determined" and, in furtherance of the statute's purpose, to define and interpret the relevant statutory terms. 62 *Opinions of the Attorney General* 360, 362 (1977).

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[1] The State Board's authority does not extend to local budgetary control, however. Under §§16-401 and 16-402 of the Education Article, the governing body of the locality that supports the college approves its operating and capital budgets and controls the expenditure of funds for operating expenses. Like other public bodies, the college may not spend in excess of the funds appropriated to it. §16-402(c)(1). *Cf.* Article 15A, §14 of the Maryland Code ("No . . . institution of the State shall at any time spend in excess of the total amount of its appropriation.").

II

Financing of Community Colleges—Regular Appropriations

A. *State Aid Formula*

Throughout the existence of the public community college system, financing has been predicated on a statutorily prescribed formula, presently set forth in §16-403 of the Education Article. Under this arrangement, a college receives its revenues from three primary sources: the State, the locality or localities that support it, and its students. As noted earlier, the State pays a share of "current expenses", subject to a prescribed ceiling amount. §16-403(c).

The term "current expenses" is defined as "the product of the per student operating cost of the . . . college for the current fiscal year multiplied by the number of full-time equivalent students enrolled at the . . . college in the current fiscal year." §16-403(b)(2). "Per student operating cost" is derived from the total fiscal year operating costs of the college, reduced by federal or other reimbursements and by any inappropriate charges. *See* 62 *Opinions of the Attorney General* 360 (1977) (federal funds under CETA program reduce operating costs). The "number of full-time equivalent students" is "the quotient of the number of student credit hours produced in the fiscal year divided by 30". §16-403(b)(3).

If the State's statutory percentage of the operating cost per full-time equivalent student ("FTE") is less than the statutory dollar ceiling per FTE, the State's contribution is simply the statutory percentage applied to current expenses.[2] However, if the State's percentage share of operating cost per FTE exceeds the statutory dollar ceiling—as, we understand, it does for sixteen of the seventeen colleges in the system—the State's contribution is that ceiling multiplied by the number of eligible FTEs. Under these formulas, the State ordinarily contributes less than half of a college's operating costs—a result consistent with the apparent legislative intent.

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[2] The State percentage share is generally 50%; the dollar ceiling, as most recently raised by Chapter 845, Laws of Maryland 1982, is generally $878 per FTE. Higher State shares and ceilings, however, are provided for some colleges. §16-403(c).

B. *Development of the State Aid Budget*

The State's share of support of the community college system, included each year in the budget of the State Board, is derived by using the formula contained in §16-403. As discussed above, an essential component of this formula is student enrollment. Because the budget request is submitted by the Governor to the General Assembly in advance of the fiscal year in which the funds are to be expended, the number of FTEs necessarily must be projected. For this purpose, the State Board is charged each year with computing a systemwide FTE projection, "in consultation with the State Board for Higher Education and each community college and with the concurrence of the State Department of Budget and Fiscal Planning". §16-404(b).

Acting under this mandate, the State Board has developed its "Procedures for Determining Community College Enrollment Projections and Redistributions for State Aid Purposes" (the "Procedures"), a policy that has been followed since June, 1978. Under the Procedures, preliminary systemwide enrollment projections are developed more than a year in advance of the fiscal year to which they are to be applied; these projections are then refined throughout the following months. During this process, the Executive Director of the State Board discusses with each community college president the college's enrollment projection for the succeeding fiscal year, focusing on the factors and rationale underlying the projections.

Usually, agreement is reached with each community college on its projected enrollment; the total of these projected enrollments eventually becomes the proposed systemwide FTE projection. This proposed projection and supporting data are then formally submitted to the State Board for its approval.[3] As required by §16-404(c)(1), the approved projection is converted into the total annual State appropriation for aid to community colleges and submitted to the Governor, for inclusion in the Governor's budget request to the General Assembly.

Thus, the systemwide enrollment projection and the underlying negotiated enrollment projection for each community col-

[3] Although this cooperative process has worked successfully, consensus on the allocation of FTEs is not a legal prerequisite to State Board approval. We have no doubt about the State Board's authority to make these determinations itself, after the required consultations, if agreement cannot be achieved.

lege are critical numbers. They are subject to considerable analysis, debate, and refinement and are expected to be the best possible estimates—estimates within which the colleges are expected to operate, at least as far as financial aid from the State is concerned.[4] Under §16-404(c)(2), the budget request submitted to the Governor by the State Board "is final".

C. *Redistribution of Annual Appropriation*

Until Fiscal Year 1981, the colleges within the system were able to accommodate the systemwide projection, without the need to request supplemental funds from the State. When a college exceeded its individual projected enrollment, the State Board permitted it to receive additional State aid for its "excess" enrollment to the extent that one or more other colleges in the system fell short of their projected enrollment. A community college had no assurance, however, that it would receive any additional funds through this "redistribution" process, because its excess enrollment might not be compensated by underenrollment at other community colleges.

The formula for redistribution of State aid is embodied in the Procedures:

> "On December 15, March 15, and June 1 of each year, each community college will be given the opportunity to submit, in writing . . . , either a request for an enrollment projection increase or a reduction in the college's approved projection for the current fiscal year and/or the succeeding fiscal year. If any college voluntarily requests a reduction in projection, these FTEs . . . will be placed in a pool and reallocated proportionately to those institutions requesting increases based upon actual institutional enrollment for the prior fiscal year. These revised enrollment projections will be presented to the State Board for Community Colleges for approval at each respective succeeding Board meeting. Any FTEs remaining at the end of the fiscal year, after final au-

[4] Because the enrollment projection fixes the maximum amount of potential State aid, it is an essential component of the budget preparation and approval process. With this information, a local governing body can assess the college's budget in light of the locality's own ability to contribute beyond the minimum prescribed by statute.

> dits have been completed and each college has been fully reimbursed up to its approved projection level, will be allocated proportionately to colleges exceeding projections based upon actual enrollment for the prior fiscal year."

A hallmark of this redistribution procedure is allotment based on actual enrollment in the *prior,* rather than the *current,* fiscal year. Thus, there is a reasonable probability under this procedure that a college exceeding its enrollment will receive less State aid than if its original enrollment projection had been entirely accurate.

III

Financing of Community Colleges— Supplemental Appropriations

A. *Introduction*

Additional State funds for the system can be made available only through a supplemental appropriation. Under §16-404(c)(2), "on or before February 10 [of each fiscal year], the State Board for Community Colleges may request additional funds to be included in any supplemental budget." The State Board has interpreted this as permissive: changed circumstances—e.g., an increase in actual system enrollment—do not impose on it any obligation to request additional funds or, if it chooses to do so, to request only the amount that literal application of the statutory formula to the increased enrollment would yield.

As indicated above, the colleges have generally been able to operate under the regular annual appropriations and the systemwide enrollment projection. Until Fiscal Year ("FY") 1981, therefore, the State Board did not request supplemental funds.

B. *Supplemental Appropriations for FY 1981*

During FY 1981, for the first time, the State Board requested through the Governor, and the General Assembly granted, a $1-million supplemental appropriation to defray some of the costs of unexpectedly increased enrollment in FY 1981. These funds were made available for use in FY 1982.

Chapter 773, Section 1 [§16-403(c)(5)] and Section 3, Laws of Maryland 1981.

We understand that, at a March 31, 1981, meeting of the Executive Director with community college presidents, including the President of Frederick Community College, those present agreed that the redistribution process provided for in the State Board's Procedures, as described above, would be applied to those supplementally appropriated funds—even though, under the Procedures, the allocation would be proportional to enrollment in the fiscal year *prior to* the year in which the excess enrollment occurred. In accordance with that agreement, the supplemental appropriation was later distributed under the Procedures' redistribution process.

At a meeting on August 10, 1981, the community college presidents again discussed with the Executive Director the redistribution process, including its applicability to the allocation of supplemental funds. No changes were proposed, and it was agreed that the existing redistribution process would continue to apply. The President of Frederick Community College, we understand, was present at that meeting and voiced no objection.

C. *Supplemental Appropriations for FY 1982*

Revised enrollment projections submitted by the colleges through mid-November, 1981, in accordance with the Procedures, indicated a year-end system enrollment of 1,541 FTEs more than the 58,700 FTEs on which the State's FY 1982 aid appropriation was based. Approximately $1.5-million more appeared to be necessary to fully fund the total enrollment, including those "excess" FTEs, on the basis of the formula set forth in §16-403. This amount ($1,515,000) was included by the Governor in his supplemental budget request.

Subsequently revised enrollment statistics, as submitted by the colleges, indicated that an even higher total of about $2-million would be required if the §16-403 formula were to be applied to total enrollment. The State Board therefore requested yet an additional $500,000 on February 17, 1982. Governor Hughes replied that he was not optimistic about the availability of the additional $500,000, and, in fact, this additional sum was not appropriated.

In sum, a total of $1,515,000 in State aid was ultimately appropriated to the State Board, under the category of a 1982 Deficiency Appropriation, "to become available immediately upon passage of this budget to supplement the appropriation for fiscal year 1982 to provide funds to cover higher than anticipated enrollment". Chapter 125, Laws of Maryland 1982.

D. *The Frederick Community College Complaint*

In late March, 1982, the President of Frederick Community College requested that he be allowed to propose to the State Board a change in the method of allocating supplemental funds. This item was placed on the agenda of the State Board for its meeting of April 13, 1982.

At that time, and for the first time, the President of Frederick Community College objected to applying the Procedures' redistribution process to supplemental funds. Instead, he proposed that distribution be proportional to current rather than prior year enrollment.[5] He maintained that the supplemental funds constituted "deficiency funding" and should be allocated as if they had been included in the original FY 1982 State Budget for aid to the system.[6] Using the redistribution formula, he complained, was "unfair, unjust, contrary to [the State Board's] established Procedures, and is not consistent with state law". Presentation of Jack B. Kussmaul to State Board, April 13, 1982, at 2.

The State Board declined to change the method of allocation for the then current FY 1982, although it indicated that con-

[5] We note that the proposal advanced on behalf of Frederick Community College would have increased its share of the supplemental appropriation from $49,000 to $162,000, with corresponding reductions in the shares of other colleges.

[6] The General Assembly treated the supplemental funding as a deficiency appropriation so that it would be expended in FY 1982; otherwise, the appropriation would not have been available until the following fiscal year. Certainly, in this sense, the General Assembly funded a "deficiency" in the budget of the State Board. It does not follow, however, that the appropriation or any part of it was to constitute "deficiency funding" for any college in the system. Although your letter to this Office suggests that "Frederick Community College will . . . suffer great financial loss", we are aware of no evidence to suggest that Frederick Community College or any other college in the system expected to incur in FY 1982 any expenses beyond its approved budget.

sideration would be given to a revision in policy for subsequent years. The supplemental appropriation for FY 1982, therefore, was distributed in accordance with the redistribution process to fifteen of the seventeen colleges. As promised, however, the State Board did consider revisions to its policy; and, on June 1, 1982, the State Board approved a revised process for the allocation of supplemental funds, based on current year enrollment, to become effective in FY 1983. The basic redistribution process, based on prior year enrollments, was retained for reallocation of excess FTEs.[7]

Although the State Board evidently felt the allocation mechanism could be improved, it did not find that the use of the redistribution formula to distribute the FY 1982 supplemental funding was contrary to law. We concur.[8]

IV

The State Board's Exercise of Discretion

The statutes governing the operation of the community college system do not support the conclusion that, if a supplemental appropriation is made because of increased enrollment, it *must* be distributed in accordance with the statutory formula of §16-403 or any other formula that relates State aid proportionally to the increased enrollments. By its terms, the formula of §16-403 is to be used to project and to disburse the initial State aid appropriation, but the statute does not require

[7] If the FY 1982 deficiency appropriation had included "full funding" to cover the increased enrollments at the statutory State aid rate, each eligible college would have received the same allocation, whether the redistribution process or the revised policy adopted by the State Board in June, 1982, had been used. It is only when less than full funding is available that the results differ.

[8] We have reviewed on their merits all of the issues raised on behalf of Frederick Community College. A threshold question might well be the timeliness of the complaint. All of the contentions could have been raised in 1981, when the redistribution process was first used for allocation of supplemental funding. However, the College did not suggest any revision when the FY 1981 $1-million supplemental appropriation was acted on or when the community college presidents discussed the process in August, 1981. We think that the State Board in effect decided that the college's later objections were not timely, a conclusion with which we would not disagree.

that it be used to project or disburse supplemental appropriations.

The provision specifically applicable to supplemental funding, §16-404(c)(2), affords the State Board broad discretion to determine whether or not even to request any additional funds at all. The word "may" in a statute like §16-404(c)(2) bears its ordinary significance of permission unless the context or the purpose of the statute "compels" a construction that it is meant to be imperative. *Fleishman v. Kremer*, 179 Md. 536, 541 (1941). *See also Maryland-National Capital Park and Planning Comm'n v. Silkor Development Corp.*, 246 Md. 516, 524 (1976). We have found nothing in the statutory framework to suggest a mandatory interpretation here.

To the contrary, §16-404(c)(2) refers to the State Board's budget request—and, thus, the systemwide FTE projection from which it is derived—as being "final". A request for supplemental funds presumably is to be made only when unforeseeable circumstances have overtaken the projection. Obviously, the determination of whether circumstances exist to justify a departure from the finality of the original appropriation requires the exercise of an informed judgment. Section 16-404(c)(2) vests that decision, at least initially, in the State Board's discretion.

It follows, then, that the method of distributing that appropriated supplemental aid also is a matter for the exercise of the State Board's discretion. Having analyzed the factors that led it to conclude that such an appropriation was justified, the State Board is in the best position to judge how those—or other—factors should enter into the allocation of the supplemental appropriation among the colleges.

For example, the formula of §16-403 is used to distribute the annual total State appropriation during the year in which current expenses are incurred, with final settlement at year-end. [§16-405.] The State Board could find sufficient similarities between aid distributed in that fashion, on the one hand, and supplemental aid distributed in a lump sum at the end of the fiscal year, on the other, so as to warrant the use of the §16-403 formula to allocate the supplemental appropriation.

Conversely, the State Board could reasonably determine that funds distributed near the close of a fiscal year, after most if not all current expenses have been incurred, stand on an entirely different footing and that, consistent with the statutory scheme, these funds may be allocated under a different rationale from that underlying §16-403. The State Board evidently did so in applying the redistribution process to the supplemental funding.[9]

The objection by Frederick Community College to the State Board's decision is apparently based on the incorrect assumption that State aid is enrollment driven and only enrollment driven.[10] Although enrollment is indeed a critical component, State aid is also dependent on "current expenses". Unexpected increases in enrollment cannot be expected to affect significantly fixed operating costs, which make up a substantial part of a college's operating budget. Rather, the marginal impact on current expenses is likely to be substantially less than the budgeted per student operating cost and, in some cases, may be substantially covered by the additional tuition and fees generated. In making judgments regarding the allocation of supplemental State aid, the State Board may take such considerations into account.[11]

The State Board may properly exercise its discretion based on these or other legitimate factors. Its application of the redistribution process to the supplemental funding was well within its authority "to prescribe methods by which the

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[9] Until 1971, *all* State aid was calculated by multiplying per student operating costs for the *preceding* year by current year enrollment. *See* former Article 77A, §7(a) of the Maryland Code (1969 Repl. Vol.). If the General Assembly deemed such a formula appropriate, the State Board's choice of a similar procedure cannot readily be termed irrational or arbitrary. Moreover, if the redistribution process is fair and reasonable in reallocating excess FTEs—and no one has contended that it is not—then we do not see how that same process can be considered unfair or irrational when it is used to allocate a supplemental appropriation.

[10] We think this misconception about the basis of State aid was responsible for the unfortunate circumstances described in 62 *Opinions of the Attorney General* 360 (1977) and 62 *Opinions of the Attorney General* 743 (1977). Both Opinions dealt with overpayments of State aid that resulted from inclusion of ineligible FTEs in certified requests for State aid. The argument of Frederick Community College suggests that this misconception still exists.

[11] For example, it may also consider whether to offset local funding contributions that exceeded the statutory minimum in localities in which such additional contributions were made necessary because per student operating costs exceeded the statutory ceiling for the State's contribution.

amounts of State aid to community colleges shall be determined". 62 *Opinions of the Attorney General* 360, 362 (1977).[12]

When the responsible agency exercises its authority to choose among alternative means of implementing a law, its choice is entitled to great weight. "In the matter of statutory construction it is well understood that the view taken of a statute by administrative officials soon after its passage . . . should not be disregarded except for the strongest and most urgent reasons." *Holy Cross Hospital v. Health Services Cost Review Commission*, 283 Md. 677, 685 (1978). *See also Roberts v. Police and Firemen's Retirement and Relief Board*, 412 A.2d 47, 50 (D.C. 1980); 2 K. C. Davis, *Administrative Law Treatise* §7.14 (2d ed. 1979).

V

Conclusion

In summary, it is our opinion that use of the redistribution process in this case was a reasonable exercise of the discretion vested in the State Board and did not violate State law.

STEPHEN H. SACHS, *Attorney General*

WILLIAM A. KAHN, *Assistant Attorney General*

AVERY AISENSTARK
Chief Counsel,
Opinions and Advice

[12] All State funds must be expended for the purposes for which they are appropriated and not otherwise. Article 15A, §1 of the Maryland Code. The supplemental appropriation in question was made "to provide funds to cover higher than anticipated enrollment". In our view, the distribution formula used by the State Board conforms with this mandate.

We also believe that, in using this formula, the State Board did not "violate" its Procedures, as contended by Frederick Community College. These Procedures are themselves directly applicable only to reallocation within the original State aid appropriation; they do not at all expressly address the method by which supplemental aid is to be distributed. The State Board simply adapted a portion of the Procedures to the problem before it. It was free to do so, just as the State Board could have, if it thought it to be appropriate, adopted any other reasonable method of distribution.

EDUCATION—HEALTH—HANDICAPPED CHILDREN—"SPECIAL EDUCATION"/"RELATED SERVICES"—REGIONAL INSTITUTES FOR CHILDREN AND ADOLESCENTS—CRITERIA FOR RICA PLACEMENT—STATE'S RIGHT TO REIMBURSEMENT FOR CARE AND TREATMENT

November 18, 1982

The Honorable Harry Hughes
Governor

You have requested our opinion on the financial obligation of parents for the care and treatment of children placed at a Regional Institute for Children and Adolescents ("RICA"). Specifically, you inquire: (i) whether the State may seek reimbursement from parents for all costs of care and treatment at a RICA; and (ii) if not, under what circumstances, if any, the State may seek partial reimbursement—i.e., reimbursement for costs other than those identified as educational.

For the reasons discussed below, it is our opinion that the State may seek reimbursement from parents for the cost of care and treatment of children at a RICA only within the following legal limits:

(1) If a child is placed in a RICA solely for educational reasons, the State may seek reimbursement only for nondiagnostic medical services (i.e., treatment performed by a physician) and for other services that are shown to be unrelated to the child's educational needs. The basic cost of care at a RICA may not be recovered from the child's parents.

(2) If a child is placed in a RICA for medical or social reasons—in addition to, or instead of, educational reasons—the State may seek reimbursement for the cost of the portion of RICA care that is allocable to the child's noneducational needs, as well as for the cost of nondiagnostic medical services and other specific noneducational services. The cost of educational and related services, and the cost of the portion of RICA care allocable to educational needs, may not be recovered from the child's parents.

I

Regional Institutes for Children and Adolescents

There are three Regional Institutes for Children and Adolescents in this State: RICA-Rockville, RICA-Cheltenham, and RICA-Baltimore. Each RICA operates under the auspices of the Department of Health and Mental Hygiene ("DHMH") and offers day and residential programs for emotionally disturbed children. The programs are multidisciplinary and provide clinical, child care, and educational services.

As we discuss in more detail below, these programs are subject to requirements contained in three sources of law: Title 19, Subtitle 3, of the Health-General Article of the Maryland Code ("HG" Article); Title 8, Subtitle 4, of the Education Article of the Maryland Code ("Ed" Article); and the federal Education for All Handicapped Children Act, 20 U.S.C. §§1401 through 1420.

Under Maryland law, a RICA is a "care home" that "provides care to individuals who, because of . . . mental disability, require domiciliary care or personal care in a protective, institutional environment". HG §19-307(b)(1). *See also* HG §§19-301(d), (i) and (j). As such, a RICA—further defined in the applicable regulations as a "residential treatment center"—may not operate without a license from the Secretary of Health and Mental Hygiene. HG §19-318; COMAR 10.07.04.01A.

The licensing process requires: (i) approval by the Department of Health and Mental Hygiene of the RICA's "[c]linical services and treatment program"; (ii) approval by the Department of Human Resources of the RICA's "[c]hild care services and program"; and (iii) approval by the Department of Education of the RICA's "educational program". COMAR 10.07.04.02E. Thus, the regulations recognize that a RICA resident will typically receive services that go beyond the educational. Indeed, both an "individualized education program" and an "individualized treatment plan" are developed for each child admitted to a RICA program.[1]

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[1] An "individualized education program" is "a written comprehensive outline for total special education services which describes the special education

(cont'd)

A child may be referred to a RICA program by a public or private agency, a Juvenile Court, or the child's family or physician. At RICA-Rockville and RICA-Cheltenham, all applications for admission to the program are screened and evaluated by the local school board, acting through its Admission, Review, and Dismissal Committee ("ARD Committee"), to determine first whether the child's needs could not otherwise be adequately met through placement in a special educational program in the local public school system.[2]

Current regulations limit the ARD Committee to determinations concerning educational needs alone. If a child is placed in residence at a RICA pursuant to the recommendations of an ARD Committee, the sole basis for such placement, under present regulations, must be as follows:

> "[*The child*] *requires 24-hour special education programming and personal care.* [This placement] is designed to provide instruction or treatment, or both, on a short or long-term basis in a residential setting, which includes a comprehensive special education program, special equipment, related services

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needs of the child and the services to be provided to meet those needs". COMAR 13A.05.01.06D(1). It includes a description of "the specific special education and related services to be provided to the child". COMAR 13A.05.01.06D(4)(c).

An "individualized treatment plan" is "a comprehensive and thoughtfully written plan based on an initial diagnostic impression and an overall evaluation of the patient's specific needs and problems". COMAR 10.21.03.03A. It includes a "plan of active treatment . . . which aims at the arrest, reversal, and amelioration of the [child's] illness and symptoms". *Id.* It also includes the child's educational program. COMAR 10.21.03.03G.

[2] Each local school board is required to maintain an ARD Committee responsible for: (1) reviewing all referrals for special educational services; (2) arranging for assessments of the child and development of individualized education programs; and (3) determining special placements within the public school system. COMAR 13A.05.01.06C. If a child needs special educational services not provided in the public school system, the ARD Committee may either recommend the child's placement in an appropriate State-operated program or, if the services are not available in a State-operated program, request additional State funding for placement in a private program that provides the necessary services. Ed §8-409; COMAR 13A.05.01.06F(2)(a).

> and 24-hour personal care". COMAR 13A.05.01.06E(3)(f) (emphasis added).[3]

Such a determination will have been made prior to a residential placement in RICA-Rockville or RICA-Cheltenham.[4]

Admissions to RICA-Baltimore follow a different process. If a child is referred by a local department of social services, a Juvenile Court, a private physician, or the child's family, RICA-Baltimore may accept the child directly without prior screening or evaluation by the local school board. In these cases, however, the appropriate ARD Committee conducts a post-admission assessment to determine whether the child's educational needs require RICA placement. In some circumstances, a child may remain at RICA-Baltimore even if the ARD Committee does not so determine.

II

Governing Law

A. *State Health Law*

Under the Health-General Article of the Maryland Code, the parents of a child who receives care from DHMH are generally responsible for the cost of that care. HG §16-102(a) provides:

> "It is the policy of this State to obligate each recipient of services and, to the extent provided in this title, those legally responsible for the recipient to pay, if financially able, for the cost of care that is received by the recipient of services."

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[3] In addition, admission to a day program at RICA-Rockville or RICA-Cheltenham would be based on the ARD Committee's finding that the child "requires a comprehensive special education setting for his entire school day in a special wing or day school. Services are provided in a comprehensive special education setting which includes special equipment and related services." COMAR 13A.05.01.06E(3)(e).

[4] RICA-Rockville has a self-contained unit that provides acute care and diagnostic services. Admissions to that special unit, often as a result of Juvenile Court referrals, do not entail a prior educational determination by the local ARD Committee. However, an ARD Committee's determination of educational need is a prerequisite to a child's transfer to the regular RICA-Rockville program.

"Cost of care" is defined as "the cost of care, maintenance, treatment, and support of a recipient of services". HG §16-101(d)(1). "Treatment", in turn, means "any professional care or attention that is given in a facility . . . to improve or to prevent the worsening of a mental disorder". HG §10-101(i).

As noted above, the RICAs are DHMH facilities. Hence, children placed in a RICA are "recipients of services" within the scope of HG §16-102(a). And, for purposes of that law, "[t]he parents of a recipient of services who is a minor" are "chargeable persons". HG §16-101(c) and (f)(2).

B. *State Education Law*

In the Education Article of the Maryland Code, the General Assembly has provided for the free education of handicapped children. Ed §8-402(a) provides as follows:

> "The State and each county shall make *free educational programs* available to each handicapped child . . . as provided by this subtitle." (Emphasis added.)

The Education Article further requires the State Board of Education to adopt, "as bylaws, standards for the identification, diagnosis, examination, and education of each child in this State who is under the age of 21 and is found to need special educational services . . . , whether or not the child is receiving nonduplicative services from another governmental agency". Ed §8-403(a). The standards are to include "provisions for local, regional, and State day and residential centers for children who cannot be served reasonably in the regular public schools; [and provisions for] coordination of these special educational services with services given by any other government agency". Ed §8-403(d)(4) and (5). Local boards must develop plans to carry out these standards.

The Education Article defines "special educational services" as follows:

> " 'Special educational services' means the educational services necessary to assure that all handicapped children are given the opportunity to reach appropriate levels of knowledge and learning skills consistent with their potential and includes the full range of these services, including special equipment, therapeutic treatments ancillary to education, and

> transportation, whether provided as part of or in addition to regular classroom placement or in separate public or private classes or facilities". Ed §8-401(a)(3).

State Board of Education regulations refine the statutory term "special educational services" into two components: "special education" and "related services". "Special education" includes "instruction in hospitals and institutions". COMAR 13A.05.01.02B. "Related services" is defined as follows:

> "Related services are transportation and those developmental, corrective, and other supportive services that are required to assist a handicapped child in benefitting from education. The term 'related services' includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities, counseling services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training." COMAR 13A.05.01.02B.

C. *Federal Law*

The Maryland law governing education of the handicapped reflects the State's obligations under federal law. Under the federal Education for All Handicapped Children Act of 1975, Public Law No. 94-142, a state that seeks certain assistance grants must demonstrate that it "has in effect a policy that assures all handicapped children the right to a free appropriate public education". 20 U.S.C. §1412(1).[5]

A "free appropriate public education" consists of two elements, "special education" and "related services", both to be provided at public expense. 20 U.S.C. §1401(18). "[S]pecial education" means "specially designed instruction . . . to meet the unique needs of a handicapped child, including . . . in-

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[5] As a condition of receiving federal financial assistance, Maryland must also comply with a statute that generally prohibits discrimination against the handicapped. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. We do not believe that, in the context of this discussion, this statute imposes requirements that differ from those of the Education for All Handicapped Children Act.

struction in hospitals and institutions". 20 U.S.C. §1401(16). "Related services" means:

> "such developmental, corrective, and other supportive services (including . . . psychological services . . . and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education". 20 U.S.C. §1401(17).

The United States Supreme Court—in holding that the federal law did not require a local school board to provide a sign-language interpreter to a deaf student who was otherwise receiving an adequate education—recently observed: "The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child." *Board of Ed. of the Hendrick Hudson Central School Dist. v. Rowley,* 458 U.S. 176, 207 (1982). Of course, "primary [state] responsibility" does not mean exclusive state authority; the states must in any event comply with identifiable federal requirements under the Act. 458 U.S. at 203-04, 208-10 (provision of personalized instruction and related services that resulted in adequate education satisfied "free appropriate public education" requirement of the Act).

III

Application of the Law to RICA Care

On the one hand, the Health-General Article requires the parents of children who receive care at DHMH facilities to pay for the cost of that care. On the other hand, the Education Article frees parents of handicapped children from the cost of special education and related services, in compliance with the applicable federal law. The issue is how these differing legal mandates are to be applied to the costs incurred by RICA residents.

In *Criminal Injuries Compensation Bd. v. Gould,* 273 Md. 486 (1975), the Court of Appeals analyzed the problem of two statutes that could not be given simultaneous effect. The Court held that the more specific statute of the two was controlling:

> "[W]here there is a specific enactment and a general enactment ' "which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment." '." 273 Md. at 495 (quoting *Maguire v. State*, 192 Md. 615, 623 (1949) [original source cited as *"Pretty v. Solly,* 26 Beav. 610, per Romilly, M. R."]).

In addition, the Court applied the rule of construction that, in case of conflict, the later enacted of two statutes supersedes the earlier enacted one. 273 Md. at 494-95.

In our view, these principles are controlling here. The General Assembly has prescribed a general policy, applicable to all who use DHMH facilities, that the cost of care be reimbursed. However, it has also determined that one particular group, handicapped children, are to receive free educational services—including "the full range" of services "necessary to assure that all handicapped children are given the opportunity to reach appropriate levels of knowledge and learning skills". Ed §§8-401(a)(3) and 8-402(a). At a RICA, these services are provided under the auspices of DHMH. Applying the principle of construction set out in *Gould*, we conclude that the specific provision mandating free educational services for handicapped children must be understood as an exception to the general policy of cost recovery from parents for their children's use of DHMH facilities.

Moreover, the statutory provision authorizing the State to charge persons for the cost of care and treatment in State facilities was first enacted in 1943. *See* Chapter 170, Laws of Maryland 1943. A similar provision was enacted in 1970 for State mental health facilities. *See* Chapter 407, Laws of Maryland 1970. However, the relevant provisions of the Education Article—requiring the State to make special educational services available to handicapped children at no charge or cost to the parents—were more recently enacted in 1973. *See* Chapter 359, Laws of Maryland 1973.

Finally, to the extent that a child placed at a RICA receives "special education and related services" within the meaning of the Education for All Handicapped Children Act, a condition of federal grant assistance is the State's compliance with that Act. In this regard:

> "[T]the unambiguous mandate of federal law is that these services be provided at not cost to [the child's] parents. While [the local school board's] refusal to meet fully [the child's] expenses may be authorized by state law, such laws are inconsistent with the mandate to provide an appropriate free public education, and cannot stand." *Parks v. Pavkovic*, 536 F.Supp. 296, 304 (N.D.Ill. 1982).

Federal law expressly requires that "sufficient support services to permit the child to benefit educationally from [personalized] instruction" be provided free of charge. *Board of Ed. of Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176, 203 (1982). Neither regulation nor case law delineates with precision the scope of such "related services". It nevertheless appears that, as a general matter, a service must be provided free of charge (1) if it is necessary to aid the child's special education, and (2) if either (i) the service may be performed under state law by a nurse or other qualified person, rather than by a physician only, or (ii) if the service is a medical procedure performed by a physician for diagnostic purposes. *See, e.g., Tatro v. State of Texas*, 625 F.2d 557, 563 (5th Cir. 1980), *on remand,* 516 F.Supp. 968 (N.D. Tex. 1981). Nondiagnostic medical services (i.e., nondiagnostic services that can only be performed by a physician) are excluded by statute from "related services". 20 U.S.C. §1401(17).[6]

Under current procedures, residential placement at a RICA for educational reasons entails a finding that "24-hour special education programming and personal care" is necessary for the child's education. COMAR 13A.05.01.06E(3)(f). Given such a determination, no portion of the cost of care—apart from nondiagnostic medical treatment or other services that are unre-

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[6] In the case of a child whose educational needs do not require residential placement, a service would not be "related" to education "if it did not have to be provided during school hours, but could instead be performed at some other time". *Tatro v. State of Texas*, 625 F.2d at 563. *See also Kruelle v. New Castle County School Dist.*, 642 F.2d 687, 694 (3d Cir. 1981).

lated to the child's educational program—may be recovered from the parents. Moreover, reimbursement may not be sought from parents for the costs of a service that is necessary to aid the child's education, even if the service also contributes to care of the child's other needs. *Tokarcik v. Forest Hills School Dist.*, 665 F.2d 443, 456 (3d Cir. 1981).[7]

IV

Possible Changes in Admission Practices

As discussed above, the regulations under which RICAs now operate expressly state that RICAs are to offer clinical and child care services, as well as an educational program. *See* COMAR 10.07.04.02E. However, current admission procedures at RICA-Rockville and RICA-Cheltenham do not recognize admission for purposes related to a child's noneducational needs. If these admission procedures were revised to permit accurate identification of RICA placements for noneducational purposes—or for separately identifiable multiple purposes, of which education is but one—then the parents of a child so placed could legally be held responsible for the costs of care proportionate to noneducational services.

We recognize that such a revised system poses complex problems of administration. First, a proposed placement in a

[7] With regard to reimbursement from the parents' insurance carrier, the U.S. Department of Education has issued a policy statement, pursuant to the Education for All Handicapped Children Act, that prohibits the states from requesting parents to file an insurance claim related to the costs of educational placements if the parents would thereby incur a financial loss. 45 Fed. Reg. 86390 (December 30, 1980). The policy statement defines financial loss to include payment of a deductible amount, an increase in premiums, a decrease in lifetime coverage, or discontinuation of a policy. *Id.* If a state holds parents harmless from any financial loss (e.g., pays the deductible), the policy permits the state to request parents to file an insurance claim. *Id.* The federal policy does not apply to noneducational services and medical services. The Secretary of Education recently proposed to adopt this policy statement as part of his agency's revised regulations under the Education for All Handicapped Children Act. *See* 47 Fed. Reg. 33854 (August 4, 1982). We would therefore advise the State to observe the policy with respect to educational and related service costs of RICA placements.

RICA might require assessment by several agencies. Thus, clear placement criteria and consultative procedures are needed. One such procedure might provide that children with emotional and psychiatric problems would be referred to a RICA through local departments of health or regional mental health directors. In this way, physicians would be responsible for recommending admission to the RICA and for prescribing the child's individual treatment plan. *See* HG §10-705; COMAR 10.21.03. For such a medical placement, the State could lawfully seek reimbursement from the parents for the cost of the therapeutic treatments prescribed by a physician in the child's individual treatment plan, even if the physician did not personally administer the treatments. Under this hypothetical approach, local school boards would review these RICA placements to ensure that children admitted in this way nevertheless receive appropriate special educational services free of charge. *See* COMAR 13A.05.01.06D.

A second problem may involve the difficulty of providing for a proper allocation of costs between: (i) educational and related services, for which reimbursement from parents may not be sought under any circumstances; and (ii) nondiagnostic medical and noneducational social services, for which reimbursement may be sought. As discussed above, State law itself does not always provide a precise demarcation among the range of services offered at an institution like a RICA—and, indeed, the law's application to scores of children, each with his or her unique needs, probably cannot be defined fully in advance. Nevertheless, the State is free to supplement the statute with regulations that define more exactly the circumstances under which particular RICA services are to be reimbursed. *See generally North v. District of Columbia Board of Education*, 471 F.Supp. 136, 141 (D.D.C. 1979) (responsibility for distinguishing educational from other needs lies with local agencies).

This Office has for some time been involved in consultations with our client agencies to resolve these and similar problems. In furtherance of your Executive Order 01.01.1982.09, concerning the activities of the State Coordinating Council on Services to Handicapped Children, these efforts will continue. We hope that, in the near future, a system can be developed that will accommodate the mandate of the law, the practical problems of the agencies, and the needs of handicapped children and their parents.[8]

V

Conclusion

In summary, it is our opinion that the State may seek reimbursement from parents for the cost of care and treatment of children who are placed at a RICA only within the following legal limits:

(1) If a child is placed in a RICA solely for educational reasons, the State may seek reimbursement only for nondiagnostic medical services (i.e., treatment performed by a physician) and for other services that are shown to be unrelated to the child's educational needs. The basic cost of care at a RICA may not be recovered from the child's parents.

(2) If a child is placed in a RICA for medical or social reasons—in addition to, or instead of, educational reasons—the State may seek reimbursement for the cost of the portion of RICA care that is allocable to the child's noneducational needs, as well as for the cost of nondiagnostic medical services and other specific noneducational services. The cost of educational and related services, and the cost of the portion of RICA care allocable to educational needs, may not be recovered from the child's parents.[9]

This Office is working with the responsible State agencies to develop a RICA placement procedure that reflects these legal guidelines.

STEPHEN H. SACHS *Attorney General*

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[8] Your letter also inquired whether our analysis of the reimbursement issue concerning RICAs would apply as well to handicapped children in other DHMH facilities. The underlying legal principle is identical: the costs of educational and related services may not be recaptured from parents, but the costs of medical and other noneducational services may be. However, given the need to assess the particular factual and legal setting in each case, we do not here address the application of this principle to other DHMH facilities.

[9] As to reimbursement from a parent's insurance carrier, *see* note 7 above.

JACK SCHWARTZ, *Assistant Counsel, Opinions and Advice*

AVERY AISENSTARK
Chief Counsel,
Opinions and Advice

ELECTIONS

INFAMOUS CRIMES—TAX EVASION—VOTER REGISTRATION—WILLFUL TAX EVASION RESULTS IN LOSS OF REGISTRATION—INDEX TO INFAMOUS CRIMES

July 28, 1982

Harold J. Tulley, Esq.
Counsel,
Harford County Board of Supervisors of Elections

As counsel to the Harford County Board of Supervisors of Elections, you have asked for our opinion on whether the recent conviction of Lehman W. Spry for willfully providing false information on his State tax return constitutes the conviction of an "infamous crime" within the meaning of Article 33, §3-4(c) of the Maryland Code.

For the reasons outlined below, we believe that it does.

I

Background

Lehman W. Spry is a candidate in the Democratic Primary, to be held on September 14, 1982, for the Harford County Council, District D. He has been registered to vote in Harford County since 1970.

A. *The Conviction*

On June 22, 1982, Spry pleaded guilty in the Circuit Court for Harford County to having violated Article 81, §221 of the Maryland Code in that, as specified in the Criminal Information, he "willfully and with intent to evade the payment of State income tax [gave] incorrect, untrue, and misleading information" on a 1980 Maryland State Personal Income Tax Return.

In the Agreed Statement of Facts that accompanied his guilty plea, Spry acknowledged that "his statement on line 5 [of the 1980 Return] was knowingly and willfully false" and that, "[a]s a result of this false representation, an additional income tax of Five Thousand One Dollar and Sixty-Nine Cents ($5,001.69) is due the State of Maryland", exclusive of interest or penalties.

The Court accepted Spry's plea of guilty and, on June 22, 1982, sentenced him to 3½ years of supervised probation, in addition to a suspended fine of $2,500, and a partially suspended sentence of 1 year imprisonment.

B. *The Issue*

Harford County Charter §207 requires a County Councilman to be a "qualified voter of the County". In addition, Article 33, §4A-1 of the Maryland Code provides that a person seeking nomination to any local office "must be a registered voter of the particular county or district in which he seeks to be nominated".

Article 33, §3-4(c), however, provides that:

> "No person shall be registered as a qualified voter if he has been convicted of theft or other infamous crime, unless he has been pardoned, or, in connection with his first such conviction only, he has completed any sentence imposed pursuant to that conviction, including any period of probation imposed by virtue of parole or otherwise in lieu of a sentence or part of a sentence."[1]

The question then is whether Spry's conviction is a conviction of an "infamous crime" within the meaning of Article 33, §3-4(c), so as to disqualify him from continued registration as a qualified voter.[2]

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[1] This section implements Article I, §4 of the Maryland Constitution, which provides in relevant part that:

> "The General Assembly by law may regulate or prohibit the right to vote of a person convicted of [an] infamous or other serious crime[.]"

[2] The procedures for cancellation of one's voter registration are set forth in Article 33, §3-18(c).

II

Analysis

Article 33, §1-1(a)(9) defines "infamous crime" as meaning "any felony, treason, perjury, or any crime involving an element of deceit, fraud or corruption".

This definition is essentially a codification of the common law, which "regarded as infamous[,] because of their moral turpitude[, the crimes of] treason, felony, perjury, forgery and those other offenses, classified generally as *crimen falsi*, which impressed upon their perpetrator such a moral taint that to permit him to testify in legal proceedings would injuriously affect the public administration of justice". *Garitee v. Bond*, 102 Md. 379, 383 (1905). *See also State v. Bixler*, 62 Md. 354, 360 (1884) (defining "infamous crime" as including "such crime as involved moral turpitude"). *See generally* 60 *Opinions of the Attorney General* 245, 251 *et seq.* (1975).

The Court of Appeals has clearly characterized tax offenses comparable to Spry's as necessarily involving the very elements that constitute an "infamous crime". Thus, willful tax evasion in violation of 26 U.S.C. §7201 has been held to be a crime that—in and of itself, and without considering the underlying circumstances—"involves moral turpitude, and is infested with fraud, deceit, and dishonesty". *Maryland State Bar Ass'n v. Agnew*, 271 Md. 543, 551 (1974).[3] *See also Maryland State Bar Ass'n v. Callanan*, 271 Md. 554 (1974).[4] The Court of Appeals similarly has found that understating one's

[3] Echoing the common law characterization of an "infamous crime"—as quoted above from *Garitee v. Bond*, 102 Md. 379, 383 (1905)—the Court also noted that "the crime of willful tax evasion . . . constitutes conduct prejudicial to the administration of justice". *Agnew*, 271 Md. at 543.

[4] The language used in Article 81, §221 is strikingly similar to that found in 26 U.S.C. §7201. The federal statute prohibits persons from

> "willfully attempt[ing] in any manner to evade or defeat any tax imposed by this title or the payment thereof".

The State statute, somewhat more elaborately, prohibits persons from

> "wilfully or with the intent to evade the payment, or prevent or hinder the collection of any tax, fail[ing] to furnish any information, or to answer any interrogatory, or to file any report or list [as] required by this article, or giv[ing] any incorrect, untrue or misleading information or answer to any such interrogatory".

(cont'd)

gross income in violation of 26 U.S.C. §7206(1) involves "moral turpitude" *per se*, because the "offense . . . is similarly 'infested with fraud, deceit and dishonesty' ". *Attorney Grievance Commission of Maryland v. Swerdloff,* 279 Md. 296, 299 (1977). *See also Attorney Grievance Commission of Maryland v. Lebowitz*, 290 Md. 499 (1981).[5]

Inasmuch as the federal tax offenses considered in *Agnew* and *Swerdloff* were deemed to be *"infested with* fraud, deceit *and* dishonesty", it follows that Spry's comparable State tax offense is one that, in the words of Article 33, §1-1(a)(9), at least *"involv*[*es*] *an element of* deceit, fraud *or* corruption". As

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Although §221, unlike §7201, refers to "evad[ing]" the payment of taxes in the alternative, it is significant that the specific Criminal Information to which Spry pleaded guilty refers twice to his offense as having been committed "willfully *and* with the intent to evade" the payment of State income tax.

[5] Even "lesser" tax offenses, such as the failure to file a return in violation of 26 U.S.C. §7203 (or, by analogy, Article 81, §320) have been held, depending on the particular facts of the individual case, to constitute a crime involving "moral turpitude". *Compare Attorney Grievance Commission of Maryland v. Barnes*, 286 Md. 474, 480 (1979):

> "We think that Barnes' misconduct, considered in the light of the total circumstances revealed by the record, involved moral turpitude since his intention was to cheat the government and his fellow citizens by avoiding payment of the substantial taxes justly due."

with Attorney Grievance Commission of Maryland v. Walman, 280 Md. 453, 462 (1977):

> "[N]o evidence has been presented to show that respondent's failure to file the returns was accompanied by a fraudulent or dishonest intent. Nor does the record reflect an intent to avoid the ultimate payment of taxes. There is no suggestion, for example, that respondent falsified records, made deceptive statements to Internal Revenue agents, testified untruthfully, committed any other act of dishonesty, or was guilty of further misconduct. No evidence has ever been uncovered by either the I.R.S. or petitioner to refute respondent's explanation for his conduct: that it resulted from his inability to pay."

In our view, even if a violation of Article 81, §221 were not—by analogy to *Agnew* and *Swerdloff*—deemed to be an "infamous crime" *per se*, the particular circumstances of Spry's offense, as evidenced by the Criminal Information and the Agreed Statement of Facts, would nevertheless require a conclusion that this particular conviction was for a crime involving "deceit, fraud or corruption". Unlike the facts in *Walman*, we here have a record that reflects, for example, "an intent to avoid the ultimate payment of taxes", "falsified records", and "deceptive statements".

such, it clearly is an "infamous crime" within the meaning of Article 33, §3-4(c).

III

Conclusion

In summary, it is our opinion that the conviction of Lehman W. Spry of having violated Article 81, §221 of the Maryland Code is a conviction of an "infamous crime" within the meaning of Article 33, §3-4(c) of the Maryland Code. Consequently, he is disqualified from continued registration as a qualified voter.

STEPHEN H. SACHS, *Attorney General*

AVERY AISENSTARK, *Chief Counsel, Opinions and Advice*

Editor's Note: In a subsequent declaratory judgment proceeding, the Circuit Court for Harford County ruled that "[a] conviction for violating §221 of Article 81 of the Maryland Code is an 'infamous crime' within the meaning of §3-4(c) of Article 33"; that "Spry's voting registration is cancelled pursuant to Board action under §3-18(c) of Article 33"; and that "Spry is disqualified as a candidate for County Council pursuant to §4A-1 of Article 33 and §207 of the Harford County Charter". *Board of Supervisors of Elections v. Spry,* Law No. 12084/21/85 (Cir. Ct. for Harford Co., Declaratory Judgment filed August 20, 1982). No appeal was taken.

APPENDIX

Editor's Note: Since the issuance of the preceding Opinion, the Attorney General prepared an index of offenses that, under Maryland law, are "infamous crimes". This index, issued on August 30, 1983, applies the criteria for "infamous crimes" discussed in the preceding Opinion and, previously, in 60 *Opinions of the Attorney General* 245 (1975) and 58 *Opinions of the Attorney General* 301 (1973). *See also* 62 *Opinions of the Attorney General* 924 (1977).

The index, although far more comprehensive than any previously available, is not exhaustive. It contains only those crimes that, by their very nature, are "infamous". It excludes crimes that may or may not be "infamous" depending on the particular facts—for example, as discussed in note 5 of the preceding Opinion, conviction for failure to file a tax return in violation of Article 81, §320 of the Maryland Code.

This index is as follows:

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§7	Arson
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§9	Arson
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§11	Arson
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§430	Procuring and related offenses
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C. *Common Law Offenses*

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Bigamy	Murder
Burglary	Perjury
Forgery	Robbery
Kidnapping	Sodomy
Manslaughter	Theft—attempt

II
NONDISQUALIFYING OFFENSES

The following is a list of some of the most frequently encountered offenses that are *not* "infamous crimes":

Article 27

§8(b)	Arson—personal property, when damage is under $1,000
§10(b)	Arson—attempts to burn personal property or goods and wares
§15	Prostitution
§38	Conspiracy
§111	Malicious destruction of property
§121	Disturbing the peace
§122	Disturbing the peace
§123	Disorderly conduct
§268F	Harboring a fugitive
§268G	Harboring a prisoner
§287(a)	Drug possession
§287(d)	Possession of drug paraphernalia
§342	Theft [less than $300]
§388	Manslaughter by automobile
§464C	Fourth degree sexual offense
§490	Rogues and vagabonds

Common Law Offense

Assault

ELECTIONS—POLITICAL CONTRIBUTIONS—BALLOT QUESTIONS—CONSTITUTIONAL LAW—FIRST AMENDMENT—LIMITATIONS ON CONTRIBUTIONS TO PROMOTE OR DEFEAT REFERENDA AND OTHER BALLOT QUESTIONS ARE UNCONSTITUTIONAL

October 25, 1982

Mr. Willard A. Morris
Administrator
State Administrative Board
of Election Laws

In your letter of October 20, 1982, you requested our opinion on the constitutionality of Article 33, §26-9(b)(2) of the Maryland Code, which imposes a $2,500–limit on the amount that individuals, corporations, and others may contribute "to one or more committees for the purpose of promoting or defeating the passage of one or more questions, principles, propositions, or referendum questions . . . in any primary, general or special election". Specifically, you question the impact on §26-9(b)(2) of the recent decision of the Supreme Court in *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981).

For the reasons given below, it is our opinion that Article 33, §26-9(b)(2) unconstitutionally infringes upon the rights to free speech and association guaranteed by the First Amendment to the United States Constitution.[1]

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[1] Article 33, §26-9(b) provides, in its entirety:

> "(b) *Limit of contributions*—(1) It is unlawful for any individual, association, unincorporated association, corporation, or any other entity either directly or indirectly, to contribute any money or thing of value greater than $1,000 to any candidate or to contribute money in excess of $100 except by check in any primary, general or special election. Total contributions by a contributor under this subsection shall not exceed $2,500 in any primary or general election.
>
> (2) It is unlawful for any individual, association, unincorporated association, corporation, or any other entity either directly or indirectly, to contribute any money or thing of value greater than $2,500 to one or more committees for the purpose of promoting or defeating the passage of one or more questions, princi-

(cont'd)

I

The *Buckley* Decision

The constitutionality of restraints on political contributions was first extensively addressed by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976).

In *Buckley*, the Court assessed the constitutionality of the Federal Election Campaign Act of 1971 (the "Campaign Act"), as amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-433, 88 Stat. 1263. The Campaign Act Amendments imposed certain limitations on contributions to candidates and candidate-authorized campaign committees, as well as limitations on direct expenditures by individuals and groups in candidacy elections. In a long *per curiam* opinion, the Supreme Court upheld the contribution limitations, but struck down the restrictions on direct spending. 424 U.S. at 58-60.

The Court's analysis was guided by at least two basic constitutional principles: First, that one of the primary purposes of the First Amendment is to safeguard free and uninhibited discourse on public and political issues. 424 U.S. at 14-15. Second, that a law which infringes on fundamental First Amendment rights must be subjected to strict judicial scrutiny. 424 U.S. at 25, 29, 44-45. The Court reasoned that the spending of money in a political campaign, whether by way of contributions or independent expenditures, is "political speech", because disseminating political information "in today's mass society requires the expenditure of money". 424 U.S. at 19. The Court also reasoned that political spending, like partisan party activities and political rallies, involves not only First Amendment rights of expression but also First Amendment rights of asso-

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> ples, propositions, or referendum questions or to contribute money in excess of $100 except by check in any primary, general or special election. Contributions under this subparagraph shall not be counted toward the contribution limit in [subsection] (b)(1) of this section."

As will be seen from the discussion below, the provisions of subsection (b)(1)—which impose monetary limits on contributions "to . . . candidate[s] . . . in any primary, general or special election"—are themselves constitutional, at least to the extent that they are not applied to contributions given in connection with campaigns for federal office. *See* 61 *Opinions of the Attorney General* 363, 368-69 (1976).

ciation. Because the costs of an effective political campaign are often great, it is only through resource pooling that advocates with otherwise limited financial means can make themselves heard in political debate and focus their otherwise individual efforts. 424 U.S. at 21-22.

The Court differentiated, however, between contributions and independent expenditures. Political contributions in candidacy elections enjoy less First Amendment protection than do campaign expenditures. The Court explained:

> "A limitation on the amount of money a person may give to a candidate or campaign organization . . . involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.
>
> . . .
>
> The overall effect of the [Campaign] Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression." *Id.*

Nevertheless, even though political contributions to candidates enjoy a lesser degree of First Amendment protection than do direct expenditures, a state may restrict such contributions only if the state "demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms". 424 U.S. at 25. In this regard, the sole governmental interest that the Court identified in *Buckley* as a legitimate justification for contribution limits was the prevention of corruption in the electoral process. 424 U.S. at 26-29. This interest is substantial: corruption, resulting from a candidate's dependence on large individual contributors, erodes the integrity of representative democracy; even the appearance of corruption—the possibility that large contributions could be used to secure political favors from a candidate—undermines public confidence in the electoral process. *Id.*

II

The *Bellotti* Decision

Two years later, in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), the Supreme Court first addressed the application of *Buckley* to ballot question campaigns, at least insofar as corporate spending is concerned.

In *Bellotti*, the Court invalidated a statute that generally prohibited both corporate expenditures and corporate contributions in public issue campaigns. The Court observed:

> "Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue. To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution 'protects expression which is eloquent no less than that which is unconvincing.' . . . We noted only recently that 'the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . '." 435 U.S. at 790-91 (footnotes and citations omitted).

This distinction between candidacy and referendum elections has been recognized by several lower courts, which have uniformally struck down state restrictions on contributions to ballot question campaigns. *See Let's Help Florida v. McCrary*, 621 F.2d 195 (5th Cir. 1980), *aff'd mem. sub nom. Firestone v. Let's Help Florida*, 454 U.S. 1130 (1982) (invalidating a Florida law that imposed a $3,000–limit on the amount an individual could contribute to a committee in a ballot question campaign); *C & C Plywood Corp. v. Hanson*, 583 F.2d 421 (9th Cir. 1978) (invalidating a Montana law that prohibited corporate or bank contributions to ballot question campaigns); *Schwartz v. Romnes*, 495 F.2d 844 (2d Cir. 1974) (holding that a New York law, which prohibited corporate spending for political purposes, must be narrowly construed under the First Amendment to permit contributions by corporations in referendum elections).

III

The *City of Berkeley* Decision

More significantly, in *Citizens Against Rent Control v. City of Berkeley,* 454 U.S. 290 (1981), the Supreme Court itself confirmed that limitations placed on the amounts that individuals or corporations may contribute towards a ballot question unconstitutionally infringe upon the First Amendment rights of free speech and association.

In that case, the Court considered a First Amendment challenge to a provision of the Berkeley Election Reform Act of 1974, which established a $250–limit on contributions to committees formed to support or oppose any ballot question.[2] The Court held that this limitation violated the rights to freedom of association and speech guaranteed by the First Amendment.

The Court began its analysis by discussing at some length the important and historical right of political association. It found that "[c]ontributions by individuals to support concerted action by a committee advocating a position on a ballot measure is beyond question a very significant form of political expression." 454 U.S. at 298. Thus, with respect to the First Amendment right of association:

> "To place a spartan limit—*or indeed any limit*—on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on

[2] As quoted by the Court, the provision in question stated:

> "No person shall make, and no campaign treasurer shall solicit or accept, any contribution which will cause the total amount contributed by such person with respect to a single election in support of or in opposition to a measure to exceed two hundred and fifty dollars ($250)." 454 U.S. at 292.

the right of association." 454 U.S. at 296 (emphasis added).[3]

The Court then analyzed the contribution limitation in terms of the "virtually inseparable" First Amendment right of expression. 454 U.S. at 299. According to the Court, limits on contributions automatically limit expenditures; and the consequent limits on expenditures impose a direct restraint on the freedom of expression of groups, and of individuals desiring to speak through groups, with respect to ballot questions. Unlike a state's interest in controlling money channelled to candidates:

> "[T]here is no significant state or public interest in curtailing debate and discussion of a ballot measure. Placing limits on contributions which in turn limit expenditures plainly impairs freedom of expression. The integrity of the political system will be adequately protected if contributors are identified in a public filing revealing the amounts contributed." *Id.*

In *City of Berkeley,* the Court emphatically rejected the proffered "compelling State interest" that had been used in *Buckley* to justify candidate contribution limitations: "the prevention of quid pro quo corruption between a contributor and a candidate". 454 U.S. at 297. Rather, the Court adhered to its earlier statement in *Bellotti* that "[t]he risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue". *Id.*

The Court likewise rejected the argument that contribution limitations encourage disclosure of the sources of contributions; indeed, the Berkeley statute—as does our own law in Article 33, §26-11(d)—already required source reporting of contributions. Finally, the Court was unpersuaded by the record below

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[3] The issues in *City of Berkeley* were virtually identical to those addressed by the earlier, Fifth Circuit decision in *Let's Help Florida v. McCrary,* 621 F.2d 195 (5th Cir. 1980). Of significance here is the fact that, in *City of Berkeley,* the Supreme Court used virtually the same interpretation of *Buckley* and *Bellotti* as did the Fifth Circuit; then, a month later, it summarily affirmed the decision of the Fifth Circuit in *Firestone v. Let's Help Florida,* 454 U.S. 1130 (1982). In this regard, we note that the Florida limitation held unconstitutional was $3,000–some $2,750 higher than the Berkeley restriction and $500 higher than the Maryland maximum.

that the limitation was necessary to preserve the confidence of the voters in the ballot question process.[4]

IV

Conclusion

In summary, we find that the several courts which have considered the propriety of various statutory limitations on ballot question contributions—under various asserted justifications and claims of substantial state interest—have uniformly held such limitations to violate the First Amendment. For these reasons, it is our opinion that, if confronted with the question, the courts similarly would declare the limitations imposed by Article 33, §26-9(b)(2) to be unconstitutional.

STEPHEN H. SACHS, *Attorney General*

LINDA H. LAMONE, *Assistant Attorney General*

AVERY AISENSTARK
Chief Counsel,
Opinions and Advice

[4] In this regard, the Court seemed to have left open the possibility that a statute limiting ballot measure contributions might be sustained if a sufficient showing were made that the provision was indeed "needed to preserve voters' confidence in the ballot measure process". 454 U.S. at 299. However, in our case, the legislative history of Article 33, §26-9(b)(2) lacks any findings—let alone a detailed record—of any such need.

GENERAL ASSEMBLY

PUBLIC OFFICE—CREATION OF OFFICE—INCREASE IN SALARY—SENATOR OR DELEGATE NOT PRECLUDED FROM APPOINTMENT TO OFFICE FOR WHICH THE TERM OR MANNER OF SELECTION IS CHANGED OR THE SALARY IS INCREASED BY GENERAL ACROSS-THE-BOARD BUDGETARY RAISE

December 16, 1982

The Honorable Gerald J. Curran
Maryland House of Delegates

You have requested our opinion on the circumstances under which members of the General Assembly might become ineligible for appointment as Insurance Commissioner by virtue of Article III, §17 of the Maryland Constitution. This section provides as follows:

> "No Senator or Delegate, after qualifying as such, notwithstanding he may thereafter resign, shall during the whole period of time, for which he was elected, be eligible to any office, which shall have been created, or the salary, or profits of which shall have been increased, during such term."

You anticipate that, at its next Session, the General Assembly may enact legislation affecting the office of Insurance Commissioner. You wish to know whether particular legislative action might give rise to the prohibition in Article III, §17.

Specifically, you posed the following questions:

1. If the General Assembly repealed and reenacted portions of the Insurance Code to change either the manner in which the Insurance Commissioner is selected or the term of that office, would the office of Insurance Commissioner thereby "have been created" within the meaning of Article III, §17?

2. If the General Assembly enacted a budget in which the salaries of all State officers and employees, including the Insurance Commissioner, were raised by an equal percentage, would such an across-the-board raise be a salary increase for the Insurance Commissioner within the meaning of Article III, §17?

For the reasons given below, we have concluded that the repeal and reenactment of the provisions of the Insurance Code governing the selection of the Insurance Commissioner would not "creat[e]" that office within the meaning of Article III, §17. Moreover, although not entirely free from doubt, an across-the-board salary increment for all State officers and employees would not, in our view, constitute a salary increase under that provision. Accordingly, neither such occurrence would give rise to the prohibition in Article III, §17.

I

Creation of an Office

The General Assembly "create[s]" an office, within the meaning of Article III, §17, when it brings a new office into existence, either by instituting an office where none previously existed or by increasing the number of seats of a previously established office.

However, if an office already exists and the General Assembly merely changes its duties, the method by which its holder is selected, or the length of its term, the General Assembly has not thereby "created" an office within the prohibition of Article III, §17. *Compare Kimble v. Bender,* 173 Md. 608 (1938) (Senator may not be appointed to one of additional Justice of the Peace positions established by the General Assembly) *with Mayor and Comm'rs v. Green,* 144 Md. 85 (1923) (Delegate may be appointed to town clerk position, although General Assembly had changed its duties and selection process). *See also* 61 *Opinions of the Attorney General* 152, 157-58 (1976).

Accordingly, the kind of repeal and reenactment to which you refer in your question would not "creat[e]" the office of Insurance Commissioner.

II

Increase in Salary

The prohibition in Article III, §17 is intended to eliminate the bias or the appearance of bias that would otherwise attend

General Assembly approval of measures from which its members could later profit. *Mayor and Comm'rs v. Green*, 144 Md. at 88. In light of this purpose, General Assembly approval of a general pay raise should not be understood to give rise to the prohibition.

Such a raise does not result from the kind of affirmative action by the General Assembly to which Article III, §17 appears to be directed. The increase is proposed by the Governor as a single line item in the budget.[1] It is not earmarked for the Insurance Commissioner or other designated officers; rather, the Insurance Commissioner would benefit from the increase simply because he or she is one of thousands for whom a general salary increase has been passed. Finally, the General Assembly does not affirmatively vote for the increase for particular offices; instead, it only "approves" the general increase by declining to strike or reduce the line item.

We believe that Article III, §17 contemplates much more direct action by the General Assembly than this extremely attenuated link between budget consideration and the consequent pay increase for the affected offices. *Creation* of an office—the other event that gives rise to the prohibition in Article III, §17—obviously entails both focused attention on the particular office and legislative action directly affecting that office. Article III, §17 similarly applies to pay increases that involve comparably focused legislative action.[2] Consideration of a budget line for a general salary increase lacks that characteristic.

In our view, Article III, §17 cannot reasonably be construed to bar *all* members of the General Assembly from *all* State offices simply as a result of that body's failure to delete the Governor's proposal for an across-the-board salary increase. *See generally* 54 *Opinions of the Attorney General* 48 (1969) (pay raise resulting from constitutional amendment). *See also*

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[1] *See, e.g.*, Chapter 125, Item No. 26.01.07.01, Laws of Maryland 1982.

[2] For example, the annual salary review process involves specific consideration by the General Assembly of whether particular offices are to receive pay raises. *See* Letter from Stephen H. Sachs, Attorney General, to Harry Hughes, Governor (August 2, 1981) (Article III, §17 precludes appointment of General Assembly members to Workmen's Compensation Commission, because those offices had benefited from a pay raise derived in part from annual salary review).

Jenkins v. Jensen, 632 P.2d 858 (Utah 1981) and *Shields v. Toronto*, 395 P.2d 829 (Utah 1964) (comparable provision of Utah Constitution). *But see Warwick v. State ex rel. Chance*, 548 P.2d 384 (Alaska 1976) (comparable provision of Alaska Constitution).

III

Conclusion

In summary, it is our opinion that if the General Assembly changed the selection method and term of the Insurance Commissioner and, as part of an across-the-board salary increase for all State officers and employees, increased the salary of the Insurance Commissioner, members of the General Assembly would nevertheless remain eligible for appointment to that office. Neither action would give rise to the prohibition in Article III, §17 of the Maryland Constitution.

STEPHEN H. SACHS, *Attorney General*

JACK SCHWARTZ, *Assistant Counsel*
Opinions and Advice

AVERY AISENSTARK
Chief Counsel,
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Editor's Note: The preceding Opinion was originally written as a letter of advice. Because of the novelty of the issues raised, it is published here in a slightly revised format.

GOVERNOR

STATE DEVELOPMENT COUNCIL—EXECUTIVE ORDERS—AUTHORITY TO ISSUE—EFFECT OF EXECUTIVE ORDER ON DEVELOPMENT POLICIES

February 12, 1982

The Honorable Constance Lieder
Secretary of State Planning

You have requested our opinion on the legality, interpretation, and effect of a proposed Executive Order setting "Policies to Guide State Actions for the Physical and Economic Development of Maryland". Specifically, you have asked:

(1) Does the Governor have sufficient authority to issue such an Executive Order?

(2) What would be the legal effect of the Order on State agencies? In particular:

(a) Could it, while providing that its provisions do not override existing statutes and regulations, nevertheless require agencies to identify and draft proposed changes in statutes, rules, and regulations that conflict with the Order?

(b) Would the effect of the Order be to require agencies to establish new procedures for decision-making?

(c) Would private parties have standing to challenge agency decisions that violate a particular principle or policy stated in the Order?

(3) If the question of an agency's compliance with the Order arose in the course of legal proceedings (e.g., circuit court review of the denial of a permit), could a court invoke noncompliance with the Order as a basis for declaring some agency action to be illegal and void?

For the reasons given below, we conclude as follows:

(1) Issuance of the proposed Executive Order would be authorized by statute.

(2) As a statutorily-authorized Executive Order, it would have the force of law. However, by its express terms, the Executive Order would not override any existing statutory or regulatory provisions.

(3) The terms of the Executive Order are "directory" rather than "mandatory". This does not mean, however, that they can be ignored by State agencies with impunity. Pursuant to the Order, agencies still would be obligated to: (i) identify and draft proposed changes in existing statutes, rules, and regulations that conflict with the Order; and (ii) consider the factors specified in the Order in their decision-making. The Order would not require agencies to modify existing procedures, although some modifications might further the purposes of the gubernatorial directive. What is intended by the Order is that agencies consider the enumerated policies in their regular decision-making.

(4) By its express terms, the Order would not create any private causes of action; thus, it would not of itself confer standing on parties challenging agency actions. Moreover, we believe that the Order, as presently drafted, could reasonably be construed so as to prevent, even in the course of legal proceedings based on other grounds, any consideration of alleged noncompliance with the Order as a factor supporting possible nullification of agency decisions; however, because a court might see the question differently, we suggest that, if this result is intended, the proposed Order be amended to specifically prevent its directives from affecting the outcome of any legal proceedings.

I

Background

In 1980, by Executive Order 01.01.1980.01 (January 7, 1980), the Governor established a seven-member State Development Council.[1] The purpose of the State Development Council is, among other things, to recommend:

> "The appropriate content of an Executive Order relating to policies to guide the effective and efficient allocation of State resources for physical and economic development decisions concerning (1) loca-

[1] The Council consists of six cabinet secretaries (or their designees) and the Lieutenant Governor. Executive Order 01.01.1980.01, ¶2.

> tion of State facilities provided for in the capital budget (2) policies of the State Department of Transportation concerning construction and improvement of, and acquisition of access rights to, existing and proposed State highways and other transportation facilities (3) policies of the State Department of Health and Mental Hygiene concerning local sewage treatment facilities and environmental standards (4) exercise of the intervention and critical areas powers of the Department of State Planning (5) targeting of the State business and housing loan programs, and marketing and business promotion activities (6) the State Outdoor Recreation Plan and plans for community facilities and (7) other forms of State and Federal aid targeted to areas of greatest need." Executive Order 01.01.1980.01,¶3(a).

In accordance with this directive, the Council has prepared and submitted to the Governor a draft Executive Order (referred to below as the "Draft Order"). As most recently revised on October 20, 1981, the Draft Order provides:

> "*To the extent that they are not inconsistent with law, the principles and policies stated herein shall guide decisions by all* State departments, agencies and commissions and other *official State bodies* for purposes of investments, financial or technical assistance, participation in development of local or regional plans, project or plan review, A-95 clearinghouse review, exercise of intervention powers and all other official acts, including cooperation with federal and local governments and agencies." Draft Order, ¶1 (emphasis added).

The Draft Order lists "six principles to guide State investments and actions". Draft Order, ¶2. It then states:

> "In order to follow these principles, State officials and agencies, in cooperation with the private sector and other levels of government, shall carry out their programs in accordance with the policies set forth below." Draft Order, ¶3.

This directive is followed by a listing of 72 economic, environmental, agricultural, urban, energy, and development policies to be "promote[d]", "encourage[d]", or "give[n] priority". *Id.*

In addition, the Draft Order sets a schedule for agency actions designed to implement the Order. These actions include: the identification of existing programs "that can be used, without modification, to implement" the Order's principles and policies; the identification of existing programs "requiring statutory or regulatory changes" for implementation; and the "draft[ing]" of legislative and regulatory changes to make further implementation possible. Draft Order, ¶5.[2]

Finally, the Draft Order states:

> "This Executive Order is not intended to and may not be construed to create any cause of action against any State department, agency, commission, or other official body, or against any State official or employee." Draft Order, ¶4.

II

Gubernatorial Authority

The Preamble of the Draft Order cites various provisions of the Maryland Code that concern the powers and duties of certain agencies; its "Promulgation Clause" states that it is being issued "by virtue of the authority vested in" the Governor "by the Constitution and Laws of Maryland".

There is no need for us to consider here whether the Constitution or the specifically cited statutes authorize this particular Executive Order, because we find sufficient statutory authority for its issuance in three sections of Article 41 of the Maryland Code: §§15, 15C, and 15CA.

Section 15 provides:

> "The head of the Executive Department shall be *the Governor* of the State, who in addition to the rights, powers, duties, obligations and functions now or hereafter conferred by law, *shall* also *have supervision and direction over* the *officers and agencies* hereby or hereafter assigned to the Executive Department." (Emphasis added.)

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[2] The Draft Order would continue the existence of the State Development Council and the State Development Task Force to review agency implementation of the Order. Draft Order, ¶¶7 and 8.

Section 15C(c) states:

> "Notwithstanding any other provision of this article, *the Governor may,* when circumstances dictate, *establish task forces for programs which cut across departmental lines. This shall be limited to programs which require integration of services so as to achieve a governmental program which cannot efficiently be performed through simple cooperation between departments.* Such task forces may exist for not more than one year unless their existence is specifically continued by the Governor." (Emphasis added.)

Finally, §15CA(b)(1)(v) expressly includes within the definition of "executive order" a written order by the Governor "[p]romulgating rules of conduct or procedure, or guidelines for State . . . agencies".

These provisions envision gubernatorial directives to State agencies to guide them in their operations and the efficient administration of their programs. Thus, §15 grants the Governor extremely broad authority to "supervis[e] and direc[t] . . . the officers and agencies . . . assigned to the Executive Department";[3] §15CA(b)(1)(v), in turn, recognizes the ability of the Governor to exercise this authority through the issuance of executive orders establishing, inter alia, "guidelines" for State agencies to follow. More particularly, §15C(c) contemplates the establishment of interagency programs growing out of "task forces", such as the State Development Council; §15CA(b)(1)(iii), in turn, provides that the Governor may exercise this authority by executive order.[4]

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[3] Section 15 is a legislative implementation of Article II, §1 of the Maryland Constitution, which vests the "executive power of the State . . . in [the] Governor".

[4] Section 15CA(b)(1)(iii) defines "executive order" to include:

> "(1) A written order, proclamation, or directive issued over the Governor's signature:
>
> . . .
>
> (iii) In the exercise of authority granted to the Governor by §15C of this article or by any other law dealing with organization of the executive branch, both within and between departments, units and agencies of that branch."

In the past, we have viewed these and similar provisions of law as authorizing far-reaching executive orders on significant matters involving the way in which the business of the Executive Branch is conducted. For example, in 64 *Opinions of the Attorney General* 180 (1979), we said that an Executive Order establishing the Governor's Commission on Law Enforcement and the Administration of Justice was authorized by Article 41, §§15C and 15CA(b)(1)(iii). Earlier, in 61 *Opinions of the Attorney General* 219 (1976), this Office concluded that, pursuant to Article 41, §§15 and 15CA(b), the Governor had ample authority to issue an Executive Order extending grievance procedures to unclassified State employees. In so concluding, that Opinion noted:

> "Under the circumstances of its issuance, we view the Executive Order as the exercise of a management function which is implicit in the power of the Governor to supervise and direct the agencies of the Executive Department." 61 *Opinions of the Attorney General* at 227.

Similarly, here, the Governor's management powers to supervise and direct, to establish interagency programs for, and to issue guidelines governing the operations of State agencies—as reflected in §§15, 15C(c), and 15CA(b)(l)(v)—afford a sufficient statutory basis for the issuance of the proposed Executive Order on development principles and policies.

III

Legal Effect of Proposed Order

A. *In General*

In 64 *Opinions of the Attorney General* 180 (1979), we concluded that a statutorily-authorized executive order had the force and effect of law. At the same time, however, we indicated that such an order (unlike, for example, an order issued pursuant to Article II, §24 of the Maryland Constitution) could not alter or contravene existing law. *Id.* at 183-84.

The principles and policies contained in the Draft Order on development policies apply only "[t]o the extent . . . not inconsistent with law" [Draft Order, ¶1]. Thus, the proposed Executive Order expressly disavows any intention of contravening existing "law"—i.e., existing statutes or rules having the force of law. In light of this language, it is clear that the Order would not have any such superseding effect.

To conclude that the Draft Order would have the force of law does not mean that its terms are "mandatory" in the sense that a failure to abide by its provisions would have an invalidating effect on agency action. The Order is couched in terms of "guid[ing]" agency action [Draft Order, ¶2. *Cf.* 62 *Opinions of the Attorney General* 36, 39 (1977)], and it affirmatively eschews the creation of private causes of action [Draft Order, ¶4]. Moreover, it does not provide for any kind of sanction for noncompliance. Thus, it seems evident that the Order is not intended to be "mandatory", as that term is commonly used. *See* 1A *Sutherland, Statutory Construction* §25.03 (C.Sands 4th ed. 1972) ("The important distinction between directory and mandatory statutes is that the violation of the former is attended with no consequences, while the failure to comply with the requirements of the latter either invalidates purported transactions or subjects the non-complier to affirmative legal liabilities.").[5]

But even if "directory" rather than "mandatory", the Executive Order could not be ignored by State agencies. As noted by a Pennsylvania court, in *Borough of Pleasant Hills v. Carroll,* 125 A.2d 466, 469 (Pa. Super. 1956):

> "To hold that a provision is directory rather than mandatory does not mean that it is optional—to be ignored at will. Both mandatory and directory provisions . . . are meant to be followed. It is only in the effect of non-compliance that a distinction arises. A provision is mandatory when failure to follow it renders the proceedings to which it relates illegal and void; it is directory when the failure to follow it does not invalidate the proceedings."

See also 1A *Sutherland, Statutory Construction* §25.04 (C.Sands 4th ed. 1972).

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[5] This conclusion is reinforced by the fact that the Draft Order obviously contemplates some measure of agency discretion; it directs consideration of some 72 diverse policies, and it is highly unlikely that all of them can be fully accommodated in any given agency action.

Thus, if the Order is issued, agencies must, in accordance with its terms, identify and draft appropriate changes in statutory and regulatory provisions and, to the extent not inconsistent with existing law, consider the factors specified in the Order in their decision-making.[6] Indeed, an agency head who disregards the Order may very well be doing so at the risk of his or her job.

B. *Private Rights; Standing*

If an executive order states that it does not intend to create private rights of action, it obviously cannot have that kind of substantive effect.[7] In this case, the Draft Order on development policies expressly states that it "is not intended to and may not be construed to create any cause of action" in favor of private parties against State officers or agencies. Moreover, as a "directory" regulation that envisions a measure of discretion in its implementation,[8] the Order could not be used as a basis for an "enforcement" action against a State agency. *See Brack v. Wells*, 184 Md. 86, 90 (1944); 52 Am. Jur. 2d *Mandamus* §76 (1970).

Because the Draft Order necessarily requires discretionary implementation and expressly denies private parties legal redress, even traditional rules of standing would deny a litigant the right to challenge a "violation" of the Order. A litigant could not assert that he or she was injured by a violation of the Order and thus had a claim "arguably within the zone of interests to be protected or regulated" by the Order. *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972).

Finally, it is our view that the Order could not be successfully invoked in court proceedings, such as those involving re-

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[6] For example, ¶3C(7) of the Draft Order directs State officials to provide transportation access needed to support employment centers. However, if no funds are provided by law in the budget for such a project, a State agency may be unable to comply with the directive.

[7] *Cf.* 62 *Opinions of the Attorney General* 36, 38-39 (1977)("[T]he best evidence of any agency's intent with respect to the kinds of rules it is promulgating 'is what it says when it issues the rules'.").

[8] *See* note 5 above.

view of the denial of a permit, as an independent basis to challenge some agency decision or action. For example, Article 41, §255(f) of the Maryland Code provides that, in appeals of certain agency actions under the Administrative Procedure Act:

> "*The court may* affirm the decision of the agency or remand the case for further proceedings; or it may *reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced* because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions; or
>
> (2) In excess of the statutory authority or jurisdiction of the agency; or
>
> (3) Made upon unlawful procedure; or
>
> (4) Affected by other error of law; or
>
> (5) Unsupported by competent, material, and substantial evidence in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious." (Emphasis added.)

For the reasons discussed above, a directory Executive Order such as the one under consideration here would not create or impact on "the substantial rights" of a third party.

In our view, a reasonable reading of the Draft Order would also preclude a litigant from invoking the directive as even one of several other grounds for invalidating an agency decision. However, it is not inconceivable that a court could differ with our reading and might choose to include a "violation" of the Order as one of a number of errors or factors supporting a claim that an agency decision was "arbitrary and capricious". To avoid this possibility, we think it advisable to amend the language of the Draft Order to expressly provide, for example, that the Order "is not intended to and may not be construed to confer any right, privilege, or status cognizable by a court in any proceeding".[9]

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[9] Similar language appears in the Preamble to Chapter 575, Laws of Maryland 1978 (the Minority Business Enterprise Law). [*See* Editor's Note below.]

IV

Conclusion

In summary, it is our opinion that:

(1) The proposed Executive Order on Development Policy, if issued by the Governor, would be authorized by statute.

(2) As a statutorily-authorized Executive Order, it would have the force of law, but would not override any existing statutory or regulatory provisions.

(3) The terms of the Executive Order are "directory" rather than "mandatory". However, they cannot be ignored by State agencies with impunity. Pursuant to the Order, agencies still would be obligated to: (i) identify and draft proposed changes in existing statutes, rules, and regulations that conflict with the Order; and (ii) consider the factors specified in the Order in their decision-making.

(4) By its terms, the Order would not create any private causes of action. Thus, it would not confer standing on parties challenging agency action or result in nullification of any agency decisions for noncompliance with the Order. However, to make this intention of the Order perfectly clear, we suggest that it be amended to specify that it does not confer private rights cognizable in court.

STEPHEN H. SACHS, *Attorney General*

ROBERT A. ZARNOCH, *Assistant Attorney General*

AVERY AISENSTARK
Principal Counsel,
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Editor's Note: On May 28, 1982, Governor Hughes issued Executive Order 01.01.1982.08, entitled "Policies to Guide State Actions for the Physical and Economic Development of Maryland". The Executive Order became effective June 1, 1982. As issued, ¶4 of the Order provides: "This Executive Order is not intended to and may not be construed to confer any right, privilege, or status on any private party cognizable by a court in any proceeding."

HEALTH OCCUPATIONS

PHYSICIANS—COMMISSION ON MEDICAL DISCIPLINE—UNPROFESSIONAL CONDUCT—"IMMORAL CONDUCT"—MORAL TURPITUDE—OBSTRUCTION OF JUSTICE—WITNESS–TAMPERING BY DEFENDANT–PHYSICIAN IN MALPRACTICE SUIT IS "IMMORAL CONDUCT IN HIS PRACTICE AS A PHYSICIAN"

November 29, 1979*

John E. Adams, M.D., Chairman
Commission on Medical Discipline

You have requested our opinion on whether the Commission on Medical Discipline of Maryland has jurisdiction under Article 43, §130(h) [HO§14-504] of the Maryland Code to consider possible disciplinary action against Edward J. McDonnell, M.D. ("McDonnell") and William H.M. Finney, M.D. ("Finney"), for acts allegedly taken by them in connection with the defense of a medical malpractice suit filed against McDonnell. This matter was brought to your attention by a decision of the Court of Special Appeals, in which the Court labeled as "outrageous" the conduct of McDonnell in tampering with expert medical witnesses of the plaintiff. *Meyer v. McDonnell,* 40 Md. App. 524 (1978).[1]

For the reasons stated below, we conclude that the Commission on Medical Discipline has jurisdiction under Article 43, §130(h)(8) [HO §14-504(3)] to investigate and consider possible disciplinary action against McDonnell, but not Finney.[2]

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* Issued on November 29, 1979, on confidential basis pending action by the Commission on Medical Discipline. *See* Editor's Note following Opinion.

The statutory provisions upon which this Opinion relied have since been recodified, without substantive change, as part of the Health Occupation Article ("HO" Article) of the Maryland Code. Cross-references to the new codification have been added to the text in brackets.

[1] Although the Court of Special Appeals labeled as "outrageous" only the conduct of McDonnell (the appellee in the case before it), we also address the question of whether the Commission has jurisdiction over Finney for actions he took in concert with McDonnell.

[2] This Opinion is based solely upon the facts set forth by the Court of Special Appeals in *Meyer v. McDonnell.* On the basis of those facts, we have

(cont'd)

I

Background

In *Meyer v. McDonnell*, 40 Md. App. 524 (1978), the Court of Special Appeals reversed the lower court's judgment in favor of the defendant, McDonnell, and held that the trial judge incorrectly instructed the jury with regard to evidence that McDonnell had "tampered" with the plaintiff's witnesses. The trial judge had instructed the jury that this evidence was admissible only for the purpose of raising an inference that the testimony of the witnesses would be unfavorable to McDonnell, but not as substantive evidence to support the plaintiff's claim of negligence on the part of McDonnell. The Court of Special Appeals, however, held that the jury should have been instructed that the witness-tampering evidence was admissible to show McDonnell's consciousness of the weakness of his case. The Court, therefore, remanded the case for a new trial.

According to the evidence, as reported by the Court of Special Appeals, the first instance of witness-tampering was initiated during the malpractice trial against McDonnell when McDonnell asked his colleague, Finney, to call Dr. Thomas H. Langfitt, former Chief of Neurosurgery at the University of Pennsylvania and a long-time friend of Finney, and inform Dr. Langfitt that Dr. Francis J. Pizzi was scheduled to testify against McDonnell and that Dr. Pizzi's testimony would be transcribed and sent to Dr. Pizzi's local medical society in New Jersey. Dr. Langfitt had trained Dr. Pizzi and was the person responsible for bringing Dr. Pizzi into neurosurgery. Finney carried out McDonnell's request; in doing so, he also told Dr. Langfitt that it might be inadvisable for Dr. Pizzi to testify in an out-of-state medical malpractice trial inasmuch as Dr. Pizzi was scheduled to take the oral portion of his certification ex-

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concluded that the Commission has jurisdiction to proceed against McDonnell. However, it is not our role to conclude—nor do we conclude—that McDonnell in fact is guilty of "unprofessional conduct". Only the Commission can make such a finding.

If the Commission on Medical Discipline decides to proceed against McDonnell for "unprofessional conduct", McDonnell is entitled to an evidentiary hearing before the Commission, at which he may introduce additional evidence relevant to any charges made by the Commission. *See generally Laws, Regulations & Guidelines of the Commission on Medical Discipline*, Commission on Medical Discipline (1976).

aminations before the American Board of Neurological Surgery.[3] Dr. Langfitt then called Dr. Pizzi and communicated the substance of Dr. Finney's admonition. Dr. Pizzi was quite upset by the Langfitt phone call, but he did testify in the McDonnell case.

The second instance of witness-tampering was initiated during the trial when McDonnell directed his secretary to call Dr. Robert P. Keyser, a physician in Florida, and tell him that another Florida physician, Dr. Robert B. Nystrom, was scheduled to testify against McDonnell and that Dr. Nystrom's testimony would be transcribed and disseminated to both Dr. Nystrom's local medical society in Florida and the American Academy of Orthopedic Surgeons. McDonnell's secretary made the call. Dr. Keyser told her that he would communicate this information to Dr. Nystrom, a result expected and intended by McDonnell. Dr. Keyser, a mentor and close colleague of Dr. Nystrom, did call Dr. Nystrom. Dr. Nystrom later stated to the trial judge that, as a consequence of Dr. Keyser's call, he felt he would be unable to testify candidly. He did, however, testify at trial. In short, according to the Court of Special Appeals, McDonnell's message was clearly intimidating and was intended by him to be so.

In describing the conduct of McDonnell as "outrageous", the Court noted: "Whatever merit the medical profession may have in its current outcry against malpractice suits, the remedy does not lie in polluting the streams of justice by tampering with witnesses." 40 Md. App. at 525.

II

The Commission's Jurisdiction

The Commission on Medical Discipline of Maryland (the "Commission") was created by Chapter 469, Laws of Maryland 1968, to conduct investigations of "unprofessional conduct" and to impose disciplinary measures on physicians, for the purpose of protecting the public from a physician's improper conduct,

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[3] The Court of Special Appeals noted that McDonnell denied any knowledge of Dr. Pizzi's impending oral examination. 40 Md. App. at 527.

incompetence, or unscrupulous practices. *Cocco v. Maryland Commission on Medical Discipline*, 39 Md. App. 170, 173 (1978).

Article 43, §130(h) [HO §14-504] lists twenty-four types of "unprofessional conduct" that provide the basis for a variety of sanctions, including reprimand, probation, or suspension or revocation of a physician's license to practice medicine in Maryland.

The Commission, as an administrative agency created by statute, has no authority beyond its statute. *Cf.*, *e.g.*, *Holy Cross Hospital v. Health Services Cost Review Commission*, 283 Md. 677, 683 (1978).[4] It is thus clear that, for the Commission to have jurisdiction over the actions of McDonnell and Finney, those actions must fall within the scope of one or more of the items listed in §130(h). Almost all of the specific types of unprofessional conduct described in §130(h) are facially inapplicable to the tampering incidents. There are several items, however, that are potentially applicable.

First, §130(h)(10) [HO §14-504(13)] authorizes the imposition of disciplinary measures if a physician willfully impedes or obstructs the filing or recording of, or induces another person to omit to file or record, "medical reports required by law". The record of *Meyer v. McDonnell* in the Baltimore City Court contains no subpoenas for those out-of-state witnesses who were subjected to the attempts at intimidation. Nor would any subpoena be effective as to an out-of-state witness. Md. Rule of Procedure 103a. It therefore appears that the witnesses had agreed to testify on a voluntary basis and not in response to any legal process. Consequently, even if their intended testimony were "medical reports" within the meaning of §130(h)(10), they were not "required by law".

A second potentially applicable provision is §130(h)(4) [HO §14-504(6)]. It authorizes the Commission to exercise jurisdic-

[4] The legislative history of the statute also confirms that the General Assembly intended the Commission to have jurisdiction only over those types of unprofessional conduct specifically listed in §130(h). An early version of the Commission's enabling legislation would have empowered the Commission to take disciplinary action for any of the specific causes listed as "unprofessional conduct", but would have further provided that "such action shall not be limited to these causes". This phrase, however, was deleted from the legislation before its enactment. *See* Chapter 469, Laws of Maryland 1968.

tion if a physician has been charged with a crime involving moral turpitude and has entered a *nolo contendere* or guilty plea or has been convicted of the crime. If, as a result of the tampering incidents, McDonnell and Finney were prosecuted criminally for obstruction of justice, or for some other related crime involving moral turpitude, and if they were convicted or entered *nolo contendere* or guilty pleas, the Commission then would have jurisdiction to conduct an investigation and impose disciplinary measures under §130(h)(4). But §130(h)(4) now is not applicable, because the physicians have not been charged with any crime.

The only remaining item of "unprofessional conduct" that might provide the Commission with jurisdiction in this case is §130(h)(8) [HO §14-504(3)], which makes punishable "immoral conduct of a physician in his practice as a physician".[5] As discussed below, we believe that McDonnell's conduct, if proven to be as described by the Court of Special Appeals, is within the scope of this subsection, but that Finney's conduct is not. We separately analyze the two components of this subsection: (1) "immoral conduct of a physician" and (2) "in his practice as a physician".

III

"Immoral Conduct"

In *Black's Law Dictionary* 676 (rev. 5th ed. 1979), "immoral" is defined as meaning:

> "Contrary to good morals; inconsistent with the rules and principles of morality; inimical to public welfare according to the standards of a given community, as expreessed in law or otherwise. Morally

[5] If the Commission were to determine that McDonnell had been professionally incompetent in his treatment of Alvin Meyer, the plaintiff-appellant in *Meyer v. McDonnell*, it could assert jurisdiction over McDonnell under §130(h)(18) [HO§14-504(4)]. This item authorizes the Commission to investigate a physician guilty of "professional incompetency". However, we do not believe that McDonnell's and Finney's alleged misconduct in connection with McDonnell's medical malpractice case falls within the scope of this item.

evil, impure; obscene; unprincipled; vicious; or dissolute."[6]

According to the opinion of the Court of Special Appeals in *Meyer v. McDonnell,* the conduct said to have been taken by McDonnell and Finney meets this definition.

The acts of McDonnell and Finney might be considered—subject, of course, to further investigation into all of the facts and circumstances surrounding the tampering incidents—as having been improper efforts to enforce a "conspiracy of silence", the term used to connote the reputed unwillingness of physicians to testify against other physicians in medical malpractice trials.

Courts in Maryland and elsewhere have recognized not only the existence of this "conspiracy of silence" but, also, the fact that it is unethical and contrary to the proper administration of justice. *See, e.g., Sard v. Hardy,* 281 Md. 432, 443 (1977); *L'Orange v. Medical Protective Co.*, 394 F.2d 57 (6th Cir. 1968) (permitting insurer to cancel physician's malpractice insurance policy as punishment for testifying as expert witness for a plaintiff in a malpractice trial is contrary to public policy); *Carbone v. Warburton,* 91 A.2d 518 (N.J. Super. Ct. App. Div. 1952), *aff'd,* 94 A.2d 680, 684 (N.J. 1953); *Steiginga v. Thron,* 105 A.2d 10, 11 (N.J. Super. Ct. App. Div. 1954) (physician's unwillingness to testify against another physician is "shocking" and "unethical").

Efforts to enforce this "conspiracy of silence" by seeking to harm an expert witness professionally constitute the crime of obstruction of justice. *See, e.g., Konrad v. Delong,* 57 F.R.D. 123 (N.D. Illinois 1972) (defendant's attempt to intimidate plaintiff's expert medical witness by filing complaint against

[6] In *Attorney Grievance Commission v. Walman,* 280 Md. 453, 459 (1977), which concerned whether a conviction for income tax evasion was a crime involving "moral turpitude" so as to merit disbarment, the Court defined moral turpitude as "an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man". *See also Board of Dental Examiners v. Lazzell,* 172 Md. 314, 320 (1937); *Braverman v. Bar Assn. of Baltimore,* 209 Md. 328, 344 (1956), *cert. denied,* 352 U.S. 830 (1956).

him with local medical society constituted obstruction of justice).[7]

There can be little doubt that conduct which constitutes obstruction of justice is "immoral conduct". In cases involving the disciplining of lawyers, the Maryland Court of Appeals has noted that obstruction of justice is a crime of moral turpitude that justifies the revocation of a professional license. *See, e.g., Attorney Grievance Commission v. Green*, 278 Md. 412, 415 (1976) (subornation of perjury strikes at fundamentals of our system of justice and constitutes a crime involving moral turpitude); *Maryland State Bar Association v. Rosenberg*, 273 Md. 351 (1974) (perjury is a blatant and purposeful obstruction of the administration of justice and is a crime involving moral turpitude); *Maryland State Bar Association v. Frank*, 272 Md. 528, 539 (1974) (effort to corrupt public prosecutor to subvert legitimate prosecutions of first degree murder and narcotic violations was conduct "of the greatest moral turpitude"). *See also State v. Margoles*, 124 N.W.2d 37 (Wis. 1963) (upholding revocation of physician's professional license based on conviction of several crimes of moral turpitude—i.e., filing false tax returns, corruptly influencing officers of federal court, and obstructing justice).

For these reasons, we believe that the conduct of McDonnell and Finney, if proved to be as described by the Court of Special Appeals in *Meyer v. McDonnell*, constituted "immoral conduct". We turn now to the more difficult question of whether this conduct occurred in either doctor's "practice as a physician".

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[7] Article 27, §27 of the Maryland Code establishes the crime of obstruction of justice in the following terms:

> "If any person shall corruptly or by threats or force endeavor to influence, intimidate or impede any juror, witness or officer in any court of this state in the discharge of his duty, or shall corruptly or by threats or force obstruct or impede, or endeavor to obstruct or impede, the due administration of justice therein, he shall be liable to be prosecuted, therefor by indictment, and on conviction thereof be punished by fine not exceeding ten thousand dollars, or by imprisonment not exceeding three years, or both, according to the nature and aggravation of the offense."

IV

"In His Practice as a Physician"

A. *Introduction*

Section 130(h)(8) does not authorize the Commission to exercise jurisdiction over just any "immoral conduct" of a physician. Instead, that item limits the scope of punishable misconduct to immoral conduct of a physician "in his practice as a physician".

Section 130(h)(8) is a penal statute. *See State Board of Osteopathic Examiners v. Berberian*, 190 A.2d 330 (Pa. Super. Ct. 1963); 3 *Sutherland, Statutory Construction* §59.01 (C. Sands 4th ed. 1974). Therefore, it must be narrowly construed. *See State v. Fabritz*, 276 Md. 416 (1975), *cert. denied*, 425 U.S. 942 (1975); *Fisher v. Bethesda Discount Corporation*, 221 Md. 271, 275 (1960); 3 *Sutherland, Statutory Construction* at §59.03. Nonetheless, the intention of the legislature governs in the construction of all statutes, even penal statutes. *State v. Fabritz*, 276 Md. 416 (1975). Accordingly, penal statutes are not to be given a narrow or strained construction in an attempt to "exclude from their operation cases plainly within their scope and meaning"; rather, like other statutes, they are to be "fairly and reasonably construed." *Id.*

Thus, recognition of the well-accepted canon of statutory construction that penal statutes must be narrowly construed does not resolve, but simply refines, the question we must answer: Given a properly narrow construction of §130(h)(8), what is the meaning of the limiting phrase "in his practice as a physician"?

We have found no controlling decision by a Maryland appellate court to assist us in answering this question. Decisions involving medical disciplinary statutes in other jurisdictions provide us with some, albeit limited, guidance.[8] These deci-

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[8] For the most part, the statutes in other jurisdictions are much less comprehensive or less specific than their Maryland counterpart; hence, decisions interpreting them are of limited value. Many of these statutes tend to resemble the former Maryland statute, previously codified at Article 43, §145 of the Maryland Code (1957 ed.). That section authorized the Board of Medical Examiners to revoke or suspend a physician's license for fraud in obtaining a medical license, habitual drunkenness, insanity, addiction to narcotics, un-

(cont'd)

sions are not uniform but, instead, suggest at least two possible constructions of §130(h)(8).

B. *Alternative Constructions*

First, the word "practice", as used in the clause "in his practice as a physician", might be construed to cover only the direct provision of medical care and treatment by a physician to his or her patients. So construed, it would cover, for example, an intentional assault on a patient by a physician during the course of the physician's examination. *Cf., e.g., State Board of Osteopathic Examiners v. Berberian,* 190 A.2d 330 (Pa. Super Ct. 1963) (term "unethical conduct", when used as a basis for jurisdiction in medical discipline statute, must be limited to the doctor-patient relationship). *Accord Pennsylvania State Board of Medical Education and Licensure v. Ferry,* 63 Dauphin County Reports 243, *aff'd,* 94 A.2d 121 (Pa. Super. Ct. 1953) (term "grossly unethical practice" referred to the practice of medicine and surgery).

Second, the word "practice" might be construed to include acts done by a physician that, even though they might not accompany immediate care or treatment, have a direct impact on present or former patients and some clear connection to a present or former physician-patient relationship. *See, e.g., Forziati v. Board of Registration in Medicine,* 128 N.E.2d 789 (Mass. 1955); *Wasserman v. Board of Regents,* 182 N.E.2d 264 (N.Y. 1962); *Mester v. Board of Regents,* 18 N.Y.S.2d 300 (N.Y. App. Div. 1940); *Kaplan v. Department of Registration*

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lawful abortion, conviction of a crime involving moral turpitude, "or unprofessional or dishonorable conduct". The current statute, which substituted the Commission on the Medical Discipline for the Board of Medical Examiners as the disciplinary body, was proposed in part because the Board of Medical Examiners was hampered both by its competing duties in connection with physician licensure, collection of fees, and maintenance of a physician's registry and by inadequate statutory authority to protect the public. *See* J. Berman, *Legal Mechanism for Dealing with the Disabled Physician in Maryland: Partnership between the Medical Society and the State Commission on Medical Discipline,* Maryland State Medical Journal 4145 (February 1976); F. Grad and N. Marti, *Legislative Drafting Research Fund of Columbia University, Study of Medical Disciplinary Procedures* (Final Report Under Contract No. PHS-282-76-0452-65, submitted Feb. 16, 1978).

and Education, 361 N.E.2d 626 (Ill. App. 1977). So construed, §130(h)(8) would authorize the Commission to punish, for example, a physician who makes obscene phone calls to present or former patients.

Although §130(h)(8) clearly allows punishment for "immoral conduct" that occurs while a physician is providing direct medical care to a patient (the intentional assault example), we do not believe that it should be limited solely to such conduct. We conclude, rather, that it should also be construed to include, at least, "immoral conduct" by a physician that, even though not occurring directly in the course of or as a part of medical treatment, has a direct impact on a present or former patient relationship (the obscene phone calls example). A discussion of the pertinent cases and canons of statutory construction follows.

C. *Discussion*

In *Forziati v. Board of Registration in Medicine*, 128 N.E.2d 789 (Mass. 1955), the Massachusetts Supreme Judicial Court interpreted a state statute that authorized the state medical board to discipline a physician found to be guilty of:

> " 'deceit, malpractice, [or] gross misconduct *in the practise* [sic] *of his profession*, or of any offence [sic] against the laws of the commonwealth relating thereto.' " 128 N.E.2d at 791 (emphasis added).

Forziati, a practicing physician, was charged with soliciting patients for an attorney who, in turn, rewarded Forziati with a percentage of his legal fees. In a declaratory judgment action, Forziati argued that the medical board was without jurisdiction to hear the charges against him because the statutory language "in the practice of his profession" was limited to the diagnosis and treatment of patients. The court in *Forziati* rejected this contention:

> "These words . . . are not in our opinion limited, as the plaintiff would have us believe, to that which is done in the diagnosis and treatment of the patient. We are satisfied that they were intended to include all conduct of the practitioner in carrying on his professional activities. Fee splitting was one of the

> methods adopted by the plaintiff in his practice of medicine." 128 N.E.2d at 792.[9]

In reaching its conclusion that the charged misconduct was within the scope of Forziati's "practice of his profession", the court gave substantial weight to the fact that the attorney-physician scheme violated the trust and confidence reposed in the physician by his patients. 128 N.E.2d at 791.

A series of New York cases provide further support for our construction of §130(h)(8). In *Wasserman v. Board of Regents*, 182 N.E.2d 264 (N.Y. 1962), the New York Court of Appeals reviewed a statute that authorized discipline for "fraud in the practice of medicine". It concluded that a physician's participation in the preparation of false medical reports and bills for use in settling personal injury cases placed him within the purview of that statute. The court rejected the physician's argument that he had never mistreated a patient, submitted a false bill to a patient, or falsely diagnosed a patient:

> "Nothing in the statute limits discipline for fraudulent diagnoses to cases where the fraud is perpetrated directly on the patient . . . . Appellant's fraudulent scheme, of course, was dependent upon misuse of his medical license, and the submission of false reports and bills to interested persons was an integral part of his medical practice." 182 N.E.2d at 266.

The court concluded that the physician was "engaged in the practice of medicine when he committed the fraudulent acts". 182 N.E.2d at 265-66.

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[9] As is the case with §130(h)(8), the medical discipline statute in *Forziati* had several detailed provisions (§2) as well as the more general clause (§61) construed by the court. However, the court attached little significance to this juxtaposition of detailed and more general provisions:

> "[W]e are not convinced that the specific mention in §2 of certain kinds of misconduct for which a physician may be subject to discipline as there specified has the effect of weakening the broader power conferred upon the board by §61, in any other way, than as indicated by the opening words of the present §61, 'Except as otherwise provided by law.' " 128 N.E.2d at 792.

The court in *Wasserman* supported its decision by citing to *Mester v. Board of Regents*, 18 N.Y.S.2d 300 (N.Y. App. Div. 1940). In *Mester*, the court found that a physician's issuance of a false medical certificate concerning the physical condition of one of his patients constituted deceit in the "practice of medicine". 18 N.Y.S.2d at 301. Again, the court reached this conclusion even though the disciplined physician had not been found to have mistreated or improperly cared for a patient. *Accord Kaplan v. Department of Registration and Education*, 361 N.E.2d 626 (Ill. App. 1977) (conspiracy to defraud insurer by submission of false reports constituted "fraud or deceit in the practice of medicine"). *See also Kansas State Board of Healing Arts v. Seasholtz*, 504 P.2d 576 (Kan. 1972); *Erdman v. Board of Regents*, 261 N.Y.S.2d 634 (N.Y. App. Div. 1965); *State of Montana v. Board of Medical Examiners*, 339 P.2d 981 (Mont. 1959).

These decisions suggest that the words of §130(h)(8)—"in his practice as a physician"—ought to be construed to include acts done by a physician that, while not necessarily occurring directly in the course of or as a part of medical care or treatment, have a direct impact on present or former patients and are connected to a present or former physician-patient relationship.

To be sure, the plain meaning of §130(h)(8), as well as the general legislative history of §130, indicate that it was not intended to be an open-ended disciplinary code that authorizes discipline for all immoral conduct, even if unrelated to a physician's practice. Our construction of §130(h)(8), however, which requires that a physician's "immoral conduct" have a direct impact on a physician's patient and be connected to a physician-patient relationship, rejects such an open-ended reading of §130 and, we believe, is consistent with its plain meaning and history.

For the same reasons, we believe that our construction is consistent with the maxim discussed above that penal statutes should be narrowly construed.

Finally, our construction gives full effect to all provisions of §130. *See Blumenthal v. Clerk of Circuit Court for Anne Arundel County*, 278 Md. 398, 403 (1976); *Board of County Commissioners of Howard County v. Fleming*, 13 Md. App.

261, 268 (1971). By reading §130(h)(8) to make punishable only immoral conduct that affects patients and is connected to a physician-patient relationship, our construction gives full effect to §130(h)(4), which is available to punish a physician who is convicted of or pleads guilty or *nolo contendere* to a crime of moral turpitude that may be entirely unrelated to his or her practice.

V

Application

Applying §130(h)(8), as construed above, to the conduct of McDonnell and Finney, we conclude that it is applicable to McDonnell's conduct, but not Finney's.

McDonnell's alleged "immoral conduct" occurred during a medical malpractice case that was brought by one of his former patients and that arose out of McDonnell's professional relationship with that patient. McDonnell's witness-tampering had the inevitable potential of denying a fair trial to this patient, who was alleging that McDonnell's medical treatment of him had been substandard. If these claims of malpractice had been proven to be true, McDonnell's "practice as a physician" might have been injured or jeopardized. His actions violated the trust and confidence reposed in him, as a physician, by his patient. They also appear to have been calculated to protect his professional reputation and, ultimately, his ability to continue to practice and accept future patients. Hence, we conclude that these acts, as related by the Court of Special Appeals, occurred in McDonnell's "practice as a physician".

The apparent witness-tampering of both Finney and McDonnell was accomplished by threats, communicated by medical colleagues, to use medical societies to injure professionally two medical experts. However, there is no immediate connection between Finney's misconduct and Finney's medical practice. Thus, unlike McDonnell's conduct, Finney's actions did not occur "in his [Finney's] practice as a physician". Accordingly, his conduct was outside the scope of §130(h)(8).

VI

Conclusion

In summary, although the question is a close one, it is our opinion that, for purposes of Article 43, §130(h)(8) of the Maryland Code, the alleged witness-tampering conduct of McDonnell and Finney may, if proven before the Commission, constitute "immoral conduct". However, only McDonnell's conduct occurred "in his practice as a physician". Accordingly, the Commission has jurisdiction over McDonnell, but not over Finney.

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Editor's Note: On April 29, 1981, the Commission on Medical Discipline found Dr. McDonnell guilty of violating Article 43, §130(h)(8) and issued a reprimand. That decision, however, has since been reversed by the Court of Appeals. *See McDonnell v. Commission on Medical Discipline*, No. 25, September Term, 1984 (opinion filed November 2, 1984), *rev'g* 56 Md. App. 391 (1983).

JUDICIARY

CIRCUIT COURT—ELECTIONS—"HOLDING OVER"—RETIREMENT OF HOLDOVER AFTER TERM EXPIRATION—TIMING OF ELECTION DEPENDS ON HOW AND WHEN VACANCY AROSE

January 12, 1982

William H. Adkins II, Esq.
State Court Administrator

You have requested our opinion concerning the term of the person to be appointed to succeed The Honorable Albert L. Sklar as Associate Judge, Supreme Bench of Baltimore City. Specifically, you ask when the person appointed to succeed Judge Sklar, who retired last month, would be required to run for election for a full 15-year term.

For the reasons given below, it is our opinion that, if the person appointed to succeed Judge Sklar desires to seek a full 15-year term of office, that person would be required to run for a full term at the general election to be held on November 2, 1982.

I

Article IV, §5

The filling of vacancies in the office of judge of a circuit court (such as the Supreme Bench) is governed by Article IV, §5 of the Maryland Constitution:

> "Upon every occurrence or recurrence of a vacancy through death, resignation, removal, disqualification by reason of age or otherwise, or expiration of the term of fifteen years of any judge of a circuit court . . . , or creation of the office of any such judge, or in any other way, the Governor shall appoint a person duly qualified to fill said office, who shall hold the same until the election and qualification of his successor . . . . *His successor shall be elected at the first biennial general election for Representatives in Congress after the expiration of the*

> *term of fifteen years (if the vacancy occurred in that way) or the first such general election after one year after the occurrence of the vacancy in any other way than through expiration of such term.* Except in case of reappointment of a judge upon expiration of his term of fifteen years, no person shall be appointed who will become disqualified by reason of age and thereby unable to continue to hold office until the prescribed time when his successor would have been elected." (Emphasis added.)

As indicated by the first sentence of §5, a person appointed to fill a vacancy—whether that vacancy arose through expiration of a 15-year term, death, resignation, or otherwise—will hold office until the election and qualification of "his successor". The second sentence of §5 provides, in turn, that "[h]is successor"—i.e., the successor to the person appointed to fill the vacancy[1]—shall be elected either: (i) "at the first biennial general election for Representatives in Congress after the expiration of the term of fifteen years (if the vacancy occurred in that way)"; or (ii) at "the first such general election after one year after the occurrence of the vacancy in any other way than through the expiration of such term".

Thus, as a general matter, the issue of when an election must be held depends on how and when the original vacancy arose: Under the last clause of the second sentence of §5, it is evident that the minimum one-year requirement applies only if that vacancy occurred in some way "other . . . than" by reason of the expiration of a 15-year term. *See* 46 *Opinions of the Attorney General* 60 (1961); 43 *Opinions of the Attorney General* 213 (1958). Under both clauses of that sentence, it is similarly evident that the "first" general election is to be measured from the date of the original vacancy rather than from the date of the appointment or qualification of the person appointed to fill that vacancy. *See* 54 *Opinions of the Attorney General* 148 (1969); 43 *Opinions of the Attorney General* 213 (1958).

[1] *See* 43 *Opinions of the Attorney General* 213, 214-15 (1958).

II

Analysis

We understand that Judge Sklar was last elected to a full 15-year term in November of 1966. Under Article IV, §3 of the Constitution, the term of a circuit court judge expires 15 years after "the time of his election" (not, for example, 15 years after the date of subsequent qualification). *See* 9 *Opinions of the Attorney General* 287 (1924). Thus, Judge Sklar's term expired—and the vacancy arose—in November of 1981, on the 15th anniversary of his election.

It is this vacancy—the expiration of a term of 15 years—that is now to be filled by gubernatorial appointment. Although Judge Sklar continued to serve on the bench until December 18, 1981—when he reached mandatory retirement age—he did so merely as a "holdover" under the common law and Article IV, §3 of the Constitution. Article IV, §3 provides, in relevant part:

> "Each of the said Judges shall hold his office for the term of fifteen years from the time of his election, and *until his successor is elected and qualified, or until he shall have attained the age of seventy years, whichever may first happen*". (Emphasis added.)[2]

See also 60 *Opinions of the Attorney General* 407 (1975) (judge whose 15-year term expires may continue to hold office until successor is appointed).

Significantly, Judge Sklar (at, we understand, his own request) was not reappointed by the Governor to fill the vacancy arising out of the expiration of his 15-year term.[3] Conse-

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[2] As indicated above, Judge Sklar reached mandatory retirement age on December 18, 1981. Thus, under the last clause quoted above, he was precluded from holding over beyond that date even though a successor had not as yet been appointed.

[3] The last sentence of Article IV, §5 provides that:

> "*Except in case of reappointment of a judge upon expiration of his term of fifteen years*, no person shall be appointed who will become disqualified by reason of age and thereby unable to continue to hold office until the prescribed time when his successor would have been elected." (Emphasis added.)

(cont'd)

quently, at any time after the expiration of that term in November—even during the brief period until December 18, 1981, during which Judge Sklar "held over"—the Governor was authorized to appoint a successor to immediately assume office and fill the resultant vacancy. It is thus evident that this vacancy, which yet remains to be filled, is one arising out of the expiration of Judge Sklar's 15-year term, not his subsequent retirement.

This analysis is consistent with the general rule that the temporary occupancy of an office by a "holdover" does not prevent the existence of a vacancy and the filling of the office by the appropriate authority. *See, e.g., State ex rel. Ryan v. Bailey*, 48 A.2d 229 (Conn. 1946); *State ex rel. Hodges v. Amos*, 133 So. 623 (Fla. 1931); *People v. Pillman*, 1 N.E.2d 788 (Ill. App. Ct. 1936). That is, an office becomes vacant when the regular term expires—and a vacancy to be filled exists on expiration of that term—notwithstanding the fact that the incumbent may have been "held over". *See, e.g., State ex rel. Sikes v. Williams*, 121 S.W. 64 (Mo. 1909); *Denison v. State*, 61 S.W.2d 1017 (Tex. Civ. App. 1933), *error ref.*, 61 S.W.2d 1022 (Tex. 1933). *See also* 60 *Opinions of the Attorney General* 407 (1975).

In sum, then, the present vacancy to be filled here is one that, for purposes of Article IV, §5, arose in November of 1981 on "the expiration of the term of fifteen years". In such cases, §5 requires that the successor of the person appointed to fill that vacancy shall be elected at the "biennial general election-for Representatives in Congress" that "first" follows the occurrence of the vacancy. The first such election following the expiration of Judge Sklar's term is the general election to be held on November 2, 1982.[4]

Thus, Judge Sklar, as an incumbent, could have been reappointed to fill the vacancy, notwithstanding the fact that he would have had to retire soon after such reappointment. *See* note 4 below.

[4] As indicated above in note 3 and accompanying text, Judge Sklar could have been—but was not—formally reappointed to succeed himself. Had Judge Sklar in fact been so reappointed, then (i) the original vacancy arising out of the expiration of his 15-year term would have ceased to exist, (ii) the Governor would have been precluded from appointing anyone else to serve in

(cont'd)

III

Conclusion

In summary, it is our opinion that the person appointed to succeed Judge Albert L. Sklar as Associate Judge, Supreme Bench of Baltimore City, would be required to run in the general election to be held on November 2, 1982, assuming that the appointee desires to seek a full 15-year term of office.

STEPHEN H. SACHS, *Attorney General*

AVERY AISENSTARK, *Principal Counsel, Opinions and Advice*

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that office until the office again became vacant, and (iii) the vacancy now to be filled would have been one arising directly out of Judge Sklar's subsequent retirement on December 18, 1981. In such a case, §5 would require that the successor of the person appointed to fill the subsequent vacancy be elected at "the first [biennial] general election [for Representatives in Congress] after one year after the occurrence of the vacancy". The first such election—i.e., one that is at least one year from December 18, 1981—is the general election to be held in November of 1984. *See also* 53 *Opinions of the Attorney General* 205 (1968) (analysis of effect of resignation of incumbent and appointment of successor (i) before general election and (ii) between primary and general elections).

JUDICIARY—CIRCUIT COURTS—JUDICIAL RESIDENCY REQUIREMENTS—LEGISLATIVE CREATION OF RESIDENT COUNTY JUDGES NOT UNCONSTITUTIONAL

June 29, 1982

William H. Adkins II, Esq.
State Court Administrator

You have requested our opinion on the constitutionality of the statutory residency requirement for judges of the Circuit Court for Prince George's County, as specified in §1-503 of the Courts and Judicial Proceedings Article of the Maryland Code. Specifically, you ask whether a member of the bar who resides in the Seventh Judicial Circuit, but not in Prince George's County, is eligible to run for election to fill a vacancy in a seat that, by statute but not by express constitutional mandate, is limited to residents of Prince George's County.

For the reasons given below, it is our opinion that §1-503 of the Courts Article is constitutional, and a person who is not a resident of Prince George's County is not an eligible candidate to fill the vacancy in question.

I

The Constitutional Provisions

The resolution of your inquiry centers on the proper interpretation of certain provisions of the Maryland Constitution that relate to the residency of judges.

Article IV, §1 of the Constitution specifies the various courts in which the "[t]he Judicial power of this State is vested". These include "a Court of Appeals, such intermediate courts of appeal as the General Assembly may create by law, Circuit Courts, . . . and a District Court".

As to the general qualifications, including residency, of the judges of these various courts, Article IV, §2 of the Constitution provides in relevant part:

> "*The Judges* of all of the said Courts shall be citizens of the State of Maryland, and qualified voters under this Constitution, and *shall have resided*

> therein not less than five years, and *not less than six months next preceding their election, or appointment, as the case may be, in the* city, *county,* district, *judicial circuit,* intermediate appellate judicial circuit or appellate judicial circuit *for which they may be, respectively, elected or appointed.*" (Emphasis added.)[1]

As to residency requirements for circuit court judges in particular, Article IV, §21(a) and (b) of the Constitution provides:

> "(a) Subject to the provisions of subsection (b) *the General Assembly shall determine by law the number of judges of the circuit court in each county and circuit.* These judges shall be selected in accordance with Sections 3 and 5 of this Article.
>
> (b) *There shall be at least four circuit court judges resident in each circuit, and* at least one circuit court judge shall be resident in each county. There shall be at least two such judges resident in Anne Arundel County, at least three resident in Baltimore County, *at least four resident in Prince George's County,* and at least five resident in Montgomery County." (Emphasis added.)

II

The Vacancy in Question

Your inquiry concerns a member of the bar who wants to run for election to fill a vacancy created last year by the resignation of a resident circuit court judge from Prince George's County. This prospective candidate resides in the Seventh Judicial Circuit—which consists of Prince George's, Charles, Calvert, and St. Mary's Counties[2]—but he does not reside in Prince George's County.

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[1] In its enumeration of the courts of this State, Article IV, §1 also refers to the Orphans' Courts. However, the judges of the Orphans' Courts are not subject to the qualifications set forth in Article IV, §2. *Kadan v. Board of Supervisors of Elections*, 273 Md. 406 (1974).

[2] *See* Article IV, §19 of the Constitution.

Section 1-503(a) of the Courts Article specifies the "number of resident judges"—"including the judge or judges provided for by the Constitution"—for "each county in the first seven judicial circuits". For each county in the Seventh Judicial Circuit, the statute specifies the following number of resident judges:

Calvert	1
St. Mary's	1
Charles	2
Prince George's	13[3]

The vacancy in question is in one of the 13 positions allocated by this statute to residents of Prince George's County. The individual in question, while not a resident of Prince George's County, nevertheless contends that he is eligible to be a candidate for and, if elected, to fill this vacancy.

He first argues that, under Article IV, §21(b) of the Constitution, only 4 of the 13 judgeships alloted by the General Assembly to the Prince George's County Circuit Court require actual residency in the County. He further argues that, except for these four seats, Article IV, §2 of the Constitution must be read to require residency only in the judicial circuit, and not in any particular county within that circuit. Thus, he concludes, to the extent that §1-503 requires county residency for all 13 judgeships, it is unconstitutional.

In our view, this reading is contradicted by the plain language of Article IV, §21, the history of that provision, and the decision of the Court of Appeals in *Boyer v. Thurston*, 247 Md. 279 (1967).

III

Prior Implementation of Article IV, §21

Article IV, §21(a) expressly provides that the General Assembly shall determine "by law" the number of judges of the circuit court "in each county" as well as "in each . . . circuit".

[3] Chapter 132, Laws of Maryland 1982, increased the number of resident circuit court judges in Prince George's County to 14, effective July 1, 1982.

The additional mandate in §21(b) that there be "at least" a specified number of resident judges in certain counties, including Prince George's County, distinctly and, we think, quite intentionally refers to but the *minimum* number of resident judges to be so provided for by law—clearly implying that the General Assembly may exceed that minimum number.

This implied power to create resident judgeships by statute, as part of the express duty to determine by law the number of judges "in each county", was conferred on the General Assembly by a 1954 amendment to the Constitution: Chapter 607, Laws of Maryland 1953, ratified November 2, 1954. Until that time, judges were elected from their respective judicial circuits by the qualified voters of the entire circuit, and there was no constitutional requirement that a judge be selected from any particular county. *See Boyer v. Thurston*, 247 Md. 279, 285 (1967). The 1954 amendment modified §21 to require that there be "at least" one resident judge in each county of the Third, Fourth, Fifth, Sixth, and Seventh Judicial Circuits, with an additional minimum number of resident judges for certain specified counties—including "not less than" two judges resident in Prince George's County. It also amended §21 to permit the General Assembly, for the first time, to increase or—subject to the minimum requirements there set forth—decrease "the number of judges . . . for any of the counties".[4]

The General Assembly wasted little time in exercising this authority to increase the number of resident judges in a particular county. *See, e.g.*, Chapter 445, Laws of Maryland 1955, which provided for a new resident judge for the Baltimore County Circuit Court, in addition to the minimum number of resident judges already specified in Article IV, §21 of the Constitution. And, over the last quarter century, the General Assembly has repeatedly exercised the power to establish resident judgeships in excess of the minimums set forth in Article IV, §21. *See* present §1-503 of the Courts Article and its pred-

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[4] In addition, the 1954 amendment enacted a new §3 to Article IV to provide that, in each county of the five affected circuits, all circuit court judges were to be elected "by the qualified voters . . . of [that] county".

In 1976, the new requirements established by the 1954 amendment in §§3 and 21 were extended to all counties and all circuits. Chapter 542, Laws of Maryland 1976, ratified November 2, 1976.

ecessor statute, former Article 26, §§32 through 32J, as enacted and repeatedly amended over the years.[5]

Ordinarily, the construction placed continuously and uniformly on a particular provision of the Constitution by the General Assembly furnishes "a very strong presumption" that its view of the intent of the provision is correct. *See Humphrey v. Walls*, 169 Md. 292, 299 (1936). In this case, the General Assembly's construction of Article IV, §21, as authorizing it to create additional resident judgeships, is particularly compelling: On at least two separate occasions, the General Assembly proposed a constitutional amendment to Article IV, §21 to increase the minimum number of required resident judgeships for certain counties while, at the very same Session, creating by statute additional resident judgeships, in excess of the number already required by §21, for other counties. In 1959, for example, the General Assembly passed both Chapter 231, Laws of Maryland 1959 (a statute adding a resident judge in Baltimore County) and Chapter 642, Laws of Maryland 1959 (a constitutional amendment, ratified November 8, 1960, increasing the minimum number of resident judges in Prince George's County). Similarly, in 1966, the General Assembly passed both Chapter 338, Laws of Maryland 1966 (a statute adding a resident judge in Anne Arundel County) and Chapter 372, Laws of Maryland 1966 (a constitutional amendment, ratified November 8, 1966, setting a minimum number of resident judges for counties in the Second Judicial Circuit).[6]

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[5] Until 1955, the General Assembly had never increased the number of judgeships by statute. In September, 1952, Attorney General Hammond advised the Commission to Study the Judiciary of Maryland (the "Burke Commission") that additional judgeships could be created by statute and need not be created by constitutional amendment. 37 *Opinions of the Attorney General* 237 (1952). Although the Commission had previously been divided on the issue, it informed the Governor in January, 1953, of the Attorney General's views. *See Report of the Commission to Study the Judiciary of Maryland* 13 (1953). Nevertheless, the General Assembly waited until after Chapter 607, Laws of Maryland 1953, was ratified by the voters in 1954 before exercising its authority to create a judgeship by statute. Interestingly, although the Burke Commission recommended an increase in judgeships (*see Report* at 11), it proposed no significant change to Article IV, §21 of the Constitution.

[6] The General Assembly's practice of sometimes increasing judgeships by statute and, at other times, by constitutional amendment has not gone unnoticed. *See* E. M. Byrd, Jr., *The Judicial Process in Maryland* 39-40 (1961), *noted in Boyer v. Thurston*, 247 Md. 279, 287 (1967).

This history clearly indicates a contemporaneous, long-standing, and consistent understanding by the General Assembly, as well as by the voters who ratified the various related constitutional amendments passed by the General Assembly, that (i) the numbers set by Article IV, §21 are the minimum—not the maximum—number of resident judges for a county, and (ii) the General Assembly is free, as it has done in §1-503 of the Courts Article, to create new circuit court judgeships that are also subject to a county residency requirement.

IV

The *Boyer* Decision

This view of Article IV, §21 finds additional support in the decision of the Court of Appeals in *Boyer v. Thurston,* 247 Md. 279 (1967). The issue in that case was whether the appointment of an interim clerk for the Circuit Court of Washington County was to be made by the judges of the Fourth Judicial Circuit or by the resident judges in Washington County.

In reviewing the history of Article IV, §21, Judge Barnes described the 1954 amendment to that section as effecting a "most significant change". 247 Md. at 286.[7] More specifically, Judge Barnes noted that:

> "The amendment had an important effect on the nature of judicial offices in the five judicial circuits mentioned. *The circuit judges no longer held office at large within the judicial circuits, but hold office within the particular county in which they reside,* and are elected to office by the qualified voters of each county, rather than by the voters of the entire judicial circuit as previously provided. This amendment did not deprive the judges in the five judicial circuits mentioned from having jurisdiction throughout the boundary of their respective judicial circuits, but *after the amendment, each judge held office within the county in which he was a resident* and for

[7] In 40 *Opinions of the Attorney General* 276 (1955), the Attorney General similarly described the 1954 amendment as a "far-reaching change in Maryland's judicial system".

> the individual Circuit Court in which he usually presided." 247 Md. at 286-87 (original emphasis deleted).

Thus, in construing the words "Judges of said Court" (as used in then Article IV, §25 to refer to those designated to fill a vacancy in the clerk's office), Judge Barnes held:

> "Prior to the [1954 amendment to §21,] the words, of necessity, meant the judges of the respective judicial circuits; *after the amendment* changing the holding of judicial office from a judicial circuit to a county basis, *they meant the resident judge or judges in each county.*" 247 Md. at 287-88 (original emphasis deleted).

The Court ultimately concluded that the then two "resident judges" for Washington County were the appropriate appointing authority, both having to agree on the appointment. 247 Md. at 296. Notably, although one of those two judicial offices had been created by Article IV, §21 of the Constitution, the other had been created by statute, Chapter 854, Laws of Maryland 1961. Thus, in reaching the result that it did, and by repeatedly characterizing the latter, statutorily created, office as that of a "resident judge" holding office "within the county in which he was a resident", the Court clearly recognized and endorsed the power of the General Assembly to statutorily create that judicial office as one requiring residency in the county.

V

Effect of Article IV, §2

The language of Article IV, §2—which requires a judge to reside "in the . . . county . . . [or] judicial circuit . . . for which [he or she] may be, respectively, elected or appointed"—does not require a contrary result.

Until 1966, Article IV, §2, while generally applicable to the judges of all State courts, nevertheless referred only to required residency "in the Judicial Circuit". As to circuit court judges, however, that reference was obviously superseded by the 1954 amendment to §21, which added certain, more limited, *county* residency requirements to the Constitution. Moreover, as noted above, the General Assembly has consistently acted since 1954 to statutorily create resident circuit court judgeships for particular counties.[8]

In 1966, Article IV, §2 was amended to refer, inter alia, to "county" residency. Chapter 10, Laws of Maryland 1966, ratified November 8, 1966. It is apparent that the 1966 constitutional amendment, even while retaining the preexisting reference to "judicial circuit" residency, was not intended to restrict, for the first time in 11 years, the General Assembly's practice of creating by statute resident judgeships for a county. Rather, that constitutional amendment was enacted primarily for the purpose of authorizing the creation of the Court of Special Appeals. *See Walston v. Sun Cab Co.*, 267 Md. 559, 566-67 (1973). In our view, the 1966 change in residency language was designed simply to conform §2 to §21; and, by adding a reference to "county", it reflected, even affirmed, the preexisting and continuing practice of statutorily establishing resident circuit court judgeships for a particular county.[9]

Clearly, under Article IV, §21, the General Assembly may create additional circuit court judgeships for either a county or

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[8] The 1954 amendment to Article IV, §21 specifically provided that it prevailed over any other inconsistent provision of the Constitution. *See Boyer v. Thurston*, 247 Md. 279, 287 (1967). That specific provision continued for over two decades, until its deletion by Chapter 542, Laws of Maryland 1976, ratified November 2, 1976.

As noted below, Article IV, §2 was amended in 1966 to add a conforming reference to "county". It was only after—and, presumably, in reliance on—this conforming amendment that the General Assembly saw fit to delete the now obsolete provision in §21 regarding conflicts with other provisions.

[9] The judges of the Court of Appeals are required to be residents of "their respective Appellate Judicial Circuits" [Article IV, §14], and the judges of the Court of Special Appeals are to be chosen from among residents of those same circuits [§1-402 of the Courts Article]. Hence, the reference in §2 to "county" refers only to circuit court judges and, in the words of the title to the 1966 amendment, was added simply "to correct [an] erro[r]".

Indeed, it would be beyond the scope of that title, which contains no reference at all to circuit courts or circuit court judges, to also read the 1966 amendment as somehow limiting the General Assembly's then existing powers under §21.

See also note 8 above.

an entire circuit, even though in practice it has uniformly adopted the former option rather than the latter. Article IV, §2, by referring in the alternative to both "county" and "judicial circuit", merely mirrors the two options available to the General Assembly in this regard; and, in doing so, it simply supplements Article IV, §21 by specifying the minimum requisite period of continued residency ("six months next preceding [the judge's] election . . . or appointment") in the particular locality ("county [or] judicial circuit") from which the particular circuit court judge is required by law to be elected or appointed.

VI

Conclusion

In summary, it is our opinion that §1-503 of the Courts Article is constitutional. Accordingly, a candidate for a resident judgeship in Prince George's County must be a resident of that county for a period of at least six months immediately preceding his or her appointment or, as in this case, election.

STEPHEN H. SACHS, *Attorney General*

ROBERT A. ZARNOCH, *Assistant Attorney General*

AVERY AISENSTARK
Principal Counsel,
Opinions and Advice

JUDICIARY—CIRCUIT COURT—"HOLDING OVER"—JUDGE DEFEATED AT PRIMARY CONTINUES TO SERVE UNTIL SUCCESSOR ELECTED AND QUALIFIES

October 5, 1982

The Honorable James A. Perrott
Supreme Bench of Baltimore City

You have requested our opinion as to the last day on which you may hold office as Associate Judge of the Supreme Bench of Baltimore City.

For the reasons discussed below, we believe that you may continue to hold office until your successor is elected and qualifed—that is, until your successor is elected at the general election in November of this year and, thereafter, until that successor qualifies by taking the requisite oath of office.

I

Background

As we understand the relevant facts, you were elected to the Supreme Bench, for a full 15-year term, in November of 1966. On the expiration of that term, you were reappointed by the Governor on November 20, 1981, as—in the words of the Governor's Commission to you—an "Associate Judge of the Supreme Bench of Baltimore City to serve until the general election of November 1982".

Having since lost your bid for nomination at the recent primary election, you now ask when your present tenure will expire.

II

Discussion

Article IV, §5 of the Maryland Constitution provides, in relevant part:

> "Upon every occurrence or recurrence of a vacancy through . . . expiration of the term of fifteen

> years of any judge of a circuit court or of the Supreme Bench of Baltimore City, . . . the Governor shall appoint a person duly qualified to fill said office, who shall hold the same until the election and qualification of his successor. . . . His successor shall be elected at the first biennial general election for Representatives in Congress after the expiration of the term of fifteen years. . . . "

As indicated by the first sentence of §5, your reappointment by the Governor in November of 1981 was an appointment to fill the vacancy that arose out of the expiration of your own preceding 15-year term. In this regard, the Constitution expressly provides that the person appointed to fill such a vacancy "shall hold [office] until the election and qualification of his successor". The second sentence of §5 provides, in turn, that "[h]is successor"—i.e., the successor of the person so appointed to fill the vacancy—"shall be elected at the first biennial general election for Representatives in Congress after the expiration of the term of fifteen years"—in this case, the general election to be held on November 2, 1982.

Thus, although your immediate successor is to be "elected" next month, the Constitution provides that you will continue to hold office until the "election *and qualification*" of that individual. The purpose of this "holdover" provision has been described as follows:

> "As a matter of fact the Judge who is elected does not get his commission on the day of election because, under the provisions of the Election Law, the Supervisors of Elections have to tabulate the returns and certify the result to the Governor who in turn issues the commission to the successful candidate. This necessarily causes some little delay, and, therefore, the constitution provides that the [incumbent] Judge shall hold his office until his successor is qualified". 9 *Opinions of the Attorney General* 287, 288 (1924).

In this context, it has long been understood that "qualifying" for appointed or elective office requires, among other things, the taking of the applicable oath of office. *See, e.g., Archer v. State*, 74 Md. 410 (1891); *Harwood v. Marshall*, 10 Md. 451 (1857); *Thomas v. Owens*, 4 Md. 189 (1853). *See also* Article I,

§10 of the Maryland Constitution ("[I]n case an officer shall *qualify out of the County in which he resides, an official copy of his oath* shall be filed and recorded in the Clerk's office of the Circuit Court of the County in which he may reside."); 46 *Opinions of the Attorney General* 60, 61 (1961) ("We are advised that Judge Henderson *qualified* for office on the 12th day of December, 1946, *by* accepting his commission of office and *taking the prescribed oath.*").

III

Conclusion

In sum, then, "when an incumbent judge is defeated in November, he is authorized to hold over until the election victor takes the oath". 60 *Opinions of the Attorney General* 407, 410 (1975). This result—mandated by the express language of Article IV, §5 of the Constitution—necessarily prevails over the more limited language contained in the Governor's Commission to you of November 20, 1981. *Cf.* 43 *Opinions of the Attorney General* 213, 216 (1958) (judicial commission "should be revised" to conform to constitutional requisites).

Thus, we conclude that you may continue to hold office until your successor is elected at the general election in November, and, thereafter, until that successor qualifies by taking the requisite oath of office.

STEPHEN H. SACHS, *Attorney General*

AVERY AISENSTARK, *Chief Counsel, Opinions and Advice*

Editor's Note: The preceding Opinion was originally written as a letter of advice. It is published here, in a slightly revised format, because of the general guidance provided.

LEGAL SERVICES CORPORATION

ETHICS—PUBLIC OFFICERS/EMPLOYEES—PUBLIC AGENCIES—LEGAL SERVICES CORPORATION, ITS DIRECTORS AND EMPLOYEES, NOT SUBJECT TO PUBLIC ETHICS LAW

August 3, 1982

Benjamin R. Civiletti, Esquire
Chairman, Maryland Legal Services Corporation

You have requested our opinion on whether the Maryland Legal Services Corporation, its board of directors, or its employees are subject to the Maryland Public Ethics Law.

For the reasons below, we conclude that they are not.

I

The Public Ethics Law

Article 40A of the Maryland Code, the Maryland Public Ethics Law, applies in varying degrees to "executive agencies", "public officials", "State officials", and "State employees". As these terms are defined in Article 40A, it is clear that the Public Ethics Law applies to those agencies, officials, and employees generally deemed to be a part of our State government.

Thus, for example, "public official" is defined, in relevant part, as referring to an individual "in an executive agency" who meets certain specified criteria [§1–201(aa)]. Similarly, "State employee" is defined, in relevant part, as referring to "any person, other than a State or public official, employed by an executive agency" [§1–201(i)]. "Executive agency", in turn, is defined as meaning "a commission, board, council, or other body in State government [that] is established by law but . . . is not a part of either the legislative branch or the judicial branch" [§1–201(1)].[1]

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[1] *See also* Article 40A, §1–201(w) and (dd), which defines "official" and "State official", respectively.

II

The Legal Services Corporation

The Maryland Legal Services Corporation (the "Corporation") was created by Chapter 829, Laws of Maryland 1982, effective July 1, 1982.

Chapter 829 enacted new §§45A through 45-O of Article 10 of the Maryland Code (the "Maryland Legal Services Corporation Act"), for the primary purpose "of establishing the Maryland Legal Services Corporation as a nonstock, nonprofit corporation, to receive and distribute funds to grantees that provide legal assistance in noncriminal proceedings or matters to eligible clients".

III

Analysis

To be sure, the Corporation is an entity that has been "established by law" and that, in some respects, bears various attributes of a State agency.[2] Nevertheless, it is evident from the provisions of Article 10, §45A *et seq.*, that the Corporation was not intended by the General Assembly to be an "executive agency" of the type subject to the operation of the Public Ethics Law. Rather, the Corporation is primarily designed to operate as a nonstock, nonprofit corporation, in a manner not wholly unlike that of other charitable, but nongovernmental, corporations established in accordance with State law.

For example, the new law specifies that the Corporation is a "nonstock corporation" [§45D(a)], with "the powers conferred upon a nonstock corporation by the Corporations and Associations Article, §5–201 et seq. of the Code" [§45G(a)]. It is to have a "principal office" in this State and is required to appoint a "designated agent to accept service of process for the Corpo-

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[2] *See, e.g.*, Article 10, §45E(a), which provides that the Corporation is to have a board of directors "appointed by the Governor, with the advice and consent of the Senate"; §45E(i), which requires all meetings of the board to be open to the public unless closed in accordance with Article 76A, §11 of the Code; and §§45G(g) and 45K, which require various reports to be filed with the Governor, the General Assembly, and —as to annual audits—the Department of Budget and Fiscal Planning.

ration" [§45D(b)]. The activities of the Corporation are specifically limited so as to preclude it, as is true of other nongovernmental charitable organizations, from "conduct[ing] or carry[ing] on any activities not permitted to be conducted or carried on by an organization qualified under §501(c)(3) of the Internal Revenue Code or by an organization, contributions to which are deductible under §170(c)(2) thereof" [§45H(e)].[3]

Although the Corporation may be the recipient of State funds appropriated to assist it in its activities [§45-O], it is nevertheless authorized to receive, hold, and dispose of all money and property in its own name [§45G(c)]; in the event of the Corporation's "liquidation, dissolution or winding up", its assets do not revert to the State but, rather, are to be transferred to "one or more corporations or associations" that have a "similar or analogous character or purpose" and that "qualify under the provisions of §501(c)(3) of the Internal Revenue Code" [§45H(f)].

We also find certain other provisions that, if the Corporation were designed to be a typical State agency, would be superfluous or otherwise inappropriate as written. Thus, for example, the statute provides that the Corporation "is exempt from all special and ordinary taxes and from documentary stamps and transfer taxes imposed by the State or any political subdivision thereof" [§45D(c)]. Also, in additioı to the statutory requirement that the Corporation be audited annually by independent certified public accountants [§45K(a)], the statute also provides that the "financial transactions of the Corporation for any fiscal year during which State funds are available to finance any portion of its operations may be audited by the Legislative Auditor" [§45K(b)].[4]

Finally, to the extent that the various provisions noted above might be viewed as something less than dispositive of this matter, the new law expressly provides that "[t]he members of the [b]oard [of directors of the Corporation] are not officers or employees of the State" [§45E(c)]; that "[e]mployees of the Corpo-

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[3] *See also* the specific limitations set forth in Article 10, §45H(c), (d), and (f).

[4] *Cf.* Article 40, §61B(a) of the Maryland Code, which already provides generally that the Legislative Auditor "shall audit and report on every department, board, commission, or other agency of State government".

ration are not employees of the State" [§45F(b)(3)]; and that, "[e]xcept as otherwise provided in this subtitle, the Corporation is not a department, agency, or instrumentality of the State" [§45D(d)]. In the specific context of the Maryland Public Ethics Law and its possible application to the Corporation, we have found no provision anywhere in the Maryland Legal Services Corporation Act that, even given the caveat quoted above, might be construed as an exception "otherwise provided in this subtitle".[5]

IV

Conclusion

In summary, it is our opinion that the Legal Services Corporation, its board members, and its employees are not subject to or governed by the Maryland Public Ethics Law.

Stephen H. Sachs, *Attorney General*

Avery Aisenstark, *Chief Counsel, Opinions and Advice*

Editor's Note: The preceding opinion was originally written as a letter of advice. It is published here, in a slightly revised format, because of the unusual nature of the Legal Services Corporation and, therefore, of the issues addressed.

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[5] Whether and to what extent the Corporation might be considered to be a State entity for other purposes is a matter we need not—and, therefore, do not—here address.

LEGAL SERVICES CORPORATION—ATTORNEYS—ESCROW ACCOUNTS—TRUST FUNDS—BENEFICIARIES—"NOW" ACCOUNTS—TAXATION—"BENEFICIAL INTEREST"—TRUST ACCOUNTS ESTABLISHED FOR BENEFIT OF CORPORATION MAY BE DEPOSITED IN NOW ACCOUNTS

August 19, 1982

Benjamin R. Civiletti, Esquire
Chairman
Maryland Legal Services Corporation

You have requested our opinion on whether, under State law, trust accounts established by lawyers for the benefit of the Maryland Legal Services Corporation would qualify under 12 U.S.C. §1832(a)(2) for deposit in negotiable order of withdrawal accounts ("NOW accounts").

In our opinion, they would.

I

Background

The Maryland Legal Services Corporation (the "Corporation") was established on July 1, 1982, by Chapter 829, Laws of Maryland 1982. Chapter 829 enacted new §§45A through 45-O of Article 10 of the Maryland Code (the "Maryland Legal Services Corporation Act") for the primary purpose "of establishing the Maryland Legal Services Corporation as a nonstock, nonprofit corporation, to receive and distribute funds to grantees that provide legal assistance in noncriminal proceedings or matters to eligible clients".

A companion measure, Chapter 830, Laws of Maryland 1982, amended Article 10, §44 of the Maryland Code to provide a source of funding for the Corporation. Prior to the amendment, Article 10, §44 required lawyers to maintain all trust funds "as a separate account or accounts", and it prohibited any lawyer from either (i) commingling trust funds with the lawyer's own funds or (ii) using trust funds "for any purpose other than the purpose for which such funds were entrusted to him".

Effective July 1, 1982, Chapter 830 made two major changes in the law: It first authorizes lawyers "to determine whether such trust [funds] are to be deposited in a noninterest bearing checking account, in an interest bearing checking account, in one or more savings accounts, in one or more accounts subject to negotiable orders of withdrawal ('NOW accounts'), or in any combination thereof"; it further specifically authorizes lawyers to commingle certain small or short-term trust funds into one account, with "the aggregate interest earned on such commingled account [to] be paid . . . to the Maryland Legal Services Corporation exclusively for the charitable purposes defined in its statutory charter".

The question you pose involves the ability of lawyers to place these commingled funds in NOW accounts, with the interest earned on the accounts to be paid to the Legal Services Corporation.

II

Requirements of Federal Law

Federal law imposes certain restrictions on the availability of NOW accounts. Under 12 U.S.C. §1832(a)(2), NOW accounts are available "only with respect to deposits or accounts which consist solely of funds in which the entire beneficial interest is held by one or more individuals or by an organization which is operated primarily for religious, philanthropic, charitable, educational, or other similar purposes and which is not operated for profit".[1]

The unique feature of a NOW account, when compared to a "traditional" (i.e. noninterest bearing) checking account, is the income—the interest or dividends—that may be earned on deposited funds. This distinctive feature of NOW accounts is recognized in the legislative history of Title III of Pub. L. 96–221, the Consumer Checking Account Equity Act of 1980, which made NOW accounts available nationwide. Pub. L. No. 96–221, 94 Stat. 132. *See* S.Rep.No. 96–368, 96th Cong. 2d Sess. 8 (1979), *reprinted in* 1980 U.S. Code Cong. & Ad. News 236, 243.

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[1] For purposes of this Opinion, we assume that the Corporation will qualify as a nonprofit organization of the type described in this section. *See, e.g.*, Article 10, §45H, as enacted by Chapter 829, Laws of Maryland 1982.

Thus, the underlying purpose of the Consumer Checking Account Equity Act, from the depositor's point of view at least, is to permit the earning of this income on funds subject to withdrawal by negotiable instruments. In our opinion, the restrictions imposed on NOW account eligibility by 12 U.S.C. §1832(a)(2) must be viewed in light of this underlying purpose of the Act and, as such, as applying only to that aspect of a NOW account which specifically differentiates it from a checking account: the interest or dividends to be earned on the account.

In this regard, we note that the Board of Governors of the Federal Reserve System (the "Federal Reserve Board") has recognized that the language of 12 U.S.C. §1832(a)(2) is virtually identical to the language used by Regulation Q, in 12 C.F.R. §217.1(e), to restrict eligibility for unlimited savings deposit accounts.[2] Thus, the Federal Reserve Board has ruled that Regulation Q is applicable to NOW accounts as well as to unlimited savings deposit accounts. *See* 12 C.F.R. §217.157. And, under the Board's interpretation of Regulation Q, a nonprofit organization (such as the Maryland Legal Services Corporation) is eligible to hold a NOW account in its own capacity. *Id.* Similarly, we believe, attorney trust accounts established for the use and benefit of such an organization may be held in NOW accounts.

III

Effect of State Law

To the extent that NOW accounts are governed by Maryland law, lawyers' trust accounts are unquestionably eligible for deposit in them. *See, e.g.*, §9–408 of the Financial Institutions Article of the Maryland Code, which authorizes state-char-

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[2] *See* Letter from Michael Bradfield, General Counsel of the Federal Reserve Board, to Donald M. Middlebrooks, Director, Florida Bar Foundation, Inc. (October 15, 1981), *reprinted in* Middlebrooks, *The Interest on Trust Accounts Program—Mechanics of its Operation*, 56 Fla. Bar J. 115, 117 (1982). *See also* 12 C.F.R. §217.132 (trust funds classified as savings deposits within the meaning of Regulation Q); 12 C.F.R. §217.157 (nonprofit organizations qualifying under certain provisions of §501(c) of the Internal Revenue Code may maintain NOW accounts).

tered savings and loan associations to establish NOW accounts without, however, imposing any eligibility restrictions on them.

Also, under Maryland law, it has long been recognized that the beneficiary of a trust account holds a valuable interest created by the establishment of the account in such a form. *Mitchell v. Register of Wills*, 227 Md. 305 (1962). *See also* 40 *Opinions of the Attorney General* 546, 555 (1955) (recognizing that a "beneficial interest" in a trust account may be jointly held). As discussed above, the amendment to Article 10 that allows commingling of certain trust funds also expressly directs that the income from any such commingled account be paid to the Corporation, "exclusively for [its] charitable purposes". Thus, the Corporation clearly holds a "beneficial interest"—indeed, the sole and entire beneficial interest—in that income.

In our view, the significant and distinct beneficial interest in commingled trust accounts, as authorized by Chapter 830, is the right to receive all of the income to be earned on the accounts—particularly so where, as here, the commingled trust accounts are only established in the first instance for the specific purpose of transmitting that income to the Corporation for its exclusive use and sole benefit. Conversely stated, whatever other interest in these trust funds might be held by someone other than the Corporation would be an interest that: (i) is limited to those aspects of a NOW account that are identical to traditional (i.e., noninterest bearing) checking accounts; and (ii) as such, derives no benefit whatever from that income-producing feature which differentiates a NOW account from a traditional checking account. Any such other interest, therefore, is merely incidental to the maintenance of the NOW account and would not, in our view, vitiate compliance with 12 U.S.C. §1832(a)(2).

Under State law, the Corporation clearly holds the *sole and entire beneficial right and interest* in all of the income—all of the interest or dividends—that may be earned on these NOW accounts. Neither the lawyers participating in the State program nor their clients—nor, indeed, any person or entity other than the Maryland Legal Services Corporation—obtains any direct financial benefit from the establishment or maintenance of these accounts. Accordingly, we believe, the Corporation holds a beneficial interest in these accounts to the full extent required by 12 U.S.C. §1832(a)(2).

Our view of the applicable law is reinforced by an opinion of the Federal Reserve Board's General Counsel in which he approved, also under 12 U.S.C. §1832(a)(2), a like program in Florida. Under the Florida program, which went into effect on September 1, 1981, lawyers' trust funds are held in NOW accounts in a substantially similar—if not identical—manner and for substantially similar—if not identical—purposes as will be the case in Maryland. The Federal Reserve Board's General Counsel wrote as follows on the question of beneficial interest:

> "In his opinion concerning the [Florida] Program, the Florida Attorney General has expressed the view that . . . the Florida Bar Foundation, Inc. has the exclusive right to the interest on the trust funds maintained under the Program . . . . [3] Since no entity other than the Foundation has any interest to the income derived from funds maintained under the Program, it would appear that, for purposes of 12 U.S.C. §1832 and 12 CFR §217.1(e), the Foundation hold[s] the entire beneficial interest to the funds. Accordingly, it is my opinion that funds held under the Florida Bar Foundation's Interest on Trust Accounts Program are eligible to be maintained in NOW accounts at member banks." Letter from Michael Bradfield, General Counsel, to Donald M. Middlebrooks, Director, Florida Bar Foundation, Inc. (October 15, 1981), *reprinted in* Middlebrooks, *The Interest on Trust Accounts Program—Mechanics of its Operation*, 56 Fla. Bar J. 115, 117 (1982).

[3] This refers to an opinion of the Florida Attorney General that assessed the impact of Florida law on the restrictions in 12 U.S.C. §1832(a)(2). Letter from Jim Smith, Attorney General, to E. Albert Pallot, President of the Florida Bar Foundation (August 21, 1981), *reprinted in* Middlebrooks, *The Interest on Trust Accounts Program—Mechanics of Its Operation*, 56 Fla. Bar J. 115, 116 (1981). We note here that, for purposes of this inquiry, the general authorities regarding "beneficial interests" cited in that letter are as applicable in this State as they are in Florida.

IV

Conclusion

In summary, it is our opinion that trust accounts established under Article 10, §44(a)(2) of the Maryland Code for the benefit of the Maryland Legal Services Corporation qualify under 12 U.S.C. §1832(a)(2) for deposit in NOW accounts.

STEPHEN H. SACHS, *Attorney General*

AVERY AISENSTARK, *Chief Counsel, Opinions and Advice*

Editor's Note: The Federal Reserve Board's General Counsel has since agreed that trust accounts established under the Maryland program qualify for deposit in NOW accounts:

> "With respect to the program authorized under Maryland law, it is my opinion that the submissions included with your request fulfill [the requisite] conditions. These submissions provide evidence that the [Maryland Legal Services] Corporation is a nonprofit organization that qualifies under section 501(c)(3) of the Internal Revenue Code and an opinion rendered by the Maryland Attorney General expressing the view that the Corporation has the exclusive right to interest earned on the trust accounts. Consequently, it is my opinion that funds deposited under this program may be maintained in NOW accounts." Letter from Michael Bradfield, General Counsel, to Charles B. Schelberg, Esq. (January 10, 1983).

LOCAL GOVERNMENT

COUNTIES—MUNICIPALITIES—CONSTITUTIONAL LAW—HOME RULE POWERS—CONFLICTS BETWEEN JURISDICTIONS—PUBLIC GENERAL LAW MAY BE ADOPTED TO REGULATE CONFLICTS

March 4, 1982

The Honorable Robert S. Redding
Maryland House of Delegates

You have requested our opinion on whether a constitutional amendment would be needed to limit the application of charter county ordinances to municipal corporations in those counties.

For the reasons given below, it is our opinion that such a limitation may be imposed by a public general law enacted by the General Assembly; hence, it would not be necessary to adopt a constitutional amendment to accomplish this purpose.

I

The *Frank* Case

In the recent case of *Town of Forest Heights v. Frank*, 291 Md. 331 (1981), the Court of Appeals held that the Constitution does not bar the general application of the ordinances of a charter county—i.e., a county that has adopted home rule under Article XI-A of the Constitution—to the municipal corporations in that county, even though municipal corporations also enjoy home rule under Article XI-E of the Constitution.

Article XI-A, §3 provides that a charter county cannot enact "laws or regulations for any . . . municipality" on any matter within the municipality's own delegated powers. The Court concluded, however, that this provision does not fobid a charter county from enacting ordinances that affect *all* municipalities in that county. It only forbids the enactment of those ordinances that affect a "particular municipality or municipalities".

Thus, in *Frank*, the Court ruled that the Constitution did not prevent a countywide ordinance requiring the licensing of fortunetellers from applying in the municipalities within that county, including two municipalities that had exercised their own home rule powers to forbid the practice of fortunetelling. 291 Md. at 339–46.

II

Analysis

As seen from *Frank*, the Constitution does not bar the general application of a charter county's ordinances to all municipalities within the county. The Constitution thus permits potential conflicts in the exercise of the home rule powers of charter counties and the home rule powers of municipal corporations.

Nevertheless, as the Court in *Frank* indicated, the General Assembly may deal with such conflicts by statutorily regulating the respective legislative powers of these political subdivisions. Specifically, the Court said:

> "Art. XI-A, §2, and Art. XI-E, §§1 and 6, give the General Assembly broad authority to determine the powers of chartered counties and municipalities, as long as enactments relating to chartered counties are public general laws and as long as enactments relating specifically to municipalities apply alike to all municipalities of the same class. Consequently, by delineating the powers of chartered counties and municipalities, *the General Assembly has full authority by statute to resolve conflicts, either in specific areas or generally.*" 291 Md. at 346 (emphasis added) (footnote omitted).

In the *Frank* case, the Court found that there was a conflict between the county licensing law and the municipal prohibitions on fortunetelling. It further found that the General Assembly had enacted legislation, Article 23A, §2 of the Maryland Code, that effectively resolved the conflict by statutorily providing for the county ordinance to prevail. 291 Md. at 338–39 and 350.

Just as the General Assembly had the authority to enact the specific statute that was relied on by the Court to resolve the *Frank* controversy in favor of the county ordinance, the General Assembly has similar authority to revise that statute to bring about a different result. Hence, a constitutional amendment would not be necessary.

III

Conclusion

In summary, although the Constitution forbids a charter county to enact an ordinance for a particular municipality or municipalities, the Constitution does not bar the application of the general ordinances of a charter county to all of the municipalities in that county. Thus, when both a charter county and a municipality exercise their respective home rule powers on the same subject, there is a potential conflict.

Such conflicts may be dealt with by the General Assembly through legislation that regulates and defines the respective legislative powers of the charter counties and municipalities. At present, the General Assembly has effectively provided by statute that, as a general rule, a charter county ordinance prevails over a conflicting municipal ordinance. The General Assembly is free to amend that statutory rule by a public general law, and it would not be necessary to amend the Constitution for this purpose.

In reaching this conclusion, we have not attempted to review and comment on any of the specific legislative proposals now pending before the General Assembly. There are a variety of legislative options open to the General Assembly, and, if you like, we would be happy to discuss with you our assessment of the potential scope and effect of one or more of these options.

STEPHEN H. SACHS, *Attorney General*

RICHARD E. ISRAEL, *Assistant Attorney General*

AVERY AISENSTARK
Principal Counsel,
Opinions and Advice

Editor's Note: Since the issuance of this Opinion, the General Assembly enacted Chapter 398, Laws of Maryland 1983, for the purpose of "providing the conditions under which legislation enacted by a county does not apply in municipalities located in the county". The new law, effective January 1, 1984, is now codified at Article 23A, §§2(a), 2B, and 2C.

LOCAL GOVERNMENT—COMMISSIONER COUNTIES—BUILDING CODES—ZONING—REGULATION OF NUISANCES—DUE PROCESS—COUNTY MAY REQUIRE FENCING OF EXISTING SWIMMING POOLS

May 4, 1982

Mr. Jack G. Upton
Administrative Director
Board of County Commissioners
of Calvert County

On behalf of the Board of County Commissioners of Calvert County, you have asked for our opinion on the authority of the Commissioners to require the fencing of swimming pools constructed or installed in Calvert County before May, 1980. We understand that 1979 amendments to the County Building Code require the fencing of pools constructed or installed in the County after May, 1980. The Commissioners are now considering an expansion of this fencing requirement to provide additional protection against tragic accidents.

In our opinion, the Commissioners have the requisite authority to do so.

I

Due Process Considerations

The threshold issue underlying your inquiry is one of constitutional dimension: Can the Commissioners impose a regulation that will retroactively affect structures that were lawfully constructed or installed before May, 1980? The Court of Appeals has stated that there is no absolute prohibition against retroactive application of a statute, as long as constitutional prohibitions are not violated. *State Commission on Human Relations v. Amecom Division*, 278 Md. 120, 123 (1976). We must first decide, then, whether the regulation contemplated by the Commissioners would deprive the owners of existing, unfenced pools of vested rights, in violation of the Due Process Clauses of the Maryland and United States Constitutions.[1] We think not.

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[1] United States Constitution, Amendment XIV, §1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law");

(cont'd)

The relevant legal principles were discussed and applied in *Kahl v. Consolidated Gas, Electric Light & Power Co.*, 191 Md. 249 (1948). In that case, a power company contended that Baltimore County could not constitutionally require it to obtain a special permit before installing overhead transmission lines. When the company had acquired the land and purchased the materials for the lines, the county zoning ordinance did not require any permit. However, before the lines were actually installed, the zoning ordinance had been amended to require this permit. The company argued that requiring it to obtain a permit under the amended ordinance would violate its rights under the Due Process Clause. In the Court's view, the determinative question was whether the power company had acquired vested rights to proceed without a permit. The Court ruled that it had not. It noted that questions of whether vested rights have been acquired must be determined by the facts of the particular case. *Id.*, 191 Md. at 260.

In the circumstances posed by your inquiry, the fundamental question is whether owners of swimming pools constructed or installed in Calvert County before May, 1980, have acquired a vested right to maintain their pools free from fencing. We do not believe that the courts would recognize the existence of any such vested right. It seems clear that unfenced swimming pools pose a potential danger to the public (particularly to young children), which may be regulated under the police power of the State. As the Court of Appeals of Maryland has emphasized:

> "[A]ll uses of property which are injurious to the health, comfort, safety and welfare of society may be prohibited under the sovereign power of the state, even though the exercise of such power results in inconvenience or loss to certain persons. In those cases, individual rights are subordinate to the higher rights of the public." *Walker v. County Commissioners*, 208 Md. 72, 87 (1955).

See also Carney v. Baltimore, 201 Md. 130, 134–35 (1952). *And see Commissioners v. Phillips Packing Co.*, 207 Md. 12,

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Maryland Declaration of Rights, Article 24 ("no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land").

18 (1955) (dicta: "a reasonable sanitary regulation can be made effective as to existing structures").

In sum, one cannot obtain a vested right to maintain, forever unfettered by reasonable governmental regulation, a hazard to public safety. Thus, to the extent that the General Assembly has delegated to the County the State's police power in such matters (*see* Part II of this Opinion), Calvert County may adopt reasonable regulations to govern the maintenance of existing pools in a safe manner.

In this regard, it is important to keep in mind that the County Commissioners of Calvert County are not seeking to deprive the owners of unfenced pools of all right to maintain and use their pools; they are merely seeking to require the erection of fences for safety purposes. We do not believe that this relatively minor infringement on property rights, one clearly justified for the protection of public safety, rises to constitutional proportions. It is only substantial rights that enjoy constitutional protection. *See Kelch v. Keehn*, 183 Md. 140, 144 (1944).

Such exercise of the police power is not at all unprecedented. For example, Article 25, §122C of the Maryland Code requires the owners or operators of certain junkyards in Calvert County to screen or fence the junkyards, so that they are not visible from roads or highways. Section 122C(d) expressly provides that "[t]he provisions of this section shall apply to all junkyards . . . created after June 1, 1967 [the effective date of the legislation], and shall also apply to all such junkyards [that is, to junkyards created on or before June 1, 1967] . . . eighteen (18) months after June 1, 1967". The General Assembly clearly felt that it could make the fencing requirement of §122C retroactive, as long as it gave owners of existing junkyards an adequate period of time to comply.[2] If the owner of a junkyard may be compelled to erect a fence to serve primarily aesthetic interests of the public, the owner of a swimming pool should be subject to similar local requirements designed to serve a much more traditional public safety objective.

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[2] We think that fundamental fairness—if not due process considerations—would require the Calvert County Commissioners to provide a similar "phase-in" period to enable owners of existing unfenced pools to comply with any new fencing requirements.

II

Statutory Authorization

Since we conclude that there is no basic constitutional objection to the legislation you suggest, the only remaining question is whether the General Assembly has authorized the Board of County Commissioners of Calvert County to exercise the State's police power in this subject matter area—namely, to regulate the construction, installation, and maintenance of swimming pools. At least three statutory sources of authority are potentially applicable: Article 25, §3 of the Maryland Code (enumerated powers of county commissioners); Article 43, §45 *et seq.* of the Maryland Code (county commissioners as local boards of health); and Article 66B, §4.01 *et seq.* of the Maryland Code (zoning authority of noncharter counties and municipal corporations).[3]

With respect to the first of these, Article 25, §3(n) provides county commissioners with the express power "[t]o prevent and remove nuisances" and "to approve the location of . . . places which may involve or give rise to . . . conditions detrimental to health". Section 3(s)(2) provides the county commissioners of Calvert and five other counties with power to adopt and amend building or housing codes: under subsection (s)(2)(ii), any building code "shall provide and prescribe regulations for the issuance of building permits to be required prior to the construction or improvement of any buildings" and "shall prescribe standards of construction, maintenance, and repair"; and, under subsection (s)(2)(iii), all regulations under the building code "shall be designed to assure and protect the public health, safety, comfort, and moral and economic welfare". Finally, under §3(t)(1), county commissioners may "authorize and require the inspection of all buildings and structures and . . . authorize the condemnation thereof as provided under public general laws . . . when dangerous or insecure, and . . . require that such buildings and structures be made safe or be taken down".

[3] The Maryland Constitution provides only that the powers and duties of county commissioners "shall be such as now or may be hereafter prescribed by law". Article VII, §1. We have examined the Code of Public Local Laws of Calvert County and find no applicable provisions.

Somewhat similar to the powers enumerated in Article 25, §3(n) is the power set out in Article 43. Under Article 43, §45, the board of county commissioners of a noncharter county also serves as the local board of health. Section 48, in turn, enables local boards of health to "adopt and enforce all needful rules and regulations concerning nuisances" within the limits of their jurisdiction.

In our view, unfenced swimming pools may reasonably be regarded by Calvert County as public nuisances and threats to public health and safety. The Court of Appeals of Maryland has said that the term "nuisance" extends to "everything that endangers life or health, gives offense to the senses, violates the laws of decency or obstructs the reasonable and comfortable use of property". *Hart v. Wagner*, 184 Md. 40, 46 (1944). Likewise, *Black's Law Dictionary* 961 (rev. 5th ed. 1979) defines "nuisance" as "[e]verything that endangers life or health, gives offense to senses, violates the laws of decency, or obstructs reasonable and comfortable use of property". The Court of Appeals has indicated that local power to abate nuisances is broad. *See Mount Airy v. Sappington*, 195 Md. 259, 263 (1950) (power to prevent and abate nuisances is generally and liberally conferred on municipal corporations). Accordingly, we believe that the Board of County Commissioners of Calvert County may require the fencing of pools under its Article 25, §3(n) or its Article 43, §48 powers.

We also believe that the County may impose fencing requirements in its building code, as indeed it has done, under Article 25, §3(s)(2). This statutory grant of authority permits local regulations on the general subject matter of building construction. Although §3(s)(2) does not specifically mention any structures other than buildings, §3(s)(2)(iv) permits a local building code to incorporate by reference a portion or all of a building code made available for general circulation by any governmental agency or by any trade or professional association.[4] We understand that generally circulated building codes often reach beyond strict building construction to the construction of appurtenances such as swimming pools, and we therefore believe

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[4] Calvert County's current building code incorporates provisions of the Standard Building Code of the Southern Standard Building Code Congress International.

that county codes adopted under §3(s)(2) may reach these appurtenances.

Section 3(t)(1) of Article 25 specifically extends to structures other than buildings. It enables county commissioners to provide for the inspection of "buildings and structures" and to require that dangerous structures be made safe. In our opinion, this section would also support the action the Calvert County Commissioners wish to take.

We believe that the strongest authority of all, however, is the zoning authority codified in Article 66B. Section 4.01(a) of that article empowers boards of county commissioners, as the legislative bodies of noncharter counties, among other things, "to regulate and restrict . . . the location and use of buildings, signs, structures and land for trade, industry, residence or other purposes". Section 4.02 authorizes county commissioners to "divide the county . . . into districts . . . , and within such districts [to] regulate and restrict the erection, construction, reconstruction, and alteration, repair or use of buildings, structures or land". The regulations and restrictions must be imposed "[f]or the purpose of promoting health, safety, morals, or the general welfare of the community". Article 66B, §4.01(a). *See also* Article 66B, §4.03.

The Court of Appeals recently held that these provisions vest in the Board of County Commissioners of Calvert County "the full measure of power which the State could exercise" in pursuit of the objective of promoting the health, safety, and general welfare of the public. *Harbor Island Marina, Inc. v. County Commissioners*, 286 Md. 303, 312 (1979). The Court indicated that the words of §4.01 should be read broadly to effectuate the underlying remedial purpose of the statute. Accordingly, we believe that, under Article 66B, §4.01 *et seq.*, the County Zoning Ordinance could properly regulate or restrict the construction or maintenance of swimming pools and require that they be fenced. Indeed, a number of local zoning ordinances in Maryland, adopted pursuant to Article 66B, contain swimming pool fencing requirements.[5]

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[5] *E.g.*, Dorchester County Zoning Ordinance (January, 1976, revised to October, 1977), §23.02, p. 37 (definition of "Swimming Pool"); Chestertown Zoning Ordinance (December 30, 1974), Article 10, §9.4; St. Michael's Zoning Ordinance (December 9, 1975, amended June 14, 1977), §6.12c. None of these

(cont'd)

III

Conclusion

In summary, it is our opinion that the Board of County Commissioners of Calvert County may require the fencing of all pools in the county—including those constructed or installed before May, 1980—whether through its building code, its zoning ordinance, or otherwise.

STEPHEN H. SACHS, *Attorney General*

JUDITH A. ARMOLD, *Assistant Attorney General*

AVERY AISENSTARK
Principal Counsel,
Opinions and Advice

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sections indicates specifically that the fencing requirements are applicable to pools constructed or installed before the effective date of the ordinance. In the absence of a clear indication of legislative intent that an ordinance apply retroactively, it will be construed to operate prospectively only. *Rigger v. Baltimore County,* 269 Md. 306, 310 (1973).

LOCAL GOVERNMENT—CHARTER COUNTIES—SALE-LEASEBACK OF PUBLIC PROPERTY—SALE-LEASEBACK TRANSACTION AUTHORIZED UNDER ARTICLE 25A, §5(B) OF CODE

July 14, 1982

The Honorable J. Thomas Barranger
County Executive of Harford County

You have requested our opinion on whether a proposed sale-leaseback transaction involving real property currently owned by Harford County is authorized by Article 25A, §5(B) of the Maryland Code.

For the reasons given below, it is our opinion that a sale-leaseback of county-owned property is permitted by Article 25A, §5(B), where, in the exercise of its broad discretionary powers, the county reasonably determines that its retained possessory interest in the property is sufficient to ensure the continuation of any needed public use of that property.[1]

I

The Proposed Transaction

In December 1981, Harford County purchased a parcel of land, together with the existing office building and other improvements located on that land.[2] Since then, the property has been occupied (i) in part by the County for certain governmental functions and (ii) in part by various nongovernmental tenants under both short-term and long-term lease agreements.

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[1] We have not been given any of the documentation for or details of the specific transaction proposed by Harford County and, consequently, must here couch our response in relatively general terms.

As to whether such a transaction would be permitted under relevant provisions of the County Charter or the County Code, we necessarily defer to the expertise of the County Attorney. To the extent that those provisions are patterned after and substantively similar to Article 25A, §5(B), we suspect that they can be read in a manner similar to that in which we here construe that section.

[2] For several years prior to its purchase of this property, the County occupied a portion of the office building as a tenant.

The County now proposes to sell this property to a private investor and, as a part of the same transaction, lease back the building and improvements under a long-term lease agreement. We understand that, under the lease agreement, the current use of the property by the County will not be changed in any significant manner.

II

Authority to Dispose of Public Property

In 1972, Harford County adopted a charter home rule form of government under Article XI-A of the Maryland Constitution. The General Assembly, in accordance with the directive contained in Article XI-A, §2, has granted charter counties the various express powers enumerated in Article 25A, §5 of the Maryland Code.

Among those express powers is one specifically relating to the disposition of county property. Under Article 25A, §5(B), a charter county is given the authority

> "to dispose of any real or leasehold property belonging to the county, provided the same is no longer needed for public use[,] . . . upon such terms and compensation as said county may deem proper".[3]

This express power—and its limited application to "property . . . no longer needed for public use"—is essentially a codification of the common law rule long applicable to municipal corporations and similar forms of local government:

> "A municipal corporation cannot sell or dispose of property devoted to a public governmental use or purpose . . . without special statutory or charter authority, since as to governmental functions the mu-

[3] Similar authority, subject to similar limitations, has been granted to municipal corporations and commissioner counties as well. *See* Article 23A, §2(24) (municipal corporation authorized "to sell . . . any real or leasehold property belonging to the municipality when [its] legislative body determines that the same is no longer needed for any public use"); Article 25, §11A ("The county commissioners of every county may . . . [s]ell . . . any property when no longer needed for public use"). *See also* Article 25, §§7(b), 8, 9, 9A, and 9B.

> nicipality is a mere agent of the state and subject to control by the state legislative authorities. . . . In this sense all property is public which has been dedicated to public use, or which may be affected by a public trust, either general or special. Municipal corporations hold all property in which the public is interested . . . in trust for the use of the public; and, on principle, such trust property can be disposed of by the municipality only in accordance with the terms of the trust, i.e., in the public interest as declared by statue. The general rule is often thus broadly stated: Property held for a public purpose cannot be alienated, assessed for taxes, sold for nonpayment, nor can prescriptive rights thereto be established." 10 McQuillin, *Municipal Corporations*, §28.38 (3rd ed. 1981).[4]

A review of Maryland case law indicates that the Maryland courts have distinguished the disposition of property held by a local government in its governmental capacity from the disposition of property held by a local government in a proprietary capacity. *See, e.g., McRobie v. Mayor and Commissioners of Westernport*, 260 Md. 464, 467 (1971); *Montgomery County v. Maryland-Washington Metropolitan District*, 202 Md. 293, 303 (1953). Thus, on the one hand, the courts have held that property held by a local government in a proprietary capacity may be disposed of at any time, without special or express authority. *Maryland-Washington Metropolitan District*, 202 Md. at 305–06. On the other hand, property held by a local government in its governmental capacity cannot be disposed of without special or express authority. *Mayor and Commissioners of Westernport*, 260 Md. at 467–69; *Worcester Electric Company v. James W. Hancock*, 151 Md. 670 (1927).

In this case, at least part of the property in question is occupied by nongovernmental tenants; to that extent, this property presumably is held by the County only in a proprietary capacity and, as such, is not needed for a "public use" within the meaning of Article 25A, §5(B). Nevertheless, the balance

[4] Although this discussion speaks specifically to "municipal corporations", general principles of municipal home rule have been applied in this State to other forms of local government as well. *See, e.g., Montgomery County v. Maryland-Washington Metropolitan District*, 202 Md. 293, 304 (1953).

of the property is directly used by the County in a governmental capacity and, as such, presumably is and will continue to be needed for "public use". Hence, we need to determine here whether the proposed sale-leaseback is precluded by the proviso in Article 25A, §5(B), which permits a charter county "to dispose of . . . property" only to the extent that "the same is no longer needed for public use".[5] The Maryland courts have never directly addressed this precise issue.[6]

III

"Property . . . Needed for Public Use"

The word "property" has been broadly construed in Maryland to embrace everything that has "exchangeable value", in-

[5] We have no doubt that the term "dispose of" encompasses the sale of a fee simple interest in property, even when coupled with the simultaneous acquisition of a leasehold interest. "Dispose of" is an expression signifying the right to alienate or direct the ownership of property. *Black's Law Dictionary* 423 (rev. 5th ed. 1979). Included in the definition of "alienation" is the transfer of property and of the possession of land, tenements, or other things from one person to another. *Black's Law Dictionary,* at 66. The term "dispose of" has been broadly construed by Maryland courts to include various methods of transfer of property. *McRobie v. Mayor and Commissioners of Westernport,* 260 Md. 464, 467–69 (1971); *Montgomery County v. Maryland-Washington Metropolitan District,* 202 Md. 293, 305 (1953); *Worcester Electric Company v. James W. Hancock,* 151 Md. 670, 677 (1927). Similarly, statutory references in the Maryland Code to the transfer of an interest in property use the term "dispose of" and its variants as a broad catchall encompassing a wide range of activities. *See, e.g.,* Article 78A, §15 of the Maryland Code ("property . . . sold, leased, transferred, exchanged, granted *or otherwise disposed of*"); Article 41, §181J of the Maryland Code ("sell, convey, assign, lease, *or otherwise* transfer or *dispose of* any property").

[6] In *Eberhart v. Mayor and City Council of Baltimore,* 291 Md. 92 (1981), the Court of Appeals recently addressed the related issue of whether a sale-leaseback transaction involving the Mayor and City Council of Baltimore contravened the debt limitation provisions of Article XI, §7 of the Maryland Constitution. The Court held that the proposed sale-leaseback transaction was authorized under Article II, §15(c) of the Baltimore City Charter and did not create a debt.

Although the Baltimore City Charter contains yet another provision—Article V, §5(b) of the Charter—that is quite similar to Article 25A, §5(B), the possible application of that provision to the transaction at issue in *Eberhart* was not at all discussed by the Court in its decision, nor was it suggested by the litigants in their respective briefs.

cluding "every interest or estate which the law regards of sufficient value for judicial recognition". *Diffendall v. Diffendall*, 239 Md. 32, 36 (1965). Thus, the term "property" is generally used in the Maryland Code to refer to any one or more interests of varying nature and degree in that property. *See, e.g.*, Real Property Article, §1–101(k) (" 'Property' means real property or *any interest therein or appurtenant thereto*"); Estates and Trusts Article, §1–101(p) (" 'Property' includes both real and personal property, and *any right or interest therein*"); Financial Institutions Article, §1–101(p) (" 'Real property' includes *any interest in real property*").

Applying this interpretation here, we think that the relevant provisions of Article 25A, §5(B) can—and should—be read as in effect providing a charter county with the authority

> "to dispose of [*any one or more interests in*] any real or leasehold property belonging to the county, provided the same [i.e., *that interest or interests*] is no longer needed for public use".[7]

In so reading the statute, it becomes evident that the disposition of a charter county's fee simple ownership interest in property is permitted by Article 25A, §5(B), when, as a part of the same transaction, the county nevertheless effectively retains all such interest in the property as would be needed for continuation of the public use of that property. Conversely stated, where a *particular interest* in property, such as a fee simple interest, is itself no longer needed to maintain a public use, *that interest* may be disposed of by the county under Article 25A, §5(B).

Here, it is evident that Harford County, through its retention of a possessory, leasehold interest in the property, fully intends to maintain active public use of the property. By conditioning the sale of its fee simple interest in the property on the

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[7] Such a reading is consistent with the statute's counterpart authorization "to provide for the acquisition . . . of property required for public purposes in the county". Generally, the power to acquire property implies the power to obtain some lesser interest in that property. 10 McQuillin, *Municipal Corporations*, §28.10 (3rd ed. 1981). *See also Mattingly v. Charlotte Hall School*, 37 Md. App. 157 (1977) (express power to purchase property carries with it implied power to enter into an option). Similarly, the power to dispose of property will imply the power to dispose of something less than all interests in that property.

simultaneous acquisition of a long-term leasehold interest sufficient to meet its anticipated use of the property, the County would not, in our view, be disposing of any property interests still "needed for public use".

IV

Public Purpose Considerations

While we have not reviewed and do not know all of the details of the proposed sale-leaseback transaction, it would appear that such a transaction might well serve a legitimate public purpose.

Through the sale and leaseback of its property, the County presumably will be able to continue its present use of the property for governmental purposes, without disruption or diminution, while at the same time being able to derive certain economic advantages not otherwise available to it. For example, the County's transfer of title to a private investor will provide the County with money that might be used for other needed County programs and capital projects; in addition, the transfer of title would add a private property owner to the County's tax rolls—even while retaining for public use a possessory, leasehold interest in the property.

Given such obvious potential public benefits to be derived from a properly structured sale-leaseback transaction, we cannot believe that the General Assembly intended Article 25A, §5(B) to be read so narrowly as to prevent a charter county from even considering such a transaction. Moreover, we believe that the courts would give considerable weight and deference to a good faith determination by a county (i) that a valid public purpose in fact will be served by the particular transaction and (ii) more specifically, that the county's current fee simple interest in the property would, given a continued possessory interest, "no longer [be] needed for public use".

Charter counties have been granted broad discretionary powers to promote good government and the general welfare of their communities. *See, e.g., Salisbury Beauty Schools v. State Board of Cosmetologists*, 268 Md. 32 (1973); *Montgomery Citizens League v. Greenhalgh*, 253 Md. 151 (1969). And the power of a county to dispose of its property—even while subject to the various statutory and common law considerations noted above—is one of the incidental discretionary powers reasonably implied from the general powers that have been expressly conferred on it. *Montgomery County v. Maryland-Washington Metropolitan District*, 202 Md. 293 (1953).

In this regard, it is a general principle of law that the courts will not interfere with a county's exercise of its discretionary powers unless those powers are misused. *E.g.*, *Wincamp Partnership v. Anne Arundel County*, 458 F.Supp. 1009 (D. Md. 1978); *Steuart Petroleum Company v. Board of County Commissioners of St. Mary's County*, 276 Md. 435 (1975); *Salisbury Beauty Schools v. State Board of Cosmetologists*, 268 Md. 32 (1973); *Leonardo v. Board of County Commissioners of St. Mary's County*, 214 Md. 287 (1956), *cert. den.*, 355 U.S. 906 (1958). *See also Union Investors, Inc. v. Montgomery County*, 244 Md. 585 (1966) (sale of county property will not be set aside because of differences of opinion as to the value of the property).

This general rule, limiting a court's review of the exercise of discretionary powers by a local government, has been applied to various areas of local government concern, including the business affairs of the local government, the lease of governmental property, and the purchase or—as here—sale of property by the local government. 2 McQuillin, *Municipal Corporations*, §10.36 (3rd ed. 1981). *See also Purnell v. Ocean City*, 162 Md. 169 (1932) (absent fraud or abuse of discretion, court will not review determination of municipality that public interest demands grant of a franchise).

V

Conclusion

In summary, it is our opinion that the proposed sale-leaseback of property by a charter county is permitted under Article 25A, §5(B), provided that the county, in the exercise of its broad discretionary powers, reasonably determines that its retained possessory interest in the property is sufficient to ensure the continuation of any needed public use of that property.

STEPHEN H. SACHS, *Attorney General*

AVERY AISENSTARK *Principal Counsel, Opinions and Advice*

JUDITH S. WARANCH, *Assistant Attorney General*

LOCAL GOVERNMENT—COMMISSIONER COUNTIES—RETIREMENT ANNUITIES/DEFERRED COMPENSATION—CECIL COUNTY COMMISSIONERS LACK AUTHORITY TO ADOPT A DEFERRED COMPENSATION PLAN FOR ELECTED OFFICIALS

August 25, 1982

Dennis S. Clower, Esquire
County Attorney for Cecil County

You have requested our opinion on the legality of a deferred compensation plan for elected officials that was adopted by the Board of County Commissioners of Cecil County in July, 1973, and made retroactive to January, 1970.

For the reasons given below, it is our opinion that the plan was beyond the authority of the County Commissioners to adopt and is therefore illegal, whether applied retrospectively or prospectively.

I

Background

From documents and information you provided, we understand that on July 24, 1973, the then Board of County Commissioners of Cecil County, by resolution, adopted a deferred compensation plan for its elected officials, naming the Treasurer of Cecil County as the plan administrator.

The resolution provided that the plan was "to provide retirement benefits for certain of its elected officials as portions of their compensations" and was to be funded by the County—not by reductions from the officials' salaries—through the purchase of "retirement annuity contracts as issued by Aetna Variable Annuity Life Insurance Company, in such amounts as may be appropriate to provide the plan benefits". *See* Minutes of the Board of County Commissioners, July 24, 1973. The plan was made retroactive to 1970, the year in which the incumbents took office.

In accordance with the resolution, the County Treasurer entered into a deferred compensation agreement with the County on behalf of the elected officials of Cecil County. The agreement, which refers to Cecil County as "County" and the elected officials as "Employees", provides in part:

> "WHEREAS, the Employees have agreed to serve the County, beginning July 24th, 1973, in the capacity of Elected Officials, and by reason of their experience and knowledge is [sic] of considerable value to the County; and
>
> WHEREAS, the County wishes to offer an inducement to the Employee to remain in its employ in the form of additional compensation for services which he will hereafter render; and
>
> WHEREAS, the Employee is willing to continue in the employ of the County on the basis stated herein;
>
> NOW THEREFORE, it is mutually agreed as follows:"

The agreement then provides that, if a covered official continues in the employ of the County until retirement (as defined in the agreement), the County will pay that official a monthly retirement income equal to the amount that would have been payable under an Aetna Variable Annuity Contract with an annual premium sufficient to pay $250 per month at retirement. If the official terminates employment, voluntarily or involuntarily, or dies before retirement, the official or the official's beneficiary is entitled to 100% of the amount available in the account in his or her name, with a choice of settlement options. Another provision allows the County to honor requests of officials and former officials to obtain full ownership of their annuity contracts in substitution for the County's obligation to make payments under the agreement. Nothing in the agreement, however, gives the covered officials any additional direct payment during their tenure with the County.

In accordance with the resolution and agreement, the County has paid annual premiums to Aetna, retroactive to 1970, for annuity contracts for persons holding the offices of County Commissioner, County Treasurer, State's Attorney, and Sheriff. To date, two former commissioners and the widow of a third have become eligible for benefits.

II

Basic Powers of County Commissioners

Article VII, §1 of the Maryland Constitution, titled "Sundry Officers", is applicable to counties that, like Cecil County, have neither code nor charter "home rule". It provides, in pertinent part, that the compensation, powers, and duties of the County Commissioners "shall be such as now or may be hereafter prescribed by law".

In a recent Opinion of this Office, the powers of County Commissioners were summarized as follows:

> "It is well settled that in counties without home rule, which are the concern of this opinion, the county commissioners do not have general power to enact local legislation. *County Commissioners for Montgomery County v. Supervisors of Elections for Montgomery County,* 192 Md. 196, 209 (1948). Rather, their powers are derived solely from statutes enacted by the General Assembly (*Gaver v. Frederick County,* 175 Md. 639, 648 (1939), *Fulker v. Baltimore County,* 156 Md. 408, 410 (1929), and *O'Brien v. Baltimore County,* 51 Md. 15, 22 (1879)), and these powers may be altered by the General Assembly so long as the statutes do not conflict with some provision of the Constitution (*Prince George's County v. Mitchell,* 97 Md. 330, 337 (1903)). As a general rule, the statutes conferring powers on county commissioners are to be strictly construed. *Walker v. Talbot County,* 208 Md. 72, 86, *cert. denied* 350 U.S. 902 (1955); *Barnett v. Charles County,* 206 Md. 478, 483 (1955). Accordingly, it is well established that county commissioners in counties without home rule have only those powers that are expressly granted by statute and those that can be implied as necessary to carry out their express powers. *Miller v. Carroll County,* 226 Md. 105, 114 (1961); *Gaver, supra; Frederick County v. Page,* 163 Md. 619, 632 (1933); *Fulker, supra;* [*Howard County v.*] *Mathews,* [146 Md. 553 (1924)]." Opinion No. 79–046 (August 20, 1979) (unpublished).

The basic enumerated powers of County Commissioners, as conferred by the General Assembly, are generally found either in Article 25 of the Maryland Code or in the public local laws of the specific county concerned. With respect to Cecil County, most of the basic powers of the County Commissioners derive from public local laws rather than from Article 25. *See, e.g.*, Article 25, §3(a)(2)(iv).

We have carefully examined the most current edition of the Cecil County Code, which you kindly supplied, but we found no public local law conferring express power on the County Commissioners to adopt a deferred compensation plan for its elected officials. Thus, their adoption of the plan was unlawful unless the Commissioners have implied power to do so.

III

Annuity Payments are Unauthorized Additional Compensation

County Commissioners, State's Attorneys, and Sheriffs are constitutional officers, and the Maryland Constitution provides that their compensation or salary shall be prescribed or fixed by law. *See* Article VII, §1 (County Commissioners); Article V, §9 (State's Attorney); Article IV, §44 (Sheriff). Pursuant to these requirements, the General Assembly has set the salary and expenses for Cecil County Commissioners by public local law (Chapter 486, Laws of Maryland 1980); for the State's Attorney by Code (Article 10, §40); and for the Sheriff by Code (Courts Article, §2–309). In addition, the General Assembly has set the salary for the Cecil County Treasurer and has provided specifically that "[t]he treasurer may not receive any other income for performing the duties of his office". Article 25, §51(u).

In light of these provisions, if the County's payment of premiums (i.e., the approximate present value of the future annuity income) is compensation to these officials, it is an unlawful intrusion into an area that is unambiguously within the General Assembly's exclusive authority.[1]

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[1] The General Assembly has also legislated with respect to deferred compensation plans. Article 73B, §§66 to 70 of the Maryland Code. The State Employees Deferred Compensation Plan enables employees to gain the tax

(cont'd)

In our view, such payment is compensation. Indeed, it is described as such in the Board's own resolution and in the agreement. Similarly, under the State's own Employees Deferred Compensation Plan, the statute requires that the amounts deferred "shall be included in the employee's compensation for purposes of computing [Social Security] contributions and contributions to a State retirement system", although the amounts are not then taxable. Article 73B, §69 of the Maryland Code.[2] If a State employee receives "compensation" for the portion of his or her salary that the employee pays for an annuity under the State plan, surely a Cecil County official likewise receives compensation for the *additional* money, over and above his or her salary, that the County pays for an annuity under its plan.

We have recently received a copy of a memorandum, dated May 29, 1982, from Jonathan M. Topodas, Counsel to Aetna Life and Casualty Insurance Company, to Paul Chamberlin, General Agent, in support of the plan's validity under §457 of the Internal Revenue Code, 26 U.S.C. §457, which governs the federal income tax status of state or local government deferred compensation plans. While we do not dispute his contention that the plan was carefully drawn to comply with requirements of §457 and IRS rulings, we believe that the federal income tax ramifications of the plan are wholly irrelevant to the issue of the County's authority to adopt such a plan under Maryland's Constitution and statutes.

Mr. Topodas' memorandum states in part: "Whether the compensation deferred results from employer additions or an employee salary-reduction arrangement has never been of any consequence for federal tax law purposes." Memorandum at p. 2. This distinction, however, *is* of consequence under State law. Because the only income that may be deferred under the provisions of §457 is a portion of a public employee's annual

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advantages of deferring a portion of their income until retirement. However, unlike the Cecil County plan, State employees receive no increment over their regular compensation to pay into the plan. *See* Article 73B, §68. Significantly, even this program was adopted only after enactment of express enabling legislation.

[2] *See* note 1 above.

compensation, it follows that the amount deferred through "employer additions" (the annuity premiums paid by the County) necessarily increases the annual compensation of each plan participant beyond the amount fixed by the General Assembly. Such an increment is, therefore, contrary to State law.

IV

Establishment of Retirement Plan is Beyond Commissioner's Powers

Even if we assume that the plan is not truly a compensation plan but is, instead, a general noncontributory retirement plan for the elected officials of Cecil County, our answer is no different. The only general retirement authority given to the counties of Maryland by the General Assembly is the authority to participate in the Employees' Retirement and Pension Systems of the State. Article 73B, §21 *et seq.* and §130 of the Maryland Code. We have been advised by the State Retirement Systems that officials and employees of Cecil County do, in fact, participate.

In our view, if the county commissioners of a particular county also wish to establish a separate local retirement plan for some or all of the county's officers or employees, an express grant of such power would be required. In fact, several counties do have such express authority. *See* Article 25, §3(g) (Kent, Dorchester, and Charles Counties); §3(g-1) (Charles County Sheriff's department); §3(g-2) (Kent County Sheriff's Department). If the General Assembly had intended to give similar authority to Cecil County, it would, we believe, have included Cecil County among these other counties so authorized.

We have found no reference in the Cecil County Code or in the 1973 resolution of the County Commissioners to any provision of public general or public local law that authorizes the establishment of a local retirement or pension plan for that County's elected officials. Absent such a provision, we must conclude that the County Commissioners lacked the requisite authority to adopt such a plan.

V

Conclusion

In summary, it is our opinion that the deferred compensation plan for elected officials adopted by the Board of County Commissioners of Cecil County in July, 1973, was beyond the authority of the County Commissioners to adopt and is, therefore, illegal.[3]

STEPHEN H. SACHS, *Attorney General*

CAROL S. SUGAR, *Assistant Attorney General*

AVERY AISENSTARK
Chief Counsel,
Opinions and Advice

[3] In light of our conclusion, we need not consider here whether that plan also violated the provisions of Article III, §35 of the Maryland Constitution by increasing the compensation of the officers of Cecil County during their terms or by retroactively authorizing payment in 1973 for services rendered in 1970, 1971, and 1972.

LOCAL GOVERNMENT—COUNTIES—CHANGE IN BOUNDARY LINES—REFERENDUM—GENERAL ASSEMBLY—DELEGATION OF LAWMAKING FUNCTION—REFERENDUM ON BOUNDARY CHANGE TO BE LIMITED TO AFFECTED AREA—GENERAL ASSEMBLY MAY NOT DELEGATE POWER TO MAKE LAW

September 9, 1982

The Honorable Pauline H. Menes
Maryland House of Delegates

You have requested our opinion on proposed procedures to unify the City of Takoma Park, which now traverses both Prince George's and Montgomery Counties, into one county or the other. The draft bill that accompanied your request would establish an elaborate referendum procedure to decide the matter.

In brief, this procedure would call for simultaneous referenda in the Montgomery and Prince George's sections of the City, at which the voters would be asked (i) first, whether they favored an alteration of the county boundary and (ii) if so, whether they wanted Takoma Park to be unified in Montgomery County or Prince George's County. If either section of the City voted against a boundary change, no change would occur. If both sections voted in favor of a boundary change and both also voted for the same county, then Takoma Park would be unified in that county. However, if the two sections differed over their choice of county, additional referenda would be held the following year, at which the choice of county alone would appear on the ballot.[1]

For the reasons given below, it is our opinion that the draft bill is inconsistent with the boundary change requirements of Article XIII, §1 of the Maryland Constitution and, moreover, would unconstitutionally delegate to the voters a decision vested by law in the General Assembly. For your guidance, we also review below some of the legal difficulties that would likely arise in implementing a boundary alteration and how

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[1] The draft bill is not clear whether, in these later referenda, a majority of each section of the City would have to approve the same county before unification could occur or whether an overall citywide majority would suffice.

those difficulties might be anticipated and dealt with in any future bill on the subject.[2]

I

Referendum on Boundary Change Limited to Area to be Transferred

In our opinion, the draft bill does not conform to the constitutional requirement that county lines not be changed unless the voters in the area to be transferred from one county to another—and *only* those voters—consent to the change.[3]

A. *The Referendum Requirement*

1. *Introduction*

Article XIII §1 of the Maryland Constitution provides as follows:

> "*The General Assembly may provide, by Law, for organizing new Counties, locating and removing county seats, and changing county lines*; but no new county shall be organized without the consent of the majority of the legal voters residing within the limits proposed to be formed into said new county; and whenever a new county shall be proposed to be formed out of portions of two or more counties, the consent of a majority of the legal voters of such part of each of said counties, respectively, shall be required; *nor shall the lines of any county nor of Baltimore City be changed without the consent of a majority of the legal voters residing within the district,*

[2] In the 1982 Regular Session of the General Assembly, a somewhat simpler bill was introduced that would have transferred the Prince George's section of Takoma Park to Montgomery County, subject to the approval of the voters in that section of the City. House Bill 1391. Although this bill did not suffer from either of the two constitutional infirmities noted here, it did fail to address expressly the potential implementation difficulties reviewed below. House Bill 1391 did not pass.

[3] A Letter of Advice from Linda H. Lamone, Assistant Attorney General, to Delegate Timothy F. Maloney (March 31, 1982), concerning House Bill 1391 of the 1982 Regular Session, concluded that Article XIII, §1 would preclude the holding of one citywide referendum to approve the consolidation of Takoma Park. As discussed below, we agree with that conclusion.

> *which under said proposed change, would form a part of a county or of Baltimore City different from that to which it belonged prior to said change;* and no new county shall contain less than four hundred square miles, nor less than ten thousand inhabitants; nor shall any change be made in the limits of any county, whereby the population of said county would be reduced to less than ten thousand inhabitants, or its territory reduced to less than four hundred square miles. *No county lines heretofore validly established shall be changed except in accordance with this section.*" (Emphasis added.)

The immediate predecessor of Article XIII, §1 was Article X, §1 of the Constitution of 1864. That section provided that the "lines of any county [may not] be changed without the consent of a majority of the legal voters residing within the limits of the lines proposed to be changed". In the Constitution of 1867, Article X became Article XIII, the first section of which prohibited an alteration of county lines "without the consent of a majority of the legal voters, residing within the district, which, under said proposed change, would form a part of a county different from that to which it belonged prior to said change".[4]

There are two possible interpretations of the language of Article XIII, §1. First, the constitutional requirement for a referendum of the voters in the affected portion of the City of Takoma Park—i.e., in the section to be transferred—can be regarded as prescribing merely a *minimum* requirement. Under this reading, the approval of the voters in the area to be transferred remains a necessary condition for a change from one county to another, but the General Assembly would also be able to condition the transfer on the additional approval of some other group of voters—e.g., those in the other section of Takoma Park—as well. The literal language of §1, taken alone, certainly does not preclude this construction.

Alternatively, this section might be considered a mandate under which the General Assembly is limited to providing for a

[4] Since 1867, Article XIII, §1 has been amended three times. Chapter 618, Laws of Maryland 1947, ratified on November 2, 1948; Chapter 550, Laws of Maryland 1976, ratified November 2, 1976; Chapter 681, Laws of Maryland 1977, ratified November 7, 1978. These amendments, however, are not relevant to the issues discussed in this Opinion.

binding referendum at which *only* those voters residing within the area to be ceded to a different county would be permitted to vote. We believe this latter interpretation to be correct.

2. *Purpose of Requirement*

The Constitution of Maryland is not a grant of power to the General Assembly but, rather, is generally regarded as a limitation or restriction on legislative powers. *Richards Furniture Corp. v. Board of County Commissioners of Anne Arundel County,* 233 Md. 249, 257 (1963). The General Assembly may not exercise any power that is inconsistent with the limitations or restrictions contained in that instrument. *See Regents of the University of Maryland v. Williams,* 9 G. & J. 365, 410 (1838).

Moreover, the very language of Article XIII, §1, requiring the assent of the voters residing in the portion of the county to be ceded or created, was itself characterized at the 1864 Constitutional Convention as a *limitation* on the power of the General Assembly. 3 *Debates of the Constitutional Convention of the State of Maryland of 1864* 1692 (1864).[5] Although the General Assembly is given the power to alter county boundaries, "[n]o county lines heretofore validly established shall be changed except in accordance with this Section". To read §1 as empowering the General Assembly to prescribe binding referenda in areas beyond the one to be transferred would be inconsistent with the limiting character of the provision.

The purpose of this referendum requirement has been described in a leading Maryland case as being "to give constitutional security to local government":

> "*The people were not to be denied the privilege of living under county governments of their own choice.* No portion of the population of a county were to be excluded from it, and transferred to another, unless their consent was given at the polls, through a majority of the voters of the district affected. The right of local government would be violated as much by transferring them to the City of Baltimore without their consent, as it would be by annexing their territory to another county. The essential right of

[5] A more detailed discussion of the purposes of the 1864 provision, as evidenced by these debates, appears below in Part I B of this Opinion.

> choice is denied in each case." *Daly v. Morgan*, 69 Md. 460, 472 (1888) (Bryan, J., concurring) (emphasis added).

We also note that at least one other state has specifically interpreted a similar constitutional provision as doing more than merely imposing a minimum requirement. In deciding a challenge to the legislative creation of a new county, the Supreme Court of Mississippi interpreted the following language, appearing in §260 of that state's constitution:

> "No new county shall be formed unless a majority of qualified electors voting in each part of the county or counties proposed to be dismembered and embraced in the new county, shall separately vote therefor."

The Mississippi Supreme Court construed this analogue to Article XIII, §1 of the Maryland Constitution as follows:

> "[T]he question of the creation of the county could properly be determined *only* by a majority of the qualified electors voting in that part of the county proposed to be dismembered and embraced in the new county. Certainly it does not mean, as contended by counsel for appeallants, that this question of creating the new county should have been voted on by the qualified electors in the territory of the proposed new county and also by the qualified electors in the territory of the old, or remaining, county of Harrison. Such a construction would be erroneous and violent, indeed." *Hatten v. Bond*, 63 So. 612, 613 (Miss. 1917) (emphasis added).

We think that the language of Article XIII, §1 would be similarly construed by the courts of this State.

B. *Constitutional Background*

Our construction of Article XIII, §1 is supported by the debates of the Constitutional Conventions of 1851 and 1864.

1. *1851 Debates*

During the 1851 Constitutional Convention, the Committee on the Legislative Department suggested the following language for inclusion in a new §23 of Article III:

> "No county now established by law, shall ever be reduced by the establishment of any new county, to a population of less than ___ thousands, nor shall any new county be hereafter established with a population of less than ___ thousand." 1 *Debates and Proceedings of the Maryland Reform Convention to Revise the State Constitution* 124 (1851).

During subsequent debate, several amendments were offered that would have required a majority of the voters in *each* county involved to approve the formation of the new county. *Id.*, Vol. 2, at 334–39. Several members of the Convention voiced their opposition. The following comments of Elias Brown of Carroll County are particularly relevant:

> "*There would not be a county in the State in which the majority of the voters of the county would agree to part with any portion of it.* Carroll county had been erected right in the teeth of Frederick and Baltimore counties. *Although the people who lived in the proposed new county would almost unanimously vote in favor of it, yet the remainder of the voters would out number them.*" *Id.* at 338 (emphasis added).

The suggested §23 and proposed amendments to it were not adopted. *Id.* at 339.

Although these debates focused on the creation of new counties, rather than on the alteration of boundaries between existing counties, the rationale of Mr. Brown's objection is equally applicable to the latter issue. If, for example, all Montgomery County voters, including those outside of Takoma Park, were to be given a voice in a proposal to unify Takoma Park in Prince George's County—a procedure that would be permitted under the alternate reading of Article XIII, §1 as but imposing a *minimum* requirement—such a vote would directly fly in the face of the objections expressed by Mr. Brown.

2. *1864 Debates*

At the 1864 Constitutional Convention, the delegates considered, on third reading, a committee report involving the alteration of boundaries between existing counties. An amendment to add the language at issue here was proposed by James L. Ridgely, of Baltimore County. In his attempt to persuade the Convention to adopt the amendment, Mr. Ridgely stated:

"I will in a very few words explain the object of that amendment. The previous part of the section provides that in the event of organizing a new county, the consent of the majority of the legal voters residing within the limits about to form said new county shall be first obtained. It is also proposed that any portion of the lines of a county may be changed; *but there is no provision made to consult the residents within the limits of the lines proposed to be changed.* Now I understand very well the effect of this provision about changing county lines, and I have no objection in the world to it. I am free to confess that Baltimore city must necessarily, by reason of its constantly accumulating population, find its way within the limits of Baltimore county. It is the result of that sort of law which nothing in the world can prevent. In time it must find its way there; and I do not propose to throw any obstacle in the way of that end.

But I simply ask that the people, residing within the limits of the district proposed to be included within the increased limits of Baltimore city, shall be consulted for the same reason that you would consult the people residing within the limits of a new county that you propose to form. I ask that the same theory be applied to the people of Baltimore county, in relation to an increase of the limits of Baltimore city, that you would apply in relation to the organization of new counties in the State. I know that Baltimore city must increase and expand, until in process of time it shall absorb a large portion of the area of Baltimore county, and I say Godspeed to it. I do not propose to throw any obstacles whatever in its way. But I simply ask that when they apply to the legislature for an extension of its boundaries, *there shall be a limitation upon the power of the legislature to grant, which shall require the assent of the people residing in the portion of the county asked to be included within the limits of Baltimore city.* It will have a very serious effect upon our county treasury. The very largest proportion of the taxes received by the county is derived from the suburban population of Baltimore city; and the extension into Baltimore county of the limits of Baltimore city, of course, very essentially affects the financial ability of that county to sustain itself.

And I ask, in view of its importance to our community, that you will at least put in here a provision that the people shall be consulted and their consent obtained before any such extensions of boundary shall be granted to Baltimore city." 3 *Debates of the Constitutional Convention of the State of Maryland of 1864* 1692 (emphasis added).

Archibald Stirling, Jr., of Baltimore City, objected to the amendment, saying:

"So far as this matter applies to Baltimore City, I certainly have no desire that anything should be done in respect to extending its limits, which would be unacceptable to the people interested in the matter; anything which would be unjust to Baltimore county. So far as I have any personal interest in the matter, it is rather against any increase of the city limits, than otherwise.

But this proposition affects all the counties of the State; it seems to me it is too broad. It says the legislature shall not change the lines of any county, except upon the consent of those who reside within the lines proposed to be changed. Now it may be necessary to change a county line for a few yards, or a few hundred yards. There might be but one or two people residing within the limits of the proposed change. One man might hold the whole of the land within those limits, and thus you would give to him the absolute control over the matter.

. . . .

This proposition practically puts it into the power of two or three landholders to decide the whole question of legislative policy in regard to this matter. I do not believe the legislature will do anything which will not be acceptable to the people. I know the people of the city of Baltimore will ask nothing against the interests of Baltimore county." *Id.* at 1692–93.

Mr. Ridgely responded:

> "I do not place it upon that theory at all. I do not understand how the people of Baltimore county get any protection from the city of Baltimore. I do not understand that argument. This is a question of right, one which belongs to the people of the community to be consulted upon the subject. It is a question of the transfer of their relative political position; and I ask this house, upon that ground, to give them protection." *Id.* at 1693.

After limited discussion of a collateral issue, the amendment was adopted. *Id.* at 1694.

C. *Legislative Implementation*

It is an accepted rule that the contemporaneous construction given a constitutional provision by the General Assembly, uniformly followed over a long period of time, is a valuable tool in determining the intention of the framers. *Pressman v. D'Alesandro*, 211 Md. 50, 59–60 (1952).

Accordingly, we have examined several relevant enactments of the General Assembly and have found that the consistent legislative practice has followed that of the first General Assembly to apply Article XIII, §1, only five years after its adoption in 1867: referenda have been provided for *only* in the areas to be transferred. *See, e.g.*, Chapter 212, Laws of Maryland 1872 (creating Garrett County); Chapter 98, Laws of Maryland 1888 (extending the limits of Baltimore City); and Chapter 841, Laws of Maryland 1982 (altering the boundary line between Anne Arundel and Calvert Counties).[6]

D. *Prior Legal Construction*

In 50 *Opinions of the Attorney General* 111 (1965), this Office discussed the provisions of Article XIII, §1 in conjunction with legislation designed to end a long-standing dispute over the correct boundary between Allegany and Garrett Counties. In that Opinion, Attorney General Finan detailed the history

[6] The sole exception to this consistent practice appears to have been Chapter 730, Laws of Maryland 1906, providing for the "final establishment" of the boundary line between Allegany and Garrett Counties. As discussed below in Part I D of this Opinion, however, that Act was held to be unconstitutional.

of the dispute, which included several legislative attempts by the General Assembly to resolve the controversy, as well as litigation in the Circuit Court for Garrett County over the constitutionality of one such attempt: a referendum procedure enacted by Chapter 730, Laws of Maryland 1906.

As described by the Opinion:

> "Although it had twice failed to resolve this dispute, the General Assembly tried again, by enacting Chapter 730 of the Laws of 1906, a piece of legislation optimistically entitled an act 'to provide for the definite and final establishment of the boundary line between Allegany and Garrett Counties'." *Id.* at 123.

Such an enactment was thought necessary because two different boundary lines had been drawn (the "Chisholm Line" of 1872 and the "Bauer Line" of 1898), leaving uncertain the status of the intervening land. Chapter 730 provided for a referendum of "all the qualified voters of the State of Maryland, residing Westward of" the easternmost of the two lines (the Bauer Line) to decide whether the disputed area should belong to Garrett County or Allegany County. The Act thus authorized a referendum of *both* the voters residing within the disputed area *and* the voters residing in undisputed areas of Garrett County. The question on the ballot was "For Garrett County" and "Against Garrett County".

In *County Commissioners of Allegany County v. Board of Supervisors of Elections of Garrett County*, Equity No. 1424 (1906), quoted at length in Attorney General Finan's Opinion, the Circuit Court for Garrett County found Chapter 730 to be defective. If, as the Circuit Court assumed, the sparsely-populated disputed area was then legally a part of Allegany County, and if the majority of those authorized by Chapter 730 to vote on the question ultimately voted "For Garrett County", then, in effect, the voters of Garrett County—those residing outside of the disputed area—would have been able to take territory away from Allegany County—even over the objections of those voters residing in the disputed area. The Circuit Court held that " '[s]uch legislation would not only be unconstitutional, but if it would be upheld, would be most disastrous' ". 50 *Opinions of the Attorney General* at 124–25. According to the Circuit Court, the Act was defective because, among other reasons, it did not " 'leave it to those within the district affected [the disputed area between the Chisholm and Bauer

Lines] to determine' " whether the area was to be annexed to Garrett County. *Id.* at 125.[7]

The legislation specifically at issue in the 1965 Opinion of the Attorney General was yet a later attempt by the General Assembly to lay to rest the controversy over the boundary between Allegany and Garrett Counties: Chapter 708, Laws of Maryland 1955. Chapter 708 again purported to establish the Bauer Line as the boundary between the counties. However, because Chapter 708 "did not provide for a plebiscite at which those residing between the Chisholm and Bauer Lines could express their preference", the Opinion concluded that the Act was invalid under Article XIII, §1 of the Constitution. *Id.* at 132–34.

E. *Summary*

From this history, we find that all those before us who have been asked to implement, construe, and apply the provisions of Article XIII, §1 have uniformly shared the same view: this provision does not permit a referendum in which persons other than those residing in the affected area are permitted to have a say in—let alone a veto over—the proposed change.

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[7] The Opinion indicates that the Circuit Court nonetheless declined to enjoin the referendum "upon 'the general principle that courts of Equity will not use that writ to prevent elections being held' ". *Id.* at 127.

The Opinion then parenthetically noted that a majority of referendum votes were cast for Garrett County. However, we now find that this in fact might not have been the case. In 1945, the General Assembly passed Senate Bill 564, which would have repealed the provisions of Sections 1 and 2 of Chapter 730, Laws of Maryland 1906, as codified in §§37 and 38 of Article I of the Code of Public Local Laws of Maryland (1930 Ed.). Senate Bill 564 was vetoed by Governor Herbert R. O'Conor. In his veto message, Governor O'Conor stated:

> "These sections relate to an election scheduled to have been held in 1906 for the purpose of establishing the boundary line between Allegany and Garrett Counties. *The Attorney General has advised me that, according to the records in the office of the Land Commissioner this election was never held.* The Attorney General has further advised me that the repeal of these sections might cause serious difficulties with respect to the existing boundary line between the two counties, and since the law as it now stands does no harm, its repeal might give rise to serious controversies. I believe that this matter should receive serious study and be made the subject of legislation at some future session of the General Assembly." Laws of Maryland 1945, p. 1973 (emphasis added).

In summary, then, it is our opinion that Article XIII, §1 of the Maryland Constitution contemplates that the required referendum be held only in the area encompassed by the boundary line alteration, and in no other. For this reason, the draft bill—which would permit those outside the affected area to vote against and effectively prevent a transfer desired by a majority of those in the affected area—would be unconstitutional.

II

Improper Delegation

It is firmly established that the General Assembly has the exclusive power to make laws in the State. That is, the power to legislate may not be delegated by the General Assembly to the people. *Fell v. State*, 42 Md. 71, 83 (1875); *Bradshaw v. Lankford*, 73 Md. 428, 430 (1891). This doctrine, as stated in the *Bradshaw* case, is based on the following grounds:

> "Now it can hardly be necessary to say that, by the Constitution of this State, the power to enact laws belongs to the General Assembly, composed of the Senate and the House of Delegates; and this being so, it is a well-settled principle of constitutional law, that the power thus delegated cannot be redelegated to the people themselves. Our government is a representative government, and to the members of the General Assembly the people have confided the power to pass such laws as they, in the exercise of their judgment, may deem best for the public interest; and they have no power to substitute the judgment of others in matters of legislation for the judgment of those to whom this sovereign trust has been committed." 73 Md. at 430.[8]

Although a legislature cannot delegate its power to *make* laws, it may condition the *operation* of a law on the happening of a

[8] In *Brawner v. Supervisors of Elections*, 141 Md. 586, 600–01 (1922), the Court of Appeals cited Article III, §1 and §§27 through 30, and Article II, §17 as constitutional provisions conferring on the General Assembly the exclusive power of making laws in the State.

certain contingency or future event. 2 *Sutherland, Statutory Construction* §33.07 (C. Sands 4th ed. 1973). The rule is stated in 16 C.J.S. *Constitutional Law* §141 (1956):

> "It is the general rule that where an act is clothed with all the forms of law and is complete in and of itself, it is fairly within the scope of the legislative power to prescribe that it shall become operative only on the happening of some specified contingency, contingencies, or succession of contingencies. Such a statute lies dormant until called into active force by the existence of the conditions on which it is intended to operate."

In Maryland, it is clear that the General Assembly may condition the operation of a public local law, although not a public general law, on a vote of the people in the locality affected. *Brawner v. Supervisors of Elections*, 141 Md. 586 (1922); *Levering v. Supervisors of Elections*, 137 Md. 281 (1920); *Bradshaw v. Lankford*, 73 Md. 428 (1891); *Fell v. State*, 42 Md. 71 (1875). However, the act submitted to the voters must be complete in itself and have been made law by the General Assembly; only the effect and operation of the law may be made dependent on the referendum contingency. *Maryland Co-op Milk Producers v. Miller*, 170 Md. 81 (1935); *Brawner v. Supervisors of Elections*, 141 Md. at 602; *Fell v. State*, 42 Md. at 85.

In *Fell v. State*, 42 Md. 71 (1875), the Court of Appeals upheld the provisions of Chapter 453, Laws of Maryland 1874. Section 1 of that Act called for a referendum at which the voters were to cast ballots "for the sale of spirituous or fermented liquors" or "against the sale of spirituous or fermented liquors". Section 2 provided that, if the majority voted against the sale of liquors, "then it shall not be lawful for any person, or persons, or body corporate to sell spirituous or fermented liquors" in the district. Section 3 stated the penalty for a violation, and Section 4 stipulated that the Act was to take effect immediately after the referendum. In construing the law, the Court queried:

> "Now what has been delegated to the voters by this act of Assembly? Certainly not the power to make the law, or to repeal existing laws. They are called on by the first section simply to express, by their ballots, their opinion or sentiment as to the

> subject-matter to which the law relates. They declare no consequences, prescribe no penalties and exercise no legislative functions. *The consequences are declared in the law, and are exclusively the result of the legislative will. The Act of Assembly is 'a perfect and complete law as it left the halls of legislation and was approved by the Governor;' but by its terms, it was made to go into operation in any district, upon the contingency of a majority of the legal voters within the district*, being ascertained to be in favor of the prohibition maintained in the second section." *Id.* (Emphasis added.)

Thus, the critical distinction is between the delegation of power to make law, which necessarily involves discretion and judgment as to what the law should be, and a statutory provision that has become law but that depends on a contingency for its execution. The former is prohibited; the latter is not.

In *Hamilton v. Carroll*, 82 Md. 326 (1896), at issue was Chapter 546, Laws of Maryland 1894, which provided "for the removal of the county seat of Charles County from Port Tobacco to La Plata or Chapel Point, if the legal and qualified voters of said county shall so determine". By terms of the Act, the question submitted to the voters was whether the county seat should be located at La Plata or Chapel Point—the direct question of whether the county seat should be removed from Port Tobacco was not submitted. The appellants argued that the Act, by not first deciding whether the county seat should be removed at all, was not a perfected law, improperly conferring on the voters discretion as to what the law should be. The Court rejected this argument, holding that the Act as passed by the General Assembly—and, therefore, the question as submitted—inferentially provided for the removal of the county seat from Port Tobacco.

Unlike the law at issue in *Hamilton*, however, the draft bill involving the unification of Takoma Park leaves to the discretion of the voters of Takoma Park the issues both of whether the boundary line between Prince George's and Montgomery Counties is to be altered at all, and, if so, how it is to be changed. Accordingly, it is the vote that will make or alter the law, rather than simply give effect (or not) to the prescriptions of the law. The draft bill, therefore, is not complete, because the General Assembly will not have exercised its discretion and judgment about the expediency of the change in the boundary between the two counties.

For these reasons, it is our opinion that the draft bill, were it to be enacted, would be an unconstitutional delegation of legislative authority to the voters of Takoma Park.

III

Implementation Issues

Finally, we suggest that any bill on this subject take account of the legal complexities of implementing a boundary line change between two counties.

A. *Legislative Precedent*

First, we note that prior acts of the General Assembly involving such changes have themselves incorporated various express implementation provisions. These acts should be considered for guidance on the subject. *See, e.g.*, the following:

> Chapter 212, Laws of Maryland 1872 (officers to hold over; rights and privileges of the inhabitants of the county created; claim and interest in county buildings and other public property; liability for existing debts and obligations; payment of county taxes);
>
> Chapter 98, Laws of Maryland 1888 (applicability of alcoholic beverage, building code, and other public local laws after annexation; ownership and valuation of roads, fire and school property, water and sewer pipes; election precincts; congressional and legislative districts; rate and collection of taxation; school teachers to retain positions);
>
> Chapter 82, Laws of Maryland 1918 (applicability of the public local laws after annexation, including alcoholic beverage laws; voter registration; legislative and congressional districts; taxation; payment for or maintenance of police force, fire department, public highways, public schools, and other governmental functions and property transferred; taxing districts

and tax assessments; school teachers; capital improvements; water and sewerage disposal contracts; criminal and civil jurisdiction; officers to hold over);[9]

Chapter 264, Laws of Maryland 1918, supplementing Chapter 82, Laws of Maryland 1918 (regulating and licensing of horse racing);

Chapter 283, Laws of Maryland 1918, supplementing Chapter 82, Laws of Maryland 1918 (responsibility for bonded indebtedness);

Chapter 296, Laws of Maryland 1918, supplementing Chapter 82, Laws of Maryland 1918 (providing for membership in Teachers' Retirement Fund);

Chapter 667, Laws of Maryland 1959 (real and personal property taxation).

B. *Judicial Precedent*

We also note for your consideration that several of these and related issues have been litigated in other jurisdictions.

The most common constitutional objection occasioned by laws authorizing the detachment or the annexation of territory is the claimed impairment of contractual obligations, in violation of Article I, Section 10, Clause 1 of the United States Constitution. Although most of the cases involve the enlargement or contraction of municipal boundaries, they are instructive on possible issues that might be addressed in legislation proposing to alter the boundary between Montgomery and Prince George's Counties.

1. *Bondholders' Rights*

Protection of bondholders' rights is one of the clearest areas of potential contractual impairment. The security underlying the purchase of municipal bonds is the right to enforce collection by a tax on the property of the territory as it existed at

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[9] Concerning the provision in Chapter 82 that allowed officers residing in the territory to be annexed to hold over until the end of their present terms, this Office advised that Notaries Public did not have to be recommissioned, but would continue to "exercise their functions until the end of their terms as if the Annex Act had not been passed". Letter from Ogle Marbury, Acting Attorney General, to Emerson C. Harrington, Governor (August 26, 1918).

the time the bonds were issued. Statutes diminishing the taxing power of the reduced unit of government, thereby materially impairing its ability to meet its pledge obligations, have been declared unconstitutional. *See, e.g., Board of Education of City of Lincoln Park v. Board of Education of City of Detroit,* 222 N.W. 763 (Mich. 1929). Accordingly, the General Assembly might be advised to incorporate a safeguard provision governing such debts.

2. *Franchises*

The status of franchise contracts granted by the territorily diminished or expanded unit of local government is also problematic. Courts have held that, when a franchise requires a third party to perform services within a designated area (e.g., garbage collection, water and sewer services, public utilities, transportation), subsequent annexation may render the obligation burdensome—a statutory impairment of contractual rights. *Georgia Railway and Power Co. v. Town of Decatur,* 262 U.S. 432 (1923); *Detroit United Railway v. Michigan,* 242 U.S. 238 (1916). *But see Peterson v. Tacoma Railway and Power Co.,* 111 P. 338 (Wash. 1910) (contract held to have contemplated expanded municipal boundaries).

In *Delta Electric Power Ass'n v. Mississippi Power and Light Co.,* 149 So.2d 504 (Miss. 1963), *appeal dismissed,* 375 U.S. 77 (1963), a refusal to extend a corporate franchise and street lighting contract to an annexed area was based in part on the theory that the municipality, as a creature of the state exercising only delegated powers, had no inherent power to authorize the expansion of a franchise to territory over which the city had no jurisdiction at the time the franchise contract was signed. Other cases indicate that franchises held by obligors of the *diminished* county unit are automatically terminated. *See, e.g., Washington Gas Co. of Washington v. City of Bremerton,* 153 P. 2d 846 (Wash. 1944).

3. *Liabilities and Assets*

Unlike several other state constitutions, the Maryland Constitution contains no express provision for apportionment of existing liabilities and assets when one county acquires additional territory from another. In the absence of legislative intent to the contrary:

> "Upon general principles of law, as well as upon the reason of the thing, if a part of the territory and inhabitants of a county or town are separated from it, by annexation to another, or by the creation of a new county, as in the present instance, the remaining part of the county, or town, retains all its property, powers, rights and privileges, and remains subject to all its obligations and duties; unless some express provision be made by the act authorizing the separation. This is a well established principle." *School Commissioners of Wicomico County v. School Commissioners of Worcester County*, 35 Md. 201, 206–07 (1872).[10]

This result follows from the theory that title to and ownership of all assets are vested in a county as a corporate entity, which remains intact despite the severance of a portion of its territory. *Laramie County v. Albany County*, 92 U.S. 307 (1875). Thus, if a legislature fails to exercise its authority to divest title by apportioning property and specified indebtedness, annexation will not automatically result in a transfer of assets or liabilities. *School Commissioners of Wicomico County v. School Commissioners of Worcester County*, 35 Md. 201, 206–07 (1872); *Kings County v. Tulare County*, 51 P. 866 (Cal. 1898).

However, debts contracted and claims reduced to judgment before the separation remain binding on the detached property. *Houston County v. Henry County*, 47 So. 710 (Ala. 1908); *Royal Oak Township v. City of Berkley*, 16 N.W.2d 83 (Mich. 1944); *In re Fremont County*, 54 P. 1073, 1081 (Wyo. 1898). Similarly, liens for special assessments are considered vested property rights, subject to protection by state and federal constitutional provisions that prohibit the impairment of contractual obligations and the taking of property without due process. *Hogan v. Bleeker*, 193 N.E.2d 844 (Ill. 1963).

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[10] *See also Washington County v. Weed County*, 20 P. 273 (Colo. 1889):

> "[T]he old county retains all assets previously owned by it, including rights of action, funds, and other personal property; also all real estate held in proprietary right, save such, if any, as may be within the territory taken away; it likewise remains bound by its existing contracts, and is subjected to the burden of discharging all existing obligations and liabilities. The new county receives none of the assets, and assumes none of the burdens."

4. *Planned Improvements*

Another related issue is whether the annexing area has the authority to abandon improvements contemplated by the diminished unit. In *City of Chicago v. Weber*, 91 Ill. App. 561 (1901), the court dismissed a challenge to the annexing city's abandonment of a planned improvement project. The court found that the annexing municipality inherited the exclusive prerogative to continue or terminate construction plans in the new area. If appropriate, the General Assembly might consider specific provisions on the authority of the annexing jurisdiction to object to planned improvements.

5. *Utilities*

Although it may be of less concern in the particular boundary change contemplated here, another recurring problem in instances of municipal annexation is the disputed ownership and control of sewer lines and water mains. The litigants are usually the municipal system and a real estate developer in the annexed territory. On a case-by-case basis, the courts have generally upheld the right and duty of a city that has annexed territory to protect the public welfare and safety of the inhabitants of the annexed area and, in so doing, to take control of the water mains and sanitation systems laid in the streets of the newly-acquired territory at the expense of the original property owners. *Trentman v. City and County of Denver, Colo.*, 236 F.2d 951 (10th Cir. 1956) *Royal Oak Township v. City of Ferndale*, 15 N.W.2d 707 (Mich. 1944); *Ford Realty & Construction Co. v. City of Cleveland*, 164 N.E. 62 (Ohio 1928); *City of Beaumont v. Calder Place Corp.*, 183 S.W.2d 713 (Tex. 1944). *But see City of El Cajon v. Health*, 196 P.2d 81 (Cal.Dist.Ct. of App. 1948) (city may not deprive certain users of their connections to a sewer system acquired by acquisition).

6. *Public Employees*

In New York, certain public servants who serviced areas subsequently annexed by New York City apparently enjoyed the benefit of tenured contracts. *Bell v. City of New York*, 61 N.Y.S. 709 (App.Div. 1899). Unlike a "public officer", who is "invested with some portion of the sovereign functions of government" [61 N.Y.S. at 711], a school district librarian was held to be a contractual employee of the annexed municipality; consequently, the annexing City of New York was found to assume the burden of the contract, thereby becoming liable for the librarian's salary. *Cf. People ex rel. Golden v. Roosevelt,* 48 N.Y.S. 1043 (App.Div. 1897) (terms of annexation statute did not vest town policeman with position on city force). Here also, specific consideration by the General Assembly of the status of employment contracts may alleviate future problems.

C. *Summary*

The possibilities for litigation in the area of municipal/county annexation are virtually inexhaustible, especially in the face of legislative silence. For example, who becomes responsible for uncollected tax assessments? What of anticipated State grants allocated on the basis of previous territorial distribution? Who enforces subsequent building code violations? Is any provision to be made for inhabitants of water, sewer, or fire protection districts who have paid for coverage, but who now may be serviceless due to the proposed annexation?

In this regard, we hope that the preceding discussion will assist you in fashioning an appropriate bill that would permit, with as little legal uncertainty as possible, implementation of any future proposal to unify the City of Takoma Park.

IV

Conclusion

In summary, we believe Article XIII, §1 of the Maryland Constitution contemplates that, in a proposed change of county boundary lines, the controlling referendum is to be held only in the area of a county that is to be ceded to another county. Moreover, the Constitution requires that the General Assembly, and not the voters, initially decide which way the boundary is to be changed.

We do not intend to suggest, however, that the General Assembly is precluded from taking other action to assess voter sentiment throughout the whole of Takoma Park. For example, it could first direct placement on the ballot of a question or questions that would elicit the opinion of voters citywide, although without binding effect (i.e., a "straw ballot"). *See* 58 *Opinions of the Attorney General* 282 (1973). The General Assembly could then enact a bill designed to implement the indicated desires of those voters—even though, under Article XIII, §1, it would be required to submit the question for a binding referendum only in the area to be transferred.

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Opinions and Advice

LOCAL GOVERNMENT—CHARTER COUNTIES—MUNICIPALITIES—CONSTITUTIONAL LAW—HOME RULE POWERS—CONFLICTS BETWEEN JURISDICTIONS—COUNTY CHARTER MAY CONDITION EFFECT OF COUNTY LAW IN MUNICIPALITY ON CONSENT OF MUNICIPALITY

October 26, 1982

Mr. C. Lloyd Robbins
Mayor of Cambridge

Mr. Calvin Travers
Dorchester County Commissioner

You have requested our opinion on the constitutionality of §221 of the proposed Charter for Dorchester County. We understand that the proposed Charter will be on the ballot in the November election. Section 221 ("Municipalities") would provide that, subject to certain exceptions:

> "[A] local law enacted in Dorchester County does not apply in any incorporated municipality within the County, unless a particular municipality requests by ordinance the application of any particular local law therein."

The specific issue posed by §221 has not been previously addressed by this Office or the Court of Appeals.[1] Nevertheless, for the reasons given below, it is our opinion that the provisions of §221 would not conflict with applicable constitutional or statutory requirements.

I

Background

Dorchester County, a commissioner county, has undertaken the process of adopting charter home rule under Article XI-A of the Maryland Constitution. A proposed charter, prepared by a charter board, will be submitted to the voters of the County at the November election. *See* Article XI-A, §1A of the Constitution.

[1] Indeed, we know of no charter in this State that contains a provision comparable to §221.

Section 221 of the proposed Charter would provide as follows:

> "MUNICIPALITIES. Except for revenue measures that the County is otherwise authorized by law to enact for applicability throughout the County and except [as] otherwise expressly provided by Public General Law, *a local law enacted by Dorchester County does not apply in any incorporated municipality within the County, unless a particular municipality requests by ordinance the application of any particular local law therein.*" (Emphasis added.)

The issue is whether the emphasized language is consistent with the constitutional requirements governing the allocation of legislative authority between a charter county and municipal corporations located in that county.

Under Article XI-A, §3 of the Maryland Constitution:

> "Every [county] charter . . . shall provide for an elective legislative body in which shall be vested the law-making power of said . . . County . . . . [S]ubject to the Constitution and Public General Laws of this State, [the County Council] shall have full power to enact local laws of said . . . County . . . upon all matters covered by the express powers granted [by the General Assembly]; provided that nothing herein contained shall be construed to authorize or empower the County Council of any County in this State to enact laws or regulations for any incorporated town, village, or municipality in said County, on any matter covered by the powers granted to said town, village, or municipality by the Act incorporating it . . . . "

The Express Powers Act, Article 25A, §5 of the Maryland Code, implements Article XI-A of the Constitution, by conferring on a charter county broad "police powers", as well as authority to enact local laws on a number of specified subjects. The Act contains no provision that expressly addresses the role of municipal corporations in a county's legislative process.

The Court of Appeals has held that, in implementing its express powers, the council of a charter home rule county is empowered to enact countywide legislation effective in all municipal corporations within the county. *Town of Forest Heights v. Frank*, 291 Md. 331, 341–46 (1981).[2] When the county has so acted, its legislation prevails over conflicting municipal enactments, unless the General Assembly prescribes differently by public general law. 291 Md. at 350–51.[3]

The question here is whether a charter county may, as in §221 of the proposed Dorchester County Charter, adopt a different legislative relationship between the County and its municipalities than that described in *Frank*. We believe that it may: The essence of charter home rule—which vests "full power to enact local laws" in the County Council—is that a charter county's legislative authority be exercised by its county council; in our view, this requirement would not be violated by §221 of the proposed Charter for Dorchester County.[4]

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[2] The Court held that the proviso in Article XI-A, §3 regarding municipalities merely means that a "home rule county may not enact a law solely for, and limited to, a particular municipality or particular municipalities if the municipality had power to legislate regarding the matter". 291 Md. at 346.

In this regard, §221 would impose a broader restriction than does the proviso in Article XI-A, §3. Although the proviso allows automatic applicability of a countywide ordinance to all local municipalities, §221 would preclude that result. Absent a municipality's individual consent, a countywide ordinance adopted under §221 would *not* apply in that municipality—even if the municipality did not itself have home rule power to legislate on the same matter.

[3] We previously have summarized the present statutory scheme as follows:

> "At present, the General Assembly has effectively provided by statute [Article 23A, §2 of the Maryland Code] that, as a general rule, a charter county ordinance prevails over a conflicting municipal ordinance. The General Assembly is free to amend that statutory rule by a public general law, and it would not be necessary to amend the Constitution for this purpose." 67 *Opinions of the Attorney General* 254, 256 (1982).

[4] A recent case, *Hardy v. Housing Management Co.*, 293 Md. 394 (1982), illustrates a similar, albeit distinguishable, approach. *Hardy* involved a county ordinance that, by its own terms, did not apply "in any incorporated town, village or other municipality which by law has authority to enact a law on the same subjects . . . [unless such a municipality] shall adopt [the ordinance] and request the county to enforce the provisions thereof within its corporate limits". The ordinance had substantially the same effect, within its more limited scope, as §221 would have in general. However, the limitation contained in the ordinance was a result of the county council's own exercise of its

(cont'd)

II

Analysis

Under §221, the Dorchester County Council's authority to enact whatever legislation it deemed necessary, within the confines of the Express Powers Act, would not be diminished. Rather, §221 would simply add a precondition to the applicability of such legislation in the municipal corporations in the county: the local law would not take effect in a municipality unless that municipality so requested. Such a condition on the implementation of otherwise unfettered legislative authority is, we believe, constitutionally permissible.

Indeed charter provisions granting to others a role in determining the effectiveness of legislation already have been sustained by the Court of Appeals. In *Ritchmount Partnership v. Board of Supervisors of Elections*, 283 Md. 48 (1978), the Court considered the constitutionality of §308 of the Anne Arundel County Charter, which conferred on the citizens of that county the right to petition ordinances to referendum. The plaintiff, aggrieved by the rejection of a zoning ordinance at referendum, contended that the referendum provision of the charter unconstitutionally infringed upon the "plenary" power of the County Council. The plaintiff argued that the language of Article XI-A, §3, vesting "the law-making power" in the County Council, meant that no other entity could exercise any role in the legislative process.

The Court of Appeals rejected this argument in language that we find relevant to the question presented by §221:

> "No attempt was made by the framers [of the Constitution] to confine the power to legislate exclusively to the council. There is nothing in this clause which would purport to prohibit the exercise of some portion of this power by the people. . . .

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discretion—and, presumably, the council would likewise have the same discretion to remove the limitation, at any time, by simply amending the ordinance. Section 221, in contrast, would effectively deprive the county council of all such discretion. Moreover, the Court of Appeals in *Hardy* was not asked to address the constitutionality of the ordinance. For these reasons, *Hardy* is not directly relevant to the question raised by §221. Nonetheless, the case does suggest the permissibility of legislative alternatives to the kind of county-municipal conflicts described in *Frank*.

> Section 3 undoubtedly requires that the council be the primary legislative organ; it does not altogether preclude the existence of other entities with coordinate legislative powers.
>
> . . .
>
> Thus, while Article XI-A, §3 bestows upon the county council ample and complete power to legislate within the limits set forth in the Express Powers Act, it does not necessarily confer the exclusive power to do so." 283 Md. at 62–63.[5]

Just as §308 of the Anne Arundel County Charter permitted the electorate, by referendum, to prevent the implementation of a local law enacted by the council, so, too, §221 of the proposed Dorchester County Charter would permit each municipal corporation to prevent the implementation within its boundaries of a local law enacted by the council.

Referendum by petition, to be sure, is a negative device—that is, a law enacted by the county council becomes effective unless the voters act negatively, by rejecting it at referendum. The procedure in §221, on the other hand, gives the municipalities a more positive role—that is, a law enacted by the Dorchester County Council would not become effective within a municipality unless the municipality acts affirmatively, by requesting its application to the municipality. But the constitutional principle identified in *Ritchmount*—that Article XI-A, §3 allows for "other entities with coordinate legislative powers"—applies as much to the latter as to the former. Thus, for example, this Office has held that a charter provision conditioning the effectiveness of a specific class of legislation on approval at referendum would be constitutional under the reasoning of *Ritchmount*, even though that case itself only involved referendum by petition, a more limited form of voter involvement in the legislative process. *See* 63 *Opinions of the Attorney General* 291 (1978).

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[5] The Court of Appeals also rejected the argument that a charter could not contain a referendum provision unless the Express Powers Act or other public general law so authorized. The Court held that the referendum provision concerns "the form or structure of local government" and, as such, is implicitly authorized by the Constitution itself. 283 Md. at 58–62. Section 221 similarly concerns "the form or structure of local government", as we discuss more fully below.

Moreover, §221 of the proposed Dorchester County Charter would avoid the constitutional defects identified in *Cheeks v. Cedlair Corp.*, 287 Md. 595 (1980). In *Cheeks*, the Court of Appeals invalidated a proposed Baltimore City Charter amendment that would have created a detailed system of rent control. The Court found the proposed amendment to be inconsistent with Article XI-A, §3 of the Maryland Constitution. The amendment, an attempt to exercise the City's police powers through charter amendment, "would constitute an unlawful extension or enlargement of the City's limited grant of express powers and would violate the constitutional requirement that those powers be exercised by ordinance enacted by the City Council." 287 Md. at 609. Furthermore, if the charter amendment process permitted legislation of this kind, "[such an] exercise of the legislative initiative power [would] completely circumven[t] the legislative body, thereby totally undermining its status as the primary legislative organ." 287 Md. at 613.

By contrast, §221 is not itself an attempt to legislate in any way. Instead, it merely specifies the conditions under which future legislation will become effective within the municipal corporations in Dorchester County. As such, it is an element of the "broad organizational framework establishing the form of and structure of government in pursuance of which the political subdivision is to be governed and local laws enacted"—the proper content of a county charter, according to *Cheeks*. 287 Md. at 607.

Nor does §221 supplant the county council with another forum for lawmaking. In distinguishing the referendum provision held proper in *Ritchmount* from the initiative measure held invalid in *Cheeks*, the Court wrote of the former: "Under the referendum power, the elective legislative body, consistent with [Article XI-A,] §3 continues to be the primary legislative organ, for it has formulated and approved the legislative enactment referred to the people." 287 Md. at 613. Here, too, the Dorchester County Council would remain "the primary legislative organ", and, as such, would retain full authority under §221 to "formulat[e] and approv[e]" its legislative enactments.[6]

[6] In essence, as previously noted, §221 merely conditions the degree of effectiveness of those legislative enactments on a certain contingency. In this regard, it is a well-established rule that "[a] statute may take effect upon the happening of a contingency, such as the passage of a law in another jurisdic-

(cont'd)

III

Conclusion

In summary, it is our opinion that the provisions of §221 of the proposed Dorchester County Charter would not conflict with applicable constitutional or statutory requirements. Thus, except as otherwise specified in §221, local laws enacted by the new County Council would not apply in any incorporated municipality without the consent of that municipality's own legislative body.

STEPHEN H. SACHS, *Attorney General*

JACK SCHWARTZ, *Assistant Counsel, Opinions and Advice*

AVERY AISENSTARK
Chief Counsel,
Opinions and Advice

Editor's Note: Since the issuance of this Opinion, the General Assembly enacted Chapter 398, Laws of Maryland 1983, for the purpose of "providing the conditions under which legislation enacted by a county does not apply in municipalities located in the county". The new law, effective January 1, 1984, is now codified at Article 23A, §§2(a), 2B, and 2C.

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tion, or a vote of the people." 2 *Sutherland, Statutory Construction* §33.07 at 11 (C. Sands 4th ed. 1973). *See generally* 67 *Opinions of the Attorney General* 279, 290-93 (1982) (distinguishing permissible contingency from unconstitutional delegation). *Cf. Telford v. City of Gainesville*, 65 S.E.2d 246 (Ga. 1951) (no unconstitutional delegation in statute that created a housing authority in each locality but made the functioning of each such authority contingent upon each locality's determination of need).

LOCAL GOVERNMENT—MUNICIPALITIES—LICENSING AND REGULATION—FEES—BUSINESSES AND PROFESSIONS—PREEMPTION—CONFLICT—SCOPE OF MUNICIPAL AUTHORITY TO LICENSE AND IMPOSE FEES UPON BUSINESSES AND PROFESSIONS

November 9, 1982

Edward D. E. Rollins, Jr., Esq.
Town Attorney,
Town of Elkton

You have requested our opinion on the scope of municipal authority to license and impose fees upon businesses and professions operating within the corporate boundaries of the Town of Elkton.

As explained more fully below, it is our opinion that, even to the extent that a municipal corporation may have general authority to license and otherwise regulate various businesses and professions, it may only exercise that authority to the extent that such regulation is not preempted by or in conflict with public general or public local laws. A blanket municipal ordinance, such as that contemplated by the Town of Elkton, would be problematic because of existing legislation that already applies to and regulates many of the same businesses and professions. Accordingly, the decision to license a given business or profession is best made on a case-by-case basis.

In order to answer your query fully, it is appropriate to consider the following issues:

(1) Whether, under existing public general and public local laws, the Town of Elkton has sufficient enabling authority to enact licensing regulations; and

(2) Whether preexisting legislative action in the area of licensing preempts or creates unavoidable conflict with municipal regulation of businesses and professions operating within corporate boundaries.

I

Municipal Enabling Authority

According to Article XI-E, §3 of the Maryland Constitution, each municipal corporation in Maryland is vested with "the power and authority . . . to amend or repeal an existing charter or local laws relating to the incorporation, organization, government, or affairs of said municipal corporation heretofore enacted by the General Assembly of Maryland". Article XI-E §6, in turn, imposes the condition that "[a]ll charter provisions, or amendments thereto, adopted under the provisions of this Article, shall be subject to all applicable laws enacted by the General Assembly".

These clauses of the Maryland Constitution are implemented by Article 23A, §2 of the Maryland Code, which begins with the following:

> "The legislative body of every incorporated municipality in this State, except Baltimore City, by whatever name known, shall have general power to pass such ordinances *not contrary to the public general or public local laws* and the Constitution of Maryland as they may deem necessary in order to assure the good government of the municipality, to protect and preserve the municipality's rights, property, and privileges, to preserve peace and good order, to secure persons and property from danger and destruction, and to protect the health, comfort and convenience of the citizens of the municipality." (Emphasis added.)

When Article 23A, §2 is read in conjunction with Article XI-E of the Maryland Constitution, it is clear that, despite the delegation of legislative authority, municipal corporations may not exercise power in a fashion that is: (i) inconsistent with any applicable public general or public local law enacted by the General Assembly, *see Commissioners of Cambridge v. Cambridge Water Co.*, 99 Md. 501 (1904); or (ii) inconsistent with any applicable countywide law enacted by a charter county, *see Town of Forest Heights v. Tillie Frank*, 291 Md. 331 (1981).[1]

The ability of a municipal corporation to regulate businesses or professions is expressly circumscribed, at least in part, by

[1] We recognize, of course, that Cecil County, in which the Town of Elkton is located, is a commissioner county, not a home rule charter county. Whether and to what extent an ordinance enacted by county commissioners affects municipal legislative authority has not yet been similarly addressed by the Maryland Court of Appeals.

the provisions of Article 56, §12 of the Maryland Code. In pertinent part, §12 prohibits a municipal corporation from requiring any business or occupation already subject to State licensure under Article 56 to pay fees or obtain permits in order to transact business within corporate boundaries, except "where necessary for regulatory purposes in the interest of the public health, safety or morals".[2]

The clause last quoted seems to affirmatively authorize municipal corporations to require additional, municipal permits "where necessary" to promote the public interest. Nevertheless, the Maryland Court of Appeals has suggested that this clause may be merely an exception, not an affirmative grant of authority. *Campbell v. City of Annapolis*, 289 Md. 300, 311 (1981). In *Campbell*, the Court held that a $10 license fee imposed by a municipal corporation on residential rental dwellings contravened Article XI-E, §5 of the Maryland Constitution.[3] Refuting the City's attempt to justify its license fee

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[2] Article 56, §12 states:

> "Except as otherwise expressly provided in this article, no county, city or other political subdivision of this State shall require any person, firm or corporation to obtain a permit or license to transact in such county, city or other political subdivision, any business or occupation for which it or he is required to obtain a State license under the provisions of this article, nor shall any county, city or other political subdivision of this State levy any occupational tax or fee upon such person, firm or corporation for transacting any such business or engaging in any such occupation for which such State license is required. Notwithstanding the provisions of this section, any county, city or other political subdivision of this State may require permits or licenses to be obtained where necessary for regulatory purposes in the interest of the public health, safety or morals. The provisions of this section shall not be deemed to be repealed by any local act hereafter passed unless expressly referred to and expressly repealed in terms. Provided, however, that the provisions of this section shall not apply to Prince George's County, Baltimore City or Worcester County."

[3] In pertinent part, Article XI-E, §5 of the Maryland Constitution provides as follows:

> "No . . . municipal corporation shall levy any type of tax, license fee, franchise tax or fee which was not in effect in such municipal corporation on January 1, 1954, unless it shall receive the express authorization of the General Assembly for such purpose, by a general law which in its terms and its effect applies alike to all municipal corporations in one or more of the classes provided for in Section 2 of this Article."

under this particular clause of Article 56, §12, the Court stated, first, that the language of the clause was but "an exception to a particular prohibition" and "not an affirmative grant of power"; and, second, that, even if viewed as a grant of authority, "the statutory language itself would indicate that it is merely a power to license and not to collect fees". 289 Md. at 311.

In 1981, the General Assembly enacted Article 23A, §2(32) and (33) as an emergency response to the Court's decision in *Campbell.*

Through this enactment, the General Assembly sought to restore to municipal corporations the broad authority "heretofore thought to exist" to levy fees and charges in connection with the exercise of their lawful powers. *See* Bill Review Letter (Senate Bill 751) from Stephen H. Sachs, Attorney General, to Harry Hughes, Governor (May 14, 1981).[4] Subsections (32) and (33) thus may be considered enabling legislation that confers authority on a municipal corporation to collect "reasonable" fees and charges from businesses and occupations, but only, in the words of the statute itself, with respect to "franchises, licenses, or permits [otherwise] authorized by law to be granted by a municipal corporation"—i.e., only to the extent that the municipal corporation is "exercis[ing] the licensing authority [elsewhere] granted in Article 56 and other provisions of law".

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[4] Article 23A, §2(32) and (33) provides:

> "In addition to, but not in substitution of, the powers which have been, or may hereafter be, granted to it, [the] legislative body [of every incorporated municipality in this State] also shall have the following express ordinance-making powers:
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> . . .
>
> (32) To exercise the licensing authority granted in Article 56 and other provisions of law.
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> (33) Subject to the limitations imposed by the provisions of Article 81, to establish and collect reasonable fees and charges:
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> (i) For the franchises, licenses, or permits authorized by law to be granted by a municipal corporation; or
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> (ii) Associated with the exercise of any governmental or proprietary function authorized by law to be exercised by a municipal corporation."

In this context, we note that there is a distinction between licensing fees based on regulatory costs and those imposed for revenue-raising purposes. This distinction is particularly relevant when Article 23A, §2(32) is used in conjunction with the exception contained in Article 56, §12, with regard to entities otherwise licensed under Article 56. Under Article 56, §12, a key restraint upon a municipal corporation's ability to impose permit requirements is the caveat that such requirements may be imposed only "where necessary for *regulatory purposes* in the interest of the public health, safety or morals".

Authority delegated to a municipal corporation to "regulate" or to "license and regulate" under its police powers does not include the authority to impose a license tax or fee to raise revenue that bears no reasonable relation to the expense of regulation—i.e., that is not reasonably related to the "costs attendant upon the expense, trouble and labor of licensing and supervising". *Vansant, Comptroller v. The Harlem Stage Company of Baltimore City,* 59 Md. 330, 335 (1882). The court in *Vansant* upheld an ordinance imposing license fees on certain commercial vehicles, but cautioned that whenever a license fee exacted as a police regulation incidentally benefits the public treasury:

> "[T]he Court must see . . . that the requirement of fees for the exercise of privileges is a *reasonable* exercise of power of legislation granted the corporation. If under the guise of licensing and regulating, the municipal corporation should attempt to raise revenue, or clearly violate the rule requiring a reasonable exercise of its powers, the Courts will declare such ordinance unlawful and void." *Id.* (Emphasis in original.)

That Article 23A, §2(33) authorizes only the collection of "*reasonable* permit fees and charges" also underscores the need for restraint in the exercise of municipal licensing authority.

II

Preemption/Conflict

Furthermore, as we noted earlier, municipal ordinances passed pursuant to the general powers granted by Article 23A must be harmonized with existing public general and public local law. Absent an express delegation to a municipal corporation of specific authority to regulate or license a particular activity, one must assess the proposed municipal regulation in light of the judicial doctrines of preemption and conflict. Local laws may not be given effect if they are preempted by or in conflict with public general or public local law.

A. *Preemption*

In general, preemption occurs either when the General Assembly has expressly stated its intent to occupy exclusively a specific field of legislation or when a court is able to infer, from a patterned approach to the subject, an implied intent on the part of the legislature to occupy exclusively the field. *See McCarthy v. Board of Education of Anne Arundel County,* 280 Md. 634 (1977); *County Council for Montgomery County v. Montgomery Ass'n, Inc.*, 274 Md. 52 (1975); 65 *Opinions of the Attorney General* 136 (1980). When State law contains extensive provisions that comprehensively regulate a given field or profession, preemption of comparable local legislation will likely occur. The effect of such preemption is to preclude local legislation in that field, even though it may otherwise be within the political subdivision's general legislative powers. 63 *Opinions of the Attorney General* 377, 392 (1978).

Maryland courts have examined the nature of statewide legislation regulating various trades and professions on several different occasions, including *State v. Knowles*, 90 Md. 646 (1900) (dentists); *Aitchison v. State*, 204 Md. 538 (1953) and *Scholle v. State*, 90 Md. 729 (1900) (physicians); *State v. Broadbelt,* 89 Md. 565 (1899) (dairymen); *Singer v. State*, 72 Md. 464 (1890) (plumbers).

Given judicial recognition of the General Assembly's authority to enact statutes that regulate the conduct of businesses and professions affecting the public health and welfare, the courts may well find such statewide legislation to be preemptive of local legislation, at least where a comprehensive statutory scheme is apparent.

B. *Concurrent Powers*

In contrast to the doctrine of legislative preemption, there exists the concurrent or supplemental power theory. Under this latter theory, both the General Assembly (or, in its stead, a charter county) and a municipal corporation may legislate, without conflict, on the same subject. *Billig v. State of Maryland*, 157 Md. 185, 191-93 (1929). *See also American Nat'l Bldg. and Loan Ass'n v. Mayor and City Council*, 245 Md. 23 (1966).

Thus, for example, even though the State has enacted a public general law governing a particular business or occupation, that does not necessarily prohibit a political subdivision from enacting additional regulations that further that public general law's function. *Mayor and City Council of Baltimore v. Sitnick*, 254 Md. 303, 311, 315-19 (1969). *See also City of Baltimore v. Stuyvesant Insurance Company*, 226 Md. 379 (1960). As a general rule of judicial construction, where such municipal ordinances are enacted pursuant to competent authority, "they should be upheld by every reasonable intendment, and reasonable doubts as to the validity of an ordinance should be resolved in its favor". *Eastern Tar Products Corp. v. State Tax Commission*, 176 Md. 290, 297 (1939). *See also McBriety v. Baltimore City*, 219 Md. 223, 233 (1958); *Town of Bladensburg v. Berg*, 216 Md. 292, 296-99 (1958).

Nevertheless, as discussed below, concurrent municipal authority must be exercised with care so as not to conflict with or unduly impinge upon existing public general or public local law.

C. *Conflicts*

Despite concurrent municipal authority, a municipal corporation may not legislate in a fashion that conflicts with public general or public local law.

Irreconcilable conflict will result when a county or municipal corporation purports to prohibit that which State law expressly permits, or purports to permit that which State law prohibits; in such cases, the local law is invalid. *Mayor and City Council of Baltimore v. Sitnick*, 254 Md. 303, 317 (1969); *Rossberg v. State*, 111 Md. 394, 416 (1909).

The same rule applies as to potential conflict between municipal ordinances and legislation enacted by a charter county. For example, in *Town of Forest Heights v. Tillie Frank*, 291 Md. 331 (1981), the Maryland Court of Appeals invalidated a municipal ordinance that prohibited all fortunetelling within town limits. After examining the language of a county licensing statute that entitled an individual to practice fortunetelling at a designated location on completion of the application, the Court stated: "[A] county license provides affirmative authorization to tell fortunes. It is in direct conflict with the prohibition on fortunetelling contained in the municipal ordinances at issue here." 291 Md. at 338. The Court further observed: "[M]atters that may be popularly viewed as 'local' are actually controlled by public general laws enacted by the General Assembly. . . . Many 'local' licenses fall within this category." 291 Md. at 345.[5]

In *City of Baltimore v. Stuyvesant Insurance Company*, 226 Md. 379 (1960), the "irreconcilable conflict" test was applied to bail bond licensing legislation. The municipal ordinance was invalidated to the extent that it regulated topics already covered by State insurance laws in Article 48A. However, to the extent that the State did not license or regulate particular classes of bail bondsmen by public general law, the municipal ordinance was held to be a valid exercise of police power by the Mayor and City Council.

III

Conclusion

In summary, where a municipal corporation is authorized by public general or public local law to license or regulate a particular business or profession, the municipal corporation may impose reasonable fees and charges under the authority granted by Article 23A, §2(32) and (33).[6] Where the business or occupation is already licensed by the State under Article 56,

[5] In its footnote, the Court detailed the nature of the General Assembly's control over certain licensees, such as traders of all types, private detectives, employment agencies, restaurants, plumbers, storage warehouses, and so on. That the Maryland Court of Appeals has found such licensing activity to be significantly "controlled" by existing public general law indicates a potential for conflict to the extent that municipal law requires additional pre-operative payments from State-licensed enterprises. *See also* 63 *Opinions of the Attorney General* 377, 388 (1978).

[6] In this regard, we again emphasize that Article 23A is not itself an independent grant of licensing/regulatory powers: It merely authorizes a municipal corporation to impose fees and charges in connection with the exercise of licensing authority that elsewhere has been granted to it by law.

then—absent express authority to the contrary—the municipality may only require a permit "where necessary for regulatory purposes in the interest of the public health, safety or morals".

Furthermore, a municipal corporation may not legislate in an area that has been expressly or implicitly preempted by the State legislature, whether the business or profession is regulated under Article 56 or elsewhere. Finally, even absent preemption, a municipal corporation may not use its licensing authority to permit that which State law prohibits or to prohibit that which State law expressly permits.

In closing, then—even assuming that the Town has general power to enact reasonable licensing requirements—we fear that the indiscriminate application of a blanket ordinance requiring the licensure of *all* businesses and professions in the Town would likely be held invalid as applied to many of those businesses and professions, given existing Statewide law already regulating the very same activities.[7]

STEPHEN H. SACHS, *Attorney General*

AVERY AISENSTARK, *Chief Counsel, Opinions and Advice*

LYNETTE M. PHILLIPS, *Staff Attorney*

Editor's Note: The preceding Opinion was originally written as a letter of advice. Because of the general guidance provided, however, it is published here in a slightly revised format.

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[7] If you should have questions as to the status of current State regulation of a particular business or occupation, counsel at the appropriate State agency will be happy to assist you.

LOCAL GOVERNMENT—HANDGUNS—AMMUNITION—PREEMPTION—STATE LAW GOVERNING HANDGUNS PREEMPTS LOCAL LEGISLATION DESIGNED TO REGULATE THE POSSESSION OR SALE OF HANDGUN AMMUNITION

December 10, 1982

The Honorable Thomas Patrick O'Reilly
Senate of Maryland

Stephen P. Elmendorf, Esq.
Assistant County Attorney for Montgomery County

You have each requested our opinion on the authority of local governments to enact legislation that would ban or restrict the possession or sale of handgun ammunition. Mr. Elmendorf has specifically requested our views on the legality of: (i) a proposed Montgomery County ordinance to restrict the sale of handgun ammunition in Montgomery County; and (ii) a regulation adopted by the Friendship Heights Village Council to ban the possession of ammunition in the Villages of Friendship Heights and the Hills, a "special tax area or district" under the Montgomery County Code. Both of these measures are pending before the Montgomery County Council.

For the reasons given below, it is our opinion that State law generally preempts the authority of local governments to regulate either the possession or the sale of handgun ammunition. Accordingly, it is our view that, as to handgun ammunition, neither the proposed Montgomery County ordinance nor the Friendship Heights regulation could, if enacted, be lawfully enforced.[1]

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[1] We have benefited from the ably presented, albeit differing, views on this matter from the County Attorney and the attorney for Friendship Heights. Although this Opinion does not expressly review every point raised in their exchange of views, we nevertheless have carefully considered their respective analyses during the preparation of this Opinion.

One related issue considered by these attorneys involved the underlying scope of the regulatory authority or police powers of a special tax district such as the Villages of Friendship Heights and the Hills. Given our conclusion here, which is based on the preemptive nature of the State law governing handguns, we need not address that issue in this Opinion.

I

Local Proposals

A. *Friendship Heights*

The Friendship Heights Village Council seeks county approval of a regulation to ban the possession of all ammunition within the tax district. The only exceptions would be for law enforcement and military personnel, licensed ammunition dealers, and persons who have State permits to carry a handgun.

The Friendship Heights regulation would also prohibit anyone other than a federally licensed ammunition dealer from selling ammunition.[2] Moreover, a sale could lawfully be made only to a person who can show proof that he or she falls within one of the exceptions to the regulation's broad ban on possession.

B. *Montgomery County*

A bill now pending before the Montgomery County Council would impose certain restrictions on the sale of handgun ammunition, but none directly on possession.

All ammunition dealers in the county would be required to register with the county police. In order to purchase ammunition, a person would be required to appear in person, present a valid firearm registration certificate (or, in the case of a nonresident, proof that the firearm is lawfully possessed), and purchase only ammunition of the same caliber as the registered firearm.

Although registration of firearms is merely voluntary in Maryland, the ordinance would effectively require all handgun owners to register their weapons so as to be able to purchase ammunition in the county.

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[2] A dealer who wishes to sell firearms or ammunition must obtain a license to do so from the Treasury Department. 18 U.S.C. §923. Maryland has a more rigorous licensing procedure for handgun dealers. Article 27, §443 of the Maryland Code. However, the State does not separately license ammunition dealers.

II

State Law

Maryland law contains detailed regulation of the possession and sale of handguns.

Under Article 27, §36B(b) of the Maryland Code, it is generally unlawful to "wear, carry, or transport any handgun". However, there are numerous exceptions to this prohibition. A private citizen may carry a handgun if he or she has a permit to do so [Article 27, §36B(c)(2)]; if the handgun is carried "within the confines of real estate owned or leased by him or upon which he resides or within the confines of a business establishment owned or leased by him" [Article 27, §36B(c)(4)]; or if the handgun is unloaded and is being transported from place to place [Article 27, §36B(c)(3)]. There is no requirement in State law that a gun owner register a firearm. However, the Maryland State Police conducts a voluntary registration program.[3]

Article 27, §442 imposes certain restrictions on the sale of handguns.[4] Approval of an application by the State police is a prerequisite to the purchase of the weapon. Under §443, only licensed dealers may sell handguns.

State law contains three separate preemption provisions concerning local handgun restrictions. One deals with "possession":

> "All restrictions imposed by the laws, ordinances or regulations of all subordinate jurisdictions within the State of Maryland on possession or transfers by private parties of pistols and revolvers are superseded by this section and *the State of Maryland hereby preempts the right of such jurisdictions to regulate the possession and transfer of pistols and revolvers.*" Article 27, §445(a) (emphasis added).

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[3] This program is not mandated by law. Thus, the proposed county ordinance, which conditions ammunition purchases on gun registration, incorporates a procedure that could be discontinued at any time.

[4] Section 442 applies to "pistols and revolvers", which are defined as firearms "with barrel[s] less than twelve inches in length". Article 27, §441(c). For convenience, we refer to these simply as "handguns".

The legislation that enacted the current State restrictions on the "wearing, carrying, or transporting" of handguns contains similar preemptive language:

> "[A]ll restrictions imposed by the law, ordinances, or regulations of the political subdivisions on the wearing, carrying, or transporting of handguns are superseded by this Act, and *the State of Maryland hereby preempts the right of the political subdivisions to regulate such matters.*" Chapter 13, §6, Laws of Maryland 1972 (emphasis added).

Finally, a similarly worded preemption provision has been enacted with respect to "sales":

> "All restrictions imposed by the laws, ordinances or regulations of all subordinate jurisdictions within the State of Maryland on sales of pistols or revolvers are superseded by this section, and *the State of Maryland hereby preempts the rights of such jurisdictions to regulate the sale of pistols and revolvers.*" Article 27, §442(a) (emphasis added).

III

Scope of Preemption

It is obvious that the local legislative proposals in question would be preempted if they directly restricted possession or sale of handguns. In our view, State law mandates the same result with respect to restrictions on handgun ammunition.

Ammunition is an integral element of a handgun. Indeed, the ability to detonate and propel projectile ammunition is the very factor—the *sine qua non*—that distinguishes firearms from other devices. *Howell v. State*, 278 Md. 389 (1976); 61 *Opinions of the Attorney General* 647 (1976). *See also* Article 27, §441(g) (defining "antique pistol or revolver").

The State handgun laws recognize this reality. For example, the law specifies that when one travels between places where one may lawfully carry a handgun even without a permit—e.g., one's home or business—"[the] handgun shall be *unloaded* and carried in an enclosed case or enclosed holder". Article 27, §36B(c)(3) (emphasis added). This requirement strongly suggests that the General Assembly intended the converse as well: persons who are at a place where they may lawfully carry handguns without a permit, like their homes or businesses, may also load them with ammunition—the very element that renders the handguns operable as such.

The provisions of State law that preempt local regulation of handguns can only be effectuated if they are understood to preempt local regulation of handgun ammunition as well. Conversely stated, local regulation of the possession or sale of handgun ammunition is, in reality, local regulation of handguns—a result expressly prohibited by State law.[5] Indeed, when the General Assembly has wished to restrict access to ammunition, it has enacted such a restriction directly. *See*, Article 27, §406.

IV

Conclusion

In summary, it is our opinion that State law preempts local restrictions on the possession or sale of handgun ammunition such as are embodied in the Friendship Heights regulation and the proposed Montgomery County ordinance.

STEPHEN H. SACHS, *Attorney General*

AVERY AISENSTARK, *Chief Counsel, Opinions and Advice*

Editor's Note: On June 7, 1983, the Montgomery County Council enacted the proposed ammunition control ordinance as Chapter 50 (Council Bill 17–82), Laws of Montgomery County 1983, effective September 6, 1983. In a subsequent lawsuit challenging the validity of that ordinance, the Circuit Court for

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[5] In describing the scope of State preemption with respect to the possession or sale of handgun ammunition, we do not intend to suggest that *all* local firearms regulation, such as regulations governing the discharge of firearms, is necessarily preempted. *See, e.g.*, Article 23A, §2(10) of the Maryland Code; §57-3 of the Montgomery County Code. We do not here address the effect of State law on local regulation other than as expressly discussed above.

Montgomery County noted that the ordinance was "invalid inasmuch as the power to enact such legislation has been preempted by State law". *Atlantic Guns, Inc. v. Montgomery County,* Equity No. 85854 (Cir. Ct. for Mont. Co., Opinion and Order filed October 27, 1983). A review of that trial court decision is now pending before the Court of Appeals. *Montgomery County v. Atlantic Guns, Inc.*, No. 157, September Term, 1983 (Md. Ct. App., cert. granted February 23, 1984).

PERSONNEL

CONSTITUTIONAL LAW—DRUG ABUSE—DISCRIMINATION AGAINST HANDICAPPED—FEDERAL REHABILITATION ACT OF 1973—EQUAL PROTECTION—DUE PROCESS—BARRING DRUG ABUSERS FROM STATE EMPLOYMENT NOT UNCONSTITUTIONAL, BUT MIGHT VIOLATE REHABILITATION ACT

December 22, 1982

The Honorable Robert R. Staab
Maryland House of Delegates

You have requested our opinion on the legality of a proposed procedure to determine whether applicants for State employment are current users of illegal drugs ("drug abusers") and to bar from employment those who are. You describe as follows the procedure that you have recommended to the Secretary of Personnel:

> "My proposal was a urinalysis to be given during the preliminary physical examination: detection of drugs (other than prescribed medications) in the system would result in a temporary hold on that individual's application for employment. Following a thirty-day hiatus, the individual would be re-tested and a negative result would return the application for processing."

Your letter cites the policy concerns underlying your proposal, including absenteeism and poor quality work by drug abusers. You have specifically asked us to consider the Secretary's authority to adopt your proposal and the potential constitutional or statutory restrictions on the exercise of that authority.

For the reasons given below, we conclude as follows:

(1) Under State law, the Secretary of Personnel has the authority to adopt a rule that would uniformly bar drug abusers from State positions. To implement such a rule, the Secretary would have authority to provide for a process by which to screen all applicants for drug abuse.

(2) With respect to *constitutional* restrictions, an across-the-board employment ban applicable to drug abusers would likely be sustained against a challenge under the Equal Protec-

tion Clause of the Fourteenth Amendment to the United States Constitution. Moreover, while the matter is slightly less certain, such a ban would also likely survive scrutiny under the Due Process Clause of the Fourteenth Amendment.

(3) With respect to *federal statutory* restrictions, an across-the-board employment ban applicable to drug abusers would be contrary to the federal Rehabilitation Act of 1973. However, that Act would permit a more selective rule, reflecting the needs of particular types of positions or the attributes of particular drug abusers. State statutes prohibiting discrimination against the handicapped do not apply in this context.

We emphasize that our discussion here is confined to the legality of the proposed screening program. Determinations about whether such a program would be feasible or desirable are, at least in the first instance, the responsibility of the Secretary of Personnel, and we do not wish to be understood as addressing those serious policy concerns.

I

Authority of Secretary of Personnel

The Secretary of Personnel has the general authority and duty "to carry out the provisions of [the Merit System law] and to make such rules as he deems necessary or proper to that end. . . . [A]ll such rules shall have the force and effect of law." Article 64A, §11 of the Maryland Code. The Secretary also has specific authority to classify positions "similar in respect to the duties and responsibilities appertaining thereto *and the qualifications required for the fulfillment thereof*". Article 64A, §16 (emphasis added).

Finally, the Secretary has authority to prescribe such testing and investigation of job applicants as may be necessary to determine their fitness for particular positions:

> "Examinations held by the Secretary of Personnel to establish lists of persons eligible for appointment may be written or oral or in the form of a demonstration of skill or any combination of these and shall be of a character fairly to test and determine the relative fitness and ability of candidates actually to

> perform the duties of the class of positions to which they seek to be appointed. Any investigation of training and experience and any tests of technical knowledge, manual skill or physical fitness that in the judgment of the Secretary serves [sic] to this end may be employed." Article 64A, §18(a).

In our opinion, if the Secretary determines that an employee's drug abuse would have consequences incompatible with effective performance in some or all classes of State positions, he would have authority under these statutes to establish abstinence from illegal drug use as a qualification for those classes.[1] Moreover, he would have authority to adopt any measure reasonably designed to ascertain whether an applicant meets that qualification or not.[2] If the screening program you propose would do so, the Secretary has statutory authority to adopt it.

II

Equal Protection Requirements

Any State ban on the hiring of drug abusers must comport with the federal constitutional prohibition against a state's "deny[ing] to any person within its jurisdiction the equal protection of the laws". U.S. Const. amend. XIV, §1. We believe that such a ban would likely be sustained against a challenge under the Equal Protection Clause.[3]

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[1] For the reasons discussed in Part V below, however, the Secretary's exercise of this authority to establish an indiscriminate, across-the-board ban would be incompatible with federal law applicable to programs or activities that receive federal financial assistance.

[2] Our view that the Secretary has broad authority to use screening devices is reinforced by the fact that, when the General Assembly determined to prohibit the use of lie detector tests by employers, it included "the government of the State of Maryland" within this specific prohibition. Article 100, §95(a)(2) of the Maryland Code. Such a specific reference would have been unnecessary if the Secretary otherwise lacked authority to require lie detector or other screening tests. There is no comparable prohibition on drug screening.

[3] The ban in question must also comply with the equal protection principle of Article 24 of the Maryland Declaration of Rights. *See generally Attorney General v. Waldron*, 289 Md. 683 (1981). We assume, however, that the Court of Appeals would reach the same result in applying the State equal protection principle to this issue as it would in applying the Equal Protection Clause.

In *New York City Transit Authority v. Beazer,* 440 U.S. 568 (1979), the United States Supreme Court considered the constitutionality of a New York City Transit Authority ("Authority") rule that barred current methadone users from *all* jobs in the subway system.[4] The lower courts had found the rule to be unconstitutionally overbroad: "Because it is clear that substantial numbers of methadone users are capable of performing many of the jobs at [the Authority], the [District C] ourt held that the Constitution will not tolerate a blanket exclusion of all users from all jobs." 440 U.S. at 578.

The Supreme Court reversed, however, finding a constitutionally sufficient rational basis for the Authority's rule. It summarized its equal protection analysis as follows:

> "At its simplest, the District Court's conclusion was that [the Authority's] rule is broader than necessary to exclude those methadone users who are not actually qualified to work for [the Authority]. We may assume not only that this conclusion is correct but also that it is probably unwise for a large employer like [the Authority] to rely on a general rule instead of individualized consideration of every job applicant. But these assumptions concern matters of personnel policy that do not implicate the principle safeguarded by the Equal Protection Clause. As the District Court recognized, the special classification created by [the Authority's] rule serves the general objectives of safety and efficiency. . . . Under these circumstances, it is of no constitutional significance that the degree of rationality is not as great with respect to certain ill-defined subparts of the classification as it is with respect to the classification as a whole. . . .
>
> No matter how unwise it may be for [the Authority] to refuse employment to individual car cleaners, track repairmen, or bus drivers simply because they are receiving methadone treatment, the Constitution does not authorize a federal court to interfere in that policy decision." 440 U.S. at 592–94.

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[4] The rule applied to users of narcotics and certain other drugs. The suit challenging the rule was brought by participants in a methadone maintenance program.

If the Secretary of Personnel adopted a rule barring drug abusers from State jobs for the reasons alluded to in your letter—i.e., because the work quality and absenteeism rate of drug abusers, as a general matter, would not meet State standards—such a rule would be consistent with the equal protection analysis of *Beazer.*[5]

III

Due Process Requirements

A rule barring drug abusers from all State jobs must meet yet another constitutional test: the rule must not "deprive any person of life, liberty, or property, without due process of law". U. S. Const. amend. XIV, §1. The issue posed by the proposed rule is one of "substantive due process"—that is, whether the State's refusal to hire drug abusers would be viewed as an arbitrary exercise of governmental power. We think that such a rule would likely survive this constitutional scrutiny, although the issue is not free from all doubt.[6]

Under the view of the Due Process Clause adopted by the vast majority of federal courts, a person may assert a deprivation of either substantive or procedural due process rights only if he or she claims a cognizable "liberty or property" interest: "[T]he absence of any claim by the plaintiff that an interest in liberty or property has been impaired is a fatal defect in her substantive due process argument." *Jeffries v. Turkey Run*

[5] In *Kindem v. City of Alameda,* 502 F.Supp. 1108 (N.D. Cal. 1980), the court enjoined, on equal protection grounds, enforcement of an ordinance that permanently barred ex-felons from city employment. The court observed that, unlike the ban on the hiring of ex-felons before it, the rule upheld in *Beazer* "only covered current users of methadone, so that a person was not necessarily forever barred from employment with the [Authority] since eligibility returned once he was no longer using methadone". 502 F.Supp. at 1113. The proposed ban in question here would likewise not necessarily forever bar anyone from State employment, because a rejected drug user would be given the opportunity to gain eligibility by stopping his or her drug abuse.

[6] In *Beazer,* the district court had concluded that the Authority's rule violated the Due Process Clause, as well as the Equal Protection Clause. The due process argument was not pressed before the Supreme Court. The Supreme Court nevertheless stated in an unelaborated footnote that "we find no merit in it". 440 U.S. at 592 n. 38.

Consolidated School Dist., 492 F.2d 1, 4 (7th Cir. 1974) (per Stevens, J.). *See also Jolly v. Listerman*, 672 F. 2d 935, 941 (D.C. Cir. 1982); *Clark v. Whiting*, 607 F.2d 634, 641 n. 17 (4th Cir. 1979); *Buhr v. Buffalo Public School Dist. No. 38*, 509 F. 2d 1196, 1201–03 (8th Cir. 1974); *Steinberg v. Elkins*, 470 F. Supp. 1024, 1025 (D.Md. 1979).

"Property interests in employment positions are not created by the Constitution, but rather, are created and their dimensions defined by independent sources such as state law, local ordinances, and employment contracts." *Kersey v. Shipley*, 673 F.2d 730, 732 (4th Cir. 1982). In our opinion, the opportunity to be hired by the State is not a protected "property" interest, because an applicant has no statutory or other entitlement to a position. At most, the applicant has a need, desire, or expectation of a job; these interests are not protected by the Due Process Clause. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). *See Andre v. Montgomery County Personnel Board*, 37 Md. App. 48, 63–64 (1977) (opportunity for promotion not a protected property interest). As the Court of Appeals has summarized; "[T]here is no constitutional right to public employment as such which will be protected against infringement on its own account apart from violation of other constitutional rights." *Montgomery County v. Walsh*, 274 Md. 502, 521 (1975).

In our opinion, a drug abuser who is refused State employment also suffers no impairment of a "liberty" interest within the protection of the Due Process Clause. A cause of action for infringement of liberty arises in this context only if the State acts in some specific way to "effectively foreclose [a person's] opportunities to obtain future employment in his profession", for example by publicly stigmatizing the person. *Mervin v. FTC*, 591 F.2d 821, 828 (D.C. Cir. 1978). Denial of State employment, the explanation for which would presumably not be disclosed to other potential employers, does not itself reduce an applicant's opportunity to obtain a job elsewhere. Thus, the rule in question here would not deprive a drug abuser of any liberty interest protected under the federal Constitution.[7] "It

[7] In *Kindem v. City of Alameda*, discussed in note 5 above, the court held that dismissal of a current city employee, pursuant to an ordinance provision barring the employment of ex-felons, arbitrarily impaired the employee's "liberty interest", because the dismissal coupled "stigma" with "absolute fore-

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stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another." *Board of Regents v. Roth*, 408 U.S. at 575.

However, we caution that a more expansive view of the Due Process Clause, as adopted by a minority of courts, casts some small doubt on the validity of a flat hiring ban. In *Thompson v. Gallagher*, 489 F.2d 443 (5th Cir. 1974), the court held unconstitutional a city ordinance that prohibited persons with less than honorable military discharges from employment with the city. Against the argument that a job with the city represented neither a liberty nor a property interest, the court held that:

> "The Fourteenth Amendment stands for the proposition that the government must act, when it acts, in a manner which is neither arbitrary nor unreasonable. . . . It is one which most certainly applies not only to the government as policeman but also to the government as employer." 489 F.2d at 447.

The court viewed the flat hiring ban as "irrational", in part because the ordinance failed to correlate the basis for a less than honorable discharge with job performance requirements. It is at least conceivable that a skeptical court might reach the same conclusion about the rule you have proposed. *See also Butts v. Nichols*, 381 F.Supp. 573 (S.D. Iowa 1974) (suggesting substantive due process defect in statute barring ex-felons from all state jobs; statute held unconstitutional on equal protection grounds).

Nevertheless, even under the more expansive standard applied in these minority cases, we believe the proposed rule would likely be upheld, given the State interests said to justify it. The substantive due process analysis to be applied to a government classification is comparable to an equal protection analysis. *Beller v. Middendorf*, 632 F.2d 788, 807–08 (9th Cir. 1980); *Bussey v. Harris*, 611 F.2d 1001, 1006 (5th Cir. 1980). Because the proposed rule would comport with the Equal Pro-

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closure from working for the City in which he resides". 502 F.Supp. at 1113. By contrast, the proposed across-the-board ban on the hiring of drug abusers involves no comparable stigma and falls short of an "absolute foreclosure" from State employment, for an applicant refused under the proposed policy could be hired if he or she stopped using drugs.

tection Clause, it should likewise be held consistent with the requisites of substantive due process.[8]

IV

State Prohibition of Discrimination Against Handicapped

Even if a rule barring drug abusers from State employment were constitutional, it could not be adopted if it were inconsistent with statutes prohibiting employment discrimination by the State against the handicapped.

Three such statutes are potentially applicable here. Under Article 49B, §16(a)(1), an employer—including the State—is subject to the following prohibition:

> "*It shall be an unlawful employment practice for an employer* . . . [*t*]*o fail or refuse to hire* or to discharge *any individual*, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's* . . . *physical or mental handicap* unrelated in nature and extent so as to reasonably preclude the performance of the employment". (Emphasis added.)

Article 64A, §12 provides as follows:

> "Notwithstanding any provision of law to the contrary, except as herein provided, *the Secretary shall not hereafter prohibit, prevent, disqualify or discriminate against any person* who is physically and mentally qualified from competing, registering for or participating in a competitive or promotional examination held under the provisions of this article or *from qualifying for a position in the classified service* by reason of his or her age and/or *on account of any physical defect or impairment*, providing such physically impaired person shall produce a certificate from a competent medical doctor certifying that the said physically impaired person is not suffering from any physical defect or impairment which is of such a

[8] *Cf.* note 6 above.

character that would interfere with the physically impaired person performing the duties of the position which the said physically impaired person is seeking." (Emphasis added.)

In addition, Article 64A, §12A imposes the following requirement of equal employment opportunity:

> "*All merit system actions and transactions shall be made without regard to* political or religious opinion or affiliation, marital status, race, color, national origin, sex, *physical or mental handicap*, age, or other nonmerit factors, except when sex, handicap, or age involves a bona fide job requirement." (Emphasis added.)

Neither the term "physical defect or impairment" nor the term "physical or mental handicap" is defined in these two provisions of Article 64A. However, "physical or mental handicap" is defined for purposes of the first of the statutes quoted above, the prohibition of discrimination contained in Article 49B:

> "The term 'physical or mental handicap' means any physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness including epilepsy, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impairment, deafness or hearing impairment, muteness or speech impediment or physical reliance on a seeing eye dog, wheelchair, or other remedial appliance or device; and any mental impairment or deficiency as, but not limited to, retardation or such other which may have necessitated remedial or special education and related services." Article 49B, §15(g).

In 63 *Opinions of the Attorney General* 408 (1978), this Office considered whether alcoholism and drug addiction were included within this definition. The Opinion concluded; "[B]ecause alcoholism and drug addiction are in no way similar to the types of maladies and disabilities listed in [§15(g)], we are unable to say that the General Assembly intended to include them as physical or mental handicaps within the meaning of the antidiscrimination provisions of Article 49B". 63 *Opinions of the Attorney General* at 413.

That Opinion was careful to note that "this interpretation in no way affects other sections of the Code which may recognize that for some purpose (such as services and programs) chronic alcoholics and narcotics addicts are handicapped persons". *Id.* Nevertheless, with respect to the provisions applicable here—§§12 and 12A of Article 64A—we discern no reason why the General Assembly should be understood to have intended a different definition of similar terms, particularly when §§12 and 12A *also* deal with equal employment opportunity. "Unless the context indicates otherwise, words or phrases in a provision that were used in a prior act pertaining to the same subject matter will be construed to be used in the same sense." 2A *Sutherland, Statutory Construction* §51.02 at 290 (C. Sands 4th ed. 1973). *See, e.g., Northcross v. Board of Educ. of the Memphis City Schools*, 412 U.S. 427, 428 (1973).

We conclude, therefore, that the term "physical or mental handicap" in Article 64A, §12A and the narrower term "physical defect or impairment" in Article 64A, §12 do not include drug abuse. Hence, a rule barring drug abusers from State employment would not violate the antidiscrimination commands of these sections.[9]

V

Federal Statutory Requirements

The Rehabilitation Act of 1973 reflects a national policy to "promote and expand employment opportunities in the public and private sectors for handicapped individuals". 29 U.S.C. §701(8). Section 504 of that Act generally prohibits employment and other discrimination against an "otherwise qualified handicapped individual" in "any program or activity receiving Federal financial assistance". 29 U.S.C. §794. A violation of

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[9] Indeed, even if §12A were applicable, it would not prohibit an employment ban, for by hypothesis the Secretary would adopt such a ban only on determining that abstinence from drug use was a necessary qualification—in other words, "a bona fide job requirement"—within the exception of §12A.

this prohibition could result in termination of the federal assistance. *See* 29 U.S.C. §794a; 42 U.S.C. §2000d–1. The Act also permits private actions against states for alleged discrimination in programs that receive federal aid. *See, e.g.*, *Helms v. McDaniel*, 657 F.2d 800, 806 (5th Cir. 1981); *Tatro v. State of Texas*, 625 F.2d 557, 564 (5th Cir. 1980). *See generally* Guy, *The Developing Law on Equal Employment Opportunity for the Handicapped*, 7 U. Balt. L. Rev. 183, 204 n. 70 (1978).[10]

In 1978, the Act was amended to provide that, for purposes of employment, the term "handicapped individual" excludes "any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others". 29 U.S.C. §706(7)(B). The report of the conference committee that fashioned this provision makes clear the intent that not *all* current drug abusers were to be excluded from the statutory sphere of protection: "The conference substitute clarifies that only those active alcoholics or drug abusers who cannot perform the essential functions of a job in question or who present a danger to life and property are not covered by the employment provisions of sections 503 and 504." H. R. Rep. No. 95–1780, 95th Cong., 2d Sess. 102 (1978), *reprinted in* 1978 U.S. Code Cong. & Adm. News 7413.

With respect to State positions in federally aided activities, therefore, an across-the-board bar to the employment of drug abusers would conflict with federal law and, as such, jeopardize the State's right to continued federal assistance. However,

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[10] The federal circuit courts of appeal disagree over the scope of the private right of action to enforce §504, in light of the stated purposes of the Act and the particular wording of the Act's remedial provision. *Compare, e.g.*, *Trageser v. Libbie Rehabilitation Center*, 590 F.2d 87, 89 (4th Cir. 1978) (action under §504 to redress alleged employment discrimination may not be maintained "unless a primary objective of the federal financial assistance is to provide employment") *with Jones v. Metropolitan Atlanta Rapid Transit Auth.*, 681 F.2d 1376 (11th Cir. 1982) (action under §504 to redress alleged employment discrimination may be maintained as to "programs receiving federal financial assistance of any kind, not just those programs receiving federal financial assistance for the purpose of providing employment"). Whatever the ultimate resolution of this disagreement over remedy, we believe that, in order to avoid jeopardizing its right to continued federal assistance, the State has an obligation to comply with the mandate of §504 in all of its federally assisted programs.

the Secretary would not be precluded from determining that an applicant's drug abuse would prevent the applicant from "perform[ing] the essential function of [the] job in question or [would] present a danger to life and property". We believe that the Secretary has leeway to make this determination either on a position-by-position basis or on an individual applicant basis. *See Southeastern Community College v. Davis*, 442 U.S. 397 (1979) (§504 permits employer "to require reasonable physical qualifications").

Consequently, in our view, the Secretary might require reasonable screening tests of all applicants for positions in federally aided programs to determine current drug abuse, so that the Department could then make the particularized judgment called for by federal law. *See* 45 C.F.R. §84.14 (Health and Human Services regulations implementing §504 permit an employer to require pre-employment physical examinations of handicapped persons if such examinations are given to all other applicants as well).

VI

Conclusion

In summary, it is our opinion that the Secretary of Personnel is not prevented by federal constitutional requirements or State antidiscrimination laws from adopting a rule barring drug abusers from State employment generally. A rule generally barring drug abusers from positions in federally assisted activities would be contrary to the federal Rehabilitation Act of 1973; with respect to federally assisted activities, however, the Secretary would be authorized to determine, on a position-by-position or applicant-by-applicant basis, that an applicant's drug abuse would prevent performance of the essential functions of the position in question.

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PUBLIC OFFICERS

SUSPENSION ON CONVICTION OF CRIME—REINSTATEMENT ON REVERSAL OF CONVICTION—ENTITLEMENT TO BACK PAY

February 11, 1982

Mr. Irvin E. Feinstein
Administrative Officer
Executive Department

At the request of the Legislative Auditor, you have asked for our opinion on whether the payment of back pay in 1979 to former Governor Marvin Mandel was proper under the provisions of Article XV, §2 of the Maryland Constitution.

For the reasons expressed below, we believe that the payment was lawful and proper.

I

Article XV, §2

Article XV, §2 of the Maryland Constitution provides:

> "Any elected official of the State, or of a county or of a municipal corporation who during his term of office is convicted of or enters a plea of nolo contendere to any crime which is a felony, or which is a misdemeanor related to his public duties and responsibilities and involves moral turpitude for which the penalty may be incarceration in any penal institution, shall be suspended by operation of law without pay or benefits from the elective office. During and for the period of suspension of the elected official, the appropriate governing body and/or official authorized by law to fill any vacancy in the elective office shall appoint a person to temporarily fill the elective office, provided that if the elective office is one for which automatic succession is provided by law, then in such event the person entitled to succeed to the office shall temporarily fill the elective office. If the conviction becomes final, after judicial review or oth-

Mandel applied for the salary that would have been paid to him but for his suspension, and in due course the payment was made.

Shortly after the expiration of Governor Mandel's term, and before the mandate of the Court of Appeals issued, the United States moved for rehearing by the full court.[2] The motion was granted and the case reargued. On July 20, 1979, the full court split 3–3 and, as a consequence, affirmed the original 1977 conviction. *United States v. Mandel*, 602 F.2d 653 (4th Cir. 1979). On November 1, 1979, the defendant's motion for another rehearing was denied. *United States v. Mandel*, 609 F.2d 1076 (4th Cir. 1979). A petition for a writ of certiorari was filed with the United States Supreme Court and denied on April 14, 1980. *Mandel v. United States*, 445 U.S. 961 (1980).

III

Analysis

Under the plain terms of Article XV, §2, a suspended elected official is entitled to return to office, as well as back pay and lost benefits, if his or her conviction is "reversed or overturned". Because the same event triggers the "recovery" of both the office and the pay and benefits, it is reasonable to conclude that reinstatement and entitlement to back pay are rooted in the same rationale. Even as a more general rule, the return of back pay is incident to reinstatement and, indeed, is an integral part of that equitable remedy. *See McFerren v. County Board of Education*, 455 F.2d 199, 202–03 (6th Cir. 1972); *Harkless v. Sweeney Independent School District*, 427 F.2d 319, 323–24 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971); *Smith v. Hampton Training School*, 360 F.2d 577, 581 n. 8 (4th Cir. 1966). And, in our opinion, the important constitutional remedies provided by §2 when a conviction is reversed or overturned should be construed in accordance with this concept of equity.[3]

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[2] The timely filing of a motion for reconsideration automatically stays the issuance of the Court's mandate. Federal Rules of Appellate Procedure, Rule 41.

[3] At common law, a public officer could not recover salary for the period of his or her wrongful suspension or removal, because that person had not actu-

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> erwise, such elected official shall be removed from the elective office by operation of Law and the office shall be deemed vacant. *If the conviction of the elected official is reversed or overturned, the elected official shall be reinstated by operation of Law to the elective office for the remainder, if any, of the elective term of office during which he was so suspended or removed, and all pay and benefits shall be restored.*" (Emphasis added.)

II

Background

On August 23, 1977, Governor Mandel was found guilty, by a jury in the United States District Court for the District of Maryland, of certain mail fraud and racketeering offenses of the character triggering suspension from office under Article XV, §2. On October 7, 1977, he was sentenced to a four-year prison term. By operation of Article XV, §2, he was then automatically suspended "without pay or benefits from [his] elective office". *See* 62 *Opinions of the Attorney General* 365 (1977); 62 *Opinions of the Attorney General* 464, 471 (1977).

Following an appeal to the United States Court of Appeals for the Fourth Circuit, a panel of that court, on January 11, 1979, issued an opinion concluding that the Mandel conviction should be vacated and the case remanded for a new trial. *United States v. Mandel*, 591 F.2d 1347 (4th Cir. 1979). On the same day that the opinion was announced, a judgment was entered on the docket by the Clerk of the Court of Appeals. *See* Federal Rules of Appellate Procedure, Rule 36. As a result, this Office advised that Governor Mandel could resume his office until January 17, 1979, when his term expired.[1] Upon resuming his office for the last two days of the term, Governor

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[1] An intermediate step was necessary before Governor Mandel could actually return to office. He had to revoke, in writing, a June 4, 1977, letter in which he had stepped aside as Governor on grounds of ill health and named Lieutenant Governor Blair Lee as Acting Governor. *See* Article II, §6 of the Maryland Constitution. The earlier letter was properly revoked in January of 1979, and Governor Mandel returned to office for the last two days of his term.

In our view, Governor Mandel was entitled to be reinstated to his office because the action of the Fourth Circuit panel on January 11, 1979, served to "revers[e] or overtur[n]" his conviction within the meaning of Article XV, §2, *regardless of what might happen afterwards.* For a number of reasons, we concluded in January of 1979 that such a reversal occurs when the "judgment" of the court is entered, rather than when the mandate eventually issues or at some later point in time.[4]

First, although notions of finality play a role under §2 in determining when a "removal" occurs, the language of that constitutional provision does not suggest that finality is important when it comes to a "reversal". Thus, the fact that the United States Court of Appeals may subsequently entertain a petition for rehearing of the judgment (and thus stay its mandate) should not control the meaning of a "reversal" and the determination of whether a reversal has occurred.[5]

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ally rendered service. *Mastrobattista v. Essex County Park Commission,* 204 A.2d 601 (N.J. Super. 1964). The statutes authorizing equitable remedies in the cases cited above clearly abrogated this common law rule. A similar result, we believe, was intended by Article XV, §2.

[4] Under the Federal Rules of Appellate Procedure, when the clerk of a United States Court of Appeals receives the Court's opinion and makes a notation of a judgment in the docket, a "judgment" is entered. Rule 36. Ordinarily, the mandate of the Court issues 21 days later. Rule 41. This mandate—which consists only of a certified copy of the judgment, a copy of the Court's opinion, and a direction as to costs—may be stayed automatically by the timely filing of a petition for rehearing within 14 days of judgment. *Id.* The mandate also may be stayed by the Court on motion pending an application for certiorari.

A mandate is the official mode of communicating the judgment of an appellate court to the lower court. *Tierney v. Tierney,* 290 So.2d 136 (Fla. Ct.App. 1974); 5 Am.Jur.2d *Appeal and Error* §989. Although a mandate is important for the purpose of reinvesting the lower court with jurisdiction over the case, 58 C.J.S. *Appeal and Error* §1959, its issuance is generally a ministerial act, *Save the Trains Ass'n v. Chicago & N.W. Ry. Co.*, 95 N.W.2d 334 (Neb. 1959). In fact, the Supreme Court of Arkansas had held that a judgment of that court is in force despite the fact that no mandate has ever issued on it. *Stroud v. Crow,* 192 S.W.2d 548 (Ark. 1946); 58 C.J.S. *Appeal and Error* §1959. In essence, a mandate is more like an "execution" on a judgment than the "judgment" itself. *Id.*

[5] In 1980, a proposed constitutional amendment was introduced (Senate Bill 37), which would have amended the last sentence of §2 to require reinstatement and back pay only when the reversal occurs "after a final disposition, from which no further appeal may be made". That bill, however, died.

Second, because the time of *judgment* is the central factor in determining when a conviction has occurred under §2, *see* 62 *Opinions of the Attorney General* 365 (1977), consistency would dictate that the time of judgment in the appellate court similarly be the central factor in determining when a reversal has occurred.[6]

Finally and most importantly, one of the reasons that led us to conclude that "conviction" meant "judgment" or "sentence" was the rule of construction that the term be broadly construed when the imposition of disabilities is at stake. 62 *Opinions of the Attorney General* 365, 370 (1977). A similar, consistent, liberal rule of construction should operate when the lifting of those disabilities is concerned. Indeed, a strong public interest factor weighs in favor of that construction—namely, the desirability of a speedy restoration to office of those elected by the people, without the further uncertainty and delay that could be caused by petitions for rehearing, the staying of mandates, and petitions for certiorari. This is particularly so considering that, in common parlance, a reversal is considered to have occurred when the Court announces its judgment. Just as the law abhors an interregnum and favors the prompt filling of vacancies in an office, *Benson v. Mellor,* 152 Md. 481, 486–87 (1927), so, too, Article XV, §2 could be said to favor the return of an elected official to office, at the earliest possible time, upon a judicial determination that a prior conviction should be set aside.

For these reasons, we concluded (i) that, for purposes of Article XV, §2, a "reversal" occurred on January 11, 1979, at the time of the judgment of the appellate court, (ii) that Governor Mandel's suspension was therefore lifted on January 11, 1979, and (iii) that it was within his power to resume his office (as he then did).

As we indicated above, the payment of back pay should not stand on a different plane than the constitutional remedy of

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[6] One reason many state removal statutes do not allow a convicted official to remain in office pending appeal is the strong presumption of validity associated with a judgment of conviction. 62 *Opinions of the Attorney General* 365, 371 (1977). Certainly, on January 11, 1979, when the Fourth Circuit panel's opinion was announced, the judgment of conviction was removed as support for the Article XV, §2 suspension. *See In re Echeles,* 374 F.2d 780 (7th Cir. 1965).

reinstatement. Both remedies go hand in hand.[7] And both are triggered by a "reversal". Moreover, although the facts of the *Mandel* case are decidedly unique and present a genuine test of the sparse language of Article XV, §2, the reinstatement and back pay mandated here are no less justified than that which could occur under more "sympathetic" scenarios.

To construe §2 as requiring that the restoration of an elected officeholder to office await the formal issuance of a mandate would lead to anomalous results. For example, an official whose conviction is reversed on appeal (and returned to office pursuant to §2), yet who is later again found guilty of the same offense on retrial, is clearly not thereby divested of his or her prior entitlement to reinstatement and back pay. However, if an appellate court's decision to reverse a conviction is itself upset years later by the Supreme Court, thus affirming or restoring the conviction without the necessity of a retrial, does it make any sense to reach a different result and divest that official of back pay received during a period when, in the eyes of the law, he or she was innocent? We think not.

IV

Conclusion

In summary, it is our opinion that Article XV, §2 authorized payment to Governor Mandel of back pay as a result of the January 11, 1979, panel decision of the federal Court of Appeals, and the State does not now have a right to seek the return of the money thus paid because of subsequent developments restoring the conviction.

STEPHEN H. SACHS, *Attorney General*

GEORGE A. NILSON, *Deputy Attorney General*

ROBERT A. ZARNOCH, *Assistant Attorney General*

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[7] *See* note 3 above and accompanying text. We believe that Article XV, §2 was intended to abrogate the harsh common law rule that a public officer who lost his or her office and salary as a result of a conviction could not recover either, even if the conviction were reversed. For a discussion of that common law rule, *see Becker v. Green County*, 184 N.W. 715 (Wis. 1922).

PUBLIC OFFICERS—BOARD OF SUPERVISORS OF ELECTIONS—SALARIES—ARTICLE III, §35 DOES NOT BAR AN INCREASE FIRST EFFECTIVE AT SAME TIME NEW TERM BEGINS

March 8, 1982

Thomas B. Dabney, Jr., Esq.
Attorney for Board of Supervisors of Elections for Garrett County

You have requested our opinion on whether Article III, §35 of the Maryland Constitution prohibits the payment of the increased salary provided by Chapter 416 (House Bill 1073), Laws of Maryland 1981, to the members of the Garrett County Board of Supervisors of Elections, whose terms of office began June 1, 1981, the effective date of House Bill 1073.

For the reasons given below, it is our opinion that Article III, §35 does not prevent public officials from receiving increased compensation if their term of office begins after or, as here, simultaneously with the effectiveness of a pay increase.

I

Background

House Bill 1073 amended Article 33, §2–3(a)(12) of the Maryland Code to increase the salaries of the members of the Garrett County Board of Supervisors of Elections from $1,300 to $1,800 for the President and from $1,300 to $1,500 for the two other members. Section 2 of the bill provided that the bill would not apply to the salaries of members of the Garrett County Board "in office on the effective date" of the bill, but that it would apply to members' salaries beginning with the next term of office. Finally, Section 3 of the bill provided that the bill was to be an emergency measure, effective on the date of its enactment. The bill was signed into law by the Governor on May 12, 1981.

In our bill review letter of April 8, 1981, we advised the Governor of two problems with the bill.[1] First, the bill could

[1] Bill Review Letter (House Bill 1073) from Stephen H. Sachs, Attorney General, to Harry R. Hughes, Governor (April 8, 1981).

not become effective on the date of its enactment as an emergency measure, because Article XVI, §2 of the Maryland Constitution prohibits measures changing the salaries of public officers from being enacted as emergency laws. Members of the Board of Supervisors of Elections are public officers. *See* 58 *Opinions of the Attorney General* 285 and 343 (1973). As a result, we advised that the effective date of the bill must be deferred to the June 1 following its enactment—i.e., June 1, 1981. *See Allied American Co. v. Commissioners*, 219 Md. 607 (1959); 22 *Opinions of the Attorney General* 230 (1937). We reaffirm this advice as to the effective date of House Bill 1073.

Second, we concluded that, because the next term of office of members of the Board began on June 1, 1981, the first Monday of June [Article XVII, §6], and because House Bill 1073 also became effective on June 1, 1981 [Article XVI, §2], Article III, §35 of the Constitution prohibited the Board members serving those new terms from benefiting from the increase in salary. We also determined that the language of Section 2 of the bill, which made it applicable to members of the Board in office on its effective date, necessitated the same conclusion. You have asked us to reconsider this second conclusion.[2]

II

Article III, §35

Article III, §35 of the Maryland Constitution provides, in pertinent part:

> "[T]he salary or compensation of any public officer [may not] be increased or diminished during his term of office except those whose full term in office is fixed by law in excess of 4 years."

Because the members of the Garrett County Board of Supervisors of Elections are public officers appointed to two-year terms, they are generally subject to this provision. *See* 58 *Opinions of the Attorney General* 285 and 342 (1973); Article 33, §2–1(a) of the Maryland Code. However, although Article

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[2] Because bill review letters, unlike Opinions of the Attorney General, are prepared under severe time restraints, we are not reluctant to reconsider them when appropriate and given the opportunity.

III, §35 has been the subject of numerous opinions of both the Attorney General and the Court of Appeals, the precise question presented here—whether the section prohibits a salary increase for officers whose terms commence simultaneously with the effective date of the law providing for the increase—has not been addressed in Maryland.[3]

Article III, §35 is based on an important public policy:

> "to prevent a public officer from using his office for the purpose of putting pressure upon the General Assembly or other authorized agency to award him additional compensation and, on the other hand, to prevent the General Assembly or other agency from putting pressure on a public officer by offering him increased compensation or threatening a decrease

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[3] *County Commissioners v. Monnett*, 164 Md. 101 (1933), involved a similar set of circumstances, but the Court of Appeals found it unnecessary to address this question. An act decreasing the salary of the Calvert County Treasurer and providing for his term to begin June 1 was passed as an emergency law, effective April 6, 1931. The trial court held that Article XVI, §2 of the Constitution prohibited the act from being enacted as an emergency measure and that the act therefore was effective June 1, 1931, thus making the salary change effective simultaneously with the beginning of the new term. However, the treasurer had already been elected and taken his oath of office in 1930 pursuant to the then applicable law. The trial court concluded that the treasurer's term had therefore begun before the act was effective. The Court of Appeals, while not determining whether the act was effective April 6 or June 1, agreed that the treasurer had commenced his term before the act was effective. The Court stated, at 106–07:

> "[W]hatever the effect of the section of the Act of 1931 fixing the beginning of the treasurer's term at June 1st may be on the holding of this incumbent, that provision could not alter the fact that his term of office had begun previously. . . . [W]e conclude that he was serving the same term after as well as before June 1st."

Consequently, Article III, §35 prohibited the act from applying to the treasurer and decreasing his salary during his term.

In *Levin v. Hewes*, 118 Md. 624, 642–43 (1912), the Court of Appeals held that the General Assembly could act to decrease a magistrate's compensation between the time of his appointment and the commencement of his term. The act decreasing salaries became effective May 2; the magistrate qualified for office before May 2, but the Constitution provided for his term to commence the first Monday in May, which was May 6. Consequently, Article III, §35 was not violated by the salary change.

> thereof". *Comptroller v. Klein*, 215 Md. 427, 434 (1958).

See also 65 *Opinions of the Attorney General* 373 (1980); 60 *Opinions of the Attorney General* 823, 824 (1975). This policy is particularly important in the area of election laws, where the actions of boards of supervisors of elections can directly affect members of the General Assembly.

In considering whether a particular salary increase or decrease may be effected constitutionally in accordance with these purposes, the Maryland Court of Appeals and this Office have recognized that the time of legislative consideration of the salary change is critical. For example, in *Comptroller v. Klein*, 215 Md. 427 (1958), the Court examined the meaning of the constitutional phrase "his term of office" and concluded:

> "The phrase means the incumbent in office *at the time the legislature* or other appropriate agency *acts upon the proposal* to increase or decrease the emoluments of that particular office." 215 Md. at 433 (emphasis added).

The Court held that a public officer, appointed to fill out an unexpired term, could receive an increase in salary that had been provided for after the appointment of his predecessor but before his own appointment. Considering the balance of §35, the Court stated:

> "[The first clause of §35] tends to show that the entire sentence was to deal with the individual who held the office *at the time the question arose.*" 215 Md. at 434 (emphasis added).

In 60 *Opinions of the Attorney General* 823 (1975), this Office concluded that the General Assembly could provide a public officer with automatic cost-of-living increases, resulting in an increase during the officer's term, provided that the raises were set according to certain objective criteria. The Opinion noted that, if such increases were fixed prior to the commencement of the officer's term, they afforded no opportunity for "logrolling" and, therefore, the "purpose of Article III, §35 is fully and effectively preserved". 60 *Opinions of the Attorney General* at 832. *See also* 58 *Opinions of the Attorney General* 130, 134 (1973), which refers to the time when the legislature "acted to increase the compensation".

III

Analysis

As the Court noted in *Comptroller v. Klein*, "the evil sought to be avoided [by §35] is applicable only with respect to the incumbents *then* in office". 215 Md. at 434 (emphasis added). If we were to consider this purpose alone, we might easily conclude that "the evil sought to be avoided" has no application to the members of the Board of Supervisors of Elections, whose terms of office began after the legislature had considered and acted on the proposed salary increase. Such a conclusion is reinforced by the unique circumstances here: the General Assembly expressly intended House Bill 1073 to be enacted as an emergency measure and, as such, take effect before June 1; in addition, the General Assembly specifically provided that the bill should not apply to board members "in office on the effective date of this Act" and, further, that the bill should "take effect at the beginning of the next following term of office".[4] The General Assembly thus obviously contemplated that the new law would take effect *before* June and, thus, could and would apply to the Board members appointed to terms commencing *in* June.

However, the authorities that have applied Article III, §35 have looked specifically to the actual effective date of the statute as the time for determining its applicability. For example, in *Woelfel v. State of Maryland*, 177 Md. 494 (1940), the Court held that a bill reducing the salary of justices of the peace, which became effective on June 1, 1939, would not apply to a justice of the peace appointed to a two-year term beginning May 1, 1939. The public official was not in office at the time the legislature considered the bill and, thus, the evil sought to be avoided by Article III, §35 was never an issue; nevertheless, the Court applied §35. Similarly, in 64 *Opinions of*

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[4] Section 2 of House Bill 1073 provides:

> "[T]his Act may not be construed to extend or apply to the salary of the president and each member of the Garrett County Election Board in office on the effective date of this Act, but the provisions of this Act concerning the salary of the president and each member of the Garrett County Election Board shall take effect at the beginning of the next following term of office."

the Attorney General 267 (1979), this Office determined that public officers whose terms began June 1, 1976, could not be paid an increased salary under a statute that became effective on July 1, 1976.[5]

In each of these instances, the legislature had "considered" and "acted upon" the change in compensation before the term of office began, but it was the statute's effective date that was held to control the application of the constitutional prohibition. However, even though the scope of §35's prohibition is thus somewhat wider in these instances then the "evil sought to be avoided", that does not answer our specific inquiry: whether the prohibition applies when a term of office begins not before but *simultaneously with* the effective date of the statute enacting the salary change.

We have found no Maryland case that addresses this precise question. The Court of Appeals has stated that Article III, §35 is to be "interpreted broadly to promote its policy". *See e.g., Pressman v. D'Alesandro*, 211 Md. 50, 55 (1956); *State ex rel. Lane v. Dashiel*, 195 Md. 657 (1950). To construe §35 as applying to an officer whose term of office begins simultaneously with the effective date of a statute changing his or her salary would be to interpret the section "broadly", but would *not*, in our view, "promote [the] policy" underlying §35.

The Supreme Court of Tennessee apparently reached the same conclusion in *Overton County v. State*, 588 S.W.2d 282 (Tenn. 1979). Article VI, §7 of the Tennessee Constitution provides that judges' compensation "shall not be increased or diminished during the time for which they are elected". The act in question increased judges' salaries, linking the increase to the consumer price index. The act took effect September 1, 1974, the date a judge's term began. The court held the new salary applicable to the judge, apparently on the basis that the legislative action had not been taken "during the time for which [the judge] was elected", but, instead, had preceded his term. The Tennessee court thus concluded, in effect, that the "evil sought to be avoided" by a limitation on compensation

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[5] *See also Levin v. Hewes*, 118 Md. 624 (1912), discussed in note 3 above, where a salary decrease became effective four days before a term began.

changes is not present when an officer's term and a legislative act providing for a salary change are simultaneously effective.[6]

Construing Article III, §35 otherwise would also, we believe, be beyond the language of the section. Section 35 prohibits a salary change for any public officer "*during* his term of office" (emphasis added). The Court of Appeals has directed that the "natural and logical interpretation of the wording of the Constitution" shall govern an interpretation of §35. *Comptroller v. Klein*, 215 Md. at 432.[7] The term "during" is defined as "throughout the course of", "after the commencement and before the expiration", "in the time of". Black's Law Dictionary 453 (rev. 5th ed. 1979); Webster's New International Dictionary 801 (2d ed. 1953). When a law changing an officer's compensation is effective simultaneously with the commencement of his or her term, the salary change cannot be said to have ocurred "in the time of" or "after the commencement and before the expiration" of the officer's term.

Thus, in our view, the application of §35 to this situation not only fails to further the policy underlying §35 but, also, is not supported by the very language of the section.[8]

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[6] In *State v. Giessel*, 51 N.W.2d 547 (Wisc. 1952), the Supreme Court of Wisconsin examined whether Article IV, §26 of the Wisconsin Constitution ("nor shall the compensation of any public officer be increased or diminished during his term of office") was violated by a statute that both altered salaries of officials and provided that current officers' terms ended on the effective date of the Act, May 1, 1951. No date was provided for the commencement of new terms; thus salary changes and new terms were not simultaneously effective. The court found the statute constitutional.

In *Carlile v. Henderson*, 31 P. 117 (Col. 1892), the Supreme Court of Colorado held that a statute increasing the State Treasurer's salary, effective 11 a.m., January 13, 1891, could not apply to a state treasurer elected in November 1890, when the Constitution provided that his term of office began the second Tuesday of January, which was January 13, 1891. The court decided the case not on Article 4, §19 of the Colorado Constitution (salary "shall not be increased or diminished during their official terms"), but on Article 5, §30 ("no law shall extend the term of any public officer, or increase or diminish his salary or emoluments, after his election or appointment").

[7] As indicated by the discussion above, in *Comptroller v. Klein*, the Court construed the phrase "his term of office" to mean the incumbent's period in office; the Court did not discuss the word "during".

[8] For the purposes of §35, terms of officers begin on the date provided by the Constitution or other Maryland law, whether or not the officer has taken

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IV

Conclusion

In summary, it is our opinion that Article III, §35 does not prohibit the members of the Garrett County Board of Supervisors of Elections, whose terms began simultaneously with the effective date of a salary increase, from receiving that increase.

STEPHEN H. SACHS, *Attorney General*

MARY N. HUMPHRIES, *Assistant Attorney General*

AVERY AISENSTARK
Principal Counsel,
Opinions and Advice

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any required oath of office. Otherwise an officer could delay taking the required oath and thus delay commencement of his or her term in order to benefit from a new salary effective after the date that term was to commence. Consequently, whether or not the members of the Board of Supervisors of Elections of Garrett County had taken the oaths required by Article 33, §2–2 by June 1 is not determinative of when their terms of office began for the purposes of §35.

RETIREMENT SYSTEMS

ACCIDENTAL DISABILITY PENSION BENEFITS—BOARD OF TRUSTEES—LIMITATIONS—DISABILITIES BOARD LACKS AUTHORITY TO ACCEPT APPLICATION FOR DISABILITY RETIREMENT BENEFITS FROM FORMER MEMBER OF SYSTEM

December 17, 1982

Mr. Christ G. Christis
Secretary to the Board of Trustees
State Retirement Systems

On behalf of the Board of Trustees of the Employees' Retirement System, you have requested our opinion on whether the Board has authority to permit a former State employee—that is, one who is no longer a member of the Employees' Retirement System ("System")—to file retroactively for accidental disability retirement benefits.

For the reasons discussed below, we have concluded as follows:

(1) The statutory provisions governing accidental disability retirement benefits permit only a member of the System (or the member's department head, a possibility not relevant to this inquiry) to apply for such benefits.

(2) The statute contains no exception that would permit a *former* member to apply, even if his or her failure to apply during the period of membership was the result of disability.

(3) In light of the statutory requirement, the Board of Trustees lacks the discretionary authority to accept an application from a former member.

I

Procedural Background

This question is presented in the context of a particular contested case. A former State employee applied for disability retirement benefits in November of 1979. The System declined to process the application on the grounds that the applicant was no longer a member of the System. Thereafter, the applicant sought agency review of this determination. In February of 1982, the Director of Employer-Employee Relations of the Department of Personnel filed a Proposal for Decision that would affirm the System's determination to decline to process the application. The matter is now pending before the Board of Trustees.[1]

II

Factual Background

The applicant was employed by a State agency in February of 1971 and was enrolled in the retirement system in May of that year.[2] The applicant was injured at work in January of 1973. His last contribution to the retirement system occurred in June of 1973; and, in July of 1973, he was granted a leave of absence without pay for one year because of "injury in the line of duty".[3]

In August of 1973, the System wrote to the applicant to advise him of his rights and benefits while on leave of absence, including the right "to apply for accidental disability retirement prior to the expiration of this leave". He was placed on inactive membership status in July of 1974, after his one year leave of absence had expired. The System wrote to him again in March of 1976 to inform him of the rights and benefits to which he was entitled as an inactive member. The applicant alleges that he received neither letter.

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[1] It should be noted that, in this contested case, Assistant Attorney General Nancy Knisley represented the System. Ms. Knisley played no role in the preparation of this Opinion. *See* Memorandum from Attorney General Stephen H. Sachs to All Assistant Attorneys General (December 4, 1980) (Guidelines for Administrative Adjudicatory Proceedings 1, 2, and 3).

[2] This chronology is drawn from the Findings of Fact in the Proposal for Decision filed by the Director of Employer-Employee Relations of the Department of Personnel.

[3] The applicant filed for worker's compensation benefits in July of 1973. He was assisted by the same attorney who now represents him in this matter. He agreed to settlement of his worker's compensation claim in December of 1975 and received payments under the settlement through March of 1976.

In July of 1976, the System terminated the applicant's membership. He had not applied for any benefits by that date. The System next contacted the applicant in June of 1979 to notify him that his contributions to the System were about to be turned over to the Comptroller as abandoned property. The applicant did not request the return of those contributions. Instead, in November of 1979, he filed an application for disability retirement.

III

Applicant's Argument

The applicant contends that he did not file his application before July of 1976—when the System terminated his membership—because his mental disability prevented him from doing so.[4] In a letter from his attorney, he asserts that "time and limitation requirements are tolled of those persons under disability insofar as filings under any statute relating to benefits and actions".

IV

Statutory Requirements

A. *Membership Requirement*

Article 73B, §11(6) of the Maryland Code contains the following provision on filing for accidental disability retirement benefits:

> "*Upon the application of a member*, or of the head of his department, *any member* who has been totally and permanently incapacitated for duty as the natural and proximate result of an accident occurring while in the actual performance of duty . . . shall be retired by the board of trustees, provided that the

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[4] He also contends that he was unaware of his rights, or the deadline for their exercise, because he had not received either of the letters that the System had mailed him. However, we do not think that failure to comply with a statutory requirement may be excused on the basis of such an assertion.

> medical board shall certify that *such member* is mentally or physically incapacitated for the further performance of duty, that such incapacity is likely to be permanent, and that *such member* should be retired." (Emphasis added.)

Article 73B, §3 sets out the categories of employees who are members of the System. *See also* Article 73B, §1(3), (4), and (7). Under Article 73B, §3(3)(A), "[m]embership ceases if the member . . . [i]s absent from service for more than 2 years". On this basis the applicant's membership was terminated.[5]

There is no ambiguity whatever in the requirement that only a "member" (or the member's department head, a possibility not relevant here) may apply for accidental disability retirement benefits. In particular, the term "member" cannot reasonably be read to extend to former members, because the statute elsewhere in the same Article expressly sets out the rights of a "former member". *See* Article 73B, §§5 and 11(1)(a)(ii).

This statutory restriction appears to reflect the General Assembly's policy judgment that permitting applications by former members would entail adverse consequences for the System. For example, Article 73B, §11(6) requires certain determinations about the circumstances and consequences of an accident before accidental disability retirement benefits may be paid; these determinations would be much more difficult if the application were permitted to be filed years after the event.[6] Moreover, the financing of the System depends in part on actuarial assumptions. *See* Article 73B, §14. These underlying assumptions about risk would be less certain if claims were

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[5] In a letter from his attorney, the applicant asserts that: "As long as a person continues to draw workmen's compensation benefits as a result of work related accident, clearly he is not absent 'from service'." We discern no legal basis for this assertion. The statute defines "service" to mean, in relevant part, "service as employee paid for by the State". Article 73B, §1(7). Post-employment receipt of worker's compensation does not meet this definition, in our view.

[6] In the case at issue before the Board, a determination of the merits of the applicant's claim would focus on events that took place in January of 1973—nearly seven years before the date of his application. Obviously, the evidence of these events would have become stale during this long interval.

allowed not only from present and recently terminated employees but also from all former employees.

Finally, while there is no reported appellate decision in Maryland directly on point, several cases dealing with comparable pension eligibility requirements strongly suggest that the term "member" may not be construed beyond its plain meaning. *See, e.g., Saxton v. Board of Trustees of the Fire and Police Employees Retirement System*, 266 Md. 690 (1972) (death benefit payable only to "member in service"; retired firefighter not "member in service" although death resulted from service-connected injury); *Hecht v. Crook*, 184 Md. 271 (1945) (benefits under Baltimore City pension plan payable only to that class of persons described in enabling legislation; appointed municipal tax appeal judge not "employee", notwithstanding that he had contributed to the plan); *Snyder v. Grand Int'l Bhd. of Locomotive Eng'rs*, 157 Md. 322 (1929) (railroad engineer denied pension benefit because he was not a "member" of the Association paying the benefits at the time such application was received, even though he was a former member).[7]

B. *Implied Tolling of Application Deadline*

We next consider whether the express statutory requirement—i.e., that any accidental disability retirement application must be filed before membership in the System ends—should be understood to permit an exception if the failure to file during the period of membership is caused by disability. In our view, the provision in question may not be so construed.

The General Assembly elsewhere has provided for the extension of certain time limitations that would otherwise apply to certain judicial proceedings. Thus, for example, §5–201 of the Courts Article of the Maryland Code provides:

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[7] We also understand that, only last week, a Maryland trial court ruled that a former member of the System is not a "member" within the meaning of the statute and, for that reason, is ineligible to file for accidental disability retirement benefits. *Wright v. Board of Trustees of the Employees Retirement System*, No. 108293 (Balto. City Court, Dec. 10, 1982). This oral ruling has not yet been embodied in a written opinion or order.

> "When a cause of action subject to a limitation under [Title 5,] Subtitle 1 [of the Courts Article] accrues in favor of a minor or mental incompetent, that person shall file his action within the lesser of three years or the applicable period of limitations after the date the disability is removed."

This provision, however, is applicable only to the actions there specified—i.e., actions subject to the limitations otherwise contained in Title 5, Subtitle 1 of the Courts Article—not to claims for accidental disability retirement benefits. *See, e.g., Redfern v. Holtite Mfg. Co.*, 209 Md. 106, 111 (1955) (former Article 57, §2—now incorporated in §5-201 of the Courts Article—inapplicable to worker's compensation claim). We cannot ignore the fact that the General Assembly has failed to enact any such time extension in the statute governing applications for accidental disability retirement benefits.[8]

Our view of the issue is supported by a court decision involving a comparable problem under the federal Social Security disability program. The Social Security Act provides in essence that a qualified individual who files a disability application receives future benefits plus benefits for up to one year preceding the application date. 42 U.S.C. §423(b).

In *Donnelly v. Gardner*, 286 F.Supp. 288 (W.D. Wis. 1968), the applicant claimed entitlement to disability benefits for six years preceding his filing, not just one: "Plaintiff contends that the 12-month rule with respect to filing an application should not govern a case in which one has been suffering for some time from a mental disorder rendering him incapable of filing an application." 286 F.Supp. at 289. The court nevertheless held that it was bound by the statutory language and could not properly infer such an exception:

> "Here the [statutory] term . . . allows no room for construction. The court is asked, instead, simply to ignore the requirement in the case of a mentally ill person. I do not consider myself free to improvise in

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[8] By contrast, The General Assembly has expressly authorized the Workmen's Compensation Commission, for example, to "excus[e] . . . for . . . sufficient reason" certain untimely applications. *See* Article 101, §39(a) of the Maryland Code.

> this manner when dealing with a statutory scheme." 286 F.Supp. at 289-90.[9]

The same result, we believe, is required by the Maryland statutory scheme.

V

The Board's Authority

The statute vests in the Board of Trustees "general administration and responsibility for the proper operation of the retirement and pension systems, and for making effective the provisions of this article". Article 73B, §12. This provision is a grant to the Board of "broad powers to administer the retirement system". 65 *Opinions of the Attorney General* 461, 463 (1980).

This power, however, must be exercised in accordance with limitations in the statute. *See* 65 *Opinions of the Attorney General* at 463. Because the General Assembly has limited to "members" of the System the opportunity to apply for accidental disability benefits, the Board is without authority to set aside that requirement, however compassionate the reasons for its wishing to do so.

In a case involving the Board's attempt to limit by rule a statutory provision that it thought too broad, the Court of Appeals described the Board's authority in terms that, we believe, are equally applicable here:

> "We have many times stated that courts may not, under the guise of statutory construction, remedy possible defects in a statute or insert exceptions not made by the Legislature. [Citations omitted.] The same is true of administrative agencies. If the Board believed that the statute was too broad, it should

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[9] Congress has relaxed the filing requirement in a related context by permitting someone whose disability has ended to apply up to 36 months after the disability ended if "the failure of such individual to file an application for a disability within [the 12 month period after the disability ended] was attributable to a physical or mental condition of such individual which rendered him incapable of executing such an application". 42 U.S.C. §416(i)(2)(F).

> have gone to the General Assembly and sought an amendment. It was not authorized to ignore the clear legislative directive." *Mauzy v. Hornbeck*, 285 Md. 84, 95 (1979).

See also Fallin v. Mayor and City Council of Baltimore, 193 Md. 464 (1949).

If the Board believes that the case now before it reveals a shortcoming in the statute, the Board should request ameliorative legislation from the General Assembly. Under the existing unambiguous statutory language, however, the Board currently lacks authority to excuse noncompliance with the present filing requirement.

VI

Conclusion

In summary, it is our opinion that:

(1) Only a member of the Employees' Retirement System (or the member's department head) may file an application for accidental disability retirement benefits.

(2) The statute contains no exception to this requirement for a former member who failed to file an application during his or her membership, even if the failure was the result of a disability.

(3) The Board of Trustees of the Employees' Retirement System lacks the discretionary authority to accept an application from a former member.

STEPHEN H. SACHS, *Attorney General*

JACK SCHWARTZ, *Assistant Counsel, Opinions and Advice*

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Chief Counsel,
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SOCIAL SERVICES

LOCAL DEPARTMENTS—BALTIMORE CITY DEPARTMENT—LOCAL DEPARTMENTS SUBJECT TO STATE FISCAL PROCEDURES—INTEREST EARNED ON "MONEYS OF STATE" BELONG TO STATE

August 10, 1982

The Honorable Kalman R. Hettleman
Secretary of Human Resources

You have requested our opinion on the following questions concerning whether and to what extent State or City fiscal budgeting and accounting procedures and requirements apply to the Baltimore City Department of Social Services:

> "(1) A directive of the [State] Social Services Administration, Circular Letter No. 82–17, dated January 14, 1982, requires all local departments [of social services] to convert bank accounts used for the funds which they administer to interest bearing accounts and periodically revert the interest on these accounts to the [State] Department of Human Resources. Does this directive apply to the [Baltimore City Department of Social Services]?
>
> (2) Does that Circular Letter or any other State statute or directive permit the deposit of State/Federal funds which the [Baltimore City Department of Social Services] administers in a bank account in the name of the City of Baltimore?
>
> (3) Does §2(e) of Article 88A of the Maryland Code require the City government to impose on the [Baltimore City Department of Social Services] the budgeting, fund receipt and expenditure, record keeping and reporting and other fiscal or administrative requirements of the City government, regardless of Department of Human Resources or other State government requirements in these areas?"

These questions result from two recent Opinions of the Baltimore City Solicitor concerning the use and accounting of funds by the Baltimore City Department of Social Services. In the first, dated June 10, 1982, the City Solicitor concluded that

"State monies held by the [Baltimore City] Department of Social Services . . . may be retained by City government". Opinion of Benjamin L. Brown, City Solicitor, to George G. Musgrove, Director, Baltimore City Department of Social Services, et alia (June 10, 1982). In the second, dated June 25, 1982, the City Solicitor more specifically concluded that the Baltimore City Department of Social Services "is a municipal agency of the City . . . for the purposes of (1) budgeting, (2) receipt of and expenditure of funds[, including interest accrual], and (3) recording and reporting [of these funds] in the City's accounts and financial statements". Opinion of Benjamin L. Brown, City Solicitor, to Charles L. Benton, Director, Baltimore City Department of Finance (June 25, 1982).

For the reasons given below, it is our opinion that:

(1) Circular Letter 82–17 of the Social Services Administration of the Department of Human Resources applies to the Baltimore City Department of Social Services.

(2) Neither the Circular Letter nor any other authority permits the deposit of State or Federal funds allocated to the Baltimore City Department of Social Services in a bank account in the name of the City of Baltimore. Moreover, the interest earned on all deposits of these funds—however the account may be denominated—belongs to the State, not the City.

(3) With respect to the State and Federal funds appropriated to the Department of Human Resources for the use of the Baltimore City Department of Social Services, neither Article 88A, §2(e) of the Maryland Code nor any other authority authorizes the City government to impose its budgeting, fund receipt and expenditure, record keeping and reporting, and other administrative requirements on the Baltimore City Department of Social Services, if those requirements conflict or are otherwise inconsistent with requirements lawfully issued by the Department of Human Resources or other State agencies.

I

Background

Until July 1, 1981, all State and Federal funds allocated by the Department of Human Resources ("DHR") for the operation of welfare programs in Baltimore City, in addition to all local funds, were appropriated in the City's Ordinance of Estimates. They were subjected to the City's record keeping and accounting procedures and were transmitted to the City Treasurer for deposit in the City's bank account. The City government then either (i) made the funds available to the Baltimore City Department of Social Services ("BCDSS") as needed for benefit payments and other costs or (ii) paid those costs itself. In contrast, funds allocated to the other local departments of social services in the counties were paid directly to those agencies, which deposited them in their own bank accounts and were responsible for accounting for their expenditures.

On July 1, 1981, with the approval of City officials, BCDSS assumed direct responsibility for accounting for these State allocated funds in a manner similar to the other local departments. Since then, these funds have been transmitted directly to BCDSS, for deposit in its own interest-bearing account, and BCDSS has handled their expenditure.

In August of 1981, the State Division of Audits recommended that DHR

> "establish a specific written policy applicable to all local departments requiring that all cash advances be deposited into interest-bearing accounts and that such interest earnings be remitted to the State at the end of each fiscal year and deposited as general fund revenue". Memorandum from Peter J. Klemans, Assistant Legislative Auditor, to Howard Albert, Director, Division of Budget and Finance, at p. 24 (August 17, 1982).

In response to that recommendation, DHR (through its Social Services Administration) issued Circular Letter 82–17, dated January 14, 1982, which directed all local departments of social services to deposit their funds immediately in interest-bearing accounts and to transmit the interest earned on these accounts periodically to DHR for deposit in the State Treasury.

This spring, independent auditors examining the City's accounts for Fiscal Year 1982 took the position that BCDSS was a City agency and that, as such, all of its financial transactions must be reflected in the City's accounts and financial statements. That conclusion led to the request for the views of the

City Solicitor on the propriety of the recently changed fiscal and accounting procedures of BCDSS. City officials initially indicated that, if City government procedures were held to apply to BCDSS, then BCDSS officials would be directed: (1) to deposit all State funds allocated to BCDSS to the credit of the Mayor and City Council of Baltimore; (2) to expend and account for these funds in FY 1983 pursuant to regular City procedures; and (3) to reconstruct the FY 1982 financial transactions in accord with these procedures.

In your request to us, you indicated that City officials now have agreed that, before any action is taken, an Opinion of the Attorney General on these issues would be helpful. You further stated that, depending on the nature of our advice, legislation might be proposed to resolve these issues in accord with the interests of both the State and City governments.

II

Impact of Circular Letter 82–17

Your first two questions concern the applicability and impact of Circular Letter 82–17 on the funds allocated by DHR to BCDSS.

Article 88A clearly provides that a DHR directive to local departments of social services with regard to State funds applies to BCDSS. Under §2(b), the State Director of Social Services, a DHR official, is "responsible for . . . the supervision of local departments, and other agencies and institutions under the supervision of the State [Social Services] Administration". Moreover, under §13(c), directors of local departments of social services, including BCDSS, have a "general administrative responsibility to the State Administration" and, in addition to various other specified duties, have such "[o]ther responsibilities as may from time to time be required by the State Administration or by other applicable laws, rules and regulations".

Section 3(a)(2) more specifically provides that:

> "All of the activities of the local departments in the counties and in Baltimore City, which the State

> [Social Services] Administration finances, in whole or in part, shall be subject to the supervision, direction and control of the State Administration."

If an activity financed "in whole or in part" by State funds is subject to State "supervision, direction and control", both in the counties "and in Baltimore City", it follows that the underlying funds themselves—their allocation, transmittal receipt, accounting, and disposition—must be similarly subject to State "supervision, direction and control". Obviously, the use and disposition of State appropriated funds is an "activity . . . which the State Administration finances". Indeed, under §13(d), the administrative costs of local departments of social services "shall be paid out of funds derived from local sources or out of allotments from State or federal funds, or any of them, *as the State [Social Services Administration] may prescribe*". (Emphasis added.)

In our opinion, these statutory provisions vest the control of DHR funding in the State, and they authorized the issuance of Circular Letter 82–17 to the local departments, including BCDSS. Thus, the directive lawfully governs the use of interest by BCDSS, unless some other provision of law exempts BCDSS from the directive's requirements.

III

Effect of Article 88A, §2(e)

A. *Position of City Solicitor*

The City Solicitor concluded that, notwithstanding the State directive, the funds allocated by DHR to BCDSS are subject to City control once they have been transferred to BCDSS. In reaching this conclusion, he relied primarily on Article 88A, §2(e), which states:

> "The organization, rights, powers, duties, obligations and functions of the department of social services of Baltimore City as prescribed in §48 of Article VII of the said Charter of Baltimore City shall not be affected by this article, except as herein provided, and said department of social services in Baltimore City is hereby vested with all the rights,

> powers, duties, obligations, and functions which are vested in the local departments in the counties under this article."

This statutory provision, the City Solicitor concluded, preserves the City's authority over funds derived from the State.[1]

In this context, the City Solicitor emphasized the applicability of Article VII, §48(f) of the City Charter, which provides:

> "[T]he [Baltimore City] Department of Social Services is hereby authorized and empowered to make and put into effect, within the limits of appropriations therefor in the Ordinance of Estimates, such plans and procedures as in its judgment may be necessary or advisable for the relief and care of needy persons in Baltimore City."

According to his Opinion of June 25, this Charter provision requires that "all the monies granted to the City's Department of Social Services for welfare purposes by the Federal, State

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[1] A memorandum accompanying the City Solicitor's Opinion of July 10 also suggested that DHR's own fiscal regulations should be understood as having adopted the pre-July 1, 1981, arrangement, whereby funds were transmitted directly to the City Treasury for a "pass through" to BCDSS. Memorandum from Al Kramer, Legal Assistant, to Benjamin L. Brown, City Solicitor (June 9, 1982).

In our view, however, the fiscal regulations adopted by DHR do not mandate that the funds allocated by DHR under Article 88A be deposited either with the City or with BCDSS. COMAR 07.01.05.06C(1) merely provides that funds allocated to BCDSS shall be deposited in a bank in the area of the local office of BCDSS and that they shall be given the same fiscal protection as "other funds received and disbursed by Baltimore City". COMAR 07.01.05.06C(2) and .06C(3), in turn, authorize the use of bank accounts in the name of the local department and the access of the Director and Assistant Director for Financial Management of BCDSS, as well as the Baltimore City Treasurer and Director of Finance, for the purpose of withdrawals. This language does not require payments directly to the City under the former "pass-through" arrangement, nor does it preclude the deposit of funds in BCDSS bank accounts.

Thus, the regulations appear to permit both the practice existing before July 1, 1981, and the action taken by DHR in July (with the concurrence of City and BCDSS officials) to transmit the State funds directly to BCDSS for deposit in its own bank account.

or local governments . . . be appropriated in the Ordinance of Estimates and are therefore subject, by law, to the control of the City". With respect to any interest generated by accounts containing the funds allocated to BCDSS by DHR, he determined that these funds belong to the City.[2]

B. *Analysis*

The funds in question are State and Federal funds appropriated in the State Budget to DHR. The appropriation is made under such categories as public assistance payments, funds for social services, and administrative costs. There is no specific appropriation made by the General Assembly to the City of Baltimore or to BCDSS for any of these purposes.

In our view, Article 88A, §2(e) does not authorize the City to treat funds allocated by DHR to BCDSS as if they were City funds. Although §2(e) generally preserves the "rights, powers, duties, obligations and functions" of BCDSS under Article VII, §48 of the City Charter, §2(e) nevertheless contains an express exception with regard to all matters that are otherwise "herein [*i.e.*, in Article 88A] provided". We believe that the several provisions of Article 88A discussed above fall within that exception and, as such, provide the framework within which State administrators may supervise, direct, and control—and issue detailed instructions governing—the use by BCDSS of State appropriated funds. These instructions are therefore binding on BCDSS in accordance with the express exception in §2(e).

The City Solicitor's interpretation of §2(e) follows from his broader view that BCDSS is an entity of the City, not of the State. He relied heavily on a 1961 Opinion of this Office so concluding. 46 *Opinions of the Attorney General* 158 (1961). However, subsequent changes in §2(e) and in other provisions of Article 88A, as well as a later Opinion of this Office, lead us to a different conclusion.

[2] The memorandum accompanying his first Opinion of June 10 (*see* note 1 above) indicated that this interest was to be spent "mainly, in great part" for the relief of the needy; the second Opinion of June 25, however, does not mention that limitation.

The original version of §2(e), enacted in 1935 as then Article 88A, §8G, provided as follows.

> "The organization, rights, powers, duties, obligations and functions of the Department of Welfare of Baltimore City as prescribed in Section 171A of the Charter of Baltimore City shall not be affected by this act, except as hereinbefore provided, but said Department of Welfare is hereby vested with all the rights, powers and functions which are vested in the County Boards under this Act." Chapter 586, Laws of Maryland 1935.

That provision remained virtually intact (despite some renumbering) until it was amended in 1967 to add the words "duties" and "obligations" after the reference to the "powers" vested in the local departments. Chapter 148, Laws of Maryland 1967. Thus, in 1967, BCDSS was made subject to the same "duties [and] obligations" as are imposed on the other local departments of social services in the counties. Significantly, this change was made by the same amendment that enacted §13(c), delineating the various "responsibilities" of all local departments, subject to the "administrative authority" of the then State Department of Public Welfare (now the Social Services Administration).

Reinforcing the parity between BCDSS and other local departments, 1974 amendments to Article 88A transferred all employees of the Baltimore City Department of Social Services from the Baltimore City Merit System to the State Merit System. These amendments also phased out the so-called "James Formula", which had required local funding to be provided for local departments of social services. Chapter 709, Laws of Maryland 1974.

The 1967 and 1974 statutory amendments, when considered with the Statewide nature of the programs administered by local departments, subsequently led this Office to conclude that local departments of social services, including BCDSS, are within the Executive Branch of State government for purposes of the Governor's reorganization authority under Article II, §24 of the Maryland Constitution. 61 *Opinions of the Attorney General* 786 (1976).

In that Opinion, this Office reassessed its prior views in light of the subsequent statutory changes, as well as the other changes in the State's social service programs, which effected a dramatic change in the character of local departments.[3] In so doing, the Opinion explicitly identified BCDSS as being subject to the same analysis as that applicable to other local departments.[4] We concur with the conclusions reached in that Opinion.[5]

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[3] In reviewing the history of the administration of social service programs in this State, the Opinion noted the independent assessment of the Maryland Commission on the Functions of Government that, by reason of these changes, social services had become a " 'solely state function'—one in which the 'funding, administration and policy making are the sole responsibility of State government.' " *Id.* at 794–95 (quoting I *Report of the Maryland Commission on the Functions of Government*, at p. 3 (July, 1975)).

[4] Specifically, the Opinion noted:

> "It is true that in the past this office has advised officials of the Department of Human Resources and the Social Services Administration that the local departments appeared to be departments of local governments rather than units of the State government and, particularly in the case of the Baltimore City Department of Social Services, that such agencies were subject to the administrative requirements imposed by the local government, *e.g.* 46 *Opinions of the Attorney General* 158 (1961). That advice, however, was based upon the State statutes as they existed prior to the legislative changes made in 1974." *Id.* at 796.

[5] Subsequent administrative practices have endorsed the views expressed in that Opinion. For example, Executive Orders of the Governor—one involving an automated income maintenance system [Executive Order 01.01.1978.13 (November 14, 1978)] and another involving the leasing of office space [Executive Order 01.01.1977.04 (June 30, 1977)]—have considered local departments of social services as "units of the Executive Branch of State Government", "principally" supported and funded by State and Federal funds appropriated to DHR through the State Budget.

In this regard, we understand that BCDSS has implicitly acquiesced in this view of its status by adhering to the State leasing procedures mandated by Executive Order 01.01.1977.04 (June 30, 1977). Moreover, acquiescence by the General Assembly itself in this view of the status of local departments, including BCDSS, might well be inferred from the absence of subsequent legislative "correction" of either this Office's 1976 interpretation of Article 88A or any of the administrative practices relying on that interpretation—notwithstanding numerous amendments made to Article 88A since the issuance of the 1976 Opinion. *See, e.g., Valentine v. Board of License Commissioners*, 291 Md. 523, 533-34 (1981); *Twinbrook Swimming Pool Corp. v. Comptroller of the Treasury*, 274 Md. 88, 94–95 (1975); *Comptroller of the Treasury v. M. E. Rockhill, Inc.*, 205 Md. 226, 233 (1953).

We might also note that, in practical terms, reversion to the City of interest earned on State appropriated funds would be somewhat anomalous given the relative amounts contributed by the State and Baltimore City toward these programs and the amount of interest involved. For example, we understand that, in fiscal year 1982, the total amount expended by BCDSS for benefits, programs, and administrative costs was approximately $171,900,000. State general funds constituted about $97,900,000 or 57% of that amount; Federal funds paid to and appropriated by the State for these expenditures constituted $71,100,000 or 41%; and Baltimore City contributions constituted about $3,100,000 or 2%.[6] As a result of its new interest-bearing accounts, BCDSS earned approximately $770,000 on the State and Federal funds formerly transmitted to the City government. Inasmuch as that interest was earned on "moneys of the State"—funds appropriated to DHR in the State Budget[7]—that interest inures to the benefit of the State.[8]

Your third question also concerned the general effect of §2(e) on the fiscal and administrative procedures to be followed by BCDSS. The City Solicitor concluded that City, not State, procedures applied to BCDSS and that the funds allocated to BCDSS were subject to those procedures. However, for the reasons already stated, to the extent that DHR exercises its administrative authority over BCDSS, it is our view that the BCDSS is under an obligation to accommodate those directives. When, pursuant to §13 or other applicable provisions of State law, DHR and its constituent agencies issue directives to

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[6] As indicated above, mandatory local contributions under the "James Formula", former §18A of Article 88A, were phased out by Chapter 709, Laws of Maryland 1974. Consequently, the Baltimore City contribution toward BCDSS costs was a voluntary one under Article 88A, §14A(9).

[7] For an analysis of the definition and treatment of "moneys of the State" in differing contexts, *see, e.g.*, 58 *Opinions of the Attorney General* 88 (1973); 53 *Opinions of the Attorney General* 3 (1968); 52 *Opinions of the Attorney General* 481 (1967). [*Editor's Note: See also* Opinion No. 83-004 (January 20, 1983) (to be published at 68 *Opinions of the Attorney General* ____ (1983)), discussing the treatment of federal "block grants" as "moneys of the State".]

[8] Thus, the disposition of such interest is governed by Article 15A, §7 of the Maryland Code, as incorporated in the State Budget. *See, e.g.*, Section 5 of Chapter 125, Laws of Maryland 1982.

local departments concerning State financed activities, those directives are binding on the local departments.

IV

Conclusion

In summary, it is our opinion that all local departments of social services, including BCDSS, must comply with Circular Letter 82–17 and the administrative and fiscal procedures that DHR determines to be necessary or reasonable for the proper administration of the State and Federal funds that it provides to the local departments.[9] For purposes of State fiscal administration, Article 88A, §2(e) does not place BCDSS in a different position from other local departments.

In so concluding, we recognize that the original scope and effect of Article 88A, §2(e), as enacted in 1935, have since been largely eroded. Whether and to what extent §2(e) continues to serve a viable administrative purpose is a matter that, we believe, deserves legislative attention and clarification.

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Editor's Note: Since the issuance of this Opinion, the General Assembly enacted Chapter 110, Laws of Maryland 1983, for "the purpose of . . . clarifying that the Baltimore City Department of Social Services has the same status with respect to the Department of Human Resources as other local departments of Social Services." The new law, effective July 1, 1983, repealed Article 88A, §2(e) as "obsolete" and amended Article 88A, §13(a) to add references to Baltimore City.

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[9] We do not here address the procedures to be followed by BCDSS with respect to local funds that have been voluntarily contributed by the City to BCDSS (*see* note 6 above) or with respect to any of BCDSS's activities that are wholly funded by the City. *Compare* Article 88A, §3(a)(2) *with* Article 88A, §§13(d) and 14A(8) and (9).

STATUTES

INCONSISTENT ENACTMENTS—LEGISLATIVE INTENT—SUBSTANTIVE INTEGRATION—CODIFICATION—PURPOSE AND TITLE REQUIRE GIVING EFFECT TO INCONSISTENT AMENDMENTS TO SAME STATUTE, REGARDLESS OF DIFFICULTY IN CODIFICATION

May 24, 1982

The Honorable Harry Hughes,
Governor

We have reviewed for constitutionality and legal sufficiency Senate Bill 1042 (Racing—Racetrack Building Funds) and Senate Bill 1043 (Racing—Takeout at Thoroughbred Tracks), both involving provisions of Article 78B ("Racing Commission").

Although both bills may be signed into law, we have noted and resolved an apparent inconsistency between the bills that we wish to bring to your attention.

I

Description of Bills

A. *Senate Bill 1042*

Senate Bill 1042, effective July 1, 1982, was enacted for the purpose, inter alia, of abolishing the racetrack building fund for mile thoroughbred tracks and providing for the reallocation of the money presently allocated to this fund.

Under present Article 78B, §11(b)(6), each mile thoroughbred licensee is required to set aside an amount equal to .50% of the mutuel pool on all races conducted by it and to allocate this amount to the Racing Fund for capital improvements in accordance with §12. Senate Bill 1042 repeals §§11(b)(6) and 12, and it transfers that .50% amount to the licensees' share of the takeout now provided for in §11(b)(7).

Thus, the licensees' present share of the takeout on all pools under §11(b)(7) is to be increased by .50%: that is, for each calendar year through 1984, the licensees' share of the takeout is increased from 4.41% to 4.91% of the regular mutuel pool and from 5.41% to 5.91% of the multiple mutuel pool; and, for the calendar year 1985 and each year following, the share of the takeout from the regular mutuel pool increases from 3.66% to 4.16%, and the share from the multiple mutuel pool increases from 4.66% to 5.16%.

B. *Senate Bill 1043*

Senate Bill 1043, effective January 1, 1983, was enacted for the purpose, inter alia, of increasing, from 15% to 17%, the overall takeout from the regular betting at mile thoroughbred tracks.

This bill also amends §11(b)(7) by allocating the additional 2% to the licensees' share of the takeout. It does this by increasing, for calendar years 1983 and 1984, the licensees' present 4.41% share of the regular mutuel pools by an additional 2%, for a total share of 6.41%; and by increasing, for calendar year 1985 and each year following, the present 3.66% share of the regular mutuel pools by an additional 2%, for a total share of 5.66%.

Unlike Senate Bill 1042, this bill makes no change in the share of the takeout from the multiple mutuel pools.

II

Analysis

The seeming inconsistency created by the bills is that neither bill considers the effect of the increase in the licensees' share caused by the other. In our opinion, however, this seeming inconsistency is a technical problem of statutory codification and not one of substantive intent or effect.

It is a general rule of statutory construction that, where two statutes deal with the same general subject matter, they should be construed together and, to the extent possible, full effect given to each, notwithstanding the fact that both may have been enacted at different times and with no reference to each other. *E.g.*, *Surratts Associates v. Prince George's County*, 286 Md. 555 (1979). In this instance, each bill was designed for a separate distinct purpose, and—although each required an amendment to the same section of the law—we believe that the intention of the General Assembly is clear when reading both bills together.

One bill increases the total takeout from the regular mutuel pool by 2% and adds that increase to the licensees' share that is provided for in present §11(b)(7) [Senate Bill 1043]; the other bill reallocates a portion of the present takeout from both the regular and the multiple mutuel pools, by transferring .50% from the Racing Fund to the licensees' share that is provided for in present §11(b)(7) [Senate Bill 1042]. The net effect of these bills, when read together, allows for: (i) a .50% increase in the licensees' share of the takeout from both the regular mutuel and the multiple mutuel pools [Senate Bill 1042]; and (ii) an *additional* 2% increase in the licensees' share of the takeout from the regular mutuel pools [Senate Bill 1043]. Thus, as to the regular mutuel pool takeout affected by both bills, these bills create a combined 2.5% increase in the licensees' share, resulting in a combined total takeout share of 6.91% in 1983 and 1984 and 6.16% in 1985 and subsequent years.

It is significant, we believe, that the immediate source for each of these increases (in one case, a portion of the present takeout; in the other case, a newly-enacted increase in that takeout) is different, and that neither bill purports to amend the statutory source for the increase provided by the other bill.

The only alternative to the two bills would have been to combine both measures into one bill. But this alternative would have effectively—and, we believe, unnecessarily—conditioned the enactment of one proposed law, with one specific purpose, on the enactment of another proposed law, with yet another specific purpose. The sponsor of these bills obviously desired that each proposal be considered separately on its own merits, rather than in one bill that would have required "all or nothing". Such a desire is generally appropriate, and it would certainly defeat the legislative intent if both bills, having been separately approved by the General Assembly, could not now be signed into law and given effect.

In this regard, we note that repeals by implication are disfavored, particularly where the two acts in question, as here, were passed at the same session of the General Assembly.

E.g., *City of Baltimore v. German-American Fire Ins. Co.*, 132 Md. 380 (1918). We also note that the title of each bill is limited to the specific subject matter of that bill. Thus, even if both bills are signed into law, the title of whichever bill will be the later signed is not, in our view, sufficiently broad enough to permit us to read that bill as having repealed the effect of the other, previously signed, bill. For example, the title to Senate Bill 1043 refers simply to "increasing the takeout from the regular betting . . . and providing for the allocation of the increased amount to thoroughbred track licensees"; if Senate Bill 1043 were signed after Senate Bill 1042, its title would be unconstitutional if we were to read Senate Bill 1043 as not only increasing the licensees' share by 2% but, also, decreasing the licensees' share by the .50% increase previously enacted by Senate Bill 1042.

III

Conclusion

In sum, if you were to sign both of these bills into law, we think that it would be appropriate to read them together as if they were codified in new §11(b)(6) in the following, integrated manner:

> "(6)(i) [For calendar year 1982, effective July 1, 1982, as increased by S.B. 1042:] 4.91 percent of the regular mutuel pool and 5.91 percent of the multiple mutuel pool of all races during the year shall be retained by the licensee from which 0.25 percent of both pools shall be paid by the licensee to the Maryland Race Track Employees Pension Fund to be administered by representatives of the licensee and the employees and from which 0.75 percent of both pools, in calendar year 1982 only, shall be allocated by the licensee, with the approval of the thoroughbred racing board, solely to pay the cost of track maintenance, physical improvements, personnel related expenses, and to ensure the maintenance of proper living conditions in the backstretch.
>
> (ii) [For 1983 and 1984, as increased by S.B. 1042 and S.B. 1043:] 6.91 percent of the regular mutuel

pool and 5.91 percent of the multiple mutuel pool of all races during the year shall be retained by the licensee from which 0.25 percent of both pools shall be paid by the licensee to the Maryland Race Track Employees Pension Fund to be administered by representatives of the licensee and the employees and from which 0.75 percent of both pools, in calendar years 1983 and 1984 only, shall be allocated by the licensee, with the approval of the thoroughbred racing board, solely to pay the cost of track maintenance, physical improvements, personnel related expenses, and to ensure the maintenance of proper living conditions in the backstretch.

(iii) [For 1985 and after, as increased by S.B. 1042 and S.B. 1043:] Effective January 1, 1985, the percent of the mutuel pools retained by the licensee shall be 6.16 percent of the regular mutuel pool and 5.16 percent of the multiple mutuel pool from which 0.25 percent of both pools shall be paid by the licensee to the Maryland Race Track Employees Pension Fund to be administered by representatives of the licensee and the employees."

STEPHEN H. SACHS, *Attorney General*

AVERY AISENSTARK, *Chief Counsel, Opinions and Advice*

Editor's Note: On June 1, 1982, Senate Bills 1042 and 1043 were signed into law as Chapters 580 and 581, respectively, Laws of Maryland 1982. The preceding Opinion was originally written as a bill review letter; because of the novelty of the issue addressed, it is published here in a slightly revised format.

TAXATION

ADMISSIONS AND AMUSEMENT TAX—CONSTITUTIONAL LAW—EQUAL PROTECTION—AUTHORITY OF POLITICAL SUBDIVISIONS TO ENACT EXEMPTIONS

August 13, 1982

The Honorable Charles S. Blumenthal
Maryland House of Delegates

You have requested our opinion on the legality of legislation being considered by Prince George's County that would temporarily lower the admissions tax on gross receipts from professional ice hockey games to ½ of 1%, while retaining a 10% rate for virtually all other admissions. The specific legal issue is whether this differential tax rate would violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

For the reasons stated below—particularly, the broad discretion usually afforded legislative bodies in making this type of decision—we believe that such a tax would most likely be upheld as constitutional.

I

Statutory Background

Article 81, §402(a) of the Maryland Code authorizes any county to "levy a tax on the gross receipts of every person, firm or corporation obtained from sources within the county derived from the amounts charged for" each of four enumerated activities, the first of which is "admission to any place". Section 403(b), in turn, grants to the legislative body of the county "the authority to classify the different types of activities defined under §402 and the rate of tax levied need not be the same for each type of activity".

This Office previously has held that these sections confer on the counties broad authority to "impose any rate of tax below the maximum, including a zero rate". 63 *Opinions of the Attorney General* 612, 614 (1978). That Opinion also identified the issue that we consider in detail below: "[I]n enacting any exemptions, the subdivisions must have a rational basis for the classifications that they establish so that the constitutional guarantees of equal protection of the law are not violated." *Id.* at 616.

II

The Prince George's County Proposal

Pursuant to the authority conferred by §402(a), Prince George's County has imposed an admissions and amusement tax on all categories of admissions authorized by that section. *See* §10-207 of the Prince George's County Code (1980 Supp.). With two exceptions, the tax is imposed at the rate of 10%.[1]

On July 27, 1982, Council Bill 143-1982 was introduced in the Prince George's County Council "FOR the purpose of decreasing the amusement tax on professional hockey events for a period of years." The bill would amend §10-207 of the Prince George's County Code to provide for a third exception to the general tax rate of 10%:

> "Provided further, that the tax on the gross receipts for admissions to professional hockey games shall be at the rate of one-half of one percentum (½%) until June 30, 1985. From July 1, 1985 to June 30, 1986, the tax shall be three percent (3%). From July 1, 1986 to June 30, 1988, the tax shall be six percent (6%). After July 1, 1988, the tax shall be ten percent (10%)."

Council Bill 143-1982 would also amend §10-209 to provide that the separately stated tax imposed on "an admission without charge or at reduced rates . . . shall not apply to gross receipts from professional hockey games until July 1, 1988." The bill declares the existence of an emergency

> "affecting the health, safety, or welfare of the citizens of Prince George's County, Maryland, said

[1] The two exceptions are gross receipts from "coin-operated amusement devices" (2%) and gross receipts derived from charges for "refreshment, service or merchandise at any . . . cabaret or other similar place where there is furnished a performance" (½ of 1%).

> emergency being the need to reduce this tax prior to the start of the 1982-83 hockey season and give as much notice as possible to the State Comptroller of the Treasury of this change in tax rate".[2]

The classification that would be established by enactment of Council Bill 143-1982 is one that distinguishes between admissions to professional hockey games, on the one hand, and all other admissions—including other professional sporting exhibitions, such as basketball—on the other. This classification calls into question the application of the Equal Protection Clause of the Fourteenth Amendment.[3]

III

Equal Protection Considerations

A. *Introduction*

The Court of Appeals has summarized the principles of equal protection analysis, as applied to state choices involving the burden of taxation, as follows:

> "The constitutional need for equal protection does not shackle the legislature. *It has the widest discretion in classifying those who are to be regulated and*

[2] Article 81, §404(b) of the Maryland Code requires local officials to give the Comptroller at least 60 days' notice in advance of the date on which any change in the tax rate takes place.

[3] In *Attorney General v. Waldron*, 289 Md. 683 (1981), the Court of Appeals noted the possibility that evaluation of an issue under Article 24 of the Maryland Declaration of Rights might lead to a different result than under the Fourteenth Amendment:

> "Although the equal protection clause of the fourteenth amendment and the equal protection principle embodied in Article 24 are 'in pari materia,' and decisions applying one provision are persuasive authority in cases involving the other, we reiterate that each provision is independent, and a violation of one is not necessarily a violation of the other." 289 Md. at 714.

However, at least with regard to economic regulation like that in question here, *Waldron* strongly suggests that the analytical approach developed under the Fourteenth Amendment governs application of Article 24. 289 Md. at 713, 717.

> *taxed*. Only if the grouping is without any reasonable basis, and so entirely arbitrary is it forbidden. Abstract symmetry or mathematical nicety are not requisites. . . . *If any state of facts reasonably can be conceived that would sustain a classification, the existence of that state of facts as a basis for the passage of the law must be assumed*. The burden is on him who assails a classification to show that it does not rest on any reasonable basis." *Allied American Co. v. Commissioner*, 219 Md. 607, 623 (1959) (emphasis added).

This view of the applicable legal principles reflects an extensive body of United States Supreme Court decisions to the same effect. *See, e.g., City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) ("[T]he judiciary may not sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines . . . ; in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment."). *See also Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959).

In *Villa Nova Night Club, Inc. v. Comptroller of the Treasury*, 256 Md. 381 (1970), the Court of Appeals sustained the constitutionality of the then applicable State admissions tax, Article 81, §402 of the Maryland Code (1970 Supp.). The taxpayer, a cabaret owner, was subject to a higher rate of tax than the rate applicable to other places of amusement, like theaters. In rejecting the taxpayer's claim that the higher tax was a denial of equal protection, the Court wrote:

> "The point is that the Legislature, when it passes a revenue measure, has the power to classify, and may impose varying tax burdens on different groups. It is only when the attempted classification has no reasonable basis in the nature of the businesses classified and burdens are imposed unequally on taxpayers between whom there is no real difference that the courts will interfere." 256 Md. at 391.[4]

[4] Section 402 was amended in 1971 to repeal the State tax and to authorize the counties instead to levy such a tax. Chapter 429, Laws of Maryland 1971. The reasoning of *Villa Nova* applies as much to county admission taxes as to State taxes. 56 *Opinions of the Attorney General* 430, 431 (1971).

See also Lane Construction Corp. v. Comptroller of the Treasury, 228 Md. 90 (1962).

B. *Illustrative Cases*

Although we have found no Maryland cases dealing specifically with the distinction proposed here, cases from other jurisdictions illustrate the broad latitude that courts will extend to the legislative branch in making classifications for tax purposes.

For example, in *Bullock v. Texas Skating Association,* 583 S.W.2d 888 (Tex.Civ.App. 1979), a lower admissions tax rate imposed on skating rinks than on ballrooms was held not to violate the Equal Protection Clause. Quoting from the Supreme Court of the United States [*Carmichael v. Southern Coal & Coke Company,* 301 U.S. 495, 509 (1937)], the Texas Court noted that " 'A legislature is not bound to tax every member of a class or none.' " 583 S.W.2d at 892. *See also Hemphill v. Washington State Tax Commission,* 400 P.2d 297 (Wash. 1965), *appeal dismissed,* 383 U.S. 123 (1966) (no violation of Equal Protection Clause in statute taxing gross receipts from roller skating and exempting gross receipts from bowling); *Bullock v. ABC Interstate Theaters,* 557 S.W.2d 337 (Tex.Civ.App. 1977) (statutory scheme exempting rental of motion picture films to television stations but imposing sales tax on rental of motion picture films to theaters sustained); *Fairmont Dallas Restaurants, Inc. v. McBeath,* 618 S.W.2d 931 (Tex.Civ.App. 1981) (statute imposing a 5¢ tax on alcoholic beverages served by airlines and a 10% tax on mixed drinks sold by all other retailers held constitutional); *Clark v. Dwyer,* 353 P.2d 941 (Wash. 1960) (regulatory scheme classifying apples based on color sustained).[5]

Perhaps the two cases most analogous to our present inquiry involve certain New York tax provisions, applicable to horse racing, that were more favorable to flat tracks than to harness tracks. In *Roosevelt Raceway, Inc. v. County of Nassau,* 218 N.E.2d 539 (N.Y. 1966), *appeal dismissed,* 385 U.S. 453 (1967), the New York Court of Appeals upheld the constitu-

[5] In *Sonitrol Northwest, Inc. v. Seattle,* 528 P.2d 474, 477 (Wash. 1975), the Supreme Court of Washington cited *Clark v. Dwyer* and then observed that a "legislature has even broader discretion and greater power in making classifications for taxation than it has for regulation."

tionality of a state statute that imposed higher local admissions taxes at harness tracks than at flat tracks. In a later case, *National Association of Harness Drivers v. New York State Racing Commission*, 291 N.Y.S.2d 475 (Sup.Ct. 1968), the issue was a law that required harness tracks to pay one-half of an increase in the track's share of the betting pool to the state as a tax, even though it permitted the flat tracks to retain the new revenue for purse enrichment; on the authority of *Roosevelt Raceway*, the Court sustained the different tax treatment against the challenge that there was "no rational basis for diversity of tax treatment between flat tracks and harness tracks". 291 N.Y.S.2d at 477.

IV

Application

Because "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification, . . . [t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). We doubt that such a burden could be sustained in this matter.

Prince George's Council Bill 143-1982 contains a detailed preamble, setting forth legislative findings in support of the need for the proposed legislation. The preamble reads as follows:

> "WHEREAS, the council finds that professional hockey is a sport which has been indigenous to Canada and the northeast United States for many years.
>
> "WHEREAS, the Council finds that recreation is a valid public purpose, and that the attendance of spectators at professional hockey games is a valid recreational purpose to be encouraged in the interests of the public welfare.
>
> "WHEREAS, the Council finds that despite the recent introduction of professional hockey as a spectator sport into the Washington Metropolitan Area, it has attracted enthusiastic crowds of spectators who have derived recreation from attending hockey games.

"WHEREAS, the Council finds that the expenses associated with professional hockey are high and greater than any other professional team sport present in Prince George's County.[6]

"WHEREAS, the Council finds that professional hockey has been of great economic benefit to Prince George's County in that the restaurants, motels, and gasoline service stations have received great amounts of revenue from the spectators who attend hockey games.

"WHEREAS, the Council finds that the aforementioned economic benefits have generated tax revenues for the benefit of Prince George's County and the State of Maryland.

"WHEREAS, the Council finds that professional hockey has attracted spectators from beyond the borders of Prince George's County who have made expenditures in Prince George's County generating additional State and County taxes.

"WHEREAS, the Council finds that it is beneficial to the public welfare to provide an economic incentive to the sport of professional hockey thereby assisting in its retention in Prince George's County.

"WHEREAS, the Council finds that tax incentives to induce and retain industry within the geographic borders of a political subdivision has been recognized as a valid exercise of the police power.

"WHEREAS, the Council finds that it is a benefit to the public welfare to encourage professional hockey within Prince George's County.

"WHEREAS, the Council finds that a reduction in the amusement tax will act to encourage professional hockey within Prince George's County."

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[6] *Cf. Hemphill v. Washington State Tax Commission*, 400 P.2d 297, 299 (Wash. 1965) (noting that "bowling requires a high initial capitalization" in upholding an exemption for bowling alleys from a generally applicable admissions tax).

Although the contents of a preamble—or, indeed, its absence—will not generally prove conclusive of the constitutionality of the legislation itself, here the preamble evidences attention to the requirement that professional ice hockey be distinguished from other professional sports in the County on some rational basis.[7] In light of the broad scope of discretionary authority that has been afforded legislative bodies in establishing classifications for tax purposes, we are inclined to believe that a rational basis, as suggested by the preamble, might well be present to support this particular legislation.

V

Conclusion

With the obviously limited information now available to us, we cannot say unequivocally that the proposed decrease in the amusement tax on professional hockey in Prince George's County for a period of years is clearly constitutional. On the other hand, given the broad discretion afforded the County Council regarding this kind of tax classification, coupled with the heavy burden placed on one who seeks to demonstrate that such a classification is without rational basis, we certainly are unable to conclude that the proposed reduction is unconstitutional.

On balance, given the County Council's broad discretion and the consequent presumption of constitutionality, we believe that the proposed reduction would most likely be upheld as constitutional if ever challenged.

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GERALD LANGBAUM, *Assistant Attorney General*

AVERY AISENSTARK
Chief Counsel,
Opinions and Advice

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[7] The County Council might perceive a justification for the tax reduction not only from the factors cited in the preamble but also from testimony at hearings on the bill and from other sources of information.

TRADEMARKS

"PERSONS" ELIGIBILE TO REGISTER—"GEOGRAPHICALLY DESCRIPTIVE" MARKS/SECONDARY MEANING—"PERSON" INCLUDES GOVERNMENTAL ENTITY—CITY SLOGAN "BALTIMORE'S BEST/BALTIMORE IS BEST" IS REGISTRABLE

November 15, 1982

The Honorable Patricia G. Holtz
Secretary of State

You have requested our opinion on whether, under the Maryland Trademark Law, your Office may register as trade and services marks certain submissions made by Baltimore City. Specifically, you ask: (1) whether a governmental entity—here, the Mayor and City Council of Baltimore—is a "person" eligible under that law to apply for registration of a mark; and (2) whether the City's submissions [particularly, the slogan "Baltimore's Best/Baltimore is Best"] are "primarily geographically descriptive" of the goods or services in question and, as such, statutorily disqualified from registration.

For the reasons given below, it is our opinion that: (1) governmental entities such as Baltimore City are "persons" entitled to apply for the registration of trade and service marks; and (2) the specific marks submitted by the City convey a distinctive secondary meaning and, consequently, are not disqualified from registration.

I

Background of the Controversy

In February, 1982, the Mayor and City Council of Baltimore filed an application under the Maryland Trademark Law for registration of the conjoined slogan "Baltimore's Best/Baltimore is Best".[1] Trademark registration was sought in connec-

[1] One item on the City's application form listed the phrases "Baltimore's Best" and "Baltimore is Best" as two separate slogans. However, other entries on the form—and, most significantly, the specimens of the mark that must by law accompany the application—make clear that the phrases are *(cont'd)*

tion with the slogan's use on "promotional items, clothes, bags, ties, stickers and manufactured items"; and the slogan was described in the application as having been used by the City and its constituent agencies since 1976 "to promote various educational and cultural activities as well as to promote tourism". A service mark was also sought for the same slogan, as used in connection with "various promotional services and cultural activities of the City of Baltimore", including a biannual awards program designed to stimulate civic pride and community cooperation.

In March, 1982, the City submitted an additional service mark application for a stylized version of the word "Baltimore", preceded by a logo of a sailboat on water in front of the Baltimore skyline. According to the application, the mark is used for advertising and promotional activities on behalf of the Baltimore Civic Center and Convention Bureau, and it has been so used since October, 1978, on "Convention Bureau stationery, business cards, visual displays and various other documents distributed by the Bureau".

After receipt of these applications, the Office of Secretary of State—on preliminary advice of counsel—advised the City that the applications were being rejected because "municipalities are not eligible applicants" under the Maryland Trademark Law. After the City expressed its disagreement with this determination, your Office sought our opinion on the matter.

II

The Maryland Trademark Law

Ever since 1892, Maryland has provided a mechanism for the registration of trademarks used in this State. *See* Chapter 357, Laws of Maryland 1892. However, the General Assembly did not adopt a modern scheme of trademark registration until 1954. *See* Chapter 63, Laws of Maryland 1954. The Maryland

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used together as but a single slogan. In our view, the mark should be registered as shown in the specimen. As discussed in note 10 below, an application to register the phrase "Baltimore's Best" alone would raise more difficult issues.

Trademark Law is now codified in Article 41, §§90 through 103 of the Maryland Code.

The 1954 law followed two notable events in the history of trademark protection and registration: (1) the enactment by Congress in 1946 of the Lanham Trademark Act, 15 U.S.C. §§1051 through 1127; and (2) the approval of a "Model State Trademark Bill" in 1950 by the National Association of Secretaries of State and the Drafting Committee of the Council of State Governments. The Lanham Act was intended, among other things, to protect the use in interstate commerce of trade and service marks through a system of federal registration and to prevent interference with registered marks by "state or territorial legislation". *See* 15 U.S.C. §1127. The Model State Bill—at least in part an outgrowth of the federal act—was intended to promote uniform state legislation by providing a system for registering marks used within a particular state. *See* Sacks and Stokes, *Statutory Treatment of the Model State Trademark Bill in the Areas of Service Marks and Conflicting Federal Registrations*, 127 Geo. Wash. L. Rev. 353, 354 (1959).

State trademark registration laws patterned after the Model State Bill have been adopted with some variations in 46 jurisdictions. In Maryland, as elsewhere, it is evident that such laws do not abridge the common law but, rather, simply affirm it. *See* Article 41, §102 of the Maryland Code; *A. & H. Transp. Co. v. Save Way Stations*, 214 Md. 325, 331-32 (1957); Sacks and Stokes, *supra*, at 355; R. Callmann, *The Law of Unfair Competition, Monopolies and Trademarks* §97.4 (1967). Common law ownership rights in a trademark "can only be acquired by actual adoption and use of the mark for the purpose of identifying the source or origin of the article to which it is attached. Mere state registration of a trademark is not enough to create an exclusive right to use the mark in the absence of true common law ownership." Sacks and Stokes, *supra*, at 355. *See also A. & H. Transp. Co. v. Save Way Stations*, 214 Md. at 331-32.

State registration, in turn, merely provides a public record of asserted common law rights in a trade or service mark. Sacks and Stokes, *supra*, at 355. "State registration, as distinguished from federal registration, does not warrant any presumption of ownership or validity of the mark registered, since states ordinarily lack the facilities for pre-examination or even classification". Callmann, *supra*, at §97.4.[2] Whatever the value of state registration, the Maryland Trademark Law contains a registration mechanism that largely follows the Model State Bill and, as a consequence, mirrors many provisions of the Lanham Act.[3]

III

"Persons" Eligible for Registration

A. *Introduction*

Under the Maryland Trademark Law, "any person who adopts and uses a mark in the State may file . . . an application for registration of that mark". Article 41, §92(a) of the Maryland Code. For those purposes, "person" is defined to mean "any individual, firm, partnership, corporation, association, union or other organization". Article 41, §90(b) of the Maryland Code. Virtually the same definition of "person" appears in the Model State Bill, as well as in the statutes of many states. *See, e.g.*, N.Y. Gen. Bus. Law §360(b); Del. Code Ann. tit. 6, §3302(3). Similar definitions appear in the Lanham Act. *See* 15 U.S.C. §1051(a) and §1127.[4] None of these definitions expressly include governmental entities within their purview.

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[2] Under the Lanham Act, a federal registrant enjoys a favored status. Registration on the Principal Register in the Trademark Office is prima facie evidence of the owner's right to use of the trademark in interstate commerce, and this right may become incontestable. *See* 15 U.S.C. §1115.

Commentators differ as to the desirability of state registration. *Compare* Sacks and Stokes, *supra*, at 354 ("Traditional state trademark statutes are important additions to the protection afforded by the common law.") *with* Callmann, *supra*, at §98.1 n. 34 ("The advantage of state registration is so negligible that it might be better if there was none.").

[3] The only substantive amendment to the 1954 Maryland law expanded the statute to encompass "service marks" as well as trademarks. Chapter 751, Laws of Maryland 1967. This amendment, however, did not affect the particular provisions, derived from the Model State Bill and the Lanham Act, that we consider in this Opinion.

[4] Under 15 U.S.C. §1051(a), an application for a federal trademark must be "verified by the applicant, or by a member of the firm or an officer of the corporation or association applying". 15 U.S.C. §1127, in turn, provides that:

(cont'd)

The Court of Appeals recently summarized the rule of construction for such a general definition:

> "This Court has consistently held that the word 'person' in a statute does not include the State, its agencies or subdivisions unless an intention to include these entities is made manifest by the Legislature." *Unnamed Physician v. Commission on Medical Discipline*, 285 Md. 1, 12 (1979).

In the case of the Maryland Trademark law, however, we believe that the General Assembly's intention to include governmental entities within the registration provisions can fairly be inferred.

B. *Construction of "Person" in Other Trademark Laws*

As discussed above, the registration mechanism of the Maryland Trademark Law mirrors in key respects that of the Lanham Act and the Model State Bill, including the definition of "person". And, under those other statutes, governmental entities have been treated as encompassed by the term "person".

Under the Lanham Act, according to the official manual for federal trademark examiners: "Nations, states, municipalities, and other related types of bodies, operating with governmental authorization, may apply to register marks which they own." *Trademark Manual of Examining Procedures* §802.01 (citing *In re United States Department of the Interior*, 142 U.S.P.Q. 506 (TT&A Bd. 1964) and *National Aeronautics and Space Administration v. Record Chemical Co., Inc.*, 185 U.S.P.Q. 563 (TT&A Bd. 1975)).[5]

> "The term 'person' and any other word or term used to designate the applicant or other entitled to a benefit or privilege or rendered liable under the provisions of this chapter includes a juristic person as well as a natural person. The term 'juristic person' includes a firm, corporation, union, association, or other organization capable of suing and being sued in a court of law."

A provision of the Lanham Act dealing with the registration of collective marks and certification marks authorizes "persons, and nations, States, municipalities and the like" to seek registrations. 15 U.S.C. §1054. Nevertheless, the specific inclusion of governmental entities in this one provision has not been interpreted to imply the exclusion of such entities from the general provision on trademark registration found elsewhere in the statute.

Similarly, the Attorney General of New York has concluded that, under that state's version of the Model State Bill, a governmental agency may register a mark. 1958 *Opinions of the Attorney General of New York* 193 (1958).[6] Other states with trademark registration statutes similar to Maryland's also have permitted registration of marks by governmental agencies. For example, Connecticut permitted the Town of East Hartford to register a symbol of the East Hartford Bicentennial; Indiana has authorized itself to register the phrase "Wander Indiana"; and New York has registered "I Love New York".

Such construction, given to the term "person" in federal practice and in jurisdictions that have adopted the Model State Bill, is especially pertinent here: when a provision of Maryland law is patterned after a provision of the law of other jurisdictions, the construction given that provision in those other jurisdictions is "persuasive as to the meaning of the Maryland act". *St. Joseph Hospital v. Quinn*, 241 Md. 371, 377 (1965). *See also Unsatisfied Claim and Judgment Fund v. Hamilton*, 256 Md. 56, 59 (1969); *Saunders v. Unemployment Compensation Bd.*, 188 Md. 677, 688 (1947); 2A *Sutherland, Statutory Construction* §52.05 (C. Sands 4th ed. 1973).

Hence, we believe that the General Assembly should be understood to have intended the same inclusive definition of "person" in its comparable trademark registration provision.

C. *Rationale for Inclusive Construction of "Person"*

We also believe that the underlying justification for the general "exclusionary rule" of construction used by the Court of Appeals is inapplicable to this provision of the Maryland Trademark Law.

As one court has explained, this rule of construction is not automatically applied to every statute regardless of its nature:

> "In support of their contention that [the word 'person' in a statute governing water rights applied] only [to] private persons, firms or corporations, defendants cite statements by this court that in the ab-

[6] The State of New York has itself registered a mark with its Secretary of State: "I Love New York." *See* Service Mark No. 4180, dated September 16, 1977.

> sence of express words to the contrary, neither the state nor its subdivisions are included within the general words of a statute. [Citations omitted.] But this rule excludes governmental entities from the operation of general statutory provisions only if their inclusion would result in an infringment upon sovereign governmental powers. 'Where . . . no impairment of sovereign powers would result, the reason underlying this rule of construction ceases to exist and the Legislature may properly be held to have intended that the statute apply to governmental bodies even though it used general statutory language only.' [Citations omitted.]" *City of Los Angeles v. City of San Fernando*, 537 P.2d 1250, 1306-07 (Cal. 1975) (emphasis deleted).

See also In re Public Parking Auth. of Pittsburgh, 76 A.2d 620 (Pa. 1950).

The Maryland Court of Appeals has similarly described the purpose of the rule in the leading case of *Mayor and City Council of Baltimore v. Baltimore Gas and Elec. Co.*, 232 Md. 123 (1963). According to the Court of Appeals, the general rule of construction that excludes the sovereign "from the purview of a statute in terms applicable to a person or corporation 'finds its basis in no small part in the doctrine of governmental immunity'". 252 Md. at 136 (quoting *United States v. Coumantaros*, 165 F.Supp. 695, 698 (D.Md. 1958)). By contrast, "'the general exclusionary rule has no application where no impairment of sovereign power will result, where immunity has been waived or where the government is given, rather than deprived of, powers'". 232 Md. at 136. The *Coumantaros* case, from which the Court of Appeals quoted with evident approval, adds that this exclusionary rule of construction should not be applied when the sovereign entity is acting without detriment to its sovereignty and "is engaging in commercial and business transactions such as other persons, natural or artificial, are accustomed to conduct". *United States v. Coumantaros*, 165 F.Supp. at 698.

Taken together, *Baltimore Gas* and *Coumantaros* suggest at least the following distinction: A governmental entity will be excluded from the general term "person" if the contrary reading would result in impairment of the entity's sovereignty, but not if it would result solely in enhancement of the entity's proprietary activities.[7]

Here, in applying for and obtaining registration of a trade or service mark, Baltimore City (or any State or local governmental entity) does not impair its sovereign powers, waive immunity, or incur liability. To the contrary, it seeks a proprietary benefit as part of its effort to engage in a commercial or business transaction customary to private entities. In our opinion, the rule of construction ordinarily excluding a governmental agency from references to the word "person" is inapplicable in these circumstances.

D. *Conclusion*

For these reasons, we believe that Baltimore City and other governmental entities are "persons" within the meaning of the Maryland Trademark Law and, as such, are entitled to register a mark used in Maryland.

IV

Geographical Marks

A second issue is whether registration of the particular marks in question is barred by Article 41, §91(5).

[7] Although *Baltimore Gas* has been cited by the Court of Appeals in its subsequent reiterations of the rule of statutory construction in question, the distinction we suggest has not been fully developed or articulated. *See Unnamed Physician v. Commission on Medical Discipline*, 285 Md. 1, 12 (1979); *State Comm'n on Human Relations v. Baltimore*, 208 Md. 35, 39 (1977); *Harden v. Mass Transit Admin.*, 277 Md. 399, 408 (1976). In *Harden*, the Court of Appeals stated that: "Although many of the cases supporting this principle [of statutory construction] involve some portion of the sovereign power, the cases are by no means confined to that." 277 Md. at 412. It then cited with approval an 1877 United States Supreme Court opinion in which the United States was held not to be a "person" entitled to take lands under a will. *Id.* Thus, we do not suggest that the rule excluding governmental entities from general terms like "person" applies *only* when sovereignty would otherwise be impaired. We do think, however, that it would not be applied by the Court of Appeals at least where, as here, there is no impairment of sovereignty *and* the provision in question is designed to protect a proprietary interest.

Section 91(5) provides in pertinent part that a submission may not be registered if it consists of a mark that, "when applied to the goods or services of the applicant[,] is primarily geographically descriptive or deceptively misdescriptive of them". This restriction is necessary to prevent someone from monopolizing a geographical term in common use. *See* R. Callmann, *supra*, at §72. On the other hand, if a word is understood by the public to convey a distinctive "secondary meaning" beyond mere geographic description, then it may be registered. *Id.* at §72.5. Thus, §91(5) goes on to state that:

> "The Secretary of State may accept as evidence that the mark has become distinctive, as applied to the applicant's goods or services, proof of continuous use thereof as a mark by the applicant in this State or elsewhere for the five years next preceding the date of the filing of the application for registration."

Although Maryland courts apparently have not had occasion to construe this particular statutory provision, they have explored the issue in applying the common law requirements for a technical tradename in suits alleging unfair competition. For example, in *Baltimore Bedding Corp. v. Moses*, 182 Md. 229 (1943), the Court of Appeals held that there can be no exclusive appropriation of geographical marks. However, the Court recognized that a geographical word or phrase originally incapable of exclusive appropriation "might nevertheless have been used so long and so exclusively by one producer with reference to his article that, in that trade and to that branch of the purchasing public, the word or phrase had come to mean that the article was his product". 182 Md. at 238. If so used, the words were said to acquire a "secondary meaning", rendering the geographical name or mark valid. *Id.* On the facts before it, the Court applied these principles to reject the contention that 27 years as a manufacturer of bedding in Baltimore under the name of "Baltimore Spring Bed Company" gave the firm name a valid secondary meaning.

Similarly, in *Edmondson Village Theatre v. Einbinder*, 208 Md. 38 (1955), the Court of Appeals held that one business did not have the exclusive right to use the geographical name "Edmondson". In so doing, however, the Court wrote:

> "It is a general rule, subject to exceptions, that a geographical, locational or place name is common

> property and cannot be appropriated as the subject of an exclusive trademark or trade name. But where a geographical name acquires a secondary meaning indicating not only the place of production but also the producer and the quality of his product, the owner may assert an exclusive right to the name against all persons who are not doing business within the geographical limits, and even against persons within the geographical limits if the name has been used fraudulently to mislead purchasers. It has thus been held that the use of the name of a place may ordinarily be protected where it indicates the origin and ownership of medicinal waters; but where a name has become a generic one for mineral waters of a certain type, coming from a more or less extensive district, it cannot be the subject of exclusive use. *La Republique Francaise v. Saratoga Vichy Spring Co.*, 191 U.S. 427, 24 S.Ct. 145, 48 L.Ed. 247; *Saxlehner v. Wagner*, 216 U.S. 375, 30 S.Ct. 198, 54 L.Ed. 525." 208 Md. at 46.

Rudolph Callmann states that "[a] geographical term is generally understood as one which refers to, or describes the place or origin of a product or the situs of a business." Callmann, *supra*, at §72. He also notes that:

> "Though a word may be geographical, it may nevertheless have another meaning . . . . The decisive factor in such a case is the public reaction to and understanding of the word." *Id.* at §72.5.

Callmann adds that "[t]he modification of a geographical word may be sufficiently distinctive to entitle the resulting phrase to protection". *Id.* at §72.6(c).

Similar principles govern the treatment of geographical marks by the federal authorities. According to the Trademark Trial and Appeal Board:

> "[T]he criteria for determining the registrability of a geographical designation . . . are (a) whether the term conveys to customers primarily or immediately a geographical connotation and then (b) whether the goods do in fact come from the place so named . . . . If the notation in question does not convey an immediate or readily recognizable geographical signifi-

> cance to the average consumer, the mark is manifestly arbitrary, and the second question, need not be pursued. However, if the response is in the affirmative, we proceed to the next question. If the goods actually come from the place named, the mark in question is primarily geographically descriptive of the goods and registrable . . . upon a showing . . . that the mark has become distinctive of that party's goods in commerce. [G]eographic terms should be free to be used by all business organizations within the geographical area to describe geographically the origin of their goods unless and until it can be shown by competent proof that the mark has acquired a secondary meaning." *In re Charles S. Loeb Pipes, Inc.*, 190 U.S.P.Q. 238, 244 (TT&A Bd. 1975).

The *Trademark Manual of Examining Procedures*, states as follows:

> "When a name of a geographic area or other matter having geographical meaning is a *component* of a mark, the other wording or design in the mark might dilute the geographical significance so that the composite mark might not be subject to refusal on a geographical basis." §1208.07 (emphasis in original).

It is indisputable that the slogan "Baltimore's Best/Baltimore is Best" conveys an immediate geographical connotation. A slogan designed to promote the City and encourage tourism could hardly be effective if it did not.[8] However, the slogan in question does not consist solely of a geographical phrase but is a "matter having geographical meaning [as] a *component* of a mark".

Moreover, it does not appear that the City's submission was intended primarily to describe the place of origin of the goods to which "Baltimore's Best/Baltimore is Best" is affixed or to describe the location of the services to be provided.[9] Rather, the mark is intended to instill civic pride and promote the virtues of the City.

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[8] State registered marks such as "I Love New York" and "Wander Indiana" have a similar geographical connotation.

[9] The application submitted by the City does not disclose if the goods in question are produced locally or elsewhere.

We think it can be forcefully argued that the "Baltimore's Best/Baltimore is Best" phrase has indeed acquired a distinctive meaning and is associated in the mind of the public *only* with the City's laudable promotion efforts and awards program. The City is not attempting to appropriate for its own exclusive use the commonplace terms "Baltimore" and "Best". Rather it simply seeks to register the distinctive slogan that has resulted from the City's past use of the conjoined phrases "Baltimore's Best/Baltimore is Best".[10]

Moreover, §91(5) authorizes the Secretary of State to accept, as evidence of the distinctive nature of the mark, five years continued use in Maryland. The City's application states that the mark has been used since 1976 and, as required by law, represents that "no other person has the right to use such mark in this State, either in the identical form thereof or in any such near resemblance thereto as might be calculated to deceive or to be mistaken therefor". *See* Article 41; §92(a)(4). It is our opinion that you may rely on these assertions to conclude that the mark has become distinctive and that, therefore, registration is not foreclosed on the grounds that the submission is geographical.

Finally, as to the sailboat logo sought to be registered on behalf of the City Convention Bureau, we note that this logo is not primarily a geographical mark. The application does not seek to register the word "Baltimore" in isolation, only the distinctive logo that embellishes it.[11]

[10] Greater difficulty would be presented if the City were to seek separate registration of each of the two phrases that, together, constitute the slogan "Baltimore's Best/Baltimore is Best". The phrase "Baltimore's Best", in particular, consists of nothing but descriptive words—part geographical, part qualitative—that have probably long been used by purveyors of various goods and services in the City. Indeed, the additional word associated with "Baltimore"—i.e., "Best"—has been found to be incapable of exclusive use. *See Nebraska Consolidated Mills v. Shawnee Milling Co.*, 99 F.Supp. 70 (W.D. Okla. 1951), *aff'd*, 198 F.2d 36 (10th Cir. 1952). Perhaps the other phrase in the slogan, "Baltimore is Best", is independently registrable, because it is a distinctive claim for the City itself, not readily useable as a description for goods or services. At any rate, we need not resolve these questions in view of the fact that the slogan for which registration is sought is the combination of the two phrases, not either in isolation.

[11] As discussed above, "the other wording or *design*" in a mark with a geographical component may permit registration. *Trademark Manual of Examining Procedures* §1208.07.

V

Conclusion

In summary, it is our opinion that: (1) governmental entities such as Baltimore City are "persons" entitled to apply for registration of trade and service marks under the Maryland Trademark Law; and (2) the specific marks submitted by Baltimore City are not disqualified from registration on the basis of their evident geographically descriptive nature, because the marks convey a distinctive secondary meaning.

STEPHEN H. SACHS, *Attorney General*

AVERY AISENSTARK, *Chief Counsel, Opinions and Advice*

ROBERT A. ZARNOCH, *Assistant Attorney General*

VEHICLE LAWS

LICENSING OF DEALERS AND SALESMEN—CAR BUYING/REFERRAL SERVICES—"EMPLOYMENT" OF SALESMEN BY DEALERS—SALE OF NEW VEHICLE THROUGH BUYING/REFERRAL SERVICE VIOLATES STATE LICENSING LAWS

June 8, 1982

The Honorable Lowell N. Bridwell
Secretary of Transportation

You have requested our opinion on the legality of the action of the Motor Vehicle Administration ("MVA") in authorizing certain car buying/referral service businesses to operate in Maryland. Specifically, you have asked whether these businesses are subject to the vehicle salesman licensing laws of Maryland and, if so, whether they are in compliance with the statutory requirements for licensure.

For the reasons discussed below, it is our opinion that the licensing and regulatory requirements of Title 15 of the Transportation Article of the Maryland Code do not adequately accommodate the operation of car buying/referral services, and such businesses are unauthorized to the extent that they receive or expect to receive a commission or other compensation for their referrals. Consequently, unless the General Assembly acts to amend current licensing requirements, the MVA should discontinue its current recognition of these businesses in an orderly manner.

I

Description of Buying/Referral Services

Although the operations of each car buying/referral service may differ in some of their details, we understand that the basic operations of these services are substantially similar to those of the first car buying/referral service to do business in this State: the United Buying Service. Accordingly, as a basis for our discussion, we will first review that we understand to be the method of operation of that company, as described in *Detroit Automotive Purchasing Services, Inc. v. Lee*, 463

F.Supp. 954 (D.Md. 1978) and 53 *Opinions of the Attorney General* 402 (1968). (We assume that United Buying Service has not changed its method of operation in any material respect from that described in that case and Opinion.) In addition, we also will review an alternative car buying/referral service proposed to the MVA by the District of Columbia Division of the American Automobile Association.

United Buying Service ("UBS") has its principal office in Chevy Chase, Maryland. UBS solicits new motor vehicle buyers through advertisements suggesting that buyers may be able to obtain savings on the purchase of a vehicle if they purchase through UBS. A potential buyer, desiring to take advantage of UBS's services, contacts UBS directly. UBS employees, who are licensed vehicle salesmen associated with various participating dealers, provide the customer with a brochure listing car models that may be purchased and the prices for each model and optional accessories that the buyer might desire.

When the customer decides which model and accessory package he or she desires to purchase, UBS provides the customer with a purchase certificate and the name of a dealer who, in participation with UBS, has agreed to sell the vehicle and accessories to UBS customers at the price listed in the brochure. The participating dealer takes the purchase certificate from the customer at the time of sale and returns it to UBS, together with payment of a prenegotiated referral fee.

The District of Columbia Division of the American Automobile Association ("AAA") has proposed an alternative car buying/referral service. Under its proposal, AAA would establish agreements with various car dealers to provide AAA members with automobiles at a fixed price above dealer cost. Licensed vehicle salesmen, located at and employed by various participating dealers, would act as the "contact" salespersons for AAA members. AAA employees, who are not themselves licensed vehicle salesmen, would advise members on general vehicle information, consumer ratings, models, available options, and pricing structures, but would refer members to participating dealers for specifics. The member would then be informed that an AAA authorization (confirmation of membership) would be forwarded to the "contact" salesperson at the dealer. On receipt of the authorization, the "contact" would call the member to set up an appointment. A referral or service fee would be remitted to AAA by the dealer in the same manner that dealers remit their referral fees to UBS.

A basic difference between the UBS operation and the AAA proposal is that UBS's own employees are themselves licensed vehicle salesmen associated with participating dealers, while AAA's employees would not be licensed salesmen but would be associated with "contact" licensees directly employed by participating dealers.

II

History of Buying/Referral Services in Maryland

For over thirty years, the sale of motor vehicles has been comprehensively regulated in Maryland. *See Detroit Automotive Purchasing Services, Inc. v. Lee*, 463 F.Supp. 954 (D.Md. 1978); *Aero Motors, Inc. v. Adm'r, M.V.A.*, 274 Md. 567 (1975). Under the provisions of the Transportation Article, licenses are required for vehicle manufacturers, distributors, and persons operating factory branches, §15-202; for dealers, §15-302; and for salesmen, §15-402. *See also* COMAR 11.12.01.

In 1966, the General Assembly of Maryland enacted Chapter 515, Laws of Maryland 1966, which defined a vehicle salesman, in relevant part, as follows:

> "The term 'salesman' means any person who sells or offers to sell any motor vehicle . . . or solicits or otherwise endeavors to procure in any manner the sales [sic] of a motor vehicle on behalf of a dealer or himself, if he is also a dealer, whether or not such individual is licensed or subject to the licensing requirements of this article." Former Article 66½, §2(a)(49a).

In 1968, an Opinion of this Office concluded that buying services acted "on behalf of a dealer" under this definition and, without licensure, could not do business in Maryland:

> "[T]he buying service brings together the buyer and seller, and, in effect, secures a purchase for a fee paid to the buying service; to that extent, the buying service 'solicits or endeavors to procure in any

> manner the sale of a motor vehicle' within the above definition of salesman, and is, therefore, subject to the dealer licensing laws of this State." 53 *Opinions of the Attorney General* 402, 403 (1968).

Pursuant to this Opinion, the MVA advised UBS, which already had been operating in Maryland, that it must cease selling automobiles.

However, in 1969, the MVA altered its position after UBS modified the format of its purchasing certificates to reflect that its compensation comes from the buyer, albeit through the dealer. Apparently, the dealer was authorized by the buyer to take UBS's fee out of the money that the dealer received from the buyer and forward that fee to UBS, along with written confirmation by the buyer that UBS was acting as purchasing agent for the buyer and not as selling agent for the dealer. Based on this arrangement, the MVA determined that UBS was not subject to the then dealer and salesmen licensing laws of Maryland.

In 1970, the General Assembly enacted a change in the definition of vehicle salesman, broadening the definition to include one who "[i]nduces or attempts to induce" the sale of a vehicle and who "receives or expects to receive" therefor any value from either the seller *or* the buyer of a vehicle. Chapter 534, Laws of Maryland 1970.[1]

In June of 1971, as a result of this redefinition of the term "vehicle salesman", the MVA again determined that UBS could not legally operate in Maryland unless the representatives of the buying/referral service held valid salesman's licenses. How-

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[1] Codified as Article 66½, §1-210(a), this legislation defined a "vehicle salesman" as any person who:

> "1. Is employed as a salesman by a dealer or who, under any form of contract, agreement or arrangement with a dealer, for commission, money, profit or other thing of value, sells, exchanges, buys, or offers for sale, negotiates or attempts to negotiate, a sale or exchange of an interest in a vehicle required to be registered under subtitle 3; or
>
> 2. *Induces or attempts to induce* any person to buy or exchange an interest in a vehicle required to be registered under subtitle 3, *and who receives or expects to receive a commission, money, brokerage fee, profit or any other thing of value from either the seller or purchaser of said vehicle.*" (Emphasis added.)

ever, UBS and the MVA eventually reached an accommodation under which the individual employees of UBS would be licensed as vehicle salesmen through the dealers with which UBS was associated. As licensed vehicle salesmen, the employees of the buying/referral service were regarded by the MVA to be agents and employees of the respective dealers, even though the salesmen were not located at the dealers' fixed places of business and were compensated by UBS, not the dealer.

At the present time, there are several buying/referral services operating in Maryland under this general arrangement.[2]

III

The DAPS Case

In 1978, the United States District Court for the District of Maryland held that the Maryland licensing provisions for vehicle salesmen were constitutional. *Detroit Automotive Purchasing Services, Inc. v. Lee*, 463 F.Supp. 954 (D.Md. 1978). In that case, the plaintiff organization, Detroit Automotive Purchasing Services, Inc. ("DAPS"), challenged the statute after it had unsuccessfully tried to reach an accommodation with the MVA to do business in Maryland.

The Court agreed with the MVA's position that the operations of UBS, as previously approved by the MVA, were significantly different from that of DAPS. Under the DAPS proposal, the broker through which the customer would deal would not be licensed. The Court found that the MVA had acted lawfully when it refused to permit the DAPS operation in Maryland, because the DAPS brokers, as independent contractors, would not have been affiliated with a particular dealer.

In reaching its conclusion, the Court twice noted that there can be "some question as to the legality" of even the UBS operation under its accommodation with the MVA. 463 F.Supp. at 960 and 971.

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[2] Of course, to the extent that this accommodation might sanction unlawful conduct, the State is not bound to honor it.

During the pendency of the DAPS case, the 1978 General Assembly considered a bill (House Hill 1759) that would have established a licensing and regulatory scheme for new vehicle brokers. Similar legislation was again filed during the 1979 Session (House Bill 1145). Neither bill was enacted.[3]

IV

Buying/Referral Services as "Dealers"

Turning to your specific question, we first find that these buying/referral services may not be licensed as dealers.

"Dealer" is defined by §15-101(b), in relevant part, as follows:

> "(1) 'Dealer' means . . . a dealer in vehicles of a type required to be registered under Title 13 of this article.
>
> (2) 'Dealer' includes:
>
> (i) A person who during any 12-month period sells five or more of these vehicles, the ownership of which was acquired for resale purposes; and
>
> (ii) For the purposes of §§15-301 through 15-315, inclusive, of this title, any person who sells vehicles, whether or not that person acquired the vehicles for personal or business use, if the vehicles are displayed at a fixed location used principally for the purpose of selling vehicles on a regular basis."

The requirements for obtaining a dealer's license to deal in new vehicles include the requirement that each dealer must possess an unexpired franchise from a manufacturer [§§13-113.1 and 15-305]; that the business be conducted from a

[3] House Bill 1759 was characterized in the DAPS case as a "less restrictive regulation of vehicle brokers"—that is, less restrictive than the ongoing UBS accommodation. 463 F.Supp. at 967 n. 6, and at 969. Inasmuch as that proposed legislation would have permitted a totally different method of operation from that of UBS, we cannot draw from its rejection any clear inferences about what the General Assembly understood or intended with regard to the continued legality of the method of operation then—and now—conducted by UBS.

fixed location in an adequate and appropriate building with proper service facilities available [§§15-105 and 15-304]; and that the dealer post a surety bond with the MVA for the benefit of the MVA or any other person who sustains a loss as a result of a violation by the dealer, its employees, or its agents [§§15-103 and 15-308]. Sections 15-312 through 15-315 enumerate several unlawful acts, the commission of which by dealers and their employees and agents would subject them to administrative sanctions, including loss of license and possible criminal prosecutions.

Under this statutory scheme, it is evident that car buying/referral services may not be licensed as dealers because they do not hold unexpired franchises from a licensed manufacturer and do not meet the location and other applicable requirements of the Code. *See Aero Motors, Inc. v. Adm'r, M.V.A.*, 274 Md. 567 (1975).

V

Activities of Buying/Referral Service Employees Require Licensure

We now address the question of whether the referral, for a fee, of potential customers to either a dealer or a licensed vehicle salesman falls within the definition of "vehicle salesman" for purposes of licensing regulation. We think it does.

Under §15-402 of the Transportation Article, an individual may not act as a vehicle salesman without first obtaining a license. A "vehicle salesman" is currently defined by §15-101(e)(1) as any individual who:

> "(i) For a commission or other compensation, under any form of agreement or arrangement with a dealer, buys, sells, or exchanges or negotiates or attempts to negotiate a sale or exchange of an interest in a vehicle of a type required to be registered under Title 13 of this article; or
>
> (ii) *Induces or attempts to induce* any other person to buy or exchange an interest in a vehicle of a type required to be registered under Title 13 of this article *and receives or expects to receive a commis-*

sion or other compensation from either the seller or buyer of the vehicle." (Emphasis added.)

Sections 15-401 through 15-412 set out the requirements for licensure as a vehicle salesman. Licenses are issued only to individuals [§15-403]. The application for a license must state the "address of the fixed location from which the licensed activity of the applicant will be conducted" [§15-102]. A person may not be licensed as a vehicle salesman unless the person "[i]s a licensed dealer" or "[i]s employed as a vehicle salesman by a licensed dealer" [§15-404].

Each application must include the "name and business address of the licensed dealer by whom the applicant is or will be employed" [§15-405]. Futher, "[a] licensed vehicle salesman may not act as a vehicle salesman for any person other than the licensed dealer named in the salesman's license" [§15-409].

As indicated above, a vehicle salesman is defined as including one who, for or with the expectation of receiving a "commission or other compensation from either the seller or the buyer", "[i]nduces or attempts to induce" the sale of a vehicle.[4] The terms "induces" and "attempts to induce" are not defined anywhere in the Transportation Article.

In construing the scope of the phrase "induces or attempts to induce", as used in the definition of "vehicle salesman", we apply the cardinal rule of statutory construction that, unless a different meaning is clearly indicated, a statutory term is to be construed in accordance with the plain and ordinary meaning of the term. *Hunt v. Montgomery Co.*, 248 Md. 403, 414-15 (1968); *Pressman v. Barnes*, 209 Md. 544, 558-59 (1956).

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[4] Obviously, the *gratuitous* referral of a potential customer to a licensed dealer or vehicle salesman—i.e., a referral without receipt of or expectation of receiving compensation from either the buyer or seller—does not fall within this definition and would not require licensure. For discussions of what constitutes compensation for a referral in similar contexts, *see, e.g.*, 52 *Opinions of the Attorney General* 215 (1967) (payment of fee for influencing procurement of insurance: consideration requirement is met even if it merely compensates expenses); Opinion No. 79-039 (July 12, 1979) (unpublished) (payment of referral fee falls within statutory reference, in law regulating real estate brokers and salesmen, to "compensation . . . for the rendering of any service . . . forbidden to be rendered . . . by other than licensees"); Opinion No. 78-057 (May 8, 1978) (unpublished) (licensure not required under home improvement statute where no consideration passes for referral).

A standard dictionary definition of "induce" is:

> "To lead on; to influence; to prevail on; to move by persuasion or influence." *Webster's New International Dictionary* 1269 (2nd ed. 1953).

Similarly, a leading legal dictionary defines "induce" to mean:

> "To bring on or about, to affect, [to] cause, to influence to an act or course of conduct, [to] lead by persuasion or reasoning, [to] incite by motives, [to] prevail on." *Black's Law Dictionary* 697 (rev. 5th ed. 1979).[5]

See also Burlington Industries, Inc. v. Exxon Corporation, 379 F.Supp. 754, 757 (D. Md. 1974):

> " 'Inducement', . . . while requiring active or affirmative steps to be taken . . . , otherwise is as broad in scope as the range of actions by which one may cause, urge, encourage or aid another to [act]."[6]

The word "attempt", in turn, is defined as follows:

> "In statutes and in cases other than criminal prosecutions[,] an 'attempt' ordinarily means an intent combined with an act falling short of the thing intended. It may be described as an endeavor to do an act, carried beyond mere preparation, but short of execution." *Black's Law Dictionary* 116 (rev. 5th ed. 1979).

Thus, even if "induces" is given a restrictive meaning—i.e., the action taken must actually accomplish the goal (here, a car sale)—the phrase "attempts to induce" is significantly more expansive and does not require that the buying/referral service's actions actually cause an auto sale. It is sufficient if their

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[5] Numerous courts have consistently adopted and applied these or substantially similar definitions in varying contexts. *See, e.g., LaPage v. U.S.*, 146 F.2d 536 (8th Cir. 1945) (inducing transportation of women in commerce for immoral purposes); *Commonwealth v. Mason*, 112 A.2d 174 (Pa. 1955) (inducing holders of securities to exchange or sell them).

[6] *Accord Fromberg, Inc. v. Thornhill*, 315 F.2d 407 (5th Cir. 1963); *Aluminum Extrusion Co. v. Soule Steel Co.*, 260 F.Supp. 221 (C.D. Cal. 1966).

actions are designed to do so. We believe that, in this case, they are.

In our view, the action of referring a potential customer to a specific dealer or dealers at which the customer is told to expect some special service or benefit (e.g., a lower purchase price) that is available to the customer solely by reason of the referral—and, presumably, not available through other dealers—serves "to influence", "to aid", "to bring about", or "to affect", if not even encourage, the transaction in question: the sale of a vehicle by that dealer to that customer.[7] Moreover, established and respected organizations such as UBS and AAA, by serving as intermediaries and making referrals to selected dealers, implicitly lend their own good will and prestige to the referrals, and, indeed, to the referent dealers themselves.[8]

As indicated by this Office in 1968, while addressing the then narrower definition of "salesman":[9]

> "[T]he buying service brings together the buyer and seller, and, in effect, secures a purchase for a fee paid to the buying service; to that extent, the buying service 'solicits or endeavors to procure . . . the sale of a motor vehicle'." 53 *Opinions of the Attorney General* 402, 403 (1968).[10]

Since that Opinion was issued, the statutory definition has been *broadened* to cover one who, among other things, merely "induces or attempts to induce" the sale of a vehicle. If, under the prior, narrower definition of "salesman", the "bring[ing] together [of a] buyer and seller" was, "in effect, secur[ing] a pur-

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[7] It is this referral to a specific dealer or dealers—coupled with the receipt of a commission on the sale of a vehicle by the dealer—that sharply distinguishes the activities of car buying/referral services from the mere sale of automotive and other consumer reporting type magazines to the public.

[8] *Cf.* 49 *Opinions of the Attorney General* 263 (1964) (credit card company's program of offering to finance payment of insurance premiums unlawfully influences the procurement of insurance).

[9] *See* Part II of this Opinion.

[10] Nothing in the subsequent history of this matter, including the MVA's accommodation with UBS, suggests that this Opinion's characterization of referral service activities is not as valid today as it was in 1968.

chase", then certainly the same actions, under the present, broader definition, constitute an "inducement".[11]

In sum, we believe that the activities of car buying/referral services, by referring customers to associated dealers with the expectation of receiving a commission or other compensation on the sale of a vehicle, fall within the definition of "vehicle salesman". Consequently, those employees who make the referrals are prohibited from engaging in these activities unless properly licensed as vehicle salesmen. For these reasons, we must conclude that the AAA proposal, pursuant to which AAA employees would not themselves be licensed as vehicle salesmen, is not countenanced by the statutory scheme and may not be permitted by the MVA.[12]

VI

Eligibility of Buying/Referral Service Employees for Licensure

The question then is whether UBS or other car buying/referral services can comply with the statute by having their employees licensed as "vehicle salesmen". We think not.

It is clear that the State's interest in protecting the consuming public from fraud and deception in the sale of automobiles justifies the present, comprehensive, licensing system. *Detroit Automotive Purchasing Services v. Lee*, 463 F.Supp. at 964 n. 5, and at 968. *See also Aero Motors, Inc. v. Adm'r, M.V.A.*, 274 Md. 567, 579-80 (1975) (upholding the licensing require-

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[11] Other statutes, using broad language not unlike that used by §15-101(e) to define "vehicle salesman", have been similarly construed. *See, e.g., Real Estate Comm'n v. Phares*, 268 Md. 344, 348 (1973); *Ritterspusch v. Lithographic Plate Service, Inc.*, 208 Md. 592, 600 (1956); 49 *Opinions of the Attorney General* 263 (1964); Opinion No. 79-039 (July 12, 1979) (unpublished); Opinion No. 77-041 (March 23, 1977) (unpublished).

[12] For purposes of the current licensing laws, as broadened in 1970, it is immaterial whether the buying/referral services act as agents of the buyer or of the seller. These services, which contract with dealers to sell vehicles to buyers at a prenegotiated price, are clearly intermediaries in vehicle sales transactions and receive payment for their services. Under §15-101(e), any entity or person inducing vehicle sales for compensation, whether from the seller *or* the buyer, is a vehicle salesman and must be licensed.

ment that new motor vehicle dealers must possess an unexpired franchise from a manufacturer). Although a licensed vehicle salesman is essentially dealing in, or selling, motor vehicles, he or she is relieved of the several licensing requirements imposed on dealers because the salesman is required to be an employee of a licensed dealer. The dealer is legally responsible for the conduct of its employee-salesmen. *See* §15-109 and §§15-312 through 15-315.

In *Detroit Automotive Purchasing Services v. Lee*, 463 F.Supp. at 958 and 961, the Court concluded:

> "[O]ne who acts as a 'broker' for a car purchase and thereby 'induces or attempts to induce' a car sale in return for a fee qualifies as a new vehicle broker under this statutory scheme and is required to obtain a license.
>
> . . .
>
> By extending the definition of vehicle salesman to embrace the so-called vehicle broker, the General Assembly implicitly acknowledged the fact that *the vehicle broker acts as much, if not more, to the benefit of dealers as buyers, and that, as an agent facilitating car sales, he should be subject to the same qualifications as traditional salesmen.* Accordingly, it required the vehicle broker to align himself to one licensed dealer, as it requires the traditional salesman." (Emphasis added.)

In statutorily defining the role of such "traditional [vehicle] salesmen", the salesman licensing provisions of Title 15 (§§15-404, 15-405, and 15-409) repeatedly refer to and qualify the salesman-dealer relationship by using the words "employed" and "employment".[13] Again, we look to the basic rule of construction that a statute should be construed according to

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[13] For example, §15-404 provides that a person may not be licensed unless the person "is *employed* as a vehicle salesman by a licensed dealer"; that "each application for a license shall contain or be accompanied by the written statement of the licensed dealer by whom the applicant is or will be *employed*, certifying that the applicant has been accepted by the licensed dealer for *employment* as a vehicle salesman"; and that the dealer must "immediately . . . notify the administration of any termination of *employment* of the salesman".

the ordinary and natural import of its language, unless a different meaning is clearly indicated by the context of the law. *Hunt v. Montgomery Co.*, 248 Md. 403, 414-15 (1968); *Pressman v. Barnes*, 209 Md. 544, 558-59 (1956). In this regard, we believe that the General Assembly used the words "employed" and "employment" in their ordinary sense to describe the conventional relationship of a master and servant and, accordingly, intended that the rules for determining the existence of the relation of an employer and employee under Title 15 be the same as the common law rules for determining the master-servant relation. *See, e.g., Thompson v. Paul C. Thompson & Sons*, 258 Md. 391, 394 (1970); *Anderson Nursing Homes, Inc. v. Walker*, 232 Md. 442, 444 (1963); *Marine v. Service Trucking Co., Inc.*, 225 Md. 315, 318-19 (1961). *See also People v. Grier*, 128 P.2d 207, 210 (Cal. L.A. Co. App. Dep't Super. Ct. 1942) ("The word 'servant' is generally synonymous with the word 'employee'"); *Tennessee Valley Appliances, Inc. v. Rowden*, 146 S.W.2d 845, 848 (Tenn. Ct. App. 1940) ("The words 'employer' and 'employee' are synonymous with the words 'master' and 'servant'").

Among the criteria for determining whether a master-servant relation exists are the selection and engagement of the employee; the payment of wages; the power to discharge; the power to control the employee's performance and manner of doing the work; and the extent to which the work is a part of the regular business of the employer. *Anderson Nursing Homes v. Walker*, 232 Md. at 444-45; *Keitz v. National Paving Co.*, 214 Md. 479, 491 (1957); *Sun Cab Co. v. Powell*, 196 Md. 572, 578 (1951). Of these criteria, the most decisive test is the right to control and direct the employee in the performance and manner of doing the work. *Thompson v. Paul C. Thompson & Sons*, 258 Md. at 395. *See also Marine v. Service Trucking Co.*, 225 Md. at 319; *Keitz v. National Paving Co.*, 214 Md. at 491. *See also L.M.T. Steel Products, Inc. v. Peirson*, 47 Md. App. 633, 635-38 (1981).

In this regard, we have been advised that UBS and the various other buying/referral services already operating in Maryland—*not* the dealers with which they are associated—select and hire the individuals to be licensed, pay the employees' compensation, retain the power to discharge the employees, and, most importantly, control the employees' performance and manner of doing their work. Apparently, the individuals who are licensed as vehicle salesmen operate out of the buying/referral services' places of business and *not* at the dealers' own locations. Thus, in some instances, it is conceivable that the dealer may not even personally know the buying service employee who is nominally one of the dealer's licensed salesmen. Moreover, we are advised that UBS, *not* the participating dealers, assumes the Workmen's Compensation obligations for these licensed salesmen. If, however, these licensees are in fact employees of the dealers, then the dealers, not UBS, would be legally responsible for the licensees' Workmen's Compensation.[14]

As the Court stated in *Detroit Automotive Purchasing Services v. Lee*, the statutory scheme regulating the licensing of dealers and vehicle salesmen clearly contemplates that it is the dealer who should have the right and obligation to control and direct its salespersons in the performance and manner of doing their work:

> "[The] licensed dealer, clearly identified as a result of the licensing requirements for vehicle salesman, is himself lawfully and professionally responsible for the conduct of the employee-salesmen. Under §15-109, the licensed dealer can, in some circumstances, lose his own license because of the misconduct of his employee. Thus, the dealer's interest in preserving the investment in a business dependent upon retaining a dealer's license serves as an incentive to monitor the practice of the employee-salesman. In this way, dealer supervision of salesmen augments the regulation of vehicle salesmen through

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[14] Section 1-102 of the Transportation Article provides:

> "(a) In this section, 'employer' has the same meaning as under the State Workmen's Compensation Laws.
>
> (b) Before any license or permit is issued under this article to an employer to engage in an activity in which the employer may employ any individual, the employer shall file with the issuing authority:
>
> (1) A certificate of compliance with the State Workmen's Compensation Laws; or
>
> (2) A workmen's compensation insurance policy or binder number."

> formal MVA adjudication of customer complaints and the imposition of sanctions directly upon the salesman, either by revoking or suspending the salesman's license." 463 F.Supp. at 957-58 (footnote omitted).

Furthermore:

> "The pertinent restriction which requires a licensed broker to be 'employed' by a licensed dealer and act as a vehicle salesman for only him, §15-409(b), can be rationally justified as facilitating the informal supervision of vehicle brokers by licensed dealers. . . . [T]he one-dealer-one-salesman rule conceivably functions to avoid confusion among dealers concerning who will have the legal responsibility for supervising the conduct of a salesman on a given transaction." 463 F.Supp. at 969 n. 9.

There is little evidence that dealers, in their arrangements with UBS and similar car buying/referral services, exercise the necessary supervision of and control over "their" licensed vehicle salesmen; such salesmen, in fact, are supervised and controlled by the car buying/referral service.

In light of the above, we conclude that the master-servant relationship actually exists between the buying/referral service and the individual licensees, not between the dealers and the licensees. This is contrary to the statutory scheme regulating the licensing of dealers and vehicle salesmen.[15]

VII

Conclusion

In summary, it is our opinion that the statutory licensing scheme does not permit the operation of car buying/referral services in the manner described above. The licensing scheme makes it lawful only for licensed dealers and their licensed

[15] It may even have been that, for reasons such as this, the Court in the DAPS case, as noted in Part III of this Opinion, suggested "some question as to the legality" of the MVA-UBS accommodation. That issue, while not then before the Court, is of course now before us.

salesmen to participate in vehicle sales in Maryland. Furthermore, the General Assembly has long required that, as a condition on which a salesman's license may be granted, the salesman must be an employee of the dealer, not some other entity. The mere alignment of buying/referral service staff members as vehicle salesmen with a dealer does not satisfy this employment requirement.

Accordingly, until the General Assembly acts to modify current licensing requirements, it is our opinion that the Motor Vehicle Administration should not authorize the operation of any new car buying/referral services. As to the buying/referral services already operating in Maryland with MVA approval, we recognize that, given the 1971 accommodation with UBS and the long-standing reliance on that accommodation by these various services, it would be inequitable to require them to immediately cease doing business without at least some opportunity to seek legislative relief.[16] We suggest, therefore, that services presently operating with MVA approval under the 1971 accommodation be allowed to continue in operation until the current salesman licenses of their employees expire on April 30, 1983.

STEPHEN H. SACHS, *Attorney General*

LINDA H. LAMONE, *Assistant Attorney General*

AVERY AISENSTARK
Principal Counsel,
Opinions and Advice

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[16] We recognize that our conclusion affects the operation of a type of business that may well be beneficial to consumers. We suggest that, if the General Assembly believes these buying services should be permitted to operate, it should adopt legislation expressly providing for the same and, in that legislation, clearly specify the terms and conditions under which buying/referral services would be authorized to conduct business. *See, e.g.*, the proposals contained in House Bill 1759 (1978) and House Bill 1145 (1979).

ZONING

HISTORIC AREA ZONING—APPEALS—MANNER OF APPEAL FROM HISTORIC DISTRICT COMMISSION—SCOPE OF REVIEW BY BOARD OF ZONING APPEALS

December 20, 1982

L. Clark Ewing, Esquire
Town Attorney, Town of Easton

On behalf of the Mayor and Town Council of the Town of Easton, Maryland, you have asked for our opinion on whether Article 66B of the Maryland Code authorizes appeals from decisions of the Town's Historic District Commission in the manner set forth in §512-N of the Town's Zoning Ordinance—that is, an appeal to the Town's Board of Zoning Appeals in the first instance, with subsequent appeals to the Circuit Court for Talbot County and, thereafter, the Court of Special Appeals.[1] You have also asked for our opinion on the proper scope of review by the Board of Zoning Appeals.

For the reasons given below, we conclude that §512-N of the Zoning Ordinance accords with Article 66B. We also conclude that the Board of Zoning Appeals, in matters related to interpretation or enforcement of the Historic District Ordinance, has more than ordinary appellate jurisdiction: It may conduct *de novo* hearings and make its own determination of disputed issues; however, because the members of the Historic District Commission possess special interest, knowledge, or training in pertinent fields, we believe that the Board of Zoning Appeals should give especially strong consideration to the views expressed by members of the Commission on the various factors prescribed by Article 66B, §8.06 for consideration in reviewing applications for permission to build or change structures.

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[1] The historic area zoning provisions of Article 66B, §§8.01 to 8.15, are applicable to all nonchartered Maryland counties and to all Maryland municipal corporations except Baltimore City. §§7.03 and 8.01(a)(2). *See* 60 *Opinions of the Attorney General* 569 (1975). They are, accordingly, applicable to the Town of Easton, which was incorporated in 1790.

I

Manner of Appeal from Historic District Commission

A. *Introduction*

In connection with your primary question, Article 66B, §8.14 provides:

> "Any person or persons, firm, or corporation aggrieved by a decision of the historic district commission has a right of appeal therefrom similar to that provided from the decision of the zoning board or commission within the county or municipal corporation."

The language of this section has remained the same since it was originally enacted by Chapter 874, Laws of Maryland 1963. Your question therefore becomes: What is the right of appeal of an aggrieved person "from the decision of the [local] zoning board or commission"?

Unfortunately, this question is not easy to answer. It engenders several difficult subsidiary questions: First, what is the local "zoning board or commission"? Second, as of what date is the right of appeal from a decision of this entity to be evaluated—as of 1963, when §8.14 was enacted, or as of the date when the question arises? Finally, do we look to the appeal provisions of Article 66B itself or to local implementing ordinances to see what rights of appeal exist?

B. *Meaning of "Zoning Board or Commission"*

On the first of these subsidiary questions, we note that the term "zoning commission" appears only rarely in the current text of Article 66B. Section 2.07, a section applicable only to Baltimore City, speaks of a "zoning commission"; but the reference in §8.14 cannot be to this commission, because Baltimore City is not covered by §8.14. Section 3.01(c) also refers to a "zoning commission"—and, alternately, to a "planning *and* zoning commission" and a "planning *or* zoning commission"—as a predecessor of the body now established by Article 66B as the local "planning commission". There are several other references in Article 66B to the term "planning and zoning commission". *E.g.*, §§3.01(c), 3.02(b)(2), 3.04(a), 4.05(d), 4.05(e), 7.01(c)(1), 9.01(a), and 9.01(c).

It appears that the body generally referred to in Article 66B as the "planning commission" is currently called a "planning and zoning commission" in many local jurisdictions (for example, Carroll County [*see* §3.02(b)(2)] and Somerset County [*see* §9.01(c)]).[2] It also appears that the name "planning and zoning commission" was a more standard name at some earlier time. *See* §§3.01(c) and 9.01(a). The term "zoning board" is never used in Article 66B, although that Article provides for bodies known as "boards of appeals" or "boards of zoning appeals". §§2.08, 4.07 and 6.02.

In deciding what §8.14 means by "a right of appeal . . . similar to that provided from the decision of the zoning board or commission", it is also worthy of note that, at least until July 1, 1971—the effective date of Chapter 793, Laws of Maryland 1971—neither the planning commission sections (Subtitle 3) nor the subdivision control sections (Subtitle 5) of Article 66B provided for a right of appeal to a court from the decision of a local planning commission. *Urbana Civic Association, Inc. v. Urbana Mobile Village, Inc.*, 260 Md. 458 (1971).[3] Furthermore, the local planning commission (or "planning and zoning commission") then, as now, had no final decision-making power in connection with local zoning. Therefore, in 1963, when §8.14 was originally enacted, there was no right to appeal to a court from any final decision of a local "planning and zoning commission". On the other hand, there was a right of appeal to the circuit court and, thereafter, to the Court of Appeals, from the decision of a local "board of appeals". *See* Chapter 321, Laws of Maryland 1957 (dividing what was then Article 66B, §22, dealing with the board of appeals, into subsections and adding a provision for appeal to the Court of Appeals); Chapter 36, Laws of Maryland 1962, Sections 1 and 41 (amending then Article 66B, §22(i) and repealing §22(j) and (k)).

Despite this possible justification for concluding that the "zoning board or commission" referred to in §8.14 is the "board of appeals", we cannot accept such a reading. Section 8.14 refers to the "zoning board or commission" as a singular body, suggesting that it might be called either a "zoning board" or a

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[2] The name "planning and zoning commission" is common enough that it, rather than "planning commission", was used as the general term in Chapter 825, Laws of Maryland 1982, which added §7.01(c) to Article 66B. Subsection (c)(1)(i) of that section defines "commission" as "the planning and zoning commission or similar body of the county".

[3] *See* note 4 below.

"zoning commission". We do not believe that a board of appeals qualifies for both of these names: whether or not it could be called a "zoning board", it could not properly be called a "zoning commission". Therefore, in our opinion, the reference in §8.14 to the "zoning board or commission" is a reference to the commission established under Article 66B, §3.01—that is, the entity that is most often referred to today as the local "planning commission".[4]

Although §8.14 thus apparently provided no right of appeal to any court before July 1, 1971, we think the question of what appeal rights §8.14 affords must be addressed, not as of 1963, but as of the date the question arises. Thus, if we wish to know what rights §8.14 affords today, we must examine the "right of appeal . . . [now] provided from the decision of the [local planning commission]".

C. *Applicable Right of Appeal*

We addressed this latter question in some detail in 64 *Opinions of the Attorney General* 349 (1979). In that Opinion, we noted that, as a result of Chapter 793, Laws of Maryland 1971, local boards of appeals were newly authorized to entertain appeals arising out of the enforcement of any part of Article 66B or of a local ordinance passed under any of the subtitles of Article 66B.[5] Thus, we specifically concluded, Chapter

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[4] Although our conclusion means that §8.14 provided for no appeal before July 1, 1971, we do not believe that this is a totally unreasonable interpretation. As the Court of Appeals pointed out in the *Urbana* case, decided in January of 1971, there was then no right of appeal from decisions of local planning commissions in the enforcement of local subdivision ordinances. At that time, Article 66B, §4.07(d)(1) only authorized the board of appeals "to hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of *this subtitle* [i.e., Subtitle 4 on Zoning] or of any ordinance adopted pursuant thereto".

The General Assembly, however, presumably was not even aware of this "problem" until the *Urbana* case was decided; and it immediately acted to remedy the situation. On May 28, 1971, Chapter 793, Laws of Maryland 1971, was enacted to amend §4.07(d)(1) to provide the board of appeals with jurisdiction to review "any order, requirement, decision, or determination made by an administrative official in the enforcement of *this article* [i.e, Article 66B] or any ordinance adopted pursuant thereto".

[5] *See* note 4 above.

793 authorized an appeal to the local board of appeals from action of a local planning commission in approving or disapproving a subdivision plat under local subdivision regulations. 64 *Opinions of the Attorney General* at 350-51.

We similarly conclude here that Chapter 793, Laws of Maryland 1971, authorized an appeal to the local board of appeals from action of a local historic district commission in approving or disapproving an application to build or change a structure under Subtitle 8 of Article 66B and the local historic district ordinance.[6] As we explained in our 1979 Opinion, we believe that a multi-member body such as a local planning commission—or, in this case, an historic district commission—qualifies as "an administrative official" within the meaning of Article 66B, §4.07(d)(1). 64 *Opinions of the Attorney General* at 351 n. 4.[6a]

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[6] In an earlier Opinion, this Office stated that "[a]n appeal from a decision of the historic district commission goes directly to the Circuit Court". 62 *Opinions of the Attorney General* 490, 495-96 (1977). The point emphasized in that Opinion, however, was that the decisions of an historic district commission were not reviewable by "the local governing body"; furthermore, the jurisdiction involved was Annapolis, which had specifically provided for direct appeal of decisions of its historic district commission to the Circuit Court. *See Annapolis v. Anne Arundel County*, 271 Md. 265, 288 (1974). The Opinion relied in part on a footnote from the *Urbana* case, 260 Md. at 460 n. 1, which suggested that Article 66B, §8.14 gave a right to judicial review not given by Article 66B, Subtitle 3 or Subtitle 5. We cannot reconcile this unexplained suggestion with our reading of §8.14

[6a] [*Editor's Note*: In reaching this conclusion, the 1979 Opinion "considered with respect" the fact that, in *Cecil County v. Gaster*, 285 Md. 233 (1979), the Court of Appeals expressed "considerable doubt as to whether [a planning] commission is 'an administrative official'" within the meaning of Article 66B, §4.07(d)(1), since "[t]he term 'an administrative official' seems to connote an individual, not a group of individuals". 64 *Opinions of the Attorney General* at 351 n. 4. The Opinion went on to explain why, notwithstanding the "considerable doubt" expressed in *Gaster*, the term "administrative official" should be read to include a multi-member body. *Id.*

The Court of Appeals has since addressed this issue anew. For reasons similar to those set forth in the 1979 Opinion, the Court concluded that, as used in a statute of this sort, the term "administrative official" means "administrative official or officials", including a multi-member administrative agency. *See Howard Research and Development Corp. v. Concerned Citizens for the Columbia Concept*, 297 Md. 357, 365-66 & n. 5 (1983).]

In our 1979 Opinion, we also noted changes made by Chapter 267, Laws of Maryland 1975. That legislation added a new subsection (f) to §4.08 of Article 66B, authorizing local legislative bodies to provide for direct appeal to the circuit court of "any matter arising under the planning and zoning laws of the county or municipal corporation". We concluded that Chapter 267 authorized local jurisdictions to provide for direct appeal to the circuit court from approvals or disapprovals of subdivision plats by local planning commissions. 64 *Opinions of the Attorney General* at 351-52. We expand that Opinion here and similarly conclude that Chapter 267 enabled local jurisdictions to provide, if they wish, for direct appeal to the circuit court from decisions of local historic district commissions under historic area zoning provisions.

D. *Summary*

Thus, we advise you that, in a jurisdiction that has created an historic district commission under Article 66B, §8.03(a), current State enabling law [Article 66B, §4.07(d)(1)] gives the local board of appeals the power to hear and decide appeals from decisions of that commission. Section 512-N of the Easton Zoning Ordinance is consistent with this enabling law.

In addition, current State law [Article 66B, §4.08(f)] permits a local legislative body to provide an alternative right of appeal directly to the circuit court. In the case of the Town of Easton, the local legislative body has evidently chosen not to provide such an alternative. Because §4.08(f) is clearly permissive and not mandatory, Easton is in compliance with State law.[7]

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[7] Enabling laws in other states vary in their provisions for appeal from decisions of historic district commissions. For example, Connecticut General Statutes, §7-147a *et seq.*, provide for direct appeal to the courts. On the other hand, Rhode Island General Laws Annotated, §45-24.1-1 *et seq.*, provide for intermediate appeal to a zoning board; and Massachusetts Annotated Laws, Chapter 40C, §12, allows a city or town to provide for intermediate review by "a person or persons of competence and experience in such matters".

II

Scope of Review by Board of Appeals

In connection with your second question, we are aware of no Maryland authority directly on point. However, Article 66B, §4.07 gives general guidance on the scope of the review to be conducted by a board of appeals.

Section 4.07(e) provides that "[t]he officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken". Section 4.07(g) provides for a public hearing at which any party may appear. Section 4.07(h) gives the board power to reverse, affirm, or modify the decision appealed from and to "make such order, requirement, decision or determination as ought to be made"; it expressly gives the board, for that purpose, "all the powers of the officer from whom the appeal is taken".

In our view, §4.07 calls for the board of appeals to exercise its own judgment on matters appealed to it. Although the board of appeals receives a record from the initial decision-maker, it is not bound by that record alone; it can take independent testimony and arrive at its own decision. However, its basic function is to serve as a check on erroneous decisions of other bodies and officials, not to usurp the authority and discretion invested initially in those other bodies and officials.

In its consideration of historic zoning matters, a board of appeals is particularly justified in giving greater than usual weight to the views of the members of an historic district commission. Article 66B, §8.03 specifies that the members of such a commission shall be "qualified by special interest, knowledge or training in such fields as history, architecture, preservation or urban design". The historic district commission reviews applications for permission to build or change structures if the changes involved would affect exteriors visible from public ways in an historic district. §8.05. In reviewing these applications, the commission is required to consider such factors as "the historic or architectural value and significance of [the structures]", the "relationship [of particular structures] to the historic value of the surrounding area", "the relationship of the exterior architectural features of the structure to the remainder of the structure and to the surrounding area", and "the general compatibility of [the proposed] exterior design, arrangement, texture, and materials". §8.06. These statutory criteria involve value judgments that members of a local historic district commission are especially equipped by their knowledge and experience to make.[8]

Notwithstanding our recommendations that boards of appeals give deference to the views of members of a local historic district commission, we do not mean to suggest that Article 66B *mandates* a narrow scope of review in historic zoning matters: Article 66B, §8.14, in providing for an appeal "similar to" the appeal available to one aggrieved by the decision of a local planning commission, makes no distinction as to the mandated scope of review between appeals from an historic district commission and appeals from a local planning commission. In our opinion, therefore, while the board of appeals should give considerable weight to the decision of the historic district commission, the board of appeals ultimately is called on to conduct its own review and, in doing so, exercise its own judgment under the general provisions of Article 66B, §4.07, discussed above.

III

Conclusion

In summary, it is our opinion that the Zoning Ordinance of the Town of Easton is valid under and consistent with Article

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[8] In *Gunley v. Board of Selectmen of Nantucket*, 358 N.E.2d 1011 (Mass. 1977), the Supreme Judicial Court of Massachusetts held that, on intermediate appeal of the decision of an historic district commission to the local legislative body, the scope of review was narrow. The court read the applicable enabling legislation to give the commission "a substantial measure of discretionary power with respect to 'the appropriateness of exterior architectural features' and congruity to historic aspects of the surroundings and the district". 358 N.E.2d at 1015. The court concluded that provisions for appeal did not transfer this discretionary power to the reviewing body and that the decision of the commission could be disturbed on review only if "it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary". *Id. See also Sleeper v. Old King's Highway Regional Historic District Commission*, 417 N.E.2d 987 (Mass. App. 1981). On the other hand, in *Hayes v. Smith*, 167 A.2d 546 (R.I. 1961), Rhode Island's highest court ruled that, on appeals from decisions of an historic zoning commission, a zoning board does not merely exercise appellate jurisdiction; rather, it is authorized to consider the questions raised *de novo*.

66B insofar as it provides for appeals from the Historic District Commission to the Board of Zoning Appeals. In reviewing decisions of the Historic District Commission, we believe that the Board of Zoning Appeals may consider the record of proceedings before the Commission, as well as any other evidence or argument it chooses to hear, and that it may make its own decision on any issue raised. At the same time, we think that the Board should give very strong consideration to the views expressed by members of the Historic District Commission, particularly where these views relate to largely subjective aesthetic and other value judgments that the expertise of the Commission members renders them especially qualified to make.

STEPHEN H. SACHS, *Attorney General*

JUDITH A. ARMOLD, *Assistant Attorney General*

AVERY AISENSTARK
Chief Counsel,
Opinions and Advice

SYNOPSES OF OPINIONS NOT PUBLISHED IN THIS VOLUME

SYNOPSES OF OPINIONS

AGRICULTURE

AGRICULTURAL LAND PRESERVATION FOUNDATION ("MALPF")—PROGRAM OPEN SPACE ("POS")—LOCAL GOVERNMENT

Given the present absence of express legislative authorization, a local governing body may not transfer its allocations of Program Open Space funds to the Maryland Agricultural Land Preservation Foundation.

Op. No. 82–037	To:
	Mr. Hugh E. Binks
December 16, 1982	*Deputy Secretary*
	Department of Agriculture

PEST CONTROL—PESTICIDE APPLICATORS—LICENSING AND REGULATION

The Department of Agriculture has authority to adopt regulations governing structural inspection standards for pest control licensees, and it may revoke or suspend a license because of the licensee's failure to make a thorough structural inspection for wood-destroying pests.

Op. No. 82–008	To:
	The Honorable Wayne A. Cawley
February 17, 1982	*Secretary of Agriculture*

BUDGETARY ADMINISTRATION

HISTORICAL TRUST—TRANSFER OF STATE PROPERTY

A portion of the proceeds from the sale of the Malloy House must be applied to the State Annuity Bond Fund Account to compensate for the bonded indebtedness incurred by the State for renovation of the House. That portion should be the percentage of the proceeds which equals the ratio of the general construction loan appropriation to the sum of the value of the unrestored house plus the total renovation costs. The remaining proceeds may be expended at the discretion of the trustees of the Maryland Historical Trust for general Trust purposes.

Op. No. 82–004	To:
	Mr. J. Rodney Little
February 4, 1982	*Director*
	Maryland Historical Trust

ELECTIONS

REDISTRICTING—SUBDIVISION BOUNDARIES

Subsequent changes in the county line between Prince George's and Montgomery Counties would not invalidate any current reapportionment or Congressional redistricting.

Op. No. 82–007	To:
	The Honorable Stewart Bainum, Jr.
February 15, 1982	*Maryland House of Delegates*

FOOD CENTER AUTHORITY

ANCILLARY OR APPURTENANT FACILITIES—POWERS AND DUTIES

The Maryland Food Center Authority may convey land for the use and development of a crafts, flower, and farmers market and a retail shopping center.

Op. No. 82–040	To:
	Mr. J. Gary Lee
December 17, 1982	*Executive Director*
	Maryland Food Center Authority

LOCAL GOVERNMENT

MUNICIPAL CORPORATIONS—ZONING—REFERENDUM

Article 23A, §2(30) of the Maryland Code does not condition the passage or effectiveness of a municipal zoning ordinance on either (i) the submission of the ordinance to a referendum for voter approval; or (ii) the right of the voters to themselves petition the ordinance to referendum.

Op. No. 82–021 To:
The Honorable Charles Montgomery
June 29, 1982 *Mayor of Havre de Grace*

RETIREMENT SYSTEMS

"MUNICIPAL CORPORATIONS"—PENSION REFORM ACT

(1) The bills submitted to "municipal corporations" in April of 1981 for Fiscal Year 1981 are in accordance with Article 73B, §26 of the Maryland Code, except that the amounts payable should have been computed by the actuary as a rate percentage of payroll rather than as flat level payments. (2) Unless the General Assembly amends Article 73B, §26, the Board of Trustees of the Employees' Retirement System should continue its present procedures in certifying the contributions required of participating "municipal corporations" for future years.

Op. No. 82–010 To:
The Honorable James Clark, Jr.
February 22, 1982 *Joint Committee on Pensions*

SOCIAL SERVICES

UNEMPLOYMENT COMPENSATION—BUDGETARY ADMINISTRATION

Under the recently amended Title XII of the Social Security Act, the Governor's application for a loan made to finance payment of unemployment insurance benefits would create a valid legal obligation of the State to pay the interest that would accrue during the term of the loan.

Op. No. 82–028 To:
The Honorable Kalman R. Hettleman
August 26, 1982 *Secretary of Human Resources*

STATE ACCIDENT FUND

INVESTMENTS

Money belonging to the State Accident Fund may be used to purchase a building for the Fund's own use and occupancy.

Op. No. 82–015 To:
Mr. Donald W. Potter
April 22, 1982 *Superintendent*
State Accident Fund

WATER QUALITY LOAN ACTS

ELIGIBILITY REQUIREMENTS—OCEAN CITY INTERCEPTOR PROJECT

The North Ocean City Interceptor Project is not eligible for a State grant from the proceeds of any Water Quality Loan Act. However, the Project is eligible for a State loan of not more than $500,000 from funds available under the Water Quality Loan Act of 1974.

Op. No. 82–038 To:
The Honorable Constance Lieder
December 16, 1982 *Secretary of State Planning*

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