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ANNUAL REPORT
AND
OFFICIAL OPINIONS
OF THE
ATTORNEY GENERAL
OF
MARYLAND

1983

STEPHEN H. SACHS
ATTORNEY GENERAL



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 Superseded by Carroll.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Plater I of St. Mary's County (Prot.), appears as acting Attorney General, for the crown, as early as 23 April 1691; superseded by Wynne.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

tinued to serve until his death in Nov. 1704. He was also Naval Officer of North Potomac, and in May, 1704, he became joint Commissary 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.

Luther Martin	1778
William Pinkney	1805
John Thomas Mason	1806
John Johnson	1806
John Montgomery	1811
Luther Martin	1818
¹ Nathaniel 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'Connor	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 Nathaniel 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.

STATE LAW DEPARTMENT

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ANNUAL REPORT FOR 1983

December 31, 1983

*The Honorable Harry Hughes
Governor of Maryland
State House
Annapolis, MD 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 1983. A detailed financial statement of the Department, as well as caseload statistics and the official Opinions of the Attorney General, follow this report.

Department of Economic and Community Development

In the past few years, Maryland's Department of Economic and Community Development has made a significant contribution to business development and expansion in this State.

It has done so through a number of diverse agencies, such as the Maryland Industrial Development Financing Authority (MIDFA), which in the last four years has assisted the financing of over 200 tax-exempt loans representing over \$150 million for firms moving to or expanding in Maryland; the Community Development Administration (CDA), which in 1982 and 1983 issued over \$450 million in revenue bonds to finance the construction or rehabilitation of single and multi-family housing units in Maryland and to provide permanent financing for such housing; the Maryland Small Business Development Financing Authority, which makes and guarantees loans to minority businesses for working capital and equipment; and a number of other agencies and programs that provide financial assistance for industrial and commercial redevelopment projects, industrial parks and buildings, industrial and commercial energy generation or conservation projects, and venture capital activities.

Because a substantial portion of these activities involves the issuance of revenue bonds, the lending of revenue bond and State general obligation bond proceeds, and the use of State funds to guarantee loans, the seven Assistant Attorneys General assigned

to the Department under the supervision of Thomas E. Plank, Counsel to the Department, play a vital role in the Department's efforts. In essence, these attorneys operate as the public, commercial, and real estate financing department of the Attorney General's office.

In addition to the normal responsibility of properly structuring and documenting various financial transactions, these attorneys have the additional challenge of shaping the Department's various activities to conform to its enabling legislation, which often lacks the flexibility required by the increased complexity of today's business dealings. Consequently, the nature of the Department's work has presented numerous opportunities for devising creative solutions to difficult legal problems.

For example, among the transactions requiring both legal imagination and substantial amounts of work was a \$20.5 million revenue bond financing of the Rolling Hills Apartment project by the Community Development Administration. This was the largest loan in the Department's history and is one of the first non-subsidized residential rental projects insured by the Federal Housing Administration. It required the innovative creation of a non-amortizing second mortgage that met both the CDA's and the Maryland Housing Fund's statutory requirements, the requirements of the bond documents, and the financial constraints on the developer. To the best of our knowledge, such a mortgage is the first of its kind in Maryland and possibly in the country.

Another example would be the \$2 million loan to Baltimore County to assist an \$18 million expansion of AAI Corporation and create 1,000 jobs. It had to be structured to provide the company with a cash flow equivalent of the \$3 million originally requested by the firm in order to satisfy technical requirements of State and County law. Then there was the \$5 million industrial development bond financing of the Maryland Wholesale Seafood Market pursuant to a lease and lease-back arrangement that was put together in a remarkably quick six-week period, and a \$7.5 million MIDFA transaction requiring a practically round-the-clock closing session beginning at mid-day Friday and concluding around 6 a.m. the following Saturday. Over 300 jobs in Baltimore City were on the line in that deal.

MIDFA also illustrates another contribution by the Department and by the Attorney General's Office to the State's economic development. MIDFA had been operating under a statute that was

enacted in 1965 and was becoming increasingly obsolete. For years we had been drafting more and more complicated documents to conform today's financial transactions to the cumbersome MIDFA law. Finally, this past session, the General Assembly responded to the Department's request and passed a new MIDFA statute that streamlined MIDFA's process of insuring (under its traditional program) and issuing (under its new "umbrella" program) tax exempt bonds through the Maryland Economic Development Revenue Bond Act. It also created a new insurance fund to enable MIDFA to insure all types of business loans, such as conventional loans, not just tax exempt financing. With the aid of the Assistant Attorneys General assigned to it, the Department now is in the process of structuring and implementing this unique new program.

In the past four years, the Attorney General's Office has been instrumental in creating a legal structure for economic development programs that has aroused interest nationwide. We believe Maryland now has two of the best industrial development revenue bond statutes in the country, and we are privileged to work with one of the most dynamic housing financing agencies in the nation. We also represent one of the few state housing finance insurance funds in the nation, and we have participated in structuring and implementing a unique loan and guaranty program for minority businesses that other states now are looking to emulate. We are proud to be a part of some of the most successful and innovative programs for economic and community development in the United States.

Department of Health and Mental Hygiene

On April 27, 1983, Fairchild Industries, Inc. was found guilty of five counts of unauthorized hazardous waste disposal and water pollution and fined \$100,000, the largest criminal penalty ever imposed under Maryland's anti-pollution laws.

Ruling from the bench after a 13-day trial, Washington County Circuit Court Judge Frederick C. Wright III found Fairchild guilty of one count of illegally discharging hazardous waste water containing hexavalent chromium from its plant on Showalter Road in Hagerstown and three additional counts of illegally releasing chrome-bearing waste water from a tank. This waste water then flowed into an open floor drain from which it flowed into ground water. The company was also found guilty of one count of permitting chrome-bearing waste water to leak to ground water through

a hole in a concrete pit. The firm was acquitted on 19 charges, the remaining 62 having been dismissed earlier.

Assistant Attorneys General James J. Lyko and Charles R. Taylor, Jr., members of the Hazardous Waste Strike Force, prosecuted the case, which began as a result of violations uncovered during routine inspections by Robert A. Boone, an Inspector with the Office of Environmental Programs in the Department of Health and Mental Hygiene.

Antitrust Division

In 1983, Maryland—along with four other states and the District of Columbia—settled its price-fixing suit against the regional Toyota distributor and 100 Toyota dealers. The suit was brought on behalf of 36,000 Toyota purchasers in the five-state, mid-Atlantic region who bought 1980 model Toyotas with polyglycoat protection packages. The suit alleged that the distributor, Mid-Atlantic Toyota Distributors, Inc., had agreed with the Toyota dealers in the five-state region to raise the starting price for negotiations on 1980 Toyotas by automatically including a \$500 protection package on virtually all of its 1980 models.

Under the terms of the settlement, the defendants agreed to pay nearly \$5 million in cash, or goods and services valued at \$9 million, to injured purchasers. Maryland's share of the settlement fund is approximately \$1.35 million, the largest single recovery ever obtained by the State in an antitrust suit and the largest *parens patriae* recovery of any state. Under the terms of the settlement, each Maryland consumer who purchased a 1980 model Toyota with a protection package may choose between a \$135 cash payment or \$250 worth of goods and services from a Toyota dealer.

The Division also settled a three-year-old antitrust suit in which it defended five Eastern Shore soil conservation districts, the Department of Agriculture, and the Secretary of Agriculture, from a suit brought by a group of private land improvement contractors. The soil conservation districts are quasi-political subdivisions which were established in the late 1930's to assist landowners with soil conservation measures, such as construction of dams, drainage ditches, and ponds. The suit alleged that the districts were violating Federal antitrust laws by monopolizing the land improvement business on the Eastern Shore. The earthmoving companies had sought \$7 million in damages from the State. In-

stead, they obtained no money but agreed to a Consent Order which establishes limited restrictions on certain land improvement contracting activities of the districts that may not be directly related to conservation.

During 1983, the Division also was active in investigating and prosecuting State and local government damage claims arising from bid-rigging on highway paving contracts. To date, the State has obtained settlements with four paving contractors and one individual, recovering \$480,000 in damages, as a result of its continuing investigation into highway paving bid-rigging. All four companies also were debarred from bidding on State contracts for various periods of time. Additional settlements are expected.

As part of this investigation, the State also filed civil antitrust suits in 1983 against two individuals. The suits allege that Russell Y. Baldwin and Henry C. Standridge, both employees of a Prince George's County paving contractor named A. H. Smith, conspired with other paving contractors to rig bids on asphalt paving and supply contracts awarded by the State and counties.

In 1983, Maryland received \$340,000 as its first substantial recovery resulting from the Division's participation in the oil overcharge actions instituted by the Department of Energy (DOE). The DOE is bringing enforcement actions against many oil companies, alleging violations of price and allocation controls between 1973 and 1981. Consumers and other purchasers who were injured as a result of overcharges are entitled to refunds. The Division is filing refund claims with DOE on behalf of Maryland consumers and governmental agencies. The overcharge money will be allocated to energy assistance and weatherization programs in a manner most likely to make restitution to those consumers or purchasers who were injured by the overcharges.

The Antitrust Division has played an active role in the Governor's Task Force on Local Government Antitrust Liability. The Supreme Court's 1982 decision in *Community Communications Co. v. City of Boulder* raised important questions about the long-standing policy of granting antitrust immunity to local governments for traditional governmental responsibilities, such as zoning, solid waste disposal, and sewage services. The effect of the *Boulder* decision was to preserve immunity only in those cases where the state legislature has clearly articulated an affirmatively expressed policy to supplant competition with regulation. Municipalities, once generally free from antitrust scrutiny, are now sub-

ject to potential liability for violation of the Federal antitrust laws. Consequently, the Task Force on Local Government Antitrust Liability, comprised of counsel to various municipalities and political subdivisions, as well as members of the bar experienced in antitrust litigation, has had to examine those activities of local government now subject to challenge as a result of *Boulder* and recommend appropriate legislation. The Antitrust Division was represented on the Task Force by its Chief, Assistant Attorney General Charles O. Monk, II.

The final report of the Task Force was submitted in February, 1983. It recommended legislation to preserve government antitrust immunity in several areas, including zoning, and in the operation of important health-related services, such as water and sewage, solid waste collection and disposal, and ambulance services. The General Assembly enacted the recommended legislation during the 1983 session.

The issue of antitrust immunity for state governmental activities was before the Supreme Court in 1983. The case *Hoover v. Ronwin*, involved allegations that the Arizona Board of Bar Examiners manipulated grades on the bar exam in order to artificially limit the number of new lawyers admitted to the bar and thereby avoid increased competition. Maryland, on behalf of six other states, filed an *amicus* brief urging the Supreme Court to apply the policy expressed in *Boulder* to all state licensing boards, including boards of bar examiners. In its brief, Maryland argued that a licensing or regulatory board may act to restrain competition only when the state's highest court or legislature has specifically directed it to do so. Maryland contends that the Arizona bar examiners had no such authority and are not immune from antitrust liability for their actions. The case is scheduled to be argued before the Supreme Court in January, 1984.

Finally, in February, 1983, the Supreme Court affirmed the settlement of the Federal government's antitrust suit against AT&T. The settlement requires AT&T to divest itself of its local telephone companies by January 1, 1984. The Antitrust Division, on behalf of 13 other states, had challenged the proposed settlement on the ground that it deprived the states of their ability to protect consumers' interests. The Division's involvement in the case continued throughout 1983 as it monitored the implementation of the settlement. On several occasions the Division interceded on behalf of Maryland citizens in an attempt to minimize the disruption of

their telephone service and to ensure that it remains adequate following divestiture.

Consumer and Investor Affairs

Since late 1982, the work of the Consumer Protection Division and the Securities Division of the Attorney General's Office has been coordinated under the leadership of Assistant Attorney General Steven J. Cole, Director of Consumer and Investor Affairs. The consolidation of the work of these two divisions was a natural marshalling of resources, since the victims of consumer and investor fraud often encounter similar problems, and the investigators in each division frequently probe similar questionable activities. Beginning in mid-1983, the legal and investigative staffs of the two divisions have been merged, providing for both greater coordination and efficiency of operations.

Consumer Protection Division

To better address the continuing problems the Consumer Protection Division has found to exist in the auto repair industry, a special auto repair fraud unit was established in 1983 to coordinate the work of the Complaint Handling Unit, the Investigative Unit and the Assistant Attorneys General assigned to auto repair cases. The Division's own garage was opened to facilitate probes of suspected auto repair frauds, and every complaint received in this area now is reviewed by an Assistant Attorney General. This new operation should result in an increase in the number of fraud cases brought against auto repair facilities, and it already has enabled the Division to better mediate complaints in this area.

The scope of the Consumer Protection Division's liason with the State legislature was expanded in 1983 with the permanent appointment of Henry M. Greenberg as the Director of Legislation and Research. Mr. Greenberg's new role builds upon the work he already has done in representing the Division's viewpoint on proposed legislation pending before committees in the General Assembly.

In the credit field, the Division reached a settlement with Timesaver, Inc., a credit card counseling and soliciting firm, in November, 1983, providing for up to \$294,000 in repayments to consumers who allegedly were charged a \$25 fee for aid in getting a credit card without first being told that they also would

have to open a \$300 savings account with the card-issuing institution. The settlement, one of the largest restitution agreements in the history of the Division, culminated nearly two years of negotiations and reflects the growing commitment the Division has to monitoring the credit card market.

In the area of price advertising, the Division obtained a ruling from the Prince George's County Circuit Court in August, 1983, that F.W. Woolworth Company misled Maryland consumers into thinking they were obtaining considerable bargains during sales at its Woolco outlets here in late 1982, when in fact the savings were much smaller or non-existent.

With the enactment in 1983 of new provisions strengthening Maryland's 1982 health spa law, the Division obtained authority to require the registration of all health clubs and the posting of a \$50,000 bond or a letter of credit or cash by all clubs offering long-term contracts of three months or more to provide funds with which to compensate consumers who may be harmed by the unexpected closing of a health spa or the failure of one to open as scheduled. Beginning in September, 1983, the Division launched a crackdown on health spas that had failed to comply with the new registration and bonding requirements, which took effect on July 1.

The Division's education unit greatly expanded its programs and offerings in 1983, increasing the number of informational pamphlets it distributed by more than six-fold; nearly doubling its number of new pamphlets, and launching a special effort to respond to the consumer needs of senior citizens.

Specifically, the Division released seven new pamphlets, including four that formed the core of a new 10-pamphlet packet of consumer information for senior citizens. Released in March, this new packet proved immensely popular and over 15,000 of them were distributed by the end of the year. In all, the Division distributed 194,632 pamphlets in 1983, compared to 30,000 pamphlets in 1982. In addition, the Division prepared a half-hour videotape program on consumer rights in cooperation with WBAL-TV and placed copies of the tape in the media resource libraries of all 24 school systems in Maryland. Between the release of the videotape in April and the end of 1983, the Division also responded to 23 requests for a circulating copy of it which is being distributed on a rotating basis to all who ask for it. Representatives from the Division also ad-

dressed nearly 40 workshops and community groups during 1983. The Division's hour-long slide show, first released in 1982, was distributed to 61 community groups, consumer organizations and schools in 1983. In addition, two 15-minute adaptations of it were placed in the media resource libraries of the school systems in Baltimore City, and Anne Arundel, Baltimore, Howard, Montgomery and Prince George's Counties.

Securities Division

In 1983, the Division of Securities participated in the nationwide deregulatory trend by developing two new exemptions from the registration requirements under Maryland's Securities Act. The purpose of these exemptions, which were drafted in cooperation with the Maryland State Bar Association, is to facilitate the raising of capital by small businesses. One of the new regulations provides a fully coordinated procedure for anyone using certain Federal exemptions. The second is a limited offering exemption developed independently of Federal regulations. These exemptions are designed to retain safeguards for investor protection while simplifying the procedure for raising money.

The Securities Division also continued its active and aggressive role in enforcement of the Maryland Securities Act, the Maryland Franchise Registration and Disclosure Law, and the Business Opportunities Sales Act. The Division initiated approximately 115 investigations during fiscal 1983. These actions resulted in a range of sanctions, including rescission offers, consent orders, Cease and Desist Orders, and criminal referrals.

In addition, during the same period, the Securities Division contributed \$88,297 to State revenues from registration fees under the Franchise Act; \$1,059,389 in registration fees for securities under the Securities Act, and \$536,300 for registration of broker/dealers and agents under the Securities Act.

In 1983 I also was pleased to appoint Assistant Attorney General Susan M. Rittenhouse as Maryland Securities Commissioner, succeeding K. Houston Matney, who resigned to join a New York law firm. Ms. Rittenhouse is the first woman to hold such a position in the 64-year history of securities enforcement in Maryland. Under Houston Matney, Maryland has played a crucial role in protecting not only its own citizens but

investors throughout the country from securities frauds and questionable business practices. All of the citizens of this State should be grateful for his fine service and delighted that someone with such superb qualifications as Susan Rittenhouse is able to step right in and continue our efforts to safeguard the public.

Criminal Investigations Division

The Criminal Investigations Unit of the Criminal Investigations Division enjoyed continued success during 1983 in its battle against complex white-collar criminality in Maryland. The Unit uncovered, charged, and proved crimes involving over \$2,000,000. In these cases, 42 individuals and one corporation were convicted of such offenses as bribery, theft, misappropriation by a fiduciary, criminal contempt, securities fraud, tax evasion, forgery, uttering, and conspiracy.

The subject matter of the Unit's cases covered the spectrum of white-collar crime. Among the parties convicted were the chairman of a university department, who was found to have obtained kickbacks from his graduate students for grades and degrees; the owner and manager of a boiler-room operation that made fraudulent charitable solicitations; the director of a data center and two consultants who engaged in a sophisticated kickback scheme involving the procurement of computer software; an entrepreneur for the fraudulent solicitation of investments in his ship-cleaning firm; the president of a large plumbing company who bribed five plumbing inspectors; a "front" corporation in the first Maryland prosecution for minority business enterprise fraud, and the developers of an Ocean City condominium time-sharing project, who misappropriated over \$1.3 million in purchasers' deposits.

During 1983 the Unit continued its concerted efforts to enforce the criminal tax laws, viewing tax evasion as the "Achilles heel" of the white-collar criminal. In one of these cases, the stiffest sentence ever handed down by a Maryland court for a tax offense—five years in the Division of Correction—was imposed on a mortgage broker who failed to report over \$270,000 in earnings between 1979 and 1981.

As has been stated in prior annual reports, the Unit continues to stress the importance of incarceration to deter would-be white-collar criminals. This position is gaining increased ac-

ceptance among judges, as evidenced by the fact that 25 of the individuals convicted by the Unit this year were sentenced to jail terms ranging from 30 days to 10 years.

Medicaid Fraud Unit

The Medicaid Fraud Control Unit of the Criminal Investigations Division successfully concluded 18 criminal prosecutions in 1983, resulting in over \$100,000 in fines and restitution, as well as the imposition of 2,790 hours of community service on the defendants. Included among those prosecuted in 1983 were two physicians, two pharmacists, four dentists, an optometrist, and a nursing home owner.

The Unit has had success using computer screening programs to identify fraudulent billing patterns among dental providers. The Unit expects to use the computer screens to detect fraud among other provider groups in the future.

In addition to its criminal prosecutions, the Unit has reached civil settlements that have resulted in over \$262,000 in repayments to the Medicaid Assistance Program. Investigation of Medicaid fraud also has led the Unit to initiate several tax and theft prosecutions.

Legislative Office

A special session of the General Assembly called to consider legislation to inhibit certain hostile corporate takeovers brought to an end the Attorney General's 1983 bill review. That session was held and concluded on June 21, and the bill was signed on the same day, although our review of it noted that the statute raised serious questions under the Commerce and Supremacy Clauses of the United States Constitution.

The regular 1983 session bill review ended on May 31. During the previous six weeks, the office reviewed more than 750 bills and sent more than 100 letters to the Governor's office resolving legal and constitutional questions raised by proposed legislation. Among the conclusions reached by the 1983 bill review were that:

- Legislation giving the counties a share of lottery revenues from "lotto" (House Bill 812) did not violate the Maryland constitutional requirement that a State lottery be "operated by and for the benefit of the State";

- A reduction of the gasohol tax (Senate Bill 276) did not unconstitutionally impair the contract obligations reflected in State transportation bonds;
- A bill permanently denying a liquor license to an applicant convicted of a crime, but making loss of a license upon conviction discretionary for existing licensees (House Bill 994), did not violate equal protection rights;
- A bill requiring a board of directors of a health spa to contain a resident director for each county in which the firm is doing business (Senate Bill 742) did not impermissibly burden interstate commerce;
- It is constitutional for the General Assembly to exempt public school employees who object to unionism on religious grounds from being compelled to support such unions, as well as to require those who are exempted to make a charitable contribution in the amount of the union dues that would have been payable otherwise (House Bill 774);
- A bill authorizing the Natural Resources police to pursue violators across the State line into Virginia waters (Senate Bill 296) does not impermissibly deny an offender the right to extradition;
- The Commerce Clause and Privileges and Immunities Clause of the U.S. Constitution are not violated when the State affords a preference in bidding on State contracts to certain resident businesses (Senate Bill 272);
- The State can exempt from the mandatory school immunization law persons who object to immunization on religious grounds (House Bill 224).

Among the bills vetoed for constitutional and substantive defects on the advice of the Attorney General were:

- Legislation permitting industrial homework in areas not exempt from the Federal Wage and Hour Law (Senate Bill 199);
- A bill requiring an applicant for a county palm reader's license to be a county resident, taxpayer and property owner for 18 months (Senate Bill 293);
- Legislation imposing a criminal penalty on an out-of-State truck vendor who fails to pay a \$250 county license fee.

Educational Affairs Division

The Educational Affairs Division continues to handle an extraordinarily broad scope of legal problems, issues and litigation. In large part this is a function of the range and complexity of those whom the Division regularly represents. Its clients include 26 identifiable public educational agencies, institutions, universities, colleges, boards and commissions which have an aggregate annual operating budget exceeding one billion dollars; an aggregate workforce exceeding 25,000 employees, and an aggregate student enrollment exceeding 100,000 individuals.

As a consequence, the Division constantly contends with a significant volume, velocity and variety of court litigation, administrative hearings, day-to-day matters, and preventive counseling activities.

In 1983, the Division handled more than 100 Federal and State court cases. A total of 51 new cases were filed during the year, while 42 cases were resolved dispositively. It is gratifying to note that all "closed" cases were resolved favorably for Division clients.

In addition, Division attorneys represented clients in hundreds of administrative proceedings before an array of Federal and State agencies. These proceedings entailed a variety of disputes, including employees' grievances, discrimination charges, procurement protests, audit disallowances, school closings, special education, and affirmative action programs.

In 1983, as in past years, the Division also devoted substantial attention to the day-to-day counseling of clients in more than 100 distinct—and sensitive—subject areas. The Division either successfully deflected or resourcefully resolved scores of troublesome problems involving employees, students, contractors, and other third parties. Moreover, attorneys reviewed or drafted dozens of major institutional policies dealing with, for example, tenure, retrenchment, disciplinary codes, human research, grievance procedures, medical service plans, faculty contracts, affirmative action plans, post-retirement employment, and home school instruction.

Division attorneys also actively assisted clients in negotiating many major agreements. The most notable ones included: sophisticated lease-back property transactions with private de-

velopers for construction of campus auxiliary facilities; arduous efforts to achieve agreement with the Federal government on a State-wide higher education desegregation plan, and lease-purchase arrangements for multi-million dollar computer equipment software. Also, as part of its counseling portfolio, 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, and consolidated and increased revenue bond authority for construction of campus auxiliary facilities.

The Division's unique prevention counseling program was equally ambitious and fruitful in 1983. The series of seminars, begun in 1981 and designed to help our client agencies avoid legal problems, has thus far covered more than 75 topics and attracted an aggregate of 1,800 public college and school administrators.

Licensing and Regulation

During 1983, a question arose whether the coverage of the Real Estate Guaranty Fund extended to participants in investments that happened to include both real estate and real estate brokers. It was an issue that potentially involved hundreds of thousands of dollars in the fund, which was created for the protection of consumers who deal with real estate brokers or salesmen in the purchase or sale of homes and other real property.

In *Sheppard v. Bay County Realty*, the Assistant Attorneys General assigned to the Department of Licensing and Regulation and the Real Estate Commission successfully argued before the Court of Appeals that the Real Estate Guaranty Fund should cover only the activities for which a real estate license is required and not the sale of speculative interests as an entity dealing in real estate.

In *State of Maryland v. Landrum Hite*, the first successful criminal prosecution was made in the 10-year history of Maryland's Occupational Safety and Health law. Following the death of a worker who fell while washing windows on a nine-story condominium, a MOSH investigator revealed that the owner of the window cleaning firm had willfully violated Maryland oc-

cupational and safety health standards regarding the safety equipment that is required to be used in window cleaning. Following a MOSH hearing that upheld administrative citations issued against the employer, two Assistant Attorneys General, appointed as Special Assistant State's Attorneys for Baltimore County, obtained a two-count indictment charging the employer with manslaughter and willful violation of the MOSH law. After the defendant's motion to dismiss and exclude evidence was denied, he pleaded guilty to willfully violating the MOSH law and received a suspended jail sentence; was fined \$8,400, and placed on supervised probation for three years.

Human Resources

In 1983, the Human Resources Unit was actively involved in litigation generated by the Reagan Administration's changes in Federal law and policies in the human services area.

The Unit successfully defended a suit that challenged how the Department of Human Resources implemented changes in the Aid to Families with Dependent Children (AFDC) program that were mandated by the Omnibus Budget Reconciliation Act of 1981. (*See Bell v. Massinga*, 721 F.2d 131 (4th Cir. 1983).) Had the plaintiffs prevailed in that case, the State would have had to pay approximately \$800,000 a year in additional benefits.

The Unit also was involved in a variety of administrative and judicial actions challenging the disallowance of State claims for Federal funds. These actions have resulted in the reversal of some \$26,000 in proposed disallowance decisions, and in other cases the State's potential liability has been reduced substantially. In one case alone, the liability was reduced by approximately \$100,000. The office also filed a case, *Maryland Department of Human Resources v. Department of Health and Human Services*, JH 83-3811 (D. Md. 1983), which challenges how the Federal government pays the State's claims for Block Grant funds.

As the State's needs increase and Federal resources decline, we anticipate that Federal funding issues will command increasing attention in the Attorney General's Office. Our task is to assure that Maryland receives and retains every Federal dollar to which it is entitled.

Natural Resources and State Planning

The U.S. District Court in Baltimore dismissed three suits by a Maryland salvage firm that claimed to have discovered the wrecks of three ancient Spanish treasure galleons and an English privateer off Ocean City. The court ruled that the Federal courts did not have jurisdiction over the issue of rights to any ships or cargo found submerged within the State's territorial waters.

In *Subaqueous Exploration & Archaeology, Ltd. v. Unidentified, Wrecked and Abandoned Vessels*, the plaintiff sought title to what it claimed were the wrecks of the treasure ships Santa Roselea, San Lorenzo, and Santa Clara, as well as an English privateer, the Royal George. If it could not get title, it wanted liberal salvage awards for the recovery of the vessels.

The State argued that if in fact the shipwrecks existed, the Federal court had no jurisdiction over either them or the case. In addition to citing the 11th Amendment to the U.S. Constitution, which forbids Federal courts to hear suits against the states, we argued that the regulation of any recovery operations within the three-mile limit of State territorial waters was within Maryland's police powers, and that any historical or archaeological material that might be recovered belonged to the State.

In making its argument, the State relied heavily on the U.S. Supreme Court's 1982 decision in *Florida Department of State v. Treasure Salvors, Inc.*, 102 S. Ct. 3304, and Judge Norman P. Ramsey's 33-page opinion accepting the State's arguments has attracted national attention because it is one of the first to apply the principles of *Treasure Salvors* to the issue of wrecks located in state territorial waters.

Public Safety and Correctional Services

As the population of the State's prisons grew and the number of individuals placed on probation by Maryland courts continued to increase, so did the volume of litigation handled by the Department of Public Safety and Correctional Services during 1983. There was an especially significant increase in the number of individuals filing appeals to the courts in order to challenge either the revocation of parole or the denial of it.

In response to this increase in litigation, an internal grievance procedure for inmates within the State's correctional institutions has been designed and prepared by the Assistant Attorneys General assigned to the Department of Public Safety and Correctional Services and Criminal Appeals and Correctional Litigation Unit, in conjunction with the Division of Correction. When fully implemented, this procedure will allow inmates to present their grievances directly to institutional staff, which in turn will attempt to have these disputes resolved at the earliest stages, thereby avoiding litigation.

During 1983, the Assistant Attorneys General assigned to the Department of Public Safety and Correctional Services initiated a number of legal issues training programs in furtherance of the "preventive law" concept we have fostered in the Attorney General's Office. Legal issues training has been provided to State and local Fire Marshals, supervisors in the Division of Parole and Probation, and the Maryland State Police, among others. A number of training programs have been developed and are under consideration with the Police and Correctional Training Commissions.

We also provide advice and representation to Maryland's 24 elected sheriffs and their officers, and two training programs for sheriffs and their administrative staffs were conducted during 1983.

Preventive law has been emphasized during 1983, as have our efforts to ensure that the State complies with the numerous agreements and court decrees involving the operation of the State correctional system.

Department of Transportation

The Assistant Attorneys General assigned to the Department of Transportation and its units completed 503 cases in 1983, worked on 357 cases that still are in the process of trial, and opened 573 new cases. During 1983, claims and bid protests before the Board of Contract Appeals continued to add significantly to the case load managed by these attorneys, so a separate Contract Litigation Unit was established this year to deal more effectively with these cases. The Unit, directed by the Deputy Counsel to the Department, is headquartered in downtown Baltimore so it will be more conveniently located for

both the clients which its attorneys serve and the tribunals before which they appear.

As of January 1, 1983, there were 31 cases pending before the Board of Contract Appeals for a total of \$45,629,497 in dispute. Fourteen additional cases were filed during 1983 for another \$815,133. Thirteen cases were closed this past year, either through negotiations or by decision of the Board, for a total amount of \$16,282,736. As of today (December 31, 1983), the Contract Litigation Unit is handling 32 cases involving claims totaling \$30,161,894. These figures include all cases involving the Department of Transportation's divisions. They do not include those few cases which have been appealed to the courts.

In response to the requirements of Federal and State law, the Department and the Motor Vehicle Administration undertook to implement a Vehicle Emissions Inspection Program (VEIP) in various counties during 1983. The inspection program is scheduled to begin in February, 1984, when seven of the State's ten inspection stations should open. Because of the complexity of this multi-million dollar program, the Department's Assistant Attorneys General were deeply involved in advising Department officials on the legal aspects of the plan, ranging from contract negotiations to evaluations of potential claims; advice on proposed legislation; rendering of formal Opinions, and defense of the State in law suits filed by some citizens who sought to enjoin the implementation and test the constitutionality of the program.

During 1983 we rendered legal services in connection with a \$22,270,000 issue of Department of Transportation County Transportation Bonds, which provide funds for various counties and Baltimore City for transportation projects. While this Office has previously rendered services in connection with such issues, and also with issues of Consolidated Transportation Bonds, this issue required additional work because it was the first sale of bonds that were registered under the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA).

Department of General Services

During 1983, the Department was successful in a major affirmative recovery action against architectural and engineering

firms that did shoddy work for the State. A Baltimore County Circuit Court jury awarded the State \$393,500 in damages after finding that Tatar and Kelly, a now-defunct architectural firm, was negligent in designing and supervising the construction of the problem-plagued administration building at Towson State University.

Evidence presented during a five-day trial showed that the \$1.8 million structure, which was built in 1972, had a leaking roof, cracked supports, and shattering windows until extensive repairs were made on it in 1976. The State paid some \$750,000 to fix the defects which created fluctuations in the building that crushed windows and cracked the walls and roof.

In filing the suit, the State also charged that the work of Tartar and Kelly and Carroll Engineering, Inc., a structural engineering firm that designed part of the building, rendered the structure unfit for its intended use. A \$230,000 settlement was reached independently with the Carroll company. (Since the repairs were made on the building, it has been suitable for use.)

Comptroller of the Treasury

In perhaps the most significant case handled in 1983 by the Assistant Attorneys General assigned to the Comptroller's Office, the Court of Appeals ruled in August that the sale of canned or pre-programmed computer software is subject to Maryland's sales tax, since it represents the sale of tangible personal property when it is sold in a tangible form, such as a tape or a disk. The decision reinstated the original Tax Court ruling, which had been reversed by the Baltimore City Court.

The case, *Equitable Trust Company v. Comptroller*, resulted from an assessment made against the Equitable for the purchase of such software in 1974. The Retail Sales Tax Division in Maryland, like the majority of sales tax divisions in other states, has always viewed canned software as a taxable sale of tangible personal property. Prior to the decision of the Court of Appeals, all the appellate courts in other states that had ruled on sales tax assessments in this area had found such software to be exempt from tax as a performance of services or as a conveyance of an intangible right. The *Equitable* decision therefore is the first of its kind in the country.

In the decision, the Court rejected the argument of Equitable that the intangible information on a specific tape or disk could or should be severed from the tangible medium of property on which it is sold. The Court, however, viewed the sale as analagous to the sale of a phonograph record or a dress pattern, which has been routinely considered subject to tax, even though the purpose of the buyer might be to make only a temporary or one-time use of the tangible object that was purchased in order to achieve an intangible result. The Court also rejected the argument that contractual restrictions placed on the buyer's use or disposition of the software could make the transaction tax exempt.

Department of Personnel

As a result of a study done by a gubernatorially-appointed asbestos task force and an asbestos committee which was advised by the Attorney General's Office, an Executive Order was signed in April providing for an Asbestos Safety and Health Program to protect all State employees, occupants and visitors to State buildings and facilities from the potential hazard of asbestos material.

The program provides a comprehensive, State-wide, uniform asbestos safety and health plan, as well as internal action guidelines for all departments.

I am proud of the consistently high quality work of the lawyers and staff of the Attorney General's Office and thank you for the excellent cooperation we have received from you and your staff.

Sincerely,

Stephen H. Sachs
Attorney General

CASES IN WHICH THE STATE LAW DEPARTMENT HAS PARTICIPATED For Calendar Year 1983

Supreme Court of the United States (Includes Petitions for Certiorari)	65
United States Court of Appeals for the Fourth Circuit	142
Other United States Courts of Appeal	13
Total	154
United States District Court for the District of Maryland	801
Other United States District Courts	52
Total	853
Court of Appeals of Maryland (Includes Petitions for Certiorari and Answers to Petitions)	
Civil Appeals	130
Criminal Appeals	64
Total	194
Court of Special Appeals of Maryland	
Civil Appeals	147
Criminal Appeals	946
Total	1093
Circuit Court and Supreme Bench	4055
District Court of Maryland	5570
Maryland Tax Court	1799
Workmen's Compensation Hearings	7556
Miscellaneous Administrative Hearings	2597

FINANCIAL STATEMENT of the State Law Department

FOR THE FISCAL YEAR BEGINNING JULY 1, 1982
AND ENDING JUNE 30, 1983

Appropriations and Budget Credits

Program .001	\$ 3,451,819.00
Program .004	256,536.00
Program .005	998,478.00
Program .006	509,300.00
Program .008	77,219.00
Program .009	<u>915,392.00</u>
Total	<u>\$ 6,208,744.00</u>

Program .001

Legal Counsel and Advice

Appropriation	\$ 3,274,766.00
Budget Credits	<u>177,053.00</u>
Total Funds Available	<u>\$ 3,451,819.00</u>

Salaries:

Attorney General	\$ 62,500.00
Deputy Attorney General (2) ...	108,600.00
Principal Counsel (2)	84,900.00
Executive Associate	
Attorney General (5)	233,000.00
Division Director II (4)	135,600.00
Assistant Attorney	
General VII (2)	70,191.00
Assistant Attorney	
General VI (11)	332,864.00
Assistant Attorney	
General V (12)	383,128.00
Assistant Attorney	
General IV (10)	275,486.00
Legal Assistant II (3)	43,764.00
Administrative Officer II	24,188.00
First Administrative Assistant .	23,337.00
Administrative Specialist	19,235.00
Administrative Aide II (3)	56,956.00

Administrative Aide I (8)	112,093.00
Fiscal Administrator I	30,056.00
Associate Librarian II	21,879.00
Operations Specialist II	—
Operations Specialist I	20,233.00
Personnel Specialist III	21,448.00
Stenographer, Law & Legislative (12)	172,665.00
Office Secretary III	14,954.00
Office Secretary II (2)	28,578.00
Supply Clerk	11,452.00
Total Salaries	<u>\$ 2,287,107.00</u>
Expenses (Exclusive of Salaries):	
Technical & Special Fees	\$ 266,815.00
Communications	230,685.00
Travel	26,411.00
Motor Vehicle Operation & Maintenance	22,990.00
Contractual Services	165,113.00
Supplies	37,383.00
Equipment—Additional	(66,543.00)
Grants, Subsidies, & Contributions	59.00
Fixed Charges	<u>481,799.00</u>
Total Expenses	1,164,712.00
Salaries	<u>2,287,107.00</u>
Total Expenditures	<u>\$ 3,451,819.00</u>
Original General Fund Appropriation	\$ 3,274,766.00
Transfer of General Fund Appropriation	<u>177,053.00</u>
Total General Fund Appropriation	<u>3,451,819.00</u>
Net General Fund Expenditures	<u>\$ 3,451,819.00</u>

Program .004

Securities Division

Appropriation	\$	256,535.00
Transfer of General Funds		<u>1.00</u>
Total Funds Available	\$	<u>256,536.00</u>

Salaries:

Division Director II	\$	45,200.00
Assistant Attorney		
General VI (2)		69,703.00
Assistant Attorney		
General IV		27,238.00
Administrator II		24,714.00
Administrative Aide I		16,474.00
Office Secretary II		13,474.00
Office Secretary I		11,507.00
Typist Clerk IV		<u>10,359.00</u>
Total Salaries	\$	<u>218,669.00</u>

Expenses (Exclusive of Salaries):

Technical & Special Fees	\$	12,862.00
Communications		70.00
Travel		2,206.00
Motor Vehicle Operation &		
Maintenance		660.00
Contractual Services		13,819.00
Supplies		779.00
Equipment—Additional		2,213.00
Fixed Charges		<u>5,258.00</u>
Total Expenses		37,867.00
Salaries		<u>218,669.00</u>
Total Expenditures	\$	<u>256,536.00</u>

Original General Fund Appropriation	\$ 256,535.00
Transfer of General Fund Appropriation	<u>1.00</u>
Total General Fund Appropriation	<u>256,536.00</u>
Net General Fund Expenditures	<u>\$ 256,536.00</u>

Program .005

Consumer Protection Division

General Fund Appropriation	\$ 990,987.00
Special Fund Appropriation	<u>7,491.00</u>
Total Funds Available	<u>\$ 998,478.00</u>

Salaries:

Division Director II	\$ 28,820.00
Assistant Attorney	
General VI (3)	110,709.00
Assistant Attorney	
General V (3)	55,878.00
Administrative Officer III	27,273.00
Administrative Officer II	25,828.00
Administrative Specialist II (2) .	30,522.00
Administrative Specialist I (2) ..	36,798.00
Chief Investigator	21,738.00
Consumer Affairs Supervisor (2)	40,662.00
Consumer Affairs	
Specialist II (6)	104,237.00
Consumer Affairs Specialist I (2)	29,238.00
Public Affairs Officer II	27,818.00
Services Supervisor III (2)	40,662.00
Administrative Aide II	19,183.00
Stenographer Law &	
Legislative (2)	30,430.00
Office Secretary III	15,517.00
Office Secretary II (4)	39,079.00
Office Clerk II	13,436.00
Data Processing Operations	
Technician	<u>13,179.00</u>
Total Salaries	<u>\$ 711,007.00</u>

Expenses (Exclusive of Salaries):

Technical & Special Fees	\$ 69,757.00
Communications	1,471.00
Travel	17,231.00
Motor Vehicle Operation & Maintenance	6,549.00
Contractual Services	167,526.00
Supplies	9,149.00
Equipment—Additional	4,554.00
Grants, Subsidies, & Contributions	9,263.00
Fixed Charges	<u>1,971.00</u>
Total Expenses	287,471.00
Salaries	<u>711,007.00</u>

Total Expenditures \$ 998,478.00

Original General Fund Appropriation \$ 990,987.00

Special Fund Appropriation 7,491.00

Total Appropriation \$ 998,478.00

Net Expenditure \$ 998,478.00

Program .006

Antitrust Division

Appropriation \$ 414,136.00

Budget Credits 45,000.00

Federal Fund Appropriation 50,164.00

Total Funds Available \$ 509,300.00

Salaries:

Division Director II \$ 45,076.00

Assistant Attorney

General VI (3) 104,398.00

Assistant Attorney

General V (2) 34,369.00

Assistant Attorney General IV . 27,691.00

Administrative Officer II 18,250.00

Accountant Auditor III	20,314.00
Administrative Aide I	16,592.00
Stenographer Law & Legislative (2)	<u>27,859.00</u>
Total Salaries	<u>\$ 294,549.00</u>

Expenses (Exclusive of Salaries):

Technical & Special Fees	\$ 69,945.00
Communications	137.00
Travel	14,615.00
Motor Vehicle Operation & Maintenance	660.00
Contractual Services	111,777.00
Supplies	2,540.00
Equipment—Additional	7,132.00
Grants, Subsidies, & Contributions	5,830.00
Fixed Charges	<u>2,115.00</u>
Total Expenses	\$ 214,751.00
Salaries	<u>294,549.00</u>
Total Expenditures	<u>\$ 509,300.00</u>

Original General Fund Appropriation	\$ 414,136.00
Transfer of General Fund Appropriation	45,000.00
Federal Fund Appropriation	<u>50,164.00</u>
Total Funds Available	<u>509,300.00</u>
Net Expenditures	<u>\$ 509,300.00</u>

Program .008

State's Attorneys' Coordinator

Appropriation	\$ <u>77,219.00</u>
Total Funds Available	<u>\$ 77,219.00</u>

Salaries:

State's Attorneys'	
Coordinator	\$ 36,500.00
Stenographer Law &	
Legislative	<u>13,549.00</u>
Total Salaries	<u>\$ 50,049.00</u>

Expenses (Exclusive of Salaries):

Technical & Special Fees	\$ 5,661.00
Communications	(2,402.00)
Travel	3,725.00
Contractual Services	18,180.00
Supplies	650.00
Equipment—Additional	530.00
Fixed Charges	<u>826.00</u>
Total Expenses	\$ 27,170.00
Salaries	<u>50,049.00</u>
Total Expenditures	<u>\$ 77,219.00</u>

Original General Fund Appropriation \$ 77,219.00

Net General Fund Expenditures \$ 77,219.00

Program .009

Medicaid Fraud Control Unit

Appropriation	\$ 203,926.00
Federal Fund Appropriation	<u>740,101.00</u>
Total Funds Available	<u>\$ 944,027.00</u>

Salaries:

Principal Counsel (2)	\$ 83,602.00
Division Director	38,500.00
Assistant Attorney	
General V (4)	131,076.00

Fiscal Administrator (4)	90,716.00	
Fiscal Specialist III	25,291.00	
Fiscal Specialist I	18,850.00	
Chief Investigator	32,100.00	
Investigator III	19,089.00	
Investigator II (4)	89,045.00	
Operations Specialist II	24,039.00	
Administrative Aide I	16,638.00	
Stenographer, Law & Legislative (3)	42,652.00	
Office Assistant III	9,740.00	
Total Salaries	<u>\$ 621,338.00</u>	
Expenses (Exclusive of Salaries):		
Technical & Special Fees	\$ 72,158.00	
Communications	7,973.00	
Travel	16,383.00	
Motor Vehicles Operation & Maintenance	25,449.00	
Contractual Services	28,291.00	
Supplies & Materials	7,370.00	
Equipment—Additional	2,206.00	
Grants, Subsidies, & Contributions	98,105.00	
Fixed Charges	<u>36,119.00</u>	
Total Expenses	\$ 294,054.00	
Salaries	<u>621,338.00</u>	
Total Expenditures	<u>\$ 915,392.00</u>	
Original General Fund Appropriation	\$ 203,926.00	
Transfer of General Funds	744.00	
Federal Fund Appropriation	<u>740,101.00</u>	
Total Appropriation	\$ 944,771.00	
Less: Federal Fund Reversion	<u>29,379.00</u>	
Net Expenditures	<u>\$ 915,392.00</u>	

SUMMARY

Total Net Appropriation & Transfers:

Program .001	....	\$ 3,451,819.00
Program .004	....	256,536.00
Program .005	....	998,478.00
Program .006	....	509,300.00
Program .008	....	77,219.00
Program .009	....	<u>944,771.00</u>

Total\$ 6,238,123.00

Less: Federal Fund Reversion .. 29,379.00

Total\$ 6,208,744.00

Total Expenditures:

Program .001	....	\$ 3,451,819.00
Program .004	....	256,536.00
Program .005	....	998,478.00
Program .006	....	509,300.00
Program .008	....	77,219.00
Program .009	....	<u>915,392.00</u>

Total\$ 6,208,744.00

OFFICIAL OPINIONS
of the
ATTORNEY GENERAL
of
MARYLAND

**OPINIONS PUBLISHED
IN FULL**

See also page 461 for Synopses of additional Opinions.

ADMINISTRATIVE LAW

RULEMAKING—ENVIRONMENTAL HEALTH—ASBESTOS—AIR QUALITY CONTROL—ASBESTOS REMOVAL—DEPARTMENT AUTHORIZED TO ADOPT ASBESTOS PROJECT CLEAN- LINESS MEASUREMENT.

May 2, 1983

The Honorable Harry Hughes
Governor

You have requested our opinion on whether the Department of Health and Mental Hygiene acted within its statutory authority when it adopted a regulation, codified at COMAR 10.18.15.03B(1)(d)(ii), that requires persons engaged in certain asbestos removal projects to clean the project site "until no residue is visible and the airborne concentration of asbestos fibers longer than 5 microns is less than 0.1 fibers per cubic centimeter (8-hour time-weighted average)". The Department's authority to adopt a requirement concerning asbestos residue in indoor air has been questioned by the Joint Committee on Administrative, Executive, and Legislative Review.

In a letter dated March 9, 1983, to the Honorable John S. Arnick, Chairman of that Committee, Chief General Counsel Dennis M. Sweeney and Assistant Attorney General Ann Marie DeBiase concluded that the adoption of such a requirement was within the Department's authority under §2-301(a)(1) of the Health-Environmental Article of the Maryland Code, which empowers the Department to "adopt rules and regulations for the control of [outdoor] air pollution". We concur in the conclusion stated in that letter, a copy of which is appended to this Opinion. In our view, a requirement that the cleaning of an asbestos removal project be measured by a numerical concentration ratio is reasonably related to the prevention of outdoor air pollution, for the reasons stated in the letter.

Moreover, we think that the Department acted within authority granted to it by Subtitle 4 of Title 6 of the Health-Environmental Article. That subtitle governs the licensing of business entities that engage in asbestos removal. In adopting this statute, the General Assembly made the following findings:

“(1) That exposure to asbestos, a known carcinogenic agent, creates a significant hazard to the health of the people of this State;

(2) That projects to remove asbestos expose increasing numbers of asbestos removers to this hazard; and

(3) That it is in the public interest to protect asbestos removers from this hazard by requiring adherence to strict safety standards on asbestos removal projects.” §6-402 of the Health-Environmental Article.

In order to prevent this serious harm to the public health generally and to asbestos workers in particular, the statute requires business entities that intend to engage in asbestos removal to be licensed by the Department. §6-409. To qualify for a license, a business entity must meet not only several specific conditions set out in the subtitle, but also “any other standards that the Department sets”. §6-410(d). On its license application form, the business entity must include, among other items, “[a] description of the final clean up procedures that the business entity will use”. §6-411(b)(8). A licensee must keep records of each of its asbestos removal projects, including “[a] summary of the procedures that were used to comply with all applicable standards”. §6-414(c)(4). Finally, the Department has a duty to “adopt the rules and regulations necessary to carry out the provisions of this subtitle”. §6-406(1).

In short, the statute plainly contemplates that a business entity must not only meet the Department’s qualification standards in order to initially qualify for an asbestos removal license, but must also actually conduct its removal operations in compliance with the Department’s operational standards. Indeed, the Department may reprimand a licensee, or suspend or revoke a license, if the licensee “[f]ails at any time to meet: (i) [t]he qualifications for a license; or (ii) [a]ny rule or regulation that the Department adopts under this subtitle”. §6-415(2).

In our view, a requirement of the nature contained in COMAR 10.18.15.03B(1)(d)(ii) is well within the authority granted by the asbestos subtitle. An improperly cleaned project site poses precisely the risk to public health that the sub-

title's licensing process is intended to prevent. Therefore, when the Department requires a measurement procedure for determining whether a site has in fact been properly cleaned, it is carrying out its statutory duty under the asbestos removal subtitle. In this regard, we note that the Department cited the authority of this subtitle both when it proposed and, later, when it adopted the regulation in question. 9 Md. Reg. 1731 (August 20, 1982); 10 Md. Reg. 30 (January 7, 1983).

For all of these reasons, it is our opinion that the Department of Health and Mental Hygiene has ample statutory authority to adopt an asbestos project cleanliness measurement such as that contained in COMAR 10.18.15.03B(1)(d)(ii).

STEPHEN H. SACHS, *Attorney General*

JACK SCHWARTZ, *Assistant Counsel*
Opinions and Advice

AVERY AISENSTARK
Chief Counsel
Opinions and Advice

APPENDIX

March 9, 1983

*The Honorable John S. Arnick
Chairman, AELR Committee
428 Lowe Building
Annapolis, Maryland 21401*

Dear Chairman Arnick:

At a working session of the AELR Committee on March 7, 1983, your Committee questioned the authority of the Department of Health and Mental Hygiene to promulgate a particular work practice standard for the control of asbestos. The regulation at issue is COMAR 10.18.15.03B(1)(d)(ii), which requires that a person engaged in certain asbestos projects—i.e., those in which more than 260 feet of pipe covered or coated with asbestos materials are stripped or removed or in which 160 square feet of asbestos materials are used to cover or coat any duct, boiler, tank, reactor, turbine, or structural member—comply with the following:

“After removing any asbestos materials, clean all surfaces in the work area using the water and surfactant solution prescribed in §B(1)(b). When the surface has dried, vacuum any remaining dry residue on all surfaces using a vacuum equipped with a high efficiency particulate air (HEPA) filter. Repeat the sequence of wet mopping and vacuuming in 24-hour intervals until no residue is visible and *the airborne concentration of asbestos fibers longer than 5 microns is less than 0.1 fibers per cubic centimeters (8-hour time—weighted average).*” (Emphasis added.)

At your request, we were present to respond to your questions. This letter will confirm, in writing, the views expressed before your Committee.

The specific provision being questioned is part of a lengthy regulation entitled “Control of Asbestos” (COMAR 10.18.15.03). This regulation appears in COMAR 10.18.15, which is the Toxic Air Pollutant chapter of the State Air Pollution Control Regulations and was promulgated primarily under

the authority of the State Air Quality Act (Health Environmental Article, §2-101 *et seq.*). Section 2-301(a)(1) of that Act provides a broad grant of rulemaking authority to the Department to “. . . adopt rules and regulations for the control of air pollution in this State. . . .” The definition of “air pollution” at HE §2-101(b) is limited to substances present in the *outdoor* atmosphere. It was this reference to outdoor air which gave rise to the Committee’s concern that the Department was exceeding its statutory authority when it promulgated the 0.1 fiber/cc standard at COMAR 10.18.15.03B(1)(d)(ii), since that standard appeared to control *indoor* air pollution. Whether the Department exceeded its authority, therefore, depends on whether the subject regulation reasonably relates to outdoor air pollution.

Looking at the 0.1 fiber/cc standard in the context of the whole regulation, it is clear that it is just one step in a series of work practice standards applicable to asbestos projects which exceed a certain minimum size. A person engaged in such a project must first enclose and seal off the area where asbestos will be removed. This is to prevent asbestos from being discharged to the atmosphere through windows, doors, and ventilation systems during the asbestos removal work. The asbestos which has been removed must be placed in specially sealed containers and then transported and disposed of at approved sites. These precautions are also designed to prevent the escape of asbestos to the outdoor atmosphere. Finally, once the work has been completed, the plastic enclosure must be carefully cleaned to remove any asbestos residue before the enclosure can be dismantled. Again, the reason for this precaution is to prevent reentrainment of the asbestos fibers and escape into the atmosphere.

The monitoring requirement and the 0.1 fiber/cc standard were included as an objective method of determining adequate clean-up of the asbestos project site. The 0.1 standard is, therefore, a logical part of an overall scheme to minimize the discharge of airborne asbestos during asbestos projects by requiring total enclosure of the site during the work and thorough clean-up after the work is completed. When the provision in question is viewed in this context, the nexus to the outdoor atmosphere is clear and the authority of the Department to promulgate it necessarily follows.

In summary, we believe that the State Air Quality Act and, specifically, §2-101 provides adequate authority for the promulgation of COMAR 10.18.15.03B (1)(d)(ii).

DENNIS M. SWEENEY, *Chief General Counsel*

ANN MARIE DEBIASE, *Assistant Attorney General*

ADMINISTRATIVE LAW—RULEMAKING—MARYLAND PORT ADMINISTRATION—TARIFFS—PROPRIETARY PRICE SETTING NOT APA “RULE”—MPA RETAINS PROCEDURAL TARIFF SETTING AUTONOMY.

May 4, 1983

Mr. John S. Bednarik
Chairman, Board of Review
Department of Transportation

You have requested our opinion concerning the procedure by which the Maryland Port Administration sets the tariff of charges and related terms for the use of its marine terminals. Specifically, you have asked: (1) whether the Port Administration's tariff is a “rule” within the meaning of that term in the Maryland Administrative Procedure Act; and (2) if so, whether application of the rulemaking requirements of the Maryland Administrative Procedure Act is preempted by federal law.

For the reasons given below, we have concluded that a Maryland Port Administration tariff for marine terminal services is not a “rule” within the meaning of the Maryland Administrative Procedure Act, because (i) the definition of “rule” in Article 41, §244(c) of the Maryland Code does not generally apply to the action of a State agency in setting, as a proprietor, prices and related terms for the sale of its own goods or services in a competitive market, and (ii) in light of the particular history of the Port Administration and the federal regulatory presence in this area, the General Assembly more specifically did not intend to impose rulemaking requirements on Port Administration tariff setting.¹

¹ In light of this conclusion, we need not determine whether federal law is preemptive or not. As discussed in Part III B below, however, federal requirements regarding marine terminal tariffs are relevant to consideration of whether the tariff in question is a “rule” under Maryland law.

I

Factual Background

By letter dated July 27, 1982, the Maryland Port Administration ("MPA") notified the President of the Steamship Trade Association of Baltimore of proposed increases in charges at marine terminals operated by the MPA. These proposed increases were subsequently approved by the Board of Public Works on September 2, 1982.

On September 27, 1982, Terminal Services Tariff No. 6 was issued, published, and filed with the Federal Maritime Commission pursuant to federal law. The tariff, which took effect on October 1, 1982, specified the new charges and other terms under which the MPA provides various services and leases certain land at its marine terminals.

On September 15, 1982, the Maryland Undercoating Co., Inc., a tenant under a month-to-month lease at the MPA's Dundalk Terminal, wrote to the Board of Review of the Department of Transportation to protest the new charges as arbitrary and discriminatory and to ask for their suspension. Subsequently, Maryland Undercoating noted a formal appeal to the Board. It requested that the Board direct the MPA to rescind the increases and to comply with the rulemaking requirements of the Maryland Administrative Procedure Act ("APA") [Article 41, §§244 through 247 of the Maryland Code] and the notice and publication requirements of the State Documents Law [Article 41, §§256B through 256T]. The MPA's position is that the tariff is not a "rule" under the APA and, therefore, is not subject to these requirements.²

II

Inapplicability of Rulemaking to
Proprietary Price Setting

The term "rule" is defined for purposes of the APA in Article 41, §244(c). This definition is as follows:

² Other issues, including that of the Board's jurisdiction in this matter, were raised at the hearing. However, we have not been asked about these other issues, and we therefore do not address them.

“*Rule*’ includes every regulation, standard, guideline, or statement of policy or interpretation of general application and future effect, including the amendment or repeal thereof, adopted by an agency, whether with or without prior hearing, to implement or make specific the law enforced or administered by it or to govern its organization, procedure, or the practice before such agency, but does not include regulations concerning only the internal management of the agency and not directly affecting the rights of or procedures available to the public, responses to petitions for adoption of rules issued pursuant to §248 of this article, or declaratory rulings issued pursuant to §250 of this article.”

This definition of “rule” was derived from the original Model State Administrative Procedure Act, drafted in 1944 and approved by the National Conference of Commissioners on Uniform State Laws in 1946. Except for minor changes not relevant to the issue here, the statutory definition has remained unchanged since it was enacted by the General Assembly in 1957. *See* Chapter 94, Laws of Maryland 1957.

Neither the language of the definition nor its legislative history clearly indicates whether the definition is intended to apply to activities of the kind in question here—that is, the setting of prices and related terms by a government agency for the goods or services that *it* makes available as a market participant. In our view, the most reasonable construction is that the General Assembly did not intend to apply rulemaking to such proprietary price setting.³

If an agency action is a “rule” under Article 41, §244(c), then the action may be taken only in accordance with the rulemaking procedures contained in Article 41, §245. *See* 65 *Opinions*

³ We use the term “price setting” to refer not only to prices alone but also to the ancillary terms and conditions that are necessarily a part of any commercial transaction and that are also contained in the MPA tariff. However, we emphasize that we are not addressing the applicability of rulemaking requirements to the approval or setting of rates or license fees by an agency when acting in a regulatory capacity.

of the Attorney General 396 (1980).⁴ However, "[n]ot every administrative action with public consequences is a rule and calling something one does not make it one." *United Parcel Service v. Oregon Transp. Comm'n*, 555 P.2d 778, 780 (Or.Ct.App. 1976) (construing definition of "rule" under Oregon APA).

Indeed, although the definition of "rule" in the Maryland APA is broad, it is not all-encompassing. State agencies may well perform "administrative acts" that are neither "rules" nor "contested cases".⁵ See Article 41, §245(c) (drawing a distinction between a "rule" and an "administrative act" for purposes of reporting increased agency expenditures to the General Assembly). See also 64 *Opinions of the Attorney General* 208, 213 (1979) (recognizing "administrative action" as distinct from rulemaking). One administrative law commentator has described as follows the difficulty of applying any across-the-board definition of "rule":

"[P]recise definition in the abstract is not necessarily desirable, for the same function may well be regarded as rule making for one purpose or in one context and as something else for some other purpose or in another context. Here as elsewhere throughout the law a proper classification requires that both the purpose and the effect of the particular classification be taken into account." K. C. Davis, *Administrative Law Treatise* §5.01, at 285-86 (1st ed. 1958).

The obvious purpose of the MPA's tariff is to meet its costs and generate operating revenue. In setting a tariff, the MPA

⁴ The determination that an agency action is a "rule" is a prerequisite to the operation of APA rulemaking procedures, the State Documents Law, and other procedural requirements of Maryland administrative law. Ordinarily, at least 45 days must elapse between the date of publication of a rule in the *Maryland Register* and the date of its adoption, to allow for public comment on the proposal. Article 41, §256-I. To be effective, agency rules must be approved by the Attorney General [Article 41, §9(a)], filed with the Division of State Documents [Article 41, §256D], and submitted to the Joint Committee on Administrative, Executive, and Legislative Review [Article 40, §40A(f)].

⁵ A "contested case" is 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". Article 41, §244(d). The MPA tariff in question does not involve this definition or its attendant procedures.

must respond to the myriad of market conditions that influence the pricing decisions of any competitive entity. As Mr. W. Gregory Halpin, the Port Administrator, testified before the Board concerning the MPA's decision making about tariffs:

"First of all, we are looking to see if we can generate more money. We start with that idea. Secondly, . . . we have available to us the best information we have about what other ports are going to do where tariff charges are comparable. Now, we don't know what the answers are yet. We have to guess, because we can't legally call another port. What do you think everybody is going to do? What's the industry going to do? Are they going to go up ten percent? We discuss it in that area. We look at individual charges." *Maryland Undercoating Co. v. Maryland Port Administration*, Appeal No. 8201, Proceedings at 184-85 (Dep't of Transp. Bd. of Review, Oct. 27, 1982).

The effect of the tariff is, likewise, the same as that of any comparable change in the price and other terms on which goods, services, or land are made commercially available. To be sure, those who use the MPA's facilities are directly affected by its tariff, and other market participants are indirectly affected by the subsequent rate adjustments of shipping companies and other users. But again, these effects are not the consequences of a regulatory decision; rather, they are the inevitable effects of a price increase or similar alteration of terms by a market participant in the course of commerce.

When the MPA sets a tariff, it is not exercising the State's *regulatory* authority. It neither sets nor approves the rates that other entities may charge the public. It does not prescribe licensing fees for those who seek to engage in a regulated activity. Finally, it does not set prices for a service that it alone, as a government agency, can provide.

When the MPA sets a tariff, it acts purely and simply as a participant in a competitive market. Its tariff decisions are made in the same environment as those of any other provider of marine terminal services, whether or not that provider is a government agency.

We doubt that the General Assembly intended to treat, within the general definition of "rule" in the APA, this kind of

proprietary price setting.⁶ Rather, we believe that the definition should be construed to achieve a result—exclusion of proprietary price setting from rulemaking requirements—that is both reasonable and consistent with analogous federal law.

When the General Assembly enacted the Maryland APA, the federal APA had been in effect for over a decade. The federal statute expressly *included*, within its definition of “rule”, the “prescription for the future of rates, . . . prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing”. 5 U.S.C. §551(4). However, the federal statute then expressly *excluded* “a matter relating to . . . public property . . . or contracts” from its rulemaking requirements. 5 U.S.C. §553(a)(2). The latter exclusion—made necessary by the all-encompassing definition of “rule”—was evidently intended to allow federal agencies to set terms for their goods and services in accordance with market conditions, without the need to initiate cumbersome rulemaking proceedings beforehand. *See, e.g., City of Santa Clara v. Andrus*, 572 F.2d 660, 673 (9th Cir. 1978) (allocation of electricity from federally owned power plant not subject to rulemaking procedures).

In our view, the General Assembly achieved a comparable result through a different statutory approach. Unlike the federal provision, the definition of “rule” in the Maryland APA does not, in the first instance, expressly include “the prescription . . . of . . . prices, . . . services . . . or practices bearing on [them]”. *See* Article 41, §244(c). Therefore, the General Assembly, unlike the Congress, would not have felt the same need to specify an exception for proprietary price setting, for which rulemaking is unsuitable. Given the special nature of such governmental market participation, we do not read the unelaborated general definition of “rule” in Article 41, §244(c) to require Maryland agencies to engage in an exercise that nei-

⁶ The distinction between an entity’s “governmental” and “proprietary” functions is a familiar one in various contexts. *See, e.g., Mayor & City Council of Baltimore v. Baltimore Steam Packet Co.*, 164 Md. 284 (1933) (City holds wharf for rental purposes in private business, not public governmental, capacity). In our discussion of the inapplicability of APA rulemaking requirements to this narrow category of proprietary price setting, we should not be understood to suggest that the same line between an agency’s functions is necessarily drawn for other purposes.

ther their federal nor their privately owned counterparts must undertake. *Cf. Emma Ah Ho v. Cobb*, 617 P.2d 1208, 1212-13 (Hawaii 1980) (contract for rental of state irrigation facilities not a "rule" under Hawaii APA).⁷

Indeed, a rulemaking requirement applicable to all proprietary price setting would, in some situations, lead to absurd consequences, the avoidance of which is a principal tenet of statutory construction. *See, e.g., Kindley v. Governor of Maryland*, 289 Md. 620, 625 (1981) ("construction of a statute which is 'unreasonable, illogical or inconsistent with common sense' to be avoided).

For example, a leading scholar of state administrative law has pointed to "the very real burden [that would be] imposed on agencies if they were required to follow rulemaking procedures every time they changed the price of carrots and peas in the cafeteria line". Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process*, 60 Iowa L. Rev. 731, 840 (1975). "[S]uch a burden," he continued, "would be intolerable and unreasonable, and would only serve to further increase the price of goods sold by the amount of the administrative costs incurred." *Id.*⁸

⁷ Under the 1981 Model State Administrative Procedure Act, proprietary price setting and related activities are "rules", but they are also expressly exempted from rulemaking procedures: such procedures "are inapplicable to . . . a rule that only establishes specific prices to be charged for particular goods or services sold by an agency [or] a rule concerning only the physical servicing, maintenance, or care of agency owned or operated facilities or property". §3-116(3) and (4), 14 U.L.A. 93 (1982 Supp.). The comment accompanying this section notes that "subjecting the particular class of statements in question to the extensive procedures and full publication requirements applicable generally to rules was either unnecessary, unduly burdensome on the agencies, or would lead to inefficient or ineffective government". *Id.*

The comment also observes that "most state acts accomplish the result of this section by excluding [such matters] from their definition of 'rule.' The more overt approach of this section seems preferable." *Id.* While we too agree that a "more overt approach" is preferable, we believe that the Maryland APA does indeed "accomplish the [same] result," albeit implicitly.

⁸ Professor Bonfield was describing the salutary effect of an express rulemaking exemption in the Iowa APA for the "specification or prices to be charged for goods or services sold by an agency as distinguished from a license fee, application fee, or other fees"—the same distinction that we believe is implicit in Article 41, §244(c).

We do not think that the general language in the APA's definition of rule should be construed to require such a prerequisite to an agency's proprietary price setting—to "those charges fixed by government in the performance of functions not peculiarly or uniquely governmental; that is, charges of a sort normally encountered in the outside world". Bonfield, *supra*, at 841. In our view, the General Assembly did not intend to apply rulemaking—a device for the control of regulatory policymaking—to proprietary price setting, the control of which is a function of market forces.⁹ "Arguably, citizens have no greater interest in participating in the specification of such charges when made by government than in the specification of those charges when they are made by entrepreneurs outside of government." Bonfield, *supra*, at 841. Because the MPA tariff in question is an example of such price setting, we believe that it is not within the definition of "rule" in Article 41, §244(c).¹⁰

III

Inapplicability of Rulemaking to MPA Tariff Setting

In Part II above, we concluded that the MPA marine terminal tariff is not a "rule" within the meaning of that term in the APA, because the tariff is an example of proprietary price setting, about which the General Assembly did not intend to require rulemaking. Quite apart from this construction of the

⁹ We recognize that "[t]he exercise of [the MPA's statutory] powers . . . is an essential governmental function of this State". §6-203(c) of the Transportation Article. However, we do not understand this provision to imply that none of the MPA's activities can be viewed as proprietary. The MPA's "essential governmental function" is to promote commerce. See *Baltimore Bldg. & Constr. Trades Council v. Maryland Port Auth.*, 238 Md. 232, 235 (1965). To this end, the MPA engages in various proprietary activities: "[T]he [MPA] was intended to operate with a substantial degree of independence, in order that it might carry out its functions with the flexibility ordinarily found in business concerns." 41 *Opinions of the Attorney General* 301 (1956). Indeed, MPA's statute refers in one provision to MPA's "business interest". See §6-204(m)(3) of the Transportation Article.

¹⁰ We emphasize, however, that we are not addressing the applicability of the APA to regulatory activities by State agencies. See generally 65 *Opinions of the Attorney General* 396, 404-06 (1980). Cf. *C&P Telephone Co. v. Pincoffs*, 23 Md. App. 474 (1974).

APA generally, we are of the view that, separately and in particular, the General Assembly did not intend to impose rulemaking requirements on MPA tariff setting.

A. *History of the MPA*

The predecessor of the MPA, the Maryland Port *Authority*, was created by the General Assembly in 1956. Chapter 2, Laws of Maryland 1956, Extra Session. Under the 1956 legislation, former Article 62B, §13(a), the Port Authority had the following specific authorization:

“[T]o fix, revise, charge and collect rentals, rates, fees or other charges for the use of each project, and to contract with any person, partnership, association or corporation desiring the use of any part of a project and its appurtenances for any proper purpose, and to fix the terms, conditions, rentals and rates of charges for such use.”

The General Assembly recognized that the level of such tariffs would necessarily fluctuate with market conditions, because it prescribed in §13(a) as follows:

“Such rentals and other rates, fees and charges shall be so fixed and adjusted . . . as to provide funds sufficient with other revenues, if any, (i) to pay the Authority’s Current Expenses . . . , (ii) to pay the principal of and the interest on all revenue bonds issued under the provisions of this Article . . . , (iii) to create reserves for such purposes, and (iv) to provide funds for paying . . . the cost of acquiring or installing equipment and the cost of . . . improving any project”.

This process of fee setting was to be entirely independent, pursuant to the following provision in §13(a):

“Such rentals and other rates, fees and charges shall not be subject to supervision or regulation by any department, division, commission, board, bureau or agency of the State or any political subdivision thereof.”

As this office summarized the MPA’s status at the time, “the Authority was intended to operate with a substantial degree of

independence, in order that it might carry out its functions with the flexibility ordinarily found in business concerns". 41 *Opinions of the Attorney General* 301 (1956). Indeed, that Opinion held that the Authority was empowered "to establish its own budget in any manner it may see fit", outside the overall State budget. *Id.* at 302. The Court of Special Appeals characterized the MPA as having, under its original statute, "fiscal autonomy". *Maryland Port Admin. v. I.T.O. Corp.*, 40 Md. App. 697, 709 (1978).

When, in 1957, the General Assembly enacted the APA, there is no indication that it intended to impose the APA's rulemaking requirements on the Authority's independent tariff setting authority. The imposition of such requirements would have amounted to an implied repeal of a portion of the MPA's autonomy, and of course implied repeals are disfavored. *See, e.g., Carroll County Educ. Ass'n v. Board of Educ.*, 294 Md. 144, 152 (1982).

To summarize, from its inception the MPA had two kinds of independence: (i) substantive fiscal autonomy—the authority to set its fees and allocate its revenues as it alone saw fit; and (ii) procedural fee setting autonomy—the authority to set its fees by the methods used by other entities in the business of providing marine terminal services.¹¹

In 1970, the MPA's name and status changed. It became the Maryland Port Administration, a "part of the Department of Transportation". Chapter 526, Laws of Maryland 1970. Its exercise of authority was thereafter "subject to the authority of the Secretary [of Transportation]". §6-203(a) of the Transportation Article. As the Court of Special Appeals observed, this change "stripped the fiscal autonomy from MPA The broad autonomous powers of the Authority were denied the Administration." *Maryland Port Admin. v. I.T.O. Corp.*, 40 Md. App. at 709.¹²

¹¹ For example, for many years MPA was a member of the Baltimore Marine Terminal Operator's Association and applied that group's tariff. Later it withdrew from the Association and published its own tariff. *See Maryland Port Admin. v. I.T.O. Corp.*, 40 Md. App. at 701-02. This is precisely the kind of decision that a privately owned operator might make.

¹² The provisions concerning the MPA's revenues, including former Article 62B, §13, were later repealed by Chapter 608, Laws of Maryland 1976.

However, the repeal of the MPA's substantive fiscal autonomy does not necessarily imply that the General Assembly also intended to require the MPA—for the first time in its history—to follow rulemaking requirements in the adoption of tariffs. The change in the MPA's status did not change the fact that tariff levels must still reflect costs, competition from other ports, and other market conditions—nor the fact that the setting of tariffs is subject to separate federal requirements and review, a point that we discuss in more detail in Part III B below.¹³ Publication of proposed tariffs might well place the MPA in a competitive disadvantage by forcing premature disclosure of its intended pricing structure to its competitors.

We therefore conclude that the General Assembly did not intend to impose rulemaking requirements on the MPA's tariff setting—what we have termed the MPA's procedural fee setting autonomy—through its legislative restructuring of the agency.¹⁴

B. Impact of Federal Law

The Shipping Act of 1916 establishes a system for federal scrutiny of the rates, tariffs, and charges of “common carrier[s] by water” and “other person[s] subject to this chapter”. See 46 U.S.C. §§816, 817, and 820. The latter classification includes entities “carrying on the business of . . . furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water”. 46 U.S.C. §801. Specifically, 46 U.S.C. §816 provides as follows, in relevant part:

¹³ Indeed, the MPA presumably publishes a tariff only because federal law requires it do so. But for this federal requirement, the MPA would be free to negotiate rates and other terms individually. In such circumstances, even if the MPA adopted standard terms, these terms would not constitute “rules”. When an agency's action is only effectuated through later incorporation in particular contracts, the agency action, standing alone, lacks legal effect. See *Greenfield Constr. Co. v. Michigan Dep't of State Highways*, 227 N.W.2d 223, 226 (Mich.Ct.App. 1975) (standard contract specifications are not rules because they “lack legal significance until they are incorporated into a contract”).

¹⁴ This does not mean that the MPA is exempted from APA rulemaking requirements for actions that are outside of its fee setting activities and are otherwise “rules”.

"Every [common] carrier [by water] and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Commission finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice."¹⁵

Section 820 requires those covered by the Shipping Act, including terminal operators, to file "any . . . rate, or charge" with the Federal Maritime Commission ("FMC"). Under §821, "any aggrieved person may file a complaint with the FMC, challenging a particular practice or tariff as unreasonable". *Maryland Port Admin., v. SS American Legend*, 453 F.Supp. 584, 592 (D.Md. 1978).¹⁶ Section 822 requires an FMC order resulting from a rate investigation to be made only after a "full hearing". If, at the conclusion of such a hearing, the FMC finds a violation of §816, it has authority to do more than just prohibit unreasonable rates; it can directly prescribe terminal charges to remedy the effects of previously unlawful charges. *State of California v. United States*, 320 U.S. 577, 584 (1944).

The filing of tariffs by terminal operators is governed in more detail by the Federal Maritime Commission's regulations. One such regulation, 46 C.F.R. §533.2, states the purpose for tariff filings:

"[T]o enable the Commission to discharge its responsibilities under section 17, Shipping Act, 1916 [46 U.S.C. §816], by keeping informed of practices and rates and charges related thereto, instituted and to be instituted by terminals, and by keeping the public informed of such practices."

In general, "[e]very tariff or tariff change shall be filed on or before its effective date". 46 C.F.R. §533.4. The rules permit

¹⁵ The term "regulation", as used in this section and in other provisions of the Shipping Act, is not synonymous with the term "rule", as used in the Maryland APA. See Part II above.

¹⁶ The FMC may also undertake a rate investigation on its own initiative. 45 U.S.C. §821.

common carriers to expeditiously pass through increases in these terminal charges to their customers. See 46 C.F.R. §§531.10(b)(5) and 536.9(b).

As a result of this federal regulatory scheme, it is "legally necessary for MPA to have some tariff in effect" in order to charge for its terminal services. *Maryland Port Admin. v. I.T.O. Corp.*, 40 Md. App. at 702 n. 8 (1978). One federal court has summarized the effect of a tariff as follows: "The terms of a lawfully promulgated tariff become (in essence) the only agreement permitted between the party who supplies the facilities or services and the party who utilizes them." *Folgnier v. Italian Line*, 383 F.Supp. 816, 818 (D.C.Z. 1974).

Although the mere filing of a tariff with the FMC does not constitute federal approval of it, the Shipping Act and implementing regulations do grant the FMC primary jurisdiction over the validity and construction of such tariffs. *Maryland Port Admin. v. SS American Legend*, 453 F.Supp. at 592-93.¹⁷ Thus, the federal government exercises a comprehensive and detailed regulatory role with respect to marine terminal tariffs.

The statute governing the MPA evidences an awareness of this federal supervisory role. Under §6-204(m) of the Transportation Article, the MPA is expressly authorized to "appear in its own behalf before any board, commission, department, or agency of the federal government . . . in any matter . . . [t]hat relates to . . . port services and charges . . . or . . . [t]hat affects the . . . business interests of the Administration and those it serves". The General Assembly thus recognized that the MPA's tariff would be subject to federal scrutiny on the complaint of any aggrieved person, and, further, that the MPA would be obliged to justify it in that forum.

While we do not suggest that the federal role necessarily preempts State requirements as to the issuance of tariffs, nevertheless we think that such federal supervision suggests why

¹⁷ The court also held that a contract between the MPA and a stevedore based upon the agency's terminal service tariff is a "maritime contract" and within the federal court's admiralty jurisdiction. 453 F.Supp. at 589-90. The MPA has both long-term and month-to-month lease agreements with its tenants. The Dundalk Marine Terminal has 13 lessees on month-to-month leases: 6 are steamship lines; 6 are stevedores; and one is Maryland Undercoating.

the General Assembly would have thought it unnecessary to apply APA rulemaking procedures to MPA tariffs. In sum, we doubt that the General Assembly intended to require that each such tariff undergo a lengthy, burdensome, and largely inapposite rulemaking process *in addition to* federal review.

IV

Conclusion

In summary, it is our opinion that a Maryland Port Administration tariff for marine terminal services is not a "rule" within the meaning of the Maryland Administrative Procedure Act, because (i) the definition of "rule" in Article 41, §244(c) of the Maryland Code does not generally apply to the action of a State agency in setting, as a proprietor, prices and related terms for the sale of its own goods or services in a competitive market, and (ii) in light of the particular history of the MPA and the federal regulatory presence in this area, the General Assembly more specifically did not intend to impose rulemaking requirements on MPA tariff setting.

In reaching these conclusions, we acknowledge that they are not altogether free from doubt. Therefore, we recommend that the General Assembly consider a clarification of the law, both as to proprietary price setting generally and MPA tariff setting in particular.¹⁸

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¹⁸ With respect to possible clarification of the status of proprietary price setting, see notes 7 and 8 above.

Editor's Note: Many of the statutory provisions reviewed in this Opinion have since been recodified as part of the new State Government Article ("SG" Article). *See generally* SG Title 10, Subtitle 1 ("Administrative Procedure Act—Regulations"); SG Title 7, Subtitle 2 ("Division of State Documents"); and SG Title 2, Subtitle 5 ("Joint Committee on Administrative, Executive, and Legislative Review").

ADMINISTRATIVE LAW—SMALL BUSINESSES LITIGATION EXPENSES ACT—ATTORNEYS' FEES—APPLICABILITY AND SCOPE OF ACT—BURDEN OF PROOF—STANDARDS APPLICABLE—MEANING OF "SMALL BUSINESS" AND "WITHOUT SUBSTANTIAL JUSTIFICATION [OR] IN BAD FAITH".

July 1, 1983

The Honorable John J. Corbley
Secretary of Licensing and Regulation

You have requested our opinion on several issues concerning the Small Businesses Litigation Expenses Act (the "Act"). Specifically, you pose the following questions concerning this statute:

1. Does the term 'small business' apply to non-profit entities, or is it limited to profit-making enterprises?

2. Does the term 'small business' apply to sole proprietorships?

3. Does the Act apply to actions brought by small businesses, or only to actions brought by a State agency against a small business?

4. Can you provide any guidance as to the meaning of the Act's substantive standard ('the agency was without substantial justification in initiating the complaint or the agency brought the action in bad faith')?

5. Does a small business that seeks fees under the Act have the burden of proving that the standard has been met, or does the agency have the burden of proving the converse?

6. Is the award of fees mandatory if the statutory standard is met, or does a court or agency have the discretion to decline to award fees?"

For the reasons given below, we have concluded as follows:

1. The term "small business" does not include nonprofit entities.

2. The term "small business" includes sole proprietorships that otherwise meet the Act's criteria.

3. The Act applies only to administrative contested cases or judicial proceedings brought by a State agency against a small business.

4. The Act's substantive standard should be applied consistently with comparable standards in existing law. That is, nearly all cases under the Act can be resolved by reference to the criteria for fee awards in the federal Equal Access to Justice Act and in Rule 604b of the Maryland Rules of Procedure: If an agency's basis for initiating a proceeding was sufficiently reasonable that a fee award *would not* be made under the comparable standard of the Equal Access to Justice Act, a fee award *may not* be made under the Maryland Act. On the other hand, if an agency's basis for initiating a proceeding was so deficient that a fee award *would* be made under the comparable standard of Maryland Rule 604b, a fee award *may* be made under the Act.¹

5. A small business that seeks fees under the Act has the burden of proving that the statutory prerequisite is met.

6. Either a court or an agency before which a fee request is pending may decline to award fees under appropriate circumstances, even if the statutory prerequisite is met.

I

The Small Businesses Litigation Expenses Act

At its 1983 Regular Session, the General Assembly amended the Maryland Administrative Procedure Act ("APA") by adding a new section permitting the award of reasonable litigation expenses, including attorneys' fees, to small businesses. Chapter 305, Laws of Maryland 1983.² The Small Businesses Litigation

¹ It is at least theoretically possible that some cases may fall in between the standards of the Equal Access to Justice Act and Rule 604b. Until there is judicial construction of the Maryland Act's own substantive standard, we can only advise that a rare case of this kind should be resolved by determining which of the two comparable standards more closely fits the facts and circumstances of that case.

² The term "reasonable litigation expenses" is defined as follows: "[T]hose expenses not in excess of \$10,000 that the agency or court finds were reasonably incurred in opposing the agency action, including court costs, expenses incurred in administrative proceedings, attorney's fees, witness fees of all necessary witnesses, and other expenses reasonably incurred." Article 41, §255A(a)(3) of the Maryland Code. Throughout this Opinion, we refer to "reasonable litigation expenses" simply as "fees".

Expenses Act, codified at Article 41, §255A of the Maryland Code, "shall apply only to civil cases or administrative complaints filed after July 1, 1983". Chapter 305, Section 2.

The title of the Act describes the Act as being:

"FOR the purpose of permitting the award of certain expenses to small businesses in certain civil and administrative cases between small businesses and certain State agencies; providing for the source of funds for these awards; providing for the reduction or denial of awards under certain circumstances; defining certain terms; and generally relating to the award of certain expenses to small businesses in civil and administrative cases brought by certain State agencies."

In essence, the Act authorizes fee awards "[i]n any administrative adjudicatory proceeding or civil action resulting from a complaint issued by an agency against a small business . . . if (1) [t]he small business prevails in that action; and (2) [e]ither the agency was without substantial justification in initiating the complaint or the agency brought the action in bad faith". Article 41, §255A(b).³

II

The Federal Analogue

The Act appears to have largely the same policy objective as its federal counterpart and predecessor, the Equal Access to Justice Act (the "EAJA"), adopted by Congress in 1980. Pub. L. No. 96-481, 94 Stat. 2325. However, even though the basic purpose may have been the same, the General Assembly departed significantly from the EAJA's wording in several important respects, which we discuss below. Therefore, judicial or

³ Under Article 41, §255A(f)(2), a small business claiming fees in "an administrative adjudicatory proceeding" is required to file its claim with the agency. If its claim is denied, the small business may appeal "in accordance with the Administrative Procedure Act". Thus, a court would review an agency's denial of a fee award under the criteria set out in Article 41, §255A(f). Under §255A(f)(1), an agency may appeal a court's award of fees.

other interpretation of the EAJA cannot be applied uncritically to issues concerning the Act's construction.⁴

The EAJA applies to both adversary adjudications under the federal Administrative Procedure Act and judicial proceedings to which the United States is a party. The basic provision with respect to adjudications involving small businesses is as follows:

"An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency as a party to the proceeding was substantially justified or that special circumstances make an award unjust." 5 U.S.C. §504(a)(1).⁵

Another provision directs a court to award fees to a prevailing small business "in any civil action (other than cases sounding in tort) brought by or against the United States . . . , unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust". 28 U.S.C. §2412(d)(1)(A).

According to the Administrative Conference of the United States—the agency responsible for monitoring implementation—the EAJA "is serving an important purpose . . . by helping to recompense parties who have been forced to bear the expense of litigating against the government when the government's position is unreasonable". Statement of Loren A. Smith, Chairman of the Administrative Conference of the United States, Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, Concerning S. 919, Reauthorization of the Equal Access to Justice

⁴ A Maryland statute patterned after that of another jurisdiction is generally "deemed to have been intended to have the meaning ascribed to [the foreign statute] by the courts of the originating [jurisdiction]". *St. Joseph Hospital v. Quinn*, 241 Md. 371, 377 (1966). However, this rule is not necessarily applicable when the General Assembly has departed from the plan or wording of the originating statute. *Id.* See *Johnson v. Hall*, 283 Md. 644, 653 n. 9 (1978) (effect of change in provision derived from uniform act). See also *Wood v. State*, 290 Md. 579, 583–84 (1981) (effect of provisions in State statute not same as effect of verbally identical federal counterpart).

⁵ For purposes of this provision, a "party" is a small business, as measured by several criteria set out in the statute. See 5 U.S.C. §504(b)(1)(B).

Act at 2 (April 14, 1983). However, "[t]he number and amount of awards under the [EAJA] have been relatively modest". *Id.* Indeed, during the EAJA's first year, only 103 applications for awards were filed in over 14,000 administrative proceedings potentially covered by the EAJA; and, by the end of that year, no award had actually been paid. Report of the Chairman of the Administrative Conference of the United States on Agency Activities under the Equal Access to Justice Act, October 1, 1981—September 30, 1982, at 4–5 (December 9, 1982) ("ACUS Annual Report").

III

Definition of "Small Business"

The Act defines a "small business" as follows:

"'Small business' means an independently owned and operated business with less than 50 employees on the date that a complaint is issued by the agency. The employees of any corporation that owns 50 percent or more of the stock of the business against which the complaint is issued shall be counted for the purpose of determining the number of employees of the business." Article 41, §255A(a)(2).

You asked whether this definition applies to nonprofit organizations and to sole proprietorships. We believe that it does not apply to nonprofit organizations but that it does apply to sole proprietorships.

A. *Nonprofit Entities*

As indicated above, the Act defines "small business" as "an independently owned and operated *business*" that meets certain criteria. The Act is codified as part of the subtitle of Article 41 that comprises the APA. "For the purpose of [the APA,] . . . '[b]*usiness*' means any trade, business, or professional entity or activity *conducted for profit*." Article 41, §244(b). Thus, the Act applies only to entities that are conducted for profit and that otherwise meet the criteria in the definition.

B. Sole Proprietorships

In our view, there is no basis in the statutory definition to distinguish between sole proprietorships and other forms in which a business is conducted. Any business—whether a sole proprietorship, partnership, or corporation—is covered by the Act if the criteria in Article 41, §255A(a)(2) are met.⁶

IV

Proceedings Covered by the Act

Article 41, §255A(b) specifies the kinds of proceedings in which fees might be awarded:

“In any administrative adjudicatory proceeding or civil action resulting from a complaint issued by an agency against a small business pursuant to the administrative or regulatory functions of the agency, the small business may be awarded reasonable litigation expenses if:

- (1) The small business prevails in that action; and
- (2) Either *the agency was without substantial justification in initiating the complaint or the agency brought the action in bad faith.*” Article 41, §255A(b).

Thus, the Act plainly applies to proceedings in which the agency is the initiator of the proceeding, either within the agency or in court.⁷ The term “administrative adjudicatory

⁶ However, the proceeding in question must be directed at the business entity as such. That is, the Act does not apply to a proceeding that involves an individual who is engaged in a business but that does not directly concern that person's business activities. Such a proceeding is not “against a small business”. Article 41, §255A(b). See also §255A(a)(2) (“the *business* against which the complaint is issued”).

⁷ The term “agency” is defined for purposes of the APA in Article 41, §244(a). If a State entity other than an “agency” under the APA initiates a proceeding, the Act is inapplicable. The Act is also inapplicable to “an agency created by general law, which operates less than statewide”. Article 41, §255A(a)(4).

A. "Without Substantial Justification" or "In Bad Faith"

It is, of course, impossible to state in advance the exact circumstances that ought to give rise to a finding that an agency acted "without substantial justification" or "in bad faith". Such determinations can only be made in light of the particular evidence in each case. At best, only general decisional principles could be stated.

There are two existing sources of law from which guidance might be drawn in applying the Act's substantive standard: the EAJA and Rule 604b of the Maryland Rules of Procedure.

1. *The EAJA Standard*

The EAJA generally requires that fees be awarded to a prevailing small business, unless the agency's adjudicative officer or the court "finds that the position of the agency [or, in court, "of the United States"] was substantially justified". 5 U.S.C. §504(a)(1); 28 U.S.C. §2412(d)(1)(A). The legislative history of the EAJA contains some clues as to the meaning of that term. The EAJA test is "essentially one of reasonableness". H. R. Rep. No. 1418, 96th Cong., 2d Sess. 10 (1980), *reprinted in* 1980 U.S. Code Cong. & Adm. News 4953, 4989.

In addition, the principles that will govern the applicability of the EAJA's substantive standard are already beginning to emerge from case law. For example, the Fourth Circuit has described the EAJA standard as "intended to be between an automatic award of fees to a successful party and an award of fees only when the government's position is arbitrary or frivolous". *Tyler Business Services, Inc. v. NLRB*, 695 F.2d 73, 75 (4th Cir. 1982). *See also, e.g., Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board*, 679 F.2d 64, 68 (5th Cir. 1982); *S & H Riggers & Erectors, Inc. v. OSHRC*, 672 F.2d 426, 429-31 (5th Cir. 1982); *Hornal v. Schweiker*, 551 F.Supp. 612, 617-18 (M.D. Tenn. 1982); *Bennett v. Schweiker*, 543 F.Supp. 897, 898-99 (D.D.C. 1982). *See generally* Robertson and Fowler, *Recovering Attorneys' Fees from the Government under the Equal Access to Justice Act*, 56 Tul. L. Rev. 903, 928-34 (1982).¹³

¹³ The Administrative Conference summarized the first year of the agencies' implementation of this standard as follows:

Continued on page 33.

The Act's "without substantial justification" criterion in §255A(b) resembles the EAJA's "substantially justified" language. One could argue from this similarity, and from references to the EAJA in the Act's legislative history, that the EAJA ought to be the principal interpretive source for the Act's substantive standard.¹⁴

However, the drafting of §255A(b) as a whole casts doubt on this interpretation. First, the two standards are in fact not identically phrased. Indeed, they are the converse of one another. Under the EAJA, the agency must show that it "was substantially justified". But, under the Act, the issue is whether the agency "was without substantial justification". Moreover, unlike its EAJA counterpart, §255A(b) contains alternative descriptions of the kind of agency action that may justify a fee award: "without substantial justification" or "in bad faith". If the General Assembly intended simply to transplant the EAJA standard into the Act, it is difficult to understand why it rephrased one criterion and why it set forth a

"In most of the proceedings in which the question of substantial justification was reached, the adjudicative officers have carefully analyzed the legal and factual issues to determine whether the government's position was reasonable in law and fact. Generally the cases in which a finding of substantial justification was made have turned on credibility issues or on the resolution of a legitimate question as to the applicability of the law to a particular set of facts. This contrasts with the two pending proceedings in which adjudicative officers have recommended awards because the government's position was not substantially justified. In [one] proceeding, the [Federal Aviation Administration] pursued an enforcement proceeding against a flight instructor for falsification of logs despite the fact that the complaining witness repeatedly told the agency that he had lied in his original statement. In [the other case], the administrative law judge held that the trial attorney should have known from the facts available to him before issuance of the complaint that no violation of the law had occurred." ACUS Annual Report at 6-7.

¹⁴ The Maryland Chamber of Commerce played a significant role in drafting and urging passage of the Act. The Chamber testified that the Act was "modeled after" the EAJA. Testimony of Charles Krautler, Vice President of Public Affairs for the Maryland Chamber of Commerce, Before the Senate Judicial Proceedings Comm. at 1 (Feb.2, 1983).

second criterion—"in bad faith"—that is not in the EAJA at all.¹⁵

2. *The Rule 604b Standard*

The *exact* verbal counterpart of §255A(b) is not the EAJA, but rather Maryland Rule 604b. This rule provides that:

"In an action or part of an action, if the court finds that any proceeding was had (1) *in bad faith*, (2) *without substantial justification*, or (3) for purposes of delay the court shall require the moving party to pay to the adverse party the amount of the costs thereof and the reasonable expenses incurred by the adverse party in opposing such proceeding, including reasonable attorneys' fees."

See also Maryland Rule 406c 1 (motion for protective order concerning discovery made "without substantial justification" leads to fee award).¹⁶

Although no reported decision contains a detailed discussion of the meaning of the terms "without substantial justification"

¹⁵ The EAJA indirectly incorporates an "in bad faith" criterion in a provision unrelated to small business fee awards. Under 28 U.S.C. §2412(b), "the prevailing party in any civil action brought by or against the United States" may be awarded fees if the government "would be liable under the common law" for such fees. One common law exception to the rule that each party bears its own fees applies when a party has "acted *in bad faith*, vexatiously, wantonly, or for oppressive reasons". *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 258-59 (1974) (emphasis added). See *Fitzgerald v. Hampton*, 545 F.Supp. 53, 56-57 (D.D.C. 1982).

¹⁶ Another verbal counterpart is a provision that requires the payment of fees to the State under some circumstances:

"In an action or proceeding against [a public] officer or employee, if a judgment is rendered in favor of the officer or employee, and if the court finds that the action or proceeding was instituted in (1) bad faith or (2) without substantial justification, the court shall require the moving party to pay the state or the officer or employee, as the case may be, the amount of the cost thereof and the reasonable expenses incurred, including reasonable attorneys' fees." Article 32A, §12G.

This provision has never been construed.

or "in bad faith", cases involving Rule 604b indicate that it applies only to frivolous or vindictive suits. For example, in *Schmidt v. Chambers*, 265 Md. 9 (1972), the Court of Appeals affirmed the lower court's refusal to charge attorneys' fees against a party. The Court observed that fees might properly have been awarded "[i]f [the party] had been guilty of fraud, bad faith or had instituted frivolous litigation without justification". 265 Md. at 40. See also *Shanks v. Williams*, 53 Md. App. 670 (1983) (fees awarded where plaintiff relitigated issue that was *res judicata*); *Brown v. Hardisty*, 40 Md. App. 688 (1978) (fees awarded where plaintiff relitigated issue that was *res judicata*); *Singer v. Steven Kokes, Inc.*, 39 Md. App. 180, 186 (1978) (fees awarded where plaintiffs' suit was for purposes of harassment and their arguments were "totally devoid of any merit"). Cf. *Dixon v. Process Corp.*, 46 Md. App. 198, 212 (1980) (fees may not be awarded because party "had a right to have whatever legal rights he had, as doubtful as they may have been, determined in an appropriate forum").¹⁷

Yet we acknowledge some uncertainty, despite the identity of wording, over whether the General Assembly really intended to incorporate the standard of Rule 604b rather than that of the EAJA. We can find no reference whatever to Rule 604b in the legislative history.¹⁸

¹⁷ In 62 *Opinions of the Attorney General* 418 (1977), this Office considered the meaning of the following provision:

"Any person may file a complaint with the State Board of Ethics alleging a conflict of interest in violation of state law by an officer or employee of the executive branch of the State Government. Upon a finding that the allegation has *substantial merit*, the Board shall investigate it." Article 41, §14A(b) of the Maryland Code (subsequently repealed).

The Opinion suggested that the "substantial merit" standard "should be construed to mean only that a complaint not be frivolous on its face". 62 *Opinions of the Attorney General* at 422.

¹⁸ Because Rule 604b is existing law, it might appear that the Act, at least as it applies to court cases, would be superfluous if it did no more than incorporate the standard of Rule 604b. Indeed, if read to incorporate the Rule's standard, the Act would actually be less protective of small businesses than Rule 604b: a fee award is mandatory under Rule 604b if the Rule's criteria are met, but a fee award is discretionary under the Act. See Part VI below.

Continued on page 36.

3. *Application*

Thus, much as we would like to be able to identify a fully applicable body of precedent, we cannot confidently identify either the EAJA or Rule 604b as the definitive or exclusive source of guidance in applying the fee awards criteria of the Act.¹⁹ Absent statutory clarification, we can only suggest that Rule 604b and the EAJA be treated as boundary lines.

That is, a decisionmaker weighing a request for fees under the Act should, as a practical matter, turn first to the standard for awarding fees under the EAJA, as elaborated in its legislative history and case law. If the agency's basis for initiating the proceeding was sufficiently reasonable that no fee award would be made if the EAJA were itself directly applicable, then no fee award may be made under the Act.

If, on the other hand, the agency's basis for initiating the proceeding was unreasonable, and thus a fee award would be made under the standard of the EAJA, the decisionmaker should then examine the agency's basis against the standard of

However, it may be that the General Assembly did not believe Rule 604b to be applicable to the State. "[C]osts cannot properly be awarded against the State in civil actions in the absence of a statute giving express authority to render such a judgment". *State v. Williams*, 101 Md. 529, 534 (1905). See Adkins, *Code Revision in Maryland: The Courts and Judicial Proceedings Article*, 34 Md. L. Rev. 7, 40 (1974) (Courts Article has not generally changed common law rule). Cf. §7-104(a) of the Courts Article. See generally 20 Am.Jur.2d *Costs* §32 (1965). Thus, the General Assembly might have thought that the Act's applicability to court cases as well as to administrative adjudications was necessary to provide "express authority" for fee awards against the State. But, given the absence of any pertinent material in the legislative history, we can only speculate about the legislative intent in this regard.

¹⁹ It is clear, however, that the large body of case law under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, is generally inapposite. This provision authorizes a federal court, "in its discretion, [to] allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs" in various civil rights actions. In enacting the EAJA, the Congress explicitly decided not to apply the standards developed under §1988 to the special problems of litigation between small businesses and the federal government. H. R. Rep. No. 96-1418, at 10. Similarly, we believe that §1988 case law cannot provide useful guidance in resolving issues under the Maryland Act.

Rule 604b. If the Rule's stringent test is satisfied, then an award under the Act may certainly be made.²⁰

Although these ground rules ought to resolve the vast majority of cases, there remains at least a theoretical possibility that a few cases will fall in between—i.e., where an agency's basis in initiating the proceeding was arguably “unreasonable” but not “frivolous”. Should this rarity occur, we can only advise the decisionmaker to gauge whether the case comes closer to one line or the other and decide accordingly. Actual experience in implementing the Act and judicial construction of its substantive standard may allow us to refine these boundary lines in the future if, indeed, a few rare cases do seem to fall between them.

B. *Burden of Proof*

As noted in Part V A above, the EAJA and the Act describe the applicability of the substantive standard for fee awards differently. The EAJA requires a fee award to a prevailing small business, “unless . . . the position of the agency as a party to the proceeding was substantially justified”. 5 U.S.C. §504(a)(1). *See also* 28 U.S.C. §2412(d)(1)(A). The Act, however, permits a fee award only if the State agency “was without substantial justification” or acted “in bad faith”. Article 41, §255A(b)(2).

We think that this difference in wording signifies a difference in the allocation of the burden of proof. The EAJA language—“unless . . . the agency . . . was substantially justified”—requires an affirmative showing of the agency's justification to avert an otherwise mandatory award; it thus strongly implies that the agency bears the burden of making this showing. The legislative history of the EAJA confirms that the burden of proof is the agency's. *See* H. R. Rep. No. 96-1434, 96th Cong., 2d Sess. 22 (1980). *See also* 46 Fed. Reg. 32904, 32912 (June 25, 1981) (ACUS Model Rule §0.105(a)).

²⁰ These tests are to be applied to the agency's basis for acting *as of the time* it initiated the proceeding. Subsequent developments that either strengthen or weaken the agency's case are irrelevant. *See* §255A(b)(2) (“[e]ither the agency was without substantial justification in *initiating the complaint* or the agency brought the action in bad faith”).

The phrasing of the Maryland Act is in marked contrast. Instead of requiring an award to be made "unless" the agency makes an affirmative showing of substantial justification, the Act allows an award to be made only "if" the *absence* of agency justification is shown. In our view, the Act's formulation clearly implies that the burden of proof is on the party that seeks fees. The Act thus accords with the general rule in Maryland: "[A]s it is in court proceedings, . . . the burden of proof is generally on the party asserting the affirmative of an issue before an administrative body." *Bernstein v. Real Estate Comm'n*, 221 Md. 221, 231 (1959).²¹

VI

Discretion to Deny Fee Awards

The Act contains two provisions that bear on the issue of whether a court or agency has the authority to reduce or deny a fee award to a prevailing small business, even if the agency has been found to have acted without substantial justification or in bad faith. Both grant such authority, albeit in different ways.

The Act specifies one particular circumstance under which fees need not be awarded:

"The *court* may reduce the amount of the reasonable litigation expenses to be awarded under this section, or deny an award, to the extent that the small business engaged in conduct during the course of the proceeding which unduly and unreasonably protracted the final resolution of the matter in controversy." Article 41, §255A(e).

This language is drawn, nearly verbatim, from the portion of the EAJA that applies to judicial proceedings. *See* 28 U.S.C. §2412(d)(1)(C).

²¹ We do not suggest that the prevailing small business must somehow canvass every possible agency justification and negate each. If the prevailing small business can demonstrate, through the evidence actually introduced at the hearing or trial, that the agency's case was wholly unsupported at its initiation, it will have carried its burden *prima facie*. At that point, the agency would be obliged to offer rebuttal as to its justification in initiating the proceeding.

But, unlike the EAJA [*cf.* 5 U.S.C. §504(a)(3)], the Act contains no comparable provision applicable to fee award decisions by agencies. Thus, although we can see no reason for the distinction, the Act seems to suggest that only courts, but not agencies, may reduce or deny fee awards specifically because of the dilatory tactics of a small business.²²

The question, then, is whether courts have authority to reduce or deny an award under any other circumstances and whether agencies have discretion to reduce or deny an award under any circumstances at all. We believe that they both have such discretion.

The very provision that specifies the criteria for awards, §255A(b), itself contains language granting courts and agencies discretion: "In any administrative adjudicatory proceeding or civil action resulting from a complaint issued by an agency against a small business . . . , the small business *may* be awarded reasonable litigation expenses if [the statutory criteria are met]." The use of the permissive term "may" plainly suggests that such expenses need not inevitably be awarded simply because the substantive criteria are met.²³

²² In light of the Act's more basic, broader grant of discretion to both courts and agencies (*see* paragraph accompanying note 23 below), §255A(c) is somewhat anomalous, apparently engrafted into the Act from the EAJA without the necessary clarification. It can be read in several ways: (i) as a restriction on the discretion of agencies, by implying that they may not exercise their broader discretion for this reason; (ii) as an example of the circumstances under which both agencies and courts may exercise their broader discretion to deny fee awards; or (iii) as a specific example of when courts, at least, should exercise their broader discretion. The General Assembly may wish to clarify its intention with regard to this provision.

²³ By contrast, the EAJA uses the mandatory term "shall" in its provisions on fee awards. *See* 5 U.S.C. §504(a)(1); 28 U.S.C. §2412(d)(1)(A). Rule 604b also uses the mandatory term "shall".

Our conclusion in this regard is strengthened by another difference in phrasing between the Act and the EAJA. Section 255A(e) of the Act, concerning the dilatory tactics of a small business [*see* note 22 above and accompanying text], begins: "The court *may* reduce the amount of the reasonable litigation expenses to be awarded under this section, or deny an award". Section 2412(d)(1)(C) of the EAJA begins: "The court, *in its discretion*, *may* reduce the amount to be awarded pursuant to this subsection, or deny an award". Presumably, in §255A(e), the General Assembly omitted the phrase "in its discretion" as redundant, given its use of the permissive term "may". We understand the term "may" as used in §255A(b), to denote the same discretion.

Of course, this discretion should not be exercised in so expansive or wholesale a fashion as to frustrate the purposes of the Act. In our view, a court or agency should reduce or deny a fee award to an otherwise qualified small business only in special circumstances.

Under the EAJA, fees need not be awarded if "special circumstances make an award unjust". *See* 5 U.S.C. §504(a)(1); 28 U.S.C. §2412(d)(1)(A). The legislative history describes its purpose as follows:

"This 'safety valve' helps to insure that the Government is not deterred from advancing in good faith the novel but creditable extensions and interpretations of the law that often underlie vigorous enforcement efforts. It also gives the court discretion to deny awards where equitable considerations dictate an award should not be made." H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. 11 (1980), *reprinted in* 1980 U.S. Code Cong. & Adm. News 4984, 4990.

With respect to the Act, we believe that the discretion expressly vested in courts and agencies by the General Assembly is intended to permit fee award denials at least in comparable situations.

VII

Conclusion

In summary, it is our opinion that:

1. The term "small business" does not include nonprofit entities.
2. The term "small business" includes sole proprietorships that otherwise meet the Act's criteria.
3. The Act applies only to administrative contested cases or judicial proceedings brought by a State agency against a small business.
4. The Act's substantive standard should be applied consistently with comparable standards in existing law. That is, nearly all cases under the Act can be resolved by reference to

the criteria for fee awards in the federal Equal Access to Justice Act and in Rule 604b of the Maryland Rules of Procedure: If an agency's basis for initiating a proceeding was sufficiently reasonable that a fee award *would not* be made under the comparable standard of the Equal Access to Justice Act, a fee award *may not* be made under the Maryland Act. On the other hand, if an agency's basis for initiating a proceeding was so deficient that a fee award *would* be made under the comparable standard of Maryland Rule 604b, a fee award *may* be made under the Act.²⁴

5. A small business that seeks fees under the Act has the burden of proving that the statutory prerequisite is met.

6. Either a court or an agency before which a fee request is pending may decline to award fees under appropriate circumstances, even if the statutory prerequisite is met.

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Editor's Note: The Small Businesses Litigation Expenses Act has since been recodified, without substantive change, as §10-217 of the new State Government Article.

²⁴ See note 1 above.

ALCOHOLIC BEVERAGES

LICENSES—CORPORATIONS AND CLUBS—“PECUNIARY INTEREST”—SOLE PECUNIARY INTEREST IN LICENSED BUSINESS TO BE HELD BY CORPORATION OR CLUB—INDIVIDUAL OFFICERS NEED NOT HAVE PECUNIARY INTEREST IN CORPORATION OR CLUB.

January 27, 1983

Ms. Sharon E. Martin
Secretary
Board of License Commissioners
for Montgomery County

On behalf of the Montgomery County Board of License Commissioners, you requested our opinion on the proper meaning and application of the term “pecuniary interest”, as used in Article 2B, §56(10) of the Maryland Code, with respect to an alcoholic beverages license issued under Article 2B, §40, “for the use of [a] corporation or club”.

For the reasons given below, we have concluded that “pecuniary interest” means ownership interest and, as used in a corporate or club context, applies to the interest of the corporation or club in the licensed business. In our view, the individual officers applying for a license “for the use of” a corporation or club need not themselves own any stock or have any other pecuniary interest in that corporation or club. Rather, the provisions of Article 2B, §56(10) and (15), when read together, require that the corporation or club “for the use of [which]” the application is made must itself have the sole “pecuniary interest” in the business to be operated under that license.

I

The Statute

Article 2B, §56(10) requires every application for an alcoholic beverages license to contain:

“A statement that the applicant has a pecuniary interest in the business to be conducted under said license[.]”

Article 2B, §56(15), in turn, requires every application to contain also:

“A statement that no person except the applicant is in any way pecuniarily interested in said license or in the business to be conducted thereunder during the continuance of the license applied for[.]”¹

Read together, the provisions of §56(10) and (15) effectively indicate that “the applicant” must hold 100% of all “pecuniary interest[s]” in the licensed business. And, in this regard, it appears settled that “pecuniary interest” refers to some kind of ownership interest—not employment nor even a creditor’s interest. *See Cohen v. Orlove*, 190 Md. 237, 243 (1948).

The issue here, then, is how these provisions apply to licenses issued to corporations. Article 2B, §40 provides that an application for a corporation—or for an unincorporated club—“shall be applied for by and be issued to three of the officers of that corporation or club, as individuals, for the use of the corporation or club”. Thus, in the context of §§40 and 56, it is generally understood that the term “applicant” refers to these officers.

As outlined below, there are several potential ways to construe and apply §56(10) and (15) in the corporate context.

II

Alternative Readings

A. Officer/Applicants to Own Total Interest

The first—and most literal—construction would be to read §56(10) and (15) as requiring each of the individual officers to be stockholders in the corporation, with their combined interests totaling 100% of the outstanding stock of that corporation.

¹ An additional reference to “pecuniary interest” is found in Article 2B, §56(12), which requires:

“A statement that the applicant, or person on behalf of whom the application is filed, is not pecuniarily interested in any other place of business in said county . . . where or for which a license has been applied for, granted or issued under this article, except as otherwise permitted in this article[.]”

That is, §56(10) and (15) would require the applicants to affirm that the applicants—and only the applicants—have a pecuniary interest in the licensed business. In the corporate context, then, the three designated officer/applicants must necessarily own among them the total ownership interest.

This construction, however, leads to several anomalies and, indeed, impossible and absurd results:

For example, such a requirement would be impossible to comply with where a corporation (other than a close corporation, for which a special rule is provided) is owned by but one or two individual stockholders.²

Such a requirement also would be impossible to comply with in cases of applications for nonstock corporations or unincorporated, membership clubs. Normally, no one—in any real sense at least—owns or has a “pecuniary interest” in such corporations or clubs.

Moreover, such a requirement would effectively prevent any corporation with a large number of stockholders—e.g., one whose stock is publicly traded—from ever being eligible to have a license issued for its use virtually anywhere in this State. Obviously, this runs counter to existing practice: in fact, we find that several publicly-traded corporations have had licenses issued “for [their] use” in this State, even though their officer/applicants did not own 100% of the corporation’s stock.³

Finally, as discussed more fully below, we find several special provisions in §40 that, as to specific counties (not including Montgomery County), expressly address when—and the extent to which—an officer/applicant must be a stockholder. These special provisions strongly suggest that the general rule does *not* otherwise require the officers to be the sole, 100% owners of the corporation. Significantly, the provisions are not part of or exceptions to §56. Rather, they are part of §40,

² A modified, though less literal, reading of §56(10) and (15) would be to permit *any one or more* of the three officers to own 100% of the stock. Although such a reading would answer this particular problem, it would not resolve those that follow.

³ Similarly, a corporation whose stockholders—even if limited in number—do not choose to serve as officers would be precluded from obtaining a license in this State.

which generally requires only that the applicants be officers—or, indeed, in some cases, mere “employees”. And they are worded as *additional requirements* for purposes of §40—not as *exceptions* to §56 or *its* requirements.

For these and similar reasons, we do not believe that Article 2B, §56(10) and (15) can be read to require the officer/applicants to be the sole stockholders in the corporation. Thus, if—as seems to be the case—the provisions of §56(10) and (15) require a 100% ownership interest, then the references in §56(10) and (15) to the “applicant” cannot logically refer to the officers applying on behalf of the corporation.

B. *Officer/Applicants to Own Some Minimum Interest*

An alternative reading of the statute would be to require the officers to own some minimum amount of stock, but not necessarily all. This reading, however, suffers from some of the same problems noted above:

For example, in the corporate context such a requirement totally ignores—and renders meaningless—the express requirements of §56(15): officer/applicants with less than all of the stock could not truthfully affirm, as required by §56(15), that no one else but themselves has a “pecuniary interest” in the corporation.

Moreover, such a requirement would still render it impossible for an unincorporated, membership club to comply with §56(10) because, as a rule, no individual club officer—or any other person, for that matter—has a stock or other “pecuniary interest” in such a club.

Finally, such a requirement simply has no textual basis in the statute itself. And, even if it were read into the statute, we still would find no guidance whatever in the statute as to the *amount* of interest that the officer/applicants must have: a “controlling” interest, a “substantial” interest, or only some “nominal” interest? Even these oft-used terms have no precise meaning, and the statute is wholly silent as to the standards that should be applied. A “nominal” interest, for example, is often tantamount to no interest at all, either in a monetary (“pecuniary”) sense or in a control sense; little, if any, public purpose is served by requiring an officer to have, for example, a 1% (or less) stock interest in a corporation. A “controlling”

interest normally speaks to voting rights and powers, not necessarily to monetary (or "pecuniary") interests. And "substantial" interest, for various purposes with respect to even the same corporation, could range anywhere from 33-1/3% (or less) to 66-2/3% (or more). The lack of statutory guidance strongly suggests that such a reading was never contemplated by the General Assembly.

Significantly, where the General Assembly has seen fit to require stock ownership by one or more of the officer/applicants, it not only has expressly said so—as in §40(c) (Howard County) and §40(e) (Queen Anne's County)—but it also has specified the exact percentage required—varying from 10% (Howard and Worcester Counties) to 75% (Wicomico County). And where, for example, a specific requirement of stock ownership was thought by the General Assembly to unduly affect the ability of publicly-traded corporations to obtain licenses, express exceptions have been provided. *See, e.g.*, §40(b-1)(5) and §40(c)(2). Except for the special case of close corporations, the General Assembly has nowhere tried to equate an individual applicant's responsibility in terms so nebulous as "nominal", "substantial", or "controlling".

For these and similar reasons, then, we do not believe that the provisions of §56(10) and (15) can be read as requiring the individual officer/applicants to have a stock interest in the corporation.

III

Preferred Reading

Given the problems noted above, we necessarily conclude that the references to the "applicant" in §56(10) and (15) must be read as referring to the entity "for the use of" which [in the words of §40(b)] or "on behalf of" which [in the words of §56(12)] the application is made: the corporation or club itself. The corporation or club must be the one—and the only one—that has the requisite "pecuniary interest" in the licensed business; that is, the corporation or club must be the sole owner of the business—and of the profits earned from the business—operated under the license. Conversely stated, the individual officer/applicants need not themselves have any stock or other pecuniary interest in the corporation—except, of course, in

those few counties for which the statute expressly provides otherwise.

The law elsewhere recognizes that the term "applicant", standing alone, makes little sense in the corporate context. For example, §56(12) refers in the alternate to "the applicant, or person on behalf of whom the application is filed".⁴ To avoid the absurd results outlined above, we believe that §56(10) and (15) must be construed similiary.⁵

A cardinal rule of statutory construction is that "[r]esults that are unreasonable, illogical or inconsistent with common sense should be avoided". *Schweitzer v. Brewer*, 280 Md. 430, 438-39 (1977). Our reading of §56(10) and (15), we believe, is the only one that gives some meaning and effect to both §56(10) and §56(15)—while, at the same time, avoiding all of the unreasonable, illogical, and inconsistent results that, as outlined above, flow from the various other possible readings of the statute.

IV

Conclusion

In summary, it is our opinion that the individual officers applying for a license "for the use of" a corporation or club need not themselves own any stock or have any other pecuniary interest in that corporation or club. Rather, the provisions of Article 2B, §56(10) and (15), when read together, require that the corporation or club "for the use of [which]" the application is made must itself have the sole "pecuniary interest" in the business to be operated under that license.

STEPHEN H. SACHS, *Attorney General*

AVERY AISENSTARK,
Chief Counsel
Opinions and Advice

⁴ See note 1 above. See also §2(j), which, for certain purposes, defines "licensee" to mean "a corporation on whose behalf an individual or individuals have obtained a license".

⁵ We emphasize here, however, that our opinion is limited to the term "applicant" as used in §56(10) and (15). We do not address the meaning of that term as used elsewhere in §56 or other provisions of Article 2B.

ATTORNEY GENERAL

ELIGIBILITY REQUIREMENT—"PRACTICE OF LAW"—INVOLVEMENT WITH LEGAL RESPONSIBILITIES AS DEAN OF LAW SCHOOL AND IN OTHER PROFESSIONAL ACTIVITIES MEETS CONSTITUTIONAL REQUIREMENT THAT ATTORNEY GENERAL HAVE "PRACTICED LAW".

December 19, 1983

Dean Michael J. Kelly
University of Maryland School of Law

You have requested our opinion on your eligibility, under Article V, §4 of the Maryland Constitution, to be a candidate for Attorney General in 1986. Specifically, you observe that your "legal work as a lawyer has not been in a conventional law office", and you inquire whether that work meets the constitutional requirement that the Attorney General shall have "practiced Law in this State for at least ten years".

For the reasons given below, we have concluded that your activities as a lawyer do satisfy the "practiced Law" requirement in Article V, §4.

I

Factual Background

Your letter summarizes your legal career as follows:

"I have been a member of the bar of Maryland since 1968. Except for approximately ten months spent as Counsel to the Mayor of Boston in 1971, and six months in Hartford for the American City Corporation in 1970-71, I have resided and practiced law in the State of Maryland from 1968 to the present. Prior to joining the faculty of the University of Maryland School of Law in 1972 I was an attorney in the Office of the General Counsel of the Rouse Company, in-house counsel and Secretary to the American City Corporation (a wholly owned subsidiary of the Rouse Company), Counsel to the Mayor of Boston, and assistant to Mayors Thomas J. D'Alessandro III, and William Donald Schaefer of Baltimore

City. Under Mayor Schaefer I was also Director of the Mayor's Coordinating Council on Criminal Justice. My major activity since 1972 has been service as a teacher of law, and beginning in 1975, as Dean of the University of Maryland School of Law. During my entire period of residency in Maryland I have engaged in legal counseling, representation, and consultation with individuals and public and private institutions, sometimes in addition to, sometimes as part of my official duties."

Appended to your letter is an illustrative listing of law-related activities. For example, during your tenure at the University of Maryland Law School, you have provided "professional advice to lawyers and law firms on matters of professional ethics", for the most part informally but occasionally for compensation. Since 1980, you have served as legal counsel to the Central Maryland Beekeepers Association, a nonprofit corporation. You are a member of the Maryland Court of Appeals' Committee on Rules of Practice and Procedure and chairman of one of its subcommittees, and you have appeared before the Court of Appeals in that capacity. In addition, you have participated in numerous conferences and other professional activities of local, state, and national bar associations.

You describe your duties as Dean of the University of Maryland Law School as including: teaching and legal research; counseling faculty and students; negotiating budgetary and other matters with University officials; advocating the interests of the Law School in other forums; adjudicating certain disputes within the Law School and writing appropriate decisions; and, in general, administering the various affairs of the Law School that are within the Dean's responsibility. Some of these administrative duties entail the exercise of legal judgment—for example, "[a]ssessment of federal law and regulations applicable to administration of grants and contracts with agencies of U.S. government".

II

Constitutional Provision

Article V, §4 of the Maryland Constitution prescribes the eligibility requirements for Attorney General as follows:

"No person shall be eligible to the office of Attorney General, who is not a citizen of this State, and a qualified voter therein, and has not resided and practiced Law in this State for at least ten years."

We are aware of no case or prior Opinion of the Attorney General that has construed the "practiced Law" eligibility requirement.¹

III

Constitutional History

A. *Prior to 1864*

The Maryland Constitution of 1776 provided that "the governor . . . , with the advice and consent of the council, may appoint . . . the attorney general". Article 48.² No eligibility requirements were set.

In 1817 the Constitution was amended to repeal all references to the Attorney General: "[T]he duties and services now provided by law to be done and performed by the attorney general, shall be done and performed by such persons, and in such manner, as the general assembly of Maryland shall hereafter direct." Chapter 247, Laws of Maryland 1816.

The Constitution of 1851 empowered the Governor, "[w]hen the public interest requires it, . . . to employ counsel". Article II, §21. That Constitution also declared that "[n]o law shall be

¹ In *Crosse v. Board of Supervisors of Elections*, 243 Md. 555 (1966), the Court of Appeals observed in passing that the Attorney General must be a "qualified vote[r], and therefore, by necessary implication, [a] citize[n] of the United States". 243 Md. at 561. The Court did not discuss any other aspect of the eligibility requirements for Attorney General.

In 68 *Opinions of the Attorney General* 342, 347-48, we discussed the timing aspect of the eligibility requirement—"for at least ten years"—but not the legal practice aspect.

² The "council to the governor" consisted of "five of the most sensible, discreet and experienced men" who were elected by the General Assembly to conduct State business. Articles 26 and 34 of the Constitution of 1776.

passed creating the office of Attorney General". Article III, §32.

B. The Constitution of 1864

The position of Attorney General was reestablished—and, for the first time in Maryland history, made elective—by the Constitution of 1864. Article V, §4 of that Constitution provided:

"No person shall be eligible to the office of attorney general who has not resided and practiced law in this State, for at least seven years next preceding his election."

Some insight into the intended meaning of "practiced law" may be gained from the debate over this and related provisions.³ Although the debate centered on the salary for the Attorney General and on the duration of the required legal practice, the participants couched their arguments in terms of the qualifications for the office.

The salary of the Attorney General was to be added to Article V, §3, which outlined the duties of the position. As reported by the drafting committee, this section provided as follows:

"Sec. 3. It shall be the duty of the attorney general to prosecute and defend, on the part of the State, all cases which at the time of his election and qualification, and thereafter may be depending in the court of appeals, or in the supreme court of the United States, by or against the State, or wherein the State may be interested; and he shall give his opinion in writing whenever required by the general

³ As reported out of committee for floor debate, Article V, §4 read as follows:

"No person shall be eligible for the office of Attorney General, who has not been admitted to practice the law in the State, and who has not practiced the law for ____ years, and who has not resided for at least ____ years in the State[.]" *Proceedings of the State Convention of Maryland to Frame a New Constitution* 503 (1864).

The blanks were left for the Convention as a whole to fill.

assembly, or either branch thereof, the governor, the comptroller, the treasurer or any State's attorney on any matter or subject depending before them; and when required by the governor or the general assembly, he shall aid any State's attorney in prosecuting any suit, or action brought by the State, in any court of this State; and he shall commence and prosecute or defend any suit, or action in any of said courts, on the part of the State, as the general assembly or the governor, acting according to law, shall direct to be commenced, prosecuted, or defended, and he shall receive for his services an annual salary of ____ thousand dollars[.]” 3 *Debates of the Constitutional Convention of the State of Maryland* 1459 (1864) (“*Debates*”).

In the debate over the dollar figure that ought to be inserted in the blank, the proponents of a comparatively generous annual salary (\$2,500 or \$3,000) emphasized that a highly skilled lawyer must be attracted to the position, given the importance of the Attorney General's duties. *Debates* at 1460 (remarks of Negley and Bond). One delegate observed: “Now you must have for attorney general a man who is accustomed to trying cases, or he will not be fit for the office.” *Id.* at 1461 (remarks of Stirling). Another, a lawyer himself, declaimed sarcastically:

“Talk about three thousand dollars being a large sum! . . . What an enormous sum! for the whole time of a man, who, unless he is one of the first lawyers in the State, is not fit for the place. You expect to obtain a man possessing the first legal abilities of the State, and you propose to pay him fifteen hundred dollars for the performance of duties which will separate him entirely from his own private concerns.” *Id.* at 1463 (remarks of Chambers).⁴

The debate then turned to the length of time that a person must have practiced law to be eligible for Attorney General. One delegate proposed ten years:

⁴ A skeptical Mr. Abbott rejoined: “As compared with the salaries paid for other services, I do not believe that there is a lawyer in the State whose services are worth more than two thousand dollars a year.” *Debates* at 1463. The salary was ultimately fixed at \$2,500. *Id.* at 1464.

"I think a man who is called upon to fill this responsible position, ought to have practiced law for ten years at least. It is one of the most important and responsible positions in the State. And from the circumstances that now surround us, from the changes proposed to be made by this constitution, it is evident that we require in this position the services of one who has occupied a leading position in the profession for ten years at least." *Debates* at 1465 (remarks of Smith).

He went on:

"[A] gentleman may be learned in the law, and yet not knowing about the duties of attorney general. I think ten years is short enough time to require of one who will be called upon to apply himself to the practice of law in all its branches." *Id.*

The proposed ten-year requirement failed. However, a seven-year requirement—"as short a time as can enable a man to fit himself for this office", said its proponent—then passed. *Id.*

C. *The Constitution of 1867*

The wording of Article V, §4 that appears in the current Constitution was adopted in 1867. The pertinent phrase, "practiced Law", was simply carried forward from the Constitution of 1864 without further amplification, although the period of required practice was increased to ten years. See *Proceedings of the State Convention of Maryland to Frame a New Constitution*, 137, 228, and 584 (1867).⁵

D. *Summary*

The constitutional history is inconclusive as to the meaning of "practiced Law". Nothing in the 1864 debates can fairly be

⁵ There was debate in 1867 over whether the period of legal practice ought to be "next preceding" the Attorney General's assumption of office. See *Debates of the Maryland Constitutional Convention of 1867* at 205 (Perlman ed. 1923). See generally 68 *Opinions of the Attorney General* 342, 345-48 (1983). However, we find nothing in that debate which sheds light on the meaning of "practiced Law".

taken as an exhaustive, or exclusive, catalog of the kinds of legal activity that satisfy the eligibility requirement.

The "practiced Law" requirement can best be understood as generally expressing the framers' intention that the Attorney General be a person steeped in the law, of sufficient legal maturity to undertake the duties of the office. Their articulation, in debate, of the necessary qualifications was quite naturally phrased in terms of the general-practice lawyering with which they were familiar. Indeed, in an era before legal specialization, large law firms, corporate law departments, and institutionalized law schools, they could hardly have done otherwise. *See generally* L. Friedman, *A History of American Law* 271-82 (1973); J. Hurst, *The Growth of American Law* 297 and 306 (1950)⁶ Moreover, as we discuss in Part IV A below, they had in mind a set of duties for the Attorney General that amounted to exactly such an individual practice on behalf of the State. But much has changed since, and we believe that the constitutional requirement ought to be construed to reflect and accommodate that change.

IV

The "Practiced Law" Requirement in Light of Changed Conditions

A. *Attorney General's Duties in 1864*

It is certain that the framers intended the Attorney General to be the State's *only* lawyer, apart from the State's Attorneys elected as prosecutors in each county. The 1864 debate over the Attorney General's salary was essentially a comparison of the State funds expended for private lawyers in prior years with the salary to be paid the Attorney General in the future.

⁶ In particular, the framers of the Constitution of 1864 could not have thought about the potential qualification of law deans and teachers, as we know them, because the nature of legal education was considerably different in 1864 than today. The first dean of a modern law school, Langdell at Harvard, was appointed in 1870. G. Gilmore, *The Ages of American Law* 42 (1977). "Until Langdell's time the typical law professor had been a retired practitioner or judge . . . or a part-time instructor who devoted the bulk of his time and energy to other pursuits." *Id.* at 57.

Debates at 1460–63. The duties of the Attorney General included the personal conduct of litigation and the personal rendering of advice. Article V, §3 of the Constitution of 1864. Most significantly, Article V, §3 expressly prohibited the Attorney General from hiring assistants:

“[The Attorney General] shall not . . . have power to appoint any agent, representative, or deputy, under any circumstances whatever.”

Precisely the same prohibition was included in Article V, §3 of the Constitution of 1867.⁷

It is unsurprising, then, that the qualifications mentioned in the 1864 debates were those of a general practitioner with extensive litigation experience—in short, “one who will be called upon to apply himself to the practice of law in all its branches”. *Debates* at 1465 (remarks of Smith). The expectation was that someone who in private practice personally handled a wide array of litigation and counseling duties—as most experienced

⁷ Article V, §3, as adopted in 1867, read in its entirety as follows:

“It shall be the duty of the Attorney-General to prosecute and defend, on the part of the State, all cases, which, at the time of his appointment and qualification, and which thereafter may be depending in the Court of Appeals, or in the Supreme Court of the United States, by or against the State, or wherein the State may be interested; and he shall give his opinion in writing, whenever required by the General Assembly, or either Branch thereof, the Governor, the Comptroller, the Treasurer, or any State’s Attorney, on any legal matter, or subject depending before them, or either of them, and when required by the Governor, or the General Assembly, he shall aid any State’s Attorney in prosecuting any suit, or action brought by the State in any Court of this State; and he shall commence and prosecute, or defend, any suit or action in any of said Courts, on the part of the State, which the General Assembly or the Governor, acting according to Law, shall direct to be commenced, prosecuted or defended; and he shall receive for his services an annual salary of three thousand dollars; but he shall not be entitled to receive any fees, perquisites, or rewards, whatever, in addition to the salary aforesaid, for the performance of any official duty, nor have power to appoint any agent, representative or deputy, under any circumstances, whatever; nor shall the Governor employ any additional counsel in any case, whatever, unless authorized by the General Assembly.”

lawyers at the time did—would personally conduct the same kind of practice on behalf of the State.

B. *Evolution of Attorney General's Duties*

The happy notion that the Attorney General could, alone, attend to all of the State's legal business did not survive the complications of this century. In 1913, Article V, §3 was amended to provide that the Attorney General "shall have and perform such other duties and shall appoint such number of deputies or assistants as the General Assembly may from time to time by law prescribe". Chapter 663, Laws of Maryland 1912 (ratified November 4, 1913).

In 1916, the General Assembly created the Department of Law. Chapter 560, Laws of Maryland 1916. "The head of said Department shall be the Attorney-General of the State." *Id.* §1. The Attorney General was authorized to hire up to three assistants. *Id.* §4.

This statute made clear that the role of the Attorney General had changed from personal performance of all duties to supervision of a law office:

"[T]he Attorney-General shall have general charge, supervision and direction of the legal business of the State, . . . and he, together with his assistants, shall perform the duties now or hereafter prescribed by the Constitution and Laws of this State

. . . .
The said assistants shall each perform such duties as the Attorney-General may, from time to time, assign to them, and the Attorney-General is hereby authorized to assign to them and each of them the performance, subject to his direction and control, of any of the duties required of him by law." *Id.* §§2 and 4.

The Attorney General's legal authority and responsibility are essentially the same today. See Article 32A, §§1, 2, and 6 of the Maryland Code. As a practical matter, of course, the Attorney General is, more than ever, a manager and policymaker. From the three assistants authorized in 1916, the Attorney General's Office has grown to employ over 200 lawyers. See 1 *Maryland State Budget [Fiscal Year 1984]*, at 90-95 (1983).

C. *Effect of Changed Conditions*

In our view, the “practiced Law” eligibility requirement should be construed in consonance with the changed responsibilities of the Attorney General and the changes in the nature of legal practice. Certainly, the expertise and acumen derived from a personally conducted private practice, which the framers of the provision seemingly had specifically in mind, remain highly pertinent. But other legal skills that reflect experience with types of legal practice unknown in 1864—for example, managing the work of subordinate attorneys or shaping legal policy for a public or private institutional client—are now just as pertinent to the constitutional test. To read the provision as if its scope were forever frozen in the mid-Nineteenth Century legal era would frustrate its overall purpose: that the Attorney General’s legal experience be “fit . . . for this office”, as both the nature of legal practice and the duties of the Attorney General may evolve.

The Court of Appeals has adopted just such an approach to other interpretive issues under the Constitution. For example, in *Norris v. Mayor & City Council of Baltimore*, 172 Md. 667 (1937), the issue was whether voting machines might lawfully be used in elections in this State. Article I, §1 of the Constitution provides that “[a]ll elections shall be by ballot”, and the opponents of voting machines argued that the term “ballot” could not possibly have been intended to permit the use of voting machines—which, of course, did not exist in 1867.

The Court forcefully rejected this constricted view of the Constitution:

“[T]he argument ignores the rule which above all others gives life to the written law and makes its use possible for the government and control of men in carrying on the actual business of life, and that is that, while the principles of the Constitution are unchangeable, in interpreting the language by which they are expressed it will be given a meaning which will permit the application of those principles to changes in the economic, social, and political life of the people, which the framers did not and could not foresee. . . . [W]here the meaning of the words employed is susceptible of expansion so as to include a significance in complete harmony with the spirit and purpose of the instrument, which will gratify a legis-

lative intent or serve a present need, they may be so interpreted, for it is an accepted canon of constitutional construction that such instruments are to be liberally construed to accomplish the purpose for which they were adopted." 172 Md. at 675-76.

The same principle of construction was applied in *Clauss v. Board of Education*, 181 Md. 513 (1943). The Board argued that it could not constitutionally spend money for certain workmen's compensation premiums, because that use of funds was outside the meaning of the term "education" in Article VIII, §3 of the Constitution.

The Court of Appeals, reviewing the evolution of educational practices from the one-room schools of 1867 to the large consolidated schools of modern times, held that the meaning of "education" in the Constitution also evolved:

"The meaning of the Constitution is not restricted to the meaning of particular words employed as they were understood at the time of its adoption. It is not to be supposed that the framers of the Constitution of 1867 did not expect the system of education then in force to be changed or improved. They could not, of course, foresee what changes were to come, so they wisely did not attempt to define what they meant by education. They left that to be interpreted in the light of conditions at any given time when such a question should arise. Education in 1867, as we have shown, did not include the employment of repair men for heating systems in public schools. Education in 1943 does include such employment, because that is the only way the kind of schools now found necessary for the education of children of the State can be made usable." 181 Md. at 523.

We think that the meaning of "practiced Law" must likewise be interpreted in light of the parallel changes in the nature of legal practice and the duties of the Attorney General. "[L]iteralism and verbalism must yield to the essential and underlying claims of the people of the State to have a reasonable and effective government." *County Commissioners for Montgomery County v. Supervisors of Elections of Montgomery County*, 192 Md. 196, 208 (1949). See also *Andrews v. Governor of Maryland*, 294 Md. 285, 290 (1982); *Johns Hopkins*

Univ. v. Williams, 199 Md. 382, 386 (1952); (*Buckingham v. Davis*, 9 Md. 324, 328 (1857).

V

Construction of Comparable Eligibility Requirements

Our understanding of the constitutional "practiced Law" requirement—that it is not limited to the specific forms of practice familiar to the framers in 1864, but instead should be construed to recognize changes in the profession since then—is reinforced by judicial construction of other, comparable eligibility requirements.

A. *Eligibility for Elective Office*

A few cases from other jurisdictions have considered whether a person whose legal experience was something other than traditional private practice nonetheless satisfied a "practice of law" eligibility requirement. These decisions suggest that such a requirement is to be construed liberally.

The leading case is *Gazan v. Heery*, 187 S.E. 371 (Ga. 1936). The issue was whether a municipal court judge was eligible to run for chief judge of that court. Only someone who had "practiced law for five years or more" was eligible. The plaintiff claimed that the sitting judge had not "practiced law" and therefore was ineligible to serve as chief judge.⁸

The Georgia Supreme Court rejected this argument:

"While a judge of the municipal court may not be engaged in the practice of law in the ordinary sense, yet he is dealing with the law, and acquiring by decision and disposition of cases in trials in his court a knowledge and experience in law which during the same period of time may enhance his qualifications

⁸ Indeed, another provision of the applicable statute prohibited judges on the court from "practice as an attorney or counselor at law" during their tenure. Cf. Judicial Ethics Canon XXX (Maryland Rule 1231).

more than an active practitioner at the bar during the same period. The purpose of section 6 of the statute creating the municipal court of Savannah was not to place an arbitrary and technical barrier against a person who might possess in reality the knowledge, training, experience, and soundness of judgment such as would qualify him to fill the office of chief judge of the municipal court. *Words limiting the right of a person to hold office are to be given a liberal construction in favor of those seeking to hold office, in order that the public may have the benefit of choice from all those who are in fact and in law qualified.* Judges all 'practice' law. They do not represent clients. They do not receive fees. They do not appear at the bar. But they are in the sense of this statute engaged in the practice of law, dealing with it, studying it, applying it, passing upon pleadings, issuing process and directing that it shall be issued, controlling counsel, and applying the ethics of the profession. The only reason why he is not practicing law in the ordinary sense is that he is not representing clients for compensation. He is doing everything else. We think we ought to construe this statute as meaning that *the Legislature intended to see that nobody held the office of Chief Judge of the municipal court of Savannah except one who possessed such learning, skill, and judgment, in regard to the principles of law and its application as can be acquired during a period of five years, whether representing parties at the bar as counsel, or as a judge upon the bench.* That statute certainly was never intended to prevent a man from being elevated to the office of Chief Judge merely because he had not had five years practice as an attorney at the bar." 187 S.E. at 369-70 (emphasis added).

Accord, *State ex rel. Schenck v. Shattuck*, 439 N.E.2d 891 (Ohio 1982) (adopting reasoning of *Gazan* in holding that a court referee engaged in the "practice of law" for purposes of judicial eligibility provision). See also *State by Reyna v. Goldberg*, 604 S.W.2d 549 (Tex. Civ. App. 1980) (service as court briefing attorney and executive director of district attorney's association, combined with limited private practice, satisfied

"practicing lawyer" requirement for purposes of judicial eligibility provision).⁹

As *Gazan* makes clear, these liberal constructions of "practice of law" requirements not only avoid a crabbed, unrealistic view of lawyering but also effectuate a broader principle: "[P]rovisions in statutes and Constitutions imposing restrictions upon the right of a person to hold office should receive a liberal construction in favor of his eligibility". *Howton v. Morrow*, 106 S.W.2d 81, 82 (1937) (court clerk with limited private practice satisfied "licensed practicing lawyer" requirement). See generally 63 Am. Jur.2d *Public Officers and Employees* §38, at 650 (1972) ("Statutes imposing disqualifications are to be construed strictly, while those declaring qualifications are to receive a liberal construction. In consequence, ambiguities are to be resolved in favor of eligibility to office.") See also Annot., 71 A.L.R.3d 498 §7 (1976).

The reason for this treatment of eligibility provisions was forcefully stated by the Florida Supreme Court:

"Even if there were doubts or ambiguities as to the [the candidate's] eligibility, they should be resolved in favor of a free expression of the people in relation to the challenged provision of the Constitution. It is the sovereign right of the people to select their own offices and the rule is against imposing disqualifications to run." *Ervin v. Collins*, 85 So.2d 852, 858 (1956).

See also *McGinnis v. Cossar*, 18 S.W.2d 988, 989 (Ky. 1929) (eligibility provisions "should receive a liberal construction in

⁹ In *Reyna*, the State argued that the "practicing lawyer" requirement necessarily implied that "a person (1) must 'hold himself out to the public . . . as being available for . . . employment for his rendition of [legal] services . . .,' (2) he must 'have or maintain a law office,' and (3) he must 'render services, counsel, advice or representation to the public requiring the use of legal skill or knowledge which was a customary, habitual or substantial application of his personal time or services'". The court rejected this interpretation: "It is our view and holding that these tests are too strict and that one need not meet those tests in order to be a practicing lawyer within the meaning of the constitutional provision." 604 S.W.2d at 553.

favor of the right of the people to exercise freedom of choice in the selection of officers").¹⁰

B. *Eligibility for Bar Admission*

In Maryland, as in many other jurisdictions, the rules governing admission to the bar differentiate between recent law school graduates and those who have practiced law in another jurisdiction for some period of years. *See* Bar Adm. Rule 14.

The latter group of applicants need not take the full bar examination, for their experience is itself a test of fitness to practice in this State: "[O]ne purpose of [a] requirement [for five years' practice in another jurisdiction] is to have the applicant put to the test of the reputation which he would acquire in five years in one locality." *Edmonds v. Webb*, 182 Md. 60, 63 (1943) (quoting letter from Court of Appeals to Board of Law Examiners). *See also In re Lohmeyer*, 218 Md. 575 (1959).

¹⁰ In 64 *Opinions of the Attorney General* 103 (1979), we considered a provision of the Howard County Charter that prescribed the qualifications for County Solicitor, an appointive position. In pertinent part, the Charter required that the appointee "shall have been actively engaged in the general practice of his profession in the State of Maryland for at least five years". §404(a).

This requirement, our Opinion stated, involved three factors: (1) a license to practice law in the State, (2) active, open engagement in legal practice, and (3) a desire to earn a living from legal practice. 64 *Opinions of the Attorney General* at 105-06.

"We do not conclude that an attorney must have satisfied all three of these requirements before he can be deemed to have engaged in 'the general practice of his profession' within the meaning of §404(a). But the failure to satisfy *any* of these requirements clearly indicates that [the potential appointee in question] was not practicing his profession in Maryland." 64 *Opinions of the Attorney General* at 106 (emphasis in original).

We think that this construction of the particular phrasing in the Howard County Charter —"*actively engaged in the general practice of [the] profession [of law]*"—is not relevant to the proper construction of the phrase "practiced Law" in Article V, §4 of the Maryland Constitution. *But cf.* note 14 below.

No Maryland case has ever addressed the forms of legal practice that would satisfy this requirement.¹¹ However, in *Application of Brewer*, 506 P.2d 676 (Alaska 1973), the Alaska Supreme Court had no difficulty holding that service as a district court judge constituted "the practice of law" within the meaning of the pertinent bar admission rule: "The district judge is continuously involved with legal problems of a wide variety The nature of the duties . . . clearly . . . constitute the 'practice of law'." 506 P.2d at 679 n. 9.¹² See also *Sullivan v. Kentucky State Board of Bar Examiners*, 563 S.W.2d 713 (1978) (under applicable rule, "active engagement in the teaching of law shall be considered active engagement in the practice of law").¹³

¹¹ The applicable rule defines "a practitioner of the law" as "a member of the Bar of another State . . . who throughout the period specified in the [applicant's] petition has regularly engaged in the practice of law . . . as the principal means of earning his livelihood and whose entire professional experience and responsibilities have been sufficient to satisfy the Board [of Law Examiners] that the petitioner should be admitted under this Rule." Bar Adm. Rule 14d.

The Rule treats separately the activities of "practitioner of law", "full-time teacher of law", and "judge of a court of record" [Bar Adm. Rule 14a(iv)], presumably because these activities yield different forms of evidence of professional competence. However, we certainly do not infer from these categories that the Court of Appeals would hold that law teaching (or judging, for that matter) is inherently not the "practice[*of*] Law" under Article V, §4 of the Constitution. See *generally* note 12 below.

¹² The fact that another paragraph of the rule in question separately itemized "the practice of law", the holding of "a judicial position", and "the teaching of law" did not impede this conclusion. To the contrary, the court held that the rule "specifically equates the holding of a judicial position with the 'practice of law'". 506 P.2d at 679 n. 9.

¹³ Other cases that interpret terms similar to "practice of law" involve the scope of statutory prohibitions of unauthorized practice. In Maryland, the statute provides that a person "may not practice the profession or perform the services of an attorney-at-law within this State without being admitted to the bar". Article 10, §1 of the Maryland Code. See also Article 10, §26A ("unauthorized practice of the law"), §32(a) ("advice or service as an attorney at law"), and §33(a) ("entitled to practice law").

The cases then explicate the statutory prohibition by deciding whether particular activities are the "practice [of] the profession". See *Public Service Comm'n v. Hahn Transp., Inc.*, 253 Md. 571, 580-81 (1969) (preparation of pleadings, examination of witnesses, and argument before administrative

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VI

Applicability of Constitutional Requirement to Facts

As our discussion above, indicates, we believe that the "practiced Law" requirement in Article V, §4 of the Constitution is not limited to the specific forms of legal practice known in 1864. Rather, it should be understood to require involvement in any of the contemporary forms of lawyering that entail the application of personal legal expertise to a range of issues.

We do not suggest that the quality of one's prior practice can or should be assessed as a matter of constitutional qualification. The "practiced Law" requirement is a *minimum* threshold. Once satisfied by the various candidates, the voters of the State will then decide which of them is indeed best fit for the office. See Part V A above.

It is evident, we think, that the experience set out in your letter of inquiry, and summarized in Part I above, satisfies the constitutional requirement. As Dean of the University of Maryland Law School, you have engaged in activities that involve both the application of your individual judgment to legal issues and participation in the framing of institutional responses to legal problems. Moreover, you have simultaneously held your-

agency is practice of law); *Ginn v. Farley*, 43 Md. App. 229, 233 (1979) (conduct of litigation in court, even without compensation, is practice of law); *Lukas v. Bar Ass'n of Montgomery County*, 35 Md. App. 442, 447-49 (1977) (representational activities and drafting of contractual instruments for others are practice of law); 65 *Opinions of the Attorney General* 28, 31 (1980) (rendering of legal advice, interpreting legal documents, and applying legal principles to client's complex problems are practice of law). See generally 7 Am. Jur.2d *Attorneys at Law* §§101-115 (1980) (summarizing cases on what constitutes unauthorized practice of law).

In our view, these cases are simply irrelevant to your inquiry. The stated purpose of unauthorized practice regulation is "the protection of the public from incompetent, unethical, or irresponsible representation". *Florida Bar v. Moses*, 380 So.2d 412, 417 (Fla. 1980). Thus, "a single act, e.g., the preparation of a will or the drawing of a power of attorney, may in appropriate circumstances constitute the practice of law". *In re Baker*, 85 A.2d 505, 514 (N.J. 1951). Such a construction of the term is plainly inapposite to the quite different issue of a "practice of law" eligibility requirement for elective office. *Gazan v. Heery*, 187 S.E. 371, 378 (1936).

self out as a practicing attorney and have engaged in various professional activities, albeit on a necessarily limited scale.¹⁴

In our view, Article V, §4 of the Constitution does not require a parsing of your legal career to determine whether any one or another of its separate components, taken in isolation, would be the “practic[e of] Law”.¹⁵ Rather, taken as a whole, your background reflects involvement with the kinds of legal responsibilities that meet the constitutional requirement.

VII

Conclusion

In summary, it is our opinion that you have “practiced Law in this State for at least ten years”, within the meaning of Article V, §4 of the Maryland Constitution.

STEPHEN H. SACHS, *Attorney General*

JACK SCHWARTZ, *Assistant Counsel*
Opinions and Advice

AVERY AISENSTARK
Chief Counsel
Opinions and Advice

¹⁴ You have been a member of the Maryland Bar since 1968. You are also listed among Maryland lawyers in 3 *Martindale-Hubbell Law Directory* 499 (1983). You have received compensation for certain of your counseling activities. It appears, then, that your legal activities might well meet even the more stringent standard of “actively engaged in the general practice of his profession” discussed in 64 *Opinions of the Attorney General* 103 (1979), were that test applicable. See note 10 above.

There is no question that, if your activities are the “practic[e of] Law”, then the geographical and timing components of Article V, §4—“in this State for at least 10 years”—will have been satisfied. The relevant time for satisfying the qualifications for Attorney General is the date of the general election. 53 *Opinions of the Attorney General* 195, 196 (1968).

¹⁵ For example, we do not address the abstract question of whether law teaching is, in and of itself, the “practic[e of] Law”. But cf. note 12 above.

BANKING INSTITUTIONS

TRUST COMPANIES—COMMON TRUST FUND ACT—FIDUCIARIES—AGENT OR CUSTODIAN OF TRUST FUNDS IS A “FIDUCIARY” UNDER COMMON TRUST FUND ACT.

January 19, 1983

The Honorable Joseph R. Crouse
Bank Commissioner

You have asked us to reconsider a prior Opinion of the Attorney General—50 *Opinions of the Attorney General* 10 (1965)—which concluded that, under the applicable statutory and common law of Maryland, a national banking institution cannot collectively invest in one common trust fund both: (i) funds held by it in its capacity as a trustee (or cotrustee) of one or more employee benefit plans; and (ii) funds held by it in its capacity as a managing agent for the trustees of one or more other employee benefit plans. Although State law permits a trust company (including a national banking association with powers similar to those given a State trust company) to commingle and collectively invest funds held by it as a “fiduciary”, the Opinion concluded that a managing agent or custodian of a trust fund, unlike the trustee of that fund, is not acting as a “fiduciary” within the meaning of that law.

For the reasons given below, it is our opinion that the 1965 Opinion was wrong in so concluding. As we construe the relevant statutory provisions—now codified in Title 3, Subtitles 2 and 5 of the Financial Institutions Article—a trust company that acts as a managing agent or custodian for other trustees is acting in a fiduciary capacity. Consequently, a trust company is permitted by State law to establish a group or “common trust fund” for purposes of commingling and investing funds held by it, whether as a trustee or as a managing agent.¹

¹ For purposes of this Opinion, we assume that neither the underlying trust instruments nor any applicable federal law governing these trusts would preclude such commingling and collective investment. See, e.g., FI §3-510(2), quoted in note 6 below.

I

Background

You have advised us of a proposal by a trust company for the investment of certain funds in a common trust fund. The trust company serves as one of the investment managers for the City's pension plan and as custodian for all of the pension plan funds. In order to obtain the most effective temporary investment for these pension plan funds, the City requested the trust company to place them in an existing common trust fund maintained by the trust company, but limited to certain employee benefit plans that are qualified under §401 of the Internal Revenue Code and exempted from taxation by §501 of that Code. This common trust fund is devoted to short-term or money market investments and permits the flexibility of daily entry and withdrawal.²

The trust company declined the City's request in light of a 1965 Opinion of the Attorney General, which concluded that Maryland statutory law did not authorize the commingling of funds held by a trust company in its capacity as managing agent or custodian with funds held by it as a trustee. 50 *Opinions of the Attorney General* 10 (1965).

II

The 1965 Opinion

The 1965 Opinion addressed the following inquiry:

"You have asked whether, in our opinion, the establishment of a group trust for employee benefit plans for the collective investment of funds held by a national bank in its capacity as trustee and co-trustee, as well as in its capacity as agent for investment purposes of various trustees, for pension,

² Baltimore City Ordinance No. 238, passed on February 7, 1981, specifically authorized the custodian of the pension plan funds to invest those funds in short-term investment funds of which that custodian is also the manager or trustee.

profit sharing, and employee benefit trusts, constitutes a common trust fund (1) specifically within the meaning of Section 62(2) of Article 11 of the Maryland Code and more generally (2) whether the establishment of such a group trust contravenes the law of Maryland." 50 *Opinions of the Attorney General* 10, 10 (1965).

The Opinion explained that, at common law, the ability of a trustee to commingle funds from separate trusts—even if derived from a common grantor and held for a common beneficiary—was severely limited. 50 *Opinions of the Attorney General* at 11. Because "[a]dherence to these principles proved inefficient under modern conditions", a number of states adopted "the Uniform Common Trust Fund Act to permit, under certain conditions, the establishment of common trust funds for the purpose of collectively investing money held by a bank or trust company in its capacity as fiduciary or co-fiduciary". 50 *Opinions of the Attorney General* at 11-12.

The Opinion then examined Maryland's version of that Act—then codified at Article 11, §62 of the Maryland Code and now found in Title 3, Subtitle 5 of the Financial Institutions Article ("FI" Article).

FI §3-502 provides that:

"A trust company may establish and administer one or more common trust funds in accordance with the requirements of this subtitle."³

FI §3-501(d), in turn, defines "trust company" to include "a national banking association that has powers similar to those given to a trust company under the laws of this State".⁴ See

³ This provision is derived without substantive change from the first sentence of former Article 11, §62(1). At the time of the 1965 Opinion, that sentence provided:

"Any trust company may establish, maintain and administer one or more common trust funds as hereinafter defined."

⁴ This definition is derived without substantive change from the second sentence of former Article 11, §62(1). At the time of the 1965 Opinion, that sentence provided:

"The term 'trust company' as used in this section shall also refer to and include any national bank or trust company authorized to exercise fiduciary powers similar to those conferred upon trust companies by this article."

also FI §1-101(m) ("national banking association") and FI §3-101(f) ("trust company").

The term "common trust fund" is defined in FI §3-501(b) as follows:

"Common trust fund' means a fund that a trust company maintains under this subtitle solely for the collective investment of money held by the trust company as fiduciary."⁵

And, for purposes of clarifying this reference to a trust company's activities as a "fiduciary", FI §3-503 provides as follows:

"The fiduciary capacities of a trust company referred to in this subtitle include all of those capacities in which a trust company may act under this article."⁶

The Opinion's inquiry focused upon the statutory prerequisite that money to be commingled by a trust company must be held by the trust company "as fiduciary"—or, as the statute was then worded, "in [the trust company's] capacity as a fiduciary or cofiduciary".⁷ More specifically:

⁵ This definition is derived without substantive change from former Article 11, §62(2). At the time of the 1965 Opinion, §62(2) provided:

"The term 'common trust fund' means a fund maintained by a trust company, exclusively for the collective investment and reinvestment of moneys contributed thereto by such trust company in its capacity as a fiduciary or cofiduciary, and operated and administered pursuant to the requirements of this section."

⁶ This provision is derived without substantive change from former Article 11, §62(3). At the time of the 1965 Opinion, §62(3) provided:

"The fiduciary capacities referred to in this section shall include all of those in which a trust company is permitted to act under the provisions of this article."

The term "fiduciary" also is used, for example, in FI §3-510, which states:

"A trust company, acting in a fiduciary capacity, may invest money in one or more common trust funds if:

- (1) The trust company holds the money for investment; and
- (2) The instrument or authorization that created the fiduciary relationship does not contain any terms inconsistent with this type of investment."

This provision is derived from former Article 11, §62(4).

⁷ See note 5 above.

"The crux of this inquiry is determining whether the fiduciary capacities under which the bank may act under Article 11, include that of managing agent." 50 *Opinions of the Attorney General* at 12.

In large part, the Opinion's resolution of the issue was based upon its view that another provision of the same article—then §58 of Article 11—was the sole operative statutory source of a trust company's fiduciary powers:

"Section 58 of Article 11, itself a departure from the common law, authorizes trust companies to act as executors or administrators of estates, guardians, trustees, receivers, or committees, or 'in any other fiduciary capacity'." 50 *Opinions of the Attorney General* at 12–13.⁸

After referring to several statutory definitions of "fiduciary", the Opinion found it significant that only the Maryland Uniform Fiduciaries Act expressly included the term "agent" within the definition of "fiduciary".⁹ Given the absence of a similar express reference to "agent" in either the common trust fund statute or §58, coupled with the common law warning against the unauthorized commingling of separate trust funds by a trustee, the Opinion suggested that to add funds held by an agent to common trust property would be "to add an additional party to the customary settlor-trustee-beneficiary relationship, will [sic] all of the attendant legal problems occasioned by varying the relationship, however slightly." 50 *Opinions of the Attorney General* at 13.¹⁰ The Opinion concluded that, therefore, the proposed collective investment did not constitute a common trust fund within the meaning of the common trust fund statute.

We believe, however, that this conclusion was based on an incomplete statutory analysis.

⁸ Article 11, §58 has since been incorporated into §13-206 of the Estates and Trusts Article. See notes 13 and 14 below and accompanying text.

⁹ The Maryland Uniform Fiduciary Act was then codified in Article 37A of the Code. It has since been recodified as Title 15, Subtitle 2 of the Estates and Trusts Article.

¹⁰ The "attendant legal problems" referred to here were not specifically identified in the Opinion.

III

Statutory Analysis

We agree with the 1965 Opinion in its recognition that "[t]he crux of this inquiry" is determining whether the "fiduciary" capacities under which a trust company may act include that of a managing agent or custodian. As noted above, however, FI §3-503 provides that the necessary "fiduciary capacities" include "*all of those* capacities in which a trust company may act under this article".¹¹ In this regard, the Opinion's reliance on but one provision of "this article"—former §58 of Article 11—was misplaced.

Former Article 11, §58, rather than setting forth all of a trust company's fiduciary capacities—an impression perhaps engendered by the section's caption—was actually quite limited in scope.¹² By its terms, §58 only applied to a trust company when acting in certain specific, narrowly-defined circumstances: (1) as personal representative of a decedent's estate; (2) as the court-appointed guardian of the estate of an infant; (3) as the court-appointed trustee or guardian of the estate of a "lunatic, idiot or habitual drunkard"; or (4) in any similar, *court-appointed* "fiduciary capacity".

We believe that the 1965 Opinion thus overemphasized and misconstrued the phrase "in any other fiduciary capacity". It was not, as the Opinion suggested, intended as the basic grant of authority for trust companies to act as fiduciaries. Rather, as seen from its context, it was merely intended as a broad "catchall" reference, to supplement the more specific references to a court appointing a trust company as a "guardian, trustee, receiver or committee". Certainly, a trust company's general ability to act as a fiduciary does not, as the Opinion's reading of §58 would suggest, necessarily first require a court appointment.

¹¹ Former Article 11, §62(3) similarly referred to "*all of those* [capacities] in which a trust company is permitted to act under the provisions of this article". See note 6 above.

¹² The caption to §58 read as follows: "Fiduciary capacities in which trust companies may act; deposit of money with". *But see* Article 1, §18 of the Code, which provides that statutory captions are not to be considered as "any part" of the law itself.

That this is so—that a trust company's fiduciary powers did not derive from former §58—is evident from the subsequent recodification of that section as part of §13-206 of the Estates and Trusts Articles ("ET" Article). As indicated in the Supplemental Revisor's Note to ET §13-206, Chapter 33, Laws of Maryland 1980, which enacted the Financial, Institutions Article, also amended ET §13-206 to "incorporate in it the substance of the last three sentences of former Article 11, §58".¹³ Those sentences included the reference to a trust company acting "in any other fiduciary capacity". Yet, as amended, ET §13-206 no longer contains such a broad reference to a "fiduciary capacity"; rather, it simply refers to a court's appointment of a trust company to serve as "guardian of the estate of a minor or disabled person". This supports our view that the original reference in §58 to a "fiduciary capacity" was simply intended—and, on revision, no longer needed—to serve as but a broad synonym for "guardian".

More significantly, however, we also find that, even in this limited guardianship context, ET §13-206 is not understood to be the source of a trust company's basic power to serve as a guardian. Rather, as the Supplemental Revisor's Note states: "[T]he general power of a trust company to serve as a guardian" is found elsewhere, in FI §3-207.¹⁴ Similarly, the Supplemental Revisor's Note indicates that the balance of former §58, relating to the granting of letters testamentary or letters of administration to a trust company, was deleted as "unnecessary" in light of other statutory provisions, such as FI §3-207.

Evidently, then, it is to such other statutory provisions—not §58—that one must look to find the basic authorization of a trust company to act as a "fiduciary". These provisions, of course, include the very sections in which a trust company's powers are delineated: FI §§3-206 and 3-207.

FI §3-206 ("General powers of commercial bank") sets forth the basic powers of all "commercial banks", including trust

¹³ The Supplemental Revisor's Note to ET §13-206 is reprinted on p. 69 of the 1982 Cumulative Supplement to the Estates and Trusts Article.

¹⁴ See FI §3-207(8), which authorizes a trust company to "[a]ct as guardian, receiver, or trustee of the estate of any person under order or appointment of a court and as a depository of money paid to the court for the benefit of the person".

companies. See FI §1-101(f) ("commercial bank"). FI §3-207 ("Additional powers of trust company"), in turn, sets forth those powers that are uniquely granted to a trust company. Among the latter, we find various references to the power of a trust company to act as an agent or custodian:

"In addition to the powers set forth elsewhere in this article, a trust company may:

(1) Receive deposits of money, securities, and other personal property from any person;

(2) Act as the agent of any foreign or Maryland corporation for any lawful purpose;

...

(4) Accept and execute any trust and any powers that are conferred on or entrusted to it in any manner, including any grant, assignment, transfer, devise, or bequest by any person or by order of a court; [and]

(5) Accept and hold trust property[.]¹⁵

That FI §3-207 enumerates "fiduciary capacities" that a trust company may assume is supported by the Court's ruling in *Ghingher v. O'Connell*, 165 Md. 267 (1933). In *Ghingher*, the Court reviewed this section—then codified as Article 11, §46—and rather succinctly noted:

"So it appears that [this section] confers upon a trust company the power to act as a fiduciary". 165 Md. at 271.

Applying this construction to the inquiry addressed in the 1965 Opinion, it appears that the collective fund there described would come within the definition of a common trust fund—even though composed in whole or in part of funds held by a trust company (or national banking association) in its capacity as an agent or custodian—because such funds are held by the trust company "in its capacity as a fiduciary or co-fiduciary".

¹⁵ At the time of the 1965 Opinion, these powers were enumerated in then Article 11, §57.

This statutory construction is consistent with the common law on agency. For example, in *Nagel v. Todd*, 185 Md. 512 (1945), the Court quoted with approval from *Restatement of Agency* §13, Comment (a) (1933):

"The agreement to act on behalf of the principal causes the agent to be a fiduciary, that is, a person having a duty, created by the undertaking, to act primarily for the benefit of another, in matters connected with his undertaking." 185 Md. at 516.¹⁶

IV

Conclusion

In summary, it is our opinion that 50 *Opinions of the Attorney General* 10 (1965) was wrong in its conclusion that Maryland law did not authorize, under any circumstances, a trust company to commingle and collectively invest funds held by it as a trustee with funds held by it as managing agent for other trustees. Consequently, the trust company in question would be authorized to make its short-term investment fund available to the City pension plan funds for which the trust company serves as agent or custodian—subject, of course, to the various requirements of Title 3, Subtitle 5 ("Common Trust Funds") of the Financial Institutions Article and the limitations, if any, contained in the underlying trust instruments or in any applicable federal law.

STEPHEN H. SACHS, *Attorney General*

AVERY AISENSTARK
Chief Counsel
Opinions and Advice

ROBERT DE V. FRIERSON, *Assistant Attorney General*

¹⁶ See also *Restatement (Second) of Agency* §13, Comment (a)(1958). Although *Nagel v. Todd* was cited in the 1965 Opinion, it was not there considered to be sufficiently pertinent in resolving the issue posed by the inquiry; again, we disagree.

BANKING INSTITUTIONS—CONSTITUTIONAL LAW—COMMERCE CLAUSE—INTERNATIONAL BANKING ACT—BANK HOLDING COMPANY ACT—MARYLAND LAW MAY NOT CONSTITUTIONALLY PROHIBIT ACQUISITION OF NATIONAL BANKING ASSOCIATIONS BY FOREIGN BANK DESIGNATING MARYLAND AS ITS “HOME STATE”.

July 14, 1983

The Honorable Margie Muller
Bank Commissioner

You have requested our opinion concerning a proposed acquisition by Allied Irish Banks Limited (“Allied Irish”) of a controlling interest in First Maryland Bancorp (“First Maryland”). Specifically, you have asked if the proposed acquisition is prohibited by Maryland law.

For the reasons given below, we have concluded that Maryland law may not be applied—consistently with the Commerce Clause of the United States Constitution—to prohibit or regulate this transaction.

I

Factual Background

Allied Irish is incorporated in the Republic of Ireland and holds a license, granted by the Central Bank of Ireland, that enables Allied Irish to carry on a banking business in Ireland. In addition to branches in Ireland and Britain, Allied Irish has two branches in the United States (New York and Chicago). At present Allied Irish does not own any shares of any bank or bank holding company in the United States. Pursuant to Section 5(c) of the International Banking Act of 1978 (12 U.S.C. §3103(c)) and Regulation K adopted under that Act (12 C.F.R. §211.22), Allied Irish has selected New York as its “home state”. Before the proposed transaction, however, Allied Irish will change its “home state” to Maryland under §211.22(c) of Regulation K.

First Maryland is a registered bank holding company under the Federal Bank Holding Company Act of 1956, as amended (12 U.S.C. §1841 *et seq.*). It is the parent and sole owner of

First National Bank of Maryland, a national banking association chartered under the National Bank Act (12 U.S.C. §21, *et seq.*) with its principal office in this State. First Maryland owns no other banks with an office in Maryland.

Under the terms of the proposal, Allied Irish will acquire approximately 43% of the common stock of First Maryland in 1983. During the succeeding four years, Allied Irish will increase its interest to between 50% and 60%. The investment will be made through a combination of purchases of common stock from existing stockholders of First Maryland and the issuance of new shares of common stock by First Maryland.¹

II

Federal Law

The interplay between the International Banking Act and the Bank Holding Company Act presents a threshold issue that must be resolved before any State law prohibitions become relevant. Under the International Banking Act, a foreign bank such as Allied Irish is prohibited from acquiring any interest in a bank located outside of its "home state" if the acquisition would be prohibited under §3(d) of the Bank Holding Company Act.²

Section 3(d) of the Bank Holding Company Act (as codified at 12 U.S.C. §1842(d)) provides, in pertinent part:

"Notwithstanding any other provision of this section, no application . . . shall be approved under this

¹ In the alternative, Allied Irish and First Maryland have proposed a transaction whereby Allied Irish will acquire 24.9% of the voting common stock, plus additional non-voting common stock, which would result in Allied Irish owning over 50% but not more than 60% of First Maryland's outstanding common stock of all classes. This alternative is favored by neither Allied Irish nor First Maryland.

² Section 5(a)(5) of the International Banking Act provides, in pertinent part, "[N]o foreign bank may directly or indirectly acquire any voting shares of, interest in, or substantially all of the assets of a bank located outside of its home State if such acquisition would be prohibited under [§3(d) of the Bank Holding Company Act] if the foreign bank were a bank holding company the operations of whose banking subsidiaries were principally conducted in the foreign bank's home State." 12 U.S.C. 3103(a)(5).

section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted . . . unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication."

If §3(d) is applicable to the proposed transaction, then this acquisition is prohibited under federal law unless the laws of Maryland specifically authorize such an acquisition "by language to that effect and not merely by implication". Since Maryland law contains no such statute, the Allied Irish transaction would be prohibited without further consideration of Maryland law.

Section 3(d), however, is not applicable to the proposed acquisition. Before the acquisition of the First Maryland stock, Allied Irish will designate Maryland as its "home state" and, by so doing, will not be an out-of-state bank holding company under §3(d).³

III

State Law Prohibitions

A. §12-204 of *The Financial Institutions Article*

1. *Introduction*

Section 12-204 of the Financial Institutions Article ("FI" Article) flatly prohibits a foreign bank from becoming a bank holding company:

³ We have been informally advised that this is also the position taken by the Federal Reserve Board. Cf. 68 Fed. Res. Bull. 114 (February, 1982) (approval by the Federal Reserve Board of the application of Banco de Colombia, S.A. and Banco de Colombia, S.A. Panama, to become bank holding companies by acquiring indirectly Eagle National Bank of Miami, Florida).

"A foreign bank or affiliated corporation may not become a bank holding company."⁴

Unquestionably, under Maryland law Allied Irish is a "foreign bank" and, through the proposed transaction, will become a "bank holding company."⁵ Accordingly, if this section is constitutionally permissible, the proposed acquisition would be prohibited.

After the most deliberate consideration, however, we have concluded that Maryland law may not constitutionally be applied to prohibit the transaction presented by your inquiry. Our conclusion is compelled by the recent decision of the Supreme Court in *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980).⁶

2. The Commerce Clause

In *BT Investment*, the Supreme Court reviewed a Florida statute that prohibited out-of-state banks, trusts, and bank

⁴ Chapter 143, Laws of Maryland 1983, provides for the acquisition by out-of-State bank holding companies of State and federal banks in Maryland chartered after July 1, 1983. [See FI Title 5, Subtitle 9.]

⁵ "Foreign bank" is defined as "any bank or trust company other than: (1) [a] State banking institution that has its principal banking office in this State; and (2) [a] national banking association that has its principal banking office in this State." FI §12-201(e).

"Bank holding company" is defined, in relevant part, as a "corporation that owns of record or beneficially 25 percent or more of the outstanding voting shares of . . . [a] national banking association that has its principal banking office in this State." FI §12-201(c)(2).

⁶ Our conclusion is consistent with a similar resolution reached by the Office of the Attorney General in Florida. The Comptroller of Florida requested an opinion concerning whether a foreign (non-U.S.) bank could acquire ownership or control of a national bank located in Florida. After reviewing the relevant Florida statute (containing an absolute prohibition of such an acquisition), the Attorney General stated: "I am unable to conclude that §658.29(1), F.S. (1980 Supp.), does in fact effectively prohibit the acquisition of ownership or control of a national bank located in Florida by a foreign (non-U.S.) bank. This office is constrained to accept §658.29(1), F.S. (1980 Supp.), as presumptively valid, but the validity of the statute is unquestionably in jeopardy due to the previously cited authorities." Opinion of the Attorney General of Florida (July 6, 1981).

holding companies from owning any business within the state that provided investment advisory services. The Florida statute thus raised serious issues under the Commerce Clause of the United States Constitution, to be resolved against a back-drop of familiar principles.

Under the Commerce Clause, Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States". Article 1, §8, cl. 3 of the United States Constitution.⁷ The Supreme Court has stated repeatedly that "the State may not promote its own economic advantage by curtailment or burdening of interstate commerce". *H. P. Hood & Sons v. DuMond*, 336 U.S. 525, 532 (1949). The underpinnings of this constitutional doctrine were colloquially stated by Justice Cardozo in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935), and quoted in *H.P. Hood & Sons, Inc.*, 336 U.S. at 532, as follows:

"The Constitution . . . 'was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.'"

Recently, the Supreme Court again "emphasiz[ed] that '[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States.'" *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 370 (1976) (quoting *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944)). At least since *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1852), the Court has considered it "clear that 'the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from inter-

⁷ Since Allied Irish is not simply out-of-State but also out-of-country, the proposed transaction has aspects of both interstate and international commerce. The Supreme Court has recently held that, "[w]hen construing Congress' power to 'regulate commerce with foreign Nations', a more extensive constitutional inquiry is required". *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 445, 446 (1979). Indeed, "Commerce Clause scrutiny may well be more rigorous when a restraint on foreign commerce is alleged". *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 n.9 (1980). In view of our resolution of the interstate commerce aspects of this transaction, we find it unnecessary to undertake a "more extensive inquiry".

ference by the States [T]he Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States.” *Great Atlantic & Pacific Tea Co., Inc.*, 424 U.S. at 370–71 (quoting *Freeman v. Hewit*, 329 U.S. 249, 252 (1946)).

Although a variety of formulations for the Commerce Clause’s limitations upon the States have been used over the years, the Court has consistently distinguished between outright protectionism and less direct burdens on the free flow of trade. *BT Investment*, 447 U.S. at 36. Where simple “economic protectionism is effected by state legislation”, “a virtually per se rule of invalidity has been erected.” *BT Investment*, 447 U.S. at 36 (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)). In contrast, legislation that affects equally both interstate and local business may be upheld if it is narrowly drawn. *Id.* As the Court explained:

“Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits” *BT Investment*, 447 U.S. at 36–37 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

In *BT Investment*, the Court declined to rule the Florida statute unconstitutional under the “per se” test of *Philadelphia v. New Jersey*, preferring instead to resolve the issue under the test in *Pike v. Bruce Church, Inc.*, which focuses on the “incidental burdens” necessitated by legitimate local concerns:

“We need not decide whether this difference is sufficient to render the Florida legislation per se invalid, for we are convinced that the disparate treatment of out-of-state bank holding companies cannot be justified as an incidental burden necessitated by legitimate local concerns.” *BT Investment*, 447 U.S. at 42.

The “local concerns” identified and rejected as justifying the burden placed on out-of-state bank holding companies were as follows: (1) an interest in discouraging undue economic con-

centration in the arena of high finance; (2) an interest in regulating financial practices, presumably to protect local residents from fraud; and (3) an interest in maximizing local control over locally based financial activities. *BT Investment*, 447 U.S. at 43.

We find this constitutional analysis dispositive in concluding that the Maryland statute, if applied to prohibit the proposed transaction, would violate the Commerce Clause. As was true of the Florida statute in *BT Investment*, it is beyond dispute that FI §12-204 imposes at least an "incidental burden" on commerce: it absolutely prohibits an out-of-state bank from becoming a bank holding company. Aside from the local concerns formulated—and specifically rejected—in *BT Investment*, we are at a loss to identify any sufficient local concern in the Allied Irish transaction that, constitutionally, can justify its prohibition.

In this regard, we deem it significant that all the banks to be acquired through the proposed transaction are national banking associations. As such, those banks are free from regulatory supervision by the State Bank Commissioner. The untenable constitutional posture of the Maryland statute, as applied in this situation, is thus highlighted by the fact that, for example, the statute would not prohibit a national banking association with its principal office in Maryland—but free from State supervision—from becoming a bank holding company, while it would prohibit the identical transaction for another bank, Allied Irish, having its principal office in Maryland—but also free from State supervision. We are unaware of any "legitimate local concerns" that would justify this distinction.

Accordingly, we conclude that FI §12-204, if it were applied to prohibit the Allied Irish transaction, could not survive the "incidental burden" analysis set forth in *BT Investment*.

3. *The Bank Holding Company Act*

Under traditional principles of constitutional law Congress may, in regulating the flow of interstate commerce, exercise this power indirectly by conferring upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy. See *H. P. Hood and Sons, Inc. v. DuMond*,

336 U.S. 525 (1949). In *BT Investment*, it was contended that Congress had conferred such authority upon the States in §3(d) and §7 of the Bank Holding Company Act.⁸

Previously, when we considered the issue of federal preemption in relation to the predecessor of FI §12-204 [Article 11, §31A(b) of the Maryland Code (1976 Repl. Vol.)]—but without benefit of the *BT Investment* decision—we concluded that the Bank Holding Company Act intended a broad reservation of States' rights in controlling interstate activities of bank holding companies. 64 *Opinions of the Attorney General* 56, 63 (1979). The Court's ruling in *BT Investment*, one year after our 1979 Opinion, clearly establishes, however, that the Bank Holding Company Act does not generally confer upon the States the authority to restrict the flow of interstate commerce as it relates to interstate activities of bank holding companies. Section 3(d) was interpreted by the Court not as authorizing State restrictions but simply as allowing the States to override a general federal prohibition against interstate expansion:

“Preliminarily, it is doubtful that §3(d) authorizes state restrictions of any nature on bank holding company activities. The language of the statute establishes a general federal prohibition on the acquisition or expansion of banking subsidiaries across state lines. The only authority granted to the States is the authority to create exceptions to this general prohibition, that is, to *permit* expansion of banking across state lines where it otherwise would be federally prohibited.” *BT Investment*, 447 U.S. at 47 (emphasis in original).

Section 7 was given a similarly narrow interpretation. The Court rejected the contention that §7 was intended to extend to the States new powers to regulate banking that they would not have possessed absent the federal legislation. Such an interpretation was contrary to the legislative history examined by the Court:

⁸ Section 7 provides, in part: “The enactment . . . of this [Act] shall not be construed as preventing any state from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies and subsidiaries thereof.” 12 U.S.C. §1846.

“Far from creating a new state power to discriminate between foreign and local bank holding companies, the legislative history evinces an interest to forestall such a broad interpretation. We therefore conclude that §7 applies only to state legislation that operates within the boundaries marked by the Commerce Clause.” *BT Investment*, 447 U.S. at 49.

It is evident from the *BT Investment* decision, therefore, that the Bank Holding Company Act provides no independent constitutional authority for the States to discriminate against out-of-state bank holding companies. Indeed, it can be argued that Congress, in enacting §3(d), has specifically delineated the outside parameters of permissible State involvement in this particular area.

We therefore conclude that the Bank Holding Company Act does not permit FI §12-204 to do that which the Commerce Clause otherwise prohibits: discriminate against out-of-state entities such as Allied Irish.

B. §12-207 of the *Financial Institutions Article*

Section 12-207 of the Financial Institutions Article generally prohibits a foreign banking corporation from conducting a general banking business in this State.⁹ By definition, upon consummation of the proposed transaction, First Maryland would become a “foreign banking corporation” and, as such, subject to the prohibitions of FI §12-207.¹⁰

⁹ FI §12-207(b) states:

“A foreign banking corporation may not have any office or electronic terminal in this State:

- (1) To solicit deposits; or
- (2) To conduct:
 - (i) A general banking business;
 - (ii) A savings banking business; or
 - (iii) A banking and trust business.”

¹⁰ “Foreign banking corporation” is defined to include “[a]ny corporation that . . . [i]s controlled by a foreign bank”. FI §12-201(f).

Nevertheless, to the extent that FI §12-207 prohibits indirectly what FI §12-204 prohibits directly, we must conclude—for the reasons stated above—that it may not constitutionally be applied to prohibit the proposed transaction.

C. §3-314 of the Financial Institutions Article

The final provision of Maryland law having potential impact on the Allied Irish transaction is §3-314 of the Financial Institutions Article, which prohibits any stock acquisition affecting the power to direct policy of a “bank holding company in this State” unless that acquisition is approved in advance by the Bank Commissioner.¹¹ Since regulatory approval has not been denied, there is no immediate issue for us to resolve. We are, however, constrained to note that Maryland law is far from being clear on the applicability of this section to the proposed transaction.

In 65 *Opinions of the Attorney* 40, 44 n.2 (1980), we expressed the following doubts about the application of FI §3-314 to national banking associations: “It is less clear, however, whether [FI §3-314] also was intended to apply to the control of . . . any national banking association that has its principal banking office in this State”.¹² In that Opinion, we concluded that the term “bank holding company in this State” is limited to a bank holding company controlling one or more local banks. Our rationale equally supports a conclusion that this term does not apply to a holding company (First Maryland) controlling a national banking association (First National Bank of Maryland) that is outside the supervisory authority of the Bank Commissioner:

“You indicate that the banks controlled by the holding company in question are all located in other ju-

¹¹ “Stock acquisition” is defined as “[a]n acquisition of the outstanding voting stock of a commercial bank or bank holding company in this State, if the acquisition will affect the power to direct or to cause the direction of the management or policy of any banking institution or [any] bank holding company [within the meaning stated in the Bank Holding Company Act]”. FI §3-314(a)(3)(i).

¹² The Revisor’s Note to FI §3-314 indicates that the purpose for enacting Chapter 294, Laws of Maryland 1979, which added the statutory reference to a bank holding company, “was to conform the requirements as to stock acquisitions to the federal law”.

risdictions. As a general matter, the statutory duties of the Bank Commissioner are necessarily concerned with banks chartered by his office, and out-of-state banks do not fall within his regulatory authority. Thus, the Bank Commissioner has no statutory authority over the individual out-of-state banks controlled by the bank holding company and, therefore, has no apparent reason to have an interest in the bank holding company". 65 *Opinions of the Attorney General* at 43.

Were we called upon to construe FI §3-314, and mindful of the close constitutional scrutiny given to state law in *BT Investment*, we would find the following rule of statutory construction particularly pertinent:

"[I]f a legislative act is susceptible of two reasonable interpretations, one of which would not involve a decision as to the constitutionality of the act while the other would, the construction which avoids the determination of constitutionality is to be preferred." *Slate v. Zitomer*, 275 Md. 534, 544-45 (1975) (quoting *Md. St. Bd. of Barber Examiners v. Kuhn*, 270 Md. 496, 505 (1973)).

IV

Conclusion

In summary, it is our opinion that Maryland law may not constitutionally be applied to prohibit the Allied Irish transaction. As explained above, such application would run afoul of the Commerce Clause, which necessarily stands as a constitutional "limitation upon the power of the States".

STEPHEN H. SACHS, *Attorney General*

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Opinions and Advice

BUDGETARY ADMINISTRATION

BLOCK GRANTS—"MONEYS OF THE STATE"—EXECUTIVE BUDGET AMENDMENT—STATE FUNDS MUST BE PUT IN TREASURY, SUBJECT TO APPROPRIATION PROCESS—GENERAL ASSEMBLY MAY NOT DIRECT THEIR PLACEMENT OUTSIDE TREASURY.

January 20, 1983

*The Honorable Laurence Levitan
Chairman, Senate Committee on
Budget and Taxation*

You have requested our opinion on the power of the General Assembly to control the use of federal "block grants". We understand this term to refer to funds that are appropriated to the State pursuant to federal law for various, rather broadly-defined purposes stated in that law. As distinct from the more traditional federal aid programs, block grants are intended to afford the State considerable flexibility in determining the particular uses of these funds.

For the reasons given below, we have concluded as follows:

(1) While federal law governs the State's continued eligibility for these grants, State law nevertheless governs the manner in which these funds are to be held and appropriated by the State.

(2) Under the Maryland Constitution, these funds must be deposited in the State Treasury and may be spent only in accordance with the appropriation process prescribed in the Constitution. The Governor must provide for the appropriation of these funds in a Budget Bill to be submitted to the General Assembly. The General Assembly may only strike, reduce, or qualify these appropriations.

(3) While the General Assembly thus has but limited power to modify a Budget Bill, it may enact legislation requiring the Governor to include, in a future budget, a particular level of funding for a particular program. Such legislation could be used to control the way in which the Governor provides for the appropriation of block grants in future budgets.

I

The Block Grant Program

Various block grants to the states have been authorized in past federal budget enactments. The most recent comprehensive enactment of block grants is found in the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 ("1981 Federal Budget Act").¹

While such budget acts ordinarily contain various terms and limitations concerning the expenditure of block grant funds, we view these simply as conditions for the receipt of the funds—that is, if the State accepts these funds from the federal government, it must abide by any specified substantive restrictions in spending the money. Acceptance of block grants may also require compliance with federal procedural requirements.² Nevertheless, it is quite clear that State law governing the appropriations of these funds from the Treasury is not preempted by the federal law.³

¹ This law contained nine block grants for: community development; education; community services; preventive health; alcohol, drug abuse, and mental health services; primary care; maternal and child health services; social services; and energy assistance. The final federal budget for fiscal year 1983 has not yet been adopted as of this writing.

² For example, the educational block grant in the 1981 Federal Budget Act requires the establishment of an advisory committee on the allocation of a state's portion of the grant. §564(a)(2). Such procedural requirements do not, however, address the manner in which the funds are to be appropriated by the state.

³ The educational block grant in the 1981 Federal Budget Act, unlike the other block grants, contains provisions that repose certain authority over the distribution of funds in a particular executive agency. For example, §565(a) of the 1981 Federal Budget Act requires that "the State educational agency shall distribute not less than 80 per centum [of the block grant funds] to local educational agencies within such State . . . in accordance with criteria approved by the [U.S.] Secretary [of Education]". We discuss the relation between such requirements and the General Assembly's authority under State law at note 13 below.

II

State Constitutional Requirements
for Control of Block Grants

Article VI, §3 of the Maryland Constitution provides, in pertinent part, as follows:

“The Treasurer shall receive the moneys of the State, and, until otherwise prescribed by law, deposit them, as soon as received, to the credit of the State, in such bank or banks as he may, from time to time, with the approval of the Governor, select”.

Article III, §32 of the Constitution provides, in turn, that, once funds are deposited in the State Treasury, they may only be withdrawn “in accordance with an appropriation by Law”.

A. *“Moneys of the State”*

In our opinion, block grants received by the State for its use are “moneys of the State” within the meaning of Article VI, §3. They are plainly intended to aid the State in the carrying out of State functions. Within the limits specified in the grant, the State may use the funds as it wishes. Indeed, the very purpose of the block grant form of federal assistance is to afford the State broad discretion in deciding how the funds can best be applied.

This characteristic of block grants is in marked contrast to the types of funds that have been held *not* to be “moneys of the State”. The State has no comparable discretion over the disposition of these other types of funds.

One example of the latter was a toll revenue fund wholly dedicated to bond repayment. In holding that the creation of such a fund outside the Treasury did not violate the procedures of Article VI, §3 of the Maryland Constitution, the Court of Appeals described the fund as follows:

“The fund from tolls will be one coming into existence only for the special, peculiar, application to the bonds, and is completely appropriated to that purpose; and nothing more than a medium of collection and transmission is required. The State will have no right to the fund, and it would be a misapplication to

put it into the ordinary channels for state revenues. *The sections of the Constitution cited are not intended to deal with a fund so completely appropriated to outside persons.*" *Wyatt v. State Roads Comm'n*, 175 Md. 258, 269 (1938) (emphasis added).

Specialized funds, analogous to private insurance pools that receive premiums and pay claims, have also been held not to be "moneys of the State". *Subsequent Injury Fund v. Pack*, 250 Md. 306 (1967); 58 *Opinions of the Attorney General* 88 (1973) (Maryland Automobile Insurance Fund); 53 *Opinions of the Attorney General* 3 (1968) (State Accident Fund). This Office characterized the last named fund as follows:

"The fund's character as a public fund may be indicated by a statute providing that industrial insurance premiums may be paid only into the state treasury for the accident and medical aid fund. *But it is not public money in the sense of being money of the state to be used for, and on behalf of, the state for a state expenditure*". 53 *Opinions of the Attorney General* at 6. (Emphasis added.)

By contrast, the block grants involved here are neither "completely appropriated to outside persons" nor dedicated to the payment of claims. Rather, they are broadly intended "to be used for, and on behalf of" the State. They are therefore "moneys of the State" and, as such, must be received by the Treasurer.⁴

B. *Deposit into the Treasury*

A more difficult issue is whether the General Assembly may, consistently with Article VI, §3 of the Maryland Constitution, direct the Treasurer to do something with the block grant funds, which are "moneys of the State", other than to receive them into the State Treasury. In 63 *Opinions of the Attorney General* 492 (1978), the then Attorney General took the position that the phrase "until otherwise prescribed by law", as

⁴ We do not suggest that the distinctions drawn here are necessarily the sole determinatives of the status of all types of funds received or maintained by State entities. See note 5 below.

used in Article VI, §3, authorized the General Assembly to direct that "moneys of the State" not be deposited in the State Treasury but, instead, be held by an agency in a separate checking account apart from the Treasury.

We do not agree with this construction of the constitutional language. The better reading, in our view, is that this language was intended to reflect (i) the authority of the General Assembly (and later, on passage of the Executive Budget Amendment, the Governor) to prescribe, through the budgetary process, the appropriation of funds *from* the Treasury and (ii) the authority of the General Assembly to prescribe, through the legislative process, the deposit of Treasury funds in financial institutions other than banks. However, the General Assembly is not, by this language, given authority to avoid the constitutional requirement that "moneys of the State" be deposited in the Treasury.⁵

Our construction of the introductory passage in Article VI, §3 necessarily derives from our review of its history and its relationship to other constitutional provisions. The language itself is quite ambiguous: given the awkward phrasing of that passage, the clause "until otherwise prescribed by law" could be said to modify virtually anything in the sentence.

As originally reported out of committee at the 1867 Constitutional Convention, Article VI, §3 would have begun with the following: "The Treasurer shall receive and keep the moneys of the State and disburse the same upon warrants drawn by the Comptroller". *Proceedings of the State Convention of Maryland to Frame a New Constitution* 87 (1867) ("1867 Proceedings"). The provision was then modified by a floor amendment to read: "The Treasurer shall receive the moneys of the State and deposit them as soon as received, to the credit of the State until otherwise prescribed by law, in such bank or banks as he may from time to time select, and which selection the Governor shall approve". *1867 Proceedings* at 233.

⁵ Thus we specifically overrule 63 *Opinions of the Attorney General* 492 (1978) to the extent that the Opinion so construed Article VI, §3. The Opinion also suggested that the funds in question—certain testamentary gifts to the Maryland Historical Trust—were not "moneys of the State". We do not here address that aspect of the Opinion nor, therefore, do we necessarily speak to the status of existing "special funds" of various State entities. Cf. 34 *Opinions of the Attorney General* 105 (1949) (discussing then existing "special funds").

At this stage of the evolution of Article VI, §3, the phrase “until otherwise prescribed by law” clearly did *not* diminish or condition the Treasurer’s obligation to deposit *all* “moneys of the State” in the Treasury immediately. Rather, its placement in the sentence suggested that the framers’ intention was simply to require that State funds be maintained in the Treasury—i.e., “to the credit of the State”—until earmarked for some purpose through the appropriation process—i.e., “until otherwise prescribed by law”.

The language of Article VI, §3 now in the Constitution resulted from another floor amendment. The Chairman of the Committee upon Revision and Compilation, to which the Treasury Article had been referred, offered a series of amendments that changed the wording in every section of the Article. 1867 *Proceedings* at 569–70. The amendment to Article VI, §3 that produced the current language thus appears to have been primarily a technical one. There is absolutely no indication that this last amendment was intended to authorize the maintenance of State funds outside the Treasury.⁶

This history, while not conclusive, supports the view that, under Article VI, §3, the General Assembly lacks power to prescribe that “moneys of the State” not enter the Treasury. This construction also reconciles Article VI, §3 with other constitutional provisions.

If State funds could be channeled to accounts outside the Treasury, the Constitution’s elaborate budget process might well be circumvented. Under Article III, §32, “[n]o money shall be drawn from the Treasury of the State, by any order or resolution, nor except in accordance with an appropriation by Law”. And, in Article III, §52—the Executive Budget Amendment—the Constitution sets out detailed procedures applicable to all appropriations.⁷

⁶ Perhaps the change in the location of the phrase “until otherwise prescribed by law” reflects an intention to modify the requirement that funds otherwise be deposited in “banks”, so as to provide the General Assembly with the authority to broaden the types of permissible depositories. See 5 *Opinions of the Attorney General* 242, 243 (1920). See also Article 95, §21 of the Maryland Code.

⁷ The applicability of the Executive Budget Amendment to block grants is discussed below in Part III of this Opinion.

We are reluctant to ascribe to the drafters of both Article III, §32 and Article VI, §3 an intention to permit one cryptic phrase in the latter to be used to undo the careful regulation of expenditures contained in the former. In determining the meaning of constitutional provisions, the Constitution "must be examined as a whole and the interrelationship or connection among all of its provisions considered." *Howard County Ass'n for Retarded Citizens v. Walls*, 288 Md. 526, 530 (1980).⁸

Theoretically, at least, if the General Assembly were indeed constitutionally able to prescribe that "moneys of the State" not be deposited in the Treasury, it then could enact a virtually unlimited series of statutes establishing various independent funds into which substantially *all* State funds could be deposited—and from which they could be expended without any budgetary appropriation whatever. We do not believe that Article VI, §3 should be read to countenance such a possibility.

C. Summary

For these reasons, we conclude that block grants are "moneys of the State". As such, they must be placed in the Treasury and may be withdrawn only in compliance with Article III, §§32 and 52.⁹

⁸ In *Walls*, the Court of Appeals was speaking of the relationship among statutory provisions. However, this and other rules of statutory construction generally apply to interpretation of the Constitution. See *Brown v. Brown*, 287 Md. 273, 277-78 (1980).

⁹ In reaching the conclusion that federal funds from the block grants must be deposited in the Treasury and are subject to appropriation in the Budget Bill, we have considered the authority conferred on the General Assembly by Article III, §46 of the Maryland Constitution. Section 46 provides as follows:

"The General Assembly shall have power to receive from the United States, any grant, or donation of land, money, or securities for any purpose designated by the United States, and shall administer, or distribute the same according to the conditions of the said grant."

This provision was first adopted as Article III, §45 of the Constitution of 1864. See *Maryland Constitutional Convention Proceedings of 1864* at 318-20; 2 *Debates of the Maryland Constitutional Convention of 1864* at 958-62. Despite the rather sweeping language of this provision, it is clear that, to the extent the federal grants are required to be deposited in the

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III

The Budget Process As Applied to Block Grants

Under the Executive Budget Amendment, there are only two kinds of appropriation bills: (1) the Budget Bill, which is prepared and submitted to the General Assembly by the Governor; and (2) supplementary appropriation bills, which are initiated by the General Assembly and must provide their own revenue. Article III, §52(2), (3), and (8). In the Budget Bill for Fiscal Year 1983, for example, the Governor provided for the appropriation of funds from the nine block grants contained in the 1981 Federal Budget Act.¹⁰

And, under the Executive Budget Amendment, the General Assembly may only strike or reduce the Governor's proposed appropriations. Article III, §52(6). This power, however, implicitly includes the power to condition or limit the way an appropriation is to be spent. *Bayne v. Secretary of State*, 283 Md. 560, 574 (1978).

While the power of the General Assembly with respect to the Budget Bill itself is thus limited, the Executive Budget Amendment also authorizes the General Assembly to enact a statute that requires the Governor to include a particular level of funding in subsequent budgets for particular programs. Article III, §52(11) and (12).¹¹ By requiring that particular programs be funded at a particular level, the General Assembly

State Treasury, they are subject to the appropriation process of the Executive Budget Amendment. In this regard, Article III, §52(14) provides: "In the event of any inconsistency between any of the provisions of this Section and any of the other provisions of the Constitution, the provisions of this Section shall prevail."

See also note 13 below.

¹⁰ *See* note 1 above. For example, the Fiscal Year 1983 budget for the Department of Human Resources shows an entry for "Federal Fund Appropriation" in each functional category. Chapter 125, Laws of Maryland 1982 at 1469-75.

¹¹ The Executive Budget Amendment carefully prescribes when this authority must be exercised if it is to be effective for a particular fiscal year or years. A law requiring a level of funding for a program must be "in effect during the fiscal year covered by the Budget and [must have been] enacted before July 1 of the fiscal year prior thereto". Article III, §52(11) and (12). Thus, for example, if the General Assembly wished to require a given level of funding for a program in Fiscal Year 1985 (beginning July 1, 1984), it must enact an appropriate statute before July 1, 1983.

could, in effect, control the way in which the Governor allocates the funds from block grants in the Budget Bill.¹²

However, in order to maintain eligibility for the federal grants, these respective powers of the Governor and the General Assembly must be exercised in a way that is consistent with the 1981 Federal Budget Act and any other applicable federal law. Thus, although the General Assembly has authority under State law to condition an appropriation in such a way as to negate a federal procedural requirement, the General Assembly could exercise such authority only at the risk of losing the block grant.¹³

IV

Conclusion

In summary, it is our opinion that federal law only governs the continued eligibility of the State for block grant funds. Once those funds are received, they are "moneys of the State" that must be deposited in the State Treasury. Once deposited in the Treasury, the funds are then subject to the regular appropriation process established by State law—which requires the Governor to provide for their appropriation in the Budget Bill and permits the General Assembly to strike, reduce, or qualify these appropriations.

We do not believe that, as to any "moneys of the State", including block grants, the General Assembly may circumvent

¹² As to what constitutes such a statutory directive, see generally 65 *Opinions of the Attorney General* 108, 110 (1980). See also 65 *Opinions of the Attorney General* 45 (1980).

¹³ For example, the General Assembly would jeopardize the educational block grant if it imposed a requirement inconsistent with the authority and responsibility of "the State educational agency" to distribute the educational block grant funds. See note 3 above.

Moreover, the failure of the General Assembly to abide by applicable federal limitations might also violate Article III, §46 of the Maryland Constitution, which provides that the General Assembly "shall administer [grants received from the United States] according to the conditions of the said grant[s]". See note 9 above.

the constitutional appropriation process by establishing independent funds outside the Treasury. In this regard, we specifically overrule 63 *Opinions of the Attorney General* 492 (1978) to the extent that it concluded otherwise.

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BUDGETARY ADMINISTRATION—PERSONNEL—CLERKS OF CIRCUIT COURT—REGISTERS OF WILLS—FEES OF OFFICE—COMPTROLLER—CENTRAL PAYROLL BUREAU—“MONEYS OF THE STATE”—COMPTROLLER MAY NOT REQUIRE, BUT MAY PERMIT, PAYMENT OF CLERKS’ AND REGISTERS’ EMPLOYEES SALARIES THROUGH CENTRAL PAYROLL.

October 31, 1983

The Honorable Louis L. Goldstein
Comptroller of the Treasury

The Honorable Peter J. Basilone
Register of Wills for Baltimore County

The Honorable Elmer H. Kahline, Jr.
Clerk of the Circuit Court for Baltimore County

You have requested our opinion on the authority of the State Comptroller to require Clerks of the Circuit Courts and Registers of Wills to pay their employees through the State’s Central Payroll Bureau. Although the particular proposal that gave rise to your question has since been withdrawn, we nonetheless believe it appropriate to provide you with a response, if only to serve as future guidance on this and related, often recurring, questions about the Comptroller’s authority over Clerks and Registers.

For the reasons given below, we have concluded that the Comptroller may not require the Clerks of the Circuit Courts and the Registers of Wills to pay their employees through the Central Payroll Bureau. The statute governing the Bureau’s operations requires participation of only those public employees who—unlike Clerks, Registers, and their employees—are paid from funds appropriated by the General Assembly. In our view, the Comptroller’s authority over Clerks and Registers is not so extensive as to permit him to require otherwise. However, there is nothing in the law that would preclude the Clerks and Registers from voluntarily agreeing to use the services of the Central Payroll Bureau, as recommended by the Comptroller.

I

Clerks of the Circuit Courts

A. *Constitutional Provisions*

The Clerks of the Circuit Courts are constitutional officers, elected by the voters of their respective counties for a term of four years. Article IV, §25.¹ They “shall have charge and custody of the records and other papers, shall perform all the duties, and be allowed the fees, which appertain to their several offices, as the same now are, or may hereafter be regulated by Law”. Article IV, §10. Thus, the Clerks’ various duties (except, presumably, the specific constitutional requirement that they “shall have charge and custody of” court records) may be enlarged or diminished “by Law”—i.e., by the General Assembly. And, although the Clerks “shall . . . be allowed the fees [that] appertain to their . . . offices”, these fees also may be changed (though, presumably, not totally eliminated) by the General Assembly.

Although the Clerks of the Courts are constitutional officers in their own right, the Constitution provides that they shall be subject to the “visitorial power of the Judges of their respective Courts, who shall exercise [that power] so as to insure the faithful performance of the duties [of the Clerks]”. *Id.* This constitutional provision commits to the judges the supervision, regulation, and direction of *how* the Clerks are to perform their duties. *Peter v. Prettyman*, 62 Md. 566, 576 (1884). *See also 58 Opinions of the Attorney General* 69, 72-74 (1973). In furtherance of this judicial power and responsibility, the Constitution provides that “it shall be the duty of the Judges . . . to make . . . such rules and regulations as may be necessary and proper for the government of said Clerks, and for the performance of the duties of their offices”. Article IV, §10. These rules and regulations “shall have the force of Law until repealed, or modified by the General Assembly”. *Id.*

It thus appears that the framers of the Constitution intended to invest the General Assembly with authority over

¹ Unless otherwise noted, all citations are to the Maryland Constitution.

the Clerks, subject only to the following limitations: (1) the General Assembly may not eliminate the express powers reserved to the Clerks by Article IV, §10—e.g., the charge and custody of court records² and the allowance of the fees of their offices;³ and (2) the General Assembly may not alter the responsibility of the Clerks in such a manner or to such a degree as to infringe upon the province of the Judiciary.⁴

Because the Constitution provides that the Clerks of the Circuit Courts are to be paid from the fees of their offices, the Clerks are subject to the provisions of Article XV, §1 of the Constitution. This section provides that "[e]very person holding any office created by, or existing under the Constitution, or Laws of the State . . . , whose pay, or compensation is derived from fees, or moneys coming into his hands for the discharge of his official duties, or, in any way, growing out of, or connected with his office" must:

1. Keep an account book of all money received as payment or compensation for his or her official duties.
2. Submit that book yearly to the Comptroller, for inspection by the Comptroller and the General Assembly.
3. Pay yearly to the State Treasurer any amount that exceeds the amount allowed by law to be retained as salary and for the expenses of his or her office.

² The General Assembly may not effectively abolish a constitutional office by taking away all of the duties of that office. *Murphy v. Yates*, 276 Md. 475, 492 (1975). See also 62 *Opinions of the Attorney General* 166 (1976).

³ Article III, §45 of the Constitution provides for the establishment of these fees as follows:

"The General Assembly shall provide a simple and uniform system of charges in the offices of Clerks of Courts and Registers of Wills . . . , and for the collection thereof; provided, the amount of compensation to any of the said officers . . . shall be such as may be prescribed by law."

Thus, the framers of the Constitution have placed upon the General Assembly a two-fold responsibility: (1) establishing a uniform system of fees to be charged for the performance of their duties; and (2) setting the amount of those fees that may be retained by the Clerks as compensation.

⁴ See 65 *Opinions of the Attorney General* 309 (1980).

If a Clerk fails to comply with these requirements, the Clerk's office is considered vacated and the Clerk is subject to suit for all money that should have been paid to the Treasurer. *Id.*

Article XV, §1 also establishes certain specific responsibilities for the Comptroller. Not only must the Comptroller inspect the books that the Clerks submit yearly, the Comptroller also must report to the General Assembly on which officers have complied or failed to comply with the requirements of the section. Finally, Article XV, §1 provides that the money paid to the Treasurer at the end of each year is subject to further "disposition . . . as the General Assembly may direct".

Significantly, the Clerks are required by the Constitution to turn over their fees only once a year and, even then, only if there exists an excess after paying their salaries and the expenses of their offices. Once received by the State Treasurer, these excess fees are "moneys of the State", within the meaning of Article VI, §3; as such, they are subject to further "disposition . . . as the General Assembly may direct" in accordance with Article III, §§32 and 52, which govern the appropriation and budgetary process. Conversely, however, the Clerks' fees of office are not "moneys of the State" unless—and until—any excess is turned over to the Treasurer at the end of the year pursuant to Article XV, §1. *Cf. Comptroller v. Panitz*, 267 Md. 296 (1972); *Subsequent Injury Fund v. Park*, 250 Md. 306 (1967); *Wyatt v. State Roads Commission*, 175 Md. 258 (1938); 68 *Opinions of the Attorney General* 86 (1983). Thus, none of these fees would be subject to appropriation under Article III, §§32 and 52 until they are turned over to the Treasurer, if ever. *See Baltimore v. O'Connor*, 147 Md. 639 (1925).⁵

In a letter to the then Chairman of the House Appropriations Committee, Assistant Attorney General Richard E. Is-

⁵ Similarly, the provisions of Article VI, §2, which set forth the basic powers and duties of the Comptroller, would have no application to fees of office received by the Clerks until those fees are turned over at the end of the year to the Treasurer. Article VI, §2 provides that the Comptroller, in addition to "perform[ing] such other duties as shall be prescribed by law", is charged with the "general superintendence of the fiscal affairs of the State", including the "prompt collection of all taxes and revenue". Arguably, the fees "allowed" the Clerks under Article IV, §10 are neither taxes nor revenue of the State within the meaning of this provision. *See* discussion in Part II B below. And, while the powers of the Comptroller are broad, they "are not without limitation". 63 *Opinions of the Attorney General* 492, 494 (1978).

rael advised that "it is only those fees which exceed the salaries and office expenses of the clerks which must be deposited in the Treasury and are subject to appropriation in the Budget Bill". Letter from Richard E. Israel, Assistant Attorney General, to John R. Hargreaves, State Delegate (March 9, 1982). The General Assembly apparently acted on this advice: in later enacting a provision requiring the Clerks to deposit their receipts in certain approved financial institutions, the General Assembly specifically provided that the funds so deposited "[s]hall be available to each circuit court clerk as needed" and "are not placed in the State Treasury, or subject to appropriation by the General Assembly". Chapter 907, Laws of Maryland 1982, *codified at* §2-205.1 of the Courts Article. *See also* Letter from Richard E. Israel, Assistant Attorney General, to John R. Hargreaves, State Delegate (March 12, 1982).⁶

In summary, the Constitution provides as follows: The Clerks of the Circuit Courts are to perform the duties set forth in the Constitution and those additional duties as may be established by the General Assembly; they are subject to the

⁶ Nor do we believe that §2-504.1 of the Courts Article, also enacted in 1982, requires that the salaries and expenses of the Clerks' offices be appropriated by the General Assembly. Section 2.504.1 requires each Clerk to "submit annually a budget for the review and approval of the General Assembly". That budget first must be submitted to the Comptroller and is "subject to review by the Comptroller and the State Court Administrator". The approved budget then is to be "included in the State budget as part of the budget for the executive branch of State government". The Governor "may include in the State budget funds to supplement the fees and receipts of the clerks of the circuit courts".

We previously advised the Governor that the legislative "approval" provisions of this enactment were "of doubtful effect", because "certain funds of the clerks are clearly not regarded as part of the State Treasury . . . and thus [are] not subject to the appropriation process". Bill Review Letter (S. B. 1103) from Stephen H. Sachs, Attorney General, to Harry Hughes, Governor (May 25, 1982).

In contrast, the authorization to appropriate funds to "supplement" the fees and receipts of the Clerks is not constitutionally infirm: the money used to supplement the Clerks' receipts is not derived from the Clerks' fees but from vehicle security lien filing fees (§13-208 of the Transportation Article) and from general revenues. Indeed, for Fiscal Year 1984, the only appropriation by the General Assembly for the Clerks of the Circuit Courts was an appropriation for *deficits* in the Clerks' offices. *See I Maryland State Budget for Fiscal Year 1984*, 260 (1983).

rules established by the judges of their Courts, which rules have the force of law unless repealed or modified by the General Assembly; the Clerks are entitled to charge and receive the fees established by the General Assembly; they are authorized to pay their own salaries and the expenses of their offices from those fees; and they are required to return any excess fees to the State Treasurer. Although the Constitution provides that the State Comptroller has the general superintendence of the fiscal affairs of the State, especially the collection of State taxes and revenues, this does not appear to include superintendence over that money which the Clerks retain as the fees for their offices.⁷

Nevertheless, because the framers of the Constitution gave the General Assembly the responsibility and power to provide further for the duties of both the Comptroller and the Clerks, we must consider the various statutory provisions relating to these offices.

B. Statutory Provisions

First, an examination of the provisions relating to the Clerks' fees is appropriate. Pursuant to its constitutional mandate, the General Assembly has provided for a system of fees and charges, from which the Clerks receive their compensation and pay the expenses of their offices. Significantly, those office expenses include the salaries of their deputies and employees. *See Smith v. Turner*. 101 Md. 584, 591 (1905).

Section 7-202 of the Courts Article provides that the State Court Administrator "shall determine the amount of all court costs and charges for the circuit courts of the counties with the approval of the Board of Public Works". Pursuant to this mandate, the State Court Administrator has established an extensive schedule of circuit court costs and charges, including filing fees, fees for issuing writs, and the like. These fees are intended to compensate the Clerks and provide for the expenses of their offices, for services relating to the administration of the judicial process.

⁷ See note 5 above and accompanying text.

In addition, the Clerks collect legislatively-established fees for performing other, essentially nonjudicial duties. Examples include marriage license fees (Article 62 of the Maryland Code), liquor license fees (Article 2B of the Maryland Code), and traders and other business license fees (Article 56 of the Maryland Code). A portion of these fees is retained by the Clerks for their services in issuing and recording the licenses and in paying over the remaining revenues to the State or appropriate political subdivision, as provided by law. The Clerks also collect recordation and transfer taxes and pay these taxes over to the State or appropriate political subdivision, as provided by law; the General Assembly has authorized the Clerks to retain a 5% commission for collecting and disbursing these taxes, as well as other public money. *See* Article 17, §74 of the Maryland Code.⁸

We next turn to the statutory provisions governing the duties of the State Comptroller as they relate to Clerks of the Circuit Courts. As indicated above, it is evident that the Clerks have numerous statutory duties and responsibilities that are not directly related to the administration of the judicial process. For instance, the Clerks have the responsibility of issuing and collecting statutory fees for many types of licenses and for collecting recordation and transfer taxes. All are revenue-raising measures and, as discussed above, the money collected is paid over to either the State or one of its political subdivisions. As to these duties of the Clerks, the Comptroller's constitutional duty of "superintend[ing] and enforc[ing] the prompt collection of all taxes and revenue" certainly applies. Indeed, the General Assembly has expressly given the Comptroller responsibility over the Clerks in these areas. *See, e.g.*, Article 56, §11 of the Maryland Code.

The General Assembly also has given the Comptroller certain oversight responsibilities pertaining to how the Clerks expend the fees of their offices. For instance, §2-505(a) of the Courts Article provides that, on application of a Clerk or on the Comptroller's own initiative, the Comptroller "may set the

⁸ This statute establishes a commission of less than 5% for certain subdivisions or under certain circumstances.

compensation of any employee of the Clerks' office".⁹ (There are two exceptions to the Comptroller's statutory authority over salaries: The Comptroller does not set the clerk's own salaries; these are set by the Board of Public Works. See §2-504(a) of the Courts Article; 68 *Opinions of the Attorney General* 352 (1983). Nor does the Comptroller set the salaries of the employees in the Washington County Clerk's office. See §2-505(c) of the Courts Article.) And §2-202(b) of the Courts Article provides that, while the "cost of office expenses and necessary equipment used by a clerk . . . shall be allowed as expenses of his office", these expenses are "subject to approval of the Comptroller".

Significantly, there is no statutory authorization for the Comptroller to establish the *method* by which employees of the Clerks' offices are to be paid. Thus, even though the Comptroller "may set the compensation of" the Clerks' employees and is given "approval" power over the expenses of the Clerks' offices, it appears that the Clerks retain the authority to determine the method by which their deputies and employees are paid, subject only to the visitorial powers of the judges of Court and the requirements, if any, enacted by the General Assembly. See Article IV, §10; *Peter v. Prettyman*, 62 Md. 566, 576 (1884).

In this regard, the General Assembly has expressly provided that "[t]he salary of a clerk is payable biweekly from the fees, receipts, and emoluments of his office after deducting the necessary expenses of the office". §2-504(c) of the Courts Article. Thus, from the fees collected by them, the Clerks should (i) deduct the salaries of their employees (which salaries, once set by the Comptroller, are among "the necessary expenses of" the Clerks' offices)¹⁰, (ii) deduct the other expenses of their offices (as approved by the Comptroller), and (iii) then pay themselves the salaries to which they are entitled. This is the method established by the General Assembly. In our view, the Comptroller has no authority to change this method by requir-

⁹ Unlike the provisions relating to Registers of Wills [see note 11 below], the General Assembly has not given the Comptroller the authority to set the number of assistants or deputies that a Clerk may appoint. That decision is reserved for the Judges of the respective Courts. Article IV, §26. See also *Smith v. Turner*, 101 Md. 584, 590 (1905).

¹⁰ See *Smith v. Turner*, 101 Md. 584, 591 (1905).

ing the Clerks to pay their employees through the Central Payroll Bureau.

II

Registers of Wills

Although much of what has been said above applies with equal force to the Registers of Wills, there are differences that deserve mention.

Like the Clerks of the Circuit Courts, the Registers of Wills are constitutional officers, elected by the voters of their respective counties for a term of four years. Article IV, §41. Unlike Clerks of the Circuit Courts, however, they are not constitutionally authorized to appoint deputies;¹¹ nor are they subject to any constitutional provision that they be compensated from the fees of their offices.

By statute, however, the General Assembly has provided that the salaries of the Registers of Wills "shall be paid semi-monthly from the fees and receipts of the office, after deducting the expenses of the office". §2-205(d) of the Estates and Trusts Article. The various fees and commissions to which Registers are entitled are enumerated in §2-206 of the Estates and Trusts Article. From these receipts the Registers are to pay the necessary and customary expenses of doing business, including the salaries of their employees and, of course, their own salaries.¹²

¹¹ By statute, the Comptroller is given the authority to "limit and fix the number and compensation of assistant clerks or deputies to be employed by any register of wills". Article 19, §26A of the Maryland Code. *See also* §2-208(b) of the Estates and Trusts Article.

¹² If the receipts are insufficient in any month to meet expenses, including authorized salaries, the Registers may deduct the deficiency "from the taxes due the State Comptroller" upon "written authority" of the Comptroller for the deduction. §2-205(e) of the Estates and Trusts Article. In the event that tax collections for the month are insufficient, the Comptroller "shall make up the deficit from funds provided in the state budget for this purpose". *Id.*

It is our understanding that there has been no need for such budgetary appropriations for deficits in the Registers' offices. From time to time, however, the Comptroller has requested the Board of Public Works to approve payment from the State's emergency fund to pay deficits in certain offices.

Consequently, Registers, like Clerks, are considered "feed" officers, subject to the provisions of Article XV, §1 of the Constitution. Therefore, Registers, like Clerks, need only turn over to the State Treasurer the excess fees, if any, remaining at the end of each year. Only at that time do these fees become part of the State Treasury, subject to the appropriation and budgetary provisions of Article III, §§32 and 52. Thus, the requirements and implications of Article XV, §1, as discussed with reference to the Clerks, apply with similar effect to the Registers of Wills.

III

Central Payroll Bureau

The Central Payroll Bureau, a unit of the Comptroller's Office, is required by statute to "handle and provide for the payment of all salaries and wages . . . for and to all officers and employees of the State . . . whose salaries and wages are paid from funds appropriated by the General Assembly". Article 64A, §38A(a) of the Maryland Code. As explained above, the salaries of the Clerks and Registers and of their employees are not paid from funds appropriated by the General Assembly. Thus, the General Assembly has not mandated that the salaries of these employees be paid through the Central Payroll Bureau. Nor, for the reasons expressed above, do we believe that the Comptroller has authority to impose such a procedure on these employees.

This does not mean, however, that the Clerks and Registers are precluded from using this service, if both the Comptroller and they so wish. Although Article 64A, §38A requires that certain public employees be paid through the Central Payroll Bureau, the statute does not limit the availability of the services of the Bureau to those public employees alone. Thus, the Clerks and the Registers could elect to pay their employees and, indeed, themselves through the Central Payroll Bureau.

We understand that, in fact, several of these officers already are doing so, and the necessary mechanics for transferring funds from the fees of their offices to the Central Payroll Bureau have been worked out. For instance, we are advised that these funds are not deposited by the Bureau in the State

Treasury; consequently, the voluntary procedures that have been implemented do not run afoul of Article III, §§32 and 52, requiring an appropriation by the General Assembly.

IV

Conclusion

In summary, it is our opinion that the State Comptroller does not have the authority, under present law, to require the Clerks of the Circuit Courts or the Registers of Will to pay their employees through the State's Central Payroll Bureau.¹³ However, there is no statutory or constitutional impediment to permitting individual Clerks or Registers, if they so choose, to enjoy the services of the Central Payroll Bureau, as suggested by the Comptroller.

STEPHEN H. SACHS, *Attorney General*

JAMES G. KLAIR, *Assistant Attorney General*

CATHERINE M. SHULTZ, *Assistant Attorney General*

AVERY AISENSTARK

Chief Counsel

Opinions and Advice

¹³ We believe that the conclusion reached here is consistent with a similar conclusion reached in 58 *Opinions of the Attorney General* 69 (1973), regarding a proposed uniform vacation and sick leave plan for Clerks of the Circuit Courts.

CONDOMINIUMS

DECLARATIONS, PLATS, BYLAWS—REAL PROPERTY—TITLE DOCUMENTS—CORRECTION OR REFORMATION—COURTS—EQUITY JURISDICTION—NEED FOR LEGISLATION TO PERMIT CORRECTION OF CONDOMINIUM DOCUMENTS.

February 17, 1983

The Honorable Jerome F. Connell, Sr.
Senate of Maryland

On behalf of the Governor's Commission on Condominiums, Cooperatives, and Homeowners Associations, you have asked for our views on the present ability of the Maryland courts to amend condominium declarations, plats, or bylaws. We understand that the Governor's Commission is considering legislation designed to expressly authorize a unit owner or council of unit owners to petition a court for correction of errors or omissions in a condominium declaration or plat.

As discussed below, we believe that legislation of this sort would be a useful addition to the Maryland Condominium Act. The specific legislation in question would amend portions of the Condominium Act—Title 11 of the Real Property Article ("RP" Article)—to provide, in certain circumstances, a feasible alternative to a rather rigorous statutory requirement: RP §§11-103(c) and 11-105(e) now require the unanimous written consent of all unit owners and mortgagees before amendments may be made to a condominium declaration or plat.¹

I

Background

As a general rule, the Maryland courts may entertain petitions for the correction or reformation of written instruments

¹ As introduced, Senate Bill 114/House Bill 322 would provide for judicial correction of a condominium declaration; Senate Bill 258/House Bill 637, in turn, would provide for judicial correction of either a declaration or a plat.

in cases of inaccuracy or erroneous omissions or insertions. See *Hoffman v. Chapman*, 182 Md. 208, 213-14 (1943). For example, when a document imperfectly reflects the mutual intention of the parties—e.g., by erroneously describing property to be conveyed—the court, exercising its equity jurisdiction, may change the instrument to conform to the original agreement. 182 Md. at 211-12. Similarly, where one party has reason to know that the written document does not conform to the original intention of the parties, but the other party is ignorant of the discrepancy, the court may equitably reform the instrument. See *Flester v. Ohio Casualty Insurance Co.*, 269 Md. 544, 556 (1973).

However, errors or ambiguities in condominium declarations or plats present unique problems. For example, a condominium plat may inaccurately describe the finished structure, or, as has recently come to our attention, the declaration may incorrectly reflect a unit owner's percentage interest in the condominium's common expenses—i.e., the owner's proportionate share of water, property tax, maintenance, repair, and similar expenses. See RP §11-107.²

A condominium's declaration and plat are title documents, drafted by the developer and its agents, in order to create and define the condominium regime. For development, construction, and financing purposes, the declaration and plat are recorded in the land records, often before actual construction has begun. The declaration itself specifies the percentage interest of each unit in the common expenses. RP §11-103(a)(5). In practice, however, a later modification of a unit's size or accoutrements by the developer might result in inequity as to the proportion of common expenses assessed in the declaration to each unit. This apparently is the kind of error that the proposed legislation is designed to redress.

² Unlike an erroneous plat description, these latter discrepancies might not be readily cured by reference to other recorded documents [*cf.* §11-124(c)] or, even, by reference to the existing finished structure itself.

II

Correction of Errors Under Current Law

Clearly, the developer and draftsmen would have reason to know of inaccuracies in the declaration resulting from modification of the initial unit plans. But, once the units are sold, the developer might have little incentive to raise the issue, let alone undertake the expense of obtaining the requisite unanimous consent needed to correct the developer's own error. And, absent express legislation of the type proposed, it is not certain that the eventual unit owner would always have standing to bring an equity suit to reform the instrument, as he or she was neither a party to the recorded documents nor, as to those documents, in privity with the developer. As such, the fact pattern here is somewhat different from the types of contract instruments that equity courts customarily are called on to reform. It is also uncertain whether an individual unit owner, by him- or herself, could petition for reformation of a document that significantly affects other unit owners in the condominium complex. See *Andrews v. City of Greenbelt*, 293 Md. 69, 81 (1982). Moreover, as indicated above, the law now expressly provides that amendments to a condominium declaration or plat may only be made by unanimous written consent of all unit owners and mortgagees. RP §§11-103(c) and 11-105(e).³ The Maryland courts might hesitate to entertain petitions that would circumvent this express statutory requirement. See *Smith v. Bowes and Wise*, 38 Md. 463, 466 (1873).

To be sure, notwithstanding these potential problems, there are analogies that may be looked to in support of the viability of such an equity suit. Nevertheless, analogies are obviously less reliable than express legislation such as that proposed.

According to the Condominium Act's legislative history, the apparent rationale behind requiring consent of *all* persons having a substantial interest in the condominium is based on the

³ Condominium bylaws, on the other hand, may be amended by a two-thirds consensus of the unit owners, unless a higher percentage is required in the bylaws. RP §11-104(e). We are aware of instances in which a condominium declaration has been effectively augmented by means of amending the bylaws. This, however, might not always be a workable alternative; in cases of conflict, the declaration will supersede the bylaws. RP §11-124(e). See also note 5 below.

importance of these recorded title documents, which contain essential information about the condominium regime. Committee on Condominiums, Cooperatives and Homeowners Associations, *Report and Analysis of S.B. 1028*, at p. 4, 7 (March 6, 1981). In fact, a specific proposal to substitute a 75% consensus of unit owners (and first mortgagees) for the unanimity requirement was recently rejected. Chapter 246, Laws of Maryland 1981.⁴

Nevertheless, in terms of practical condominium administration, achieving the necessary unanimity to reform an inaccurate declaration or plat is both expensive and inexpedient. By statutorily granting unit owners or the council express standing to petition for court-ordered reformation in limited circumstances, fundamental errors of the type mentioned above may be readily corrected.⁵

III

Recommendations

Obviously, a court should not alter a recorded instrument merely because a unit owner has become dissatisfied with one of the declaration's provisions. *Ray v. Eurice*, 201 Md. 115, 125, 127 (1952). To this end, therefore, the proposed legislation might be amended to specify the burden of proof that must be sustained by a petitioner before a court will amend the instrument in question. For example, in a contract reformation suit before a court of equity, the petitioner must establish by "clear and convincing" evidence (i) that "the written agreement was not the agreement intended by the parties", and (ii) "what . . . agreement [had been] contemplated . . . at the time [the instrument] was executed". *Painter v. Delea*, 229 Md. 558, 564 (1962). See also *Lazenby v. F. P. Asher Jr. & Sons, Inc.*, 266

⁴ A bill introduced this year, S. B. 300, would substitute an 80%-requirement for the present unanimity rule.

⁵ On the other hand, the bylaws of a condominium may be amended at any time by two-thirds, rather than all, of the unit owners. It may be unnecessary, therefore, to extend the proposed legislation to cover bylaws as well.

Md. 679 (1972). The petitioner must establish that the error or omission was common to all parties to the instrument.

Needless to say, these standards might prove burdensome for a unit owner who has purchased property subject to a pre-recorded declaration and plat with which the unit owner had no prior involvement. We suggest, therefore, that the General Assembly consider specifying, in the legislation itself, the particular standards that it believes a court should apply in a declaration or plat reformation proceeding.

STEPHEN H. SACHS, *Attorney General*

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Editor's Note: RP §§11-103 and 11-105 have since been amended by Chapter 525, Laws of Maryland 1983, and Chapters 266 and 580, Laws of Maryland 1984: (i) to permit amendment of a condominium declaration or plat with the "written consent of 80 percent of the unit owners"; and (ii) to authorize the council of unit owners, under certain conditions, to petition a court to correct "an improper description of the units or common elements" in a declaration or plat or to correct "an improper assignment of percentage interests" in a declaration.

The preceding Opinion was originally written as a letter of advice. Because it provides relevant background information for those interested in the history of the new legislation, it is published here in a slightly revised format.

CONDOMINIUMS—LIMITED COMMON ELEMENTS—NATURE
OF UNIT OWNER'S INTEREST—POWER OF BOARD TO
CONTROL APPEARANCE—RESPONSIBILITY OF UNIT
OWNERS TO MAINTAIN—BOARD'S AUTHORITY SUBJECT
TO STANDARD OF "REASONABLENESS".

July 13, 1983

David S. Boccio, Esq.

On behalf of the Board of Directors of the Old Georgetown Village Condominium, you have inquired about the scope of control that a board of directors ("board") may exercise over a condominium's limited common elements, such as the patios, balconies, parking spaces, and storage units.

We understand that the Board has raised questions about: (i) the exact nature of a unit owner's property interest in the condominium's limited common elements; (ii) the Board's right to control the appearance of these limited common elements; and (iii) responsibility for maintaining the limited common elements in a safe condition for use.

Apparently, the Board's concern about the status of and control over condominium limited common elements is motivated, in part, by its awareness of the tension between traditional private property interests and the communal nature of condominium living. Our response, therefore, will involve an examination of relevant case law, as well as Maryland statutory law and the condominium's master documents—the Old Georgetown declaration, plat, and bylaws.

I

Condominium Property Interests

A. *Background*

The condominium regime may be viewed as a system of separate ownership of individual units in a multi-unit project. 1 Rohan and Reskin, *Condominium Law and Practice* §1.01(1) (1982). Under the Maryland Condominium Act, Title 11 of the Real Property Article ("RP Article"), a condominium project comprises two basic property interests: (i) a fee simple

ownership interest in each condominium unit, held exclusively by the owner of that unit, and (ii) a tenancy in common ownership interest in the condominium's common elements. See RP §11-106(a), 11-107(a), 11-108; Comment of the Condominium Revision Committee of the Real Property, Planning and Zoning Section of the Maryland State Bar Association, *reprinted in* the 1975 Cumulative Supplement of the Real Property Article at 27. See also *Andrews v. City of Greenbelt*, 293 Md. 69, 73-74 (1982).

The common elements of a condominium are subdivided into "general" and "limited" common elements.¹ The "general common elements"—i.e., areas such as corridors, unrestricted parking spaces, gardens, and stairways—consist of all condominium property other than the individually owned units and areas defined as "limited common elements".

The "limited common elements" consist of those areas "identified in the declaration or on the condominium plat as reserved for the exclusive use of one or more but less than all of the unit owners". RP §11-101(b)(1). "Limited common elements" typically include, for example, shutters, awnings, window boxes, doorsteps, stoops, porches, balconies, patios, and all exterior doors and windows or other fixtures designed to serve one or more units.

The Declaration of the Old Georgetown Village Condominium ("OGVC Declaration") mirrors Maryland statutory law in vesting indivisible ownership of the common elements (defined as including both general and limited common elements) in the unit owners as tenants in common. Compare RP §11-107(a) with OGVC Declaration Article I, §1(a), Article III, §2, and Article V, §1. Similarly, those areas designated on the condominium plat as limited common elements are expressly "reserved for the exclusive use of the Unit owner(s) of the Unit(s) to which the [limited common elements] are declared to be appurtenant". OGVC Declaration, Article III, §2.

¹ By definition, a condominium's "common elements" consist of "all of the condominium except the units". RP §11-101(b).

B. *Limited Common Elements*

Compared to the fee simple ownership of the condominium unit itself, a unit owner's property interest in the limited common elements ("LCEs") appurtenant to his or her unit is not an absolute ownership interest.

Instead, the unit owner *shares* an indivisible fee simple interest in the LCEs as a tenant in common with the other unit owners. Payment of a higher purchase price for a condominium with an LCE—a patio, for example—merely entitles the unit owner to an exclusive or near-exclusive *right to use* that particular area. See RP §11-108.² See also *Juno by the Sea North Condominium v. Manfredonia*, 397 So.2d 297, 304 (Fla. Dist. Ct. App. 1981) (petition for rehearing); 64 *Opinions of the Attorney General* 334, 339 n. 3 (1979). The right to use an area designated as an LCE automatically passes with the unit when legal title is conveyed.

II

Regulation of Common Elements

A. *Maryland Law*

According to RP §11-109(d)(12), the council of unit owners—or board of directors, if authority is so delegated in the condominium bylaws—has the express power to “regulate the use, maintenance, repair, replacement, and modification of [condominium] common elements”, on behalf of all unit owners. Cf. RP §11-114(a) (board or council to maintain property and comprehensive liability insurance policies on common elements); §11-131(c)(1) (implied warranty on common elements to extend from developer to board or council). RP §11-104(c) also states that the condominium bylaws may contain provisions “regarding the management and operation of the condominium includ-

² RP §11-108(b) entitles a unit owner who has exclusive use of a particular LCE to deed the exclusive use of that LCE to another unit owner. In so doing, however, the unit owner cannot grant full legal title to the second unit owner, because the grantor does not individually own the absolute fee simple interest in the LCE.

ing any restriction on or requirement respecting the use and maintenance of the . . . common elements".³

The policy behind consolidating in one representative body the management and regulatory control of all condominium property, excluding the individual units, is tailored to the condominium life style. As one Florida appellate court pointed out:

"[T]o promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property. Condominium unit owners comprise a little democratic sub society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization." *Hidden Harbour Estates, Inc. v. Norman*, 309 So.2d 180, 181-82 (Fla. Dist. Ct. App. 1975).

Previously, this same court, in an action to enjoin a unit owner from substituting glass jalousies for porch screens, emphasized:

"Every man may justly consider his home his castle and himself as the king thereof; nonetheless his sovereign fiat to use his property as he pleases must yield, at least in degree, where ownership is in common or cooperation with others. The benefits of condominium living and ownership demand no less." *Sterling Village Condominium, Inc. v. Breitenbach*, 251 So.2d 685, 688 (Fla. Dist. Ct. App. 1971).

The board's adherence to and administration of the condominium declaration and bylaws ensures, to the extent possible, that "fair consideration . . . be given to the rights and privileges of *all* owners and occupants of the condominium so as to provide a harmonious residential atmosphere"—even though an individual unit owner's ability to vary an appurtenant LCE

³ As discussed in Part II B below, the OGVC Declaration and Bylaws contain several such provisions.

may be circumscribed. *Dulaney Towers Maintenance Corp. v. O'Brey*, 46 Md. App. 464, 466 (1980) (emphasis added). See *Ryan v. Baptiste*, 565 S.W.2d 196, 198 (Miss. App. 1978).

We here note that, under the statute, copies of the recorded condominium declaration and bylaws must be provided to a prospective unit owner on or before the time a contract of sale is signed. RP §11-126(b)(2) and 11-135(a)(1) and (2). Accordingly, each unit owner has notice of, and takes his or her property subject to, the express provisions of these documents. See *Pepe v. Whispering Sands Condominium Association*, 351 So.2d 755, 757-58 (Fla. Dist. Ct. App. 1977); *Mayfair Engineering Co. v. Park*, 318 So.2d 171, 173 (Fla. Dist. Ct. App. 1975). See also *White Egret Condominium, Inc. v. Franklin*, 379 So.2d 346, 350 (Fla. 1979).

B. OGVC Declaration and Bylaws

The OGVC Declaration explicitly states that a unit owner's right to use and enjoy the LCEs appurtenant to his or her unit is "subject to such reasonable rules and regulations as the Board of Directors . . . may from time to time enact". Article III, §2. See RP §11-111(b). The Condominium's Bylaws are far more detailed in this respect.

Article III, §2 of the OGVC Bylaws specifies the delegated powers and duties of the Board of Directors. This authority includes both the responsibility for controlling the use, operation, and maintenance of the common elements, Article III, §2(a) and (k), and the ability to enact "uniform Rules and Regulations from time to time for the use of the Property, as well as the conduct and enjoyment of the Unit owners", Article III, §2(i).

Section 13 of Article V (Operation of the Property) lists existing restrictions on the use of condominium property, "in order to provide for the congenial occupancy of the Property and for the protection of the values of the Units". The limited common elements are subject to extensive regulation.⁴ For ex-

⁴ The Board is further authorized to adopt binding "house rules" relative to use of the condominium common elements. Article V, §13(q).

ample, the LCEs must be kept in an orderly and uncluttered condition; a "small, orderly house pet" is permitted, but it may not run unchecked on such property; laundry may not be hung from a balcony or patio—in fact, nothing may be stored or placed upon an LCE, absent consent from the Board. Article V, §13(h), (k), (n), and (o).

Finally, the Board has the express power to approve or deny any prospective alteration to condominium common elements or unit exteriors.⁵ Section 15 of Article V requires:

"The complete plans and specifications, showing the location, nature, shape, change . . . [to be] submitted to and approved in writing as to [i] safety, [ii] the effect of any such alterations on the costs of maintaining and insuring the Condominium and [iii] harmony of design, color and location in relation to surrounding structures and topography, by the Board of Directors of the Association, or by the Ar-

⁵ RP §11-115(2) states:

"Subject to the provisions of the declaration or bylaws and other provisions of law, a unit owner:

...

(2) May not alter, make additions to, or change the appearance of the common elements, or the exterior appearance of a unit or any other portion of the condominium, without permission of the [board]."

In this regard, a unit owner's interest in a condominium LCE closely resembles an easement interest in real property. See generally *Parrillo v. 1300 Lake Shore Drive Condominium*, 431 N.E.2d 1221 (Ill. App. 1981); *Everdell v. Carroll*, 25 Md. App. 458, 462-64 (1975). Cf. *Supervisor of Assessments of Anne Arundel Co. v. Bay Ridge Properties, Inc.*, 270 Md. 216, 223 (1973) (easement rights granted to lot owners for recreational use of beach). Just as an easement may not be modified to the detriment of the servient estate, absent mutual consent of both parties, see *Reid v. Washington Gas Light Co.*, 232 Md. 545, 549 (1963), a unit owner may not alter features of an LCE, absent approval from the governing entity responsible for managing and regulating the use of condominium common elements on behalf of all unit owners.

chitectural Control Committee designated by the Board of Directors.”⁶

C. *The Standard of Reasonableness*

Thus, by statutory law and express provision of the condominium documents, the Board of Directors has extensive authority to monitor and control the use and modification of condominium LCEs by a unit owner. A prospective owner is given advance notice of that authority. Accordingly, the owner's purchase of the unit involves acceptance of the condominium regime, with its concomitant restriction on the unit owner's ability to alter the property as he or she might otherwise desire.

Nevertheless, a consistent body of case law—as well as an express provision of the OGVC Declaration—requires that the exercise of the Board's authority over prospective LCE modifications be *reasonable*.

Specifically, Article III, §2 of the OGVC Declaration subjects a unit owner's use and enjoyment of the LCE appurtenant to his or her unit to “reasonable rules and regulations” enacted by the board of directors. The factor of “reasonableness” is one of the standards applied in judicial review of board regulatory activity. *Hidden Harbour Estates, Inc. v. Basso*, 393 So.2d 637, 640 (Fla. Dist. Ct. App. 1981); *Ryan v. Baptiste*, 565 S.W.2d at 198; *Hidden Harbour Estates, Inc. v. Norman*, 309 So.2d at 182. See *Papalexiou v. Tower West Condominium*, 401 A.2d 280, 285 (N.J. Super. 1979).⁷

⁶ According to the OGVC Bylaws, the Architectural Control Committee—effectively a subcommittee of the Board—has the authority to publish “statements of policy, standards, guidelines and establish such criteria relative to architectural styles or details, or other related matters, as it may consider necessary or appropriate”. Article V, §20. A unit owner may protest a Committee decision in a hearing before the Board; Maryland statutory law provides recourse to the Maryland judicial system if the unit owner is dissatisfied with the Board's decision. RP §11-113(b)(4).

⁷ Other judicial standards used to test the validity of restrictions in a condominium declaration are (i) whether the restriction violates public policy, or (ii) whether it abrogates some fundamental constitutional right. *Hidden Harbour Estates, Inc. v. Basso*, 393 So.2d 637, 640 (Fla. Dist. Ct. App. 1981). See *White Egret Condominium, Inc. v. Franklin*, 379 So.2d 346, 349 (1979).

Essentially, the standard of "reasonableness" prevents a condominium board from adopting "arbitrary or capricious rules bearing no relationship to the health, happiness and enjoyment of life of the various unit owners". *Hidden Harbour Estates v. Norman*, 309 So.2d at 182. The court in *Hidden Harbour*, sustaining a rule that prohibited the use of alcoholic beverages in condominium common elements, remarked: "It is not necessary that conduct be so offensive as to constitute a nuisance in order to justify regulation thereof." *Id.* See also *Ritchey v. Villa Nueva Condominium Ass'n*, 146 Cal. Rptr. 695, 701 (Cal. App. 1978).

Evaluation of a board's "reasonableness" in its restrictions on the use or modification of condominium LCEs depends of necessity on the facts and circumstances of the particular case. However, courts have expressly recognized a board's desire to maintain aesthetic uniformity in a condominium's exterior as a legitimate reason for rejecting proposed architectural changes. *Sterling Village Condominium, Inc. v. Breitenbach*, 251 So.2d 685. See *Juno by the Sea North Condominium v. Manfredonia*, 397 So.2d at 304. Courts have also upheld, for example, board action with regard to the installation of locks on exterior entry-ways, *Ryan v. Baptiste*, 565 S.W.2d 196, and the enforcement of "house rules" allowing no more than one pet per unit, *Dulaney Towers v. O'Brey*, 46 Md. App. 464.

In summary, we believe that two elements must be present in order to sustain the validity of a board's decision or regulation regarding the use or modification of a condominium LCE. First, the board's authority to regulate the use or modification of the common elements must be exercised in accordance with Maryland statutory law, as well as relevant provisions of the condominium's own declaration and bylaws. See *Juno By the Sea*, 397 So.2d 297. Second, the board's decision or regulation must be reasonable, based on a legitimate concern for the health, happiness, and well-being of all the unit owners.

III

Maintenance of the LCEs

RP §11-108.1 states:

"Except to the extent otherwise provided by the declaration or bylaws, the council of unit owners [or

board] is responsible for maintenance, repair, and replacement of the common elements".⁸

The OGVC Board's general power to provide for maintenance of the common elements is articulated in Article II, §2(a) of the OGVC Bylaws. However, it is Article V, §12 that contains specific details as to responsibility for the maintenance and repair of the common elements.

According to Article V, §12(b)(1) of the OGVC Bylaws, each unit owner, at his or her expense, is responsible for the maintenance, repair, and replacement of fixtures, equipment, and the structure "wholly contained within [the] Unit and/or in a limited common element designated in the Declaration as being appurtenant to [the] Unit". Moreover, each unit owner must perform, at his or her expense, "the normal maintenance for any balcony or patio which is designated in the Declaration as being a limited common element appurtenant to [the] Unit". OGVC Bylaws, Article V, §12(b)(ii). Normal maintenance includes clearing the balcony or patio in both winter and summer, as well as performing repairs occasioned by unit owner misuse. To the extent that §12(b) does not require the unit owner to maintain or repair the common elements, the Association is responsible. See OGVC Bylaws, Article V, §12(a)(i), (iii), and (iv). See also *Casita de Castilian, Inc. v. Kamrath*, 629 P.2d 562, 564 (Ariz. Ct. App. 1981).

Clearly, the OGVC Bylaws place the primary responsibility for maintenance and repair of LCEs upon the unit owner.⁹ Nevertheless, we observe that, by law, the board must provide

⁸ As noted in Part I A above, RP §11-101(b) defines common elements to include both limited and general common elements.

⁹ We understand that a dispute has arisen concerning a unit owner's ability to repair existing LCE defects in light of a potential suit by the Board against the OGVC developer for breach of implied warranties on the common elements. Discussion of this particular issue is beyond the scope of this Opinion. We merely observe that RP §11-131(c)(1) provides that an implied warranty runs from the developer to the council of unit owners (or board); nevertheless, a suit for enforcement of the warranty on the LCEs may be brought by either the council or the unit owner to whose use the LCE is reserved. RP §11-131(c)(4). See also *Herlihy v. Dunbar Builders Corp.*, 415 N.E.2d 1224 (Ill. App. 1980); *Greentree Condominium Ass'n v. RSP Corp.*, 415 A.2d 248 (Conn. Sup. 1980).

insurance coverage for the LCEs—even though it is the unit owner that has both exclusive use of and responsibility for maintaining these areas.

Specifically, RP §11-114(a) requires the board to maintain:

“(1) Property insurance on the common elements . . . insuring against those risks of direct physical loss commonly insured against, in amounts determined by the council of unit owners but not less than any amounts specified in the declaration or bylaws; and

(2) Comprehensive general liability insurance, including medical payments insurance, in an amount determined by the council of unit owners, but not less than any amount specified in the declaration or bylaws, covering occurrences commonly insured against for death, bodily injury, and property damage arising out of or in connection with the use, ownership, or maintenance of the common elements.”

RP §11-114(c)(1) continues: “Insurance policies carried pursuant to subsection (a) shall provide that . . . [e]ach unit owner is an insured person under the policy with respect to liability arising out of his ownership of an undivided interest in the common elements [the LCEs].” *See* OGVC Bylaws, Article V, §9, ¶¶ 1 and 9.¹⁰

IV

Conclusion

In summary, it is our opinion that the Old Georgetown Village Condominium Board of Directors has the statutory authority to monitor and control the appearance of the condominium limited common elements. This authority is further detailed in the condominium’s declaration and bylaws. The

¹⁰ In this regard, even though a unit owner is responsible for “normal” maintenance, repair, or replacement, he or she would not be liable for mishaps that occur on the LCE because of basic structural defects. *See* RP §11-114(a)(1) and (2).

Board's authority to control the LCEs' appearance also entails responsibility for providing insurance coverage on the LCEs. In contrast, despite the Board's control over the general appearance of these areas, the individual unit owner is responsible for the normal maintenance and upkeep of the LCEs appurtenant to his or her unit.

STEPHEN H. SACHS, *Attorney General*

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Editor's Note: The preceding Opinion was originally written as a letter of advice. Because the issues reviewed have not as yet been addressed by the Maryland appellate courts, it is published here in a slightly revised format.

CONDOMINIUMS—LOCAL GOVERNMENT—PREEMPTION—
CONFLICT—CONSUMER PROTECTION—ANALYSIS OF
MONTGOMERY COUNTY CONDOMINIUM LEGISLATION AND
PROPOSALS.

December 20, 1983

The Honorable Sidney Kramer
The Honorable Idamae Garrott
The Honorable Lucille Maurer
The Honorable Joseph E. Owens
Montgomery County Delegation

You have asked us for an analysis of the impact of existing and proposed county legislation upon the Maryland Condominium Act—Title 11 of the Real Property Article (“RP” Article).

Specifically, you inquire:

(1) Whether existing county condominium law conflicts, in any fashion, with State law;

(2) Whether issues proposed for study by the Montgomery County Task Force are appropriate areas for supplemental county legislation, in light of the Condominium Act; and

(3) How State legislation might be clarified or amended to reduce ambiguity and better define the county’s role in enacting condominium legislation.

In general, the Maryland Condominium Act preempts county condominium legislation if the local law concerns any subject or matter covered by the State law. RP §§11-122(b) and 11-141(c). However, if the local legislation falls within one of the four exceptions enumerated in RP §11-122(b), the local legislation will *not* be preempted; then, unless the local legislation is in conflict with State law, RP §11-141(c), the local legislation will be given effect.¹ With one minor exception, the

¹ RP §11-122(b) provides as follows:

“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.”

Montgomery County law as currently enacted fits clearly within the express exceptions of RP §11-122(b).

It is less clear, however, that topics now under study by the county are uniformly suitable areas for supplemental county legislation, given the General Assembly's overall emphasis on State preemption in the condominium field and the range of the Condominium Act. By way of illustration, we will discuss the proposed county "dispute resolution" bill, as well as several other problematic issues implicated by the Task Force work plan. In so doing, we hope to better define the scope of permissible supplemental legislation in the area of condominium law. At your express request, we also consider various proposals to clarify the Condominium Act in this regard.

I

Montgomery County Condominium Legislation

Chapter 11A of the Montgomery County Code was enacted in response to specific amendments made to the Maryland Condominium Act during the 1981 Legislative Session. In pertinent part, Chapter 246, Laws of Maryland 1981, authorized local governments (i) to take certain preventive steps to alleviate the displacement of tenants in rental facilities undergoing conversion; and (ii) to adopt, in the condominium field, more stringent consumer protection laws not inconsistent with State law.

RP §11-141(c) provides 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 local enactment, in the State, the provisions of this title shall prevail."

For a review of the history of and interplay between these provisions, see generally 67 *Opinions of the Attorney* 13 (1982).

*A. Rental Housing Conversion**1. RP §11-138*

RP §11-138 authorizes a local government to require that it be offered the right to purchase a rental facility slated for condominium conversion before any other purchaser. Section 11A-3 of the Montgomery County Code embodies the county's right of first refusal and is patterned extensively after the State law. In fact, the county law is *more* attentive to relocation hardships than State law, as it requires the county—on resale of the property after the 3-year retention period—to try to sell the facility to an entity that will also minimize displacement of resident tenants. *See* §11A-3(b)(6)b of the County Code.

2. RP §11-139

A local government also may provide itself with a right of first refusal as to the purchase of individual units in a facility undergoing condominium conversion. RP §11-139 authorizes county purchase of up to 20% of the total number of units, subject to the current tenant's option to buy. *See* RP §11-139(a)(3) and (b). With one apparent exception, §11A-4 of the Montgomery County Code carefully articulates county rights and obligations as a purchaser of condominium units under the RP §11-139 preemption exception.

Nevertheless, we note one troublesome area. Under §11A-4(b)(2), if a tenant in possession fails to exercise timely his or her option to buy the unit, or, alternatively, requests reimbursement for moving expenses, the county may exercise its right of first refusal.² Section 11A-4(b)(3) then states:

“The purchase price, terms and conditions of the contract of sale of the unit to the county or its designated housing agency shall be no less favorable than the purchase price, terms and conditions of comparable units offered to tenants under section 11-136, Real Property Article, unless otherwise agreed by all parties to the contract of sale.”

² The tenant's option to buy is viable for 60 days following delivery of the notice of condominium conversion. RP §11-136(a)(2)(i) and (c)(2).

However, RP §11-136(e) expressly provides:

“If the offer terminates, the owner may not offer to sell that unit at a price or on terms and conditions more favorable to the offeree than the price, terms, and conditions offered to the tenant during the 180 day period following the giving of the notice required by §11-102.1.”

Apparently, the State law guards against the forced displacement of tenants by an owner who charges inordinately high purchase prices, planning to then sell the empty facility to a developer or other buyer at a vastly more favorable price.³ However, §11A-4(b)(3) of the County Code would implicitly permit an owner to offer the county contract terms or prices substantially more favorable than those offered to tenants. This section thus seems to conflict directly with RP §11-136—the portion of the Condominium Act that establishes the general terms and conditions of all condominium conversion offerings.⁴

3. *RP §11-140*

The exception in RP §11-140 enables a county, upon finding a housing emergency caused by conversion of rental housing to condominiums, to grant extended leases to “designated households”—including those families with elderly or handicapped members.⁵ In Montgomery County, “designated households” as defined by RP §11-137(a)(2) are eligible for lifetime leases. Furthermore, under §11A-5(b), other tenant households, less able to cope with displacement pressures, are also eligible for

³ See also RP §11-136(a)(1): “The offer [to the tenant] shall be at a price and on terms and conditions at least as favorable as the price, terms, and conditions offered for that portion of the property to any other person during the 180 day period following the giving of the notice required by §11-102.1.”

⁴ It is our understanding that §11A-4(b) tracked the language of former RP §11-139(c)(4), which has since been repealed and reenacted. See Chapter 836, Laws of Maryland 1982. We are informed, however, that §11A-4(b) will be redrafted to accord with current State law.

⁵ Units occupied by designated households may not exceed 20% of the total number of units. RP §11-137(k)(1).

the three-year tenancy authorized by RP §11-140(b)(2)(ii). This type of legislative activity is contemplated—even encouraged—by the language of RP §11-140.

B. *Consumer Protection Legislation*

The fourth statutory exception to statewide preemption in the condominium field is RP §11-130. 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.” (“CL” Article.)

A consumer is defined as “an actual or prospective purchaser, lessee, assignee or recipient of a condominium unit”. RP §11-130(b)(1).

According to CL §13-103 and RP §11-130(d), therefore, a county may adopt legislation for the protection of individuals acquiring condominium units, if that legislation is consistent with and more stringent in its protection than the Consumer Protection Act. *See 67 Opinions of the Attorney General 13* (1982). However, legislation enacted under this consumer protection exemption may not otherwise conflict with the Condominium Act. RP §11-141(c).

The remaining provisions of the Montgomery County condominium law relate intrinsically to the acquisition of units by “actual or prospective purchasers” and are clearly designed to protect individuals making such a substantial investment. For example, §11A-7 requires disclosure of additional information by the developer in the form of a “consumer guide”. Section 11A-9 places an affirmative obligation on a developer to contribute to the condominium’s reserve fund for common element repairs; in effect, this requirement prevents a disproportionate escalation of condominium fees on assumption of control by the condominium council.⁶ Section 11A-10 authorizes a tenant

⁶ The Maryland Condominium Act merely requires disclosure of the existence or absence of this fund. *See* RP §11-126(b)(5)(iii). Here, the county law is supplemental in nature, guarding against hidden costs incidental to the purchase of a newly converted unit.

organization to designate a professional engineer to verify the various conversion documents required by RP §11-126; again, this provision confers additional protection on prospective unit buyers, and is therefore within the scope of county legislative activity expressly permitted by RP §§11-122(b) and 11-130(d).

Nevertheless, we hesitate to construe the language of RP §11-130(d) as an unlimited grant of authority enabling a political subdivision to legislate in every area of condominium law. First, RP §11-141(c) expressly states that the Condominium Act "shall prevail" if the application of its provisions "conflict with the application of other provisions of the public general laws, public local laws, or any other local enactment". Thus, a political subdivision may not legislate in a fashion inconsistent with existing State law. *Co. Council for Montgomery Co. v. Montgomery Assoc., Inc.*, 274 Md. 52, 59 (1975) (discussing *City of Baltimore v. Sitnick & Firey*, 254 Md. 303 (1969)).

Moreover, we believe that the exception in RP §11-130(d) must be confined to legislation specifically designed to protect a "consumer", as defined by RP §11-130(b)(1) and CL §13-101(c).⁷ In this context, the Consumer Protection Act's application to transactions involving the sale or provision of consumer goods and services is implicated. RP §11-130(c)(1) specifically refers to the "enforcement duties and powers" of the Consumer Protection Division of the Office of the Attorney General in policing violations of the Condominium Act. Presumably, the term "consumer", as used in RP §11-130(c), incorporates the basic scope and limitations of the Consumer Protection Act. In a similar fashion, RP §11-130(d)—the consumer protection exception—may also be read to encompass both the acquisition of a unit and the unit owner's receipt of a range of commercially viable goods and services from and through the condominium's governing board. 67 *Opinions of the Attorney General* 13, 19 (1982). By contrast, if local legislation enacted under the consumer protection aegis involves neither the initial acquisition of a unit, nor the board's ongoing provision of goods or services to the condominium occupants, that legislation will

⁷ CL §13-101(c) defines consumer as "an actual or prospective purchaser, lessee, or recipient of consumer goods, consumer services, consumer realty, or consumer credit". Consumer goods and services are those goods and services that are "primarily for personal, household, family, or agricultural purposes". CL §13-101(d).

be preempted by the State condominium law. *See* RP §11-122(b); 67 *Opinions of the Attorney General* at 17-18.

In fact, as we noted in 67 *Opinions of the Attorney General* at 18 n. 5, the General Assembly *deleted* a proposed amendment to RP §11-122(b) that would have enabled political subdivisions to enact legislation to supplement generally provisions of the Condominium Act even beyond the four specifically enumerated areas. *See* Chapter 246, Laws of Maryland 1981, p. 1474.

C. *Summary*

To recapitulate, therefore: *Any* law, ordinance, or regulation affecting condominiums, enacted by a county, municipal corporation, or other jurisdiction, is preempted by the subject and material of the Maryland Condominium Act, unless that legislation clearly falls within one of the four exceptions enumerated in RP §11-122(b). And even legislation enacted pursuant to one of these exceptions may not conflict in any fashion with existing State law.

The exception most conducive to supplemental county legislation is RP §11-130—the consumer protection exception. RP §11-130(d) authorizes local legislation that is: (i) for the protection of a “consumer”; (ii) more stringent than the Consumer Protection Act; and (iii) not inconsistent with either the Consumer Protection Act or the Condominium Act.

With this in mind, we turn to an analysis of certain issues now under study by the Montgomery County Task Force.

II

The Task Force Proposals

A. *Dispute Resolution*

The Montgomery County Council is currently considering legislation to establish a compulsory dispute resolution mechanism for local condominiums, cooperatives, and homeowners' associations. The legislation is designed to provide “a new efficient, inexpensive and even-handed method for resolving

homeowners' disputes". Homeowners' Association Task Force (Group 1), *Alternative Dispute Resolution for Condominiums, Cooperatives and Homeowner Associations* (July, 1983), p. 14 ("Report").

But, as members of the Task Force recognize, the General Assembly has carefully circumscribed the authority of political subdivisions to legislate in the condominium field. *Report* at 36, 38. To the extent that the county legislation affects condominium affairs, it is preempted by the Maryland Condominium Act—unless, as explained above, the legislation (a) fits within one of four specific exceptions, and (b) does not conflict with the Condominium Act or other State law.

The avowed purposes behind the county dispute resolution proposal are: (i) to redress the inequity in legal and financial resources available to a board of directors as compared to a unit owner; (ii) to provide a disinterested, third-party arbiter not involved with the condominium regime; and (iii) to handle all disputes arising from association documents or agreements—including the declaration, bylaws, rules, and regulations. *Report* at 6, 8, 9, 14, 22, 25. Ostensibly, the proposal is cast as being authorized by RP §11-130(d), enacted for the protection of consumers.

However, the Condominium Act already details a condominium dispute mechanism "applicable to complaints or demands formally arising on or after January 1, 1982". RP §11-113(a). A public local law that creates an *alternative* mandatory dispute mechanism for condominiums would be in clear conflict with this preexisting Statewide provision and, as such, would be ineffective under RP §11-141(c).

Nonetheless, RP §11-113 does authorize condominiums to "opt out" of the statutory scheme if explicit dispute settlement mechanisms are incorporated into the documents creating the condominium regime. Whether county law may purport to "supplement" State law by, in effect, requiring a condominium to "opt out" through inclusion in its documents of a scheme that is mandated by local law, is a determination beyond the scope of this Opinion. See generally *City of Baltimore v. Sittenick & Firey*, 254 Md. 303 (1969).

Assuming, arguendo, that such supplemental legislation is permissible, RP §11-130(d) by its very nature *limits* the range of disputes that a county settlement mechanism may handle.

Because "consumer" is explicitly defined as "an actual or prospective purchaser, lessee, assignee or recipient of a condominium unit", RP §11-130(b), the county forum would be authorized to entertain only those issues germane to either (1) the acquisition of a unit; or (2) the provision of commercially valuable goods or services by the council or board to the unit owners. See CL §13-101(c); 67 *Opinions of the Attorney General* at 19. See also *Report* at 38.

Throughout the Condominium Act, the preemptive nature of the State law is emphasized. See, e.g., RP §11-122(b) and 11-141(c). We do not believe that the General Assembly intended RP §11-130(d) to be read as a broad exception to this general rule of Statewide uniformity.⁸ Supplemental county authority should therefore be limited by existing State law, by the careful definition of "consumer" in RP §11-130(b), as well as by the scope of the consumer protection laws, which are only applicable to transactions involving the sale of consumer goods and services. See CL §13-101(i) and (j) and §13-102. Matters beyond the finite scope of the consumer protection exception should be handled through the system already established by RP §11-113 or comparable condominium documents.⁹

B. Other Task Force Proposals

Unfortunately, the Montgomery County Task Force work plan offers only the barest of topic outlines for our review. Nevertheless, our analysis remains consistent. If the proposed county legislation (1) affects matters already covered by the Condominium Act, and (2) is not reasonably related to "consumer" issues (the acquisition of a condominium unit or the

⁸ If §§11-122(b) and 11-130(d) were read to authorize county legislative activity irrespective of existing law, the county would in effect be given *carte blanche* to supersede not only the Condominium Act, but also provisions of all other State law, including real property law, commercial law, and so on. We do not believe this result was intended.

⁹ For example, the maintenance and usage of condominium recreational areas clearly involves a condominium service otherwise available in the commercial business marketplace. By contrast, violation of a particular rule or bylaw that does not directly impact upon the acquisition of a unit or condominium service, per se, is arguably a matter of condominium governance and, as such, is outside county jurisdiction.

receipt of goods or services from the condominium's governing entity), that law is preempted.

By way of illustration, limitations on the number of non-residents who may serve on a condominium board of directors are, at most, only tangentially related to the "consumer" issues contemplated by RP §11-130; the same is true of matters affecting a condominium's declaration. Although perhaps cumbersome, the Condominium Act specifies that the appropriate method for dealing with such matters is by amendment to the particular condominium documents. See RP §§11-109(b), 11-104(e), and 11-103(c)(1).

On the other hand, topics directly related to the acquisition of a unit or the provision of condominium services may be eminently suitable for supplemental legislative activity—as long as such legislation is more stringent than the Consumer Protection Act and consistent with both the Consumer Protection Act and the Condominium Act. Warranty concerns, the public offering statement, certain voting provisions, and issues of developer accountability to prospective or actual unit purchasers are matters of this nature. We caution, however, that attention be given to relevant sections of the Condominium Act, as well as those of the Commercial Law and Corporations Articles. See RP §§11-109(d), 11-131, and 11-141(c).

We are troubled, moreover, by what appear to be proposals that might amount to impermissible restraints upon the alienation of property. For example, limitations on the sale of units to nonresident owners and requirements that rental leases be approved by the board of directors are both potentially repugnant to the absolute, fee simple nature of condominium unit ownership. Such clauses in effect give the condominium's governing entity unqualified and potentially arbitrary control over the use and disposition of individually owned property. See *Real Estate Co. v. Serio*, 156 Md. 229, 234-35 (1929); *Kenney v. Morgan*, 22 Md. App. 698, 704-06 (1974).

In contrast, statutes in other jurisdictions make the unit owner's right to sell or lease subject to the condominium governing board's right of first refusal. The owner is required to first offer the management body the right to lease or purchase the unit, before placing the property in the general market. See, e.g., Mass. Gen. Laws Ann., Chapter 183A, §12(c). See also *Lyons v. King*, 397 So.2d 964 (Fla. App. D4, 1981);

Backus v. Smith, 364 So.2d 786 (Fla. App. D1, 1978). This right of first refusal may not be exercised so as to restrict alienation because of race, color, creed, national origin, or sex. See, e.g., Mass. Gen. Laws, *supra*, §12(c). See also *Montgomery Citizens League v. Greenhalgh*, 253 Md. 151 (1969).

III

Alternative Legislative Proposals

You also ask how the Condominium Act might be clarified to minimize the confusion generated by concurrent State and county regulatory power in the condominium field.

In our view, one effective method of improving existing law would be to clarify the scope of the consumer protection exception. By specifying in the Condominium Act exactly which sections of the Act are to be treated as involving "consumer protection" issues subject to supplemental local legislation, the counties would be given clear guidance as to appropriate areas for legislative activity.¹⁰

Limitations of this nature, however, would also affect the enforcement jurisdiction of the Consumer Protection Division of the Office of the Attorney General. RP §11-130(c) now provides as follows:

"(1) To the extent that a violation of any provision of this title affects a consumer, that violation shall be within the scope of the enforcement duties and powers of the Division of Consumer Protection of the office of the Attorney General, as described in Title 13 of the Commercial Law Article.

(2) The provisions of this title shall otherwise be enforced by each agency of the State within the scope of its authority."

¹⁰ Some sections that are clearly consumer oriented in focus are as follows: §11-102.1 (notice of conversion); §11-126(f) (disclosure requirements); §11-131 (warranties); §11-136 (tenant's right of first refusal); and §11-137 (designated households). This list is by no means exhaustive.

As presently drafted, RP §11-130(c) and (d) are closely tied. Under current law, for example, a developer's failure to make necessary disclosures on the public offering statement or a council's refusal to maintain property and liability insurance may become an issue for Consumer Protection Division or county agency intervention. Unless otherwise provided, a legislative proposal to limit or refine the meaning of "consumer" will necessarily affect *both* the ability of local jurisdictions to legislate under the RP §11-130(d) exception *and* the scope of the Consumer Protection Division's existing enforcement powers and duties. In examining how the current law may be improved, you may wish to sever the present linkage between RP §11-130(c) and (d).

At the other extreme, the General Assembly could eliminate the RP §11-130(d) consumer protection exception in its entirety, effectively preempting this aspect of supplemental county legislation. See *County Council for Montgomery County v. Montgomery Association, Inc.*, 274 Md. 52 (1975); 67 *Opinions of the Attorney General* at 17-18.

A less extreme alternative would be to expressly authorize counties to enact supplemental legislation in areas not covered by the Condominium Act, in order to correct real property abuses unique to a given locale. See, e.g., *Sitnick & Firey*, 254 Md. at 317, 324-25; 63 *Opinions of the Attorney General* 377, 388-89 (1978). See also *Mayor and Council of Forest Heights v. Frank*, 291 Md. 331, 337 (1981). At present, unless one of the four exceptions enumerated in §11-122(b) applies, local legislation is preempted by the "subject and material" of the Condominium Act. See RP §11-122(b).

IV

Conclusion

In summary, the Maryland Condominium Act preempts county condominium legislation on any subject or matter that is addressed by the State law. However, local legislation enacted pursuant to RP §11-130, §11-138, §11-139, or §11-140 is not so preempted, and is effective, unless it conflicts with existing State law. It is our opinion that, for the most part, those

sections of the current Montgomery County Code regulating condominium conversions are both expressly authorized by and in compliance with the Condominium Act.

We have attempted here to clarify the meaning and impact of the consumer protection exception contained in RP §11-130. This exception authorizes counties to enact legislation for the protection of a consumer, as defined by RP §11-130(b) and CL §13-101(c). In this context, a county may legislate with regard to (i) the actual or prospective acquisition of a condominium unit, and (ii) the ongoing provision of goods and services to the unit owners by the condominium's governing entity.

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

CONSTITUTIONAL LAW

FIRST AMENDMENT—FREE SPEECH AND EXPRESSION—
“ETHNIC INTIMIDATION”—PROPOSED ETHNIC INTIMIDA-
TION BILL RAISES “SERIOUS QUESTIONS” BUT IS NOT
“CLEARLY UNCONSTITUTIONAL”.

January 4, 1983

Mrs. Constance R. Beims
Governor's Task Force on
Violence and Extremism

You have requested our opinion on the constitutionality of a proposed “ethnic intimidation bill”, being considered by the Governor’s Task Force on Violence and Extremism, to prohibit “racial, religious or ethnic intimidation.”¹

In an earlier letter to you, we reviewed the proposal in the context of its potentially negative effect on First Amendment rights to freedom of speech and expression. In summarizing our initial reaction to the bill, we noted that “[t]he proposal raises grave constitutional questions which cause [us] to have serious doubts about its validity”. At the same time, we indicated that our Office had “not yet resolved” its thoughts on the subject, that we would “continue our research and reflection”, and that we would “welcome any additional thoughts or suggestions” on the constitutional issues raised by the proposal. Since then we have consulted at least a half-dozen constitutional experts, received a lengthy legal memorandum from the Chairman of the National Law Committee of the Anti-Defama-

¹ Specifically, the proposed bill would provide:

“A. A person commits the crime of racial, religious or ethnic intimidation if, by reason of the race, religion or national origin of another person, or group of persons, the person violates Sections [insert code provisions for criminal trespass, criminal mischief, harassment, menacing assault and/or any other appropriate statutorily prescribed criminal conduct].

B. Ethnic intimidation is a _____ misdemeanor/felony [the degree of criminal liability should be made contingent upon the severity of injury incurred or property lost or damaged].”

tion League, met with representatives of the League, and researched the legal issues to the point of diminishing returns.

As we previously noted, the constitutional questions raised by this proposal are both sensitive and novel. They are sensitive in that they involve a balancing of fundamental rights and freedoms: To what extent would the proposed ethnic intimidation bill effectively serve a legitimate State interest in safeguarding minority rights? In serving that interest, would the bill, as its proponents argue, punish only criminal conduct or would it, instead, effectively punish protected expression and beliefs?

The questions raised are novel in that the proposal itself is unique: There is no exact model against which it can be measured for constitutionality. Our research has failed to uncover any case law that unequivocally supports the constitutionality of the proposed bill. But we also have found no decision that clearly mandates its unconstitutionality.

Significantly, however, in various federal and state civil rights statutes, there does exist an analogue that seems to rest on much the same premises as does the proposed bill. These civil rights laws suggest that, in resolving the tension created by the conflicting rights and freedoms here, a balance may be struck under some extremely limited circumstances to favor protection of those who are most in need of such protection: racial, religious, and ethnic minorities.

In this context, as much as we might like to state a definitive, clear-cut opinion, the issue does not allow us to do so. As you know, our role is that of adviser, not that of a court or final arbiter.² Consequently, notwithstanding the seriousness of our concerns, the most we can advise is that the proposed bill—at least if amended to more closely track the civil rights analogy under which it may be justified—would not be clearly unconstitutional and, therefore, would be defensible. Put more

² See *First Continental Savings and Loan Ass'n, Inc. v. Director*, 229 Md. 293, 301 (1962) (Attorney General's opinion that a law is unconstitutional cannot make the law inoperative; only a court has the power to declare a statute invalid).

colloquially: given the closeness of the question here, "a tie goes to the runner".³

I

Overview of the Proposed Bill

The proposed ethnic intimidation bill would take criminal acts already punishable under state law—such as trespass or assault—and create a new offense different only in that it imposes a higher penalty for acts involving a specific motivation: that is, for otherwise criminal conduct committed "by reason of the race, religion or national origin of another person, or group of persons".

According to its proponents, the bill is aimed only at criminal conduct, not at constitutionally protected expression.⁴ It is, they contend, primarily designed to address a perceived rise in criminal activity that is uniquely based in racial, religious, or ethnic animus. As such, it is specifically intended to deter violent and injurious acts against particularly vulnerable groups—racial, religious, and ethnic minorities—by those who, as evidenced by recent events, apparently are not deterred by existing criminal penalties.

We note, however, that, as presently drafted, the proposed legislation would have a considerably broader effect: It would not just punish criminal acts aimed at the person or property

³ Most enactments of the General Assembly are entitled to a presumption of constitutionality. See *Salisbury Beauty Schools v. State Board of Cosmetologists*, 268 Md. 32, 48 (1973). On the other hand, when dealing with legislation that infringes upon rights secured by the First Amendment, the usual presumption of constitutionality does not apply; such legislation is presumptively unconstitutional. See *City of Mobile v. Bolden*, 446 U.S. 55, 76 (1980). But where, as here, even after subjecting a measure to the exacting scrutiny required by the First Amendment, there nevertheless remains a reasonable argument in support of that measure's constitutionality, that argument cannot be dismissed. In such rare cases, then, close calls should be resolved in favor of the measure.

⁴ Proponents of the bill principally rely on *United States v. O'Brien*, 391 U.S. 367 (1968), where a First Amendment attack on a statute prohibiting draft card destruction or mutilation was rejected.

of members of a minority group. Rather, it would also reach crimes involving injury to or defacement of public property or the private property of nonminorities, if motivated by the race, religion, or national origin "of another". Thus, those persons who deface a subway or park property with racial or religious epithets would be as guilty under the bill as those who deface a synagogue or damage the home of a black family.

II

Governing Principles

There are a number of basic principles that must be considered in measuring the proposed ethnic intimidation bill against the restrictions of the First Amendment.

The First Amendment, of course, protects speech. It does not, however, protect conduct that is without substantial communicative intent and impact. *Smith v. Goguen*, 415 U.S. 566, 586 (1974) (White, J., concurring). Even Justice Douglas would have permitted a prosecution for speech "brigaded with action". *Brandenburg v. Ohio*, 395 U.S. 444, 456-57 (1969) (Douglas, J., concurring) ("They are indeed inseparable and a prosecution can be launched for the overt acts actually caused.").

Unfortunately, the Supreme Court has not yet established a test for separating speech from conduct. See *Cowgill v. California*, 396 U.S. 371, 372 (1970) (Harlan and Brennan, JJ., concurring); *Korn v. Elkins*, 317 F.Supp. 138, 142 (D.Md. 1970); L. Henkin, *The Supreme Court—Forward*, 82 Harv.L.Rev. 63, 77 (1968). Some forms of conduct, such as peaceful picketing or flag-burning, are considered expressive and protected by the First Amendment. *Carey v. Brown*, 447 U.S. 455 (1980); *Street v. New York*, 394 U.S. 576 (1969). Other forms of conduct, however, such as disorderly conduct or arson, obviously are not considered expressive and protected.

One thing is clear though: Where governmental regulation is primarily aimed at conduct and only incidentally limits speech, and where "the governmental interest is unrelated to the suppression of free expression", then—but only then—does the government bear a lighter burden in justifying the restriction

in question. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). See also *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 540 n. 9 (1980).

There are certain other basic principles relevant to consideration of the proposed bill. The government cannot constitutionally punish mere intent, motive, belief, or even advocacy in the abstract. *Yates v. United States*, 354 U.S. 298 (1957). And a judge cannot impose a greater sentence on a defendant because of his or her beliefs, political views, or associations, no matter how repugnant they may be. *United States v. Brown*, 479 F.2d 1170 (2d Cir. 1973); *Woolsey v. United States*, 478 F.2d 139 (8th Cir. 1973); *United States v. Mitchell*, 392 F.2d 214, 217 (2d Cir. 1968) (Kaufman, J., concurring); *United States v. Rao*, 296 F.Supp. 1145, 1149 (S.D. N.Y. 1969).

However, a person's religious, political, or racial beliefs are no defense to a criminal act. *Reynolds v. United States*, 98 U.S. 145 (1879). And a state may not discriminate between two kinds of protected expression by favoring one and banning the other. *Carey v. Brown*, 447 U.S. 455 (1980); *Police Department of City of Chicago v. Mosley*, 408 U.S. 92 (1972).

Finally, the Supreme Court has declined to consider challenged state laws in a vacuum, but, in a variety of contexts, has assessed the burden imposed by such laws and the state's purported justification for them in conjunction with other relevant state statutes. See, e.g., *Maryland v. Louisiana*, 451 U.S. 725, 756 (1981) (Commerce Clause); *Mandel v. Bradley*, 432 U.S. 173, 178 (1977) (First Amendment); *McLaughlin v. Florida*, 379 U.S. 184 (1964) (Equal Protection). See also *Grace v. Burger*, 665 F.2d 1193, 1194 (D.C. Cir. 1981), *prob. juris. noted*, 457 U.S. 1131 (1982) (First Amendment).

Thus, in some cases, the Court will not accept an asserted justification for a statute under constitutional attack where that state interest is already being adequately served by existing law. For example, in *Grace v. Burger*, 655 F.2d at 1194, 1203, a federal statute flatly prohibiting all expressive conduct on Supreme Court grounds—including, conceivably, the wearing of "I Love America" T-shirts—was found to be repugnant to the First Amendment in light of a preexisting, narrowly drawn statute that was fully applicable to Supreme Court grounds. See also *McLaughlin v. Florida*, 379 U.S. at 196.

III

Is the Proposed Bill Aimed at Beliefs or Expression?

Even if a law is couched in terms of prohibiting "conduct", the statute might still offend the First Amendment if it is aimed at suppressing beliefs or expression.

In *United States v. O'Brien*, 391 U.S. 367 (1968), the defendant was prosecuted for destroying his draft card. He had done so by publicly burning it; he contended that this act, performed in protest of the Vietnam War, "was protected 'symbolic speech' within the First Amendment". 391 U.S. at 376. The Supreme Court rejected his contention. It relied on a distinction between "communication", which could not constitutionally be suppressed, and "noncommunicative conduct", for which O'Brien was convicted:

"The case at bar is therefore unlike [a prior case] where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful Since the statute [held unconstitutional in that prior case] was aimed at suppressing communication it could not be sustained as a regulation of noncommunicative conduct." 391 U.S. at 382.

Justice White's later concurrence in *Smith v. Goguen*, 415 U.S. 566, 583-90 (1974), makes this distinction clear. There, a Massachusetts law punished mutilation or defacement of the flag—acts that, Justice White admitted, clearly could be constitutionally punished. However, the statute did "not stop with proscriptions against defacement or attaching foreign objects to the flag. It also makes it a crime if one 'treats contemptuously' the flag of the United States". 415 U.S. at 588. According to Justice White:

"To violate the statute in this respect, it is not enough that one 'treat' the flag; he must also treat it 'contemptuously,' which, in ordinary understanding, is the expression of contempt for the flag To convict on this basis is to convict not to protect the physical integrity or to protect against acts interfering with the proper use of the flag, but to punish for

communicating ideas about the flag unacceptable to the controlling majority in the legislature." *Id.*

Distinguishing *O'Brien*, Justice White added:

"[D]estruction of draft cards, whether communicative or not, was found to be inimical to important governmental considerations. But the Court made clear that if the concern of the law was with the expression associated with the act, the result would be otherwise It would be difficult . . . to believe that the conviction in *O'Brien* would have been sustained had the statute proscribed only contemptuous burning of draft cards." 415 U.S. at 589-90.

Apparently, for Justice White, the addition of the word "contemptuously" to the statute was enough to betray a statutory purpose of suppressing expression. Such a purpose was not apparent in *O'Brien*. In *O'Brien*, the statute at issue on its face only prohibited draft card destruction or mutilation. 391 U.S. at 375. The defendant argued that a purpose to suppress expression was apparent from the existence of a regulation already prohibiting nonpossession of draft cards. The Court, however, noted that the statute and the regulation were not identical proscriptions and served different interests. 391 U.S. at 380-81.

The proposed ethnic intimidation law is not the same kind of facially neutral statute examined in *O'Brien*. Rather, it contains the added element of discriminatory motivation.⁵ Perhaps, some mindless destruction of property for racial or religious reasons, such as some juveniles engage in, might not be expressive in any sense.⁶ On the other hand, adult members of groups such as the Ku Klux Klan or the American Nazi Party might very well intend their criminal acts to be expressive.

⁵ Another feature of the proposed bill, as noted in Part I above, is its punishment of violators regardless of whether their misconduct actually injures the person or property of minorities. This feature, if not amended out of the bill, would also raise serious questions of whether the bill does not in fact aim at protected expression.

⁶ Of course, the bill proposes a criminal penalty that would not ordinarily apply to juveniles.

Certainly, it would be reasonable to suppose that, at least in some cases, the proposed ethnic intimidation bill would reach conduct, albeit unlawful conduct, intended to be expressive.

Another difference from *O'Brien* is that here the *identical* overt act is already punishable under the criminal law. This factor, coupled with the motivation element of the offense, raises a serious question of whether the proposed bill impermissibly singles out certain expression and, in doing so, takes direct aim at protected speech or beliefs.⁷

For example, if we agree with the proffered argument that the proposed ethnic intimidation bill punishes only conduct and does not single out expression, what then of a law designed to exact a more severe penalty than does existing law against a person who, for example:

(1) trespasses on the grounds of the Washington Monument, "by reason of" his or her opposition to nuclear warfare;

(2) hurls a stone at the Supreme Court Building, "by reason of" his or her opposition to the Court's abortion decisions;

(3) mutilates a draft card, "by reason of" his or her opposition to war;

(4) destroys a flag, "by reason of" his or her contempt for the government;

(5) practices polygamy, "by reason of" his or her religious beliefs;

(6) attacks a policeman, "by reason of" his or her opposition to police protection of the Ku Klux Klan.

In each of these cases, the act is already a crime, already punishable. All that is added is a certain motivation and, as a

⁷ It is also uncertain whether the proposal would even meet the *O'Brien* standard for gauging the constitutionality of restrictions reaching conduct mixed with speech. The existence of another criminal statute, a general one punishing the exact same overt act, would appear to undercut somewhat the State's justification for the measure and its assertion that no reasonable alternative exists. See *Grace v. Burger*, 665 F.2d 1193, 1203 (D.C. Cir. 1981), *prob. juris. noted*, 457 U.S. 1131 (1982). On the other hand, a court might be convinced that an additional deterrent to racially, religiously, or ethnically motivated violence against minorities is a sufficient justification, even under the *O'Brien* standard.

result of that motivation alone, a higher penalty. Would these too be constitutional?⁸

IV

Federal and State Civil Rights Laws

As much as we are troubled by the implications of viewing the ethnic intimidation bill as constitutional, we are equally concerned by the consequences of determining the bill to be unconstitutional. If the ethnic intimidation bill is unconstitutional, does it not follow that the constitutionality of various existing federal and state civil rights laws is cast into doubt? These laws, too, might well result in the application of penalties because of a person's motivation—a motivation that, in turn, will often be closely linked to protected beliefs.

To choose but one example, federal law contains the following prohibition:

“Whoever . . . by force or threat of force willfully injures, intimidates or interferes with . . . any person because of his race, color, religion or national origin and because he is or has been . . . enrolling in or attending any public school or public college . . . shall be fined not more than \$1,000, or imprisoned not more than one year, or both”. 18 U.S.C. §245(b)(2)(A).

This statute transforms conduct that would otherwise not violate federal law at all into a federal crime only if the person committing the act does so with a motivation often allied to beliefs—“because of [the victim's] race, color, religion or national origin”. Thus, where two people commit the same act of intimidation against school children, the one who does so without racist motivation commits no federal crime at all, while the one who acts with the specified motivation is guilty of a federal crime.

The proposed ethnic intimidation bill would make comparable use of motivation to distinguish between crimes of lesser

⁸ See note 10 below and accompanying text.

and greater severity. If the proposed bill's imposition of a higher penalty for acts involving a specific motivation were deemed unconstitutional, the same analysis might call into question the constitutionality of the federal act noted above and similar civil rights statutes.

To be sure, arguments can be advanced that would differentiate various of the civil rights laws from the proposed bill.⁹ A basic question remains, though: Does the Constitution permit some potential minimal impact on First Amendment rights in order to achieve greater protection of minority groups?

This question simply has no clear answer. One can support the ethnic intimidation bill in the belief that the Constitution permits this protective measure, just as it permits various civil

⁹ Some of these laws, enacted during Reconstruction, were intended to fill a gap created by the states' failure to enforce their own laws. See *United States v. Price*, 383 U.S. 787, 804 (1966). In practical terms, therefore, such laws do not increase the penalty for racially-motivated expression; they were simply intended to punish conduct that the states effectively failed to address. Moreover, these acts were not solely aimed at the exercise of private rights, but were in part designed to reach official action. See generally *Griffin v. Breckenridge*, 403 U.S. 88, 98-99 (1971). The proposed ethnic intimidation bill cannot be comparably justified.

Other such laws, particularly those requiring equal treatment in public accommodations, employment, and housing, do not necessarily turn on motivation. See *Washington v. Davis*, 426 U.S. 229, 238-39 (1976). Thus, for example, these laws almost universally exempt expressly certain intentional discrimination, such as that practiced by private clubs, small employers, and single-family dwelling owners. The ethnic intimidation bill defines all of its proposed offenses in terms of motivation and provides for no exceptions.

To the extent that some anti-discrimination laws do link liability to motivation, they necessarily do so as the only feasible means by which it is possible to distinguish improper activities (e.g., firing an employee because he or she is black) from a much larger universe of proper activities (e.g., firing employees for business reasons). The proposed bill obviously does not use motivation to make such a distinction between the proper and the improper, because all of the covered conduct is already unlawful.

Finally, Congress's general authority in the area of civil rights is specially augmented by the grants of specific authority in Section 2 of the Thirteenth Amendment and Section 5 of the Fourteenth Amendment. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). No such special constitutional authorization underlies the proposed bill.

In the final analysis, however, it is uncertain the extent to which these distinctions mandate a constitutional difference.

rights laws that turn on motivation. We cannot say that this view is necessarily wrong.

Indeed, theoretical support for such a view might lie in the very fact that it is both forthright and self-limiting: It relies significantly less on attempting to draw fine, and sometimes impossible, distinctions among conduct, motivation, beliefs, and expression—distinctions that might as readily be proffered to justify the extreme examples of possible First Amendment encroachments set out at the end of Part III above.

Instead, this position explicitly acknowledges and attempts to resolve the tension between two fundamental constitutional goals; protection of free speech and protection of historically abused minorities. Where, as here, a statute does not purport to overtly or directly affect expression—particularly where there is some doubt as to whether the statute, as a result of its motivation element, crosses the uncertain line between conduct, on the one hand, and expression and beliefs, on the other—a court might deem it proper to resolve the underlying tension in favor of the latter goal. *Cf. Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (Eleventh Amendment necessarily limited by the statutory enforcement provisions of the Fourteenth Amendment); *National League of Cities v. Usery*, 426 U.S. 833, 852 n. 17 (1976) (reserving issue of whether legislation enacted pursuant to Section 5 of the Fourteenth Amendment overrides the Tenth Amendment).

However, even if this view were ultimately adopted by the courts, we nevertheless believe that a measure such as the proposed ethnic intimidation bill would be judicially upheld only if: (1) the measure is demonstrably necessary to protect racial, religious, or ethnic minorities; and (2) the measure affects the maintenance of beliefs or the exercise of speech no more than is essential to achieve the intended protection of those minorities.¹⁰

In our view, a responsible reading of the Constitution can go no further.

¹⁰ To meet this standard, we believe that the proposed bill should be amended to punish only such criminal acts as are aimed directly at the person or property of minority group members. So limited, there is less chance of this bill being used as precedent to justify more far-reaching encroachments on the First Amendment such as those listed at the end of Part III above.

V

Conclusion

In summary, given the absence of definitive judicial precedent, we cannot predict with any confidence what a court might do with legislation such as this. We do not believe that existing judicial precedent mandates one conclusion or another. Under these circumstances—and given especially the existence of the long-unquestioned civil rights analogy—any doubts that we might have should, we believe, be resolved in favor of the measure: in sum, “a tie goes to the runner”.¹¹

It is not for the Attorney General of Maryland to disturb the theoretical underpinnings of over a century of federal civil rights legislation and several decades of state anti-discrimination laws. Accordingly, notwithstanding our doubts, we would not disapprove of the bill, if enacted, on constitutional grounds.

However, should this proposal go forward, we strongly recommend that the bill at least be amended to limit its scope—to punish only criminal acts directly aimed at the person or property of a member of a minority group. Such a limitation in the bill would more firmly place this proposal within the civil rights acts analogy and is more likely to convince a court that the legislation is not impermissibly aimed at protected expression.

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¹¹ See note 3 above.

CONSTITUTIONAL LAW—FREE SPEECH, PETITION, AND ASSEMBLY—PRIVATE PROPERTY—TRESPASS—SHOPPING CENTERS—STATE MAY ENACT LEGISLATION TO PERMIT EXPRESSIVE ACTIVITY ON SHOPPING CENTER PREMISES, SUBJECT TO OWNER'S RIGHT TO REASONABLY REGULATE SUCH ACTIVITY.

January 21, 1983

The Honorable Ida G. Ruben
Maryland House of Delegates

You have requested our opinion on the "constitutional possibilities for legislation" designed to protect the exercise of free speech and other First Amendment activities in privately owned shopping centers.

In 62 *Opinions of the Attorney General* 221 (1977), this Office concluded that the General Assembly may properly enact legislation that requires shopping center owners to permit, subject to reasonable regulation, expressive activity on their property. We believe that this conclusion is fully consistent with subsequent case law.

I

Background

As your letter points out, regional shopping malls "are fast becoming the dominant form of 'Main Street America' ". They are an ideal locale for those who seek to disseminate political and other ideas to large numbers of people.

However, unlike the traditional town center or community business block, a shopping mall is privately owned.¹ Your inquiry correctly observes that the issue is the balance to be struck between a property owner's legitimate interest in his or

¹ Often, they are enclosed structures, built entirely on private land. Common areas not leased to the tenants, such as parking lots, sidewalks, and roadways, are under corporate supervision and control. In litigation involving expressional, First Amendment activity on such privately owned property, the contested activity—usually the solicitation of signatures—usually takes place unobtrusively in a central courtyard area of the mall.

her private property and an individual's freedom of speech, assembly, and petition.

II

The First Amendment

As noted above, the issue of whether the First Amendment itself secures the right of individuals to engage in expressive activity in privately owned shopping centers was comprehensively addressed by this Office in 62 *Opinions of the Attorney General* 221 (1977).

As indicated in that Opinion, federal First Amendment principles offer little solace to individuals wishing to picket or demonstrate on private property—or, by extrapolation, to political candidates wishing to “meet the public” in a private shopping center forum. Such activity is not within the protective ambit of the First Amendment.

Nevertheless, as discussed more fully below, the Supreme Court has recognized that a state's “statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others”. *Hudgens v. National Labor Relations Board*, 424 U.S. 507, 513 (1976). Thus, in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Supreme Court held that state constitutional provisions, construed to authorize individuals to speak and petition in privately owned shopping centers, are constitutional as long as the exercise of those rights does not unreasonably interfere with the constitutional rights of the property owner. 447 U.S. at 78-81. *See also Oregon v. Hass*, 420 U.S. 714, 719 (1975); *Cooper v. California*, 386 U.S. 58, 62 (1967).

III

Applicability of State Constitutional Guarantees

Several state courts have confronted the issue of political activity within the confines of a privately owned shopping center. Building upon the Supreme Court's affirmation of the Califor-

nia Supreme Court's holding in *PruneYard*, successful challenges to the enforcement of trespass laws by shopping center owners are those predicated on state constitutional arguments.

A. *The PruneYard Case*

In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), a state's interest in strengthening the right of free expression guaranteed by its constitution and the state's authority to regulate the use of property under its police power were balanced against the shopping center owner's property rights under the Fifth and Fourteenth Amendments and its own free speech rights under the First and Fourteenth Amendments.

In *PruneYard*, California high school students, seeking support for their opposition to a United Nations resolution, distributed pamphlets and solicited signatures in a corner of a shopping center's central courtyard. Because this activity violated shopping center regulations, a security guard asked them to leave. The students subsequently sued to enjoin the center and its owner from denying them access. The California Supreme Court, reversing a lower court's refusal to issue an injunction, concluded that the California Constitution protects "speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned". *Robins v. PruneYard Shopping Center*, 592 P.2d 341, 347 (Cal. 1979).²

The owner claimed that its right to exclude others underlies both the Fifth Amendment guarantee against the taking of property without just compensation and the Fourteenth Amendment guarantee against the deprivation of property without due process of law. The Supreme Court acknowledged that, "to the extent that the California Supreme Court has interpreted the state constitution to entitle its citizens to exercise free expression and petition rights on shopping center property", a "taking" literally existed; it nevertheless noted that not every governmental injury to property is a "taking" in a constitutional sense. 447 U.S. at 82. See also *Armstrong v. United States*, 364 U.S. 40, 48 (1960); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

² Article 1, §2(a) of the California Constitution provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Article 1, §3 provides: "[P]eople have the right to . . . petition government for redress of grievances. . . ."

Then, considering such factors as the character of the expressional activity and its economic impact upon the shopping center owner's "reasonable investment-backed expectations", the Court concluded that the activity in issue would *not* unreasonably impair the value or use of the property as a shopping center. However, the Court emphasized that the shopping center retained the right to "restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions". 447 U.S. at 83. See *Robins v. PruneYard*, 592 P.2d at 347. See also *Loretto v. Teleprompter Manhattan CATV Corporation*, 458 U.S. 419 (1982); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981).

The Court also held that the petitioning activity in *PruneYard* did not deny the owners' property rights without due process of law. Equally fundamental to private property interests is a state's concern with reasonably regulating property to serve the public welfare, as long as such regulation is neither arbitrary nor capricious. Here, the California Supreme Court did not err in concluding that the restraint upon the use of the privately owned property was reasonably related to the objective sought to be obtained—the promotion of "more expansive rights of free speech and petition than those conferred by the Federal Constitution". 447 U.S. at 81. See *Robins v. PruneYard*, 592 P.2d at 345, 346.³

The final claim of the shopping center—that a private property owner has a First Amendment right not to be forced by the state to use his property as a forum for the speech of others—was also unsuccessful. The Supreme Court observed that the shopping center, by choice of its owner, is not limited to its personal use but, rather, is a business establishment open to the general public. Thus, views expressed by petitioners or pamphleteers are not likely to be associated with those of the owner.⁴ Moreover, the state dictates no specific message to be displayed, thus avoiding the danger of governmental discrimination.

³ Justices Powell and White stressed, however, that a different result might be reached should the facts involve an individual business or a single retail establishment. *PruneYard*, 447 U.S. at 96-101 (Powell and White, JJ., concurring).

⁴ The Court also pointed out that, by posting signs, the owners of shopping centers are free to publicly disassociate themselves from views of speakers or petitioners.

B. Subsequent State Decisions

Since the decision in *PruneYard*, at least two other states have recognized a state constitutional right for citizens to engage in speech and assembly activities in private shopping centers. *Cologne v. Westfarm Associates*, 442 A.2d 471 (Conn. Super. 1982); *Alderwood Associates v. Washington Environmental Council*, 635 P.2d 108 (Wash. 1981).⁵ See also *Commonwealth v. Tate*, 432 A.2d 1382 (Pa. 1981) (petitioning on grounds of private college); *State v. Schmid*, 423 A.2d 615 (N.J. 1980) (rights of free speech and assembly on private university campus).

These decisions each involve a careful balancing process. The right to engage in free speech activity on privately owned property—such as distributing literature, speechmaking, or soliciting signatures—is weighed against competing property interests.

A primary consideration is the nature and use of the private property. To the extent the shopping center is open to the public “by design, purpose, and dedication”, the property becomes the functional equivalent of a downtown area or other public forum, and the owner has a reduced expectation of privacy. *Cologne*, 442 A.2d at 484. As a corollary, speech activities are less threatening to the property's value. *Cologne*, 442 A.2d at 482; *Alderwood Associates*, 635 P.2d at 116.⁶

⁵ The constitutions of these two states have free speech guarantees similar to those of California. Article 1, §5 of the Washington Constitution provides: “Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.” Amendment 7 provides: “The first power reserved by the people is the initiative.”

Article 1, §4 of the Connecticut Constitution is virtually identical to Article 1, §5 of the Washington Constitution. Article 1, §14 provides: “The citizens have a right, in a peaceable manner, . . . to apply to those invested with the powers of government, for redress of grievances, or other proper purposes, by petition, address or remonstrance.”

⁶ We note that this local revival of the *Marsh* doctrine [see *Marsh v. Alabama*, 326 U.S. 501 (1946) (expressional activity on streets of company-owned town protected by First Amendment)] is in the context of strong state constitutional emphasis upon the protection of expressional activity. These state courts emphasize the growing importance of shopping malls, which frequently preempt the traditional town center as a community's most prominent public forum. *Cologne*, 442 A.2d at 481; *Alderwood Associates*, 632 P.2d at 117. See also note 8 below.

A second factor is the nature and purpose of the expressional activity. The exercise of free speech, especially that relating to governmental activity, is particularly favored in the balancing process. *Alderwood Associates*, 635 P.2d at 116.

Finally, the courts have considered the potential for reasonable regulation in balancing the respective interests of the parties. The property owner may regulate, in a reasonable and impartial fashion, the time, manner, and place of the free speech activity. *Cologne*, 442 A.2d at 483; *State v. Schmid*, 423 A.2d at 630.⁷

In those states that confer strong constitutional protection to the rights of free speech, petition, and assembly, the balance has uniformly been struck in favor of such expressional activity. Nevertheless, the court in each case has noted that the result might differ if the exercise of free speech unreasonably interferes with the countervailing constitutional rights of the property owner. *Cologne*, 442 A.2d at 484; *Alderwood Associates*, 635 P.2d at 117; *Robins*, 592 P.2d at 347. See also *Commonwealth v. Tate*, 432 A.2d at 1389, 1390; *State v. Schmid*, 423 A.2d at 633.⁸

IV

Maryland Law

A. Declaration of Rights

Article 40 of the Maryland Declaration of Rights provides:

“[t]hat the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege.”

⁷ In this area of analysis, weight may be given to the existence of convenient, feasible alternative means for individuals to engage in substantially the same expressional activity. *State v. Schmid*, 423 A.2d at 630.

⁸ For an application of these and similar considerations to migrant labor camps, see 67 *Opinions of the Attorney General* 64 (1982) (owners of camps may not prevent access by others to migrants residing in camps). The *Marsh* doctrine, as applied to migrant labor camps, is briefly reviewed in that Opinion, at 66 n. 4.

The Maryland Court of Appeals has recognized that, under Article 40, freedom of speech is both a right and a principle, rather than a mere "privilege". *Police Commissioner v. Siegel Enterprises, Inc.*, 223 Md. 110, 128 (1960); *Anderson v. Baker*, 23 Md. 531, 588 (1865). Nevertheless, it is by no means clear that this Article alone, as drafted, protects the exercise of political speech or assembly in the shopping centers of Maryland.

Unlike the courts in California, Washington, and New Jersey, the Maryland courts do not have a strong history of reading Article 40 of the Declaration of Rights more broadly than its federal counterpart, the First Amendment. *Cf. Alderwood Associates*, 635 P.2d at 113 (concluding that the Washington Constitution confers greater civil liberties than its federal counterpart); *State v. Schmid*, 423 A.2d at 625-27 (recognizing the New Jersey Constitution to be an alternative and independent source of individual rights). Rather, the Court of Appeals has indicated that Article 40 is to be construed with reference to the First Amendment: "We have said that the legal effect of the guarantee of freedom of speech and press ordained in Art[icle] 40 is substantially the same as that enunciated in the First Amendment. With this in mind, we have treated Art[icle] 40 as being in *pari materia* with the First Amendment." *Sigma Delta Chi v. Speaker of the Maryland House of Delegates*, 270 Md. 1, 4 (1973). *See also Freedman v. State*, 233 Md. 498, 505 (1964), *rev'd on other grounds*, 380 U.S. 51 (1965).

In light of the Supreme Court's conclusion that the First Amendment alone does not protect expressional activity on privately owned property, it is uncertain whether the Maryland courts would construe Article 40 as itself allowing shopping centers and malls to be used as forums for political speech.⁹

Furthermore, the language of Article 40 is precatory in nature, rather than mandatory.¹⁰ In 1864, an amendment was

⁹ Similarly, the Court of Appeals has construed Article 13 of the Declaration of Rights, which permits individuals to petition the General Assembly in a peaceable manner, to authorize only direct communication with the legislative body by way of petition or a statement of grievances. *Richards Furniture v. Board*, 233 Md. 249, 259 (1964). A general right to freely assemble in shopping centers or elsewhere has not yet been read into the Maryland Constitution or Declaration of Rights.

¹⁰ *But see* discussion in note 11 below.

proposed that would have augmented Article 40 with the clause "and no law shall ever be passed to curtail, abridge or restrain the liberty of speech or of the press". *Debates and Proceedings of the Maryland Reform Convention to Revise the State Constitution* 393 (1864) ("Debates"). After considerable discussion, the Article was modified to read "that every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for abuse of that liberty". *Debates* at 399. A subsequent amendment, to alter the words "may freely" to "ought to be allowed to", met with some resistance, but also passed.¹¹

B. Police Power

The General Assembly's ability to enact legislation or to amend existing law to promote expressional rights is predicated upon the police power of the State. The State, in the reasonable and nondiscriminatory exercise of its police power, has broad discretion to determine what the welfare of the public requires, and what measures are appropriate for the protection and promotion of the health, safety, morals, and general welfare of its inhabitants.

As noted above, in the interest of promoting individual rights of speech and assembly, the Supreme Court in *PruneYard* has expressly affirmed a state's ability, in the exercise of its police power, to "adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision". *PruneYard*, 447 U.S. at 83. The issue thus becomes one of social policy, which requires the balancing of a private landowner's interest in the unencumbered use of his or her property with the public interest in furthering individual rights of speech and assembly. *See also* 62 *Opinions of the Attorney General* at 225, 226.

¹¹ Here, Mr. Clarke remarked: "I regard 'ought to' to be equivalent to 'shall'. That phrase runs all through this bill of rights, and it has been over and over again asserted that 'ought to be' means 'shall be'. And construing the words in that way, I will vote 'aye'." *Debates* at 399. If this passing comment warrants reading Article 40 as an affirmative statement of individual rights, the Maryland courts might interpret Article 40 to authorize the political activity that you suggest. However, in the absence of clear precedent for such a construction, we hesitate to ascribe so broad a meaning to the provision.

V

Conclusion

The Supreme Court has upheld a state's inherent authority to adopt in its organic and general law individual liberties more expansive than those conferred by the United States Constitution. Several state courts have already interpreted their state law to confer speech and initiative rights greater than those guaranteed by the First Amendment, which alone does not afford the right to conduct expressive or political activity in privately owned shopping centers.

Accordingly, it is our opinion that it would be constitutional to adopt legislation to promote freedom of speech, assembly, and petition, even when that protection, to a limited extent, subordinates the interests of private property owners. Nevertheless, we note that any such legislation should permit the owner of a shopping center to fashion reasonable rules to control the manner, time, and place for the exercise of expressional rights on his or her property.

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

CONSTITUTIONAL LAW—FEDERAL CONSTITUTIONAL AMENDMENTS—GENERAL ASSEMBLY—STATE LEGISLATURE MAY WITHDRAW ITS PRIOR PETITION ASKING CONGRESS TO CALL A CONSTITUTIONAL CONVENTION.

January 31, 1983

The Honorable Arthur Dorman
Senate of Maryland

You have requested our opinion on whether it would be constitutional for the General Assembly to withdraw a petition asking Congress to call a constitutional convention. In 1975, the General Assembly passed Joint Resolution 77, petitioning Congress to prepare and submit to the states an amendment to the United States Constitution that would require a balanced federal budget or, alternatively, to call a constitutional convention to propose such an amendment. *See* Laws of Maryland 1975, at 3921–24. You have asked whether the General Assembly may now, by subsequent Joint Resolution, withdraw that petition.¹

For the reasons given below, we have concluded that such a withdrawal would be constitutional.²

¹ In your letter of inquiry, you refer to a “rescission” by the General Assembly of its petition to Congress. Although “rescission” and “withdrawal” have substantially the same meaning, we use the word “withdrawal” when referring to actions to nullify a petition for a constitutional convention and the word “rescission” when referring to actions to nullify state ratifications of proposed amendments. We believe that using these words in this distinct manner comports with widely accepted practice and would facilitate clarity in our discussion of the issue.

² We do not address the question of whether a state may withdraw a petition even *after* the requisite number of states have petitioned for a convention. That particular problem is not now before us.

I

Article V

The process of amending the Constitution is governed by Article V of the United States Constitution, the pertinent provisions of which are as follows:

“The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress[.]”

Under Article V, state legislatures participate in the amendment process in one of two distinct ways: (i) by petitioning Congress to call a constitutional convention to propose amendments; and (ii) by ratifying amendments proposed either by the Congress itself or by a convention called by Congress.

Until now, every amendment to the Constitution has been originally proposed by Congress. There have, however, been several attempts over the years by state legislatures to compel Congress to call a constitutional convention for various purposes. Since 1940, close to two-thirds of the states have passed resolutions urging conventions to propose amendments that would limit the federal income tax, reverse in part the Supreme Court's reapportionment decisions, and, spurring your present inquiry, require a balanced federal budget. *See generally* American Bar Association Special Constitutional Convention Study Committee, *Amendment of the Constitution by the Convention Method under Article V* Appendix B (1974) (referred to below as “ABA Report”). The ABA Report is reprinted in *Bills to Provide Procedures For Calling Constitutional Conventions For Proposing Amendments To The Constitution of the United States, On Application of the Legislatures of Two-Thirds of the States, Pursuant To Article V of the Constitution; Hearings on S3, S520, and S1710 Before The Subcomm. on the Constitution of the Senate Comm. on the*

Judiciary, 96th Cong., 1st Sess. 69–165 (1979) (referred to below as “1979 Hearings”).

In recent Years, there has been much debate as to whether a legislature can either rescind a previous ratification of an amendment or, as in your inquiry, withdraw a petition for a constitutional convention.³

II

Rescinding A Ratification

In 1979, we considered whether the General Assembly could rescind its ratification of a constitutional amendment. We concluded that it could not do so. 64 *Opinions of the Attorney General* 84 (1979).

Our conclusion rested primarily on our determination that, when a state legislature ratifies a constitutional amendment, it is not exercising its inherent legislative powers but is, instead, “exercising power as a ratifying assembly which is conferred by Article V of the United States Constitution”. *Id.* at 92. This determination, in turn, was based on our finding that the framers of the Constitution intended the two procedures provided for in Article V for state ratification of constitutional amendments—by a state convention or by the state legislature—to be functional equivalents.

Because the ratification of an amendment by a state convention would be the final, irrevocable act of such a convention, ratification by a state legislature similarly should be final and irrevocable. *Id.* at 85–87. We found support for our conclusion in judicial and Congressional precedents. *Id.* at 87–89, 90–92.

³ There is no question whatever that the General Assembly may withdraw that portion of its 1975 petition which requested Congress to itself propose a balanced budget amendment. Article V of the U.S Constitution does not address such a request at all.

III

Withdrawing A Petition

We reach a different conclusion, however, with respect to petition withdrawals. In our view, the General Assembly has the authority to withdraw a petition.

The crucial difference between ratifications and petitions is that a state ratification—whether by the state legislature or by a state ratifying convention—is that state's final action under Article V. By contrast, Article V relies entirely on the legislature in each state to initiate a constitutional convention through a commonplace legislative device—the petition. Although ratifications are the “final act by which sovereign bodies confirm a legal or political agreement”, petitions for a constitution convention are “merely formal requests by state legislatures to Congress” to call a convention. Bonfield, *The Dirksen Amendment and the Article V Convention Process*, 66 Mich. L. Rev. 949, 966–67 (1968). See also 1979 Hearings at 297–98 (prepared statement of professor William W. Van Alstyne, Duke University Law School); Fensterwald, *Constitutional Law: The States and the Amending Process—A Reply*, 46 A.B.A.J. 717, 719 (1960).

The one reported federal court case concerning a state legislature's petition for a constitutional convention strongly supports our characterization of this procedure. In *Petuskey v. Rampton*, 431 F.2d 378 (10th Cir. 1970), cert. denied, 401 U.S. 913 (1971), the U.S. Court of Appeals reversed a district court decision that had invalidated Utah's petition for a constitutional convention. Despite a federal statute that then barred single federal judges from overturning state statutes, the district court held that it was authorized to invalidate the petition.⁴ According to the judge, the action by a legislature in petitioning for a constitutional convention was a “national” rather than a “state” function and, therefore, the petition was not a statute. 431 F.2d at 383. The circuit court disagreed, holding that:

“The argument that [the action of petitioning Congress] was national, rather than state, does not persuade us. The national action, if any, would be the

⁴ At the time the *Petuskey* case was decided, only a three-judge panel could invalidate state statutes. 431 F.2d at 383.

calling of the convention [by Congress]. Utah has announced as a matter of state policy it favors such a call. Its action was that of a state and does not partake of a national flavor." *Id.*⁵

Because the General Assembly's withdrawal of a petition for a constitutional convention is not restricted by Article V, normal rules of legislative procedure apply. One of the most basic of these rules is that one legislature may not bind its successors by its legislative acts. See *Fisher v. State*, 204 Md. 307, 315 (1954); *Montgomery County v. Bigelow*, 196 Md. 413, 423 (1950). Thus, the General Assembly is free to withdraw a previous petition for a constitutional convention. Our conclusion is concurred in by virtually every constitutional scholar who has addressed this point.⁶

The position that a state may withdraw a petition to Congress is also supported by state and Congressional practice. Since 1940, eighteen state legislatures have withdrawn petitions concerning six different calls for a constitutional convention. *ABA Report* at Appendix B.⁷ Further, the Senate of the United States, by twice unanimously passing legislation that would provide for petition withdrawals, has recognized the

⁵ But see *Opinion of the Justices to the Senate*, 366 N.E.2d 1226, 1227-28 (Mass. 1977) (dicta).

⁶ In addition to the authorities cited above, see also 1979 *Hearings* at 308 (statement of Gerald Gunther, Professor of Law, Stanford University); *ABA Report* at 32-33; Sam Ervin, Jr., *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 Mich. L. Rev. 875, 889-90 (1968); *A Bill To Provide Procedures For Calling Constitutional Conventions For Proposing Amendments To The Constitution Of The United States, On Application Of The Legislatures Of Two-Thirds Of The States, Pursuant To Article V Of The Constitution; Hearings on S. 2307 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong. 1st Sess. 64 (1967) (testimony of Alexander M. Bickel, Professor of Law, Yale University); Staff Of House Comm. On The Judiciary, *Problems Relating To State Applications For A Convention To Propose Constitutional Limitations On Federal Taxes*, 82nd Cong., 2nd Sess. 13-14 (Comm. Print. 1952). But see Packard, *Rescinding Memorialization Resolutions*, 30 Chi.-Kent L. Rev. 339 (1952).

⁷ Although Maryland has never withdrawn a petition, the State Senate has passed, in three different sessions, resolutions for withdrawal of Maryland's petition for a constitutional convention to partially overturn the Supreme Court's reapportionment decisions. S.J.R. 29, 1971 *Journal of the Senate* 621; S.J.R. 14, 1968 *Journal of the Senate* 239; S.J.R. 64, 1967 *Journal of the Senate* 1642.

constitutionality of permitting states to withdraw constitutional convention petitions. *See* S. 1272, 93rd Cong., 1st Sess., 119 Cong. Rec. 22731–37 (1973); S. 215, 92nd Cong., 1st Sess., 117 Cong. Rec. 36804–06 (1971). *See also* Graham, *The Role of the States in Proposing Constitutional Amendments*, 49 A.B.A.J. 1175, 1177 (1963) (claim that the requisite thirty-four states had petitioned Congress to call a constitutional convention to limit federal income taxes was rejected by Senate Judiciary Committee staff, in part because twelve of those states had withdrawn their petitions).

IV

“Political Question” Doctrine

Although we are confident of our legal conclusion that the General Assembly is empowered to withdraw its petition to Congress—and that the courts would so hold were the General Assembly’s action challenged—we must add one note of caution.

An argument can be made that determining the validity of a petition withdrawal is ultimately a “political question” on which Congress, and not the courts, would be the final arbiter. In our 1979 Opinion on ratification rescissions, we concluded that a determination on the validity of such rescissions is probably such a political question. 64 *Opinions of the Attorney General* at 89. Since that Opinion, however, a federal district court has ruled that the validity of ratification rescissions is a justiciable issue on which the courts may rule—and not a political question. *Idaho v. Freeman*, 529 F.Supp. 1107, 1123–46 (D.Idaho 1981), *vacated as moot*, 459 U.S. 809 (1982).

Regardless of whether the validity of ratification rescissions is justiciable, the fact that, since 1798, federal courts have consistently ruled on other Article V issues demonstrates that at least some Article V issues are justiciable and not political questions. *See, e.g. Kimble v. Swackhamer*, 439 U.S. 1385 (Rehnquist, J., Circuit Justice), *appeal dismissed*, 439 U.S. 1041 (1978); *Leser v. Garnett*, 258 U.S. 130 (1922); *Hawke v. Smith*, 253 U.S. 221 (1920); *Hollingsworth v. Virginia*, 3 U.S. 378 (1798); *Dyer v. Blair*, 390 F.Supp. 1291 (N.D. Ill. 1975); *Trombetta v. Florida*, 353 F.Supp. 575 (M.D. Fla. 1973).

Indeed, the only court that has been faced with the political question doctrine in the context of a legislature's petition for a constitutional convention held that a series of Supreme Court cases supported the justiciability of the issues before it. *Petuskey v. Rampton*, 307 F.Supp. 235, 250 (D. Utah 1969), *rev'd on other grounds*, 431 F.2d 378 (10th Cir. 1970), *cert. denied*, 401 U.S. 913 (1971). Thus we cannot assume that the validity of a withdrawal of a legislature's petition is solely a matter for Congress to decide.⁸

V

Conclusion

In summary, we conclude that the General Assembly may withdraw its 1975 petition asking Congress to call a constitutional convention to propose a balanced budget amendment. If the courts rule on this issue, we believe they will determine that such a withdrawal is permitted by Article V of the United States Constitution. Unlike ratification of a proposed constitutional amendment, the General Assembly's petition for a constitutional convention is a legislative act that may be withdrawn.

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⁸ For discussions of the applicability of the political question doctrine to the withdrawal issue, see Ripple, *Judicial Review of Congressional Determinations Pursuant to the Convention Method of Amending the Constitution*, reprinted in 1979 *Hearings* at 431-35; 1979 *Hearings* at 503 (prepared statement of Laurence H. Tribe, Professor of Law, Harvard University); ABA Report at 20-25; Note, *Proposed Legislation on the Convention Method of Amending the United States Constitution*, 85 Harv.L.Rev. 1612, 1634-41 (1972).

CONSTITUTIONAL LAW—EQUAL RIGHTS AMENDMENT—
“STATE ACTION”—INSURANCE—RATEMAKING—SEX-
BASED CLASSIFICATIONS—ERA APPLIES ONLY TO STATE
ACTION—INSURANCE RATE SETTING IN MARYLAND IS
NOT STATE ACTION.

March 7, 1983

The Honorable Helen L. Koss
Maryland House of Delegates

On behalf of the Constitutional and Administrative Law Committee, you have requested our opinion as to whether Article 46 of the Maryland Declaration of Rights, the Maryland Equal Rights Amendment, prohibits the use of sex as an insurance rate setting classification.

For the reasons given below, it is our opinion that: (i) the Equal Rights Amendment applies only to sex-based discrimination by the State itself or by entities whose activities so involve the State as to amount to “state action”; and (ii) the process by which insurance rates are set in Maryland does not amount to “state action”. Therefore, the Equal Rights Amendment is inapplicable to the establishment of such rates.¹

I

Scope of the Equal Rights Amendment

This State’s Equal Rights Amendment (“ERA”), adopted in 1972 as Article 46 of the Maryland Declaration of Rights, provides that: “Equality of rights under the law shall not be abridged or denied because of sex.” In interpreting the ERA, the Court of Appeals has said that the language is “clear and unambiguous” and “can only mean that sex is not a factor”. *Rand v. Rand*, 280 Md. 508, 511–12 (1977). *See also Condore v. Prince George’s County*, 289 Md. 516, 524 (1981). The essence of the ERA is as follows:

“[S]ex is not a permissible factor in determining the legal rights of women, or of men. This means that

¹ We advised you of our conclusion by letter dated February 22, 1983. This Opinion explains the reasons underlying our conclusion.

the treatment of any person by the law may not be based upon the circumstances that such person is of one sex or the other. The law does, of course, impose different benefits or different burdens upon different members of society. That differentiation in treatment may rest upon particular characteristics or traits of the persons affected, such as strength, intelligence, and the like. But under the Equal Rights Amendment the existence of such a characteristic or trait to a greater degree in one sex does not justify classification by sex rather than by the particular characteristic or trait." Brown, Emerson, Falk, and Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 Yale L.J. 871, 889 (1971) (cited with approval in *Rand v. Rand*, 280 Md. at 512).

However, it is the view of this Office that the ERA only prohibits discrimination by the State itself or by private persons if the State is responsible for their actions. "[T]he activities of private organizations not affected with State action do not appear to be within the ambit of [the ERA]." 63 *Opinions of the Attorney General* 246, 250 (1978). See also 65 *Opinions of the Attorney General* 103 (1980).

While there have been no decisions by the Maryland courts regarding this interpretation, our view that private organizations unaffected by "state action" are not subject to the ERA is supported by the case law in Pennsylvania, Texas, and Washington. See *Murphy v. Harleysville Mutual Ins. Co.*, 422 A.2d 1097 (Pa. Super. Ct. 1981); *Lincoln v. Mid-Cities Pee Wee Football Assoc.*, 576 S.W.2d 922 (Tex. Ct. App. 1979); *MacLean v. First N.W. Indus. of America, Inc.*, 600 P.2d 1027 (Wash. Ct. App. 1979), *rev'd on other grounds*, 635 P.2d 683 (Wash. 1981).

II

Insurance Regulation under the State Action Doctrine

Because the Equal Rights Amendment only applies to "activities . . . affected with State action", the core issue here is whether the mechanism used by the State of Maryland for reg-

ulating the setting of insurance rates by insurers constitutes "state action". It is our view that the degree of governmental regulation is insufficient to constitute state action and, therefore, the ERA is inapplicable.²

A. *Insurance Ratemaking*

Under the Maryland Insurance Code, Article 48A of the Maryland Code, insurers themselves formulate the rates they will charge and the classifications of risk that underlie those rates. Each insurer must "file with the [Insurance] Commissioner every manual, . . . rating schedule or rating plan and every other rating rule . . . which it proposes to use". Article 48A, §242(d)(1). The Insurance Commissioner has no more than 60 working days to review a filing for compliance with the ratemaking principles set out in the Code. Article 48A, §242(d)(6) and (7). A rate filing becomes effective after this review period unless "the Commissioner finds that a filing does not meet the requirements of this section". Article 48A, §242(f)(1).

B. *State Action Doctrine*

The Supreme Court recently summarized the well-established legal principles for determining whether or not a state's regulation of a private business entity amounts to state action:

"First, . . . '[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment.' . . . The complaining

² We caution that our conclusion in this regard is limited to the particular regulatory scheme in question. Because an analysis of whether or not "state action" is present turns significantly on factual and legal details, the resolution of the issue in one context is not necessarily controlling in another. "[T]he answer to the question of whether or not private conduct has been transformed into state action can change as circumstances change." *Jackson v. Associated Hospital Services of Philadelphia*, 414 F.Supp. 315, 322 (E.D.Pa. 1976) (discussed in Part II C below).

party must also show that 'there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.' . . . The purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains. The importance of this assurance is evident when, as in this case, the complaining party seeks to hold the State liable for the action of private parties.

"Second, although the factual setting of each case will be significant, our precedents indicate that a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such a significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State. . . . Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment." *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982) (emphasis in original).³

Several courts have applied these broad principles to the situation in which a state official approves privately formulated rates. The leading case in this area is *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

Jackson involved an action against a privately-owned electric utility company regulated by the Pennsylvania Public Utility Commission. The asserted "state action" was the Commission's approval of a provision in a general tariff application that permitted the utility to discontinue service on reasonable notice for nonpayment of bills. The Supreme Court noted that the

³ In *Blum*, the Supreme Court held that, because a Medicaid-funded nursing home was not a state agency, and because its private doctors, not state officials, had made the decision at issue, the home's change in the level of care afforded a patient was not state action. This finding was made even though the physicians' "independent" decision was made in accordance with state guidelines.

tariff filing became effective within 60 days unless disapproved by the Commission.

In holding that this form of regulation of the utility by the Commission was insufficient to establish state action, the Supreme Court stated that:

"The nature of governmental regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body. *Approval by a state utility commission of such a request from a regulated utility, where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into 'state action'.* At most, the Commission's failure to overturn this practice amounted to no more than a determination that a Pennsylvania utility was authorized to employ such a practice if it so desired. Respondent's exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so 'state action' for purposes of the Fourteenth Amendment." 419 U.S. at 357 (emphasis added).

C. State Action and Insurance Ratemaking

Given the analysis in *Jackson*, it is not surprising that efforts to find an element of "state action" in the rate setting activities of private insurers have been rejected. In *Broderick v. Associated Hospital Services*, 536 F.2d 1 (3rd Cir. 1976), the issue presented to the court was "whether the mere requirement that Pennsylvania approve Blue Cross and Blue Shield contracts and the rates to be charged their subscribers is sufficient to constitute 'state action'". 536 F.2d at 2. The court answered this question in the negative, finding an "absence of proof that Pennsylvania has 'put its own weight' [quoting

Jackson] on the side of the privately initiated . . . practice". 536 F.2d at 8.⁴

In *Jackson v. Associated Hospital Services of Philadelphia*, 414 F.Supp. 315 (E.D. Pa. 1976), *aff'd* 549 F.2d 795 (3rd Cir.), *cert. denied*, 434 U.S. 832 (1977), the United States District Court for the Eastern District of Pennsylvania rejected a similar claim brought against the state and various private insurers that offered maternity benefit plans. The plaintiffs sought to equate insurance regulation with "state action". In this case, the Insurance Department had investigated whether certain restrictions on maternity insurance coverage constituted sex discrimination. The court stated:

"If we read *Jackson* [*v. Metropolitan Edison Co.*] as holding that when a state regulatory agency focuses upon and investigates particular activities of a regulated business, this focus itself may tip the balance in favor of finding state action, we could perhaps find state action in this case. We do not so read *Jackson*, however. . . . Viewing the facts of this case in light of [*Jackson*], we cannot say that Pennsylvania had, either overtly or covertly, placed its *imprimatur* on the insurance practices complained of. Certainly it has not 'put its own weight on the side of the proposed practice by ordering it.' Rather it has challenged the practices and is currently investigating them. Under these circumstances and re-

⁴ The court noted that the gravamen of the plaintiffs' complaint was the enrollment practices of the insurers, which imposed restrictions on married women. There was no evidence in the record to show that these practices had ever been presented for approval. However, the court did not say that state approval of these practices would have been sufficient state action. Rather, as in *Jackson*, the court apparently would still have required proof that "Pennsylvania has 'put its own weight' on the side of the privately initiated enrollment practice". 536 F.2d at 8. The Chief Judge concurred, and he emphasized that, in his opinion, "mere state approval of the practice or policy of the kind presented herein does not constitute state action, at least where the challenged practice or policy was not instituted or prompted by the State". 536 F.2d at 9.

lying on *Jackson*, we find, at least to date, no involvement of the State in the challenged insurance activities sufficient to transform those activities into state action." 414 F.Supp. at 321-22.⁵

In *Life Ins. Co. of North America v. Reichardt*, 591 F.2d 499 (9th Cir. 1979), female disability insurance policyholders sought relief against the California State Insurance Commissioner and various insurers. Under California law, insurers must submit policy forms to the Commissioner for approval, and policies may be issued only if the Commissioner approves them or if the Commissioner takes no action during a 30-day review period. The court found no state action:

"The Commissioner's act of approving a form of policy does not necessarily result in discrimination. The state does not command the discrimination. . . . The Commissioner has placed no official imprimatur on the practice of which [the plaintiff] complains." 591 F.2d at 502.

Finally, in *Murphy v. Harleysville Mutual Ins. Co.*, 422 A.2d 1097 (Pa. Super. Ct. 1980), *cert. denied*, 454 U.S. 896 (1981), the issue of state action in automobile insurance rate setting was raised in the context of both the Fourteenth Amendment and the Pennsylvania Equal Rights Amendment. The Superior Court of Pennsylvania described a statutory scheme for the regulation of insurance that closely parallels Maryland's: the insurers are regulated by statute; insurance rates must conform with the law; the established rates are filed with the Commissioner of Insurance and become effective unless expressly disapproved within 60 days; and state law prohibits unfair discrimination in rate setting but permits differences between classes based on loss experience and underwriting and actuarial justifications. 422 A.2d at 1101-02. The court concluded as follows:

⁵ In both *Broderick v. Associated Hospital Services of Philadelphia* and *Jackson v. Associated Hospital Services of Philadelphia*, the complaints contained a pendent state claim for violation of the Pennsylvania Equal Rights Amendment. Both courts declined to reach the issue.

"[T]he degree of governmental regulation in the instant proceeding is analogous to that found insufficient in *Jackson v. Metropolitan Edison Co.*, *supra*. . . . Moreover, the challenged acts were carried out by the private party on its own initiative under the provisions of the Rate Regulatory Act which permits the fixing of rates based upon measured risk of loss, but were not required by the Commonwealth. Although the Commissioner of Insurance failed to overturn the rate structure filed by appellee, this failure is analogous to that present in *Jackson* and 'amounted to not more than a determination that [appellee] was authorized to employ such a practice if it so desired.' . . . The fact that appellee elected to exercise the choice permitted by statute does not, under the *Jackson* rationale, transform its election into state action." 422 A.2d at 1102.⁶

D. Summary

In light of the analysis in the cases discussed above, we conclude that the involvement of the State of Maryland in the setting of insurance rates is insufficient to constitute "state action".

III

Conclusion

In summary, it is our opinion that: (i) the Maryland Equal Rights Amendment, Article 46 of the Declaration of Rights, applies only to sex-based discrimination by the State itself or

⁶ A finding of state action was made in *Stern v. Massachusetts Indus. and Life Ins. Co.*, 365 F.Supp. 433 (E.D.Pa. 1973). However, that case predates the 1974 decision of the United States Supreme Court in *Jackson v. Metropolitan Edison Co.* and was not followed or even cited in *Jackson v. Associated Hospital Services of Philadelphia*, a case in which the same District Court found no state action.

by entities whose activities so involve the State as to amount to "state action"; and (ii) the process by which insurance rates are set in Maryland does not amount to "state action". Therefore, the Equal Rights Amendment is inapplicable to the establishment of such rates.⁷

STEPHEN H. SACHS, *Attorney General*

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Chief Counsel

Opinions and Advice

⁷ Because we conclude that the ERA is inapplicable, we need not address whether it would prohibit sex-based insurance classifications if it were applicable. Cf. 65 *Opinions of the Attorney General* 103 (1980) (creation of State debt for benefit of single-sex college does not violate ERA); 65 *Opinions of the Attorney General* 108 (1980) (creation of shelter for homeless women does not violate ERA).

Moreover, we do not address the circumstances under which the Insurance Commissioner might determine that the use of sex as a classification criterion is "unfairly discriminatory" under the Insurance Code. See Article 48A, §242(c)(2) of the Maryland Code. In this regard, a lower court in Pennsylvania has held that the Commonwealth's Insurance Commissioner "did not exceed his statutory authority" when he "look[ed] to [Pennsylvania's Equal Rights Amendment] as an aid in interpreting his powers and duties under [the regulatory act]". The court thus affirmed the Commissioner's finding that the use of sex as a classification basis for automobile insurance rate differentials was "unfairly discriminatory" under the Pennsylvania statute. *Hartford Accident and Indem. Co. v. Insurance Commissioner*, 442 A.2d 382 (Pa. Commw. 1982). However, the court did not hold that the Equal Rights Amendment required this construction of the regulatory statute. We understand that this case is pending on appeal to the Pennsylvania Supreme Court. [Editor's Note: The lower court's decision has since been affirmed in *Hartford Accident and Indem. Co. v. Insurance Commissioner*, 482 A.2d 542 (Pa. 1984).]

Similarly, we do not address here whether sex-based insurance classifications might violate Article 49B, §8 of the Maryland Code, which prohibits persons licensed or regulated by the Department of Licensing and Regulation from discriminating against any person "because of the . . . sex . . . of [that] person". That particular issue is now pending in a proceeding before the Human Relations Commission. We understand that the applicability of the ERA to insurance classifications is also an issue in that proceeding. Because the Attorney General is not the legal advisor to the Human Relations Commission, this Opinion is not intended to mandate a particular result in the pending proceeding.

CONSTITUTIONAL LAW—EQUAL RIGHTS AMENDMENT—
EQUAL PROTECTION—TAXING FOR “PUBLIC PURPOSE”—
ASSESSMENTS AND TAXATION—COUNTRY CLUB PREFER-
ENCE—“STATE ACTION”—STATUTES—SEVERABILITY—
PROPERTY TAX PREFERENCE FOR SINGLE-SEX COUNTRY
CLUBS IS UNCONSTITUTIONAL.

August 3, 1983

The Honorable Stewart Bainum, Jr.
Senate of Maryland

You have requested our opinion on the constitutionality of a portion of Article 81, §19(e) of the Maryland Code, which authorizes a preferential property tax assessment for country clubs under certain conditions. Your question particularly concerns those provisions of §19(e)(4) that impose a prohibition against sex discrimination by all country clubs receiving this preferential assessment, except those clubs “whose facilities are operated with the primary purpose, as determined by the Attorney General, to serve or benefit members of a particular sex”.

In addressing your question, we have considered in detail the following specific issues:

1. Is there sufficient “state action” present in §19(e)(4) so that the State’s Equal Rights Amendment, Article 46 of the Declaration of Rights, is violated by the exclusionary membership and guest policies of a single-sex country club that receives the property tax preference?

2. Does authorization of a tax benefit for a single-sex country club violate the requirement of Article 15 of the Declaration of Rights that the State may tax and spend only for a “public purpose”?

3. Does §19(e)(4) violate Article 24 of the Declaration of Rights by invidiously or irrationally discriminating between two classes of country clubs—i.e., between (i) single-sex clubs, which are permitted to discriminate on the basis of sex, and (ii) all other clubs, which are prohibited from discriminating on the basis of sex?

The central issue is not whether a single-sex country club in Maryland may continue to close its doors to one sex. The issue is whether Maryland’s country club tax preference scheme un-

constitutionally involves the State in subsidizing sex discrimination.

For the reasons given below, we think that it does. It is our opinion that implementation of §19(e)(4) does involve "state action" and, as a consequence, the exclusionary practices of single-sex country clubs receiving tax benefits under §19(e) violate Article 46 of the Declaration of Rights, the Equal Rights Amendment. Although less certain, this authorization of a tax benefit for a single-sex country club might well also violate Articles 15 and 24 of the Declaration of Rights.

I

The Statute: Its History and Operation

A. *Overview of Statute*

The General Assembly enacted the country club tax preference—Article 81, §19(e)—as an emergency measure in 1965. See Chapter 399, Laws of Maryland 1965 (effective April 8, 1965). The Preamble to the 1965 Act declares:

"[I]t [is] in the general public interest that [country club] uses should be encouraged in order to provide open spaces and provide recreational facilities and to prevent the forced conversion of such country clubs to more intensive or different uses as a result of economic pressures caused by the assessment of country club land and improvements at a rate or level incompatible with the practical use of such property for country clubs."

The mechanics of the tax preference have changed very little since 1965. The State Department of Assessments and Taxation is authorized to make "uniform agreements" with country clubs "relative to the assessment and taxation of lands actively devoted to use as a country club". §19(e)(1). The initial period to be covered by such an agreement is at the option of the club, but may not be less than 10 years. §19(e)(5). Should the State or the club desire to continue the arrangement, extensions may be agreed to for additional 5-year increments. §19(e)(14). Without an extension, the agreement expires.

If a club enters into an agreement, its land is assessed for purposes of current property tax liability on the basis of its use as a country club and not "as if subdivided or used for any other purpose". §19(e)(2). At the same time, the property also is assessed on the basis of its highest and best use—i.e., as if subdivided or more intensely developed. §19(e)(3). However, taxes attributable to the greater assessment are deferred and do not become payable unless the property ceases to be used as a country club, is conveyed to a new owner unwilling to abide by the agreement, or fails to meet the statutory definition of "country club". §19(e)(7), (8), and (9). If any of these events occurs, a club will be liable for up to 10 years of deferred taxes. §19(e)(7).

An analysis of these provisions indicates that the §19(e) tax preference, quite unlike the typical tax exemption [*cf. Kimball-Tyler v. Baltimore City*, 214 Md. 86, 97 (1957)], constitutes a surrender of a portion of the State's taxing power and—under the Contract Clause of the United States Constitution, which prohibits the states from "impairing the obligation of contracts"—creates a contractual obligation that the State is not free to impair at will. *See* Opinion No. 79-074 (December 14, 1979) (unpublished).

B. *The Discrimination Ban*

When it was first enacted in 1965, §19(e) contained no ban against discrimination by any of the country clubs receiving the tax preference. Those restrictions were only added to §19(e)(4) some 9 years later, by Chapter 870, Laws of Maryland 1974.

As introduced, the 1974 legislation would have absolutely prohibited all clubs that receive the tax preference from discriminating in membership or guest privileges on the basis of race, color, creed, national origin, or sex. To enforce this anti-discrimination requirement, the statute charges the Attorney General with determining whether a club is engaging in any prohibited discrimination. In connection with a discrimination investigation, the Attorney General is authorized to go to court for issuance of a subpoena for club records. Before the Attorney General may make a determination that a club has engaged in discriminatory practices, the Attorney General

must afford a hearing to the club. If a "pattern of discrimination" is then determined to exist, the Attorney General must try to resolve the matter by consent agreement. If the club violates that consent agreement or refuses to enter into a consent agreement, the Attorney General must then issue a cease and desist order. Only if that cease and desist order has been violated is the club's preferential assessment placed in jeopardy: upon violation of the order, the tax advantage will be withdrawn until the Attorney General determines that the club is again in compliance with the law.

Before passage of the 1974 legislation, an amendment to the bill was adopted, adding the following exemption for single-sex clubs:

"The provisions of this [sub]section with respect to discrimination in sex shall not apply to any club whose facilities are operated with the primary purpose, as determined by the Attorney General, to serve or benefit members of a particular sex"

Thus, as finally enacted, the Attorney General was given somewhat anomalous duties. In most cases, the Attorney General is called upon to investigate and determine whether discrimination exists, so as to trigger the statute's antidiscrimination enforcement scheme. In the case of single-sex clubs, however, the converse is true: the Attorney General is called upon to investigate and determine whether discrimination exists to such a degree—i.e., whether the "primary purpose" of the club is to serve members of a particular sex—as to justify an outright exemption from this antidiscrimination enforcement scheme. In most cases, then, the Attorney General is required to investigate prohibited discriminatory practices, for the purpose of taking *punitive action*; in the case of single-sex country clubs, however, the Attorney General is asked to certify that the club's "primary purpose" is, in effect, a discriminatory one, for the purpose of authorizing a continued *tax preference*.

C. Prior Implementation of Exemption

In February of 1978, the then Attorney General reached just such a conclusion in an investigation of Burning Tree Country Club in Montgomery County. As a result of that investigation,

he concluded that Burning Tree, a single-sex country club, "complied" with the statutory exemption. (To date, Burning Tree is the only single-sex country club in Maryland that has qualified for a tax preference under the exemption.)

His findings stressed that women were not allowed to enter or use clubhouse facilities—described by Burning Tree as being devoted solely to golf and "its attendant pastimes"—and that no other events, to which women might be expected to be invited, were ever held at the club. *See* Determination Letter from Jon F. Oster, Deputy Attorney General, to M. Everett Parkinson, President of Burning Tree Country Club (February 15, 1978).¹ In concluding that this single-sex club "complied" with the statutory exemption, the former Attorney General adopted the club's position that "[t]he only way the club could be 'operated' to serve both sexes would be by building a substantial addition to the clubhouse which would have the effect of requiring major changes in the location of the first tee, the ninth tee and the eighteenth green". *Id.*

II

State Action under the Equal Rights Amendment

A. Introduction

Maryland's Equal Rights Amendment ("ERA") was adopted in 1972 as Article 46 of the Declaration of Rights. It provides that: "Equality of rights under the law shall not be abridged or denied because of sex." This Office has consistently viewed the words "under the law" as indicating that the constitutional prohibition applies only to (i) governmental entities and (ii) private organizations affected by "state action". *See* 68 *Opinions of the Attorney General* 164, 165 (1983); 65 *Opinions of the Attorney General* 103, 103 (1980); 63 *Opinions of the Attorney General* 246, 250 (1978).

Clearly a single-sex country club receiving a tax preference under §19(e) is not a governmental entity. However, we believe

¹ An exception to the no-women rule permitted wives to purchase Christmas gifts for their husbands from the club's pro shop.

it to be equally clear that, under §19(e), such an entity is affected by "state action".²

B. *Elements of State Action*

There are probably as many approaches to defining "state action" as there are cases and litigants in this evolving area of constitutional law. For example, the courts of some states, in enforcing state constitutional provisions, have felt free to find "state action" more readily than the Supreme Court has done in treating cases arising under the Fourteenth Amendment to the United States Constitution. *See, e.g., Sharrock v. Dell Buick-Cadillac, Inc.*, 45 N.Y.2d 152, 160 (1978).³ Other courts have suggested that the test for finding "state action" may vary, depending on the circumstances. For example, a court might be more inclined to find state action in situations involving race or sex discrimination than in those involving some other constitutional violation. *See, e.g., Writers Guild of America, West, Inc., v. FCC*, 423 F.Supp. 1064, 1135-36 (C.D. Cal. 1976). Similarly, a court might be more likely to find state action in disputes where governmental agencies or officials have themselves been sued than in those where only private parties are involved. *See, e.g., Naranjo v. Alverno College*, 487 F.Supp. 635, 637 (E.D. Wis. 1980).

We need not here consider how a Maryland court might respond to suggestions that a more lenient test be applied to the ERA. In our view, even if the court were to apply the more recent, relatively stringent Fourteenth Amendment "state action" tests of the Supreme Court, it would find state action in §19(e)(4).

² On at least two prior occasions, this Office reserved decision on whether state action would be found in the discrimination practices of a tax exempt private club. *See 63 Opinions of the Attorney General* 246 (1978); *56 Opinions of the Attorney General* 468 (1971).

³ Indeed, even in applying the Fourteenth Amendment, the leading Maryland case on "state action" similarly seems to be more willing to find state action than have the federal courts. *Compare Statom v. Board of Commissioners*, 233 Md. 57 (1963) (furnishing free use of public school buildings to segregated boys' club violates Fourteenth Amendment) with *Golden v. Biscayne Bay Yacht Club*, 530 F.2d 16 (5th Cir. 1976), *cert. denied*, 429 U.S. 872 (1976) (preferential city lease with discriminatory yacht club not sufficient "state action").

In a trio of cases decided in June of 1982, the Supreme Court attempted to clarify its past, often conflicting precedents on state action and to formulate a new set of rules to guide that judicial inquiry. See *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Blum v. Yaretsky*, 457 U.S. 991 (1982).

In *Lugar v. Edmondson Oil*, the majority opinion distilled the entire "state action" analysis into two distinct inquiries:

1. Whether the alleged constitutional deprivation was caused by the exercise of some right or privilege created by the state, by a rule of conduct imposed by the state, or by a person for whom the state is responsible; and
2. Whether the party charged with the deprivation is a person who may be fairly said to be a "state actor". 457 U.S. at 938.

The first inquiry is relatively straightforward. The second inquiry, in contrast, is ordinarily the more difficult and complex one, because mere action by a private party pursuant to a statute is not, without "something more", sufficient to characterize that party as a "state actor". 457 U.S. at 940.

In its trio of "state action" cases, the Supreme Court clarified the tests for finding this "something more". For example, the Court held that a state financial subsidy to a private entity does not, of itself, make the decisions of that entity "state action". *Rendell-Baker v. Kohn*, 457 U.S. at 841. Similarly, the Court said that mere state regulation of a private entity does not, of itself, supply that "something more" needed for "state action". *Blum v. Yaretsky*, 457 U.S. at 1005.

However, the Court also said that any one of the following tests, standing alone, *does* give rise to "state action":

1. A state can be held responsible for a private decision when it has exercised "coercive power" or has provided such "significant encouragement", either overt or covert, that the choice must in law be deemed to be that of the state. *Blum v. Yaretsky*, 457 U.S. at 1005.
2. State action can exist when a private party performs a "public function" that has traditionally been

the exclusive prerogative of the state. 457 U.S. at 1012-13.

3. Extensive and detailed state regulation of a private entity can amount to state action if there is a sufficiently "close nexus" between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself. 457 U.S. at 1006.

4. A "symbiotic relationship" between the state and a private entity can constitute state action when the state profits from the discriminatory conduct. *Rendell-Baker v. Kohn*, 457 U.S. at 843-44.⁴

C. Application

In our view, each of the applicable inquiries and tests is satisfied when applied to §19(e)(4).

First, the source of the country club tax preference is state law. Moreover, it is state law that, while generally imposing a ban against sex discrimination for clubs receiving the preference, nevertheless exempts a club from that ban if the State, acting through the Attorney General, makes an affirmative determination that the club operates with the primary purpose of denying its facilities entirely to members of one sex. Thus, the "privilege" both to fully discriminate against members of one sex and, at the same time, to receive a substantial tax benefit⁵

⁴ The first three of these "tests" have been denominated, respectively, the "state compulsion" or "state encouragement" test, the "public function" test, and the "nexus" test. See *Lugar v. Edmondson Oil*, 457 U.S. at 940. The fourth—the "symbiotic relationship" analysis—has been said to be one branch of the "nexus" test. *Id.* It is clear that only one of these tests need be satisfied for state action to be found. *Id.*

⁵ For example, in 1981, the Burning Tree Country Club was given a preferential assessment that was based on a "country club use" value of \$1,027,570 rather than on the property's "highest and best use" value of \$11,467,500. Under a "highest and best use" valuation, Burning Tree would have been required to pay the State a tax of \$156,008.92. As a result of the "country club use" valuation, however, it paid only \$25,696.17—a net tax savings, for but one year, of \$130,312.75.

is "created by" state statute. And because this privilege is triggered by a finding that state authorities are required by law to make, a tax-supported club that discriminates against members of one sex becomes "a person for whom the State is responsible". *Lugar v. Edmondson Oil*, 457 U.S. at 938.

Second, although the State might not be "coercing" clubs into sex discrimination, it is certainly providing "significant encouragement" to that end. Clubs that are willing to close their facilities *entirely* to members of one sex receive both a tax advantage and freedom from governmental scrutiny of their membership and guest practices. In contrast, clubs not willing to make such a total commitment to sex discrimination are subject to the ban and, on violation of that ban, to loss of their tax advantage.

And this tax advantage is not a typical tax exemption involving "mere passive state involvement". Cf. *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 691 (1970).⁶ Under §19(e), a qualifying country club receives more than a mere tax

⁶ We recognize, as we must, that the recent Supreme Court "state action" decisions—e.g., *Blum v. Yaretsky*, 457 U.S. 991 (1982)—appear to undercut the vitality of older, lower court cases that have struck down or questioned as unconstitutional the grant of a tax exemption to racially discriminatory private or social clubs on the basis of a very limited "state action" inquiry. See *Pitts v. Dept. of Revenue, State of Wisconsin*, 333 F.Supp. 662 (E.D. Wis. 1971); *McGlotten v. Connally*, 338 F.Supp. 448 (D. D.C. 1972); *Falkenstein v. Dept. of Revenue, State of Oregon*, 350 F.Supp. 887 (D. Ore. 1972), appeal dismissed for lack of jurisdiction, 409 U.S. 1099 (1973); *Cornelius v. Benevolent Protective Order of Elks*, 382 F.Supp. 1182, 1187 (D. Conn. 1974); *Brunson v. Rutherford Lodge No. 547, B. & P. O. of Elks*, 319 A.2d 80 (N.J.Sup. Ct. 1974). See also *Opinion of the Attorney General for State Tax Commission, State of Idaho* (Feb. 13, 1973). But see *Eaton v. Grubbs*, 329 F.2d 710, 713 (4th Cir. 1964) (a tax exemption by itself may not impose upon the recipient the restrictions of the Fourteenth Amendment, but may attain significance when viewed in combination with other attendant state involvement).

We do note, however, that in *Bob Jones University v. United States*, 461 U.S. 574, ——— [103 S.Ct. 2017, 2032] n. 24 (1983), the Supreme Court did reserve for decision the issue of whether the denial of tax exempt status to racially discriminatory schools was required by the equal protection component of the Fifth Amendment. Because we find "state action" in so many other features of §19(e), we need not decide whether the conferral of a tax preference, by itself, to a sexually discriminatory private club constitutes "state action" under the ERA.

advantage. It benefits from the State's constitutionally-enforceable obligation not to substantially and without justification impair its agreement to confer that tax advantage; as such, it receives a surrender of a portion of the State's sovereign power to tax. See Opinion No. 79-074 (December 14, 1979) (unpublished). Cf. *Kimball-Tyler v. Baltimore City*, 214 Md. 86, 97 (1957). Even the General Assembly could not, without justification, abrogate such agreements. This is no ordinary tax break. It is the State putting its entire weight behind the purposes and policies of, and the terms and conditions set forth in, §19(e).

Third, as the Preamble to the 1965 Act makes clear, the country club tax preference seeks to impose a "public function"—namely, land use control—on the recipients of the tax preference. This function, which is akin to the zoning power, has traditionally and exclusively been associated with the powers and prerogatives of government.

Fourth, we think it obvious that a "close nexus" exists between the regulatory activities of the State and the sexually discriminatory practices of a single-sex country club. This is so because the single-sex country club can obtain its tax advantage *only* upon a State determination that it is in fact discriminating to the fullest extent possible. When a state statute that promotes a state program of open space preservation also provides a special exemption from a state tax on the very condition that certain discriminatory practices have been certified to by the state's attorney general, it is the State that is acting. That the statutory scheme commands the Attorney General to identify and endorse discriminatory practices which the State constitution expressly forbids to the State itself—and that the State fisc is employed to underwrite these practices⁷—are ironies that only serve to highlight the State's pervasive participation in these practices.

Finally, as the former Attorney General's determination in the Burning Tree Country Club investigation indicates, §19(e)(4) fosters a "symbiotic relationship" between the single-sex club and the State. Maryland "profits" not only from the open space for which it bargained but, uniquely in the case of a single-sex club, it might well obtain its full share of that

⁷ See note 5 above.

open space only *because* the club discriminates against one sex or another. For example, as expressed in the 1978 Determination Letter to Burning Tree Country Club, "[t]he only way th[at] club could be 'operated' to serve both sexes" would be by cutting into the club's open space.⁸

D. Conclusion

Under Maryland's Equal Rights Amendment, once state action is found to exist, *no justification* is sufficiently compelling to sanction sex discrimination. See *Rand v. Rand*, 280 Md. 508 (1977).⁹

On the basis of the various factors described above, we have no doubt that state action exists here: A single-sex country club receiving a tax preference under Article 81, §19(e) violates the ERA when it excludes the opposite sex as members and guests; and the State violates the ERA when, pursuant to that same state statute, it encourages, endorses, and benefits from such discrimination.¹⁰

⁸ See text accompanying note 1 above.

⁹ We have recognized an exception to the ERA where state classifications are premised on a characteristic unique to one sex. See, e.g., 65 *Opinions of the Attorney General* 108 (1980). See also Article 49B, §5(b), which exempts from the State Public Accommodations Law those facilities "which are uniquely private and personal in nature, designed to accommodate only a particular sex". We do not believe that golf and "its attendant pastimes" (see text accompanying note 1 above) fit that description.

¹⁰ You have also asked whether §19(e)(4), as applied to the discriminatory practices of a single-sex country club, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Unlike the Maryland ERA, the Fourteenth Amendment will permit sex discrimination under certain circumstances. Cf. *Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding male-only draft registration). However, a party seeking to uphold a statute or practice classifying individuals on the basis of sex and challenged under the Fourteenth Amendment must carry the burden of showing an "exceedingly persuasive justification" for the classification. *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981) (quoting *Personnel Administrator of Mass. v. Feeny*, 442 U.S. 256, 273 (1979)). That burden is met only by showing that the classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives". *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142, 150 (1980). In light of this standard, a single-sex country club receiving a tax

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III

Public Purpose and Article 15 of the Declaration of Rights

Your second inquiry focuses on the long-standing Maryland constitutional prohibition against taxing and spending for anything but a public purpose, see *Wilson v. Board of County Commissioners*, 273 Md. 30 (1974), and the similar prohibition against conferring a tax exemption for other than a public purpose, see *Baltimore City v. Starr Church*, 106 Md. 281 (1907).

At one time, it was thought that such a prohibition was contained in the Due Process Clause of the Fourteenth Amendment and the corresponding provisions of the Maryland Constitution. See *Frostburg v. Jenkins*, 215 Md. 9, 14 (1957); 61 *Opinions of the Attorney General* 497, 498 (1976). It is now clear, however, that the prohibition is firmly rooted in Article 15 of the Declaration of Rights, which provides that all taxes levied by the State shall be "for the support of the general State Government" and that taxes are to be imposed "with a political view for the good government and benefit of the community". See *Snowden v. Anne Arundel County*, 295 Md. 429 (1983).

The purpose of superimposing such a constitutional requirement on the granting of tax exemptions is to ensure that a tax exemption is "made in the advancement of the interests of the whole people", 71 *Am.Jr.2d State and Local Taxation* §307 (1973), and to prevent "the burden of supporting the government from falling upon some individuals to the exclusion or exemption of others", *Wells v. Hyattsville*, 77 Md. 125, 138 (1893).

preference under §19(e) could be expected to argue that it is serving an important governmental purpose by preserving open space and that the "discriminatory means" it employs—i.e., the exclusion of one sex—is "substantially related" to the goal of maintaining the open space because building locker rooms and rest rooms for members of the opposite sex would diminish the club's open space. See 1978 Determination Letter to Burning Tree Country Club, cited at text accompanying note 1 above. Without for a moment accepting the validity of such a justification, we do note that it involves the kind of factual question that a court, rather than an Attorney General's Opinion, is designed to resolve. For this reason, and because of our conclusion that the practices of single-sex clubs under §19(e)(4) already violate the State ERA, we refrain from expressing any view on the federal constitutional issues.

This constitutional doctrine, however, does not preclude the State from exempting persons from taxes when "State policy and considerations beneficial to the public justify it". *Baltimore City v. Starr Church*, 106 Md. 281, 285 (1907). Moreover, as the Court of Appeals has indicated: "What is a public purpose for which public funds may be expended is not a matter of exact definition; it is almost entirely a matter of general acceptance." *Frostburg v. Jenkins*, 215 Md. 9, 16 (1957). Indeed, the line of demarcation "is not immutable or incapable of adjustment to changing social and economic conditions that are properly of public and governmental concern". *Id.*

An exercise even more difficult than marking the ever shifting boundaries of the "public purpose" doctrine is trying to determine whether a tax exemption serves a "public purpose" when that exemption advances one governmental objective while, at the same time, contravening some other public policy. In *Marchant v. Mayor and City Council of Baltimore*, 146 Md. 513, 521 (1924), the Court of Appeals said that "[t]he public character of the use to which [certain] harbor structures are devoted is not affected by the fact that they may not all be made available for the indiscriminate use of the public". See also *Lerch v. Maryland Port Authority*, 240 Md. 438, 450 (1965). And, in *Frostburg v. Jenkins*, 215 Md. 9, 17 (1957), the Court said that whether private benefits outweigh public benefits "seems to us to be primarily a legislative rather than a judicial problem".¹¹

Nonetheless, in *Wilson v. Board of County Comm'rs*, 273 Md. 30, 51-52 (1974), the Court took upon itself to consider the question of whether a subsequent "private purpose" undermined the public purpose otherwise served by the enactment in question. And, in *Lodge #817, Order of Elks v. Supervisor*, 292 Md. 533 (1982), the Court held that, as a matter of statutory construction, a fraternal organization was not entitled to

¹¹ The *Frostburg* decision also noted that "[t]he fact that incidental benefits are passed on to [a private corporation] is not fatal, if there are substantial public benefits to support the action taken." 215 Md. at 17. Nevertheless, "[i]t is also recognized that, with due regard to the legislative prerogative, the courts have a duty to determine whether the particular use is within the scope of the constitutional powers." 215 Md. at 16.

a tax exemption for a golf course used only by its members. In so doing, the Court said:

“Undoubtedly, as to those members of the Lodge who use the golf course, its purpose is a benevolent one. But the benevolence does not flow to the general public which is prohibited from using the facility. In a nutshell, the golf course is not used, exclusively, primarily or otherwise, for benevolent purposes in the public interest within the contemplation of §9(e) [of Article 81] To afford a tax exemption to the Lodge’s golf course in the circumstances of this case would be to require the taxpayers of this State to subsidize private recreational activities in which they are forbidden to participate.” 292 Md. at 539.¹²

Finally, the effect of the Supreme Court’s decision in *Bob Jones University v. United States*, 461 U.S. 574 (1983), cannot be ignored. The Court there held that, *as a matter of statutory construction*, a racially discriminatory private educational institution was not entitled to a federal income tax exemption and, to qualify for an income tax exemption, a private organization “must demonstrably serve and be in harmony with the public interest. The institution’s purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred.” 461 U.S. at _____ [103 S.Ct. at 2029].¹³

In essence, your inquiry comes down to whether the Court of Appeals, in making the necessary constitutional inquiry under Article 15 of the Declaration of Rights, would adopt as a guide the *Bob Jones* formulation of the “public purpose” test, as there fashioned in the dual context of federal income tax law

¹² The *Order of Elks* opinion relied, *inter alia*, upon *Brunson v. Rutherford Lodge No. 547, B. & P.O. of Elks*, 319 A.2d 80 (N.J. Super. 1974), which struck down a tax exemption for a segregated club on constitutional grounds. See note 6 above.

¹³ In an attempt to limit the far reaching impact of the Court’s decision, the majority emphasized that a tax benefit was to be denied only where there was “no doubt” that the organization’s activities violated fundamental public policy. 461 U.S. at _____ [103 S.Ct. at 2032].

and the common law concept of charity.¹⁴ All we can say for certain is that there is *dicta* in Maryland cases that can be read either way. But, if the *Bob Jones* test were engrafted onto the Maryland constitutional doctrine that requires a public purpose for the exercise of the taxing and spending powers, we have no doubt that tax support for a single-sex country club—at least where, as here, its discriminatory practices are supported by state action—would offend Article 15 of the Declaration of Rights.¹⁵

Until the Maryland courts provide further guidance as to the appropriate test to be applied, we can only state that a serious question exists as to the constitutionality of §19(e)(4) under Article 15 of the Declaration of Rights.

IV

Equal Protection and Article 24 of the Declaration of Rights

Implied in Article 24 of the Declaration of Rights is an equal protection guarantee similar to that found in the Fifth and Fourteenth Amendments to the United States Constitution.¹⁶

¹⁴ Clearly, §19(e) was designed to serve an important public purpose: the preservation of open space. However, if the *Bob Jones* rationale were extended to Article 15, this would not conclude the inquiry—no more than did the assertion by the racially discriminatory school in *Bob Jones* that it served an educational purpose. In our view, if *Bob Jones* governed the Article 15 “public purpose” test, the public policy embodied in the ERA—which “was intended to, and did, drastically alter traditional views of the validity of sex-based classifications”, *Rand v. Rand*, 280 Md. 508, 516 (1977)—would be violated by the exclusionary policies of a tax-supported single-sex country club.

¹⁵ At this time, we express no view on whether a state tax exemption or tax advantage that does not contain the particular “state action” features manifested in §19(e)(4) would violate Article 15 if conferred upon a private club that discriminates on the basis of sex or race.

¹⁶ Article 24 provides:

“That 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.”

Its purposes are to "protect the individual from unwarranted, unfair, burdensome, discriminatory, and arbitrary legislation", *Daniel Loughran Co. v. Lord Baltimore Candy Co.*, 178 Md. 38, 45 (1940), and to prevent public authorities from administering the law "with an evil eye and an unequal hand", *Sports Daily v. Public Service Commission*, 179 Md. 355, 358 (1941).

The Court of Appeals has fashioned a three-prong test for gauging the constitutionality of State classifications that are challenged as violative of equal protection:

1. When a statute creates a distinction based upon "suspect" criteria (such as race) or infringes upon a fundamental right, the statute is examined with "strict scrutiny" and its discriminations must be justified by a "compelling state interest".

2. When a statute impacts upon "sensitive" or "quasi-suspect" criteria (such as illegitimacy), affects important personal interests, works a significant interference with liberty, or denies a benefit vital to the individual, the statute receives "heightened scrutiny" and its classifications must be justified by a "fair and substantial relation" to the statute's objectives.

3. Remaining statutory classifications, including those affecting economic regulation, are presumed constitutional and will not be invalidated unless wholly lacking a "rational basis".

See *Attorney General v. Waldron*, 289 Md. 683, 703-17 (1981).

In our view, the statutory classification created by §19(e)(4) must be measured by the last—most lenient—of these categories of equal protection review, permitting invalidation of the classification only if it lacks a "rational basis": The classification drawn by §19(e)(4) distinguishes between two types of country clubs, subjecting them to differing regulatory and economic burdens. Such a classification (unlike the exclusionary practices of any one club) is not of itself a distinction based on sex or any other "suspect" or "quasi-suspect" criterion. And those clubs that are prohibited by the State from discriminating on the basis of sex cannot be said to have some "fundamental" or "important personal" right to be free to discriminate. Hence, §19(e)(4) would not be subject to "strict" or "heightened scrutiny" but, rather, to "rational basis" review.

This standard of review, although in many respects deferential to legislative enactments, is by no means toothless. And the Court of Appeals, much more than the Supreme Court, has been willing to invalidate State statutes on equal protection grounds for lack of a rational basis. See, e.g., *Attorney General v. Waldron*, 289 Md. 683 (1981); *Wheeler v. State*, 281 Md. 593 (1977); *Davidson v. Miller*, 276 Md. 54 (1975); *Bruce v. Director, Chesapeake Bay Affairs*, 261 Md. 585 (1971).

In the case of §19(e)(4), even given the presumption of constitutionality to be accorded the statute, we are unable to say with any conviction that the Court of Appeals would uphold it. Section 19(e)(4) draws what appears to be a jarring distinction between two types of country clubs receiving the tax preference: (i) those that operate their facilities with the primary purpose of serving or benefiting members of a particular sex, but are not subject to any prohibition against sex discrimination; and (ii) those that open their facilities to members of both sexes, and are subject to the prohibition against sex discrimination.

As we have noted earlier, the language of §19(e)(4) does not suggest that this differing treatment of clubs is somehow rooted in considerations of personal privacy unique to a single-sex club.¹⁷ Nor would the deliberate lack in such clubs of adequate facilities, such as ladies' restrooms, furnish a rational basis: Otherwise, *any* club receiving a tax preference could escape the ban against sex discrimination simply by shutting down a restroom and converting its facilities to the use of a single sex.

In our view, it is difficult to conceive of a rational basis for a statutory classification that (i) scrutinizes those least likely to discriminate on the basis of sex, but (ii) immunizes and rewards those who engage in the most extreme form of such discrimination. For this reason, we believe it quite possible that the classification created by §19(e)(4) would be found by the courts to be without a rational basis and, therefore, violative of equal protection.

¹⁷ See note 9 above.

V

Severability

If a portion of §19(e)(4) is unconstitutional, the question naturally arises as to whether the exemption for single-sex country clubs can be severed from the remainder of the statute or whether the entire 1974 Act (Chapter 870, Laws of Maryland 1974)—which added the basic, underlying ban against discrimination—must also fall. The ease with which that question can be answered depends upon which theory a court employs to strike down the questioned provision or practices.

Clearly, if only a discriminatory *practice* of a single-sex club is enjoined, the statute itself would not fall. Moreover, if a court were to find that the State's subsidy of private discrimination violated the "public purpose" requirement of Article 15 of the Declaration of Rights, we think it extremely unlikely that the court would throw out the entire antidiscrimination scheme to vindicate such a principle. Thus, the question of severability would really arise only if the single-sex club exemption in §19(e)(4) were successfully challenged as violative, *on its face*, of Article 24 or Article 46 of the Declaration of Rights.

In Maryland, there is a presumption that the General Assembly intends its enactments to be severed if possible. *O. C. Taxpayers v. Ocean City*, 280 Md. 585, 600 (1977). *See also* Article 1, §23 of the Maryland Code. When the dominant purpose of an enactment may largely be carried out notwithstanding the statute's partial invalidity, courts will generally hold the valid portions to be severable and enforceable. *Shell Oil Co. v. Supervisors*, 276 Md. 36, 49 (1975).

If these were the only principles governing our inquiry, there would be no doubt that the remainder of §19(e)(4), including its general ban against sex discrimination, would be permitted to stand. Clearly, the remaining provisions of §19(e)(4) can be given independent effect. And the fact that the 1974 Act was introduced without the questionable exception reinforces a conclusion that the offending provision is not essential to the successful operation of the legislation. *See C. Sands, Sutherland Statutory Construction* §44.13 (1973).

There is, however, another principle governing the law of severability that gives us pause. That is, if a statute contains

both a general provision and an invalid exception (and if the legislature has not indicated otherwise), courts may refuse to sever the invalid exception when the remaining general provisions would impose a duty, sanction, or substantial hardship on the otherwise excepted class. See *Cities Service Co. v. Governor*, 290 Md. 553, 576 (1981); *State v. Schuller*, 280 Md. 305 (1977).

For a variety of reasons, however, we conclude that this principle of nonseverability does not warrant destruction of the entire 1974 Act:

First, despite the addition of the questioned exception to §19(e)(4), we do not believe that the General Assembly intended that all tax-supported country clubs subject to a measure of government regulation were to have a carte blanche to invidiously discriminate. This is particularly so where the antidiscrimination provisions of §19(e)(4) were enacted only 15 months after the ratification of the State ERA and at a time when a sizeable number of courts had concluded that tax support for discrimination was unconstitutional.¹⁸

Second, in resolving severability issues arising from a statute containing a discriminatory underinclusion, courts have often extended the coverage of the statute to the formerly exempted class, particularly where the legislation is especially important and the exempted class is narrow—a situation that clearly exists here. See Note: *Extension versus Invalidation of Underinclusive Statutes: A Remedial Alternative*, 12 Col. J. of L. and Soc. Prob. 115 (1975).

Finally, compliance with the sex discrimination ban contained in §19(e)(4) might not even be, in a legal sense at least, properly characterized as a “burden” for single-sex country clubs. Because of the many elements of state action present in §19(e), all country clubs receiving a tax preference under that section—including single-sex clubs—may already be subject to a constitutional duty, under the ERA, not to discriminate on the basis of sex.

For all of these reasons, it is our opinion that, if the exemption for single-sex country clubs were stricken, only that provi-

¹⁸ See cases cited in note 6 above.

sion would be severed and the balance of §19(e)(4) would remain in effect.

VI

Conclusion

In summary, it is our opinion that Article 81, §19(e)(4), as applied to single-sex country clubs, violates Article 46 of the Declaration of Rights, the Equal Rights Amendment. Although less certain, this exemption for single-sex country clubs might well also violate Articles 15 and 24 of the Declaration of Rights.

As you know, our opinion alone does not render the exemption inoperative or suspend its effectiveness. *See Barnes v. Pinkney*, 236 Md. 564 (1964); *First Continental Savings & Loan Ass'n v. Director*, 229 Md. 293 (1962). On various occasions, when we have concluded that a statutory provision is unconstitutional, we nevertheless have considered it appropriate to advise affected State agencies not to implement or enforce the provision in question. For a number of reasons, we think a different approach is warranted here:

First, the burden of change stemming from our opinion here would fall not, as is usually the case, upon a State agency, but upon a private entity—the club that is a recipient of the tax preference.

Second, as constitutionally offensive as the practices of such a club may be, the club does have an existing contractual agreement with the State—an agreement that is bound up in the constitutional prohibition against the impairment of contracts.¹⁹ Moreover, the only single-sex club now receiving a property tax preference under §19(e)(4) has been relying upon a 1978 determination of the Attorney General with respect to its discriminatory practices and its entitlement to the tax preference.

¹⁹ See discussion in the last paragraph of Part I A above.

Third, as long as the exemption for single-sex clubs remains in §19(e)(4), the elaborate administrative machinery for enforcing the discrimination ban virtually ensures that an unnecessarily long time period will elapse before the State would be in a position to remedy the club's discriminatory practices or withdraw its tax preference.²⁰

Accordingly, given the club's reliance on this Office's 1978 determination of its entitlement to the tax preference, coupled with the need to resolve the issues raised here in a definitive and prompt fashion, and because the discriminatory practices fostered by §19(e)(4) should not be allowed to continue, we have concluded that it would be appropriate in this instance to bring a declaratory judgment action, seeking a declaration by the courts that the exemption in Article 81, §19(e)(4) is, as we have concluded, unconstitutional.

STEPHEN H. SACHS, *Attorney General*

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AVERY AISENSTARK

Chief Counsel

Opinions and Advice

Editor's Note: Since the issuance of this Opinion, the Court of Appeals held that the Attorney General lacked authority to bring a declaratory judgment action challenging the portion of Article 81, §19(e)(4) that provided a tax exemption for single-sex country clubs. *State v. Burning Tree Club*, 301 Md. 9 (1984). However, the constitutionality of the provision was also challenged by private plaintiffs; in that action, the Circuit Court for Montgomery County held the provision to be unconstitutional. *Stewart Bainum, et al. v. State of Maryland, et al.*, Circuit Court for Montgomery County, Equity No. 85-397; *appeal pending*, Court of Appeals of Maryland, September Term 1984, No. 119.

²⁰ See discussion in the second paragraph of Part I B above.

CORRECTIONS

REGIONAL DETENTION CENTERS—COUNTIES—"GOVERNING BODY"—PROCEDURES TO ESTABLISH REGIONAL CENTERS—AUTHORITY TO REDESIGNATE LOCAL FACILITY AS REGIONAL CENTER—NEED FOR MULTI-COUNTY ARRANGEMENT—EFFECT OF SENTENCING LIMITATION.

December 6, 1983

Mr. Gary R. Blake

Director

Department of Correction and Rehabilitation

In your former capacity as President of the Maryland Community Correctional Administrators Association, you requested our opinion concerning the establishment and use of regional detention centers in accordance with Article 27, §705 of the Maryland Code. Specifically, you posed the following questions:

1. How does a county or Baltimore City establish a regional detention center?
2. May facilities that existed prior to the enactment of Article 27, §705 be converted into regional detention centers?
3. Does any law permit a court to sentence an offender to a regional detention center for a period in excess of 18 months—the limit specified in Article 27, §705F?

For the reasons given below, we have concluded as follows:

1. A county may establish a regional detention center, to be operated pursuant to some form of multi-county agreement, by following the procedures otherwise generally applicable in that jurisdiction for (i) the construction of a local detention facility or (ii) the change in use of a local facility.
2. An existing local facility may be redesignated as a regional detention center under an appropriate arrangement between or among the counties that the region comprises.
3. No law permits a judge to commit an offender to a regional detention center for more than 18 months.

I

Background

Article 27, §705 of the Maryland Code governs the establishment of regional detention centers. These centers are defined as "facilities operated by one or more counties for the purpose of detention and confinement". Article 27, §705A.1.¹

The statute is quite general in its description of how these centers may be established:

"The governing body of one or more counties may establish and maintain a regional detention center and may enter into a written agreement with each other as to allocation of responsibility, construction, operation, maintenance and appointment of personnel. The State may, but need not be, a party to any such agreement." Article 27, §705B.

The statute then provides for State financial assistance in the following circumstances: "Upon the determination by a county or counties to build or maintain a regional detention center, application may be made to the Commissioner of Corrections for financial assistance for the construction or enlargement of the facility." Article 27, §705D.1.

Another provision limits the terms of sentences in these centers. Article 27, §705F, provides as follows:

"Notwithstanding any other provisions of the Annotated Code of Maryland, a judge of the circuit court for any county or any judge of the District Court may sentence a convicted offender to a regional detention center[,] if the sentence to be then executed is for a period of not more than 18 months and the court imposing the sentence is located within a jurisdiction which is a party to the operation and maintenance of the facility to which the person is sentenced."

¹ Baltimore City is a "county" for purposes of this statute. Article 27, §705A.2. *See also* Article 1, §14.

Your letter states that some courts are sentencing offenders to terms in local jails "for lengthy periods of time (as much as 10 years or more) The very lengthy sentences are rare[;] however, sentences of two, three and four years are commonplace in some jurisdictions in the State." Dissatisfied with these sentencing practices, some local jurisdictions have considered establishing regional detention centers in order to avail themselves of the 18-month term limitation in §705F.²

II

Procedure to Establish Regional Detention Centers

A. *Meaning of "Governing Body"*

Under Article 27, §705B, "[t]he governing body of one or more counties may establish and maintain a regional detention center". The term "governing body" is not defined in the statute.

However, the term has elsewhere been defined. For example, for purposes of park administration, the Code provides as follows:

"The term 'governing body' as used herein means mayor and city council, by whatever name known, of a municipal corporation, board of county commissioners or county council, and shall mean and include Baltimore City." Article 25, §223 of the Maryland Code.

See also, e.g., §§3-201, 3-302(b), and 8-312(a) of the Health-General Article ("governing body" used but undefined); §2-504.1 of the Agriculture Article ("governing body" used but undefined). *Cf.* Article 66B, §1.00 (distinguishing "local executive" and "local legislative body" for purposes of zoning and planning).

We think that it is reasonable to ascribe a comparable meaning to the identical term in Article 27, §705F—that is, "gov-

² As we understand it, Montgomery County has already redesignated its local facility as a regional detention center.

erning body" signifies the "mayor and city council, . . . board of county commissioners or county council".³ This meaning best reflects both the general scheme of government in the respective jurisdictions and their specific authority regarding local detention facilities.⁴

1. For Baltimore City, "the Mayor of Baltimore and City Council of the City of Baltimore . . . shall have full power to enact local laws of said City". Article XI-A, §3 of the Maryland Constitution. More particularly, the Mayor and Council have the power "to establish, maintain and control [City] jails, and [City] houses of correction or detention and reformatories, and

³ As used in §705F, of course, the term applies only to counties and Baltimore City, not to municipal corporations generally. When the bill that contained §705F was introduced, the provision began with the phrase, "The Board of County Commissioner[s] or the County Council of one or more counties may establish . . .". An amendment changed the wording to, "The governing body of one or more counties may establish . . .". See Chapter 481, Laws of Maryland 1968. Presumably, this change was made in recognition of the fact that, because the statute was to apply to Baltimore City and charter counties, in which the executive plays a role in the legislative process, a broader term should be used.

The term "governing body" also appears in Article XI-F, §2 of the Maryland Constitution. In that context, it refers to the board of county commissioners only. See Article 25B, §3 of the Maryland Code.

In Article 25, §26A, which sets out a procedure for the establishment of regional councils of government, the phrase "governing body" connotes the legislative branch, as distinct from the executive. See, e.g., §26A(b) ("[t]he representative or representatives from each participating county . . . shall be the elected chief executive of a participating government and/or a member or members of its governing body chosen by such body to be its representatives"). This is a common meaning of the term. See *Mentus v. Town of Irvington*, 191 A.2d 806, 808 (N.J. Super. 1963). Accord *Humthlett v. Reeves*, 90 S.E.2d 14, 18 (Ga. 1955). But, with respect to Article 27, §705B, there is no reason to attribute to the General Assembly an intention to somehow exclude the Mayor of Baltimore City or the county executive of a charter county from a decisionmaking process in which they play an integral part. See generally Revisor's Note to §5-416 of the Transportation Article (language granting authority to political subdivisions should be drafted—and, here, construed—"to permit each county, subject to its local law, to adopt its own rules as to the manner of acting under the authority of this section").

⁴ For a general survey of the forms of county government in Maryland, see Moser, *County Home Rule—Sharing the State's Legislative Power with Maryland Counties*, 28 Md. L. Rev. 327 (1968). See also 66 *Opinions of the Attorney General* 197 (1981) (authority of counties organized under the various forms of government to administer and enforce local public ethics laws).

to regulate all persons confined therein". Article 25, §5(c) of the Maryland Code. *See also* Article II, §13 of the Charter of Baltimore City.

2. For charter counties—that is, counties that have adopted a home rule charter under Article XI-A of the Maryland Constitution—"the County Council of said County . . . shall have full power to enact local laws of said . . . County". Article XI-A, §3.⁵ Among a charter county's express powers is the power, under Article 25A, §5(C) of the Maryland Code, to establish and maintain detention facilities. *See, e.g.*, Chapter 13 of the Montgomery County Code.

3. For code counties—that is, counties that have adopted the optional powers of home rule under Article XI-F of the Maryland Constitution—the board of county commissioners has authority to enact the public local laws, including laws regarding detention facilities. *See* Article 25B, §§9 and 13 of the Maryland Code. *See generally, e.g.*, §4-402 of the Worcester County Code.

4. For all other counties, although the power to enact public local laws resides in the General Assembly, the county commissioners "shall have charge of and control over the property owned by the county". Article 25, §1 of the Maryland Code. They may acquire property and erect buildings for public purposes. Article 25, §11A. *See also* Article 25, §128 (establishment of prison farms).

B. Procedures for Establishing A Regional Detention Center

The statute does not specify any particular procedures that the governing body of a county or Baltimore City must follow to establish a regional detention center. Hence, we must conclude that the General Assembly intended merely to require the use of whatever procedures are normally followed in a given jurisdiction to create a local detention facility. However, though the procedures for creation are the same, a county intending to establish a regional detention center should bear in mind the major difference between such a center and a local

⁵ Of course, a county charter may permit the county executive to exercise a veto and thus share in the legislative process.

facility: as discussed in Part III B below, it is our view that a regional detention center must serve regional needs through some form of multi-county agreement.

In sum, a county's establishment of a regional detention center by construction of a new facility would be undertaken by the same basic process that the county would use to acquire property and construct a local detention facility. Similarly, the redesignation of an existing local detention facility as a regional detention center—which we discuss in Part III A below—would be accomplished through whatever procedures the jurisdiction customarily follows to redesignate the function of an existing facility. We cannot attempt, in this Opinion, to catalog those procedures for each jurisdiction in the State; instead, we suggest that the county attorney be consulted should establishment of a regional detention center be contemplated.

III

Redesignation of Existing Facilities as Regional Detention Centers

A. *Authority for Redesignation*

Although Article 27, §705 does not expressly state that local detention facilities may be converted into regional detention centers, the statute is reasonably clear that the General Assembly did intend to permit redesignation.

First, the words “establish and maintain” in Article 27, §705B are as pertinent to the redesignation of a local existing facility as to the construction of a new center. Indeed, the wording of §705D.1 plainly contemplates the possible redesignation of an existing facility as a regional detention center:

“Upon the determination by a county or counties to build *or maintain* a regional detention center, application may be made to the Commissioner of Correction for financial assistance for the construction *or enlargement* of the facility.”⁶

⁶ We think that it is immaterial whether the existing local facility was constructed before or after the date of enactment of §705.

Finally, the title of the Act that added §705 to the Code refers specifically to "facilities now existing which later qualify as Regional Detention Centers". Chapter 481, Laws of Maryland 1968.

B. *Prerequisite to Redesignation*

To redesignate an existing facility as a regional detention center, may a county simply rename its jail and, without any other change in operation, thereby avail itself of the advantage—the sentencing limit—that the statute grants regional detention centers?⁷ Although the question is not free from doubt, we think not.

The statutory definition of "regional detention center" does indicate that a single county may operate such a center. Article 27, §705A. *See also* Article 27, §705B and D. And neither the definition nor any other portion of §705 indicates precisely what geographic area constitutes a "region" or how a regional detention center differs from an ordinary county jail. Thus, there is some basis for the argument that a jail may be transformed into a regional detention center by a change of name alone.

However, it is axiomatic that individual provisions of a statute are "controlled by the[ir] context [W]here a particular provision of a statute is part of a single statutory scheme the legislative intent must be gathered from the entire statute rather than from only one part". *Guardian Life Ins. Co., v. Insurance Comm'r*, 293 Md. 629, 642–43 (1982). Taking into account the statutory context controlling the term "regional detention center", we conclude on balance that a county jail may become a regional detention center only if the operating county enters into some form of agreement with at least one other county under which the facility serves a *region*, rather than a single county alone.

We begin with the fact that the General Assembly used the terms "regional detention and correctional center" and "jail" separately in this very statute. Article 27, §705D.4. *Some* difference between the two must have been intended.

⁷ With respect to the sentencing limit unique to regional detention centers, *see* Part IV below.

That difference, in our view, lies in the import of the very name "*regional* detention centers". We think that "regional" was used to signify a service area greater than the local area—i.e., one county—typically served by a jail. Just as the General Assembly established a "*Regional* Planning Council" to deal with planning and development issues on a multi-county basis [Article 78D, §§1, 2, and 3 of the Maryland Code], so it encouraged the establishment of *regional* detention centers to deal with the housing of prisoners on a multi-county basis. This reading of the term "regional detention center" seems to us most harmonious with the apparent legislative purpose. See generally 65 *Opinions of the Attorney General* 385 (1980) (giving meaning to inexactlly defined term "State officer" in consonance with legislative intent).

The converse reading—that "regional detention center" may mean a facility operated to serve the correctional needs of one county exclusively—is inconsistent with at least one provision in the statute and leads, in our view, to an incongruous result.

The 18-month sentencing limitation, discussed in more detail in Part IV below, applies if "the court imposing the sentence is located within a jurisdiction which is a party to the operation and maintenance of the facility to which the person is sentenced". We do not see how a county can be a "*party* to the operation and maintenance" of a regional detention center if no other county is involved. This phrasing implies that a regional detention center is to be operated pursuant to some form of multi-county agreement. See generally 61 *Opinions of the Attorney General* 24 (1976) (describing a regional detention center for Howard, Carroll, and Frederick Counties).⁸

Moreover, we cannot attribute to the General Assembly the intention to enact a benefit—the 18-month limitation on sentences—that does not apply to a county facility called a "jail", but that would apply to the same facility operated in exactly the same way, as long as it is simply renamed a "regional detention center". A statutory construction that would result in this triumph of mere nomenclature over substance would be incongruous at best. Such a statutory construction is to be

⁸ Article 27, §705B suggests, but does not require, that these agreements be written. More informal arrangements, or even tacit understandings, would appear to suffice.

avoided if possible. See *Pan American Sulphur Co. v. Dep't of Assessments and Taxation*, 251 Md. 620, 626-27 (1968).

If the General Assembly simply intended to forbid judges from sentencing defendants to longer than 18 months in any county facility, of whatever name, that a county chooses to designate for this limitation, it presumably would have said just that. Instead, it applied the sentencing limit to "regional detention centers" *only*. In our view, the apparent legislative intention would be ill-served if a county were permitted to transform its jail into a regional detention center merely by repainting the sign on the facade.

We readily concede, however, that our attempt to glean an understanding of legislative intent, and to construe the term "regional detention center" accordingly, is far from conclusive on all points. In particular, the statute is silent as to the precise form of the cooperative endeavor that is necessary to the operation of a regional detention center.⁹ Therefore, we urge the General Assembly to clarify the statute so that the true legislative intent is unmistakable.

IV

Sentencing Limit

Under Article 27, §705F, a judge may sentence an offender to a regional detention center, but only if "the sentence to be then executed is for a period of not more than 18 months". This grant of sentencing authority, and its accompanying limit, applies "[n]otwithstanding any other provisions of the Annotated Code of Maryland". In any event, we have found no other provision that even purports to allow a longer sentence to a regional detention center.

It should be noted, however, that the 18-month sentence limitation is phrased in terms of the *execution* of the sentence: "[A] judge . . . may sentence a convicted offender to a regional detention center . . . if the sentence *to be then executed*

⁹ See note 8 above.

is for a period of not more than 18 months". This language differs from that in §705F as originally enacted by Chapter 481, Laws of Maryland 1968. The language then was as follows: "[A] judge . . . may sentence a convicted offender to a Regional Detention Center . . . provided the *sentence imposed* is for a period of not more than 18 months".

This change in §705F was effected by—and was the express purpose of—Chapter 205, Laws of Maryland 1975. The title of that Act states its purpose, in relevant part, as follows: "F[or] the purpose of repealing the provision that the length of the sentence imposed is a basis for determining that a convicted offender may be sentenced to a regional detention center; [and] providing that the length of the sentence to be executed is a basis for determining that a convicted offender may be sentenced to a regional detention center".

The distinction between sentence imposed and sentence to be executed is important, because the sentencing judge has authority to suspend the execution of a portion of the sentence imposed:

"Upon entering a judgment of conviction, the court having jurisdiction may suspend the imposition or execution of sentence and place the defendant on probation upon such terms and conditions as the court deems proper. The court may impose a sentence for a specified period and provide that a lesser period be served in confinement, suspend the remainder of the sentence and grant probation for a period longer than the sentence but not in excess of five years." Article 27, §641A(a).

See also Article 27, §643A (authority of District Court judge in criminal or motor vehicle case).

Reading the statutory provisions regarding the suspension of sentences in concert with the provisions of §705F, we conclude that, by placing an 18-month limit on the sentence "to be then executed", the General Assembly intended that commitments to regional detention centers be limited to 18 months or less of *actual confinement*. Accordingly, §705F allows a judge to sentence an offender to a regional detention center if the offender is given a sentence of longer than 18 months, with all but 18 months suspended.

In addition, the 18-month limit on sentence length in §705F applies only to commitments *by judges*. We do not read §705F as a flat prohibition against the incarceration of an offender with a sentence of more than 18 months in a regional detention center. Indeed, §705E provides that State prisoners may be housed in regional detention centers pursuant to agreement between the Commissioner of Correction and the jurisdictions administering the regional detention center. *See 62 Opinions of the Attorney General* 829, 834 (1977). Nothing in §705 imposes any limit—as to length of sentence or otherwise—on the category of State prisoners that may, by agreement, be housed in regional detention centers. Similarly, State inmates with sentences of more than 18 months actual confinement may be transferred to regional detention centers pursuant to the provisions of Article 27, §690(e) or §700A(c).¹⁰

Obviously, these provisions do not *require* the jurisdictions operating a regional detention center to accept prisoners with unsuspended sentences of more than 18 months. But neither does Article 27, §705F *forbid* the incarceration of such prisoners by agreement.¹¹

¹⁰ Section 690(e) provides that:

“The Commissioner of Correction may transfer minimum security inmates to county or Baltimore City detention facilities for participation in community-oriented correctional programs by mutual agreement with Baltimore City or the counties involved.”

Section 700A(c) provides that:

“The Department shall designate and adopt facilities in the institutions and camps under its jurisdiction for the housing of prisoners granted ‘work release’ privileges. In areas where such facilities are not within reasonable proximity to the place of employment of a prisoner so released, the Department may contract with the proper authorities of political subdivisions of this State for the quartering of such prisoner in suitable local confinement facilities.”

¹¹ We note that the original commitment in such cases would be to the jurisdiction of the Division of Correction. Article 27, §690(b). Actual service of the sentence in a regional detention center would result from the appropriate agreement.

V

Conclusion

In summary, it is our opinion that:

1. A county may establish a regional detention center pursuant to Article 27, §705 of the Maryland Code, to be operated pursuant to some form of multi-county agreement, by following the procedures otherwise generally applicable in that jurisdiction for (i) the construction of a local detention facility or (ii) the change in use of a local facility.
2. An existing local detention facility may be redesignated as a regional detention center under an appropriate arrangement between or among the counties that the region comprises.
3. No law permits a judge to commit an offender to a regional detention center for more than 18 months.

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CREDIT REGULATION

"CREDIT GRANTOR" REVOLVING CREDIT—RETAIL CREDIT ACCOUNTS LAW—CHANGE IN TERMS—CONVERSION OF RETAIL CREDIT ACCOUNT INTO REVOLVING PLAN—FORM OF ACCOUNTHOLDER ASSENT—APPLICATION OF NEW TERMS TO PREEXISTING BALANCES.

June 30, 1983

The Honorable Alan T. Fell
Commissioner of Consumer Credit

You have requested our opinion on certain issues arising under the recently enacted Chapter 143 (Senate Bill 591), Laws of Maryland 1983. The new law, effective July 1, 1983, adds to Title 12 of the Commercial Law Article ("CL" Article) a new Subtitle 9, entitled "Credit Grantor Revolving Credit Provisions" ("Subtitle 9"). Specifically, you have asked four questions, restated as follows:

(1) How, if at all, may a seller currently offering an open-end credit plan governed by CL Title 12, Subtitle 5, the Maryland Retail Credit Accounts Law ("RCAL"), convert this plan into a revolving credit plan governed by Subtitle 9 as to all future transactions if the RCAL plan permits amendment by giving notice but does not require a signed acceptance by the buyer?

(2) If an open-end credit plan governed by RCAL is modified into a revolving credit plan governed by Subtitle 9, may new charges permitted by Subtitle 9 be applied to existing purchase balances incurred before the modification?

(3) Is a revolving credit plan that is established in the first instance under Subtitle 9 required to be in writing and signed by the borrower?

(4) May the charges permitted under Subtitle 9, such as a membership fee, be assessed to the borrower before the account is actually used?

For the reasons given below, we have concluded as follows:

(1) Existing RCAL plans that allow amendment may be modified to be governed under Subtitle 9 if the accountholder is given clear notice of, and assents to, the modification. The accountholder's assent must be evidenced by some overt act, but it need not necessarily be embodied in a signed agreement.

(2) The only treatment of existing RCAL purchase balances that is altogether free from legal doubt is the continued application of all existing terms of the RCAL plan to those balances until they are paid off. We recognize that there exist alternative approaches under which existing balances may be subjected to new terms. Although the legality of these approaches is not free from doubt, reasonable arguments can be advanced in support of them.

(3) A new account under Subtitle 9 must be in writing, but it need not be signed by the borrower if acceptance is otherwise evidenced.

(4) If the accountholder has evidenced acceptance of a new Subtitle 9 account, a membership fee or comparable privilege fee may be assessed, if the underlying agreement so provides, even before the account is actually used.

I

The New Subtitle 9

Subtitle 9 of Title 12 of the Commercial Law Article generally permits both lenders and sellers to offer credit with fewer restrictions than under RCAL. Among its various provisions, Subtitle 9 allows a credit grantor to charge up to 24% annual interest on unpaid balances [CL §12-903(a)(1)] and, with some limitations, allows a credit grantor to impose certain fees that are not calculated as interest [CL §12-905(a) and (e)].

II

Conversion of an Existing Account

A. *Statutory Background*

All open-end retail credit accounts in this State were previously governed by RCAL.¹ With the enactment of Subtitle 9, open-end retail credit accounts may, as of July 1, 1983, be governed either by RCAL or Subtitle 9. The General Assembly's intent to provide credit grantors with a clear choice in selecting a lending statute is manifest in CL §12-914(a):

"Notwithstanding any other provisions of this title, a credit grantor may at its option offer a plan to any borrower either pursuant to this subtitle or as otherwise permitted by applicable law."²

¹ RCAL applies to "two-party" and "three-party" open-end credit (as well as to "two-party" closed-end, unsecured credit). A "two-party" plan means one under which a seller maintains the retail credit account of the buyer. A "three-party" plan involves a buyer, a seller, and a "financial institution", which is defined in CL §12-501(g)(1) as a "person who enters into an agreement with a buyer by which the person agrees to extend credit to the buyer and apply it as directed by him by use of a credit card which the person issues to the buyer". Under some credit card plans, cash advances as well as purchase privileges are offered. These cash advances are presently governed under the provisions of CL §12-103(a)(3), part of the general interest and usury statute. See *Attorney General v. Equitable Trust Co.*, 294 Md. 385 (1982). Your inquiry concerns only amendment of existing accounts under RCAL; for the most part, therefore, we have limited the scope of our response to purchase accounts.

² Subtitle 9 contemplates an express election by the credit grantor of "its option"—i.e., whether its plan is to be governed by RCAL or by Subtitle 9. Under CL §12-913, "[t]he provisions of any other law of this state limiting the rate or amount of interest . . . or other charges which may be charged . . . may not apply to extensions of credit under a revolving credit plan under this subtitle". In light of this section, a credit grantor who expressly elects to establish a plan under Subtitle 9 will avoid application of rate or charge limitations elsewhere in the law, even if the Subtitle 9 plan otherwise might fit into the loan categories of that other law. Cf. *Schmidt v. Beneficial Finance Co.*, 285 Md. 148 (1979).

Further support for this interpretation can be inferred from the underlying statutory scheme. In exchange for more liberal provisions permitting fees and charges impermissible under RCAL, the General Assembly has imposed

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The issue presented by your first inquiry is whether this election can be made pursuant to an existing RCAL plan.

We note initially that this issue is not resolved by the express provisions of Subtitle 9. While CL §12-912 provides a statutory mechanism for amending a "revolving credit plan", an existing RCAL open-end retail credit account, by definition, is not a "revolving credit plan". In order to come within the Subtitle 9 definition of a "revolving credit plan", there must be an agreement between a "credit grantor" and a "borrower". See CL §12-901(d). "Credit grantor" and "borrower" are statutorily defined, respectively, as the person making and the person receiving an "extension of credit under *this subtitle*". CL §12-901(a)(1) and (b). Such extensions of credit obviously have not been made under existing accounts governed by RCAL.

Nor do the provisions of RCAL directly answer your inquiry. Although CL §12-503(a), (d), and (e) provide in detail the formalities to be followed when establishing an open-end account under RCAL, the statute is utterly silent on the procedures to be followed when the account is to be amended.

B. *Contract Law*

With no Maryland case law directly on point to guide us, we have carefully reviewed several cases in other jurisdictions resolving very similar issues.

The leading case is *Garber v. Harris Trust & Sav. Bank*, 432 N.E.2d 1309 (Ill. App. 1982). At issue in *Garber* were amendments to credit card agreements involving a "three-party" VISA card and "two-party" J. C. Penney Co. and Sears, Roebuck and Co. credit cards. The Illinois Appellate Court upheld these amendments on alternative theories of contract law.

harsher penalties for violations. Compare CL §§12-513 and 12-515 with CL §§12-917 and 12-918. If CL §12-914(a) were not interpreted to require an express, mutually exclusive election, a lender could conceivably insist that it retain the option of selecting the lesser penalty provisions of RCAL in the event of a violation of Subtitle 9. The General Assembly could not have intended so anomalous a result.

After careful consideration, we have concluded that only one of these alternative theories—the theory that the existing open-end credit agreements identified in your inquiry constitute amendable contracts between the parties—can safely be relied on to permit conversion of a RCAL plan into a Subtitle 9 plan.

1. *Multi-Contract Theory*

In so concluding, we acknowledge that a different theory was said by the *Garber* court to be “the prevailing view in this country”. 432 N.E.2d at 1312. Under that theory, the issuance of a credit card and the accompanying agreement constitute nothing more than a bare offer to extend a line of open-account credit that is unilateral in nature and supported by no consideration. 432 N.E.2d at 1311–12.³ See also *City Stores Company v. Henderson*, 156 S.E.2d 818 (Ga.Ct.App. 1967); *Novack v. Cities Service Oil Co.*, 374 A.2d 89 (N.J. Super.Ct. Law Div. 1977), *aff'd*, 388 A.2d 264 (N.J. Super.Ct. App. Div. 1978). See generally 50 Am.Jur.2d *Letters of Credit, and Credit Cards* §38 (1970).

According to this theory, separate contracts are created each time the card is used pursuant to the terms of the cardholder agreement. The cardholder agreement simply remains a continuing offer to extend credit—the terms of which offer are incorporated into a separate contract whenever a sale is consummated by use of the card. As such, the agreement may be amended at any time as to future transactions.

While we do not altogether reject this analysis or foreclose its possible application under Maryland law, we are wary of the several problems that are presented by this approach.

First, the legislative intent in RCAL was clearly to regard these agreements as contracts. Several statutory provisions manifest this intent. The “agreement” must be in writing and either: “(i) [s]igned by the buyer; or (ii) [t]he seller or finan-

³ *Garber* intimates that this analysis would be different if a membership fee or similar charge were imposed when the account was established. 432 N.E.2d at 1313 n. 1. In Maryland, membership fees are prohibited under RCAL if a finance charge is imposed. CL §12-506(h)(1).

cial institution shall have made a reasonable attempt to obtain the signature of the buyer to the agreement". CL §12-503(e)(1). A "buyer" is defined as including "[a] person who enters into a prior agreement with a financial institution by which the financial institution agrees to pay the debts of the buyer as they accrue at various retail sellers designated by the financial institution, *in consideration of which* the buyer pays to the financial institution the cash sale price and the finance charge". CL §12-501(c)(2)(i). *See also* CL §12-501(g)(1) (defining "financial institution") and CL §12-501(l) (defining "retail credit account").

Case law concerning a cardholder's liability for unauthorized use of a credit card provides additional difficulties for this multi-contract analysis. It is standard practice in the industry to impose liability, by means of a "risk shifting clause", for unauthorized purchases if the card issuer is not promptly notified by the cardholder of the loss, theft, or unauthorized use of the card. *See Spain, The Lost Credit Card: The Liabilities of the Parties*, 30 Alb. L. Rev. 79 (1966). Such a clause appears to provide the consideration to support a credit card agreement that the court in *Garber* believed was absent.

"Consideration involves a detriment incurred by the promisee [cardholder] or a benefit received by the promisor [card issuer], at the promisor's request." *Novack v. Cities Service Oil Co.* 374 A.2d at 92. After a cardholder has evidenced acceptance of the agreement (either by signing the agreement, by using the card, or by doing some other act specified in the agreement as signifying acceptance), he or she becomes bound by a promise to notify the card issuer of loss, theft, or unauthorized use. Failure to do so can result in liability, currently limited under federal law to \$50. 15 U.S.C. §1643(a). This liability has been imposed on the cardholder under traditional contract principles, on a showing that the cardholder had accepted the terms of the agreement, including its risk shifting clause. *Read v. Gulf Oil Corp.*, 150 S.E.2d 319 (Ga.Ct.App. 1966); *Texaco, Inc. v. Goldstein*, 229 N.Y.S.2d 51 (N.Y. Mun. Ct. 1962), *aff'd* 241 N.Y.S.2d 495 (N.Y. App. Div. 1963).⁴

⁴ As a general rule, the adequacy or inadequacy of consideration is immaterial to the validity of the contract and will not be inquired into by the courts. *Blumenthal v. Heron*, 261 Md. 234 (1971).

Moreover, if credit card agreements are not deemed to be contracts on acceptance by the cardholder, the potential for deception is readily apparent. A card issuer theoretically would be free to promise the cardholder elaborate rights in a card agreement without fear of any liability in the event it defaulted. For example, an agreement could provide for a right of noncancellation except on written notification to the cardholder. Notwithstanding this promise, if the theory that the agreement did not constitute a binding contract were accepted, the card issuer would be free to cancel the card at any time without prior notification. *Cf. Novack v. Cities Service Oil Co.*, 374 A.2d at 93.

For these reasons, it is preferable to consider the agreement, once accepted, to be a binding contract governing the relations of the parties. Therefore, we analyze your question by reference to the law governing amendment of contracts.

2. *Amendable/Terminable-at-Will Contract Theory*

In your inquiry, you refer to RCAL open-end credit agreements that specifically permit amendment. Under established contract law principles, provisions in an agreement are generally enforceable according to their terms. *See Kahn v. Janowski*, 191 Md. 279 (1948) (rescission clause). Accordingly, we find no common law impediment to the exercise of such a provision to modify the terms under which future transactions will take place—even to the extent of modifying the entire agreement so that it will be newly governed under the provisions of Subtitle 9.

General contract principles also provide authority for amending agreements that contain no specific provision for amendment. Open-end retail credit agreements normally contain clauses allowing either party to terminate the agreement. These agreements are contracts terminable at will and, as such, can be modified at any time as to future transactions as a condition for continuance. *Garber*, 432 N.E.2d at 1314.

Even in the absence of a specific termination clause, if the agreement is for an indefinite duration, it is in essence terminable at will with the same resulting power to modify. *Garber*, 431 N.E.2d at 1313–14. Legal consideration supporting such

modifications is provided by the promise to continue to extend credit for the accountholder under new terms. *Garber*, 432 N.E.2d at 1315.

C. *Mechanics of Amending*

The remaining portion of your first inquiry is directed at the mechanics of accomplishing the amendment process. You have postulated an existing RCAL agreement that requires notice of amendment but not a signed acceptance.⁵ Unless the agreement provides otherwise, use of the account after the effective date of the modification specified in a properly worded notice would constitute acceptance of the new terms under Subtitle 9.⁶ It is well-settled in Maryland that conduct of the parties to a contract may be evidence of a subsequent modification of that contract. See *University National Bank v. Wolfe*, 279 Md. 512, 522 (1977).⁷

In other jurisdictions, use of a card has been viewed as signifying acceptance of a binding agreement. For example, in *Chase Manhattan Bank v. Hobbs*, 405 N.Y.S.2d 967 (N.Y. Civ.

⁵ We assume that the agreement specifies the action of the accountholder that will signify assent to the modification—for example, use of the card after a specified date. Absent such a specification in the agreement between the parties, prudence would suggest that the modification process follow the same formalities required by CL §12-503(e) for establishing a new account. We observe that, even if the agreement provides otherwise, written assent by the accountholder remains the preferable means for a credit grantor to achieve the modifications contemplated by your inquiry. Written assent alleviates potentially serious questions of whether the accountholder received actual notice of the modification. Cf. *Thomas v. Hudson Motor Car Co.*, 226 Md. 456 (1961).

⁶ As discussed in Part IV below, acceptance of a new plan under Subtitle 9 may similarly be evidenced by use of the account.

⁷ We note that, under other provisions of Maryland law, use of an unsolicited credit card can constitute acceptance of the card and enable the card issuer to shift the assumption of risk for loss, theft, or unauthorized use of the card from the card issuer to the cardholder. See CL §14-1305. The sending of unsolicited cards is generally prohibited under RCAL. See CL §12-503(a).

Ct. 1979), a written credit card agreement provided that it would become effective if the enclosed credit card were used, as evidenced by the cardholder's signature on a sales slip. The defendant later used the card. In finding him liable for the charges and attorneys' fees provided for under the agreement, the court stated:

"Unquestionably, the acceptance of a paper which purports to be a contract may be indicated by conduct or acquiescence [citations omitted]. Accordingly, the defendant's use of the credit cards issued to him by the plaintiff is tantamount to conduct evincing an acceptance of the accompanying retail installment credit agreement and all of the terms contained therein." 405 N.Y.S.2d at 970.

III

Preexisting Purchase Balances

Your second inquiry concerns whether charges permitted after the agreement has been modified to bring it under Subtitle 9 can be imposed on purchase balances in existence before the modification. In the absence of a specific factual situation in which to consider this question, we can reach but one firm conclusion: the only treatment of such existing balances that is altogether free from doubt is to treat these balances as residual extensions of credit governed by RCAL.⁸ However, reasonable—albeit legally uncertain—arguments can be advanced to support other approaches.

Our caution on the treatment of existing balances is caused by the interplay of two provisions of RCAL. Under CL §12-506.2, a RCAL accountholder has an absolute right to pay off existing purchase balances at the rate of finance charge ap-

⁸ The necessary statutory authority for this approach appears to be contained in CL §12-914(a), quoted in text accompanying note 2 above.

plicable when the purchase was made. The application of an increased rate to existing balances is expressly prohibited.⁹

In addition, §12-512 provides:

“No act, agreement, or statement of a buyer may constitute a valid waiver of any benefit or protection provided to him under this subtitle.”

We believe that this section presents no difficulty when an agreement is modified as to future transactions.¹⁰ Nevertheless, when read in conjunction with CL §12-506.2 and its prohibitions governing existing balances, CL §12-512 presents a very different issue with respect to transactions that have already taken place.¹¹

⁹ CL §12-506.2 provides:

“Changes in the rate applicable to an open-end account, including a credit card plan which provides for sales, cash advances, or both, are limited as follows:

(1) Any balance existing before July 1, 1982 is to be repaid at the then applicable rate of interest or finance charge regardless of any subsequent increase in the rate applicable to the account.

(2) If the rate applicable to any balance for which the borrower or buyer becomes obligated between July 1, 1982 and July 1, 1985 is increased, the borrower or buyer may repay the existing balance at the rate in effect, prior to the time the increase becomes effective. If the borrower or buyer increases the balance of his account by making purchases or requesting cash advances, the increased rate shall apply only to the portion of the balance incurred after the rate increases.”

¹⁰ We do not interpret the words “benefit” or “protection” in CL §12-512 to contemplate—much less preclude—an agreement between the parties to be governed by an alternative lending statute for future transactions. When enacted in 1967, CL §12-512 evidenced a clear intent that all open-end credit transactions could only be conducted in accordance with RCAL. In 1983, the General Assembly’s enactment of Subtitle 9 evidenced with equal clarity that this was no longer the case. It would be sophistry to conclude that CL §12-512 was intended to prevent an election, first becoming available 15 years after its enactment, to govern future transactions.

¹¹ A credit grantor that foregoes any effort to change the terms applicable to existing balances may certainly seek to compensate itself through a membership or other privilege fee permitted by CL §12-905(a)(1)(i) and (a)(2)(i). See Part V below.

A. *Refinancing Theory*

In *Garber*, the application of new terms to existing purchase balances was upheld with no analysis. *Garber* simply relied on a concept of refinancing announced in *Beck v. First National Bank of Minneapolis*, 270 N.E.2d 281 (Minn. 1978).

The plaintiff in *Beck* contested the imposition of higher interest charges on his "checking plus" agreement, even though he continued to use the plan after the effective date of the higher interest rate amendment. In finding the higher rate applicable to both new cash advances and past balances, the court stated:

"The Bank's September notice to plaintiff was in effect a notice of termination of the checking-plus agreement coupled with an offer to continue the present service at a new rate By writing new overdrafts, plaintiff accepted this offer and thus refinanced his existing balance under the new arrangement and the new law." 270 N.E.2d at 287.

This approach might be found to be acceptable under Maryland law if the RCAL agreement between a cardholder and a credit grantor authorizes cash advances and permits termination by the credit grantor at any time and if the cardholder were provided with a clear explanation of his or her options. These options are: (i) to maintain the RCAL balance under existing terms, but with no future credit privileges under either RCAL or Subtitle 9; or (ii) to agree to close out the RCAL balance with funds advanced by the credit grantor under Subtitle 9, thereby accepting both credit privileges and payment obligations under Subtitle 9.¹² This approach arguably

¹² It is not clear how a retailer that does not make cash advances—indeed, that is not subject to the licensure requirement of CL §12-915(a) precisely because it does not make cash advances—can achieve a comparable "refinancing". Moreover, if a retailer that charges a fee under CL §12-905(a)(1) does purport to have "refinanced" the RCAL balance by means of a cardholder's Subtitle 9 "purchase", it will have created an unintended "float" on the balance that had been in the RCAL account. Under Subtitle 9, interest or fi-

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does not violate CL §12-512, because, even if the cardholder agrees to the refinancing, he or she will not have agreed to a "waiver of any benefit or protection provided . . . under this subtitle [i.e., RCAL]".¹³

However, we cannot unequivocally approve this approach as a basis for resolving your inquiry. Several aspects of it remain problematic—particularly as applied to retailers who do not make cash advances.¹⁴

In our view, the "refinancing" of an existing purchase balance in this manner is a somewhat unorthodox concept that should receive a more considered analysis than its simple formulation as to bank lenders in *Beck* and its rote application to retailers as well in *Garber*. Particularly in light of the Court of Appeals' recent decision in *Attorney General v. Equitable Trust Co.*, 294 Md. 385 (1982), analogies and theories that transmute purchase transactions into loan transactions are particularly suspect. Finally, there is no indication in either the *Beck* or the *Garber* decisions that the statutory schemes at issue in those cases included any analogue to CL §12-512—the express waiver prohibition in RCAL.

B. Amendment Theory

An alternative approach would rely on the express statutory authority in CL §12-912(c) to impose new terms on existing

nance charges may be collected only "on the outstanding unpaid indebtedness in the borrower's account under the [Subtitle 9] plan". CL §12-903(a)(1). "If the outstanding balance . . . is paid in full within 25 days after the end of a billing period, a finance charge or interest may not be imposed . . . with respect to such balance for that billing period." CL §12-903(d)(1)(i). Because the prior RCAL balance will not have been "unpaid" under the Subtitle 9 plan until 25 days after the end of the billing period in which the amount is posted, no interest can be charged for that period.

¹³ RCAL "benefit[s] or protection[s]" do not include future credit privileges under a terminable RCAL account or, surely, future credit privileges under a Subtitle 9 account.

¹⁴ See note 12 above.

balances incurred under a Subtitle 9 plan.¹⁵ Conceptually, this approach involves two steps—although both steps could arguably be initiated and accomplished through one notice and one acceptance.

In the first step, the existing agreement would be amended so that all extensions of credit, including the continuing extension of existing balances, would be governed by Subtitle 9—but no change would be made in existing terms. At this juncture, the parties would have simply agreed to be governed by Subtitle 9 rather than by RCAL, but there would be no loss of any “benefit” or “protection” afforded under RCAL.

The second step of this approach would be an amendment to what has become a plan that, by agreement of the parties, is governed by Subtitle 9—not RCAL. This second amendment would impose new terms under the express statutory authority contained in CL §12-912.

We must add, however, that this two-step approach offers no guaranty that the difficulties presented by RCAL when imposing new terms on existing balances can be overcome. Especially if the two, theoretically distinct, steps are compressed into a single notice, the entire process might be viewed by the courts as simply a roundabout method of trying to accomplish a waiver of rights under RCAL that is prohibited by CL §12-512.

¹⁵ CL §12-912(c) provides: “Except as limited by subsection (b)(3) of this section, if the terms of the agreement governing the plan, as originally drawn or as amended provide, any amendment may, on and after the date on which it becomes effective as to a particular borrower, apply to all then outstanding unpaid indebtedness in the borrower’s account under the plan, including any indebtedness which shall have arisen out of purchases made or loans obtained prior to the effective date of the amendment.”

This section alone, however, provides no authority to apply new terms to an existing balance incurred under RCAL, because by definition that “outstanding unpaid indebtedness” is not composed of purchases charged to the borrower’s account “under the [Subtitle 9] plan”. See CL §12-901(h)(1).

C. Conclusion

In short, we believe that the only legally certain treatment of existing RCAL balances is to maintain all current RCAL terms with respect to those balances.

Given the largely deregulatory nature of Chapter 143 (Senate Bill 591), however, we suspect that the General Assembly assumed that, under Subtitle 9 and related general principles of law, credit grantors would be allowed to impose new terms on preexisting RCAL plan balances—if, of course, the cardholder uses the card after notice of the amendment or otherwise assents to the change. While such a result is not altogether free from doubt, legally defensible theories can be advanced to support that conclusion.

IV

Agreements Establishing Subtitle 9 Plans

In your third inquiry you ask if new plans established under Subtitle 9 are required to be in writing and to be signed by the borrower. We think it abundantly clear from the statute that the General Assembly intended these agreements to be in writing, but that they need not necessarily be signed by the borrower.

Subtitle 9 is replete with requirements that a credit grantor cannot take advantage of its benefits, such as fees and other charges, unless an “agreement” so provides. *See, e.g.*, CL §§12-901(h)(2); 12-903(a)(1); 12-903(b); 12-904(a); 12-905(c); 12-906; 12-910; 12-911; and 12-912(c). Moreover, Subtitle 9 imposes disclosure requirements that would be impossible to comply with unless the agreement were in writing. *See* CL §12-903(a)(1) (requiring that the rate of interest chargeable must be expressed in the agreement as a simple interest rate) and §12-914(c) (incorporating truth-in-lending disclosure requirements).

However, the statutory references to such an agreement would not appear to require the signature of the borrower as the only means of acceptance. When it enacted Subtitle 9, the General Assembly appears to have intended to deregulate the granting of open-end credit in part by simplifying previous

statutory requirements. Conspicuously absent from Subtitle 9 is the current RCAL requirement that a seller have an agreement "[s]igned by the buyer" or have made "a reasonable attempt to obtain the signature of the buyer". Cf. CL §12-503(e). By omitting such formalities for the establishment of a Subtitle 9 agreement, the General Assembly evidently intended that use of the account or other evidence of acceptance, as discussed in Part II C above, could be sufficient to constitute a binding agreement under Subtitle 9. See *Chase Manhattan Bank v. Hobbs*, 405 N.Y.S.2d at 970.¹⁶

V

Assessment of Fees

Your final inquiry concerns whether a fee, such as a membership fee, can be assessed under Subtitle 9 prior to the use of the account.¹⁷

Such fees are defined in CL §12-905(a)(1)(i) and (2)(i) as a "charge in any amount the agreement provides for the privileges made available to the consumer borrower under the plan". The General Assembly clearly intended this fee to compensate the credit grantor for establishing the account and agreeing to extend credit in accordance with an agreement, without any requirement that the account actually be used. Absent the borrower's use, however, liability for the fee would not attach unless the credit grantor could otherwise establish with sufficient evidence that the borrower had accepted the agreement. Of course, the fee could not be charged unless the underlying agreement so provides. See CL §12-905(a)(1)(i) and (2)(1).

¹⁶ In this regard, we do not interpret Subtitle 9 as necessarily requiring a sales slip signed by the borrower. We believe that any clear evidence of use of the card by the borrower (for example, an authorized purchase from a catalogue by mail or telephone) could constitute sufficient acceptance of the agreement to bind the parties to its terms.

¹⁷ Our response assumes an account newly established under Subtitle 9 or an existing account properly amended to be governed under Subtitle 9.

VI

Conclusion

For the reasons stated above, it is our opinion that:

(1) Existing RCAL plans that allow amendment may be modified to be governed under Subtitle 9 if the accountholder is given clear notice of, and assents to, the modification. The accountholder's assent must be evidenced by some overt act, but it need not necessarily be embodied in a signed agreement.

(2) The only treatment of existing RCAL purchase balances that is altogether free from legal doubt is the continued application of all existing terms of the RCAL plan to those balances until they are paid off. We recognize that there exist alternative approaches under which existing balances may be subjected to new terms. Although the legality of these approaches is not free from doubt, reasonable arguments can be advanced in support of them.

(3) A new account under Subtitle 9 must be in writing, but it need not be signed by the borrower if acceptance is otherwise evidenced.

(4) If the accountholder has evidenced acceptance of a new Subtitle 9 account, a membership fee or comparable privilege fee may be assessed, if the underlying agreement so provides, even before the account is actually used.

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Opinions and Advice

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CRIMINAL INJURIES COMPENSATION

ELIGIBILITY CRITERIA—FINANCIAL HARDSHIP—ECONOMIC
LOSS—MEDICAID RECIPIENTS.

June 1, 1983

Mr. Martin I. Moylan
Executive Secretary
Criminal Injuries Compensation Board

You have requested our opinion on whether an indigent victim of crime, whose medical expenses were paid in part by the Maryland Medical Assistance Program, is eligible under the Criminal Injuries Compensation Act for an award equal to the unpaid balance of his or her medical expenses.

For the reasons given below, we have concluded that a claimant is not eligible for such an award if, as here: (i) the claimant suffered no past economic loss as a result of the criminal injury; and (ii) there is no reasonably foreseeable prospect that future assets of the claimant will be attached by a health care provider in execution of a judgment for unpaid bills.

I

Background

On occasion, the Criminal Injuries Compensation Board receives claims for awards from indigents who have been billed for medical expenses not covered by the Maryland Medical Assistance Program ("Medicaid"). For example, in one instance, the claimant was injured during an altercation in an alcoholic treatment center and suffered paralysis from the neck down. He was hospitalized for several months. At the time of the incident, the claimant was unemployed and was receiving public assistance. He was certified as eligible for Medicaid, which paid the cost of the indigent's care at the University of Maryland Hospital up to the maximum permitted by current Medicaid regulations.¹ The claimant has submitted for payment by

¹ Medicaid formerly covered in-patient hospital services for the entire number of days certified by the appropriate professional standards review

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the Criminal Injuries Compensation Board a medical bill from the University of Maryland Hospital in the total amount of \$255,000.

You indicate that you have received comparable bills from other indigent claimants. You further indicate that payment of these hospital bills would exhaust the budget for awards under the Act.

In each case, the claimant has received all necessary medical treatment. None of the claimants has personal assets that could be attached by the hospital in execution of judgment on the unpaid bills. Thus, these claimants have suffered no actual economic loss, nor is there any foreseeable prospect that they will suffer such a loss in the future.

II

Applicable Statutory Provisions

The Criminal Injuries Compensation Act, Article 26A of the Maryland Code, establishes a system "to provide a measure of financial assistance in specified circumstances to innocent victims of crime". *Gossard v. Criminal Injuries Comp. Bd.*, 279 Md. 309, 310 (1977). The Criminal Injuries Compensation Board has authority "[t]o hear and determine all claims for awards". Article 26A, §4(d). The victims of a crime and certain other specified persons are generally eligible for such assistance. Article 26A, §5.

However, the Act establishes several prerequisites to compensation awards. The requirement relating to the financial need of a crime victim appears in Article 26A, §12(f)(1):

"If the Board . . . finds that the claimant will not suffer serious financial hardship, as a result of the loss of earnings or support and the out-of-pocket ex-

organization. However, pursuant to regulations that became effective on January 1, 1981, the coverage for inpatient hospital services in a general hospital was limited to full or partial payment for a total of twenty days per spell of illness. See COMAR 10.09.06.04(A)(1). The purpose of these emergency regulations was cost containment and reduction of Medicaid's anticipated deficit. 8:3 Maryland Register 240 (February 6, 1981).

penses incurred as a result of the injury, if not granted financial assistance pursuant to this article to meet the loss of earnings, support, or out-of-pocket expenses, the Board . . . shall deny an award. In determining the serious financial hardship, the Board . . . shall consider all of the financial resources of the claimant.”²

As the Court of Appeals has explained, this provision requires a denial of an award “if, and only if, the Board determines that the claimant will not suffer financial hardship as a result of the loss of earnings or support *and* that he will not suffer such hardship as a result of out-of-pocket expenditures”. *Holmes v. Criminal Injuries Comp. Bd.*, 278 Md. 60, 65 (1976) (emphasis in original). See also Note, *Criminal Victim Compensation*, 30 Md. L. Rev. 266, 281-82 (1970). Thus, to meet this aspect of the Act’s eligibility requirements, a claimant must show that the criminal injury itself caused a loss of earnings or out-of-pocket expenditures.

In the cases in question, the indigents undoubtedly suffer financial hardship. But this hardship is not the result of the criminal injury. *Cf.* Article 26A, §1 (quoted in Part III below), which refers to the Act’s intent to aid individuals who, as a result of criminal acts, “thereby . . . become dependent upon public assistance”. Here, the claimants already were receiving public assistance before they were injured. They received necessary medical treatment, for which they themselves paid nothing. They have no personal assets that might become subject to a lien by the hospital for costs not reimbursed by Medicaid, and there is no reasonably foreseeable prospect that future assets will be at risk. If the Board were to make an award in these cases, the money would go directly to the hospital in payment of the medical services.

Under these circumstances, we believe that the claimants do not meet the requirement of §12(f)(1): they have not suffered “serious financial hardship, as a result of the loss of earnings or support and the out-of-pocket expenses incurred as a result of the injury”.

² The claimant has the burden of proof to establish the requisite financial hardship. COMAR 12.01.01.06(B).

III

Statutory Purpose

Under the Act, the Board may not make an award "unless funds are appropriated and available for the full amount of the award". Article 26A, §12(a)(2). The present operating budget for the Board is approximately \$2 million, of which \$1.8 million is distributed in awards. The number of claimants receiving awards has varied between 300 to 400 a year.

To the extent possible, the Act should be administered in accordance with its beneficent intent:

"The legislature recognizes that many innocent persons suffer personal physical injury or death as a result of criminal acts or in their efforts to prevent crime or apprehend persons committing or attempting to commit crimes. Such persons or their dependents may thereby suffer disability, incur financial hardships or become dependent upon public assistance. The legislature finds and determines that there is a need for government financial assistance for such victims of crime. Accordingly, it is the legislature's intent that aid, care and support be provided by the State, as a matter of moral responsibility, for such victims of crime." Article 26A, §1.

Thus, the purpose of the Act—and the State's "moral responsibility"—would be best carried out if all eligible crime victims were compensated.

Under the current scheme, however, that might not be possible. A crime victim who suffers financial hardship as a result of a criminal injury might well be denied compensation because prior awards to comparably harmed victims have used up all available appropriations.³ This result, although unfortunate, would not be inconsistent with the statutory purpose.

³ In light of a volume of claims and a level of inflation that the General Assembly could not have anticipated, the prohibition in §12(a)(2) could well result in a denial of awards to eligible claimants who were unlucky enough to have been victimized late in a fiscal year.

We note that legislatures in other states have established maximum limits for victim compensation awards. Given current economic realities, a comparable amendment to the Act may be advisable. We would be glad to work with you in this regard should the Board wish to pursue this course of action.

However, the statutory purpose would be very poorly served if an eligible victim were denied victim compensation solely because available funds had been used to pay the otherwise uncollectible accounts of medical facilities. This statute is intended to ameliorate the impact of crime on victims, not the impact of Medicaid cutbacks on hospitals.

IV

Case Law

Neither Maryland nor any other jurisdiction has published a reported opinion on the precise issue presented by these claimants. However, the issue of what constitutes "serious financial hardship" was addressed in *New York State Dep't of Audit and Control v. Crime Victims Comp. Bd.*, 431 N.Y.S.2d 602 (App. Div. 1980). In that case, four police officers were injured in the line of duty. Although all four received their base salary, they were deprived of night shift differential or overtime pay due to their inability to work following their injuries. The board made awards to each of the four officers to compensate them for these losses of income beyond base pay. On review, however, the court found that, because each officer received his full base salary, medical care, and other benefits during his period of recuperation, there was no showing of the required serious financial hardship. It therefore annulled the awards.

In *Hoffman v. Pennsylvania Crime Victim's Comp. Bd.*, 405 A.2d 1110 (Pa. Commw. 1979), the widow of a crime victim petitioned for review of an order of the board that had denied her victim compensation. Although the widow had suffered a total economic loss of over \$66,000 as a result of her husband's death, she had also received over \$85,000 from his life insurance policy. In affirming the denial of the award, the Pennsylvania court found that the widow had not suffered a serious financial hardship within the meaning of the statute:

"Our reading of the Act indicates to us that the crime victim's compensation program was intended by the Legislature to compensate innocent victims of crime for economic losses sustained by them for which they received no other compensation. Within

limitations set forth in the Act, the program makes up the difference between what the victim lost economically and what a victim received economically as a result of a crime." 405 A.2d at 1111.

These cases, though certainly not directly on point, do suggest an essential purpose of the "serious financial hardship" prerequisite: to limit awards to those who suffer personal, significant financial loss. Just as the claimants in the New York and Pennsylvania cases did not meet that test, neither do the indigent claimants at issue here.

V

Conclusion

In summary, it is our opinion that a victim of crime is not eligible for an award under the Criminal Injuries Compensation Act if, as here: (i) the claimant suffered no past economic loss as a result of the criminal injury; and (ii) there is no reasonably foreseeable prospect that future assets of the claimant will be attached by a health care provider in execution of a judgment for unpaid bills.

We caution that a conclusion about the existence of "serious financial hardship" can only be reached after careful consideration of the particular facts of each case. Moreover, if subsequent events result in a significant economic loss—if, for example, a claimant unexpectedly obtains assets that are then attached by the health care provider—the Board should be prepared to reconsider a denial.

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DOMESTIC RELATIONS

DIVORCE—CHILD CUSTODY—JOINT CUSTODY—MARYLAND
EQUITY COURTS HAVE INHERENT POWER TO GRANT
AWARD OF JOINT CUSTODY.

June 2, 1983

The Honorable Donald K. Hughes
Maryland House of Delegates

You have requested our opinion on the present ability of the Maryland courts, during divorce proceedings, to grant an award of joint or "shared" custody of the divorced couple's children.

For the reasons given below, it is our opinion that Maryland equity courts have the inherent power to grant an award of joint custody, in furtherance of each child's own best interests. Nevertheless, legislation to expressly authorize courts to pass joint custody decrees may be a useful addition to the statutory law of this State.*

I

Joint Custody Defined

Courts recognize two basic versions of joint custody—that of joint "legal" custody and joint "physical" custody. Under joint legal custody, decisions about matters of major significance in the child's life are made by both parents, in consultation with each other; however, only one parent has physical custody of the child and, thus, is responsible for most day-to-day decisions concerning the child's welfare. Joint physical custody, on the other hand, involves both shared decision-making responsibility and a shared residence; here, the child lives with each parent on a split-time basis.

* [Editor's Note: The statutory provisions upon which this Opinion relied have since been recodified, without substantive change, as part of the new Family Law Article ("FL" Article). Cross-references to the new codification have been added to the text in brackets.]

In this Opinion, we use the term "joint custody" to mean joint physical custody—the sharing of parental responsibility in both decision-making matters and in the provision of a home for the child.

In practice, there is wide variation in joint custody arrangements. Depending upon the resources, proximity, and needs of the parents and children, companionship of the child may be shared over periods of days, weeks, or months. In those jurisdictions that have expressly recognized joint custody as an alternative to sole custody, flexibility in terms of scheduling is integral to devising a solution that is sensitive, in each case, to the best interests of the child. *Compare, e.g., Mayer v. Mayer*, 376 A.2d 214 (N.J. Super. Ch. 1977), *reversed on other grounds*, 434 A.2d 614 (N.J. Super. A.D. 1981) (children in mother's custody, September through June; with father for July, August, one weekend per month, and certain vacations) with *Zinni v. Zinni*, 238 A.2d 373 (R.I. 1968) (child to reside with mother on weekends; with father during the week).

II

Maryland Law

Article 72A, §1 [FL §5-203] of the Maryland Code sets forth the general rule governing the relationship between parents and their children. It provides, in relevant part:

"The father and mother are the joint natural guardians of their child under eighteen years of age and are jointly and severally charged with its support, care, nurture, welfare and education. They shall have equal powers and duties, and neither parent has any right superior to the right of the other concerning the child's custody."

In a divorce proceeding, however, when resolving the issue of custody or guardianship of a child, the paramount concern of the equity court is to "secure the welfare and promote the child's best interest". *Stancill v. Stancill*, 286 Md. 530, 534 (1979) (emphasis added). See *Sullivan v. Auslaender*, 12 Md. App. 1, 3 (1971). In this regard, the ultimate decision as to

custody of the child is within the "sound discretion of the chancellor", based on the unique facts and circumstances of each case. *Ross v. Hoffman*, 280 Md. 172, 186 (1977).

Article 72A, §1 [FL §5-203(b)(1)] states that the father and mother are "jointly and severally charged" with their child's "care, nurture, [and] welfare"—in other words, they are both individually and jointly responsible for their child's well-being. See generally *United States v. Wainer*, 108 F.Supp. 386, 387-88 (N.D. Ill. 1952); *Black's Law Dictionary* 751 (rev. 5th ed. 1979). Given the absence of statutory language to the contrary, it is our opinion that an equity court has implicit authority to select either or *both* parents as custodians, so as to best foster the child's welfare and interests. See *Carter v. Carter*, 156 Md. 500 (1929); *Sartoph v. Sartoph*, 31 Md. App. 58 (1976).¹

The concept of joint custody is not unprecedented in Maryland case law. For example, in *Andrews v. Andrews*, 242 Md. 143, 155 (1965), the Court of Appeals modified the chancellor's decree so as to give "care, custody and control" of children to the mother for two months each year and to the father for the remaining period of time. See also *Barsallo v. Barsallo*, 18 Md. App. 560, 570 (1973). Similarly, in *Sartoph v. Sartoph*, 31 Md. App. 58 (1976), the Court of Special Appeals refused to disturb a custody arrangement under which the child stayed with the father during the summer and, during the school term, spent the weekdays with the mother and alternative weekends with the father. The Court stated: "Under this arrangement, Ronald has grown into a healthy emotionally well-adjusted child, who is doing well at home and at school." 31 Md. App. at 67. See also *Carter v. Carter*, 156 Md. 500 (1929).

¹ We note that a portion of Article 72A, §1 [FL §5-203(c)] states:

"Where the parents live apart, the court may award the guardianship of the child to either of them, but, in any custody proceeding, neither parent shall be given preference solely because of his or her sex."

As discussed below in note 3 and accompanying text, similar statutory language has been judicially construed to authorize custody awards to both parents. Under this provision of Article 72A, §1, the court "may"—but need not—award custody to either parent. We do not believe that such a provision—designed to *permit* a court, in its discretion, to *deprive* one or another parent of all right to custody—should be read to *preclude* a court, under appropriate circumstances, from approving an arrangement that instead is designed to *preserve* both parents' right to continued custody.

Awards of this kind, although not expressly characterized as "joint custody" in this State, have been recognized as such in other jurisdictions. See *Mayer v. Mayer*, 376 A.2d 214 (N.J. Super. Ch. 1977); *Odette R. v. Douglas R.*, 399 N.Y.S.2d 93 (1977); *Zinni v. Zinni*, 238 A.2d 373 (R.I. 1968). See also *Bazant v. Bazant*, 439 N.Y.S.2d 521 (1981); *Flanagan v. Flanagan*, 247 P.2d 212 (Or. 1952); *Wheeler v. Wheeler*, 222 P.2d 400 (Wash. 1950); *Travis v. Travis*, 180 P.2d 310 (Kan. 1947); *Davis v. Davis*, 354 S.W.2d 526 (Mo. App. 1962). Indeed, in several states with statutes worded analogously to Article 72A, joint custody is awarded as a matter of course—given, as always, the appropriate facts and circumstances.

III

Joint Custody in Other Jurisdictions

A. State Laws

Section 9:2-4 of the New Jersey Statutes states, in pertinent part:

"In making an order or judgment relative to the custody of the children pending a controversy between their parents, or in regard to their final possession, the rights of both parents, in the absence of misconduct, shall be held to be equal, and they shall be equally charged with their care, nurture, education and welfare, and the happiness and welfare of the children shall determine the custody or possession."

In *Beck v. Beck*, 432 A.2d 63 (N.J. 1981), the New Jersey Supreme Court recognized that §9:2-4 does not explicitly authorize joint custody. Yet the court found the statutory language to indicate "a legislative preference for custody decrees that allow both parents full and genuine involvement in the lives of their children following a divorce". 432 A.2d at 65. To the extent that joint custody would promote the best interests of the child in the proper case—albeit a limited class of cases—the court "endorse[d] its use as an alternative to sole custody in matrimonial actions". 432 A.2d at 66. Accord *Mayer v. Mayer*, 376 A.2d 214 (N.J. Super. Ch. 1977).

Nevertheless, the court in *Beck* expressly refused to establish a presumption favoring a specific type of custody award, because such presumptions "might serve as a disincentive for the meticulous fact-finding required in custody cases". *Beck*, 432 A.2d at 66.² The court considered this fact-finding process to be particularly important in joint custody cases, as "the very interplay of parents and children that gives joint custody its potential value also creates complications different from those found in sole custody arrangements". *Id.*

The New York courts also infer authority to award joint custody from statutory language that (i) establishes equal custodial rights as between parents, and (ii) requires the court to act in the child's best interests, based upon the facts of each case. *Perotti v. Perotti*, 355 N.Y.S.2d 68 (1974). See *Braiman v. Braiman*, 378 N.E.2d 1019, 1020 (N.Y. App. 1978); *Dodd v. Dodd*, 403 N.Y.S.2d 401, 403 (1978); *Odette R. v. Douglas R.*, 399 N.Y.S.2d 93, 95 (1977).³

Even the most skeptical of the New York courts view joint custody as "a voluntary alternative for relatively stable, amicable parents behaving in mature civilized fashion". *Braiman*, 378 N.E.2d at 1021. In this regard, the courts have observed that such awards are generally the result of agreement be-

² In this regard, an implicit legislative or judicial presumption favoring joint custody also runs the risk of influencing the negotiating process, in a fashion not geared towards furthering the child's best interests. For example, a party failing to request joint custody may be inaccurately viewed as less willing or less able to care for his or her child, or the custody issue may become a bargaining lever to exact terms or concessions favorable to the requesting party. See *Perotti v. Perotti*, 355 N.Y.S.2d 68, 72 (1974).

³ Under §240 of the New York Domestic Relations Law,

"In any action or proceeding brought . . . to obtain . . . the custody of or right to visitation with any child of a marriage, the court must give such direction, between the parties, for the custody, care, education and maintenance of any child of the parties, as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child. In all cases there shall be no prima facie right to the custody of the child in either parent."

In *Odette R.*, 399 N.Y.S.2d at 95, and *Perotti*, 355 N.Y.S.2d at 70, the court expressly found that the statutory grant of authority to award custody to either parent encompasses the authority to grant custody awards to both parents jointly.

tween the parties. *Dodd*, 403 N.Y.S.2d at 405; *Odette R.*, 399 N.Y.S.2d at 96. *But see Perotti*, 355 N.Y.S.2d 68; *Woicik v. Woicik*, 321 N.Y.S.2d 5 (1971).

Finally, the Iowa Supreme Court, examining the significance of newly-enacted legislation that stated simply, "The court may provide for joint custody of the children by the parties", observed that the court's power to order joint custody, when justified, was already implicit in its duty to establish custody. *In re Marriage of Burham*, 283 N.W.2d 269, 272 (Iowa 1979). The court continued: "Prior to the recent amendment . . . , joint, or divided, custody was never forbidden by statute. Thus, the legislature has now simply placed its imprimatur upon joint custody." *Id.*

B. *Factors for Consideration*

As we have noted, the paramount concern and controlling legal standard in custody proceedings is the "best interests of the child". Those courts embracing joint custody generally discuss several criteria when evaluating its feasibility. As the courts appear to favor custody arrangements that are both consensual and carefully planned, such factors are usually grounded in practical considerations.⁴

Foremost among these considerations is the concern that both parents be "fit" or "physically and psychologically capable of fulfilling the role of parent". *Beck v. Beck*, 432 A.2d 63, 71 (N.J. 1981) (quoting Miller, *Joint Custody*, 13 Family L. Q. 345, 369 (1979)). This factor presumes a viable relationship between each parent and the child. Of equal importance is the ability of the parents to cooperate with each other—to set aside personal conflict, for the benefit and welfare of the children. *Compare Beck*, 432 A.2d at 71-72, *with Braiman*, 378 N.E.2d at 1021. *See also* Miller, *Joint Custody*. 13 Family L. Q. 345, 369-70 (1979).

Mutual acceptance of joint custody has also been emphasized by the courts. In this regard, joint custody awards are gener-

⁴ Other states expressly incorporate these factors into their child custody statutes—e.g., Mo. Ann. Stat. §452.375, Mich. Stat. Ann. §25.312. The importance of any one criterion is, of course, dependent upon the unique facts and circumstances of the particular case.

ally the result of mutual request. However, application by both parents is not an inflexible prerequisite, as long as both parents demonstrate the willingness and capacity to care for the children. *Beck*, 432 A.2d at 71. See also *Perotti*, 33 N.Y.S.2d at 72; *Mayer*, 376 A.2d at 219.

In terms of the physical aspects of joint custody, several interrelated issues are evaluated. For example, the financial status of the parents is considered—their respective capacity to provide food, clothing, medical care, etc., to the child. See *Beck*, 432 A.2d at 72; *Lustig v. Lustig*, 299 N.W.2d 375, 380-81 (Mich. App. 1980). Geographical proximity of the parents' homes is another factor, to the extent that it may affect schooling, travel, and the child's access to friends and relatives. *Beck*, 432 A.2d at 72. Nevertheless, courts are flexible in adapting joint custody decrees to the needs of distant parents. See, e.g., *Bazant v. Bazant*, 439 N.Y.S.2d 521 (1981); *Wheeler v. Wheeler*, 222 P.2d 400 (Wash. 1980); *Fago v. Fago*, 250 S.W.2d 837 (Mo. App. 1952); *Baer v. Baer*, 51 S.W.2d 873 (Mo. App. 1932). Parental working schedules are also addressed, especially with regard to the age and number of children in issue. See *Burham*, 283 N.W.2d at 274; *Mayer*, 376 A.2d at 219-20. Finally, the child's preference is sometimes ascertained, although the courts have considerable discretion as to the weight accorded the testimony of a child. *Beck*, 432 A.2d at 73; *Burham*, 283 N.W.2d at 274.⁵

IV

Conclusion

In summary, we believe that the Maryland courts may provide for joint custody, whenever such an award is determined to be in the child's best interests. This conclusion is based on the express language of Article 72A, §1 [FL §5-203] of the Maryland Code; the express recognition of joint custody awards in those states with statutes worded in a similar fashion; and the Maryland courts' prior affirmation of decrees that implicitly award joint custody to "fit" parents.

⁵ For a comprehensive checklist of specific issues and items that should be considered when devising a joint custody agreement, see Miller, *Joint Custody*, 13 Family L. Q. 345, 390-92 (1979).

Nevertheless—given (i) recurrent questions about the equity court's current authority to award joint custody in appropriate circumstances, (ii) the absence of any express characterization of "joint custody", as such, in Maryland case law, and (iii) some statutory ambiguity as regards certain potential effects of awards of joint custody (*see* Article 72A, §1A [FL §5-204], concerning the domicile of a child of separated parents)⁶—legislation that expressly enables the equity courts to award joint custody would, in our view, be a useful addition to the statutory law of this State.

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Editor's Note: Since the issuance of this Opinion, the Court of Special Appeals has ruled directly on the issue of joint custody. *Kerns v. Kerns*, 59 Md. App. 87 (1984). Relying in part on this Opinion [*see* 59 Md. App. at 91], the Court concluded:

"[I]n Maryland[,], a court of equity has the authority to provide for joint custody whenever such an award is determined to be in the child's best interests. The fact that the parties do not request joint custody is no limitation upon a court's authority to award it. While a request for joint custody may be a factor to be weighed by a chancellor in the sound exercise of his discretion, it is not a jurisdictional prerequisite to an award of such custody." 59 Md. App. at 94.

See also Taylor v. Taylor, 60 Md. App. 260 (1984).

⁶ Article 72A, §1A [FL §5-204] provides in pertinent part: "The domicile of a child is the same as the domicile of both or one of its parents. If the parents live apart, the child's domicile is that of . . . the parent to whom legal custody is awarded . . .". As worded, the statute addresses the consequences of some—but not all—types of custody awards. However, simply because §1A apparently does not address the effect on a child's domicile of all forms of legal custody, we do not read that section to preclude by implication alternative awards such as joint custody. Indeed, we note that, of the several bills introduced during the 1983 legislative session to expressly provide for joint custody, not one would have amended §1A.

EDUCATION

BUDGETARY ADMINISTRATION—CAPITAL PROJECTS—PUBLIC SCHOOL CONSTRUCTION—PREEMPTION—CHARTER PROVISION IMPOSING TIME LIMIT ON USE OF APPROPRIATION FOR CAPITAL PROJECTS DOES NOT APPLY TO SCHOOL BOARD.

May 31, 1983

*Max D. Miller, Jr., Esq.**County Attorney for Harford County*

You have requested our opinion on whether §519 of the Harford County Charter, concerning unexpended capital appropriations, applies to the Harford County Board of Education ("the Board"). Specifically, you ask whether the Board's capital projects are subject to the Charter requirement that "any capital project shall stand abandoned if three fiscal years elapse without any expenditure from or encumbrance of the appropriation made therefor".

For the reasons given below, we have concluded that this provision is inapplicable to the Board's capital projects.

I

Background

As we understand it, the Harford County Treasurer has notified the Harford County Board of Education that certain of its capital projects, for which funds had previously been appropriated, would be treated as abandoned pursuant to §519 of the Harford County Charter.¹ This provision is as follows:

"Unless otherwise provided by law, all unexpended and unencumbered appropriations in the cur-

¹ We understand that the projects in question involve the renovation of existing school facilities. The Board has requested State funding under the public school construction program; these requests are pending at the Interagency Committee for State Public School Construction.

rent expense budget remaining at the end of the fiscal year shall revert into the County general fund. *No appropriation for a capital project in the capital budget shall lapse until the purpose for which the appropriation was made shall have been accomplished or abandoned; provided that any capital project shall stand abandoned if three fiscal years elapse without any expenditure from or encumbrance of the appropriation made therefor.* The balances remaining to the credit of the completed or abandoned capital projects shall be available for appropriation in subsequent capital budgets." (Emphasis added.)

The County contends that, because this provision does not conflict with any provision of State law, it is applicable to the Board. The Board's position is that State law wholly preempts the field of education, and, therefore, the County is without authority to apply §519 to the Board's capital projects.

II

Analysis

A. State Preemption

In *McCarthy v. Board of Educ. of Anne Arundel County*, 280 Md. 634 (1977), the Court of Appeals held invalid two Anne Arundel County code provisions that directed the school board to provide transportation for private school students. In so holding, the Court concluded that: "Our recital of legislation by the State in the field of education demonstrates the occupation of that field by the State." 280 Md. at 651.

It is by no means entirely clear whether the Court, through this broadly phrased conclusion, intended to hold that local authority had been wholly preempted in every matter relating to education. We note for example, that, in its recent decision upholding the constitutionality of the State's system of public school financing, the Court of Appeals cited *McCarthy* in passing, but did not reiterate that decision's broadly phrased conclusion. See *Hornbeck v. Somerset County Bd. of Educ.*, 295 Md. 597 (1983).

At any rate, for purposes of this Opinion we need not attempt to demarcate the precise boundaries of State preemption as to all matters relating to education. Rather, we think it reasonably clear that county charter provisions regulating a school board's budget process *do* fall within the area of State preemption, whatever that area's outer limits might be.

In two cases prior to *McCarthy*, the Court of Appeals held that a board of education "is not subject to [county] charter budgetary requirements". *Board of Educ. of Montgomery County v. Montgomery County*, 237 Md. 191, 197 (1964). See also *Montgomery County v. Yost*, 223 Md. 150, 162 (1960). To be sure, both of these cases involved elements of conflict between county charter provisions and State law. However, in *McCarthy*, the Court of Appeals treated these same cases—from the more recent of which it quoted with approval the very language noted here—as evidence of State preemption. *McCarthy*, 280 Md. at 650. In light of *McCarthy*, therefore, we regard the Court's repeated statement that a school board "is not subject to [county] charter budgetary requirements" as a statement of preemption—that is, the State has preempted the area of educational budgeting.

B. *Extent of County Authority under the Statute*

Although the County lacks inherent authority to impose charter budgetary requirements on the Board, it does not necessarily follow that the County is entirely without authority to legislate with respect to the Board. Even after a field is preempted, local legislation nevertheless is permitted if the General Assembly has so authorized by specific statutory provision. As we said of the *McCarthy* decision itself: "We do not view this holding to mean that the counties cannot exercise certain narrow legislative or administrative authority within the limits of functions specifically assigned to the counties by the General Assembly." Opinion No. 79-078, at 10 n. 7 (December 31, 1979) (unpublished).² Therefore, the determinative

² See also 67 *Opinions of the Attorney General* 13 (1982) (local law on condominiums preempted unless it falls within exceptions enumerated in the statute); 67 *Opinions of the Attorney General* 316, 320 n. 5 (1982) (all local firearms regulation not necessarily preempted although State law generally preempts the authority of local governments to regulate handgun ammunition).

issue is whether §519 of the Harford County Charter is authorized by any provision of the Education Article ("Ed" Article) of the Maryland Code.

Under Ed §5-102(b)(1), "[e]ach county board shall submit an annual school budget in writing to the county commissioners, county council, or the county executive". The Education Article itself specifies some requirements about the procedures for the annual budget. *See, e.g.*, Ed §5-101(b)(2) (county fiscal authorities may require certain additional details); §5-101(c) (budget categories); §5-102(b)(2) (time of submission). However, the Education Article is not a detailed roadmap of the entire budget process—nor could it be, given county-to county variations in procedure.

Accordingly, we believe that, when Ed §5-102 requires submission of a school board's budget to the appropriate county, the section impliedly requires that the school board follow that county's budgetary procedures. Otherwise, the school board's budget would largely fall into a procedural vacuum: the General Assembly has not legislated every detail, yet the local government would be preempted from doing so. We do not construe the statute to produce that absurd result. *See, e.g., Kindley v. Governor of Maryland*, 289 Md. 620, 625 (1981).³

However, the essence of preemption is that local governments do not have wide-ranging implied authority within the preempted area. In our view, the most that can be inferred from Ed §5-102 and the other budgetary provisions is that school boards must generally adhere to county budgeting *procedures*. Unstated *substantive* restrictions on the use of appropriated funds are quite a different matter.

Section 519 of the Harford County Charter is not a mere procedural requirement. It imposes a restriction on the Board's use of funds for capital projects that is nowhere imposed by State law. Indeed, the pertinent provision of the Education Article implies that a county school board has broad discretion to

³ We acknowledge that, elsewhere in the Education Article, the General Assembly expressly incorporated local fiscal procedures: "The capital and operating budgets [for community colleges] shall be prepared and considered in accordance with county fiscal procedures not inconsistent with State law." Ed §16-401(d). *See generally* Opinion No. 81-014 (April 15, 1981) (unpublished). But we are reluctant to conclude, from this single express provision, that necessary budget procedures may not be implied anywhere else in the Article.

determine when to apply appropriated funds to a capital project. Only when a board wishes to "transfer . . . unexpended [capital] project balances" must it obtain the approval of the county council. Ed §5-106(c)(2).

Under Ed §5-106(b), a county council has the authority to deny appropriations for particular capital projects. We recognize the general principle that the power to deny appropriations implies the power to condition their use. As the Court of Appeals said in another context: "Through its authority to appropriate funds in the yearly budget bill, the General Assembly is free to limit the conditions under which public funds may be expended for abortion." *Kindley v. Governor of Maryland*, 289 Md. 620, 630 (1981). See also, e.g., 48 *Opinions of the Attorney General* 19, 21 (1963) (authority of the General Assembly to strike or reduce budget items entails "the subsidiary authority which naturally flows from that power, to condition or limit the use of the money appropriated"). Viewed from this perspective, one could argue that Harford County appropriates funds for the Board's capital projects with the necessarily implied condition that §519 of the Charter be adhered to.

However, we do not think that this general principle can reasonably be applied in an area in which local authority has been preempted. The General Assembly's intent to occupy the field of education would obviously be defeated if, for example, a county council were able to "condition" appropriations on the school board's adherence to the council's choice of a school building site or of curriculum requirements. Cf. 41 *Opinions of the Attorney General* 177, 179 (1956) (county council's selection of school site in budget resolution invalid: "Nowhere in the Public School Laws of Maryland is there any indication that the selection of a site for a proposed school is in any way the concern of the County Council or other county legislative or administrative body.").

Just as State preemption is incompatible with local budgetary conditions that impinge on a school board's discretion to set education policy in accordance with State law, it is also incompatible with local budgetary conditions that constrain a board's discretion to spend funds in accordance with State law. Cf. *Montgomery County v. Yost*, 223 Md. 150 (1960).

In our view, Harford County has no authority to impose any limitation or restriction on the use of the Board's funds that is

not authorized by State law.⁴ Because the Board is free, under State law, to spend appropriations for capital projects even after three years, the provision of §519 of the Harford County Charter regarding abandonment of capital projects may not be applied to these capital projects.

III

Conclusion

In summary, it is our opinion that the portion of §519 of the Harford County Charter regarding abandonment of capital projects is inapplicable to the Harford County Board of Education.

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⁴ We note that the General Assembly has evidently chosen to grant local governments different degrees of budgetary control in different areas of education. With respect to a county's borrowing of money to finance capital improvements for a community college, for example, the Education Article provides as follows: "Money may be borrowed on terms and conditions the county governing body considers proper, subject to any requirements of local law applicable to the creation of public debt." Ed §16-402(d).

EDUCATION—VEHICLE LAWS—SCHOOL BOARDS—PREEMP-
TION—SCHOOL BUS SAFETY STANDARDS—CONTRACT
SPECIFICATIONS—COUNTY BOARDS OF EDUCATION MAY
CONTRACT FOR PRODUCT SPECIFICATIONS THAT EXCEED
MINIMUM STANDARDS SET BY MARYLAND VEHICLE LAW.

June 15, 1983

The Honorable John S. Arnick, Chairman
The Honorable Catherine I. Riley, Vice-Chairman
Joint Committee on Administrative,
Executive, and Legislative Review

On behalf of the Joint Committee on Administrative, Executive, and Legislative Review, you have requested our opinion on whether a county board of education has the legal authority to include product specifications in a transportation service contract for public school buses that exceed the requirements for such vehicles set by the Motor Vehicle Administration. You have expressed particular concern over a specification involving wheel rim construction, contained in the transportation service contract specifications of the Anne Arundel County Board of Education.

For the reasons given below, we have concluded that a county board of education has authority to meet its perceived needs by including, in its transportation service contract, product specifications that exceed the standards for school vehicles contained in regulations adopted by the Motor Vehicle Administration. However, such county contract specifications may not conflict with, or fall short of, any applicable standard. It is our opinion that the Anne Arundel County Board of Education acted within its authority in adopting its contract specification for wheel rims.

I

Legal Framework

Section 25-110(a) of the Transportation Article ("Tr" Article) specifically authorizes the Motor Vehicle Administration ("MVA") to adopt regulations concerning the safe operation of all school vehicles. In accordance with this grant of authority,

MVA, with the advice of the State Department of Education, has adopted a series of regulations "intended to provide minimum standards for the design, construction, and equipment" of school vehicles with a seating capacity of 16 or more passengers. COMAR 11.19.02.01. See Tr §11-173. These regulations have the force and effect of law. See Tr §12-104(b).¹ Indeed, Tr §25-110(a)(2) expressly subjects all users of school buses to these regulations:

"The following shall be subject to the rules and regulations adopted under this section [Tr §25-110]:

(i) Every school or school district and its officers and employees;

(ii) Every person employed under contract by a school or school district; and

(iii) Every person that owns or operates a school vehicle."

By delegating to MVA the responsibility for drafting minimum design and construction standards for school buses, the General Assembly has preempted comparable local legislation and regulation in the field. Tr §25-101.1(c) expressly states:

"(1) The provisions of the Maryland Vehicle Law prevail over all local legislation and regulation on any subject with which the Maryland Vehicle Law deals; [and]

(2) All public local laws, ordinances, and regulations that are inconsistent or identical with or equivalent to any provision in the Maryland Vehicle Law are repealed."²

See 65 *Opinions of the Attorney General* 483 (1980). See also *County Council for Montgomery County v. Montgomery Association*, 274 Md. 52, 59 (1975); *Mayor and City Council of Baltimore v. Sitnick*, 254 Md. 303, 311, 317 (1969).

¹ Additional federal regulations governing the safe operation of motor vehicles appear at 49 C.F.R. §§571.101 through 572.302. All school buses must comply with these federal standards as well as MVA's standards.

² In our view, MVA regulations promulgated in accordance with the Maryland Vehicle Law are, for purposes of the express preemption stated in Tr §25-101.1(c), "provisions of the Maryland Vehicle Law".

To the extent that any political subdivision or State agency other than MVA purports in any way to regulate design, construction, or equipment standards related to the safe operation of school buses, that regulation is invalid. For example, a county council may not enact legislation requiring the county board of education to contract for or purchase only school vehicles meeting safety specifications adopted by the council. Nor may a county council or board of education impose its own safety requirements on school buses used by private parties such as private schools, churches, or social groups.

Indeed, MVA's exclusive regulatory authority over safety requirements for school buses is unaffected even by an apparently similar grant of authority to the State Board of Education in §5-203(c) of the Education Article ("Ed" Article): "The State Board shall adopt rules and regulations that provide for the safe operation of the student transportation system of each county board of education."

In a recent letter of advice to the State Superintendent of Schools, Assistant Attorney General Ellen M. Heller concluded that MVA—not the State Board—has the legal authority to promulgate the rules and regulations concerning safety requirements for public school vehicles in Maryland. Letter of Advice from Ellen M. Heller, Assistant Attorney General, to Dr. David W. Hornbeck, State Superintendent of Schools (March 10, 1983) (copy appended). After receiving this advice, the State Board of Education promptly rescinded its regulations. We have reviewed the authorities and discussion in that letter, and we concur with the views there expressed.³

³ Many of the Board's regulations have since been incorporated in proposed MVA regulations. See Proposed Emergency Regulations, COMAR 11.19.02 (May 12, 1983).

On a local level, the Anne Arundel County Board of Education incorporated certain of the State Board specifications into its contracts for public school bus transportation service. For the reasons stated in Part III below, we believe that this action does not encroach on MVA's exclusive regulatory authority in this area.

II

Anne Arundel County Contract Specifications

On March 31, 1983, the transportation supervisor for the Anne Arundel County public school system published a document titled "School Bus Specifications". These specifications for new school bus equipment were "in addition to or [in] support [of]" MVA standards for school vehicles. Transportation Office, Anne Arundel County Public Schools, *School Bus Specifications*, Introduction (March, 1983). Any school bus contractor seeking to provide transportation service to the county's public schools must ensure that its school vehicles manufactured after July 1, 1982 meet these specifications.

One of the Anne Arundel County public school bus specifications requires that a vehicle's wheel rims "be of one-piece construction". *Bus Specifications* at 5.⁴

III

Analysis

In our view, a county school board has authority to require certain safety-related features on school buses if (i) the county board requires these features in its capacity as a purchaser of transportation services and does not attempt to impose such requirements on private parties as a matter of regulation, and (ii) the safety-related features that the county board desires to be on its school buses do not conflict with MVA's requirements. The Anne Arundel County Board's contract specifications, including its specification on wheel rim construction, meet these criteria and are thus valid exercises of the Board's authority.

⁴ We understand that there is an ongoing controversy as to the safety of single piece wheel rims as compared to multi-piece wheel rims. See School Bus Rim Task Force, *Final Report* (January, 1983), as presented to D. W. Hornbeck, State Superintendent of Schools.

A. Board Activity as a Purchaser of Services

When a school board states its willingness to enter into a contract for the transportation of students to the public schools, the board is not engaged in activity in its regulatory capacity—as an agency setting educational policies in furtherance of State law. Cf. Ed §4-107. Rather, it is proposing a contractual arrangement containing certain plans and specifications, just as a private citizen or corporation might do. See generally *Wolfe v. Warfield*, 266 Md. 621 (1972); *Kandalis v. Paul Pet Construction Co.*, 210 Md. 319, 323 (1955). See also *City of Frederick v. Brosius Homes Corp.*, 247 Md. 88, 92 (1966); *Rittenhouse v. Mayor and City Council of Baltimore*, 25 Md. 336, 346 (1866).

If a county board of education were to *buy* school vehicles for its own use, it has the express authority to “name in the specifications and advertisements for bids the particular make, kind, or brand of article to be contracted for or purchased”. Ed §5-110(b)(2) (applicable to “equipment”). See *Mitchell Business Equipment Co. v. Board of Education for St. Mary's County*, 251 Md. 150 (1967). In contracting for transportation service, a board has similar flexibility to prescribe contract specifications that fulfill its own perceived needs—subject, of course, to the requirements that comprise the MVA school vehicle standards.

In this regard, we note that a county board's transportation contract affects only service to that county's public schools. It imposes no restriction on the vehicles used by private or parochial schools or on the use of school buses for alternative purposes, such as charter trips, the transportation of elderly or handicapped citizens, and so on. Moreover, a school bus contractor is under no legal obligation to comply with a county board's specifications. The only consequence of its failure to do so is that it would be ineligible for the county board's contract. But it would remain entirely free to provide service to other customers.

B. Compliance with MVA Standards

When a school board prescribes school bus specifications in a transportation service contract, its specifications must comply with MVA's standards. As we have discussed in Part I above,

MVA is responsible for determining the necessary safety components of school buses.

Essentially, compliance with MVA standards means that a county board may not purchase or contract for the use of a school bus that fails to meet MVA standards. But in its role as a purchaser of transportation services, a county board's specifications may properly exceed MVA standards, if the county board believes that its needs are better served by additional equipment or superior components.⁵ Thus, for example, a county board may require a quieter exhaust system than that specified in Table 1 in COMAR 11.14.05.

Indeed, the MVA regulations emphasize that: "The following is intended to provide *minimum* standards for the design, construction, and equipment of school buses manufactured after December 31, 1972" (emphasis added). COMAR 11.10.02.04B. See also COMAR 11.19.02.07B and 11.19.02.10B. Cf. Tr §22-101(b) ("Nothing contained in this title [Equipment of Vehicles] shall be construed to prohibit the use of additional parts and accessories on any vehicle not inconsistent with the provisions of this title"). Thus, although MVA has exclusive regulatory authority to determine the safety requirements for school buses, nothing in the statute or MVA regulations prevents a purchaser of a school bus—or, as here, a school board that contracts for the use of school buses—from requiring school vehicle equipment that exceeds these MVA "minimum standards".

In practice, county boards throughout the State incorporate additional specifications into their transportation service contracts, in order to meet perceived local needs. For example, the Kent County Board of Education requires its buses to be equipped with semaphore arms. In Washington County, sanders are mandatory, due to hazardous road conditions. Certain of the more mountainous western counties require CB radios.

⁵ Of course, if an MVA regulation specifies that only a given piece of equipment—and no other—be used, a county board may not set a different contract specification. A school bus may not be titled or registered with MVA unless the manufacturer certifies that the vehicle is in full compliance with applicable MVA regulations. COMAR 11.19.02.02. If a school board were to insist on components that in fact did not meet MVA standards, the vehicle could not lawfully be used.

In Baltimore City, special polycarbonate shatter-resistant glass is installed on school buses. Other counties, for pupil safety purposes, require crossover mirrors on both sides of the bus, although current State and federal regulations only mandate a crossover mirror on the left side.

In sum, if MVA regulations allow optional features, a county board may properly insist on specifications that exceed the minimum requirements of MVA regulations when it purchases, or contracts for the use of, school buses. Its decision might be based on any one of a number of reasons, including the county terrain, climate conditions, traffic regulations, pupil composition, convenience, and the like.

C. Anne Arundel County Board's Wheel Rim Specification

The Anne Arundel County Board of Education requires, as part of its transportation service contract specifications, that a bus's wheel rims be of single piece construction. At present, federal and State regulations are silent as to the standards applicable to rim designs. However, MVA's proposed emergency regulation will provide: "The use of single piece rims or multi-piece rims or any other rim design that meets the applicable [Federal Motor Vehicle Safety Standards] and the tire and wheel rim association [criteria] is permitted." Proposed Regulation 11.19.02.06B(9)(a) (May 12, 1983).

Clearly, if MVA were to authorize only single piece rims or multi-piece rims—but not both—every school vehicle in Maryland would have to comply with the specified rim design. But because MVA regulations are now silent, and in future will explicitly permit a choice, a county board may exercise its prerogative as a purchaser of contract services to specify the particular kind of wheel rim it desires.⁶

In our view, the Anne Arundel County Board of Education's decision to specify single piece wheel rims on the public school

⁶ We understand that the major manufacturers of school vehicles are now producing models with single piece wheel rims as a matter of course. Thus, any order for a new school bus that specifies multi-piece rims will entail additional expense.

buses for which it contracts does not encroach on the MVA's regulatory authority to adopt construction and design standards for all school vehicles.

IV

Conclusion

In summary, we conclude that a county board of education has authority to include in its transportation service contract for public school buses product specifications that exceed the minimum safety standards for school vehicles adopted by the Motor Vehicle Administration. However, such county contract specifications may not conflict with, or fall short of, any applicable standard. We conclude that the Anne Arundel County Board of Education acted within its authority in adopting its contract specification for wheel rims.

STEPHEN H. SACHS, *Attorney General*

AVERY AISENSTARK,
Principal Counsel
Opinions and Advice

LYNETTE M. PHILLIPS, *Staff Attorney*
Opinions and Advice

APPENDIX

March 10, 1983

Dr. David W. Hornbeck
State Superintendent of Schools
Maryland State Department of Education
200 West Baltimore Street
Baltimore, Maryland 21201

Dear Dr. Hornbeck:

This letter is in response to your recent inquiry as to whether the Motor Vehicle Administration ("MVA") has the authority to promulgate school bus regulations pursuant to

§25-110(a) of the Transportation Article, or whether such authority rests with the State Board of Education pursuant to §5-203(c) of the Education Article. For the reasons stated below, I have concluded that MVA has the authority to promulgate regulations governing the safe operation of school vehicles.

Section 25-110(a)(1) of the Transportation Article ("Tr" Article) reads:

"With the advice of the State Department of Education, the Motor Vehicle Administration shall adopt and enforce rules and regulations not inconsistent with the Maryland Vehicle Law to govern the safe operation of all school vehicles."

Section 5-203(c) of the Education Article ("Ed" Article) reads:

"The State Board shall adopt rules and regulations that provide for the safe operation of the student transportation system of each county board of education."

It is well established in Maryland that when two statutes appear to overlap or conflict, they should be construed so as to give as full an effect as possible to both. *City of Baltimore v. Clerk of the Superior Court*, 270 Md. 316, 319 (1973). However, a second statute will not be held to alter or limit an earlier statute unless the Legislature has clearly manifested that intention. *Gannon & Son v. Emerson*, 291 Md. 443, 455 (1981). This is especially true where the second statute is more general than the earlier statute. *Equitable Trust Co. v. State of Maryland Commission on Human Relations*, 42 Md. App. 53, 65 (1979). In Maryland, when two statutes appear to conflict, the specific statute governs over the more general. *Dept. of Natural Resources v. France*, 277 Md. 432, 461 (1976). Thus:

"Where there is a specific enactment and a general enactment, which, in the 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." *Maguire v. State*, 192 Md. 615, 623 (1949), *quoted in Criminal*

Injuries Comp. Bd. v. Gould, 273 Md. 486, 495 (1975).

Here, Ed §5-203(c) is the more general statute. Enacted after Tr §25-110,* it gives the State Board general authority to adopt regulations concerning the safety of the "student transportation system of each county board of education". Tr §25-110(a), on the other hand, gives MVA the specific authority to promulgate regulations concerning the safe operation of "all school vehicles".

These two statutes can be harmonized by applying the canons for statute constructions discussed above: The latter, more general provision, Ed §5-203(c), covers those parts of the student transportation system not covered by the earlier, more specific provision, Tr §25-110(a). In a similar situation, in *Equitable Trust Co. v. State of Maryland Commission on Human Relations*, 42 Md. App. 53, 65 (1979), a later, more general statute was held to give the Maryland Commission on Human Relations the authority to investigate only those cases not included in the specific provisions of an earlier statute.

For these reasons therefore, it is my opinion that MVA has the authority to promulgate the rules and regulations concerning public school vehicles in Maryland.

Very truly yours,

ELLEN M. HELLER
Assistant Attorney General

* Ed §5-203(c) was enacted in 1981; Tr §25-110(a) was enacted in 1943 as Article 66½, §200A.

ELECTIONS

PUBLIC ETHICS—INCOME TAX—GENERAL ASSEMBLY—
NEWSLETTERS—LEGAL STATUS UNDER FAIR ELECTION
PRACTICES ACT AND PUBLIC ETHICS LAW OF CONTRIBU-
TIONS SOLICITED BY ELECTED OFFICIALS FOR USE IN
DISTRIBUTING NEWSLETTERS—DISTINCTION BETWEEN
ELECTORAL AND CONSTITUENT NEWSLETTERS.

December 28, 1983

The Honorable Helen L. Koss
Maryland House of Delegates

You have requested our opinion on the legal status of contributions solicited by Members of the General Assembly to help defray the cost of distributing newsletters.

Specifically, you have asked for our views on the following questions:

1. In what respects, if any, does the Maryland Fair Election Practices Act govern the establishment of a fund to receive newsletter contributions or the solicitation of such contributions?
2. Does the Maryland Public Ethics Law permit members of the General Assembly to solicit contributions for newsletters that are intended to keep the member's constituents informed about legislative developments?
3. May contributions solicited by an elected official for use in distributing newsletters intended to keep his or her constituency informed be used for any other purpose?
4. May campaign contributions be used for newsletters?

For the reasons given below, we have concluded as follows:

1. As currently drafted, the Maryland Fair Election Practices Act regulates only the solicitation and expenditure of funds for electoral newsletters—newsletters that are used by a candidate, including an incumbent running for reelection, to directly advance his or her electoral prospects. However, the Act does not apply to funds for nonelectoral, or “constituent”, newsletters—newsletters that are used by an elected official to keep his or her constituency informed.

2. The Maryland Public Ethics Law does not prohibit members of the General Assembly from soliciting contributions for

constituent newsletters. Some—but not all—of such contributions must be reported as gifts in the annual financial disclosure statements required by the Public Ethics Law.

3. Contributions solicited by an elected official for use in distributing constituent newsletters may not be used for any other purpose.

4. Campaign contributions may generally be used for any lawful purpose that enhances the candidate's electoral prospects, including the distribution of electoral newsletters. However, these contributions may not later be used by an elected official to produce nonelectoral newsletters.

I

Background

As your inquiry points out, a Maryland taxpayer, in determining the amount of income subject to the State income tax, may "subtrac[t] from federal adjusted gross income" the following:

"An amount equal to the total of political and *newsletter fund contributions* made by a nonfiduciary individual taxpayer in the taxable year, as determined, calculated, and limited by the provisions of §41 of the federal Internal Revenue Code." Article 81, §280(c)(11) of the Maryland Code.

Under §41 of the federal Internal Revenue Code, an individual taxpayer may claim a credit against tax equal to "one-half of all political contributions and all newsletter fund contributions" made during the taxable year. 26 U.S.C. §41(a).¹ The Internal Revenue Code contains the following definition of "newsletter fund contribution":

"The term 'newsletter fund contribution' means a contribution or gift of money to a fund established and maintained by an individual who holds, has been elected to, or is a candidate for nomination or election to, any Federal, State, or local elective public

¹ The credit claimed may not exceed \$50 or, for a joint return, \$100. 26 U.S.C. §41(b)(1).

office for use by such individual exclusively for the preparation and circulation of a newsletter." 26 U.S.C. §41(c)(5).

This definition—which the Maryland income tax law expressly incorporates—thus gives equal tax treatment to two different types of newsletters: (i) a newsletter distributed by “a candidate for . . . elective public office”, surely intended to directly advance his or her candidacy (an “electoral newsletter”); and (ii) a newsletter distributed by “an individual who holds [or] has been elected to . . . public office”, arguably intended primarily to inform his or her constituents about pending issues (a “constituent newsletter”).

The legislative history of this definition, which was added in 1975, makes clear that Congress specifically sought to encourage the latter type of newsletter:

“[T]he committee believes that the governmental process is strengthened by encouraging such contributions [i.e., to newsletter funds]. It is vital that citizens know what their elected public officials are doing in office, so the voters can evaluate their performance for future elections and can tell their officials what they want them to do and not to do. Consequently, the committee has extended the existing credit and deduction provisions for political contributions to contributions to newsletter funds.” S. Rep. No. 93-1357, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Adm. News 7511.²

II

Applicability of Fair Election Practices Act to Newsletter Funds

At the outset we repeat an observation made in the only prior Opinion of this Office that addressed the subject of newsletters:

² A contribution for an *electoral* newsletter would apparently have been credited as a “political contribution” even without this definitional addition to the tax law. Presumably, the definition of “newsletter fund contribution” was

Continued on page 255.

"As is often the case, the relevant provisions of the Election Code do not chart a precise course; but as we have done on prior occasions, we will respond to your inquiry by attempting to make sense out of legislative provisions which frequently seem designed to frustrate that objective." Opinion No. 79-040, at 1 (July 6, 1979) (unpublished).

In revisiting the question of whether the Maryland Fair Election Practices Act applies to newsletters, we are constrained to reach the same conclusion that we did in that prior Opinion: the Fair Election Practices Act applies to the solicitation, donation, and expenditure of funds only for newsletters that are used by a candidate—including an incumbent running for reelection—to directly advance his or her electoral prospects. The Act does not apply to funds for newsletters that are used by an elected official solely to keep his or her constituency informed about legislative developments.

But we cannot pretend that this distinction—compelled, in our view, by the wording of the Act—makes sense. To the contrary, it is little more than a conceit. A newsletter produced by an incumbent through private donations and distributed widely among his or her constituents inevitably has—and, in truth, is intended to have—political impact, no matter how "neutral" and "informational" it appears. Although the Maryland Public Ethics Law both permits solicitation of donations for newsletters and requires disclosure of some such donations (see Part III below), it imposes no contribution limitations and its disclosure requirements, as compared to the Fair Election Practices Act, are relatively limited. Thus, there is a gap in the law that cries out for reform.

A. Constituent Newsletters

1. Reporting Requirements

In our 1979 Opinion, we addressed the question of "whether a group making contributions to pay the cost of production and/or postage of a constituent newsletter must file reports as

drafted to encompass both constituent and electoral newsletters to avoid questions about the status of electoral newsletter contributions that might have arisen if a provision limited only to constituent newsletters had been enacted.

a political committee pursuant to Article 33, §26-11 of the Maryland Code". Opinion No. 79-040, at 1.

The Opinion concluded that reporting under Article 33, §26-11 was not required:

"An organization must in some way assist or attempt to assist a candidate (or principle) in an election (past, present or future) in order to be subject to the reporting requirements of §26-11. *If the sole purpose of the newsletter, and thus of the committee, is to provide a regular constituent service, performed in the same manner whether [or] not an election is imminent*, then it seems to us that the committee is neither a political committee nor a partisan organization." *Id.* at 2 (emphasis in original).

We see no basis on which we can adopt a different reading of the Act. The terms that define the regulatory scheme, although far from a model of precision, are all clearly linked to actual or prospective candidacy:

"*Candidate*' means any person who files a certificate of candidacy for any public or party office. . . .

'*Contributions*' means the gift . . . of money or other thing of value to any candidate, or his representative, or a representative of any political party or partisan organization to promote . . . the success or defeat of any candidate. . . .

'*Expenditure*' means any . . . disbursement or promise of money or valuable thing by any candidate, treasurer, . . . or partisan organization to promote . . . the success or defeat of any candidate. . . .

'*Partisan organization*' means any combination of two or more persons formed for the purpose of assisting the promotion of the success or defeat of any candidate. . . .

'*Political committee*' means any combination of two or more persons . . . which assists or attempts to assist in any manner the promotion of the success or defeat of any candidate. . . . " Article 33, §1-1(a)(4),(5),(7),(12), and (14).

See also Article 33, §26-4(b) (a “committee”—undefined in the Act—must report “contributions and expenditures” in excess of \$51 that “aid or oppose the nomination or election of any candidate” to that candidate’s treasurer).

The Act imposes various financial reporting obligations on candidates, political committees, committees, and partisan organizations. See Article 33, §26-11(a) (candidates); §26-11(c) (political committees “which continu[e] in existence from year to year”); §26-11(d) (“all other [political] committees”); §26-4(b) (committees); and §26-4(a) (partisan organizations).³ However, as the definitions quoted above indicate, an entity that benefits an incumbent solely in his or her capacity *as an officeholder*, but does not aid the incumbent *as a candidate*, is not governed by the Act.

Summarizing this principle as applied, for example, to groups that hold testimonial dinners, this Office wrote:

“[T]he definition of a political committee relate[s] to *candidates and elections* [A]n ‘early’ testimonial dinner committee [—i.e., one “formed well in advance of any election and of a candidate’s announcing for public office”—is] not a political committee [and, therefore, is] not required to comply with the [Act’s] full filing, record keeping and reporting requirements” 60 *Opinions of the Attorney General* 232, 235 (1975) (emphasis in original).

Cf. 60 *Opinions of the Attorney General* 223, 230 (1975). Moreover, such a group would need to prepare the abbreviated report of a “committee” only if it “expended \$51.00 or more, di-

³ The Act is especially confusing concerning the reporting requirements applicable to partisan organizations. There is no mention of partisan organizations in Article 33, §26-11, which specifies who must file reports of receipts and expenditures. On the other hand, Article 33, §26-4(a), which applies to partisan organizations as well as to political committees, directs the treasurer and chairman of the covered entities to “file campaign fund reports in accordance with subsection (b) of this section and §26-11 of this article”. In light of this latter provision, we conclude that partisan organizations must comply with the reporting obligations of Article 33, §§26-11 and 26-12 throughout their existence, if they have reportable transactions. Any suggestion to the contrary in 59 *Opinions of the Attorney General* 282, 296 (1974) is disapproved.

rectly or indirectly, to aid the nomination or election of a candidate". 60 *Opinions of the Attorney General* at 235.⁴

2. Contribution Limitations

The Fair Election Practices Act also imposes a \$1,000 limit on the amount that a person or entity may "contribute . . . to any candidate . . . in any primary, general or special election" and a \$2,500 limit on total "contributions . . . in any primary or general election". Article 33, §26-9(b). In our view, these limitations are likewise inapplicable to gifts for constituent newsletters, because the close nexus with candidacy and elections required under the Act is missing.

No doubt it would be more true to real world politics to presume that incumbents are indeed candidates for reelection throughout their tenures—and to thus view constituent newsletters, and contributions for their production, as long-range campaign tools. But to do so would be inconsistent with the terminology used in the Act.⁵

Under the Act's current wording, the reasoning in 61 *Opinions of the Attorney General* 407 (1976) regarding "a non-election year contribution for the benefit of an incumbent office holder" is correct:

"[M]oney given to a fund-raising affair held for the benefit of incumbent office holders will not be deemed to constitute a contribution chargeable to the \$2,500 per election limitation if that affair is not conducted for the purpose of raising money either to eliminate a prior election campaign deficit or to accumulate a campaign fund for use in a subsequent election effort on the part of the incumbent officer holders It is, for example, entirely possible that

⁴ See also 58 *Opinions of the Attorney General* 266, 270 (1973) (if a committee raises funds for the future campaign of a person who does not in fact run, "the Maryland Fair Election Practices Act never becomes applicable and thus never places any obligation on the committee with respect to the distribution of its funds").

⁵ When the General Assembly chose to treat *all* incumbents as "candidates", for purposes of the statement of contributions required of certain entities that do business with the State, it did so expressly. Article 33, §30-1(d).

such affairs may be conducted solely for the purpose of providing the incumbent office holder with a gift or appropriate recognition of his public service or, conceivably, for the purpose of enabling him to defray the normal expenses of holding office and serving his constituency. If this is the only purpose of the affair and if this is the only purpose which the contributors to it intend to serve, then donations would not constitute political contributions chargeable to the \$2,500 limitation." 61 *Opinions of the Attorney General* at 413.

See also 63 *Opinions of the Attorney General* 263, 269-71 (1978) (contributions for a political committee's administrative expenses not subject to limitations); 60 *Opinions of the Attorney General* 259, 261-62 (1975) (contributions for a political party's normal headquarters office and staff not subject to limitations).

B. *Electoral Newsletters*

As our 1979 Opinion indicated, a newsletter committee—even one that originally was not subject to the Act because it merely enabled an elected official to communicate with his or her constituents—"would become a political committee if it 'assists or attempts to assist in any manner the promotion of the success or defeat of any candidate, candidates, political party, principle or proposition submitted to a vote at any election'". Opinion No. 79-040, at 3 (quoting Article 33, §1-1(a)(14) (definition of "political committee")). The Opinion then observed:

"Once [an elected official's newsletter fundraising committee] engages in such activity with regard to an announced candidate, it would be subject to all the reporting requirements applicable to political committees. See 59 *Opinions of the Attorney General* 282, 290 (1974). The question of if and when a constituent committee becomes a political committee is, of course, a factual one which must be determined on a case-by-case basis. However, if in preparation for an impending election constituent newsletter is suddenly more frequently published, or more lengthy, or includes campaign as opposed to constituent materials or becomes substantially more costly,

these factors would indicate that it is being published not merely as an ongoing constituent service but to assist [a] candidacy[,] and thus those raising money to underwrite its publication would constitute a political committee and be subject to all of the attendant legal obligations." *Id.*

Given the current state of the governing statutes, this passage provides as much guidance as can reasonably be given on the conditions under which the Fair Election Practices Act is triggered. Once a constituent newsletter becomes an electoral newsletter, contributions for it would be subject to the limitations of Article 33, §26-9(b).

III

Applicability of Public Ethics Law to Newsletter Funds

A. *Solicitation*

The Maryland Public Ethics Law provides that "[a]n official or employee may not solicit any gift". Article 40A, §3-106(a). However, the term "gift" does not include "political campaign contributions regulated in accordance with the provisions of [the Fair Election Practices Act], or any other provision of State law regulating . . . the receipt of political campaign contributions." Article 40A, §1-201(p).

A legislative investigating committee recently examined the applicability of this provision to a certain "newsletter/questionnaire" solicitation. *Report of the Legislative Investigating Committee, In re: Delegate Robin Ficker* (April, 1982). It was stipulated that the solicitation was *not* made for "political campaign contributions regulated in accordance with the provisions of [the Fair Election Practices Act]", because the newsletter in question was evidently a constituent newsletter.

The Investigating Committee nevertheless observed that the inapplicability of the Fair Election Practices Act did not resolve the question, because the definition of "gift" in the Public Ethics Law also excludes "solicitations of contributions in accordance with 'any *other* provision of State law regulating . . . the receipt of political campaign contributions'". *Report* at 9 (ellipsis in original, emphasis added).

The Investigating Committee treated the tax deduction for "political and newsletter fund contributions" in Article 81, §280(c)(11) as if it were one such "other" provision. Given the identical tax treatment of these two kinds of contributions, "the fact that the solicitation may have been a newsletter fund solicitation—as opposed to a political campaign solicitation—is of no consequence". *Report* at 10. In order to avoid "the absurd result of having a contributor entitled to a tax deduction on the one hand, yet making the solicitation of such a contribution by an official an ethical violation," the Investigating Committee concluded that "solicitations for newsletter fund contributions do not constitute solicitations for gifts in violation of the Maryland Public Ethics Law". *Report* at 11.

We agree with this conclusion, despite the problematic statutory language. It must be acknowledged that the exclusion, from the definition of "gift", of political campaign contributions "regulat[ed]" by other law does not literally apply. The most that can be said unequivocally about the tax deduction is that it reflects the General Assembly's wish to permit and encourage constituent newsletter fund contributions; surely it does not "regulate" them in any true sense of the word, nor does it transmute them into "political campaign contributions".

Constituent newsletter donations are undoubtedly "gifts", not regulated political contributions. Yet, because the later-enacted tax deduction provision must be given practical effect, we agree that they may be solicited.⁶ To read the Public Ethics Law as preventing their solicitation would lead to an absurd result that can and should be avoided. *See, e.g., Board of Fire Comm'rs v. Potter*, 268 Md. 285, 291 (1973) (later statute governs to extent of inconsistency); *Pan American Sulphur Co. v. State Dep't of Assessments & Taxation*, 251 Md. 620, 627 (1968) (avoiding absurd consequences).

B. Disclosure

The Public Ethics Law requires annual disclosure of certain "gifts":

⁶ Article 81, §280(c)(11) was added by Chapter 373, Laws of Maryland 1980. Article 40A, §1-201(p) was enacted as part of Chapter 513, Laws of Maryland 1979.

"The [annual financial disclosure] statement . . . shall contain . . . [a] schedule of each gift permitted by law in excess of \$25 in value or a series of gifts totaling \$100 or more from any one person received at any time during the year for which the statement is filed . . . from, or on behalf of, directly or indirectly, any person who does business with the State or is regulated by the State, or is a registrant [under the lobbying disclosure title of the Public Ethics Law.]" Article 40A, §4-103(d).⁷

However, "campaign contributions regulated in accordance with the provisions of [the Fair Election Practices Act] or any other provision of State law regulating the conduct of elections or the receipt of political campaign contributions" need not be disclosed. *Id.*

Neither the Fair Election Practices Act nor the tax law "regulate[s]" contributions for constituent newsletters; these contributions are simply permitted, not "regulated". Therefore, (i) they are "gifts", as defined in Article 40A, §1-201(p), and (ii) they are not within the exception from disclosure contained in Article 40A, §4-103(d) itself.

In Part III A above, we described the absurd result that would occur if the prohibition on the the solicitation of gifts were applied literally to constituent newsletter funds. By contrast, literal application of the disclosure requirement would have no absurd results. Disclosure of gifts for constituent newsletters would further the purposes of the Public Ethics Law without in any way vitiating the purpose or practical effect of the tax deduction for such contributions. Accordingly, in our view, these contributions must be disclosed to the extent required by Article 40A, §4-103(d).⁸

However, this disclosure—required only as to gifts above a specified value and, then, only if received from "any person

⁷ The phrase "doing business with the State" is defined in Article 40A, §1-201(e) as referring, in general, to those whose transactions with the State involve consideration of \$5,000 or more.

⁸ When it was originally enacted, Article 40A, §4-103(d) permitted non-disclosure of "campaign contributions which are otherwise reported by name of donor". Chapter 513, Laws of Maryland 1979. Under this formulation, donations for constituent newsletters would clearly be reportable, because such

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who does business with the State or is regulated by the State, or is a registrant”—is markedly less comprehensive than that required under the Fair Election Practices Act. Moreover, the Public Ethics Law contains no limit on the value of gifts that may be given. For these reasons, the Public Ethics Law does not fill the regulatory gap that exists as to constituent newsletters.

IV

Use of Constituent Newsletter Funds for Other Purposes

As our discussion in Part II above indicates, the Fair Election Practices Act creates a broad—and, at least in the case of newsletters, rather unrealistic—distinction between (i) donations for electoral purposes, to which the various requirements in the Act apply, and (ii) donations for official purposes, theoretically unrelated to an election, to which the Act does not apply.

From this overall statutory plan, as well as from specific provisions in the Act, we draw the conclusion that funds given for the production of a constituent newsletter may not be used for electoral purposes. In addition, newsletter funds established to take advantage of favorable tax treatment under federal and State law—i.e., the funds that are the subject of your inquiry—may not be applied even to other forms of constituent service. These funds may be used only for newsletters.⁹

A. *Conversion to Electoral Use*

In our view, the Fair Election Practices Act requires that those who solicit political contributions—i.e., contributions for

donations are not “otherwise reported”. The exception that now appears in §4-103(d)—which is identical to that in the definition of “gift”, Article 40A, §1-201(p), as first enacted and unchanged since—was added by Chapter 796, Laws of Maryland 1981. There is no indication that the new language in §4-103(d) was intended to broaden the scope of nondisclosure permitted by the exception.

⁹ We discuss the permissible uses of donations for electoral purposes in Part V below.

electoral use—do so in a manner that informs potential donors of the intended use of their gifts.

The very definition of “contribution” implies that the donor intend his or her gift to be used for electoral purposes:

“‘Contributions’ means the gift . . . of money or other thing of value to any candidate, or his representative, or a representative of any political party or partisan organization *to promote . . . the success or defeat of any candidate. . . .*” Article 33, §1-1(a)(5).

By contrast, if the donor is told that the gift will be used solely for a constituent newsletter—a nonelectoral use—there is no basis on which one can simply assume that the donor intends “to promote . . . any candidate” with the gift.

Moreover, as discussed in Part II A above, the Fair Election Practices Act prescribes certain limits on contributions by individuals and entities—no more than \$1,000 to any candidate, and no more than \$2,500 total, in any election. Article 33, §26-9(b). In order to comply with these limits, donors must be made aware that their gifts are indeed contributions governed by the Act.

Thus, in 61 *Opinions of the Attorney General* 407 (1976), this Office, describing “the circumstances under which . . . a non-election year contribution for the benefit of an incumbent office holder might be held not chargeable to the \$2,500 limitation”, emphasized “the purpose which the contributors . . . intend to serve”. *Id.* at 413.¹⁰

¹⁰ That Opinion also spoke of the possibility that those soliciting funds for electoral purposes might “conceal that intent from the persons contributing . . . and [thus] those persons [would] give money without any expectation that the money will be used in connection with an election effort”. 61 *Opinions of the Attorney General* at 413. In that case, the Opinion went on, “their donations will not be chargeable to any \$2,500 limitation”. *Id.*

We agree with this conclusion, as far as it goes: a contributor who was deceived in this way would undoubtedly not be subject to prosecution for violating a contribution limitation. See 58 *Opinions of the Attorney General* 266, 269 (1973). However, the passage quoted above certainly should not be taken to suggest that fund solicitors are *authorized* by the Act to conceal the intended use of the funds.

Similarly, this Office has concluded that the Act's contribution limits do not apply to a corporation's annual payment of certain administrative costs incurred by its political committee: "[N]ot only is the designated purpose of the funds of no benefit to any candidate, but because the donor has complete control over the administration of the political committee, it is certain that in practice the recipient cannot direct the funds to some other use." 63 *Opinions of the Attorney General* 263, 271 (1978).

In sum, we think that the Act itself and these interpretations of it stand for the following basic principle: A solicitation of funds for a politician or a political entity must make clear to potential donors whether or not the donation is within the scope of the Act. If the donation is not within the scope of the Act—that is, if it is given with the understanding that it is to be applied to a nonelectoral use such as a constituent newsletter—it may not then be converted to electoral use.

B. Conversion to a Different Nonelectoral Use

The Fair Election Practices Act has no application to the separate question of whether funds given for one nonelectoral purpose—a constituent newsletter—may be converted to other nonelectoral uses. However, the law that grants such funds favorable tax treatment itself prohibits conversion to *any* other use.

The federal Internal Revenue Code defines a "newsletter fund contribution" as "a contribution or gift of money to a fund established and maintained . . . *exclusively* for the preparation and circulation of a newsletter". 26 U.S.C. §41(c)(5). Under the implementing regulation, a donor may claim a tax credit for a newsletter fund contribution only if the contribution is a "gift of money directly to a fund described in section 527(g)" of the Code. 26 C.F.R. §1.41-1(f). A newsletter fund is described in §527(g) as follows: "*a fund established and maintained by an individual who holds, has been elected to, or is a candidate . . . for nomination or election to any Federal, State, or local elective public office for use by such individual exclusively for the preparation and circulation of such individual's newsletter*". 26 U.S.C. §527(g)(1). Finally, a newsletter fund is itself exempt from federal taxation provided that its

"exempt function shall be *only* the preparation and circulation of the newsletter." 26 U.S.C. §527(g)(2)(A).

These provisions are dispositive as to the newsletter funds about which you inquire: a newsletter fund that qualifies for favorable tax treatment must be used for newsletters, and nothing else.¹¹

V

Use of Campaign Contributions for Newsletters

In our view, just as funds given for nonelectoral purposes may not be converted to electoral use, funds given for electoral purposes may not be converted to nonelectoral use. The reasoning is the same: the Fair Election Practices Act requires that a distinction be drawn between the two kinds of donations, because it regulates electoral donations stringently and nonelectoral donations not at all. Therefore, a donor is entitled to know what kind of donation he or she is in fact making and to have the general purpose for that donation carried out.

To be sure, the Act permits a very wide range of uses for campaign funds. An "expenditure" is merely defined as "*any . . . disbursement . . . of money or valuable thing by any candidate, treasurer, or other agent of such candidate, political party or partisan organization to promote or assist in the promotion of the success or defeat of any candidate*". Article 33, §1-1(a)(7).

We were recently asked to elaborate on the purposes for which a "continuing committee" might properly spend the funds in its treasury.¹² In a letter dated April 27, 1983, we summarized our view of the law as follows:

¹¹ We have very substantial doubts about whether gifts for nonelectoral purposes other than constituent newsletters may lawfully be solicited under the Maryland Public Ethics Law. See Part III A above. Similarly, if gifts were lawfully solicited for newsletters, but these funds were then directed to some other use, serious issues of noncompliance with the Public Ethics Law would arise.

¹² A "continuing committee" is a "political committee which continues in existence from year to year". Article 33, §26-11(c). See generally 63 *Opinions of the Attorney General* 273 (1978).

"In the absence of any other directive from the legislature, it is our view that *any lawful expense*, that is, an expense not prohibited by some other provision of State or federal law or Constitution, *which enhances a candidate's election chances and would not be incurred if there were no potential candidacy, is a proper expenditure* so long as the expense is reported in accordance with the reporting requirements of the Election Code. Thus monies used to promote a candidacy—even if not expended immediately prior to an election—whether for staff, salary, equipment, supplies, postage, receptions, newsletters, etc. constitute proper expenditures under the State Election Code so long as they are reported." Letter from Stephen H. Sachs, Attorney General, to Dennis F. Rasmussen, State Senator, at 3 (April 27, 1983) (emphasis added).

Thus, an expenditure of campaign contributions for an electoral newsletter is certainly proper. Such use of contributed funds would surely be within the contemplation of most contributors.¹³

But the use of campaign contributions for a constituent newsletter is quite another matter. For the reasons explained in Part II A above, outlays for a constituent newsletter cannot be said "to promote . . . the success . . . of any *candidate*". By definition, they would be incurred even if, to borrow from our recent letter, "there were no potential candidacy". In short, the use of campaign contributions for a constituent newsletter is not, in our view, a proper "expenditure".¹⁴

¹³ We are not addressing, however, the permissible uses of contributions that have been earmarked by the donor for some *specified* purpose.

¹⁴ It can be argued that most people who make a contribution to a candidate—that is, who intend "to promote" that candidate in an election—also intend to aid the successful candidate's performance in office. Although this generalization is probably true, it does not necessarily follow that contributors intend their funds to be used for any purpose that the legislator regards as job-related. A contributor might well be unpleasantly surprised to learn that his or her campaign contribution was later spent by the legislator to attend, for example, a parliamentary convention in Paris.

In any event contributions under the Fair Election Practices Act are given for use in a particular election year:

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Our conclusion in this regard is reinforced by a provision in the Act, Article 33, §26-7(d), which specifies the disposition of "surplus funds" by noncontinuing committees:

"Prior to the time of filing the final report required by §26-11 of this article, any surplus funds remaining after payment of all campaign expenditures shall be (1) returned, pro rata, to the contributors by the treasurer; or (2) paid to the State central committee of the party of which the candidate is a member or for which the political committee is acting; or (3) paid to a central committee of the party of which the candidate is a member or for which the political committee is acting so long as the central committee is located in a county in which the candidate resides or seeks to represent; or (4) paid to the local board of education or to a recognized nonprofit organization providing services or funds for the benefit of pupils or teachers; or (5) paid to a charitable organization registered pursuant to §103B of Article 41 or to a charitable organization exempt from such registration pursuant to §103C(a) of Article 41."

Payment of the successful candidate's official expenses, unrelated to an election, is not a permitted use of surplus funds.¹⁵

"[T]he contributor must have some way of knowing in connection with which election he is contributing money If a committee is not identified as 'continuing' the contributor can assume it is organized with one election year (usually one primary and one general election) in mind and limit his contributions accordingly. If a committee is identified as 'continuing' in nature, then a contributor is alerted to the fact that he should determine the particular election for which his contribution is to be used." 63 *Opinions of the Attorney General* at 278.

See also 58 *Opinions of the Attorney General* 266, 267 (1978) ("money received at a fundraising event must be identified at the time the contribution is made as being for one election or another"). Such an allocation among elections would become even more difficult than these examples suggest if contributions were applied to nonelectoral expenses throughout a legislator's term.

¹⁵ Federal law presents a noteworthy contrast in this regard. It specifically permits the use of campaign contributions for office expenses generally:

"Amounts received by a candidate as contributions that are in excess of any amount necessary to defray his expenditures, and

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"[A] political committee, formed to assist a candidate . . . in a given election year[,] is required by Section 26-7(d) to dispose of funds remaining after payment of campaign expenditures when the committee had done all it is going to do *in the one election year* in which it was formed." 63 *Opinions of the Attorney General* at 279 (emphasis added).¹⁶

VI

Conclusion

In summary, it is our opinion that:

1. As currently drafted, the Maryland Fair Election Practices Act regulates only the solicitation and expenditure of funds for newsletters that are used by a candidate—including

any other amounts contributed to an individual for the purpose of supporting his or her activities as a holder of Federal office, may be used by such candidate or individual, as the case may be, to defray any ordinary and necessary expenses incurred in connection with his or her duties as a holder of Federal office, may be contributed to any organization described in section 170(c) of Title 26, or may be used for any other lawful purpose, including transfers without limitation to any national, State, or local committee of any political party; except that, with respect to any individual who is not a Senator or Representative in, or Delegate or Resident Commissioner to, the Congress on January 8, 1980, no such amounts may be converted by any person to any personal use, other than to defray any ordinary and necessary expenses incurred in connection with his or her duties as a holder of Federal office." 2 U.S.C. §439a.

¹⁶ Article 33, §26-7(d) does not apply to a continuing committee. 63 *Opinions of the Attorney General* at 279. The reason is that, unlike a regular political committee, a continuing committee is one "which intend[s] from the outset to continue to exist and be active, not just for election year but from year to year and from election to election". 63 *Opinions of the Attorney General* at 276. Therefore, any funds remaining after a particular election are not truly "surplus".

There is certainly a tension between the right of a continuing committee to spend money collected during one election in a later election, on the one hand, and the obligation of contributors to adhere to the contribution limits in Article 33, §26-9(b), on the other. See the second paragraph of note 14 above. The General Assembly may wish to dress this problem.

an incumbent running for reelection—to directly advance his or her electoral prospects. However, the Act does not apply to funds for newsletters that are used by an elected official to keep his or her constituency informed.

2. The Maryland Public Ethics Law does not prohibit members of the General Assembly from soliciting contributions for constituent newsletters. Some—but not all—of such contributions must be reported as gifts in the annual financial disclosure statements required by the Public Ethics Law.

3. Contributions solicited by an elected official for use in distributing constituent newsletters may not be used for any other purpose.

4. Campaign contributions may generally be used for any lawful purpose that enhances the candidate's electoral prospects, including the distribution of electoral newsletters. However, these contributions may not later be used by an elected official to produce nonelectoral newsletters.

In closing, we repeat our observation that the distinction between electoral newsletters and constituent newsletters created by current law is unrealistic and could lead to abuse. We urge the General Assembly to consider ways in which the deficiencies in the current law may be remedied.

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GENERAL ASSEMBLY

BALTIMORE CITY—CREATION OF DEBT OR EXTENSION OF CREDIT—APPROVAL BY CITY DELEGATION—RESCINDING APPROVAL—RECORDING APPROVAL.

July 5, 1983

Mr. F. Carvel Payne

Director

Department of Legislative Reference

This is in response to your request for our opinion concerning approval by the Baltimore City Delegation to the General Assembly of a proposed creation of debt or extension of credit by the City. Specifically, you have asked how the Delegation's approval might be properly recorded and whether the Delegation could rescind its approval, once given.

For the reasons given below, it is our opinion that the Delegation may rescind its approval at any time before the full period of time for giving its approval has expired. As to recording the Delegation's approval, we think that this could be done by making an appropriate entry in the Journal of either or both Houses or, given enabling legislation, by publishing the approval of the proposed creation of debt or extension of credit in the Session Laws.

I

Background

At the General Election of 1982, the voters ratified an amendment to Article XI, §7 of the Maryland Constitution, which regulates the creation of debt and extension of credit by Baltimore City. As amended, §7 continues to require that ordinances authorizing the creation of debt or extension of credit be approved in a municipal referendum. However, as an alternative to the additional requirement that, prior to the referendum, the General Assembly authorize the City's creation of debt or extension of credit, the revised §7 permits the creation of debt or extension of credit to be approved by "a majority of the members of the General Assembly representing Baltimore

City no later than the 30th day of the regular session of the General Assembly immediately preceding its submission to the voters”.

II

Rescinding Approval

With respect to rescinding approval given by the City Delegation, it is a well established principle that a prior act of the General Assembly does not preclude its rescission by a subsequent act. *See State v. Fisher*, 204 Md. 307, 315 (1954). *Cf.* 68 *Opinions of the Attorney General* 157 (1983) (General Assembly may withdraw prior petition asking Congress to call a constitutional convention).

Because the revised §7 contemplates that the Delegation will have 30 days in which to give its approval, and because no debt could be created or credit extended until the referendum, we find no objection to applying this general principle to allow the Delegation to rescind its approval—if, of course, it does this within the 30 days allotted for its decision.

III

Recording Approval

With respect to the proper recording of the Delegation's approval of the City's creation of debt or extension of credit, Article III, §22 of the Constitution provides, in relevant part, that “[e]ach House shall keep a Journal of its proceedings, and cause the same to be published”. Aside from matters that the Constitution requires to be entered on the Journals, the respective Houses may themselves decide what is to be entered on their Journals. *Ridgely v. Baltimore City*. 119 Md. 567, 587 (1913).

There is, of course, no constitutional requirement that the City Delegation's approval of a proposed creation of debt or extension of credit be recorded in the Journal of either House.

However, pursuant to an appropriate motion, the fact of such approval, as certified by the respective chairmen of the House and Senate delegations, could be entered on the Journals of the respective Houses. *See Mason's Manual* §§694.5 and 696.1. While it seems unlikely that there would be objection to such a motion, the respective Houses could amend their rules to require that such entries be made. *See* Rule 73 of the Rules of the Senate and House of Delegates.

Because the Delegation's approval would clearly not constitute a "law", it would not be subject to the constitutional requirement for the publication of laws. Article III, §30. However, to further record the Delegation's approval, the General Assembly may wish to amend Article 41, §82 of the Maryland Code to require publication in the Session Laws of the approval by the City Delegation.

IV

Conclusion

In summary, it is our opinion that approval by the City Delegation of the creation of debt or extension of credit by Baltimore City may be rescinded by the Delegation within the 30 days allowed for approval. When approval is given, this fact may properly be entered on the Journals of the respective Houses. Additionally, the General Assembly may, by legislation, require publication of the approval by the City Delegation in the Session Laws.

STEPHEN H. SACHS, *Attorney General*

RICHARD E. ISRAEL, *Assistant Attorney General*

AVERY AISENSTARK, *Chief Counsel*
Opinions and Advice

LANDLORD AND TENANT

SUMMARY EJECTMENT—LOCAL GOVERNMENT—CHARTER COUNTY—CONFLICTS/PREEMPTION—LANDLORD'S RESPONSIBILITY FOR EJECTED TENANT'S PROPERTY—COUNTY MAY ENACT LEGISLATION GOVERNING DISPOSITION OF PROPERTY.

February 23, 1983

The Honorable Anne S. Perkins
Maryland House of Delegates

You have requested clarification of a landlord's legal responsibility with respect to the disposition of a tenant's personal property after that property has been removed from leased premises as a result of a summary ejectment proceeding. Specifically, you inquired about the impact on §8-401 of the Real Property Article ("RP" Article) of proposed Baltimore County legislation that would require a landlord to store and subsequently dispose of property removed under a warrant of restitution.

The issues underlying your inquiry are as follows: (1) whether a charter county may enact local legislation to supplement the existing public general law that regulates landlord-tenant relations; and (2) whether a county, in the exercise of its police power, may require a landlord to assume responsibility for a tenant's displaced possessions.

For the reasons given below, we believe that Article XI-A of the Maryland Constitution and Article 25A, §5(S) of the Maryland Code authorize charter counties to enact legislation in the landlord-tenant field to the extent that the legislation does not conflict with existing public general law.¹ More specifically, we

¹ Specifically, Article XI-A, §3 states that a charter county, "subject to the Constitution and Public General Laws of this State, shall have full power to enact local laws of said . . . County . . . upon all matters covered by the express powers granted" by the General Assembly.

Article 25A, §5(S) provides in turn:

"The foregoing or other enumeration of powers in this article shall not be held to limit the power of the county council, in addition thereto, to pass all ordinances, resolu-

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believe that the proposed Baltimore County ordinance would not conflict with existing public general law; furthermore, we believe that, in the interest of promoting county health, safety, and welfare concerns, a charter county may enact legislation that would require landlords to store a tenant's property after its removal by the sheriff.

I

The Proposed Baltimore County Ordinance

As we understand it, the proposed ordinance would operate whenever personal property belonging to a tenant has been removed from the premises by a sheriff, acting pursuant to a warrant of restitution. RP §8-401 provides that a warrant issue, by court order, in instances of nonpayment of rent or continued possession by the tenant in violation of the lease. *See also* RP §§8-402 and 8-402.1.²

The proposed county ordinance would obligate the landlord to store the tenant's property, at the landlord's immediate expense, after the sheriff has executed the warrant and placed the property on the sidewalk. On providing the tenant with notice of the storage location and the procedure for recovery,

tions or bylaws, not inconsistent with the provisions of this article or the laws of the State, as may be proper in executing and enforcing any of the powers enumerated in this section or elsewhere in this article, as well as such ordinances as may be deemed expedient in maintaining the peace, good government, health and welfare of the county."

² Specifically, if a tenant fails to yield possession of the premises within two days of a judicial finding that the rent is unpaid, then, upon the landlord's petition, the court shall

"issue its warrant, directed to any official of the county entitled to serve process, ordering him to cause the landlord to have again and repossess the property by putting him (or his duly qualified agent or attorney for his benefit) in possession thereof, and for that purpose to remove from the property, by force if necessary, all the furniture, implements, tools, goods, effects or other chattels of every description whatsoever belonging to the tenant, or to any person claiming or holding by or under said tenant." RP §8-401(d).

the landlord would be required to store the property for 30 days. During this time, the owner could redeem the property by paying all reasonable storage costs. If the property remained unclaimed for 30 days, the landlord could then sell or otherwise dispose of the property, offsetting the storage costs against the sale proceeds. Finally, if any surplus proceeds were not claimed within six months, the balance would be forfeited to the landlord.³

II

Statutory Authority

Generally speaking, a home rule charter county is limited in its exercise of local legislative power to matters within the scope of Article 25A, §5 (the "Express Powers Act"). Section 5 does not specifically authorize charter counties to regulate landlord-tenant relations. Nevertheless, the Maryland Court of Appeals has held that §5(S)—the "general welfare" or "police powers" provision—enables a charter county to legislate in the area of apartment rentals and landlord-tenant concerns. *County Council for Montgomery County v. Investors Funding Corporation*, 270 Md. 403, 416-19 (1973).⁴ See also *Montgomery Citizens League v. Greenhalgh*, 253 Md. 151 (1969). Cf. 62 *Opinions of the Attorney General* 523 (1977) (State escrow statute does not preempt municipal landlord security deposit ordinance).

Despite judicial recognition of concurrent authority in the landlord-tenant field, however, a charter county may not legislate in a fashion that conflicts with existing public general law. That is, a county may not prohibit that which State law expressly permits, or permit that which State law prohibits. *County Council v. Investors Funding Corp.*, 270 Md. at 419

³ Section §16-3 of the Baltimore County Code now requires the county to remove and store a tenant's possessions. The proposed legislation would shift the responsibility from the county to the landlord.

⁴ See note 1 above for the text of §5(S).

(quoting *Mayor and City Council of Baltimore v. Sitnick and Firey*, 254 Md. 303, 317 (1969)). See also *Rossberg v. State*, 111 Md. 394, 416 (1909). Yet, as the court in *Sitnick* also pointed out:

“[U]nless a general public law contains an express denial of the right to act by local authority, the State’s prohibition of certain activity in a field does not impliedly guarantee that all other activity shall be free from local regulation and in such a situation the same field may thus be opened to *supplemental* local regulation.” 254 Md. at 317 (emphasis added).

RP §8-401 details the procedure by which a landlord may evict a tenant. However, the State law is silent as to disposition of the tenant’s property—the sole issue addressed by the proposed local legislation. The proposed Baltimore County ordinance thus would enlarge or supplement—not conflict with—the State statute.⁵

RP §8-401 itself neither expressly nor implicitly prohibits a charter county from enacting supplemental legislation in this area of landlord-tenant relations. It is our view, then, that Article XI-A of the Maryland Constitution and Article 25A, §5(S) of the Maryland Code authorize Baltimore County to provide for the storage of a tenant’s possessions, once removed from the landlord’s property under a warrant of restitution. See *generally Investors Funding Corp.*, 270 Md. 403. As we explain in Part III below, the county is exercising concurrent legislative authority in the furtherance of legitimate health and general welfare concerns.

⁵ We do not believe that the proposed ordinance requires an involvement by the landlord that State law prohibits. Statutes such as RP §8-401, which establish a formal summary ejectment procedure, are designed to inhibit arbitrary dispossession of tenants. Statutes of this nature ensure that tenants will receive notice of a pre-eviction hearing and an opportunity to present their defense. See *e.g.*, *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975). Here, the judicial process is over. In fact, by imposing bailment obligations, the ordinance would provide supplemental protection of a tenant’s own interests, as the landlord must remove the tenant’s property from a site of potential vandalism.

III

County Police Power

It is well established that regulatory legislation, enacted pursuant to a political subdivision's police power, must have a real and substantial relation to the public health, safety, and welfare. *Westchester West No. 2 Limited Partnership v. Montgomery County*, 276 Md. 448, 455 (1975). The proposed Baltimore County ordinance would not only resolve the immediate problem of scavengers removing a tenant's unguarded property, but would also indirectly protect and further public safety and welfare by promoting unimpeded use of public streets and highways.

Each county is under a duty to keep its public streets and sidewalks free from obstruction and other encroachments that materially impair use. See *Bethesda Armature Co., Inc. v. Sullivan*, 47 Md. App. 498, 500-01 (1981); *Adams v. Commissioners of Trappe*, 204 Md. 165, 171 (1954). See also Article 25A, §5(T). To this end, a county properly may enact legislation designed to minimize interference with pedestrian traffic.

Moreover, the Maryland courts recognize the "special use" doctrine. When an adjoining property owner makes a "special use" of the sidewalk, or creates a particular hazard on it, the property owner—not the county or municipality—is responsible for any damage caused by that special use. *Bethesda Armature Co.*, 47 Md. App. at 501, 503; *Citizens Savings Bank v. Covington*, 174 Md. 633, 635 (1938). See also *Levine v. Jale Corporation*, 413 S.W.2d 564, 567 (Mo. App. 1967). It is not unforeseeable that injury could result to a pedestrian trying to avoid obstructions on the pavement. *Ryan v. Gordon L. Hayes, Inc.*, 254 N.Y.S.2d 706, 707 (N.Y. Sup. Ct. 1964); *Donovan v. Bender*, 204 N.Y.S.2d 632, 633 (N.Y. App. Div. 1960). In effect, the proposed county ordinance defuses this situation, by requiring the property owner to remove objects hindering free passage *before* any injury might otherwise occur.

A landlord derives a private benefit from the execution of a warrant of restitution, as the landlord thus regains access to the rental property. See RP §8-401(d). See also *State v. Boone*, 284 Md. 1, 7 (1978). In pursuing these private interests—by placing a tenant's property on a public right-of-way—the landlord in effect appropriates public property for its own use. But, as the Maryland courts have noted, "the obstruction of a

public highway for a wholly private purpose cannot be legalized". *Heubschman v. Grand Company*, 166 Md. 615, 626 (1934). See *Townsend, Grace & Co. v. Epstein*, 93 Md. 537, 555 (1901). Here, the proposed ordinance would represent a legislative decision that a landlord's ability to resort to the judicial process should not absolve responsibility for the end results of the summary ejectment procedure.

In this context, the requirement that the landlord shoulder the storage costs is not—as a legal matter—unduly burdensome. *Loretto v. Teleprompter Manhattan CATV Corporation*, 458 U.S. 419, 434 (1982) (while permanent physical occupation of another's property is a taking, temporary invasion is not). Indeed, the proposed ordinance would provide for reimbursement, either from the tenant's redemption of the property or through proceeds from the sale of unclaimed items.⁶

We therefore conclude that a charter county, exercising its police power, may enact legislation requiring a landlord to temporarily store a tenant's personal property in instances of summary ejectment. Such legislation not only prevents immediate theft of the tenant's possessions, but also reflects county responsibility for maintaining public thoroughfares in a safe condition for travel. In so concluding, however, we do not mean to suggest that, as a policy matter, it is necessarily more appropriate to allocate these responsibilities to the landlord rather than, as at present, to the county.

IV

Caveat

For your consideration, we also address certain concerns that we have with the proposed legislation.

⁶ Other jurisdictions recognize an implied obligation on the part of the tenant to reimburse the landlord for expenditures incurred in removing the tenant's property from the premises. See, e.g., *State ex rel. Marsol Apt. Co. v. Vannuci*, 428 N.E.2d 468 (Ohio App. 1980); *Gargano v. Venezio*, 118 A.2d 78 (N.J. 1955). To the extent that sale proceeds do not compensate for storage expenses, therefore, a landlord may have a cause of action against the tenant for unreimbursed costs.

First, we note an apparent inconsistency. The proposed ordinance provides that "the landlord may sell the goods [remaining unclaimed for 30 days] at public or private sale, or otherwise dispose of the goods". In instances of sale, the ordinance would require that the balance of sale proceeds be paid to the former tenant, after deduction of the landlord's expenses. However, if the landlord chose to "dispose of the goods"—i.e., by destroying or giving the property away—a landlord need not reimburse the tenant for the tenant's loss.

More importantly, the proposed ordinance, as drafted, fails to take into account existing security interests that creditors might have in the tenant's property. The rights of a secured party are specified in Title 9, Subtitle 5 of the Commercial Law Article. For example, a creditor may retake possession of the collateral through a replevin action, or otherwise forestall a landlord from selling the item to satisfy storage costs. Moreover, a creditor's perfected security interest in the proceeds of any sale would supersede that of the landlord. Indeed, even in an action of distress, security interests perfected before a levy under distraint are exempt from the levy. RP §8-307(b).

With regard to the disposition of a tenant's goods, therefore, we strongly recommend that attention be given to the various provisions of the Commercial Law Article relating to security interests, so as to avoid potential conflict with State law.

STEPHEN H. SACHS, *Attorney General*

AVERY AISENSTARK, *Chief Counsel*
Opinions and Advice

LYNETTE M. PHILLIPS, *Staff Attorney*
Opinions and Advice

Editor's Note: The preceding Opinion was originally written as a letter of advice. Because of the unsettled nature of the issue addressed [*cf. Parkington Apartments, Inc. v. Cordish*, 296 Md. 143, 146 n.1 (1983)], it is published here albeit in a slightly revised format.

LOCAL GOVERNMENT

MUNICIPAL CORPORATIONS—ANNEXATION PROCEDURES—
PETITION FOR ANNEXATION—SURVEY—STATUTORILY
REQUIRED METES AND BOUNDS SURVEY TO BE OB-
TAINED BY MUNICIPALITY, NOT PETITIONERS.

February 16, 1983

Joseph L. Ely, Esq.

In your capacity as town attorney for Indian Head, you have requested our views on whether, under Article 23A, §19 of the Maryland Code, those who petition for annexation to a municipal corporation must pay for the “survey of courses and distances”—i.e., the metes and bounds survey—that must be incorporated into the annexation resolution.

For the reasons given below, we have concluded that the petitioners are required to provide some reasonably definite and accurate description of the area to be annexed, sufficient to inform the municipality of what area is involved and to permit verification of the requisite number of petition signatures. This description, however, need not be a metes and bounds survey; under the statute, the municipality itself must obtain the metes and bounds survey for its annexation resolution.

I

Background

As we understand the pertinent facts, the Woodland Village Civic Association has submitted a petition requesting annexation of Woodland Village by the Town of Indian Head. This petition was accompanied by detailed maps showing the area to be annexed, albeit not by a metes and bounds survey. Indian Head has declined to proceed further with the requested annexation until the petitioners obtain such a survey.¹

¹ We do not address allegations, now pending at the United States Department of Housing and Urban Development, that Indian Head's refusal to annex predominantly black Woodland Village constitutes racial discrimination. These allegations are not relevant to the question of statutory construction addressed below.

II

The Statute

Under Article 23A, §19 of the Maryland Code, enlargement of a municipal corporation by annexation may be initiated either by the municipality itself or by petition from residents of the area to be annexed. If the municipality initiates the annexation, the following procedure is specified by §19(b):

"The proposal for change may be initiated by resolution regularly introduced into the legislative body of the municipal corporation . . . but only after the legislative body shall have obtained the consent for the proposal from not less than twenty-five per centum (25%) of the persons who reside in the area to be annexed and who are registered as voters in county elections and from the owners of not less than twenty-five per centum (25%) of the assessed valuation of the real property in the area to be annexed. The resolution shall describe by a survey of courses and distances, and may also describe by landmarks and other well-known terms, the exact area proposed to be included in the change, and shall contain complete and detailed provisions as to the conditions and circumstances applicable to the change in boundaries and to the residents and property within the area to be annexed." (Emphasis added.)

This procedure requires the municipality to prepare the annexation resolution, and it is only this resolution that must contain a metes and bounds description of the area to be annexed.

When a proposed annexation is initiated by the residents of an area, however, §19(c) specifies the following alternative procedure:

"The proposal for change also may be initiated by a written petition signed by not less than twenty-five per centum (25%) of the persons who reside in the area to be annexed and who are registered as voters in county elections in the precinct or precincts in which the territory to be annexed is located, and by the owners of not less than twenty-five per centum (25%) of the assessed valuation of the real property located in the area to be annexed. Upon the presen-

tation of a petition to the legislative body of the municipal corporation, the presiding officer thereof shall cause to be made a verification of the signatures thereon and shall ascertain that the persons signing the petition represent at least twenty-five per centum (25%) of the persons who reside in the area to be annexed and who are registered as voters in county elections in the precinct or precincts in which the territory to be annexed is located, and the owners of twenty-five per centum (25%) of the assessed valuation of the real property located in the area to be annexed. *Upon verifying that the requirements of this subsection have been complied with, the presiding officer of the legislative body shall promptly cause to be introduced therein a resolution proposing the change of boundaries as requested by the petition. The resolution in form and content shall conform to the requirements of this section.*" (Emphasis added.)

Section 19(c) does not expressly refer to a metes and bounds description. It nevertheless does require that the annexation resolution—to be prepared by the municipality—conform "in form and content . . . to the requirements of this section"; this means that, as required by §19(b), the resolution must "describe by a survey of courses and distances . . . the exact area to be included in the change". However, §19(c) does not expressly state who must bear the cost of obtaining this survey.²

III

Construction

Under Article 23A, §19(c), the residents of an area who seek annexation must meet but a single requirement: to present to the legislative body a petition signed by 25% or more of the registered voters "who reside in the area to be annexed" and

² From an informal survey, we understand that, in recent years, those who have petitioned for annexation to various municipalities in the State have generally obtained the metes and bounds survey themselves, but the practice is neither uniform nor in any way determinative of the question of whether petitions are *legally obligated* to obtain the survey.

by owners of 25% or more of the real property "located in the area to be annexed". The other requirements of §19(c) are expressly to be undertaken by "the presiding officer" of the municipality's legislative body. He or she must: (i) verify the signatures on the petition; (ii) ascertain that the required minimum of residents and property owners "in the area to be annexed" have signed; and (iii) having done so, promptly introduce the annexation resolution, containing a metes and bounds description of "the exact area proposed to be included in the change".

We see nothing in the statutory language to suggest that the costs of any of the last three tasks—all responsibilities of the presiding officer, not of the residents—are to be borne by anyone other than the municipality itself. This provision no more obligates the residents to pay for the metes and bounds survey than it obligates them to pay for the time that an official might spend comparing petition signatures to tax rolls.

Obviously, in complying with their obligation to proffer the requisite minimum number of petition signatures, the proponents of annexation must present some reasonably definite and accurate description of "the area to be annexed". Otherwise, the municipality would not know what change of boundaries is requested and would be unable to carry out the required verification. However, the statute does not require that this description be in the form of a metes and bounds survey. See generally *Petition of Freeholders of Barry Township*, 157 A.2d 410 (Pa. 1960) (description by metes and bounds unnecessary when annexation statute does not so specify).

Under Article 23A, §19(b), when the municipality itself initiates the annexation, it must first obtain the consent of 25% of the residents and property owners "in the area to be annexed". To obtain these consents, the municipality obviously must avail itself of an accurate map or some comparable means of ascertaining "the area to be annexed". But even it need not undertake the expense of preparing a metes and bounds survey prior to obtaining these consents. As indicated in the statute, that is a prerequisite only for the annexation petition, and the petition is introduced "only after" the consents are obtained. If, under §19(b), the initiating municipality may rely on a geographical description of "the area to be annexed" less precise than a metes and bounds survey in obtaining consents, so too, under §19(c), the residents may rely on such a geographical description in circulating and presenting their petition.

Our reading of the statute is supported by a slight, but perhaps significant, difference in phrasing. As we have noted, when the statute refers to the residents and property owners who must consent to, or petition for, an annexation, it speaks of "the area to be annexed" [§19(c)]. By contrast, when the statute requires that "a survey of courses and distances" be included in the resolution, it speaks of "the *exact* area proposed to be included in the change" [§19(b) (emphasis added)]. Presumably, such exactness is required at this stage—and only at this stage—in anticipation of the later time when the boundary change is later officially registered by the municipality. See Article 23A, §19(p).

IV

Conclusion

In summary, it is our opinion that those who present a petition for annexation need not obtain a metes and bounds description of the area that they seek to have annexed to a municipality. Certainly, they must present a description of the area sufficient to inform the municipality of what area is involved and to permit verification of the residency of the petitioners. If the petitioners from Woodland Village have presented such a description, they have met their statutory obligation. Under the statute, after the petition is filed and verified, the municipality—here, Indian Head—must itself promptly obtain the metes and bounds survey data needed for the annexation resolution.

STEPHEN H. SACHS, *Attorney General*

AVERY AISENSTARK, *Chief Counsel*
Opinions and Advice

JACK SCHWARTZ, *Assistant Counsel*
Opinions and Advice

Editor's Note: The preceding Opinion was originally written as a letter of advice. Because the issue has not previously been addressed by any Maryland authority, it is published here in a slightly revised format.

LOCAL GOVERNMENT—BUDGETARY ADMINISTRATION—INVESTMENT OF PUBLIC FUNDS—LIMITATIONS—LOCAL GOVERNMENT MAY INVEST PUBLIC FUNDS ONLY AS PERMITTED BY STATE LAW.

April 13, 1983

The Honorable Fred Kuster
Mayor
Town of Glen Echo

On behalf of the Treasurer of Glen Echo, you have inquired about the legality of investing municipal funds in certain money market accounts.

As explained more fully below, Maryland law enables officers of a political subdivision to make certain investments and deposits of public funds. However, such investments may be made only in: (1) certain governmental obligations; (2) certain statutorily designated depositories, if they provide collateral sufficient to cover the amount of the deposit; and (3) the collective investment pool created under Article 95, §22F. Investments may not be made in money market accounts that fail to meet these criteria.

I

Governing Statute

The investment of public funds is governed by Article 95, §22 of the Maryland Code. This section provides, in pertinent part:

“Notwithstanding any provision . . . or . . . limitation contained in any other law or ordinance, . . . the chief fiscal or administrative officer or officers or governing body of each municipality, town, body politic, public body corporate, . . . are hereby severally directed, authorized and empowered to invest . . . all unexpended or surplus moneys in any fund or account of which they have custody or control either in

bonds or other obligations for the payment of principal and interest of which the faith and credit of the United States of America are pledged, or in obligations of federal governmental agencies issued pursuant to acts of Congress; or to deposit said moneys in any bank or banks in the State of Maryland or in any savings and loan association or savings and loan associations or in any building and loan association or building and loan associations in interest-bearing time deposit and/or savings accounts, or in the local government investment pool created in this article. . . .”

This authorization, however, is not unqualified. Section 22 further stipulates that:

“Such deposits in banks or in savings and loan associations or building and loan associations shall only be made if the bank or savings and loan associations or building and loan associations has deposited a like amount of bonds in escrow, as now prescribed by law, covering bank deposits, savings and loan deposits, building and loan deposits, or if the bank, savings and loan association or building and loan association has given as security for these deposits any of the types of collateral set forth in §21A of this article. . . .”¹

It is clear from the express language of §22 that public officials may invest only as designated by statute. For investment purposes, the officers are “*directed*,” authorized and empowered” to place surplus or unexpended funds in certain institutions and in certain bonds or other obligations. Moreover, even these investments “shall only be made if”: (i) the institution in question either deposits a “like amount of bonds in escrow” or gives an adequate amount of collateral as security;

¹ Article 95, §21A lists several types of permitted collateral, including Federal Deposit Insurance Corporation insurance, Federal Savings and Loan Insurance Corporation insurance, Maryland Savings-Share Insurance Corporation insurance, and obligations issued or guaranteed by the United States government.

and (ii) the investment bond or other obligation is federally insured.²

II

History of Statute

A brief review of the legislative development of §22 may assist in understanding this emphasis on compliance with the statutory provisions.

Initially, the chief fiscal or administrative officers of political subdivisions were authorized to invest funds only in bonds or obligations guaranteed by the faith and credit of the federal government. Chapter 78, Laws of Maryland 1943. In subsequent years, deposits into interest-bearing time accounts in State banks were authorized, provided that the bank "deposited a like amount of bonds in escrow, as now prescribed by law, covering bank deposits". Chapter 74, Laws of Maryland 1954. Clearly, protection of the public fisc was a paramount concern.

In 1974, an amendment to §22 enabled banks to give as security for State or municipal deposits "any of the types of collateral set forth in Section 21A". Chapter 731, Laws of Maryland 1974. In §21A, the types of collateral described are all insured or guaranteed by the credit of federal, State, or local governmental authorities or by specially-created insurance pools.³

² Analogous, self-explanatory provisions governing the investment of sinking funds appear in Article 31, §§6 and 7 of the Maryland Code. Sinking funds are sums accumulated for the payment of bond obligations or other municipal debts.

³ Section 21A was itself amended in 1974 to expressly require the market value of collateral given as security for deposited public funds to equal, at all times, the total amount of the deposit. Chapter 731, Laws of Maryland 1974. Consequently, a deposit cannot exceed the amount for which it is collateralized or insured.

Finally, in 1975, savings and loan associations were authorized to become depositories, as long as such associations similarly protected State or municipal investments, either by depositing bonds in escrow sufficient to cover the amount of deposit or by giving the types of collateral specified in §21A as security for the public money. Chapter 634, Laws of Maryland 1975.

In sum, each expansion of permissible investment vehicles under Article 95, §22 was accompanied by a continuing statutory requirement that public funds be adequately secured. We therefore conclude that a political subdivision, in seeking to realize maximum returns, must nevertheless confine itself to the investment of public funds within the guidelines of §22—that is, through depositories or obligations that, by statute, are sufficiently collateralized or insured.

III

Local Government Investment Pool

You have also requested our advice as to “acceptable, attractive alternatives”, in the event that investment in money market accounts is not appropriate.

Rendering investment advice is, of course, outside the scope of our expertise. Nevertheless, we are happy to point out an alternative in the law that appears to be of particular benefit to small municipalities like Glen Echo.

Under Article 95, §22, officers of a political subdivision may invest in “the local government investment pool created in this article”. This clause refers to Article 95, §22F, which establishes an investment pool, under the administration of the State Treasurer, for all funds from local governments that are placed in the custody of the State for investment and reinvestment.

Further information about the features and mechanics of this alternative investment program may be obtained from the Office of the State Treasurer.

IV

Conclusion

In summary, it is our opinion that local officials may invest public funds only as designated by statute. Under Article 95, §22 of the Maryland Code, such investments are limited to: (1) certain governmental obligations; (2) certain statutorily designated depositories, if they provide collateral sufficient to cover the amount of the deposit; and (3) of perhaps particular benefit to smaller jurisdictions, the local government collective investment pool created by Article 95, §22F.

STEPHEN H. SACHS, *Attorney General*

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Opinions and Advice

LYNETTE M. PHILLIPS, *Staff Attorney*
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Editor's Note: Article 95, §22 has since been amended by Chapter 482, Laws of Maryland 1984, to authorize an additional investment vehicle: "repurchase agreement[s] . . . secured by any bond or other obligation of the type in which the [State] Treasurer may reinvest under [Article 95,] §22F(a)(1)".

The preceding Opinion was originally written as a letter of advice. Because of the importance of this issue to local governments, it is published here in a slightly revised format.

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.

July 5, 1983

The Honorable Eileen M. Rehrmann
Maryland House of Delegates

You have requested our opinion on whether Article 23A, §§2(a) and 2B of the Maryland Code, as enacted by Chapter 398, Laws of Maryland 1983, would permit the amendment of a county charter to make application of the county's laws within the county's municipalities subject to the approval of those municipalities. Chapter 398, the so-called "Tillie Frank" legislation, will specify in statute the relationship between county and municipal laws. It takes effect on January 1, 1984.

For the reasons given below, we have concluded that the new statute will permit the kind of charter amendment that you describe.

I

Background

In *Town of Forest Heights v. Frank*, 291 Md. 331 (1981), the Court of Appeals held that Article XI-A, §3 of the Maryland Constitution does not preclude the application of charter county ordinances within a county's municipalities generally, but only bars the application of such ordinances to particular municipalities. 291 Md. at 346. However, the Court also held that, in defining the powers of charter counties and municipalities, the General Assembly may regulate the relationship of charter county and municipal law by public general law. *Id.* Accordingly, we recently advised that a constitutional amendment would not be required to limit the application of charter county ordinances within a county's municipalities. 67 *Opinions of the Attorney General* 254 (1982).

At its recent session, the General Assembly enacted Chapter 398, Laws of Maryland 1983: comprehensive legislation designed to regulate the relationship of county and municipal law. See generally Bill Review Letter (House Bill 1277) from Stephen H. Sachs, Attorney General, to Harry Hughes, Governor (May 2, 1983).

II

Issue Presented

Although the General Assembly may regulate the relationship of county and municipal laws by legislation, a county charter may also regulate this relationship by a provision that would make county laws subject to municipal approval. 67 *Opinions of the Attorney General* 300 (1982). That kind of provision would be a proper subject for a charter, because it would be "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' ". 67 *Opinions of the Attorney General* at 305 (quoting *Cheeks v. Cedlair Corp.*, 287 Md. 595, 607 (1980)). Moreover, such a provision would not deprive the county council of its essential primacy as the county's lawmaking body. 67 *Opinions of the Attorney General* at 303-05.

Thus, the only issue here is whether this type of charter amendment would conflict with the newly enacted Chapter 398. "Any conflict between a county or city charter and a public general law must be resolved in favor of the public general law." *Wilson v. Board of Supervisors of Elections*, 273 Md. 296, 301 (1974).

III

Analysis

In our view, Chapter 398 would not conflict with a charter amendment that would make county laws subject to municipal

approval. Rather, an amendment of that kind would be entirely consistent with the statute.

Chapter 398 amends the Maryland Code by adding a series of new provisions, to be codified as Article 23A, §§2(a), 2B, and 2C, that define the relationship of county and municipal laws. Under §2B(a), the general rule is as follows:

“[L]egislation enacted by a county does not apply in a municipality located in such county if the legislation:

- (1) By its terms exempts the municipality;
- (2) Conflicts with legislation of the municipality . . . ; or
- (3) Relates to a subject with respect to which the municipality . . . specifically exempts itself . . . [or] generally exempts itself from all county legislation covered by . . . grants of authority to the municipality.”

Several detailed exceptions to §2B(a)(2) and (3), as well as certain exceptions to these exceptions, are set out in §2B(b) and (c).

The references to “legislation” in §2B surely presuppose *valid* legislation—that is, legislation enacted in accordance with the requirements of a county’s charter. If the charter permits legislation that purports to apply to all municipalities, then the elaborate conflict ground rules in §2B will control. But, if the charter *itself* subjects county ordinances to municipal approval, there is no need even to resort to §2B. See Article 23A, §2(a), *as amended by* Chapter 398 (if “public local law” does not apply to municipality by virtue of a charter requirement, then municipal ordinances are “not contrary” to public local law; hence, §2B need not be consulted).

Moreover, under §2B(a)(1), county legislation “does not apply in a municipality . . . if the legislation . . . [b]y its terms exempts the municipality”. We read the phrase “by its terms” to comprehend not only “terms” expressly stated in a county ordinance but also “terms” necessarily implied by charter—here, a charter requirement that county laws are applicable only with municipal approval. Thus, legislation in a county with that charter requirement would “not apply in a municipality”, in accordance with §2B(a)(1).

IV

Conclusion

In summary, it is our opinion that Chapter 398, Laws of Maryland 1983, permits the amendment of a county charter to make the application of the county's laws within the county's municipalities subject to the approval of those municipalities.

STEPHEN H. SACHS, *Attorney General*

JACK SCHWARTZ, *Assistant Counsel*
Opinions and Advice

AVERY AISENSTARK, *Chief Counsel*
Opinions and Advice

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

LOCAL GOVERNMENT—MUNICIPAL CORPORATIONS—TAXATION—SPECIAL TAX DISTRICTS—PROMOTION OF BUSINESS AND COMMERCE—PUBLIC GENERAL LAW NEEDED TO PERMIT MUNICIPALITIES TO CREATE SPECIAL TAX DISTRICTS.

August 19, 1983

*The Honorable Paul Muldowney
Maryland House of Delegates*

You have requested our opinion on certain issues related to House Bill 1201 of the 1983 Session of the General Assembly. House Bill 1201, which did not pass, concerns the authority of municipal corporations to create special taxing districts. That bill would have amended Article 23A, §44 to provide:

“Pursuant to the provisions of §5 of Article 11E of the Constitution of Maryland prohibiting any municipal corporation classified by the General Assembly under the provisions of §2 of Article 11E of the Constitution of Maryland from levying any type of tax, license fee, franchise tax or fee which was not in effect in the municipal corporation on January 1, 1954, unless it has received the express authorization of the General Assembly for that purpose, by a general law which in its terms and its effect applies alike to all similarly classified municipal corporations, the General Assembly hereby expressly authorizes all municipal corporations in this State within the class created by §10 of this article for the purpose of financing the design, construction, establishment, extension, alteration or acquisition of adequate storm drainage systems, and for the purpose of financing the design, acquisition, establishment, improvement, extension, operation or alteration of public parking facilities, or pedestrian malls, and for the purpose of financing the design, acquisition, erection, construction, improvement and maintenance of street and area lighting, AND FOR THE PURPOSE OF FINANCING PROFESSIONAL COORDINATION, PROMOTION, DEVELOPMENT, AND MANAGEMENT OF BUSINESS AND COMMERCE, to create within their respective corporate limits special taxing districts for these purposes and to levy on all real and personal property located within these spe-

cial taxing districts an ad valorem tax at a rate sufficient to provide adequate annual revenues to pay the principal and interest on any bonds or other obligations of the municipality issued for these purposes as the principal and interest become due, and to pay the costs of operating and maintaining these facilities. These taxes shall be levied in the same manner, upon the same assessments, for the same period or periods, and as of the same date or dates of finality as are now or may hereafter be prescribed." (Capitals indicate matter to be added to existing law.)

Specifically, you have asked the following questions:

"1. Is any legislation necessary in order for the municipality of Hagerstown to establish a special taxing district, the revenue from that special tax being used to promote economic growth within that district? This would be accomplished by hiring a person to promote that specific area within the district.

2. If legislation is necessary, would [House Bill 1201] have been adequate in its wording to do what Hagerstown wants to do?

3. If [House Bill 1201], in your opinion, is inadequate, how could it be improved upon?"

For the reasons given below, it is our opinion that enabling legislation, in the form of a public general law expressly authorizing municipalities to create special taxing districts for this purpose, is required. We also believe that it would be preferable to modify the proposed legislation to expressly authorize municipalities to levy taxes to pay the costs of operating and maintaining this specific kind of program.

I

Background

On July 20, 1982, the Hagerstown Commercial and Industrial Commission recommended to the Mayor and City Council that a Downtown Assessment District ("DAD") be created to finance professional coordination, promotion, and management

of the City's central business district.¹ The Commission proposed that the DAD be financed by an annual tax or assessment against each property owner in the District in the amount of \$0.00611 times the 1981 assessed value of that person's property. The DAD would be administered by a Board, consisting of five property owners from the District, appointed by the City Council.

In an opinion dated July 28, 1982, the City Attorney, Robert E. Kuczyński, advised the Mayor and City Council:

"It is my opinion that an ordinance, if drafted, unless it includes all of the specific provisions of Article 23A, §44 and is administered accordingly, would be subject to challenge. It does not appear that the concept of the Downtown Assessment District is in accordance with the provisions of that section. In order to be allowed to create D.A.D., it is my opinion that enabling legislation from the General Assembly would be required, subject to the restrictions of the Constitution and basic legal requirements as set forth above."

Subsequently, House Bill 1201 was introduced. The bill, however, received an unfavorable report from the Constitutional and Administrative Law Committee of the House of Delegates.

II

Municipal Enabling Authority

A. *Introduction*

As a municipal corporation, the City of Hagerstown has no inherent power. *Jewel Tea Co. v. Town of Bel Air*, 172 Md. 536, 539 (1937). The City has only the authority that (1) has been expressly granted to it, (2) is necessarily or fairly implied

¹ The creation of a Downtown Assessment District was also one of the incentives and initiations included in the Enterprise Zone application submitted to the Department of Economic and Community Development by the City of Hagerstown and Washington County. See Enterprise Zone Application, Washington County and City of Hagerstown, Maryland, at p. 45 (October, 1982) (approved, December 14, 1982).

in or incident to the powers expressly granted to it, or (3) is essential to the accomplishment of the declared objects and purposes of the municipality. *Birge v. Town of Easton*, 274 Md. 635, 639-40 (1975); *Bowie Inn v. City of Bowie*, 274 Md. 230, 247 (1975).

In the area of taxation specifically, a municipality has the power to levy a tax only to the extent granted by the State. *Griffin v. Anne Arundel County*, 25 Md. App. 115, 126 (1975), *cert. denied*, 275 Md. 749 (1975). The authority of the City of Hagerstown to tax is derived from Article XI-E of the Constitution of Maryland (the Municipal Home Rule Amendment) and its implementing legislation, Article 23A of the Maryland Code. *Id.*

Article XI-E of the Constitution generally grants a municipal corporation broad home rule authority [Article XI-E, §3], and it significantly restricts the powers of the General Assembly to enact local legislation relating to the "incorporation, organization, government, or affairs" of municipal corporations [Article XI-E, §1]. However, Article XI-E, §5 specifically imposes certain restrictions on the taxing power of municipalities:

"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 effect applies alike to all municipal corporations in one or more of the classes provided for in Section 2 of this Article." (Emphasis added.)

As noted above, Article 23A of the Code enumerates the basic powers granted to municipalities by the General Assembly. We do not believe, however, that these powers authorize the creation of a special taxing district for the purpose of promoting a downtown business district.

B. Article 23A, §2

Article 23A, §2 sets forth both the "general power" of municipalities and several "express powers."

In our view, the "general power" clause of §2 does not confer the necessary authority to levy taxes for purposes of a special

taxing district.² We base this conclusion on the decision of the Court of Appeals in *Campbell v. City of Annapolis*, 289 Md. 300 (1981). In that case, the Court held that a municipal ordinance, providing for the licensure of residential rental units and imposing an annual unit license fee, violated Article XI-E, §5 of the Constitution because the license fee had not been expressly authorized by the General Assembly. Article XI-E, §5 requires “express authorization” by the General Assembly, through enactment of a public general law, for a municipality to be able to levy any new “tax, license fee, franchise tax or fee”. In *Campbell*, the Court specifically held that the “general power” clause of Article 23A, §2—characterized by the Court as a “usual non-specific delegation”—“clearly does not meet the constitutional standard of ‘express authorization’ to levy a license fee”. 289 Md. at 309.

Nor do any of the “express powers” listed in Article 23A, §2 authorize any municipality to create a special taxing district for the purpose of coordinating, promoting, and managing a business district—let alone impose a property tax to finance such a program. Although §2 was amended in response to the *Campbell* decision, that amendment simply authorizes the imposition of new “reasonable fees and charges”—but not, perhaps, new taxes—and, even then, only: (i) fees and charges for the “franchises, licenses, or permits” that have been otherwise “authorized by law to be granted by a municipal corporation”, and (ii) fees and charges associated with the exercise of “any governmental or proprietary function” that has been otherwise “authorized by law to be exercised by a municipal corporation”. Article 23A, §2(b)(33).

² Section 2 provides, in this regard:

“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. . . .”

Thus, we must look elsewhere for the underlying "express authorization".³

C. *Article 23A, §44*

In Article 23A, §44, the General Assembly "expressly authorizes" all municipal corporations to establish special taxing districts for certain specified purposes, and to levy a property tax for the redemption of bonds issued "for th[o]se purposes" and the payment of "the costs of operating and maintaining [the] facilities" there specified.

The specific purposes for which a special taxing district may be created and taxes levied under §44 are limited to the establishment and operation of "storm drainage systems", "public parking facilities", "pedestrian malls", and "street and area lighting". The Hagerstown DAD program, which is intended to promote and manage a business district, clearly does not fall within any of these capital improvement projects.⁴

Therefore, in order for the City of Hagerstown to create a downtown assessment district and to levy a tax to finance the program, the General Assembly must enact new enabling legislation.

III

Sufficiency of Proposed Legislation

As set out above, House Bill 1201 would have amended Article 23A, §44 to authorize the establishment of a special taxing district "for the purpose of financing professional coordination,

³ That Article 23A, §2 was not intended by the General Assembly to authorize the creation of special tax districts is further evidenced by the enactment of Article 23A, §44, discussed below, for that very purpose.

⁴ Statutes granting powers to municipal corporations are strictly construed. *Mayor and Council of Mount Airy v. Sappington*, 195 Md. 259, 263 (1950). Any reasonable doubt concerning the existence of the power of a municipality to act must be resolved against it. *Rushe v. Hyattsville*, 116 Md. 122, 126 (1911).





promotion, development, and management of business and commerce”.

However, the bill did not fully clarify that the municipalities could levy taxes to finance this kind of program. Section 44 only authorizes the imposition of taxes to redeem bonds and to pay for the costs of “operating and maintaining these *facilities*”. The term “*facilities*” certainly applies to the types of improvements already listed in §44 (i.e., storm drainage systems, public parking facilities, pedestrian malls, and street and area lighting); it does not, however, properly apply to a DAD.

Hence, in order to avoid any questions, the section should also be amended to expressly authorize the imposition of taxes to finance the establishment and operation of the Downtown Assessment District program.

IV

Conclusion

In summary, we conclude as follows: In order for the City of Hagerstown or any other incorporated municipality to have the power to create a special taxing district for a program like the Hagerstown Downtown Assessment District proposal, express authorization from the General Assembly is required. The provisions of existing law do not contain such an express authorization; therefore, enabling legislation such as that contemplated by House Bill 1201 (1983) is necessary. However, we suggest that the proposed legislation be refined so as to remove any doubt that the General Assembly has authorized both the creation of the special district and the imposition of taxes to finance the operation of the program.

STEPHEN H. SACHS, *Attorney General*

LINDA H. LAMONE, *Assistant Attorney General*

AVERY AISENSTARK, *Chief Counsel*
Opinions and Advice

Editor's Note: Since the issuance of this Opinion, the General Assembly enacted Chapter 752, Laws of Maryland 1984, for the purpose of authorizing municipal corporations and coun-

ties "to create commercial district management authorities . . . as special tax districts with the authority to levy". The new law, effective July 1, 1984, is codified at Article 23A, §§2(b)(35) and 44, Article 25, §3(oo), and Article 25A, §5(FF).

LOCAL GOVERNMENT—COUNTY COMMISSIONERS—EXPENSES—MILEAGE—COUNTY TREASURER—“VOUCHERS” NEEDED—CECIL COUNTY COMMISSIONERS’ MILEAGE EXPENSES LIMITED TO 10¢ A MILE—FORM AND CONTENTS OF REQUIRED VOUCHER.

December 13, 1983

The Honorable Ronald A. Guns
The Honorable Ethel Murray
Maryland House of Delegates

You have requested our opinion on two questions concerning mileage expenses incurred by the County Commissioners of Cecil County. Specifically, you ask: (1) “the amount the Cecil County Commissioners . . . are legally allowed for mileage”; and (2) whether vouchers submitted for mileage “should include date, mileage, and reason for the trip”.

For the reasons given below, we have concluded as follows:

(1) Given the lack of greater specificity in the applicable public local laws, the maximum amount that the County Commissioners may receive for mileage is that specified in Article 25, §28(a) of the Maryland Code: “ten cents for every mile over five miles from their places of residence”. We nevertheless recognize the possibility that the General Assembly might have intended a different result; consequently, we urge the introduction and passage of clarifying legislation.

(2) Absent any local law or regulation to the contrary, it is up to the County Treasurer to specify the precise form and information that he or she considers necessary to assure the validity of any claim. As a general matter, however, a voucher should at least “sho[w] on its face the fact, authority, and purpose” of the expense. Accordingly, the County Treasurer has the right to require that a voucher for mileage expenses specify the date, miles traveled, and reason for each trip for which reimbursement is sought. And, we believe, prudence suggests that a County Treasurer not accept anything less than that minimal information.

I

Rate of Reimbursement

Your first question involves the relationship between two statutes: Article 25, §28(a) of the Maryland Code provides that, "[u]nless otherwise provided in the public local laws of a county", county commissioners are entitled to receive "mileage at the rate of ten cents for every mile over five miles from their places of residence". Section 1-18(a) of the Public Local Laws of Cecil County, in turn, simply provides that, "for all mileage expenses . . . , each commissioner shall submit a voucher to the County Treasurer for reimbursment". The issue is whether §1-18(a) of the Public Local Laws can be read to "otherwise provid[e]" for a rate of reimbursement that differs from the general, 10¢ rate specified in Article 25, §28(a).¹

In a letter of advice concerning this and other matters, Assistant Attorney General Linda H. Lamone concluded that, as

¹ Article 25, §28(a) of the Maryland Code provides, in its entirety, as follows:

"Unless otherwise provided in the public local laws of a county, the county commissioners of the several counties shall receive three dollars per day for each day they shall be engaged in the discharge of their duties, and mileage at the rate of ten cents for every mile over five miles from their places of residence."

§1-18(a) of the Public Local Laws of Cecil County provides, in its entirety, as follows:

"The County Commissioners of Cecil County shall receive an annual salary in lieu of all other compensation and shall be allowed an additional amount to cover all expenses incurred in the performance of their duties as county commissioners and shall be required to devote all their time to the duties of the office. Beginning with the term of office commencing after the 1978 general election, and thereafter, the county commissioners shall receive a salary of \$16,000 per year. They shall receive \$2,000 per year to cover expenses, except that the president of the board shall receive an additional \$500. In addition, for all mileage expenses and other expenses related to county business, each Commissioner shall submit a voucher to the County Treasurer for reimbursement."

Clearly, §1-18(a) does "otherwise provid[e]" for an annual salary "in lieu" of the \$3 per diem compensation specified in §28(a). It is far less clear, however, that the same can be said with respect to mileage expenses.

to the *amount* to be paid the County Commissioners for mileage, the rate specified in Article 25, §28(a) applies. That is, §1-18(a) merely supplements the public general law by requiring the submission of "a voucher to the County Treasurer"; but it does not "otherwise provid[e]" for a different rate of reimbursement. See Letter of Advice from Linda H. Lamone, Assistant Attorney General, to Ethel Murray, State Delegate (August 3, 1983).

We fully recognize that, in enacting the quoted provisions of §1-18(a), the General Assembly might have intended a different result, leaving it to the county, in accordance with local law and procedures, to set appropriate reimbursement rates for the county commissioners. Nevertheless, we have serious reservations about whether §1-18(a) can be read to accomplish such a result.

First, the nature and scope of any such intended delegation to the county is at best speculative. For example, did the General Assembly merely intend, as one legislator has suggested, to entitle the commissioners to receive mileage reimbursement at a rate equal to—but not greater than—the rate that the county otherwise allows to county employees generally? Although this might have been a motive behind the present law—to raise the commissioners' rate from 10¢ a mile to a rate on par with that received by others in the county—the language of §1-18(a) simply is not so limited. Or did the General Assembly actually intend a more open-ended authorization, permitting the county commissioners themselves to set whatever rate of reimbursement they think they should be entitled to—whether less than, equal to, or more than the rate applicable to county employees generally? The legislative history of §1-18(a) strongly suggests that this, too, was not the intended result. A review of that history follows.

The public general law in question—now Article 25, §28(a)—was first enacted in 1866 to "regulate and make uniform the compensation of County Commissioners". Chapter 134, Laws of Maryland 1866. As to mileage expenses, the law then provided, as it still does, for "mileage at the rate of ten cents for every mile over five miles from their place[s] of resident". *Id.* Although express exceptions for specified counties have since been engrafted onto this statute, those exceptions do not include—and apparently never have included—Cecil County.

The public local law in question—now §1-18(a)—was first enacted in 1894 and provided for an annual salary of \$500 “in lieu of all other compensation, per diem[,] or *mileage*”. Chapter 387, Laws of Maryland 1894. It has since been amended several times. Significantly, however, from 1894 to at least 1966, whenever the public local law purported to “otherwise provid[e]” with regard to mileage, it either permitted *no* mileage reimbursement at all or, at most, a rate of reimbursement that was *below* the 10¢ rate specified in Article 25, §28(a).²

Only in the late 1960s were the County Commissioners first allowed even the 10¢ rate of mileage reimbursement authorized by Article 25, §28(a). In 1959, the General Assembly authorized the commissioners to receive “seven cents for each mile actually traveled in the performance of their duties . . . within the County, not to exceed \$700.” Chapter 708, Laws of Maryland 1959. Four years later, in 1963, the General Assembly amended the public local law to provide for the following: first, effective June 1, 1963, an annual salary of \$3,500, plus an “allow[ance]” of \$1,500 “to cover all expenses incurred in the performance of their duties”; then, for terms of office commencing after the 1966 general election, an annual salary of \$6,500 “in lieu of any other compensation or expense allowance of any kind”. Chapter 664, Laws of Maryland 1963. The post-1966 salary was “in lieu of” any general “expense *allowance*”, such as the \$1,500 general expense allowance that became effective in 1963. Presumably, however, it was not in lieu of and did not preclude reimbursement, in accordance with the general provisions of Article 25, §28(a), for *actual* mileage expenses at the

² See, e.g., Chapter 149, Laws of Maryland 1933 (annual salary of \$1,000 “in lieu of all other compensation, per diem or mileage”); Chapter 245, Laws of Maryland 1935 (annual salary of \$1,000, plus “five cents for each mile actually traveled in the performance of their official duties”); Chapter 639, Laws of Maryland 1949 (annual salary of \$1,800, plus “five cents for each mile actually traveled in attending . . . meetings of [the] County Commissioners”); Chapter 852, Laws of Maryland 1957 (annual salary of \$3,500, plus “Seven Cents for each mile actually traveled in attending . . . meetings of [the] County Commissioners”); Chapter 708, Laws of Maryland 1959 (annual salary of \$3,500, plus “Seven Cents for each mile actually traveled in the performance of their duties . . . within the County, not to exceed \$700”).

statutory rate of 10¢ a mile.³ Thus, as of 1966, the mileage provisions of Article 25, §28(a) would appear to have applied—permitting reimbursement for mileage expenses at the rate of “ten cents for every mile over five miles from their places of residence”.

The particular language with which we are now concerned was enacted in 1971. In that year, §1-18(a) was amended by Chapter 202, Laws of Maryland 1971, to provide, in relevant part, for three changes: first, a new \$750 general expense allowance; second, “allowed expenses” of 10¢ a mile for two round trips per week, from home to office; and, third, payment of “all other mileage expenses” upon “submit[ing] a voucher to the County Treasurer in order to be reimbursed”. Evidently, the second of these changes—the 2-round trip mileage “allow[ance]”—was intended as just that: a flat payment, whether or not the trips were actually made.⁴ The question at this point, then, is the meaning and effect of the third change, providing for the payment of “all other mileage expenses” upon voucher.

For the answer to this question, we look to the title of the 1971 Act. Article III, §29 of the Maryland Constitution requires that the subject of each Act of the General Assembly be described in the Act’s title. If a part of an Act is not so described, it may not be given effect. *See, e.g., Kelly v. State*, 139 Md. 204 (1921); *Painter v. Mattfeldt*, 119 Md. 466 (1913). And, where a part of an Act is of doubtful meaning, the title of the Act may be referred to in order to ascertain the legislative intent and purpose. *See, e.g., Commission on Human Relations v. Baltimore*, 280 Md. 35 (1977); *MTA v. Baltimore County Revenue Authority*, 267 Md. 687 (1973).

The relevant portion of the title to Chapter 202, Laws of Maryland 1971, refers only to providing for “an expense ac-

³ The phrase “in lieu of any other compensation or *expense allowance*” is markedly different from earlier versions of the section, which referred more specifically to a salary “in lieu of all other compensation, per diem or *mileage*”. *See, e.g.,* Chapter 387, Laws of Maryland 1894; Chapter 149, Laws of Maryland 1933.

⁴ The new reference to “allowed expenses”—i.e., a mileage “allowance”—is markedly different from earlier versions of the section, which referred only to miles “actually traveled”. *See, e.g.,* Chapter 708, Laws of Maryland 1959.

count . . . , including mileage expenses". This language—referring to an expense "account", or "allow[ance]", for mileage—adequately reflects the first two of the changes noted above, but the third change not at all. With regard to "all other mileage expenses", the title is silent: it simply contains no reference to or indication of any intent to change the status quo from that in effect since 1966; that is, it contains no reference to or indication of any intent to modify—let alone increase—the basic, 10¢ mileage rate specified in Article 25, §28(a). Hence, to the extent that §1-18(a) is of doubtful meaning, the title indicates that there was no intent to—in the words of Article 25, §28(a)—"otherwise provid[e]" for a different rate of reimbursement. Indeed, even if the 1971 amendment to §1-18(a) had been more explicit—for example, expressly authorizing the County Commissioners to receive a rate of, say, 25¢—it is doubtful that such an authorization could have been given effect, because it was not reflected in the title. Thus, as of 1971, the basic mileage provisions of Article 25, §28(a) would have continued to apply—permitting reimbursement only at the rate of "ten cents for every mile over five miles from their places of residence".⁵

The next—and last—significant change occurred in 1980, on enactment of Chapter 486, Laws of Maryland 1980. Chapter 486 amended §1-18(a) to: (i) increase the County Commissioners' annual salary to \$16,000 a year (plus further increases keyed to increases in the Consumer Price Index); (ii) increase the general expense allowance to \$2,000 a year; (iii) repeal the 2-round trip mileage allowance; and (iv) provide, much as be-

⁵ To the extent that a change in the wording of a statute merely continues or reiterates already existing law, the change need not be reflected in the Act's title. *See, e.g.*, Bill Review Letter (H.B. 1756) from Stephen H. Sachs, Attorney General, to Harry Hughes, Governor (March 30, 1981).

For this reason also, the title to the 1971 Act was not deficient in its failure to refer expressly to the newly added requirement that vouchers be submitted to the County Treasurer for reimbursement. Article 25, §23 of the Maryland Code already provides that the county commissioners of a county "shall allow no claim against the county not properly chargeable to the same and for which the claimant shall not produce a legal voucher". And, by public local law, that responsibility is shared with the Treasurer. *See* §§1-30(a) and 1-31 of the Public Local Laws of Cecil County, discussed in Part II of this Opinion.

fore, that for "mileage expenses" the commissioners must "submit a voucher to the County Treasurer for reimbursement". These changes *do* reflect an intent to repeal the flat, 2-round trip mileage allowance in exchange for an increase in salary and in the general expense allowance; of themselves, however, they *do not* suggest any intent to otherwise change the law governing mileage expenses generally. There is nothing in the 1980 Act, its title, or—as near as we can tell—any legislative files to indicate that the General Assembly intended other than to again continue the status quo in this regard—i.e., to continue to permit reimbursement for mileage expenses in accordance with Article 25, §28(a): "ten cents for every mile over five miles from their places of residence".

We understand that, for a few years now, the county commissioners have been receiving mileage reimbursement at rates greater than 10¢. Nevertheless, "[i]t is fundamental . . . that no custom, however long and widely followed, can nullify the clear and manifest meaning of [a] statute". *Arundel Supply Corp. v. Cason*, 265 Md. 371, 378 (1972). The language of Article 25, §28(a), at least, is quite clear and manifest: "Unless otherwise provided in the public local laws of a county, the county commissioners . . . shall receive . . . mileage at the rate of ten cents for every mile over five miles from their places of residence". And, given the history reviewed above, we have considerable difficulty in reading §1-18(a) of the Public Local Laws of Cecil County as "otherwise provid[ing]" for a different rate of reimbursement.

To be sure, the 10¢ rate specified in Article 25, §28(a) is somewhat dated—having been set almost 120 years ago. And we do not dismiss the possibility that the General Assembly somehow intended to provide the commissioners with a more realistic rate of reimbursement. But, absent some express manifestation of such an intent, we are necessarily limited to the language and history of the governing statutes themselves.

We therefore urge that §1-18(a) be clarified to specify the true intent of the General Assembly in this regard. Absent such clarification, we believe it likely that a court, if presented with this issue, would conclude that the commissioners are limited to the rate specified in Article 25, §28(a) of the Maryland Code: "ten cents for every mile over five miles from their places of residence".

II

Voucher Requirement

Your second question involves the requirement in §1-18(a) that the commissioners submit a "voucher" to the County Treasurer for reimbursement of mileage expenses. You ask whether "there is a set form for these vouchers which should include date, mileage, and reason for the trip."

Section 1-18(a), of course, does not specify a "set form", nor do we know of any public general law or public local law that does. Hence, in the first instance at least—and absent any local law or regulation that might provide otherwise—we believe it would be up to the County Treasurer to specify the information that he or she considers necessary to assure the validity of any claim for reimbursement. This is so because, by public local law, the County Treasurer is directly responsible "for the collection and disbursement of all moneys coming into his hands for the county". §1-30(a) of the Public Local Laws of Cecil County. *See also* §1-31 of the Public Local Laws.⁶ Absent statutory specificity, therefore, we can here only suggest guidelines—and cautions—that a County Treasurer might well consider.

A case illustrative of the need for care in the disbursement of public funds is that of *Larmore v. State*, 180 Md. 347 (1942). The case is particularly relevant here in that it involved a statutory voucher requirement analogous to §1-18(a). Article 25, §23 of the Maryland Code provides:

"They [the county commissioners of a county] shall allow no claim against the county not properly chargeable to the same and for which the claimant shall not produce a legal voucher."

In *Larmore*, the County Commissioners of Wicomico County had been jointly indicted and convicted of the common law crime of misfeasance in office, by "approving and passing for payment fictitious and fraudulent claims made up by a dishon-

⁶ This is not to say that the County Commissioners do not themselves share in the responsibility. As discussed below, Article 25, §23 of the Maryland Code imposes a similar, if not paramount, responsibility of care on them as well.

est clerk". 180 Md. at 348. Specifically, the indictment charged that:

"[T]he commissioners 'unlawfully and negligently did allow, approve and pass for . . . payment . . . fictitious and fraudulent claim[s] against Wicomico County designated as Voucher No[s]. 49,599 [and 49,276] in the amount[s] of \$228 [and \$135, respectively], without first having inquired and found out for themselves whether any such claim was due by Wicomico County and for which they, while acting in the capacity of commissioners, . . . were authorized and required by law to pay' " 180 Md. at 350.

The commissioners demurred to the indictment and appealed the subsequent conviction. In support of their demurrer, they argued that the indictment's charge "demands the exercise of an impossible degree of care on the part of the commissioners, and wrongly supposes that they are denied any right to rely on the honesty and care of their clerk". *Id.*

The Court of Appeals disagreed and affirmed the conviction. Even though there had been no evidence to indicate that the commissioners had actual knowledge of the clerk's fraud, they "remain charged with the management of the county's finances". *Id.* In this context, the Court specifically referred to the commissioners' duty, set forth in Article 25, §23 (then §10), to "allow no claim . . . not properly chargeable to the [county] and for which the claimant shall not produce a legal voucher". 180 Md. at 349.

As to the commissioners' claim on demurrer that "th[e] charge demands the exercise of an impossible degree of care", the Court said:

"[T]he court does not see that it is properly subject to this criticism. Considered apart from the subsequent evidence, as it must be considered on the demurrer, the charge is nothing more than that of passing payments negligently, without making the inquiries that would enable them to perform their statutory duty of verifying the indebtedness. There is no restriction to any particular method, and no denial of any particular reliance. Passing for payment without any inquiry is the gist of the charge, and that action would constitute a dereliction of duty." 180 Md. at 350-51.

The "gist" of the offense in *Larmore* was the failure to make "any inquiry" into the claims in question. Hence, there was no need for the Court to further define the general obligation of the commissioners to "mak[e] the inquiries that would enable them to perform their statutory duty of verifying the indebtedness". Indeed, as the Court itself noted, "[t]here is no restriction to any particular method". Presumably, however, one acceptable method—referred to in the statute itself—is a "legal voucher", properly evidencing the validity of the claim in question.

To our knowledge, the Maryland courts have not defined the meaning of the term "voucher" in this context, let alone specify any particular form or contents. The courts of other states, however, have provided guidance. In *Robertsons' Guardian v. Fidelity & Casualty Co.*, 12 S.W.2d 298, 300 (Ky. 1928), the court defined "voucher" as follows:

"A voucher means, when used in connection with the disbursement of money, a written or printed instrument, in the nature of a bill of particulars, account, receipt, or acquittance, that shows on its face the fact, authority, and purpose of the disbursement."

Accord Ford v. Aetna Insurance Company, 394 S.W.2d 693, 699 (Tex. Civ. App. 1965). See *Secretary of State v. Hanover Insurance Company*, 411 P.2d 89, 92 (Ore. 1966) (statement of money spent for rations that does not designate from whom rations were purchased is not valid "voucher"). See also *Moore v. Garneau*, 58 N.W. 179, 180 (Neb. 1894); *People v. Swigert*, 107 Ill. 494, 495 (1883).⁷

Much the same analysis applies to the County Treasurer's responsibility under §§1-18(a) and 1-30(a) of the Public Local Laws of Cecil County. The voucher required by the Treasurer should contain sufficient information to enable the Treasurer, as was required of the county commissioners in *Larmore*, "to

⁷ A virtually identical definition of "voucher" has also been adopted by one of the leading legal dictionaries:

"When used in connection with disbursement of money, a written or printed instrument in the nature of an account, receipt, or acquittance, that shows on its face the fact, authority, and purpose of disbursement." *Black's Law Dictionary* 1414 (rev. 5th ed. 1979).

perform [his or her] statutory duty of verifying the indebtedness". Although—to borrow from *Larmore*—"[t]here is no restriction to any particular method", we believe that the voucher should at least "sho[w] on its face the fact, authority, and purpose of the disbursement". That is, it should contain sufficient information to permit, if necessary, further "inquiry"—e.g., on periodic audit—into the validity of the claim.

With regard to mileage expenses in particular, therefore, we believe that the County Treasurer certainly has the right to require that the voucher specify the date, miles traveled, and reason for any trip for which reimbursement is sought.⁸ Indeed, in our view, prudence suggests that a County Treasurer not accept anything less than this minimal information.⁹

In summary, then, the form and contents of the voucher is, in the first instance at least, a matter to be decided by the County Treasurer. The Treasurer—along with the County Commissioners themselves—is responsible to "mak[e] the inquiries" necessary to verify the indebtedness. While "[t]here is no restriction to any particular method", a voucher should "sho[w] on its face the fact, authority, and purpose" of the expense. In our view, such a showing ordinarily would include the date, miles traveled, and reason for the trip for which reimbursement is sought.¹⁰

⁸ By way of analogy, we note that the State of Maryland Expense Form calls for just such information to be given by a claimant.

⁹ For example, the statutory "authority" for the receipt of mileage expenses requires that these expenses be "related to county business" and have been incurred by the commissioners "in the performance of their duties as county commissioners". [§1-18(a). *See also* §28(a) ("in the discharge of their duties").] Thus, a voucher that "shows on its face the fact, authority, and purpose" of the reimbursement would contain enough information about the reason for a trip to indicate that it was "related to county business" and incurred "in the discharge of [official] duties".

Whether and to what extent a court might consider less specificity to be sufficient is a matter of conjecture—and may well depend on the context in which the issue arises. For example, a civil suit against a county treasurer or against the treasurer's bond for making an unauthorized disbursement would likely involve different considerations than, for example, a criminal action against a county treasurer for misfeasance in office.

¹⁰ You also have asked if it would be "permissible" for a "set form for these vouchers . . . to be added by legislation". It would, of course, be permissible for the General Assembly to enact a law that specifies the form or contents of the required voucher. We note, however, that it is relatively unusual for legislation to reach that level of specificity in administrative matters such as this.

III

Conclusion

In conclusion, it is our opinion that:

(1) Given the lack of greater specificity in the applicable public local laws, the maximum amount that the County Commissioners of Cecil County may receive for mileage is that specified in Article 25, §28(a) of the Maryland Code: "ten cents for every mile over five miles from their places of residence". We nevertheless recognize the possibility that the General Assembly might have intended a different result; consequently, we urge the introduction and passage of clarifying legislation.

(2) Absent any local law or regulation to the contrary, it is up to the County Treasurer to specify the precise form and information that he or she considers necessary to assure the validity of any claim. As a general matter, however, a voucher should at least "show" on its face the fact, authority, and purpose of the expense. Accordingly, the County Treasurer has the right to require that a voucher for mileage expenses specify the date, miles traveled, and reason for each trip for which reimbursement is sought. And, we believe, prudence suggests that a County Treasurer not accept anything less than that minimal information.

STEPHEN H. SACHS, *Attorney General*

AVERY AISENSTARK, *Chief Counsel*
Opinions and Advice

Editor's Note: Since the issuance of this Opinion, the General Assembly enacted Chapter 58, Laws of Maryland 1984, amending §1-18(a) of the Public Local Laws of Cecil County to require all vouchers for reimbursement of expenses to "include the information required by the State Standard Travel Regulations" and to permit reimbursement for mileage expenses "at the rate authorized under the State Standard Travel Regulations".

PUBLIC EMPLOYMENT

“APPOINTING AUTHORITY”—AT-WILL EMPLOYMENT—LIMITATIONS ON DISMISSAL—ABUSIVE DISCHARGE—FIRST AMENDMENT—POLITICAL AFFILIATION AND FREE SPEECH.

May 5, 1983

The Honorable Frank D. Ragan
President
Cecil County Commissioners

You have requested our opinion on the authority of the Cecil County Treasurer-elect, on assumption of office, to retain or terminate employees of the County Treasurer's office. Specifically, you refer to §1-31A of the Cecil County Code, which provides: “The Treasurer is the appointing authority for all employees of that office.”¹

For the reasons given below, we believe that a newly elected appointing authority—such as a newly elected County Treasurer—generally has the power to dismiss personnel appointed by a predecessor. However, any dismissal would be impermissible if: (i) it violates a specific statutory requirement; (ii) it violates public policy grounded in some particular rule of law; or (iii) it penalizes an employee's exercise of his or her First Amendment rights.

I

At-Will Employment

At common law, an individual hired for an indeterminate period serves at the pleasure of the “appointing authority”. In such a situation, “where there is no limit fixed to the term [of] office and the appointee holds merely at the will of the appointing power, he may be removed without notice and without

¹ For purposes of this Opinion, we assume that no other provisions of the public local laws of Cecil County speak to this subject. Your county attorney is best qualified to advise you whether or not this is the case.

charges being preferred or reasons assigned." *Townsend v. Kurtz*, 83 Md. 331, 342 (1896). See *Washington, Baltimore and Annapolis Railroad Company v. Moss*, 127 Md. 12, 21 (1915); *Giardina v. Farms Company*, 25 Md. App. 201, 206 (1975).

Thus, absent a provision to the contrary in an employment contract or merit system statute, the power to appoint generally carries with it the power to remove. Furthermore, this power includes the right of an appointing authority to remove those persons appointed by his or her predecessor in office.²

Nevertheless, the ability of an employer to terminate an at-will employee is not absolute.

II

Limitations under Maryland Law

A. Statutory Restrictions

Maryland law prohibits the discharge of any employee "because of such individual's race, color, religion, sex, age, national origin, marital status, or physical or mental handicap unrelated in nature and extent so as to reasonably preclude the performance of the employment". Article 49B, §16(a)(1).

Other statutes similarly limit the ability of an employer to terminate an at-will employee. For example, an employee may not be discharged for filing a workmen's compensation claim (Article 101, §39A); for having his or her wages attached (Commercial Law Article, §15-606); or for involvement in proceedings under the Occupational Safety and Health Act (Article 89, §43).

B. Public Policy

The Maryland Court of Appeals recently joined several other jurisdictions in further limiting the traditional contract rule of

² We have been advised that employees of the County Treasurer's office are not protected under the County's merit system of employment. Accordingly, we do not address the extent to which employment in the Treasurer's office may implicate property interests protected by the Due Process Clause of the Fourteenth Amendment. See *Bishop v. Wood*, 426 U.S. 341 (1976).

termination at will. In *Adler v. American Standard Corporation*, 291 Md. 31 (1981), the Court held that a cause of action for wrongful or abusive discharge lies whenever an employer's motives for terminating an at-will employee "contravene[s] some clear mandate of public policy". 291 Md. at 47.³ See also *Teays v. Supreme Concrete Block*, 51 Md. App. 166, 167 (1982); *Harless v. First National Bank in Fairmont*, 246 S.E.2d 270, 273, 275 (W.Va. 1978); *Fortune v. National Cash Register*, 364 N.E.2d 1251, 1255-57 (Mass. 1977); *Monge v. Beebe Rubber Company*, 316 A.2d 549, 551 (N.H. 1974).

In this regard, judicial determination of public policy is not always confined to "legislative enactments, prior judicial decisions or administrative regulations". *Adler*, 291 Md. at 45. However, recognizing the General Assembly's function to declare and define public policy, the Court indicated in *Adler* that an employee alleging abusive discharge must cite both factual details and the "specific statutory provision . . . or other existing rule of law that particularly prohibits the claimed misconduct". 291 Md. at 46. See also *Adler v. American Standard Corporation*, 538 F.Supp. 572 (D.Md. 1982).

C. Summary

Under Maryland law, therefore, to the extent that an employer does not contravene an express statutory prohibition or "some [other] clear mandate of public policy", he or she has the authority to remove—with or without cause—an employee appointed for an indefinite term by a predecessor.

III

First Amendment

The ability of a governmental (or "public") employer to terminate an at-will employee is also circumscribed by the First

³ In *Adler*, an at-will employee alleged that his termination was motivated by his discovery of corporate impropriety, including bribery of foreign officials, falsification of documents to escape tax liability, and violations of federal and state antitrust laws. See *Adler v. American Standard Corporation*, 538 F.Supp. 572 (D.Md. 1982).

Amendment to the United States Constitution. Specifically, the discharge of an employee because of that employee's political affiliation or activity is considered an unconstitutional impairment of First Amendment rights of belief and association. *Branti v. Finkel*, 445 U.S. 507, 515-16 (1980); *Elrod v. Burns*, 427 U.S. 347, 355, 359 (1976); *Nekolny v. Painter*, 653 F.2d 1164, 1168 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982). See also *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 283-84 (1977); *DeBleeker v. Montgomery County*, 292 Md. 498, 506 (1982); *DiGrazia v. County Executive for Montgomery County*, 288 Md. 437, 447 (1980).⁴

In *Elrod v. Burns*, the Supreme Court found that a threatened dismissal of a non-civil service employee for political patronage reasons "penalizes [the] exercise" of "protected belief and association". 427 U.S. at 359. Later, in *Branti v. Finkel*, the Court again found that individuals serving at the pleasure of a public official were improperly discharged because of their political affiliation. The Court summarized the constitutional test as follows: "[U]nless the Government can demonstrate 'an overriding interest . . . of vital importance,' . . . requiring that a person's private beliefs conform to those of the hiring authority, his beliefs cannot be the sole basis for depriving him of continued public employment." 427 U.S. at 515-16 (citations omitted).⁵

⁴ Moreover, under 42 U.S.C. §1983 (1979), federal courts may entertain claims against any "person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of *any* rights, privileges, or immunities secured by the Constitution and law . . .". (Emphasis added.)

⁵ We note, however, that the Supreme Court has differentiated patronage dismissals limited to administrative *policymaking* positions, so that "representative government [is] not . . . undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate". *Elrod*, 427 U.S. at 367. In this context, the Court summarized: "[T]he question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518. Another court characterized the test for policymaking status thus: "whether the position held by the individual authorizes, either directly or indirectly, meaningful input into government decisionmaking on issues where there is room for principled disagreement on goals or their implementation." *Nekolny v. Painter*, 653 F.2d 1164, 1170 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982).

In recent years, courts have construed this *Elrod-Branti* principle to provide protection against a wide range of administrative sanctions, even short of threatened or actual dismissals. See, e.g., *DeLong v. United States*, 621 F.2d 618, 623 (4th Cir. 1980) (transfer or reassignment). See also *Tanner v. McCall*, 625 F.2d 1183 (5th Cir. 1980) (failure to reappoint deputy sheriff for patronage reasons); *Visser v. Magnarelli*, 530 F.Supp. 1165 (N.D. N.Y. 1982) (failure to reappoint city clerk because of political considerations); *Brady v. Paterson*, 515 F.Supp. 695 (N.D. N.Y. 1981) (cemetery director threatened with replacement for partisan political reasons).

In so doing, the courts have disagreed over the standard to be used in determining when political discrimination results in an unconstitutional termination. Compare, e.g., *Brady v. Paterson*, 515 F.Supp. 695, 699 (N.D. N.Y. 1981), *appeal dismissed*, 671 F.2d 491 (1981) (holdover term appointee must establish that replacement decision was based "solely" on political considerations) and *Ramey v. Harber*, 431 F.Supp. 657 (W.D. Va. 1977), *aff'd in part, rev'd in part on other grounds*, 589 F.2d 753 (4th Cir. 1978) (deputy sheriffs must show that reappointment was denied "solely" because of their partisan political affiliation) with *Tanner v. McCall*, 625 F.2d 1183, 1192 (5th Cir. 1980) (deputy sheriff need only show that political discrimination was "a substantial motivating factor" in the employment decision), *Visser v. Magnarelli*, 530 F.Supp. 1165, 1169 (N.D. N.Y. 1982) (city clerk's political affiliation was improperly a "substantial" or "motivating" factor" in decision to terminate), and *McMullan v. Thornburgh*, 508 F.Supp. 1044, 1050-52, 1054 (E.D. Pa. 1981) (dismissed employee need only show that political affiliation was a "substantial" or "motivating" factor in discharge).

Despite the variations among these decisions, it is clear that, when political considerations play a significant role in a public employer's decision to terminate an at-will employee, the employer runs the risk of violating the employee's First Amendment rights of belief and association. Because state and federal law is not yet settled in this area, we caution that this risk be taken into careful account by the new Treasurer before terminating any existing Cecil County employees, notwithstanding their status as personnel serving at the pleasure of the Treasurer.

We also note that public employees may not be discharged for commenting on issues of political, social, or other public concern. *Pickering v. Board of Education of Township High School District 205, Illinois*, 391 U.S. 563, 571-72 (1968). See *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979). The Supreme Court has consistently upheld an employee's First Amendment right of free speech, when that expression neither disrupts the proper performance of the employee's daily duties nor interferes with general office operation. *Pickering*, 391 U.S. at 572-73.

However, First Amendment protection does not shield a public employee's speech on matters of purely personal, institutional concern. *Connick v. Myers*, 461 U.S. 138 (1983). Here, the Court found the expressive activity—"an employee grievance concerning internal office policy"—to be only tangentially related to issues of public import. *Id.* 461 U.S. at _____ [103 S.Ct. at 1694]. Accordingly, the Court upheld the dismissal of the employee for engaging in activities that threatened to undermine the harmonious, efficient, and disciplined operation of the agency.

IV

Conclusion

In summary, it is our opinion that, under §1-31A of the Cecil County Code, employees hired to work in the Treasurer's office are nontenured employees and serve at the pleasure of the Treasurer. As a general rule, an employer may dismiss nontenured employees for any reason that does not impair public policy or involve statutorily or constitutionally impermissible factors such as the employee's race, religion, political beliefs, or exercise of other First Amendment freedoms. See, e.g., *Connick v. Myers*, 461 U.S. at _____ [103 S.Ct. at 1690]; *Branti v. Finkel*, 445 U.S. at 520 n. 14; *Elrod v. Bruns*, 427 U.S. at 366; *Tanner v. McCall*, 625 F.2d at 1194-95; *Delong v. United States*, 621 F.2d at 626 (Dumbauld, J. concurring). Thus, the Treasurer's decision to retain or terminate an employee—including those appointed by a predecessor—for reasons that do not impair public policy or statutory or constitu-

tional rights, is a legitimate exercise of authority under §1-31A of the Cecil County Code.

STEPHEN H. SACHS, *Attorney General*

LYNETTE M. PHILLIPS, *Staff Attorney,*
Opinions and Advice

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PUBLIC EMPLOYMENT—DISCRIMINATION AGAINST HANDICAPPED—EPILEPSY/ALCOHOLISM—JOB-RELATED DRIVING—VEHICLE LAWS—STATE AGENCY MAY RELIEVE HANDICAPPED EMPLOYEE OF DRIVING DUTY IF EMPLOYEE POSES UNREASONABLE DRIVING RISK.

May 23, 1983

Mr. Robert L. Serviss, Sr.
Director
Motor Vehicle Fuel Tax Division
Comptroller of the Treasury

You have requested our views on the circumstances under which two employees of the Motor Vehicle Fuel Tax Division (the "Division") may be forbidden from driving on official State business. One employee, whose job entails a great amount of driving, has a history of seizures resulting from epilepsy. The other employee "admits to alcohol abuse".

For the reasons given below, we have concluded as follows:

(1) In light of the decision of the Motor Vehicle Administration ("MVA") that the employee with epilepsy may continue to hold a driver's license, the Division should reevaluate its previous determination that the employee may not drive as part of his job. In conducting this reevaluation, the Division should consider the MVA's decision, the opinion of the State Medical Director, any pertinent information about the effects of the employee's illness that was not presented to the MVA, the employee's past driving record, any special hazards or requirements of his job-related driving, and any other information that might bear on his ability to drive safely. If, after a review of all of these factors, the Division concludes that the employee, as a result of his epilepsy, poses an unreasonable driving risk, it may continue to prohibit his driving while on duty.

(2) The Division should seek the advice of the State Medical Director regarding the effect of the other employee's alcohol abuse on her ability to drive safely. Pending this advice, the Division should not permit her to drive on duty unless it is clear that her alcoholism in fact poses no significant risk of unsafe driving. After the State Medical Director presents an opinion, the Division should then reevaluate whether to permit the employee to engage in job-related driving, taking into account that opinion and other pertinent information. If the Divi-

sion concludes that the employee, as a result of her alcohol abuse, poses an unreasonable driving risk, it may continue to prohibit her driving while on duty.

These conclusions about the particular employees in question comport with the employing agency's legal obligations under the antidiscrimination laws. In Part IV of this Opinion, we restate these conclusions in more general form, as guidance in future situations involving the job-related driving of handicapped employees.

I

Statutory Protection of Handicapped Employees

This Office has recently reviewed the various statutes that specify the obligations of the State toward its handicapped employees. 67 *Opinions of the Attorney General* 322 (1982).

It is clear that epilepsy is a physical handicap or impairment within the meaning of these laws. Thus, a supervisor may not "discriminate against" the employee with epilepsy "with respect to his compensation, terms, conditions, or privileges of employment", as long as that employee's epilepsy is "unrelated in nature and extent so as to reasonably preclude the performance of [his] employment". Article 49B, §16(a)(1) of the Maryland Code. Furthermore, "[a]ll merit system actions and transactions shall be made without regard to . . . [his] physical . . . handicap, . . . except when [such] handicap . . . involves a bona fide job requirement." Article 64A, §12A of the Maryland Code.

These statutes are not applicable, however, in the case of the alcoholic employee. Alcoholism is not a condition that is covered by these State antidiscrimination laws. See 67 *Opinions of the Attorney General* at 330-31; 63 *Opinions of the Attorney General* 408 (1978).¹

¹ Alcoholism is a "handicap" within the scope of the federal law that 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. See 67 *Opinions of the Attorney General* at

Continued on page 324.

II

Relieving Driving Duties from Employee with Epilepsy

In our view, the antidiscrimination laws mean that a supervisor may take no action adversely affecting a handicapped employee because of the employee's handicap, unless the handicap prevents the effective performance of the employee's job. When driving is an aspect of such an employee's job, driving duty may not be withdrawn unless the employee's handicap interferes with his or her ability to drive safely. Conversely, if an employee's handicap *does* appear to interfere with safe driving, these laws do not prevent a supervisor from taking reasonable steps—including refusal to permit on-duty driving—to avert the risk of an accident.

Applying these general rules to the specific case of your employee with epilepsy is difficult, because different officials have reached different conclusions about the effect of the employee's epilepsy on his ability to drive.

On the one hand, the State Medical Director conducted a physical examination of the employee and reviewed the history of his illness, including a recent "day-time seizure while driving". Based on his assessment, the State Medical Director concluded that the employee "not [be] allowed to drive a State owned vehicle for a period of twelve months".²

On the other hand, the MVA also reviewed the employee's record and determined that his driver's license should not be suspended or revoked. The MVA is the agency authorized by

331-33. However, we assume that the Motor Vehicle Fuel Tax Division is not such a "program or activity". In any event, the action recommended below with respect to the alcoholic employee is consistent with the requirements of this federal statute.

² The State Medical Director exercises the authority of the Secretary of Personnel "with respect to medical examinations relating to employment with the State". COMAR 06.01.01.04A. At the request of a department head, the Medical Director may conduct a medical examination "for the purpose of determining whether an employee has any disability which would prevent him from the proper performance of his duties". COMAR 06.01.01.42D(5)(a). However, the regulations do not vest in the Medical Director authority to make the final determination in such cases. *Cf.* COMAR 06.01.01.04B(2) (with respect to an examination for *initial appointment* to a State position, "[t]he determination of the Medical Director . . . shall be final and may not be subject to any administrative review").

law to "suspend, revoke, or refuse to issue or renew the license of any resident . . . on a showing by its records or other sufficient evidence that the . . . licensee . . . [i]s an unfit [or] unsafe . . . driver of a motor vehicle". §16-206(a)(2) of the Transportation Article of the Maryland Code.

In this case, the MVA, having considered the recommendation of its Medical Advisory Board, decided that the employee's driver's license should not be suspended or revoked.³ Implicit in the MVA's decision is a finding that the employee is *not* generally "an unfit [or] unsafe" driver because of his epilepsy.⁴ However, the MVA's decision—limited to the issue of minimal driving fitness—is not determinative of the quite separate question of the employee's fitness to engage in particular job-related driving, which may entail special demands or risks.

In *Curley v. General Valet Service*, 270 Md. 248 (1973), *rev'g* 16 Md. App. 453 (1973), an employer was sued for negligence as a result of an accident caused by one of its truck drivers, who had a long record of vehicle law violations but whose total of violation points was insufficient for license suspension. The

³ The Medical Advisory Board advises the MVA with respect to "the physical and mental condition of individuals who seek to drive on highways in this State". §16-118(a) of the Transportation Article. "The [Motor Vehicle] Administrator may refer to the Medical Advisory Board, for an advisory opinion, the case of any licensee . . . if the Administrator has good cause to believe that the driving of a vehicle by him would be contrary to public safety and welfare because of an existing or suspected mental or physical disability." §16-118(c)(1) of the Transportation Article.

We understand that the Medical Advisory Board does not generally conduct its own physical examination, but instead relies on the reports of others. In this case, the MVA's records indicate that the report of the State Medical Director, who had conducted an examination of the employee, was not reviewed.

⁴ Under the Medical Advisory Board's Guidelines, an individual with a disease of the nervous system who "has not had an episode of altered consciousness for the preceding 3 years . . . may be considered for any class of license". If such an individual "has not had an episode of altered consciousness in the preceding year, he may be considered for a Class D [cars and light trucks] or E [motorcycles] license only". Finally, "[a]n individual who has had an episode of altered consciousness in the preceding year may not be considered for any class license unless the alteration of consciousness was the result of a recommendation of a physician to discontinue the use of medication because of other medical or surgical considerations." COMAR 11.17.03.04D(2).

plaintiff claimed that, in light of the driver's record, the employer was negligent in entrusting the truck to the driver.

The employer argued that it "was entitled to rely upon the public policy of the State that a licensee who is required to drive a motor vehicle in the course of his regular employment (and who therefore spends much more time exposed to the hazards of driving than a person not so employed) is not deemed to be unfit or unsafe to drive . . . until he has been charged with 15 points." 16 Md. App. at 470-71. Because the driver had fewer than 15 points, the MVA had not suspended his license. Thus, the employer argued, it could not be found negligent when it simply relied on this fact in allowing him to drive its truck. The Court of Special Appeals so held.

But the Court of Appeals reversed. It found no absolute defense in the employer's reliance on the fact that the driver's license had not been suspended. Rather, the Court of Appeals held, a reasonable jury could hold the employer liable for negligence because the employer had not independently assessed the driver's ability to drive safely on the job. That is, the employer could be held negligent for failing to take into account the driver's "particular record of moving violations, known to [the employer] at the time it employed [the driver], considered in light of the type of vehicle he was driving and the area in which he was known to be driving it". 270 Md. at 266.

The implications of *Curley* for the question posed here are reasonably clear: although the Division should give some weight to the MVA's decision, it nevertheless cannot rely on that decision conclusively. The MVA, in determining whether to revoke or suspend the employee's license, did not (and indeed could not) address the issue of whether it would be reasonably prudent for this employee to drive *extensively* as part of his particular job. If there is a risk that the employee will have a seizure while driving, this risk obviously increases as the amount of driving increases. Although it might be prudent for such an employee to drive, for example, 100 miles a week, it might very well be imprudent, or even negligent, for him to drive 100 miles a day.

The MVA has no authority to take into account such particular job-related considerations; the employer, however, does have the right and duty to take these considerations into account. Certainly, the employer is best able to evaluate the risks that might warrant particular restrictions.

Accordingly, the Division must itself determine, based on all of the relevant available information, whether the employee with epilepsy would pose an unreasonable driving risk.⁵ If the Division has grounds to believe that the employee does pose such a risk, it may continue to prohibit him from driving on State business in order to protect the public (and the employee) against harm and to protect itself against possible liability. The antidiscrimination laws do not prevent an employer from taking job-related actions of that kind.

III

Relieving Driving Duties from Alcoholic Employee

As noted in Part I above, State statutes prohibiting discrimination against handicapped employees do not encompass alcoholism. As a practical matter, however, a supervisor who becomes aware of an employee's alcohol abuse should take action comparable to that required when he or she learns of any other medical condition that might be incompatible with safe driving.

(1) The supervisor should, through proper channels, seek the advice of the State Medical Director regarding the impact of the condition on the employee's ability to drive safely while on duty.

(2) Pending receipt of the State Medical Director's opinion, the supervisor should prohibit the employee from driving on duty, unless the supervisor is convinced that the employee's pattern of alcohol abuse is such that it has no effect on the employee's driving ability. If the supervisor is convinced by the available information that the employee's continued driving poses no unusual risk, then the supervisor would be acting

⁵ We understand that the employee not only has a history of seizures, but has had seizures while driving, the most recent of which precipitated the various reviews noted in this Opinion. More caution may well be required in such a case than for a hypothetical employee with epilepsy who has no history of seizures while driving and who drives on State business on a more limited basis.

reasonably—that is, without negligence—in allowing the employee to drive.⁶

(3) After receiving the State Medical Director's opinion, the supervisor should reevaluate the situation to determine whether, in light of that opinion and other relevant factors, the employee's alcohol abuse poses an unreasonable driving risk. If so, the supervisor should not permit the employee to drive on State business.

IV

Conclusion

In summary, it is our opinion that the supervisor of an employee with any handicap should follow these guidelines in determining whether such an employee should be permitted to drive on State business:

(1) Any restrictions or conditions that the MVA imposes on that individual's driver's license should of course be followed by the employing agency with respect to the employee's official driving.

(2) If the MVA imposes no such restrictions, the supervisor should generally impose no restrictions on the handicapped driver that are not equally applicable to nonhandicapped drivers.⁷

(3) If the supervisor believes that the employee's handicap might pose an unreasonable driving risk, the supervisor should seek the opinion of the State Medical Director and, under ap-

⁶ Your letter states, without elaboration, that the employee in question "admits to alcohol abuse". If the employee's alcoholism has had any detrimental effect on her job performance, then she should not be allowed to drive on State business. It is at least conceivable, however, that her alcohol abuse is controlled enough to have had no such effect.

⁷ There may well be job-related reasons why a supervisor might want to impose certain limitations on the driving of all employees, but special restrictions should generally not be imposed on the handicapped driver.

propriate circumstances, report pertinent information to the MVA.⁸

(4) In light of the State Medical Director's opinion, the MVA's decision, and all other pertinent information, the supervisor should decide whether the handicapped driver poses an unreasonable safety risk. If the driver does pose such a risk, the supervisor should not allow that person to drive on State business.

STEPHEN H. SACHS, *Attorney General*

JACK SCHWARTZ, *Assistant Counsel,*
Opinions and Advice

AVERY AISENSTARK
Chief Counsel
Opinions and Advice

⁸ To the extent that the information consists of "medical . . . data" or "personnel files", the custodian of the information is required to "deny the right of inspection . . . , unless otherwise provided by law". Article 76A, §3(c)(i) and (iii) of the Maryland Code. *See also* 65 *Opinions of the Attorney General* 365 (1980). We need not consider here under what circumstances disclosure of such information to the MVA is "otherwise provided by law". *See generally* 60 *Opinions of the Attorney General* 554 (1975); 60 *Opinions of the Attorney General* 559 (1975). Whenever an agency believes that information bearing on the fitness of an employee to drive should be reported to the MVA, this Office should be consulted prior to disclosure.

With respect to the authority of the State Medical Director and other physicians to disclose medical information to the MVA, *see* §16-119 of the Transportation Article.

PUBLIC INFORMATION

PUBLIC RECORDS—PUBLIC DEFENDER—TRIAL TRANSCRIPTS—TRANSCRIPTS IN HANDS OF PUBLIC DEFENDER ARE PUBLIC RECORDS—CLIENTS OF PUBLIC DEFENDER DO NOT HAVE PERSONAL PROPERTY RIGHT TO TRANSCRIPTS—PUBLIC INFORMATION ACT GRANTS RIGHT TO INSPECT TRANSCRIPTS AND, FOR A FEE, TO A COPY.

January 25, 1983

Alfred J. O'Ferrall, III, Esq.
Deputy Public Defender

You have requested our opinion on whether, under Maryland law, a client of the Public Defender has a "property right" to his or her trial transcript in the custody of the Public Defender. You advise that this request derives from actions now pending in the United States District Court for the District of Maryland, in which one issue is whether such a property right, if found to exist, would be enforceable under federal law.

For the reasons given below, we have concluded that, under the laws of this State, a trial transcript in the custody of the Public Defender is not the private property of a defendant or, indeed, anyone else. It is, rather, a public record within the meaning of, and subject to, the Maryland Public Information Act, Article 76A, of the Maryland Code*. The defendant whose trial the transcript reports has a right, under the Public Information Act, to be furnished with a copy of the transcript in the custody of the Public Defender for a "reasonable fee", although the Public Defender may waive the fee if the waiver is in the public interest.¹

* [Editor's Note: The records provisions of the Public Information Act have since been recodified, without substantive change, as Title 10, Subtitle 6, Part III, of the new State Government Article ("SG" Article). Cross-references to the new codification have been added to the text in brackets.]

¹ This Opinion is limited to the rights of a defendant to acquire a copy of a transcript from the Public Defender for purposes of collateral litigation, the Public Defender's office having obtained the transcript in connection with its representation of the defendant. We do not address the right of an indigent defendant to have a trial transcript prepared at State expense for purposes of appealing his or her conviction. See Maryland Rules 883 and 1083. Nor do we deal with the property rights of a defendant who has already acquired a copy of the transcript.

I

Public Record Character of Trial Transcripts

Under Maryland law, court records are generally open to public inspection: "Unless otherwise provided by law or order of court, any person may, without charge, inspect, examine, and make memoranda or notes from an index or paper filed with the clerk of a court." §2-203 of the Courts Article. "Court files, unless sealed by order of the court, are properly viewable by any person." *Beckett v. State*, 31 Md. App. 85, 89 (1976).

A trial transcript is, of course, an important element of "court files". Indeed, a "transcript represents the only *official record* of the proceeding." *Harrod v. State*, 39 Md. App. 230, 236, *cert. denied*, 283 Md. 733 (1978) (emphasis added). See Maryland Rule 826b (transcript to be included in record on appeal to Court of Appeals); Maryland Rule 1026a2 (transcript to be included in record on appeal to Court of Special Appeals). Cf. Maryland District Rule 4a (sound recording "shall be part of the official record of each proceeding"). We have found no case law or other support for the proposition that a trial transcript is in any way the private property of the defendant in the trial or of anyone else.

Apart from these specific indicia of its public record character, a trial transcript also falls squarely within the definition of "public records" in the Maryland Public Information Act. This definition is as follows:

"Public records' when not otherwise specified shall include any paper, correspondence, form, book, photograph, photostat, film, microfilm, sound recording, map, drawing, or other written document, regardless of physical form or characteristics, and including all copies thereof, that have been made by any branch of the State government, including the legislative, judicial, and executive branches, by any branch of a political subdivision, and by any agency or instrumentality of the State or a political subdivision, or received by them in connection with the transaction of public business." Article 76A, §1(b) [SG §10-611(f)].

We think it indisputable that a trial transcript is a "public recor[d]" under this definition. It is both a "written document

... made by" the judicial branch of State government and, when in the possession of the Public Defender, a document "received by [an executive branch agency] in connection with the transaction of public business". Therefore, access to a trial transcript is governed by the Public Information Act.

II

Access to Transcripts

The Public Information Act imposes various duties on the "official custodian" and the "custodian" of a public record. In the instance of a trial transcript, these duties fall on both the court clerks and the Public Defender.

An "official custodian" is the State officer or employee "who is responsible for the maintenance, care, and keeping of public records, regardless of whether such records are in his actual personal custody and control". Article 76A, §1(f) [SG §10-611(d)]. Certainly, the clerk of the court in charge of a trial record is the official custodian of a trial transcript that forms a part of that record. *See* §2-201(a)(i) of the Courts Article of the Maryland Code. We believe that the Public Defender is also the official custodian of a trial transcript obtained by the Public Defender's office in the course of its legal representation of an indigent defendant. *See* Article 27A, §§4, 5(a), and 5(c) of the Maryland Code.

A "custodian" is "any authorized person having personal custody and control of the public records in question". Article 76A, §1(g) [SG §10-611(c)]. For a given transcript held by the Public Defender's office, an Assistant Public Defender would typically be the custodian.

The primary duty of the custodian of public records is to "allow any person the right of inspection of such records", unless any of several specified reasons for denying access may be asserted. Article 76A, §3 [SG §10-612 *et seq.*]. Assuming that no such basis exists for denying access to a trial transcript, the custodian in the Public Defender's office would be required to permit his or her client—or any other person—to inspect the transcript.

Moreover, the Public Defender is also required to provide copies, upon request, of such a transcript: "In all cases in which a person has the right to inspect any public records such person shall have the right to be furnished copies, printouts, or photographs for a reasonable fee to be set by the official custodian." Article 76A, §4(a) [SG §§10-620 and 10-621]. Ordinarily, when a person is confined, this procedure is the only feasible means of access.

III

Fee Waivers

As indicated in Part II above, copies of a public record are usually provided only upon payment of "a reasonable fee to be set by the official custodian". Article 76A, §4(a) [SG §10-621(a)]. However, the Public Information Act also provides that fees may be waived in some circumstances:

"The official custodian may waive any cost or fee charged under this subtitle if a waiver is requested and the official custodian determines that a waiver would be in the public interest. The official custodian shall consider, among other relevant factors, the ability of the requester to pay the cost or fee." Article 76A, §4(e) [SG §10-621(d)].

This provision leaves the waiver decision to the discretion of the official custodian. While he or she is required to consider the requester's ability to pay the fee, that factor alone is not determinative of the waiver decision; as the statute indicates, the ability to pay is only one "among other relevant factors".

We cannot state in the abstract what other factors the Public Defender, as an official custodian of trial transcripts, ought to consider in making a "public interest" determination. That is a matter for his or her reasonable discretion.² We do suggest

² We need not reach the question of whether this exercise of discretion is judicially reviewable. *Cf. Lybarger v. Cardwell*, 577 F.2d 764 (1st Cir. 1978) (reviewing and upholding agency denial of fee waiver request under federal

Continued on page 334.

that decisions about both fees and fee waivers be coordinated with the clerks of the appropriate courts, who are also official custodians of the transcripts.

IV

Conclusion

In summary, it is our opinion that trial transcripts in the custody of the Public Defender are public records under Maryland law. They are not the private property of the trial defendant or anyone else. The defendant, in common with all other persons, has a right under the Maryland Public Information Act to be furnished with a copy of the transcript upon payment of a "reasonable fee", although the Public Defender may waive the fee if the waiver would be in the public interest.

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Editor's Note: Since the issuance of this Opinion, the Court of Appeals, on certified question from the United States District Court for the District of Maryland, has ruled on the issue addressed by this Opinion. The Court held that "a client represented by . . . the Office of the Public Defender . . . does not have a property right under the laws of this State to the transcript of his or her trial which is in the custody of the . . . Public Defender." *Levene v. Antone*, 301 Md. 610, 625 (1984).

Freedom of Information Act); *Eudey v. CIA*, 478 F.Supp. 1175 (D.D.C. 1979) (reviewing and overturning as "arbitrary and capricious" agency denial of fee waiver request under federal Freedom of Information Act). *See generally* Annot., 50 A.L.R. Fed. 552 (1980).

PUBLIC INFORMATION—EXEMPTIONS—CONFIDENTIAL RECORDS—“LETTERS OF REFERENCE”—EXEMPTION FOR LETTERS OF REFERENCE APPLIES TO BOTH SOLICITED AND UNSOLICITED LETTERS.

August 9, 1983

Mr. Arthur S. Drea, Jr.

Chairman

Governor's Information Practices Commission

You have requested our opinion as to the meaning of the term “letters of reference” in the Maryland Public Information Act, Article 76A of the Maryland Code.* Specifically, you inquire whether a provision of the Public Information Act, which requires a custodian to deny requests for inspection of “letters of reference”, applies to unsolicited letters from members of the public to a government official concerning the qualifications of persons who have applied for a public office.

For the reasons given below, we have concluded that the provision exempting “letters of reference” from public disclosure applies to all letters—solicited or unsolicited—that concern a person’s fitness for public office or employment.

I

Background

The specific context of your inquiry concerns the selection of members of the Washington Suburban Sanitary Commission (“WSSC”), a bi-county agency. Detailed procedures for the selection of WSSC members are set out in statute. Under Article 67, §1-103 of the Maryland Code, appointments are made from a list of applicants. This list is “open to the public for inspection from the time the list is first begun until an ap-

* [Editor's Note: The records provisions of the Public Information Act have since been recodified, without substantive change, as Title 10, Subtitle 6, Part III, of the new State Government Article (“SG” Article). Cross-references to the new codification have been added to the text in brackets.]

pointment is made by the County Executive". Article 67, §1-103(a)(1)(ii).¹

As you point out, "[s]ince the applicant list may be examined by the public, members of the public frequently send letters to the county executive expressing views regarding the qualifications of particular applicants. These letters are neither solicited by the county executive nor by the applicants themselves." You question the status of these letters under the "letters of reference" exemption in the Maryland Public Information Act ("PIA").²

II

Analysis

Under Article 76A, §3(c)(iv) [SG §10-616(d)], "[t]he custodian shall deny the right of inspection of the following records or any portion thereof, unless otherwise provided by law: . . . [l]etters of reference". The PIA contains no definition of "letters of reference", and the term has not been construed by any Maryland court.³

In construing statutes, the "cardinal rule", of course, is to "carry out the real legislative intent". In determining that intent, the Court considers the language of an enactment in its

¹ Comparable procedures previously appeared in §86-1-1 of the Montgomery County Code, now repealed.

² The County Attorney for Montgomery County has concluded that all "written expressions regarding applicant qualifications must be considered 'letters of reference'". Memorandum from Paul A. McGuckian, County Attorney, to Neal Potter, President of the Montgomery County Council (August 6, 1979). However, Montgomery County Council Member Esther P. Gelman believes that unsolicited letters of comment from the public regarding WSSC applicants are not "letters of reference".

³ Three other states, Colorado, New Mexico, and Wyoming, have public information statutes that include a specific exemption for "letters of reference". None of those statutes contains a definition of the term. Moreover, we have been unable to find any reported court decision construing a "letter of reference" exemption in a public information statute. *But see Board of Trustees of Stanford Univ. v. Superior Court of Santa Clara County*, 174 Cal. Rptr. 160 (Ct. App. 1981), discussed in text accompanying note 5 below.

"natural and ordinary signification". *Smelser v. Criterion Ins. Co.*, 293 Md. 384, 388-89 (1982).

Turning first to the dictionary, we find no entry for "letters of reference". A "reference" is defined in *Black's* as a "person who will provide information for you about your character, credit, etc." *Black's Law Dictionary* 1151 (rev. 5th ed. 1979). This definition suggests that a letter of reference is one solicited by the job-seeker.⁴

On the other hand, "reference" is defined in *Webster's* as either "[o]ne of whom inquiries can be made as to the integrity, capacity, etc. of another" or "[a] written statement of the qualifications of a person seeking employment, . . . given by his previous employer or by someone familiar with his character, ability, experience, training, or the like". *Webster's New International Dictionary* 2092 (2d ed. 1953). The latter definition certainly covers unsolicited letters.

The only reported court decision that seems to have construed the term "letters of reference" also suggests that the term may or may not refer to unsolicited letters, depending on the context. In *Board of Trustees of Stanford Univ. v. Superior Court of Santa Clara County*, 174 Cal. Rptr. 160 (Ct. App. 1981), one issue was whether an employee who was suing the university for defamation was entitled to discover "letters of recommendation or reference to the university concerning [the employee], written when he was being considered for employment at the university". 174 Cal. Rptr. at 166.⁵

⁴ *Black's* does contain the following definition of "letter of recommendation":

"A writing whereby one person certifies concerning another that he is of good character, solvent, possessed of commercial credit, skilled in his trade or profession, or otherwise worthy of trust, aid, or employment. It may be addressed to an individual or to whom it may concern, and is designed to aid the person commended in obtaining credit, employment, etc." *Black's Law Dictionary* 1144 (rev. 5th ed. 1979).

Presumably, an unsolicited commendation would come within this definition. However, a "letter of recommendation" by definition is laudatory; a "letter of reference" need not be. Thus, the two terms are not synonymous, and the scope of the "letter of recommendation" definition cannot simply be imputed to the statutory term "letter of reference".

⁵ It is not clear whether any of the letters were in fact unsolicited. This point was not germane to the case.

Under a California statute, the employee was entitled to inspect his personnel file, except for "letters of reference". The statute did not define the term. The court wrote as follows about the meaning of the term:

"It is undoubtedly true that the phrase will often mean communications concerning the 'qualifications of a person seeking employment . . . given by someone familiar with them.' But just as often it will connote answers in writing from persons 'to whom inquiries as to character or ability can be made.' (See Webster's New Collegiate Dict. (7th ed. 1972) 'reference', p. 719.)" 174 Cal. Rptr. 167-68.

In sum, the term "letters of reference" is uncertain. Intrinsically, it neither embraces nor excludes unsolicited letters.

Thus, we must look beyond the language itself to the structure and apparent purposes of the PIA. In that light, we conclude that the exemption for "letters of reference" applies to solicited and unsolicited letters alike.

One evident purpose of the PIA is to balance the right of public access with the protection of personal privacy. "[T]he provisions of this act shall be construed in every instance with the view toward public access, unless an unwarranted invasion of the privacy of a person in interest would result therefrom." Article 76A, §1A [SG §10-612(b)]. The exemption for "letters of reference" serves this purpose, because letters of this type—whether solicited or unsolicited—often contain private information about the subject of the letter.⁶

Indeed, if an unsolicited letter about an employee's qualifications is incorporated into that employee's personnel file, the letter in that file would not be available for public access, because the custodian may not disclose "personnel files". Article 76A, §3(c)(iii) [SG §10-616(h)]. The employee's privacy interests are thereby protected. It is difficult to see why the General

⁶ The federal Freedom of Information Act contains no comparable exemption. A letter of reference must be disclosed unless its disclosure would result in a "clearly unwarranted invasion of personal privacy". 5 U.S.C. §552(b)(6). See *Philadelphia Newspapers, Inc. v. Department of Justice*, 405 F.Supp. 8 (1975). The General Assembly's express inclusion of a blanket "letters of reference" exemption suggests its intention to protect letters that might be disclosable under the federal standard.

Assembly would have intended a different result when an unsolicited letter concerns the qualifications of a prospective employee.

A second purpose that we may reasonably ascribe to the "letters of reference" exemption is the furthering of candor in the selection process. Those who are inclined to write about the qualifications of a prospective State or local government appointee are more likely to be plainspoken if their letters are not made publicly available. Again, this goal of increased candor applies to solicited and unsolicited letters alike.⁷

We find support for this latter point in the law of defamation. "It is an established general rule that a communication respecting the character of an employee or former employee is qualifiedly privileged if made in good faith by a person having a duty in the premises to one who has a definite interest therein, and this is true even though the communication contains a charge of crime." 50 Am.Jur.2d *Libel and Slander* §273 (1970).⁸ Under this rule, a defamatory letter of reference does not give rise to a damage action unless the letter is not only false but also sent with actual malice. See *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 599 (1976).

⁷ It can be argued that someone who writes an unsolicited letter about a prospective appointee to a prominent body like the WSSC has no expectation of confidentiality. That may often be true. However, even some writers of *solicited* letters of reference are indifferent about subsequent disclosure. The General Assembly has evidently made a judgment that it wishes to protect the entire class of "letters of reference", without differentiation as to expectations of confidentiality.

Should the General Assembly decide to change the law in this regard, one possible model is the federal Buckley Amendment, governing access to educational records. Under this statute, access may be denied to certain "confidential letters and statements of recommendation". 20 U.S.C. §1232g(a)(1)(B)(ii). The only elaboration of the term "confidential" is a regulation that describes these letters as "solicited with a written assurance of confidentiality, or sent and retained with a documented understanding of confidentiality". 45 C.F.R. §99.12(a)(2)(i).

⁸ The qualified privilege extends to "persons [who] have a *bona fide* belief that they owe a moral or social duty to inform a new or prospective employer about an employee". *Sindorf v. Jacron Sales Co.*, 27 Md. App. 53, 68-69 (1975), *aff'd.*, 276 Md. 580 (1976). Certainly citizens who write unsolicited letters about prospective appointees to public office are carrying out their social duty.

The reason for the development of this qualified privilege at common law is similar to the policy that in part underlies the "letters of reference" exemption in the PIA: the public interest that requires protection of candor in those communications. See *Sindorf v. Jacron Sales Co.*, 27 Md. App. 53, 67-68 (1975), *aff'd*, 276 Md. 580 (1976).

Thus, it is especially noteworthy that the Court of Appeals has expressly applied the qualified privilege to even *unsolicited* communications concerning a prospective employee. In *Fresh v. Cutter*, 73 Md. 87 (1880), an employee sued his former employer for slander. The former employer, "voluntarily and without being requested", told the plaintiff's prospective new employer that the plaintiff was a thief. 73 Md. at 91. To the objection that voluntary statements are outside the scope of the qualified privilege, the Court responded: "[T]he mere fact of the communication being voluntarily made, does not necessarily exclude it as a non-privileged communication; for a publication warranted by an occasion apparently beneficial and honest, is not actionable in the absence of express malice." 73 Md. at 93.

We think it clear that this reasoning would apply to volunteered statements about the qualifications of prospective appointees to public positions. See *Toker v. Pollak*, 405 N.Y.S.2d 1, 7 (N.Y. 1978) (voluntary communication to judicial selection committee is qualifiedly privileged).⁹ And, because the PIA exemption for "letters of reference" serves similar public policy objectives, we conclude that such unsolicited statements are intended to be included within the exemption.

III

Conclusion

In summary, it is our opinion that the provision of the Maryland Public Information Act that requires the custodian to deny requests for inspection of "letters of reference" applies to

⁹ See note 8 above.

all letters—solicited and unsolicited—that concern a person's fitness for public office or employment.

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PUBLIC OFFICERS

JUDGES—RESIDENCY REQUIREMENTS—5-YEAR STATE RESIDENCY NEED NOT IMMEDIATELY PRECEDE ELECTION OR APPOINTMENT.

March 3, 1983

James H. Norris, Esq.
State Court Administrator

Your predecessor requested our opinion concerning the requirement of Article IV, §2 of the Maryland Constitution that individuals appointed or elected to judicial office must have resided in the State for at least five years. Specifically, he asked whether this minimum five-year State residency requirement can be met by any five-year period of prior residency or only by five years of continuous residency immediately preceding the appointment or election.

For the reasons given below, it is our opinion that the five-year State residency requirement may be met by residence in Maryland for any continuous period of five years, and that the residency period need not be for the five-year period immediately preceding the applicant's appointment or election to judicial office.¹

I

Constitutional Text

Article IV, §2 of the Maryland Constitution provides as follows:

"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 appoint-

¹ We advised your Office of this conclusion in a previous letter. This Opinion sets forth the reasoning underlying our conclusion.

ment, 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*. They shall not be less than thirty years of age at the time of their election or appointment, and shall be selected from those who have been admitted to practice law in this State, and who are most distinguished for integrity, wisdom and sound legal knowledge." (Emphasis added.)

The grammar of the residency requirement could not be clearer. The phrase "next preceding their election, or appointment" modifies *only* the six-month local residency requirement; it does not modify the five-year State residency requirement. "As a corollary of the rule that we accord words their ordinary meaning, we must accord sentences an ordinary grammatical structure." *Mazor v. Dep't of Correction*, 279 Md. 355, 362 (1977).

Given the clarity of this phrasing, the inquiry might well be ended, for the principles of constitutional construction applied by the Court of Appeals preclude resort to extrinsic aids when the text in question is—as here—unambiguous:

"[I]t is axiomatic that the words used in the enactment should be given the construction that effectuates the intent of its framers . . . ; such intent is first sought from the terminology used in the provision, with each word being given its ordinary and popularly understood meaning . . . ; and, *if the words are not ambiguous, the inquiry is terminated*, for the Court is not at liberty to search beyond the Constitution itself where the intention of the framers is clearly demonstrated by the phraseology utilized." *Brown v. Brown*, 287 Md. 273, 277-78 (1980) (emphasis added).

However, we recognize that the Court of Appeals, in construing a residency requirement elsewhere in the Constitution, has observed that: (i) as a general rule, such requirements presuppose a "fixed, present domicile" preceding the election or appointment to office—even absent an express statement to that effect; and (ii) "the Constitution of 1867 does not always possess the consistency that [a textual] argument supposes."

Rasin v. Leaverton, 181 Md. 91, 93, 96 (1942).² Thus, we consider whether there is evidence in the history of the provision that the framers intended a meaning different from that plainly conveyed by the text itself.

II

Constitutional History

The pertinent language of Article IV, §2 was adopted in the Constitution of 1867 and has remained essentially unaltered since then. Its immediate predecessor, Article IV, §2 of the shortlived Constitution of 1864, provided as follows:

"The Judges of the several Courts, except the Judges of the Orphans' Courts, shall be citizens of the United States, and residents of this State not less than five years next preceding their election or appointment by the Executive in case of a vacancy, and not less than one year next preceding their election or appointment residents in the Judicial District or Circuit, as the case may be, for which they may be elected or appointed. They shall be not less than thirty years of age at the time of their election, and selected from those who have been admitted to practice law in this State, and who are most distinguished for integrity, wisdom and sound legal knowledge." (Emphasis added.)³

² We examine this case in more detail in Part III below.

³ Article IV residency qualifications for judges first appeared in 1805. Article IV, §1, as proposed by Chapter 55, Laws of Maryland 1804, and adopted by the voters in 1805, provided, in pertinent part:

"[T]here shall be appointed, for each of the said judicial districts, three persons of integrity and sound legal knowledge, residents of the State of Maryland, who shall, previous to and during their acting as judges, reside in the district for which they shall be respectively appointed."

Thus, the 1864 Constitution quite clearly required that *both* the State and local residency requirements be satisfied by a period of residency "next preceding" the election or appointment.

The language of Article IV, §2 was amended only three years later to read as follows:

"The Judges of all 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 in the Judicial Circuit, as the case may be, for which they may be, respectively, elected or appointed. They shall be not less than thirty years of age at the time of their election, or appointment, and shall be selected from those who have been admitted to practice Law in this State, and who are most distinguished for integrity, wisdom and sound legal knowledge." (Emphasis added.)

The change from the 1864 to the 1867 Constitution is striking. The framers of the latter document carried forward, in large part verbatim, the language of former Article IV, §2—*except* that they deleted the former's clear and explicit requirement that the five-year period of State residency be "next preceding" the election or appointment.

It is, of course, possible to speculate that the change represented nothing more than a misguided attempt to streamline

Article IV, §4 of the Constitution of 1851 read, in pertinent part:

"And one person from among those learned in the law, having been admitted to practice in this State, and who shall have been a citizen of this State at least five years, and above the age of thirty years at the time of his election, and a resident of the judicial district, shall be elected from each of the said districts by the legal and qualified voters therein, as a judge of the said court of Appeals."

the wording of the provision without substantive change.⁴ But the framers of the 1867 Constitution did not make other "stylistic" changes in Article IV, §2, and we decline to assume that the draftsmen, in pursuit of an uncharacteristic economy of diction, were insensible to the dramatically changed meaning that their choice of phrasing conveys. Accordingly, we infer from their rewording of the provision an intention to change the State residency requirement, so that the five years of State residency need no longer be "next preceding" a judge's election or appointment.

Although we find no explanation of this particular change in the Convention's records, the Convention's decisions regarding certain other residency requirements suggest the policy deci-

⁴ The official digest of the Convention's transactions, *Proceedings of the State Convention of Maryland to Frame a New Constitution* (1867), is unenlightening about the meaning of this provision. The Convention did not produce an official manuscript of the debates. Consequently, the most detailed accounts of the debates appeared in newspapers. The accounts in *The Baltimore Sun* have been collected in Philip Perlman's 1923 book, *Debates on the Maryland Constitutional Convention of 1867* ("Debates").

According to the *Debates*, it seems that at least one delegate, Mr. Parran, read the reworded provision as if it effected no change in the 1864 requirement:

"Mr. Carter moved to amend by making six months' residence in the circuit necessary instead of one year's.

Mr. Ritchie opposed the amendment and Mr. Brown and others advocated it.

...

The question was then taken on the amendment of Mr. Carter, when it was agreed to by a vote of 37 to 30.

Mr. John Parran moved an amendment requiring the judges to have resided *ten years* in the State *next preceding their election*, *instead of five*.

The amendment was not agreed to." *Debates* at 303 (emphasis added).

Assuming that the newspaper reporter accurately summarized it, this characterization of Mr. Parran's amendment implies that he understood the provision then being considered (and ultimately adopted) to require that the five years' residency, which he proposed be extended to ten, must have occurred in the years "next preceding" the judicial election or appointment. However, this indication of one delegate's understanding (or misunderstanding) cannot fairly be attributed to the Convention as a whole, which rejected his amendment.

sion underlying the change: the Convention apparently decided to relax the State residency requirement so that absence from the State during the Civil War would not preclude judicial service by one who had previously been a resident of the State for at least five years.

The Convention's intent to relax State residency requirements and thereby expand eligibility for office may be seen in the deletion of the phrase "next preceding" from the eligibility provision for Attorney General. Article V, §4 of the 1864 Constitution provided:

"No person shall be eligible to the office of Attorney General, who has not resided and practiced law in this State, *for at least seven years next preceding his election.*" (Emphasis added.)

In 1867, the language of Article V, §4 was amended to read:

"No person shall be eligible to the office of Attorney General, who is not a citizen of this State and a qualified voter therein, and has not resided and practiced Law in this State *for at least ten years.*" (Emphasis added.)

Deletion of the proviso "next preceding" made attorneys who had been absent from the State during the Civil War eligible to serve as Attorney General.⁵

⁵ As first proposed to the Convention of 1867, Article V, §4 read as follows:

"No person shall be eligible to the office of Attorney General who has not resided and practiced law in this State for at least ten years next preceding his appointment."

The following debate then took place:

"Mr. Wickes moved to amend by inserting after the word 'who', 'is not a citizen of the State of Maryland and a qualified voter therein at the time of his appointment.'

Mr. Mackubin moved the following as a substitute:

'No person, unless a native of this State, actually resident therein at the time of his appointment, shall be eligible to the office of Attorney General who has not resided therein at least ten years next preceding his appointment, and has been admitted to practice law therein at least ten years prior to his appointment.'

Continued on page 348.

By contrast, the Convention did retain the requirement that State residency be "next preceding" for some offices. Thus, for example, the 1867 Constitution retained from the 1864 Constitution a requirement that the requisite period of residency be "next immediately preceding" the Governor's election (Article II, §5) and "preceding" a Sheriff's election (Article IV, §44 [1867], Article IV, §49 [1864]). Indeed, the 1867 Constitution *added* such a requirement to the qualifications for Orphans' Court judge. *Compare* Article IV, §40 (1867) *with* Article IV, §43 (1864).

In sum, the constitutional history suggests that the framers of the 1867 Constitution made a deliberate decision to fashion a more relaxed residency requirement for judges than that found in the 1864 Constitution or in other provisions of the 1867 Constitution. Our best reading of the admittedly scanty record is that this decision reflected an intention to open judgeships to Civil War veterans, especially those who fought for the Confederacy and who were therefore more likely to have served outside Maryland.⁶

Mr. Mackubin said the object of his amendment was to throw this office open to those sons of Maryland who had been temporarily absent in defense of what they conceived to be right. Now that the struggle was over, he was willing to welcome them back with open arms.

After some discussion, Mr. Barry proposed the following as a substitute:

'No person shall be eligible to the office of Attorney General who is not a citizen of this State, and a qualified voter therein, and who has not resided and practiced law in this State for at least ten years.'

Messrs. Mackubin and Wickes accepted the substitute in lieu of their amendments, and it was then adopted." *Debates* at 205.

This colloquy suggests that Mackubin, who wanted to render eligible for Attorney General "those sons of Maryland who had been temporarily absent in defense of what they conceived to be right", was satisfied that the Barry substitute—deleting "next preceding"—achieved his intended result. The Barry substitute, with Mackubin's acquiescence, was adopted by the Convention.

⁶ In general, the 1867 Constitution was drafted by Democrats, who were largely sympathetic to the Confederacy, to supplant Unionist policies embodied in the 1864 Constitution. *See Report of the Constitutional Convention Commission* 59 (1967).

In any event, even if this history provides no conclusive support for our belief that the provision ought to be read as it is written, surely it affords no basis whatever for reading the provision as if it were written differently—as if the former provisions of the 1864 Constitution had been left untouched.

III

Judicial Construction

The residency requirement in Article IV, §2 of the Maryland Constitution has not been construed by the courts. The one case that has addressed the meaning of a different residency requirement in the Constitution is distinguishable, in our view, and sheds little light on the particular phraseology used in Article IV, §2.

In *Rasin v. Leaverton*, 181 Md. 91 (1942), the Court of Appeals determined that a candidate for State's Attorney in Kent County was ineligible under Article V, §10 of the Constitution, which provides that: "No person shall be eligible to the office of State's Attorney . . . who has not resided, for at least two years, in the county, or city, in which he may be elected." The candidate had resided in Kent County for a number of years, then moved out of the county for several years, and finally took up residency there again—but less than two years immediately preceding the election.

The Court of Appeals held that the candidate was not eligible for the office. In effect, the Court appears to have construed Article V, §10 to require that the two years' residency must be "next preceding" the election, even though this provision, unlike others in the Constitution, lacked express language so stating. 181 Md. at 96. The same approach, it can be argued, should also be adopted with respect to Article IV, §2, which—as to its State residency requirement—likewise lacks such express language.

However, we do not think that *Rasin's* holding about Article V, §10 is applicable to the problem posed by Article IV, §2. First, the Court of Appeals was not asked to directly consider, and therefore did not expressly resolve, the issue that we address—whether the requisite period of residency in the State

must be met by a period immediately preceding appointment or election, or whether the requirement is satisfied by a sufficiently lengthy period of residency prior to the election but not immediately so. The candidate in *Rasin* did not argue that Article V, §10 permitted any prior period of two years' residency; he evidently conceded that Article V, §10 required residency immediately preceding an electoral event. Instead, he simply argued that the event which counted was the assumption of office, not the election itself. It was this argument only that the Court of Appeals rejected.

But even if one treats *Rasin* as speaking to issues beyond the narrow question actually presented in the case, we think that the construction of Article V, §10 adopted by the Court cannot reasonably be applied to Article IV, §2. The Court in *Rasin* rejected the contention that "the absence of the words 'preceding the election,' from the requirement of residence in the clause now considered (Art. V, Sec. 10), and the presence of those words in statements of qualifications for other offices under the same Constitution, evidence an intention that previous residence is not required of candidates for State's Attorney". 181 Md. at 96. The Court observed: "[T]he Constitution of 1867 does not always possess the consistency that the argument supposes." *Id.* Thus, the Court held, it would construe the bare phrase "resided, for at least two years, in the county" in accordance with the following generalization: "The requirement in the Constitution of residence for political or voting purposes is one of a place of fixed, present domicile." 181 Md. at 93.

We readily acknowledge that the presence of words in one constitutional provision is not necessarily determinative of the significance of the absence of such words in another, unrelated provision, especially when each provision was drafted by a different committee of the 1867 Constitutional Convention. Indeed, if neither the State nor the local residency requirement in Article IV, §2 were modified by "next preceding their election", *Rasin* might suggest that the phrase ought to be inferred, because it is the norm. But Article IV, §2—unlike Article V, §10—is not open to such an inference. Rather, in *a single sentence* the phrase "next preceding their election" modifies *one* residency requirement, and *not* the other. Surely the generalization about residency requirements in *Rasin* does not supplant the framers' specific formulation of two different requirements in the same provision.

Accordingly, we simply do not believe that the discussion in *Rasin* affords a basis on which to depart from the plain meaning of Article IV, §2.

IV

Conclusion

In summary, it is our opinion that the five-year State residency requirement for applicants for judicial office, as contained in Article IV, §2 of the Maryland Constitution, may be met by residence in Maryland for any continuous period of five years and need not be the period of residence immediately preceding election or appointment.⁷

STEPHEN H. SACHS, *Attorney General*

JACK SCHWARTZ, *Assistant Counsel,*
Opinions and Advice

AVERY AISENSTARK
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Opinions and Advice

⁷ Though the period need not occur immediately preceding the election or appointment, we believe that the required five years of residency must be continuous and may not be met by tacking together shorter, separate periods of residency. The State residency period required by the 1864 Constitution was necessarily continuous, and we do not understand the change in the 1867 Constitution to have altered this aspect of the residency requirement.

For a discussion of the general principles that govern the determination of residency in constitutional or statutory provisions setting forth qualifications for office or for voting, see *Dorf v. Skolnik*, 280 Md. 101 (1977); *Bainum v. Kalen*, 272 Md. 490 (1974).

PUBLIC OFFICERS—CLERKS OF COURT—TERM—COMPENSATION—“HOLD OVER”—CIRCUIT COURT CLERK ENTITLED TO CONTINUED COMPENSATION FOR TIME SERVED AS HOLD OVER.

April 7, 1983

Mr. J. Basil Wisner
Chief Deputy Comptroller

You have requested our opinion on whether a Clerk of the Circuit Court, who has been defeated in the General Election but continues to hold office until his or her successor qualifies, is precluded by Article III, §35 of the Maryland Constitution from receiving compensation for days served in excess of four calendar years.

For the reasons given below, it is our opinion that Article III, §35 does not prohibit a Clerk of the Circuit Court from continuing to receive compensation during the period for which the Clerk “holds over” in office pending qualification of his or her successor.

I

Background

The circumstances giving rise to this question can be summarized as follows. As a result of the November 2, 1982, election, Mr. F. Dale Minner was elected Clerk of the Circuit Court for Caroline County; he replaced Mrs. Mildred C. Butler, who had held that office from October 11, 1965. Mrs. Butler had last been elected on November 7, 1978; her last commission, dated December 1, 1978, was for “four years from November 7, 1978 or until duly discharged therefrom”.

Mr. Minner did not take the oath of office as Clerk of the Circuit Court for Caroline County until December 8, 1982, for reasons not relevant to this inquiry. Despite the fact that Mrs. Butler had made vacation plans for the first week of December, she was advised that it was her duty to remain in office until her successor qualified. Consequently, she attended to the duties of the office until Mr. Minner was sworn in.

II

Term of Office

Article IV, §25 of the Maryland Constitution provides that the Clerk of the Circuit Court “shall hold his office for four years from the time of his election, and until his successor is elected and qualified”. Pursuant to this mandate, Mrs. Butler was entitled—and, indeed, had an obligation—to hold her office for four years from the date of her election, November 7, 1978, *and* until her successor was elected and qualified.¹ Although Mr. Minner was elected on November 2, 1982, he did not qualify for or, therefore, assume the office until he took the oath of office on December 8, 1982. *See* Article I, §§9, 10, and 11 of the Maryland Constitution. *See also* §§2-104, 2-105, and 2-106 of the Courts and Judicial Proceedings Article (“CJ” Article).

The Court of Appeals has held that an elected or appointed officer may remain in office at the expiration of his or her term—and is entitled to exercise the powers of the office—until a successor qualifies, whether or not the statute creating the office so provides. *Reed v. President and Commissioners*, 226 Md. 229 (1961). Here, the Constitution itself expressly provides for the Clerk to remain in office until a successor qualifies.

III

Compensation

The compensation of the Clerk of the Circuit Court is determined in accordance with CJ §2-504. This section provides, in relevant part, that “[t]he clerk of each circuit court shall receive an annual salary of not less than \$10,000 or more than \$37,500 as set by the Board of Public Works on the basis of the relative volume of business and receipts in his office”. Pursuant to this provision, on November 9, 1978, the Board of Public Works established an annual salary for the Clerk of the Circuit

¹ This result is also reflected in her last commission. As noted above, it called for her to assume office for a term of four years from November 7, 1978, “or until duly discharged” from office.

Court for Caroline County of \$25,000, to begin at the start of the new term of the Clerk elected November 7, 1978.²

Accordingly, after she was sworn in on December 1, 1978, for the new term to which she was elected, Mrs. Butler began paying herself at the annual rate of \$25,000. Pursuant to directives from the Office of the Comptroller, Mrs. Butler: (i) first calculated her semi-monthly salary by dividing \$25,000 by 24; and (ii) then issued checks to herself for the resultant amount on the 15th and the last day of every month. Mrs. Butler paid herself her last semi-monthly check on the last day of November, 1982.

For the next few days, Mrs. Butler paid herself on a daily basis, because she knew she would not be serving as Clerk for the entire next pay period (up to and including December 15, 1982). For this purpose, Mrs. Butler: (i) calculated her daily rate by dividing her semi-monthly pay by 11 (the number of working days during the first pay period in December of 1982); and (ii) paid herself this amount for each of the six days she actually worked during that pay period (December 1, December 2, December 3, December 6, December 7, and December 8). The sum of these payments equalled \$346.44.³

IV

Constitutional Restrictions on Salary

Article III, §35 of the Maryland Constitution provides, in relevant part, as follows:

“Extra compensation may not be granted or allowed by the General Assembly to any public Of-

² We note that, on this and similar occasions, the Board of Public Works first decided on the new annual salary after Election Day—after the day on which, under Article IV, §25, a new term technically begins. We have not been asked to address—and, therefore, do not now address—whether this practice might be in contravention of Article III, §35.

³ Although we have not been asked to address whether this was the proper method of calculating her daily pay rate, we note that it conforms with one of the two methods for such calculations that are set forth in a June 21, 1966, directive from your office to all Clerks of Court and Registers of Wills.

ficer, Agent, Servant or Contractor, after the service has been rendered, or the contract entered into; nor may the salary or compensation of any public officer be increased or diminished during his term of office except those whose full term of office is fixed by law in excess of 4 years."

It is your position that Mrs. Butler should reimburse the Office of the Clerk of the Circuit Court for Caroline County for the payments she made to herself in December of 1982. You first note that, as of November 30, 1982, Mrs. Butler already had received a total of \$100,000 (i.e., 4 times the \$25,000 annual salary established by the Board of Public Works). You then argue that any amount paid for the days served after November 30, 1982, constitute "extra compensation" or an in-term salary "increase" in contravention of Article III, §35.

Under this view, of course, any delay of a newly-elected Clerk in qualifying for office would leave the incumbent with but two, equally untenable, choices: (i) continue to serve without pay, however long (days or, conceivably, even months) the delay might be; or (ii) resign from office, creating the very interruption in office that the hold-over doctrine was designed to prevent. See *Benson v. Mellor*, 152 Md. 481, 491 (1927). We do not believe that this inequitable result is countenanced, let alone mandated, by Article III, §35.

The December 1982 payments to Mrs. Butler do not constitute either "extra compensation" or an "increase" in compensation. CJ §2-504 requires that, in establishing the salaries of the Clerks of the Circuit Courts, the Board of Public Works set an annual salary. And that is exactly what the Board does, no more and no less. Specifically, the Board does *not* set a single figure as the maximum salary for an entire term. Thus, in November of 1978, the Board of Public Works did not set—or purport to set—the compensation for the Clerk of the Circuit Court for Caroline County at a maximum of \$100,000 for the entire ensuing term of office. Rather, the Board simply set the compensation at \$25,000 per year, as mandated by statute.

In our view, the establishment of such an annual salary sets a *rate* of compensation. Subject to that rate, an individual Clerk may—and should—be paid for whatever period of time he or she serves in office, whether that period is in fact greater or less than four calendar years.

Recently, the clerks were specifically advised by their then counsel that the "period of time during which a clerk is entitled to compensation is not, except coincidentally, exactly four years". Rather, because an incumbent clerk continues to hold office until his or her successor qualifies, "it is possible that a clerk elected for one term may actually perform the duties of his office for a period of time more or less than four years." Letter of Advice from Bonnie A. Travieso, Assistant Attorney General, to Howard M. Smith, Clerk of the Circuit Court for Montgomery County (May 21, 1982).

We fully concur with that advice. In our opinion, the Board of Public Works' action in settling an annual salary for a Clerk must be viewed as the setting of a *rate* of compensation to be paid to the Clerk *for the full amount of time that he or she actually serves in office*. And, under Article III, §35, it is only that *rate* that may not be increased or decreased during a Clerk's term of office.

Here, Mrs. Butler's rate of compensation did not change: After November 30, 1982, she continued to pay herself at the annual rate of \$25,000, albeit calculated on a daily basis. The payments she received for the days she served were not extra compensation or increased compensation within the meaning of Article III, §35 of the Maryland Constitution.⁴

More generally even, as a public officer for whom compensation is provided by law, Mrs. Butler was clearly entitled to compensation for all of the time during which she held over. At common law, "the holder [of a public office] is entitled to his salary as an incident of the office as long as he holds it". *Periconi v. State*, 398 N.Y.S.2d 959, 963 (N.Y. Ct. Cl. 1977). See also 63 Am. Jur.2d *Public Officers* §§361, 363 (1972).

Conversely, we might add, Mrs. Butler's successor was not entitled to begin receiving *his* salary *until* he qualified by posting bond and taking his oath of office—and, then, only for the time actually served in office *after* so qualifying. *Thomas v. Owens*, 4 Md. 189 (1853).

⁴ In contrast, had Mrs. Butler calculated her daily rate of compensation on the basis of an annual salary of \$32,500—which had been established by the Board of Public Works on December 1, 1982, for the term of the then newly-elected Clerk of the Circuit Court for Caroline County—she would have received an increase in salary in contravention of Article III, §35. This, however, she did not do.

This conclusion—that Mrs. Butler may be compensated for the days she worked in December of 1982—in no way does violence to the purposes of Article III, §35. That section of the Constitution of Maryland “was intended 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 thereof.” *Comptroller v. Klein*, 215 Md. 427, 434 (1958). See also 64 *Opinions of the Attorney General* 267 (1979).

Mrs. Butler’s rate of compensation was established as an annual salary in November of 1978. The rate did not change; she merely continued to be compensated at the pre-established rate until her successor qualified. Therefore, the evil sought to be avoided by this Constitutional provision—the potential for political pressure if the salary were subject to change—simply was not present. Thus, application of Article III, §35 to this situation does not further its underlying purposes.

V

Conclusion

In summary, it is our opinion that Article III, §35 of the Maryland Constitution does not prohibit a Clerk of the Circuit Court from continuing to receive compensation during the period for which he or she “holds over” in office pending qualification of his or her successor. Therefore, Mrs. Butler is entitled to keep the money she paid herself during December of 1982.

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PUBLIC OFFICERS—JUDICIAL NOMINATING COMMISSION—
ELIGIBILITY—BALTIMORE CITY BOARD OF RECREATION
AND PARKS—P.G. COUNTY PERSONNEL BOARD—CITY
PARK BOARD MEMBER HOLDS “OFFICE OF TRUST”—
COUNTY PERSONNEL BOARD MEMBER HOLDS “OFFICE
OF PROFIT”.

August 11, 1983

Mr. James H. Norris, Jr.
State Court Administrator

You have requested our opinion on whether persons serving in certain public positions in Baltimore City and Prince George's County hold “an office of profit or trust under the Constitution or laws of this State” and are thus precluded from serving on the Judicial Nominating Commissions established by Executive Order 01.01.1982.05 (April 24, 1982). The persons in question are (i) a member of the Board of Recreation and Parks of Baltimore City and (ii) a member of the Personnel Board of Prince George's County.

For the reasons given below, we have concluded that a member of the Baltimore City Board of Recreation and Parks holds an “office of trust” and a member of the Prince George's County Personnel Board holds an “office of profit” within the meaning of the 1982 Executive Order. Consequently, under the terms of that Executive Order, they may not serve on a Judicial Nominating Commission.

I

“Office of Profit or Trust”

The 1982 Executive Order provides that a member of a Judicial Nominating Commission “may not hold an office of profit or trust under the Constitution or laws of this State or an office in a political party or be a full-time employee of the State”. The language of the Executive Order—which expressly bars “employee[s] of the State”, but not county or municipal employees, from serving on Judicial Nominating Commissions—perhaps suggests that a similar distinction might be drawn between State “officers” and county or municipal “officers”.

However, the words "office of profit or trust under the Constitution or laws of this State" are words of art. In various forms, these words appear in numerous provisions of the Maryland Constitution. See, e.g., Article 33 of the Declaration of Rights (prohibiting judges from holding "any other office, civil or military, or political trust, or employment of any kind, whatsoever, under the Constitution or Laws of this State"); Article 35 of the Declaration of Rights (prohibiting any person from holding "more than one office of profit, created by the Constitution or Laws of this State"); Article I, §9 (requiring every person elected or appointed "to any office of profit or trust, under this Constitution, or under the Laws, made pursuant thereto" to take the prescribed oath); Article III, §11 (prohibiting a State legislator from holding "any civil office of profit, or trust, under this State"). The apparent intention of the 1982 Executive Order was to mirror these constitutional provisions and, in our view, the wealth of case law interpreting and applying them.

That case law makes it very clear that county and municipal "officers" exercise a portion of the sovereignty of the State and, as such, hold office "under the Constitution or Laws of this State". See *Truitt v. Collins*, 122 Md. 526 (1914) (Councilman of Snow Hill holds an "office of profit or trust" under Article I, §9); *Hetrich v. County Commissioners of Anne Arundel Co.*, 222 Md. 304 (1960) (county business manager holds a public office and exercises State sovereignty); *Howard County Metropolitan Commission v. Westphal*, 232 Md. 334 (1963); (members of county sanitary commission hold offices of profit); *Pressman v. D'Alesandro*, 211 Md. 50 (1956) (certain officials of Baltimore City are public officers exercising the sovereignty of the State); 59 *Opinions of the Attorney General* 109, 119 (1974) (County Councilmen in charter county hold offices of profit). In light of this authority, we conclude that the Executive Order applies to county or municipal "officers" as well as State "officers".

We also note that, for purposes of the 1982 Executive Order, it makes no difference whether those persons receive compensation or not. To hold an office "of profit", of course, one must be entitled to receive compensation. 60 *Opinions of the Attorney General* 121, 124 (1975). However, the Executive Order also reaches holders of an office "of trust", and this term reaches uncompensated public officers. See 61 *Opinions of the Attorney General* 152, 160 (1976). See also F. R. Meachem,

Public Offices and Officers §16 (1890), which defines an "office of trust" as follows:

"An office whose duties and functions require the exercise of discretion, judgment, experience and skill is an office of trust, and it is not necessary that the officer should have the handling of public money or property, or the care and oversight of some pecuniary interest of the government."

This definition stands in marked contrast to that of an "office of profit", which is simply an "office" to which "salary, compensation or fees are attached". *Id.* at §13.¹

II

Tests of "Public Office"

Thus, your inquiry becomes whether the persons holding the positions in question are public officers within the tests established by the Court of Appeals.

The traditional tests of a public office were reiterated in *Board of Supervisors of Elections v. Attorney General*, 246 Md. 417, 439 (1967):

"1. [T]he position was created by law and casts upon the incumbent duties which are continuing in nature and not occasional; 2. the incumbent performs an important public duty; 3. the position calls for the exercise of some portion of the sovereign power of the State; 4. the position has a definite term, for which a commission is issued, a bond required and an oath required; 5. the position is one of dignity and importance."

The Court of Appeals has stated that, of these five tests, the two usually deemed most significant are the requirement of an oath and the exercise of sovereignty. *Gary v. Board of Trustees of the Employees' Retirement System*, 223 Md. 446, 449 (1960).

¹ See also 65 *Opinions of the Attorney General* 285, 287 (1980) ("[T]he term 'public trust' is synonymous with the word 'office'").

But persons have been found to hold public office even in the absence of a requirement to take an oath. See, e.g., *Hetrich v. County Commissioners*, 222 Md. 304, 306-07 (1960). And, in *Duncan v. Koustenis*, 260 Md. 98, 105 (1970), the Court of Appeals said that the single most important characteristic of a public officer is that the "public servant exercise[s] in his own right some of the sovereign powers of government for the benefit of the public".²

For purposes of determining whether the holder of a public position "exercises sovereignty", the critical factor is not what the alleged officeholder does, but what the statute or other legislative enactment authorizes or requires him or her to do. See *Gary v. Board of Trustees*, 223 Md. at 452-53 (whether the alleged officeholder is acting in "his own right" is determined by the officerholder's statutory powers and duties, rather than his or her actual functions); *Howard County v. Westphal*, 232 Md. 334, 340 (1963) (position is an office of "profit" if the statute authorizes compensation, regardless of whether in fact the incumbent accepts or rejects the emoluments of the office); *Gary v. Board of Trustees*, 223 Md. at 451 (taking of oath is not as important as whether the statute requires the taking of an oath).

And, for purposes of express bans against dual officeholding, it matters not whether the two offices are somehow incompatible or in potential conflict. To be sure, such bans are partially rooted in the common law incompatibility-of-positions doctrine—but their purposes and scope are in many respects far broader:

"The need for and purpose of these provisions manifestly was to protect against conflicts of interest, self aggrandizement, concentration of power, and the blurring or obliteration of the doctrine of separation of powers". *Board of Supervisors of Elections v. Attorney General*, 246 Md. 417, 428 (1967).

Thus, for example, Article 35 of the Declaration of Rights ("no person shall hold, at the same time, more than one office of

² With respect to public boards or commissions, the Court has essentially rejected the earlier notion that an individual member of a board or commission only exercises sovereignty collectively, with the other members, and not "in his own right". See *Howard County v. Westphal*, 232 Md. 334, 341 (1963).

profit") was violated when a member of the Howard County Metropolitan Commission accepted appointment to a second office—that of notary public. *Moser v. Howard County Board*, 235 Md. 279 (1964). See also 48 *Opinions of the Attorney General* 193 (1963) (member of General Assembly may not accept notary commission).³ Obviously, there is nothing inherently incompatible with being a notary public and at the same time, a legislator or metropolitan commission member.⁴ That the Executive Order here in question similarly intended a scope that reaches beyond mere conflicts of interest and incompatibility is evident from its very language: The Executive Order refers without qualification to any "office of profit or trust"—not, for example, to any office that is "incompatible with" membership on a Judicial Nominating Commission.

We now examine the positions in question in light of these principles.

III

City Board of Recreation and Parks

The powers and duties of the Baltimore City Board of Recreation and Parks are set forth in Article VII, §§61 through 64 of the Baltimore City Charter. Board members are appointed pursuant to Article IV, §6 of the Charter ("Appointments of Municipal Officers"). They take an oath, Article IV, §6(g), and they serve a fixed term, Article VII, §61. However, they receive no compensation. *Id.*

Among the duties imposed by the Charter on the Board is the duty "to establish, maintain, operate and control [City] parks". Article VII, §63(a). In *Mayor and City Council of Baltimore v. State*, 168 Md. 619, 628 (1935), the Court of Appeals examined this provision and observed that "the maintenance,

³ As might be expected, Article 35 has since been amended to provide that "[t]he position of Notary Public shall not be considered an office of profit within the meaning of this Article".

⁴ For a review of the specific tests used to determine what constitutes an incompatibility of positions, see 65 *Opinions of the Attorney General* 285, 296-97 (1980).

control, and operation of [a City park] . . . is a governmental duty, discretionary in its nature, performed [by the Board] in its political and governmental capacity as an agency of the State”.

The Board is also empowered to “enforce” rules and regulations for the preservation of order on park property and to share jurisdiction and control over park sidewalks with the Police Commissioner. Article VII, §63(h) and (i). In *Harris v. Mayor and City Council of Baltimore*, 151 Md. 11 (1926), the Court of Appeals held that a park policeman *employed* by the “Park Board of Baltimore City” was a public officer exercising State sovereignty. In so concluding, the Court stated:

“[T]he maintenance of the parks under the control of the Park Board necessarily included the protection of the public who visited them, the control of traffic therein; the preservation of the public property, and the suppression of violence and disorder, and however the agents employed by them to discharge those highly important duties and functions may be designated, they can only be regarded as police officials exercising within the parks of Baltimore City a part of the police power of the State. . . .” 151 Md. at 19.

On the basis of these authorities, and in light of the powers and duties of the Board as set forth in the City Charter, we think it clear that members of the Baltimore City Board of Recreation and Parks are public officers who exercise some portion of the sovereign power of the State. They thus hold “an office of . . . trust under the Constitution or laws of this State”. Consequently, they are precluded by the 1982 Executive Order from serving on a Judicial Nominating Commission.

IV

County Personnel Board

Section 906 of the Prince George’s County Charter establishes a five-member Personnel Board, appointed by the County Executive “for terms coterminous with his”. It is our understanding that Board members, like other appointees of

the County Executive [see *Goodman v. Clerk, Circuit Court for Prince George's County*, 291 Md. 325 (1981)], take an oath of office. Members also are entitled to receive compensation. See Prince George's County Code, §16-104.

The powers and duties of the Personnel Board are set forth in §907 of the County Charter and in various sections of the County Code, such as §16-203. Section 907 of the County Charter requires the Board, with certain exceptions, to "hear appeals from employees in the classified service or appeals by any person who has taken or sought to take an examination concerning any action of the Personnel Officer or the appointing authority of the employee" and to "hear and decide for the County appeals from any action pertaining to the methods of examination, certification, or preparation of eligibility lists for appointment or promotion".

Section 16-203(a) of the County Code designates the Board, for purposes of certain appeals, as "the final administrative appeal authority for Prince George's County". It provides that, in the case of such appeals, "the decisions and orders of the Board shall be final on all parties concerned and may not be appealed to any other administrative board". This section also empowers the Board in its orders to "sustain, modify, or reverse the action or actions of an appointing authority, supervisor, or the Personnel Officer as the case may be, which gave rise to the appeal".

In light of these extensive powers and duties, we think it clear that members of the Personnel Board of Prince George's County are public officers who exercise some portion of the sovereign power of the State. Because they are also compensated, they hold "an office of profit . . . under the Constitution or laws of this State". Consequently, they are precluded by the 1982 Executive Order from serving on a Judicial Nominating Commission.

V

Conclusion

In summary, it is our opinion that, for purposes of Executive Order 01.01.1982.05 (April 24, 1982), governing service on Ju-

dicial Nominating Commissions: (i) a member of the Baltimore City Board of Recreation and Parks holds an "office of trust"; and (ii) a member of the Prince George's County Personnel Board holds an "office of profit". Whether, as a matter of public policy, such persons should be precluded from serving on a Judicial Nominating Commission is not for us to say. We can only note that the specific provision we are here asked to construe and apply has a hoary tradition that we are not free to ignore, even if policy might suggest a different result.

STEPHEN H. SACHS, *Attorney General*

ROBERT A. ZARNOCH, *Assistant Attorney General*

AVERY AISENSTARK,
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Opinions and Advice

RETIREMENT SYSTEMS

CONSTITUTIONAL LAW—CONTRACT CLAUSE—PENSION
“GUARANTEE CLAUSE”—PROPOSED CHANGES IN BENEFITS
NOT NECESSARILY UNCONSTITUTIONAL IMPAIRMENT—FACTUAL BASIS
NEEDED FOR CHANGES.

September 27, 1983

The Honorable Rosalie S. Abrams
The Honorable Howard A. Denis
Senate of Maryland

You have requested our opinion as to the constitutionality of legislation that would reduce, in certain respects, future benefits available to members of the State Employees' Retirement System and the Teachers' Retirement System. Specifically, you asked us whether Senate Bill 606, considered but not enacted during the 1983 Regular Session of the General Assembly, would have violated the clause in the United States Constitution that prohibits a state from “impairing the Obligation of Contracts”.

For the reasons stated below, we conclude as follows:

1. Current law governing the benefit structure of the State Employees' Retirement System and the Teachers' Retirement System does not absolutely prohibit any reduction in benefits. Rather, that law—even though embodying a contract between the members of the retirement systems and the State—implicitly permits reasonable modification of benefits, if those modifications are found by the General Assembly to be appropriate to maintain the financial flexibility and integrity of the retirement systems. If, in fact, the modifications contained in Senate Bill 606 are found to be needed for this objective, those modifications would be consistent with current law. Therefore, a bill such as Senate Bill 606 would not constitute any impairment of the contract that the law creates.

2. Even if the current law is construed as flatly precluding any reduction in benefits whatsoever, no matter what the reason, nevertheless the modifications in benefits contained in Senate Bill 606 would not be an unconstitutional impairment of a contract, assuming that a sound factual basis supported the need for such legislation.

We emphasize, however, that an impairment of the State's contractual obligation would be sustainable in court only if, in fact, it was both necessary and reasonable. Mere conclusory assertions will likely not survive the stringent judicial scrutiny that is given such impairments. Therefore, the factual basis that underlies any legislative reduction of benefits should be set out explicitly and should be well documented.

I

Background

Senate Bill 606 would have made the following changes to the State Employees' Retirement System and the Teachers' Retirement System:

1. For years of creditable service after July 1, 1983 (the proposed effective date of Senate Bill 606), a member's retirement, early retirement, ordinary and accidental disability allowances, and cost of living adjustments would be computed in the same fashion as for members of the Employees' and Teachers' Pension Systems.¹ This new method of determining benefits would result in a lower level of benefits than now provided by the law governing the systems.

2. For years of creditable service occurring before July 1, 1983, these benefits would be computed under the more remunerative scheme that is presently in effect.

¹ Article 73B of the Maryland Code provides for the establishment of four separate systems: (1) the Employees' Retirement System [§2]; (2) the Teachers' Retirement System [§82]; (3) the Pension System for Employees [§112]; and (4) the Pension System for Teachers [§141]. In general, employees or teachers who entered service on or after January 1, 1980—the date on which the two pension systems were established—are members of the respective pension systems only. *See* Article 73B, §§113(1) and 142(1). Previously employed employees or teachers who were members of the respective retirement systems on December 31, 1979 have the option of switching to the appropriate pension system or remaining in their retirement system. *See* Article 73B, §§113(2) and 142(2).

3. After July 1, 1983, members of the Employees' and Teachers' Retirement Systems would no longer be required to contribute 5% of their salaries to fund their plans, except to the extent that their salaries exceeded the Social Security tax wage base.

This bill was not enacted. However, the question of whether changes ought to be made in the retirement systems remains under consideration. By Executive Order 01.01.1983.10 (May 12, 1983), the Governor created a Joint Legislative and Executive Committee on Pensions to "analyze both the projected costs and expenses associated with the present retirement and pension systems" and make appropriate recommendations. 10:12 Md. Reg. 1037 (June 10, 1983). In addition, the Board of Trustees of the State Retirement Systems has engaged actuaries to evaluate the status of the systems and the need for change.

This Opinion is intended to provide a legal framework for such action by the General Assembly as may be thought necessary in light of these studies. Although we have focused on Senate Bill 606, as you suggested, the principles underlying our analysis of that bill would apply as well to comparable future legislation.

II

The Contract Clause Limitation

As a general rule, the General Assembly is free to modify any statute—even one that creates contractual obligations. "[O]ne legislature cannot prohibit [the] repeal or modification [of an act] by its successors, even where it purports to do so." *State v. Fisher*, 204 Md. 307, 315 (1954). Therefore, the General Assembly would be precluded from modifying the statute that governs the retirement systems only if (i) the statute creates a contract, (ii) the statute contains an explicit or implicit promise by the State that it will not make unilateral changes in the contract thereby created, and (iii) any changes made despite that promise amount to an *unconstitutional* impairment of the contract.

The constitutional limit on legislative modification of a contract is found in Article I, §10, clause 1 of the United States

Constitution: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts". Although the language of the Contract Clause is "facially absolute", the Supreme Court has said that this prohibition "must be accommodated to the inherent police power of the state "to safeguard the vital interests of its people". *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, _____ [103 S.Ct. 697, 704] (1983) (quoting *Home Building and Loan Assn. v. Blaisdell*, 290 U.S. 398, 434 (1934)).²

According to the Court of Appeals of Maryland:

"Consideration of a claim that particular governmental action invalidly impairs contractual obligations involves several steps. See *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17-21, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977). First, it must be determined whether a contract existed. If that hurdle is successfully cleared by the claimant, a court next must decide whether an obligation under that contract was changed. Finally, if the second question is answered in the affirmative, the issue becomes whether the change unconstitutionally impairs the contract obligation, '[f]or it is not every modification of a contractual promise that impairs the obligation of contract under federal law' *City of El Paso v. Simmons*, 379 U.S. 497, 506-507, 85 S.Ct. 577, 582-583, 13 L.Ed.2d 446 (1965)." *Robert T. Foley Co. v. Washington Suburban Sanitary Comm'n*, 283 Md. 140, 151-52 (1978).

We examine each of these elements in turn.

² The Supreme Court has drawn a distinction between a contract impairment premised on a state's exercise of the police power over private arrangements and an impairment of a state's own financial obligations—the latter facing more stringent examination under the Contract Clause. Compare *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400 (1983), with *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977). But, even in the latter case, the Contract Clause does not stand as an absolute bar to a legislature's ability to alter a state's own contracts if the justification for the impairment is sufficiently strong. See *United States Trust Co. v. New Jersey*, 431 U.S. at 15. Thus, a state may impair its own financial obligations if the impairment "is reasonable and necessary to serve an important public purpose". *Id.* See Part V A below.

III

Existence of a Contract.

The first question is whether the existing scheme of benefits and qualifications forms a contract between the State and its employees. The following language appears in both §3(9) and §83(9) of Article 73B and, therefore, is applicable to both the Employees' and Teachers' Retirement Systems:

"Any person who is a member of the retirement system, established by this subtitle, on December 31, 1979 and does not at any time elect to be a member of the Pension System . . . , shall, as a condition of that person's employment contract, be entitled to remain a member of the retirement system without change in the benefits provided in the retirement system as of December 31, 1979. Any person receiving benefits under the provisions of this subtitle on December 31, 1979 shall continue to receive the benefits as provided in the retirement system as of December 31, 1979. These benefits shall include but not be limited to:

(a) The eligibility for service retirement upon completion of thirty years service or attainment of age 60;

(b) The eligibility for a reduced service retirement upon completion of a certain length of service;

(c) The service retirement allowance of one fifty-fifth of average final compensation;

(d) The retirement allowance provided for ordinary or accidental disability;

(e) The selection of options for service or disability allowances;

(f) The adjustment of the retirement allowance for increases in the Consumer Price Index;

(g) The death benefit;

(h) The level of contributions from members; and

(i) The length of service for members to vest benefits in the system."

There is little doubt that a statutory specification of the terms of an "employment contract" is itself part of that contract between the State and the affected employees. See generally *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n. 14 (1977). As this Office observed even before the enactment of §§3(9) and 83(9), "the General Assembly has consistently treated members of the state systems as if they had a contract with the state". 61 *Opinions of the Attorney General* 746, 749 (1976). Thus, we next examine the nature of the contractual obligation, to determine whether that obligation is an unalterable commitment.³

IV

Amendable Nature of the Contract

The language of §§3(9) and 83(9) certainly permits and, perhaps, encourages the argument that the State not only entered into a contract but, also, has explicitly bound itself not to alter any benefits of the retirement systems: a member of either system "shall, as a condition of that person's employment contract, be entitled to remain a member of the retirement system *without change* in the benefits provided in the retirement system as of December 31, 1979". (Emphasis added.) Cf. *Baker v. Baltimore County*, 487 F.Supp. 461, 473 n. 18 (D. Md. 1980), *aff'd mem.*, 660 F.2d 488 (4th Cir. 1981) ("plaintiffs have pointed to no language to show that the Baltimore County Council intended to contract away its own power to amend the

³ A contract to which the State is a party by statute requires the same element of mutual consideration that must be present in a contract between private parties. See *Grand Lodge v. City of New Orleans*, 166 U.S. 146 (1897). See also Opinion 79-074 (December 14, 1979) (unpublished). Although, in the context of the "promise" made by §§3(9) and 83(9), there is difficulty in identifying any single form of consideration that could be said to apply to all employees, various forms of detrimental reliance by employees that amount to consideration in the legal sense may well have occurred. At the very least, some employees might have given up enough so that, on a case-by-case basis, sufficient consideration in the legal sense might be said to make the statute's reference to contract obligations a real one; and, for present purposes, we think that the existence of consideration on a broader basis should be presumed. See *Illinois Cent. R. R. Co. v. City of Decatur*, 147 U.S. 190, 201 (1893).

retirement statutes"). However, the history of §§3(9) and 83(9) suggests that the General Assembly did not intend these provisions to state an unalterable commitment.

During the 1978 Session of the General Assembly, a "guarantee clause" comparable to §§3(9) and 83(9) was recommended by the Maryland State Teachers' Association and proposed as an amendment to Senate Bill 453. However, no pension reform legislation was enacted that Session.

On February, 6, 1979, then Senate Finance Committee Chairman Steinberg sought the Attorney General's advice on the meaning of that "guarantee clause". Letter from Melvin A. Steinberg, State Senator, to Stephen H. Sachs, Attorney General (February 6, 1979). Senator Steinberg indicated that he expected the same amendment to be proposed to then pending Senate Bill 394. Senator Steinberg's request for advice stated:

"Specifically, my inquiry to you is to seek your advice as to the legality of the portion of the amendment that states, 'Such benefits shall be considered as a condition of that person's employment contract.' Does this provision preclude the State from later changing or altering the benefits in the existing system? Also, how does this provision relate to the cost-of-living adjustment provided retired members? Even with the amendment, could the cost-of-living adjustment later be reduced in a way that the reduction would only apply to members not retired at that time?"

A February 22, 1979 letter of advice to Senator Steinberg responded that the enactment of such a "guarantee clause" would *not* preclude the General Assembly from making future changes to the retirement systems. Letter from Robert A. Zarnoch, Assistant Attorney General, to Melvin A. Steinberg, State Senator (February 22, 1979). The letter relied on 61 *Opinions of the Attorney General* 746 (1976), which had concluded that vested pension rights could be legislatively modified "for the purpose of keeping the pension system flexible and maintaining its integrity". 61 *Opinions of the Attorney General* at 748. That modification, however, must "bear some material relationship to the theory of the pension system and its successful operation, and changes in a pension plan which result in disadvantages to employees should be accompanied by comparable new advantages". *Id.*

The letter also quoted at length from *City of Frederick v. Quinn*, 35 Md. App. 626 (1977), in which the Court of Special Appeals wrote as follows:

"The pension plan is not immutable and the government-employer need not keep its provisions precisely intact. As government grows in size and complexity and as more employees draw from the fund, changes must often be made to assure the soundness of the fund and permit its growth commensurate with its prospective needs. The contractual or vested rights of the employee in Maryland are subject to a reserved legislative power to make *reasonable modifications* in the plan, or indeed to modify benefits if there is a simultaneous offsetting new benefit or liberalized qualifying condition." 35 Md. App. at 630-31 (emphasis in original).

After reviewing these authorities, the February 22, 1979 letter of advice concluded that the proposed "guarantee clause" would be construed as conferring upon a State employee "a vested right to a pension".⁴ However, the letter went on to observe that:

"[T]his right to pension benefits could be subject to reasonable modification by the General Assembly for the purpose of keeping the system flexible and maintaining its integrity. And, as our 1976 opinion indicates, this rule would also apply to legislative changes affecting cost of living adjustments, regardless of when the employee retired."⁵

On March 2, 1979, the Senate Finance Committee voted 8-0 to adopt the "guarantee clause" amendment to Senate Bill 394

⁴ The February 22, 1979 letter of advice incorrectly attributed to the prior Opinion of the Attorney General the view that this pension right vested "upon [the employee's] acceptance of employment". In fact, the Opinion rejected this view. 61 *Opinions of the Attorney General* at 752.

⁵ This summary of the relevant legal background, brought to the General Assembly's attention at the time §§3(9) and 83(9) were under consideration, was later echoed in *Baker v. Baltimore County*, 487 F.Supp. 461 (D. Md. 1980), *aff'd mem.*, 660 F.2d 488 (4th Cir. 1981). In that case, Judge Kaufman summarized Maryland law as generally "permitting legislative modifications in a public employee pension plan if those modifications are reasonable and/or would tend to enhance the actuarial soundness of the plan". 487 F.Supp. at 472. For a fuller discussion of this case, see Part V B below.

and to issue a favorable report on the bill. [1979 S. Journal at 1674.] The amended bill was then passed overwhelmingly by the Senate [1979 S. Journal at 1371] and by the House [1979 H. Journal at 2040]. Subsequently, the bill was signed into law by the Governor. Chapter 23, Laws of Maryland 1979.

This legislative history suggests that §§3(9) and 83(9) were enacted by the General Assembly with the specific understanding that the General Assembly was *not* contracting away its ability to modify the benefits of members of the retirement systems. That legislative intent should govern construction of the statutory language:

"The cardinal rule of statutory construction is to ascertain and effectuate the actual intent of the Legislature. In determining this legislative intent, a court must read the language of the statute in context and in relation to all of its provisions. In addition, it may consider the statute's legislative history and must consider its purpose." *North Charles General Hosp. v. Employment Security Admin.*, 286 Md. 115, 118 (1979).

See also, e.g., *Public Service Comm'n v. Sun Cab Co.*, 160 Md. 476, 481 (1931). But see, e.g., *Baltimore Retail Liquor Package Stores Ass'n v. Board of License Comm'rs*, 171 Md. 426, 430 (1937).

On balance, we are inclined to believe that §§3(9) and 83(9) contemplate and permit "reasonable modification . . . for the purpose of keeping the system flexible and maintaining its integrity"—the meaning ascribed in the February 22, 1979 letter of advice to the then-proposed "guarantee clause".⁶ Thus, if Senate Bill 606 would have effectuated only such "reasonable

⁶ Cf. *Holy Cross Hospital v. Health Services Cost Review Comm'n*, 283 Md. 677, 685 (1978) ("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"). Here, the administrative construction is at least as sure a guide to the intent of the General Assembly, for it was received in the very course of consideration of the provision in question. See *Isserlis v. Director of Public Works*, 300 A.2d 273, 275 (R.I. 1973). Indeed, the enactment of the "guarantee clause" was presumably based on this advice about the provision's meaning.

modifications", it would not have changed the contractual obligation stated in §§3(9) and 83(9).

Senate Bill 606 itself contained no preamble or other statement of the problems that it was intended to address. However, we understand that the bill was urged as necessary to establish a pension scheme "that will guarantee solvency". Baltimore Sun, February 19, 1983, at 12A, col. 1. Such legislation was also said to be needed to avoid the "risk that the [retirement] system itself can go bankrupt in future years". Baltimore Sun, January 7, 1983, at 1A, col. 1.⁷ Of course, we are unable to state whether these underlying factual premises are correct or not; if they are, then Senate Bill 606 would likely have been the kind of "reasonable modification"—a change "made to assure the soundness of the fund and permit its growth commensurate with its prospective needs"—contemplated by the General Assembly when it enacted §§3(9) and 83(9). *City of Frederick v. Quinn*, 35 Md. App. at 630.⁸

Moreover, we note that Senate Bill 606 would have substituted at least one new benefit—reduced employee contributions—for the loss of other benefits.⁹ In addition, the bill would have left unaffected the retirement allowances of those who retired before the measure's proposed effective date.

In sum, assuming the necessary factual predicate, we conclude that Senate Bill 606 embodied the kinds of changes in the retirement systems permitted by §§3(9) and 83(9). However, we acknowledge that this is a close question; we there-

⁷ In the short run, at least, the systems cannot "go bankrupt", because the statute provides that "the amounts which will become due and payable during the year next following . . . shall be included in the [annual] budget bill". Article 73B, §§14(4) and 89(4). However, if these funding requirements became severe enough, the financial stability of the State itself—and, therefore, of the systems—would be threatened.

⁸ Perhaps other justifications could also be advanced for legislation like Senate Bill 606—for example, reducing benefits unintended and unforeseen at the time that the systems were first created, or correcting earlier actuarial miscalculations. See Baltimore Sun, January 9, 1983, at 4K, col. 1. For the reasons stated in Part V C below, we strongly advise that the factual justifications for any such legislation be set out explicitly.

⁹ See note 12 below.

fore shall consider the legal validity of Senate Bill 606 in light of the possible construction that §§3(9) and 83(9) permit no diminution of benefits whatever.

V

Impairment under the Contract Clause

Even if Article 73B, §§3(9) and 83(9) are construed to embody a contract in which the State flatly obligated itself not to reduce any benefit, nevertheless Senate Bill 606 would not automatically be in violation of the Contract Clause. "[N]ot every modification of a contractual promise . . . impairs the obligation of contract under federal law" *City of El Paso v. Simmons*, 379 U.S. 497, 506-07 (1965).

A. *The United States Trust Criteria*

The principles that determine when a state may modify its own contracts were announced by the United States Supreme Court in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977). The case involved the retroactive repeal by the New Jersey Legislature of a statutory covenant that imposed certain restrictions on the use of toll revenues accrued by the Port Authority of New York and New Jersey. The restrictions in the covenant made the bonds issued by the Port Authority more secure. Repeal of the covenant was intended to allow Port Authority bridge and tunnel toll revenues to be used to subsidize mass transit.

The Supreme Court observed that: "The Contract Clause is not an absolute bar to subsequent modification of a State's own financial obligations. As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose." 431 U.S. at 25.¹⁰

¹⁰ The Supreme Court has subsequently cited *United States Trust* for the proposition that "impairments of a state's own contracts would face more stringent examination under the Contract Clause than would laws regulating

Continued on page 377.

New Jersey argued that repeal of the covenant was necessary to a plan "to discourage private automobile use by raising bridge and tunnel tolls and [using] the extra revenues from those tolls to subsidize improved commuter railroad service". 431 U.S. at 29. Energy conservation and environmental protection—said by the Supreme Court to be "admittedly important purposes" [*id.*—were thereby to be advanced.

However, the Supreme Court "reject[ed] this justification because the repeal was neither necessary to achievement of the plan nor reasonable in light of the circumstances". *Id.* Total repeal was not necessary, in the Supreme Court's view: "a less drastic modification" of the covenant or "alternative means" apart from any modification could have been adopted instead. 431 U.S. at 30.¹¹ Nor was repeal of the covenant "reasonable in light of the surrounding circumstances": the Port Authority's possible role in providing mass transportation had been an issue for at least a half century, and yet "[i]t was with full knowledge of these concerns that the . . . covenant was adopted". Thus, the repeal could not be justified by changed circumstances. 431 U.S. at 31-32.

B. *Criteria Applied to Senate Bill 606*

Applying these touchstones of necessity and reasonableness, we believe that Senate Bill 606 would likely have survived constitutional scrutiny.

If, as the proponents of the measure contend, a reduction in some benefits is needed to protect the solvency of the retirement systems, and if no lesser reduction would achieve the required cost savings, then—in the words of the Supreme Court—no "evident and more moderate course would serve

contractual relationships between private parties". *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 n. 15 (1978). This "more stringent examination" manifests itself in a harder look at the factual basis for the legislative judgment. See Part V C below.

¹¹ New Jersey argued that "choosing among these alternatives is a matter for legislative discretion". "But", the Supreme Court responded, "a State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives. Similarly, a State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well." 431 U.S. at 30-31.

[the State's] purposes". 431 U.S. at 31. Moreover, if the retirement systems are in fact in financial trouble that was not anticipated when the "guarantee clauses" in §§3(9) and 83(9) were enacted, it would be "reasonable in light of the surrounding circumstances"—that is, the changed circumstances—to reduce benefits correspondingly.

There is one additional, telling difference between the legislative repeal held invalid in *United States Trust* and the change in benefits proposed in Senate Bill 606. When New Jersey repealed its statutory covenant, it reduced the security of the bonds for purposes wholly unrelated to the interests of the bond-holders. As the Supreme Court said: "[A] State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors." 431 U.S. at 29. But, here, the reduction in future benefits contemplated by Senate Bill 606 is related to the long-term interests of the future beneficiaries themselves. A significant justification proffered by proponents of the proposed changes is that, unless the changes are made to avert a serious future drain on State resources, the members of the systems face uncertainty and even a potential risk to the soundness of the systems. Moreover, these future beneficiaries—in their capacity as present employees—have a clear interest in the jobs and salary levels that would be threatened by excessive pension costs. These circumstances suggest that a court would view enactment of a measure like Senate Bill 606, if in fact so justified, as necessary and reasonable under the circumstances.¹²

This conclusion is supported by *Baker v. Baltimore County*, 487 F.Supp. 461 (D. Md. 1980), *aff'd mem.*, 660 F.2d 488 (4th Cir. 1981). There, Baltimore County police officers challenged an ordinance that altered the retirement plan applicable to these officers. Judge Kaufman held: "[I]f the change con-

¹² Another distinction between Senate Bill 606 and New Jersey's repeal of its covenant is that Senate Bill 606 contained at least one direct, new benefit—reduced employee contributions. If reductions in some benefits would be offset by other, added benefits, the State in effect would be paying compensation for the reductions. "Contract rights are a form of property and may be taken for a public purpose provided that just compensation is paid." *United States Trust Co. v. New Jersey*, 431 U.S. at 19 n. 16.

stituted an impairment, it was a reasonable change and therefore a change which did not constitute a violation of the [officers'] rights under the Contract Clause". 487 F.Supp. at 475. In distinguishing *United States Trust*, Judge Kaufman noted that the change in the retirement plan was only partially an effort to save the County money:

"[The plan] was also modified in ways which benefited plaintiffs. In addition, the pension plan herein was not repealed, it was only altered: the modifications did not leave plaintiffs with nugatory pension contracts, but rather with sounder, albeit somewhat smaller, pensions." 487 F.Supp. at 473.

But see Pineman v. Oechslein, 494 F.Supp. 525 (D. Conn. 1980), *vacated*, 637 F.2d 601 (2d Cir. 1981) (increase in retirement age violates Contract Clause under *United States Trust* criteria).

C. Need for Factual Basis

We conclude by emphasizing that any substantial impairment of State pension obligations can be sustained against a Contract Clause challenge only if the legislation rests on a demonstrable factual basis. The courts will not simply presume that the General Assembly had such a basis: "[C]omplete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake". *United States Trust Co. v. New Jersey*, 431 U.S. at 26. See, e.g., *Valdes v. Cory*, 189 Cal. Rptr. 212, 226 (Cal. App. 1983) (there was "no evidence that the Legislature gave considered thought to the effect [that the change in pension system funding] might have on [the system], or the possibility of alternative, less drastic, means of accomplishing its goal"); *Singer v. City of Topeka*, 607 P.2d 467, 476 (Kan. 1980) ("there was no evidence that the City will not be able to meet its obligations in the future, no evidence that plaintiffs' pensions are in jeopardy, no evidence that plaintiffs would receive any benefit from an actuarially sound system which plaintiffs would not otherwise receive"); *Halpin v. Nebraska State Patrolmen's Retirement System*, 320 N.W.2d 910, 915 (Neb. 1982) ("there [was] no evidence from which it could be found that an 'important public purpose' or a 'vital state interest' demanded the [change in annuity calculation]").

If the General Assembly determines that a reduction in benefits is necessary and reasonable, we strongly recommend that the basis for this conclusion be set out in as explicit a way as possible.¹³ Conclusory recitals alone will likely not convince a court that is looking for a substantial *factual* showing. Instead, a detailed, well documented explanation of the need for the legislation, and the lack of feasible alternatives, will be essential.

VI

Conclusion

In summary, it is our opinion that:

1. Current law governing the benefit structure of the State Employees' Retirement System and the Teachers' Retirement System does not absolutely prohibit any reduction in benefits. Rather, that law—even though embodying a contract between the members of the retirement systems and the State—implicitly permits reasonable modification of benefits, if those modifications are found by the General Assembly to be appropriate to maintain the financial flexibility and integrity of the retirement systems. If, in fact, the modifications contained in Senate Bill 606 are found to be needed for this objective, those modifications would be consistent with current law. Therefore, a bill such as Senate Bill 606 would not constitute any impairment of the contract that the law creates.

2. Even if the current law is construed as flatly precluding any reduction in benefits whatsoever, no matter what the reason, nevertheless the modifications in benefits contained in Senate Bill 606 would not be an unconstitutional impairment of a contract, assuming that a sound factual basis supports the need for such legislation.

We emphasize, however, that an impairment of the State's contractual obligation would be sustainable in court only if, in

¹³ This basis might be stated in a preamble or in the legislative history—for example, in committee reports or study documents on which the General Assembly relied. See Part I above regarding studies now under way.

fact, it was both necessary and reasonable. Mere conclusory assertions will likely not survive the stringent judicial scrutiny that is given such impairments. Therefore, the factual basis that underlies any legislative reduction of benefits should be set out explicitly and should be well documented.

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Editor's Note: Since the issuance of this Opinion, the General Assembly enacted Chapter 7 (H.B. 991), Laws of Maryland 1984, for the purposes of, among other things, altering certain conditions of membership in the Employees' and Teachers' Retirement Systems and making other necessary changes in the pension laws. The constitutionality of this pension reform legislation was upheld in *Maryland Teachers Ass'n v. Hughes*, 594 F. Supp., 1353 (D. Md. 1984).

SOVEREIGN IMMUNITY

BUDGETARY ADMINISTRATION—GENERAL ASSEMBLY—
WAIVER OF CONTRACT IMMUNITY—GOVERNOR RE-
QUIRED TO PROVIDE IN BUDGET FOR SATISFACTION OF
JUDGMENTS—GENERAL ASSEMBLY RETAINS AUTHORITY
TO STRIKE OR REDUCE APPROPRIATION.

February 8, 1983

The Honorable John A. Cade
Senate of Maryland

You have asked for our opinion on whether the State's waiver of sovereign immunity in contract actions has affected the authority of the General Assembly to determine appropriations.* Your specific question is whether, after the Governor provides an item in the annual Budget Bill for the satisfaction of a judgment in an action covered by the statutory waiver, the General Assembly may nonetheless then exercise its authority under Article III, §52(6) of the Maryland Constitution "to strike out or reduce" that item.¹

We have considered this question with great care, because it affects a large number of transactions to which the State is a party. For the reasons given below, we have concluded as follows: although (i) the statute permits State courts to enter judgments against the State and its agencies,² and although (ii) the Governor is required by statute to provide in the Budget for the satisfaction of these judgments, nevertheless (iii) the waiver of sovereign immunity has not affected the General As-

* [Editor's Note: The statutes governing the State's waiver of sovereign immunity in tort claims and contract actions have since been recodified, without substantive change, as Title 12, Subtitle 1 ("Maryland Tort Claims Act") and Subtitle 2 ("Actions in Contract") of the new State Government Article ("SG" Article). Cross-references to the new codification have been added to the text in brackets.]

¹ The State has also waived its sovereign immunity in certain tort actions. Title 5, Subtitle 4 ("Maryland Tort Claims Act") of the Courts Article [SG Title 12, Subtitle 1]. However, because payments of judgments resulting from that waiver are funded through an insurance program, the same issues are not necessarily presented. See note 11 below.

² The statute applies to the State "and every officer, department, agency, board, commission, or other unit of State government". Article 21, §7-101 [SG §12-202(a)]. For convenience, we refer to these entities in this Opinion as "the State and its agencies".

sembly's constitutional authority to strike out or reduce items in the Governor's Budget Bill.

I

Sovereign Immunity

Under the common law of Maryland, the State enjoys sovereign immunity and a litigant is precluded from asserting a cause of action against the State or a State agency unless that immunity has been expressly waived by statute or by necessary inference from a statute. *Charles E. Brohawn & Bros., Inc. v. Board of Trustees*, 269 Md. 164, 166 (1973), and cases there cited.

The Court of Appeals has repeatedly refused to abrogate sovereign immunity by judicial determination and has said that any waiver of immunity must come from the General Assembly. See, e.g., *Jackson v. Housing Opportunities Commission*, 289 Md. 118, 123 (1980). In this regard, the Court has ruled that a statute empowering a State agency "to sue and be sued" manifests consent on the part of the General Assembly to suits against that State agency, at least insofar as those suits concern matters within the scope of the agency's powers and duties. *Board of Trustees of Howard Community College v. John K. Ruff, Inc.*, 278 Md. 580, 588 (1976).

Nevertheless, even suits against State agencies empowered "to sue and be sued" may not be maintained "unless money has been appropriated for the payment of such damages as may be awarded, or the agency itself is authorized to raise money for that purpose". *University of Maryland v. Maas*, 173 Md. 554, 558 (1938). See also *American Structures, Inc. v. Baltimore*, 278 Md. 356, 359 (1976); *Lohr v. Upper Potomac River Commission*, 180 Md. 584, 591 (1942), and cases there cited.

II

Waiver of Immunity—Statutory Text

The State's waiver of sovereign immunity in contract actions was enacted by Chapter 450, Laws of Maryland 1976 ("Chap-

ter 450").³ It is now codified at Title 7, Subtitle 1 of Article 21. of the Maryland Code [SG Title 12, Subtitle 2].⁴

In Article 21, §7-101 [SG §12-202(a)], the General Assembly has provided as follows:

"Unless otherwise specifically provided by the laws of Maryland, the State of Maryland, and every officer, department, agency, board, commission, or other unit of State government may not raise the defense of sovereign immunity in the courts of this State in an action in contract based upon a written contract executed on behalf of the State, or its department, agency, board, commission, or unit by an official or employee acting within the scope of his authority."

In Article 21, §7-104 [SG §12-204], the General Assembly has further provided that:

"In order to provide for the implementation of this [subtitle], the Governor annually shall provide in the State budget adequate funds for the satisfaction of any final judgment, after the exhaustion of any right of appeal, which has been rendered against the State, or any officer, department, agency, board, commission, or other unit of government in an action in contract as provided in this [subtitle]."⁵

³ Section 1 of Chapter 450 related to the immunity of the State and is dealt with in this Opinion. Sections 2 through 5 of the Act dealt with the immunity of counties and municipal corporations and are not considered here, except insofar as they may aid in construing Section 1.

⁴ The waiver of State contract immunity was originally codified at Article 41, §10A of the Maryland Code. It was later transferred, without amendment, to Article 21 ("Procurement") by Chapter 775, Section 8, Laws of Maryland 1980.

⁵ Although §7-104 [SG §12-204] refers to "the implementation of this *section*", and "an action in contract as provided in this *section*", this usage is an accidental carryover from the time when Chapter 450 was codified as several subsections of but one section, former §10A of Article 41. See note 4 above. As the statute is presently codified, §7-104 [SG §12-204] must be understood as referring to the various sections that now constitute an entire subtitle. These sections: provide for the basic waiver of contract immunity (§7-101) [SG §12-202(a)]; preclude the award of punitive damages (§7-102) [SG §12-202(b)]; impose a one-year limitation on the filing of suits (§7-103) [SG §12-203]; and require the Governor to provide funds for the satisfaction of final judgments (§7-104) [SG §12-204].

In construing statutes, including those involving an actual or alleged waiver of sovereign immunity, the Court of Appeals has emphasized that the cardinal rule is to effectuate the legislature's intent. *See, e.g., Jackson v. Housing Opportunities Commission*, 289 Md. 118, 123 (1980); *Katz v. Washington Suburban Sanitary Commission*, 284 Md. 503, 513 (1979). In searching for what the General Assembly intended in enacting Chapter 450, we look first to the provisions of the Act itself. *See County Commissioners v. Stephans*, 286 Md. 384, 388 (1979) (legislative intent must first be sought from the words of the statute, given their ordinary meaning).

Article 21, §7-101 [SG §12-202(a)] forbids a State defendant to "raise the defense of sovereign immunity" in certain contract actions. The Act does not expressly make the defendant liable to any judgment rendered in such an action, but that is its clear and necessary implication.⁶ Indeed, the statute expressly establishes procedures "to provide for the implementation of" the immunity waiver and the payment of "judgment[s]" obtained as a result of that waiver: Article 21, §7-104 [SG §12-204] requires the Governor "annually [to] provide in the State budget adequate funds for the satisfaction of any final judgment, after the exhaustion of any right of appeal, which has been rendered against the State".⁷

⁶ In the past, the Court of Appeals has emphasized that the failure to raise the defense of sovereign immunity does not amount to a waiver of it. *See, e.g., Charles E. Brohawn & Bros., Inc. v. Board of Trustees*, 269 Md. 164, 166 (1973); *Board of Education of Charles County v. Alcrymat Corp.*, 258 Md. 508, 516 (1970). Indeed, in one case the Court of Appeals asserted the defense *sua sponte*, even though it was not raised, tried, or decided below or presented on appeal. *Board of Trustees of Howard Community College v. John K. Ruff, Inc.*, 278 Md. 580 (1976).

Nevertheless, we do not believe that the courts themselves would raise the defense of sovereign immunity in actions within the scope of Chapter 450—that is, where the statute precludes the State and its agencies from raising the defense. A court's assertion of the defense would defeat the plain intention of the General Assembly and would violate the rule of statutory construction that statutes are not to be rendered meaningless. *See, e.g., Rome v. Lowenthal*, 290 Md. 33, 41 (1981); *Welsh v. Kuntz*, 196 Md. 86, 98-99 (1950). *See also Board of Trustees of Howard Community College v. John K. Ruff, Inc.*, 278 Md. at 585 (noting that Chapter 450 did not apply to the contract at issue in the case).

⁷ As we read this language, the Governor need take no action until after the judgment has been rendered and any right of appeal is exhausted. *See Recent Legislation, Abrogation of Sovereign Immunity in Contract Cases in Maryland*, 6 U. Balt. L. Rev. 337, 343-44 (1977).

Thus—in order to discharge the liability implicitly acknowledged in §7-101 [SG §12-202(a)]—§7-104 [SG §12-204] calls for the Governor to take the initial step in the constitutional process by which State funds are appropriated. *See* Article III, §52(3), (4), and (5) of the Maryland Constitution (Governor to submit Budget annually; contents of Budget; Governor to deliver Budget and Budget Bill).⁸

Article 21, §7-104 [SG §12-204] says nothing, however, about what happens after the Governor submits the Budget to the General Assembly. Therefore, we look to other portions of Chapter 450 to see whether they shed light on the legislative intent.⁹ First of all, the purpose clause of the title to Chapter 450 reads, in relevant part, as follows:

“F[or] the purpose of providing that the State, and all units of State government, [as well as counties and municipal corporations, and units of their governments] may not raise the defense of sovereign immunity in the courts of this State in an action in contract based upon certain written contracts . . . ; and requiring that the State, and the counties and municipal corporations provide adequate funds for the satisfaction of a final judgment rendered against them . . . in such actions in contract.”

Chapter 450 also includes a rather lengthy preamble, portions of which are as follows:

⁸ Article III, §52 was amended in 1978 to require the Governor, in preparing the Budget, to comply with statutory directives that provide for particular levels of program funding. §52(11) and (12). We assume that Article 21, §7-104 [SG §12-204] is such a directive. *See generally* 65 *Opinions of the Attorney General* 108, 110 (1980).

⁹ In determining legislative intent, a court must read statutory language in context and in relation to all of the statute's provisions. *Department of State Planning v. Hagerstown*, 288 Md. 9, 14 (1980). *See also* *Comptroller v. John C. Louis Co.*, 285 Md. 527, 538 (1979). That the title of an act is relevant to ascertain its intent and purposes is well settled. *Mass Transit Admin. v. Baltimore County Revenue Auth.*, 267 Md. 687, 695-96 (1973). A preamble may also be resorted to in aid of interpretation, but only if the meaning of the statutory language is doubtful. *Compare State v. Loscomb*, 291 Md. 424, 434 n. 12 (1981), and *Dillon v. State*, 277 Md. 571, 583 (1976), with *Elchin v. State*, 47 Md. App. 358, 363 (1980), *cert. denied*, 289 Md. 735 (1981).

"WHEREAS, The Court of Appeals of Maryland has held that, as a result of the common law doctrine of sovereign immunity, a suit cannot be maintained against the State or its political subdivisions, unless authorized by the Legislature, and funds are available to satisfy any judgment rendered; and

WHEREAS, The Court of Appeals further has stated that any change in the doctrine of sovereign immunity must be made by the Legislature; and

. . .

WHEREAS, The Governor's Commission to Study Sovereign Immunity believes that there exists a moral obligation on the part of any contracting party, including the State or its political subdivisions, to fulfill the obligations of a contract; and

WHEREAS, The Governor's Commission to Study Sovereign Immunity has concluded that the doctrine is no longer appropriate to actions on certain contracts, and that the effects of this doctrine should be limited by legislative action . . . ".

Finally, in Sections 2 through 5 of Chapter 450, the General Assembly addresses the obligation of local subdivisions to fund judgments, as follows:

"In order to provide for the implementation of this section, the [governing body of the jurisdiction] shall make available adequate funds for the satisfaction of any final judgment, after the exhaustion of any right of appeal, which has been rendered against the [municipal corporation or county], or any officer, department, agency, board, commission, or other unit of government in an action in contract as provided in this section." Article 23A, §1A(d); Article 25, §1A(d); Article 25A, §1A(d); and Article 25B, §13A(d) of the Maryland Code.

These portions of the Act do not, in our view, definitively resolve the issue of whether the General Assembly may strike or reduce amounts placed in the Budget to fund judgments in contract actions. The title to Chapter 450 arguably shows that the General Assembly intended to require the State to provide

adequate funds to satisfy final judgments, just as it required the governing bodies of municipal corporations and counties to provide such funds. There is a significant difference, however, between the provisions relating to the State and those relating to local governments: Sections 2 through 5 of Chapter 450, by their terms, bind *all* officials (including the legislative body) involved in a local government's appropriation process; thus, they guarantee the appropriation of funds necessary to satisfy contract judgments against these localities. In contrast, Article 21, §7-104 [SG §12-204] purports to bind only *one* element of the State appropriation process, the Governor. The General Assembly was certainly well aware of its own vital role in the appropriation process, yet it did not purport to bind itself.¹⁰

The preamble shows that the General Assembly was aware, when it enacted Chapter 450, of case law holding that "a suit cannot be maintained against the State . . . , unless authorized by the Legislature, *and funds are available to satisfy any judgment rendered*" (emphasis added). The preamble also suggests that the legislators acknowledged a moral obligation on the part of the State to fulfill the obligations of State contracts and, further, that they believed the doctrine of sovereign immunity was no longer appropriate to actions based on written contracts executed on behalf of the State or a State agency by an official or employee acting within the scope of his or her authority (that is, the "actions on certain contracts" covered by the text of the Act).

On the other hand, the final paragraph of the preamble states that "the effects of [the doctrine of sovereign immunity] should be *limited* by legislative action" (emphasis added). Perhaps the choice of the word "limited" instead of the word "abolished"—a term used elsewhere in the preamble—indicates an intent to do less than sweep the doctrine away in its entirety,

¹⁰ Article III, §29 of the Maryland Constitution provides: "nor shall any Law be construed by reason of its title, to grant powers, or confer rights which are not expressly contained in the body of the Act". Here, we do not believe that Chapter 450 can be construed, by reason of its title, to impose limitations on the constitutional powers of the General Assembly that are not expressly imposed in the body of the Act.

even with respect to the contract actions covered by the text.¹¹ Furthermore, the acknowledgement of a moral obligation suggests acceptance of something less than an absolute legal obligation.

In sum, we do not believe that your question can be resolved on the face of Chapter 450 itself. Therefore, we look to the legislative history of the Act for further elucidation. See *County Commissioners v. Stephans*, 286 Md. 384, 390-91 (1979); *Department of State Planning v. Hagerstown*, 288 Md. 9, 14 (1980).

III

Waiver of Immunity—Legislative History

Chapter 450 (introduced at the 1976 Session of the General Assembly as House Bill 885) was proposed by the Governor's Commission to Study Sovereign Immunity. The Commission delivered the bill, together with an interim report, to the Governor on February 2, 1976. Nine months later, it published a voluminous Final Report of the Governor's Commission to Study Sovereign Immunity (November, 1976) ("Final Report"). The Final Report gives a detailed account of the history of Chapter 450.

Before the 1976 Session of the General Assembly, there had been three legislative attempts to modify the doctrine of sovereign immunity in contract. The first bill, House Bill 1119, was introduced in 1973; although it was passed by the House, it died in a Senate committee.

¹¹ In this regard, it is noteworthy that the State's waiver of sovereign immunity in certain tort actions is accompanied by the following statement of legislative intent: "It is the intent of the General Assembly that this subtitle be interpreted broadly to assure that injured parties have a remedy." §5-402(a) of the Courts Article [SG §12-102]. No such statement appears in Chapter 450. Moreover, as indicated in note 1 above, the statute waiving immunity in the specified tort actions provides for the satisfaction of judgments through an insurance program. §5-407(c) of the Courts Article [cf. SG §§12-104(b) and 12-106(c); Article 95, §§27(d) and 32].

In 1974, House Bill 5 was enacted.¹² Then-Governor Mandel vetoed the bill, citing several reasons: First, it did not make funds available for satisfying judgments and, therefore, under the law stated in *University of Maryland v. Maas*, 173 Md. 554 (1938), it was uncertain whether the bill would have any effect in permitting suits against the State and its subdivisions. Second, the bill was broad enough to permit a wide range of tort-like suits framed in the guise of contract actions. Finally, the bill might preclude State and local governments from raising the defense of unauthorized contracts, or it might result in the disallowance of counter-suits and set-off claims. See Veto Message (H.B. 5) from Marvin Mandel, Governor, to John Hanson Briscoe, Speaker of the House (May 31, 1974), reprinted in *Laws of Maryland 1974* at 3087-89. The Governor concluded his Veto Message by stating that the question of whether, how, and to what extent the doctrine of sovereign immunity should be modified must be given much more careful study. He therefore announced his intention to reconstitute a Commission to Study Sovereign Immunity. *Id.* at 3088-89.

Again in 1975, both houses of the General Assembly passed a bill on the subject, House Bill 1672. In response to the Governor's 1974 Veto Message, House Bill 1672 made the State and its subdivisions, as well as their officers and agencies, liable only for *written* contracts. The bill also included language, very similar to that of Chapter 450, concerning the obligations of State and local officials to make funds available to satisfy judgments.¹³ That is, House Bill 1672 provided, with respect to the State, that "the Governor shall annually provide in the State budget adequate funds for satisfaction of any judgment".

¹² Section 1 of House Bill 5, dealing with the State, provided simply:

"Unless otherwise specifically provided by the laws of Maryland, the State of Maryland, and every officer, department, agency, board, commission, and other unit of government of the State of Maryland is liable in any action of contract, and may not raise the defense of sovereign immunity, for any contract made by the State, or any officer, department agency, board, commission or other unit of the government of the State."

¹³ Chapter 450 added the concept that the judgment must be final and that any right of appeal must be exhausted before the provision requiring funding becomes operative.

Governor Mandel again vetoed the legislation, observing:

"There is no provision in the bill, as indeed there could not be, binding the General Assembly not to reduce or delete those funds from the Budget." Veto Message (H.B. 1672) from Marvin Mandel, Governor, to John Hanson Briscoe, Speaker of the House (May 15, 1975), *reprinted in* Laws of Maryland 1975 at 4067-69.

This Veto Message again cited the rule of *University of Maryland v. Maas*, and concluded:

"[A]s there is no assurance that the General Assembly will approve such funds, it would seem that compliance with the *Maas* test is, at best, uncertain. A final judgment probably could not be entered until the General Assembly approves the following year's budget, and then only to the extent that the Governor has, in fact, included sufficient funds and the General Assembly has approved them." *Id.* at 4068-69.

The Governor also complained that the fiscal impact of the bill was uncertain. He pointed out that he had reconstituted the Commission to Study Sovereign Immunity and indicated his desire to await completion of its study. *Id.* at 4069.

Neither the interim nor the final report of the Governor's Commission to Study Sovereign Immunity indicates that the Commission addressed the specific issues raised by the Governor about the funding provisions of House Bill 1672. In submitting the legislation that became Chapter 450, the Chairman of the Commission merely noted: "Judgments obtained in actions on contracts executed after July 1, 1976 would, under the terms of the proposed legislation, be paid when appropriate funds are provided in the State budget." Final Report at J-1. The Commission simply described Chapter 450 as "mandat[ing] that each governmental entity allocate funds for the satisfaction of adverse final judgments". *Id.* at 100. Likewise, legislative committee files on House Bill 885 (Chapter 450) contain no evidence that the funding problems raised by the Governor's 1975 Veto Message were addressed by the General Assembly.

Given the Governor's Veto Message, however, we must assume that the General Assembly was fully aware of the fact

that Chapter 450 did not guarantee the appropriation of funds to satisfy contract judgments against the State and its agencies. Under the circumstances, we cannot ignore the likelihood that the legislators intended precisely this result—one consistent with a literal interpretation of Chapter 450.¹⁴

IV

Effect of the Statutory Waiver

As discussed in Parts I and III above, the statutory waiver of sovereign immunity must be construed against the background of the "*Maas* doctrine": suits against State agencies may not be maintained "unless money has been appropriated for the payment of such damages as may be awarded, or the agency itself is authorized to raise money for that purpose". *University of Maryland v. Maas*, 173 Md. 554, 558 (1938). Although Chapter 450 does not absolutely guarantee the funding of judgments, we do not think that Maryland courts would invoke the *Maas* doctrine and decline to entertain contract actions against State agencies. The Court of Appeals, in *Katz v. Washington Suburban Sanitary Commission*, 284 Md. 503 (1979), recently refused to apply the doctrine in a case involving a statute somewhat similar to Chapter 450.

Katz involved tort actions against the Washington Suburban Sanitary Commission, which had statutory authority to sue and be sued and to certify to the county a tax rate sufficient to

¹⁴ Our conclusion is supported by the fact that the General Assembly enacted Chapter 726, Laws of Maryland 1980, to modify the 1978 statutory waiver of the State's sovereign immunity "in any administrative, arbitration, or judicial proceeding held pursuant to [Article 64A of the Maryland Code, 'Merit System'], to the rules and regulations of the Secretary of Personnel, or [to] the personal policies, rules, and regulations for classified employees of the University of Maryland involving any type of employee grievance or hearing". Article 64A, §56(b). In words similar to those of Chapter 450, the 1980 statute required the Governor to "provide in the annual State budget adequate funds for the satisfaction of any final monetary or benefit award or judgment". §56(c). The statute also expressly provided for the role of the General Assembly: "Upon appropriation of funds by the Legislature, the Comptroller of the Treasury shall satisfy existing awards in order of date of award." §56(d).

satisfy adverse judgments. The Commission invoked the defense of sovereign immunity. It argued that the authority to certify a tax rate did not necessarily guarantee that funds would be appropriated; therefore, under the *Maas* doctrine, immunity was not waived.

Rejecting this argument, the Court of Appeals concluded that the pertinent statute permitted the entry of a judgment against the Commission. The Court observed that the statute clearly contemplated both the filing of suits and the recovery of judgments. The Court concluded: "Whether the county council actually imposes and collects the mandated tax is not determinative of the waiver of [the Commission's] sovereign immunity." 284 Md. at 515.¹⁵

Our conclusion—that Chapter 450, like the statute considered in *Katz*, permits the entry of judgments but does not absolutely guarantee that funds will be made available to satisfy those judgments—does not violate generally recognized principles of sovereign immunity. As the Final Report of the Governor's Commission to Study Sovereign Immunity pointed out, a considerable number of states have set up claims boards to hear claims against those states and their agencies. These boards issue rulings that guide, but do not bind, the state legislatures in appropriating funds. Final Report at 7 (listing 13 states). The United States Claims Court similarly entertains suits and renders judgments against the federal government, but the satisfaction of its judgments depends on appropriations by Congress.¹⁶ See also *State v. Ambrose*, 191 Md. 353 (1948) (judgment against State in condemnation case not an ordinary pecuniary judgment). See generally *Department of Highways v. Shamrock Corp.*, 501 S.W.2d 584 (Ky. 1973); *George A. Fuller Co. v. Massachusetts*, 21 N.E.2d 529 (Mass. 1939).

¹⁵ In an even more recent case, *Jackson v. Housing Opportunities Commission*, 289 Md. 118, 130 (1980), the Court relied on comparable statutory language as manifesting the General Assembly's expectation that judgments would be entered against the governmental agency in question.

¹⁶ "Every final judgment rendered by the United States Claims Court against the United States shall be paid out of any general appropriation therefor". 28 U.S.C. §2517(a). In 31 U.S.C. §724a, enacted in 1956 and since amended, Congress has made a permanent appropriation, "out of any money in the Treasury not otherwise appropriated", to pay final judgments, awards, and compromise settlements under 28 U.S.C. §2517 and certain other statutes.

In sum, we believe that Chapter 450 should be construed to permit Maryland courts to entertain suits and enter judgments against the State and its agencies in actions based on written contracts executed by officials or employees acting within the scope of their authority. We also believe that the portion of Chapter 450 now codified as Article 21, §7-104 [SG §12-204] requires the Governor to place items in the annual Budget Bill to cover final contract judgments.¹⁷ We do not believe, however, that Chapter 450 diminishes the constitutional power of the General Assembly to strike out or reduce those Budget items.¹⁸

V

Constitutional Questions

A suggestion has been made that the constitutional rights of parties who in good faith enter into written contracts with the State and its agencies would be violated if Chapter 450 were to be construed other than as a full guarantee of enforcement of

¹⁷ Subject to certain exceptions, the Governor may reduce—by no more than 25% and with the approval of the Board of Public Works—any item of appropriation that the Governor “deem[s] unnecessary”. Article 15A, §11 of the Maryland Code. In 65 *Opinions of the Attorney General* 45 (1980), we concluded that a statutory mandate requiring the Governor to include in the annual Budget Bill a minimum level of funding would not prevent the Governor from later reducing the appropriation for that program in accordance with Article 15A, §11.

¹⁸ The inability to compel payment of a judgment does not mean that the judgment is worthless. There is no reason to believe that the General Assembly will not appropriate funds needed to cover judgments obtained under Chapter 450. Moreover, in some cases, State creditors are well protected even though they might not be able to execute judgments against the State. For example, holders of bonds backed by the full faith and credit of the State receive significant protection from provisions of the State Constitution. See Article III, §§34, 52(4)(d), and 52(6) of the Constitution (law authorizing State debt must provide for collection of tax to pay principal and interest; annual Budget must estimate appropriations for debt repayment; General Assembly may not amend Budget to affect debt obligations). See also Article 15A, §11 of the Maryland Code (Governor’s authority to reduce an item of appropriation does not include authority to reduce an appropriation to pay State debt).

the State's obligations. We find little support for this suggestion in the case law.

A. *Contract Clause*

The Contract Clause of the United States Constitution provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts". Article I, §10. This provision severely restricts the states in modifying their own contracts as well as those between private parties. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 (1977). However, since the beginning of American legal history, the Contract Clause has not been interpreted, as far as we are aware, to make it unconstitutional for a state to maintain its immunity from suit.

The "obligations" of a contract have long been regarded as including not only the express terms of the contract but also the contemporaneous state law pertaining to interpretation and enforcement of that contract. *United States Trust Co. v. New Jersey*, 431 U.S. at 19 n. 17; *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 257-60 (1827). In *Ogden*, the Supreme Court held that a state bankruptcy law did not violate the Contract Clause with respect to debts contracted after the passage of the law. After stating the proposition that the law of the country where a contract is made or to be executed forms a part of that contract and of its obligation, Justice Washington concluded that "it would seem to be somewhat of a solecism to say that [the law] does at the same time impair that obligation". 25 U.S. at 260.

Indeed, "[n]ot only are existing laws read into contracts in order to fix the obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order." *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 435 (1934). Thus, the immunity asserted or maintained by a state is read into each contract into which the state enters.

In cases where a state has waived its immunity so as to permit its courts to entertain suits and enter judgments against the state, but where satisfaction of those judgments has nevertheless rested within the power of the legislature, the Supreme Court has ruled that those who contract with the state have no rights against the state that are protected by the Con-

tract Clause. Therefore, even the repeal by the state of an existing waiver of immunity does not violate the Contract Clause. *South & North Alabama R.R. v. Alabama*, 101 U.S. 832 (1880); *Memphis & Charleston R.R. v. Tennessee*, 101 U.S. 337 (1880).¹⁹

B. *Due Process and Equal Protection*

Just as we believe that the maintenance of sovereign immunity does not violate the Contract Clause, we also conclude that it does not violate the Due Process and Equal Protection provisions of the United States and Maryland Constitutions. United States Constitution amend. XIV, §1; Article 24 of the Maryland Declaration of Rights.²⁰

In the absence of a waiver of immunity, a claimant against the state has no legally cognizable right. Indeed, the Supreme Court has stated that even the consent of a sovereign to suits against itself accords a privilege and not a property right protected by the Constitution. *Lynch v. United States*, 292 U.S. 571, 581 (1934). Certainly, insofar as a state waives its immunity, the terms of that waiver form a part of and define the claimant's rights. See *Schultz v. Greater New Orleans Expressway Commission*, 250 F.Supp. 89, 97 (E.D. La. 1966) ("a state may waive its immunity from suit and specify such limitations on the exercise of that immunity as it deems proper"). See also *McDonald v. Illinois*, 557 F.2d 596, 601 (7th Cir. 1977) (state can limit waiver of immunity to actions brought in its own courts "and, indeed, even as to particular state courts"). Cf. *Engle v. Cumberland*, 180 Md. 465 (1942) (Gen-

¹⁹ The Court of Special Appeals of Maryland cited these and similar cases in support of its holding that a 1970 Act, effectively reinstating sovereign immunity for the Maryland Port Administration, did not violate the Contract Clause. *Maryland Port Admin. v. I.T.O. Corp.*, 40 Md. App. 697, 711-12 (1978), cert. denied, 284 Md. 745 (1979).

²⁰ Although the Contract Clause was "perhaps the strongest single constitutional check on state legislation" during the early history of America, it "receded into comparative desuetude with the adoption of the Fourteenth Amendment, and particularly with the development of the large body of jurisprudence under the Due Process Clause of that Amendment in modern constitutional history". *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978).

eral Assembly can grant right of action against municipality on any conditions that General Assembly chooses to prescribe). As Justice Washington observed in *Ogden v. Saunders*, "it would seem to be somewhat of a solecism" to say that the same law that creates and defines a claimant's rights at the same time deprives the claimant of rights.

A statutory waiver of immunity that permits claims against the sovereign to be reduced to judgment, while leaving the satisfaction of those judgments to the discretion of the legislature, does not give claimants a constitutionally protected right to satisfaction, although successful claimants may have vested rights in the judgments themselves. See *McCullough v. Virginia*, 172 U.S. 102, 124 (1898) ("[i]t is not within the power of a legislature to take away rights which have been once vested by a judgment"). The rights vested in a judgment holder are precisely those rights created by the law in effect at the time the judgment becomes final and unreviewable. See *Hospital Association v. Toia*, 435 F.Supp. 819, 828-30 (S.D.N.Y. 1977) (modern concepts of the finality of judgments recognize that a plaintiff has no constitutionally protected vested right in a judgment until it has become final and unreviewable).

In *Board of Regents v. Roth*, 408 U.S. 564 (1972), the Supreme Court discussed the nature and source of constitutionally protected property rights:

"Property interests [protected by the Due Process Clause], of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." 408 U.S. at 577.

The Court also stated:

"To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.*

In our view, it is clear that a claimant who recovers a judgment against the State under Chapter 450 has no constitu-

tionally protected right to the final appropriation of funds to satisfy that judgment.²¹

Our conclusion is supported by the cases of *South & North Alabama R.R. v. Alabama*, 101 U.S. 832 (1880), and *Memphis & Charleston R.R. v. Tennessee*, 101 U.S. 237 (1880). In each of those cases, the Supreme Court had before it a state statute that permitted the recovery of judgments against the state, but left the ultimate satisfaction of those judgments to the state legislature. In *Alabama*, the Court described the effect of the statutes in the two cases:

“Under both the Tennessee and Alabama statutes the courts are made little else than auditing boards. If funds are not voluntarily provided to meet the judgment, the courts are not invested with the power to supply them.” 101 U.S. at 834.

Nevertheless, the Court found no constitutional infirmity in the statutes.²²

Our conclusion is also supported by “an unbroken line of Supreme Court opinions since the passage of the Eleventh Amendment”, in which the Court has rejected the proposition that the common law doctrine of sovereign immunity is unconstitutional. *Ellison v. Stephens*, 581 F.2d 584, 585 (6th Cir. 1978). For example, in *Monaco v. Mississippi*, 292 U.S. 313 (1934), Chief Justice Hughes, writing for the Court and relying on the earlier case of *Hans v. Louisiana*, 134 U.S. 1 (1890),

²¹ But see *Evans v. Chicago*, 522 F.Supp. 789 (N.D. Ill. 1980). In that case, an Illinois statute empowered the City of Chicago to pay any tort judgment on a delayed schedule if the governing body found that the amount was so great that undue hardship would arise from prompt payment. Although citing the language of the *Roth* case, quoted above, the court nevertheless found that holders of tort judgments against the City had property interests “arising from the judgment itself rather than the statute” and that the delayed payment scheme might deprive them of due process.

Notwithstanding any rights that the claimants in *Evans* may have had against the City of Chicago, we do not believe that one who obtains a judgment against the State of Maryland under Chapter 450 obtains any rights against the State not derived from that statute.

²² The statutes themselves were not attacked in the *Alabama* and *Tennessee* cases. Rather, their repeal was challenged as a violation of the Contract Clause.

explained that the cognizance of suits and actions unknown to the law was not contemplated by the framers of the Constitution and that "[t]he suability of a State without its consent was a thing unknown to the law". 292 U.S. at 327.²³ On at least two occasions, the Supreme Court has dismissed, for want of substantial federal questions, appeals challenging state sovereign immunity. *Huffman v. Kentucky*, 435 U.S. 991 (1978); *Krause v. Ohio*, 409 U.S. 1052 (1972).²⁴

The Supreme Court discussed the doctrine of sovereign immunity at some length in *Nevada v. Hall*, 440 U.S. 410 (1979). In that case, the Court ruled that the doctrine does not support a claim of immunity by one state in the courts of a sister state. It went on to sustain a tort judgment rendered against the State of Nevada and its state university by a California court. In doing so, the Court concluded that nothing in Article III, in the Eleventh Amendment, or elsewhere in the Constitution incorporated the doctrine of sovereign immunity.²⁵

Nevertheless, the Court distinguished between what it saw as two quite different concepts making up the doctrine. The first is the notion that a sovereign is immune from suit in its own courts; the second, that it is immune in the courts of an-

²³ There has been some controversy over what the framers of the Constitution intended in providing that "[t]he judicial Power shall extend . . . to Controversies . . . between a State and Citizens of another State . . . , and between a State . . . and foreign States, Citizens or Subjects". United States Constitution, Article III, §2. See *Nevada v. Hall*, 440 U.S. 415, 419 (1978). However, it has been quite clear since the passage of the Eleventh Amendment that the judicial power of the United States does not extend to "any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State". *Id.* The Eleventh Amendment was interpreted in *Hans v. Louisiana*, to prevent federal courts from entertaining suits against states by their own citizens and in *Monaco v. Mississippi*, to prevent those courts from entertaining suits against states by foreign nations.

²⁴ In *Krause*, a lower state court had found that the doctrine of sovereign immunity violated the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court of Ohio decisively reversed that ruling. *Krause v. State*, 285 N.E.2d 736, 744-45 (1972).

²⁵ Justice Blackmun, dissenting, argued that the sovereign immunity of the states is implicitly guaranteed as an essential component of federalism. 440 U.S. at 427. Justice Rehnquist, also dissenting, expressed his belief that sovereign immunity was a concept clearly incorporated in the constitutional plan or scheme. 440 U.S. at 432.

other sovereign. Although it rejected the argument that the Constitution protected a state from suits brought in another state, the Supreme Court at the time indicated support for the sovereign immunity of a state in its own courts. The majority opinion, written by Justice Stevens, quoted earlier defenses of the doctrine by Justices Jay and Holmes and said: "This explanation adequately supports the conclusion that no sovereign may be sued in its own courts without its consent." 440 U.S. at 415-16.²⁶

VI

Conclusion

In summary, it is our opinion that Chapter 450, Laws of Maryland 1976, authorized Maryland courts to entertain suits and enter judgments against the State and its agencies on written contracts executed by officials or employees acting within the scope of their authority. Furthermore, Chapter 450 and the State Constitution require the Governor to provide in the annual Budget Bill for the satisfaction of final contract judgments. However, Chapter 450 does not preclude the General Assembly from exercising its constitutional power to

²⁶ Other recent cases have dealt with Eleventh Amendment immunity issues. For example, in *Employees of Dept. of Public Health & Welfare v. Missouri*, 411 U.S. 279 (1973), the Supreme Court held that federal courts could not entertain a suit brought under the Fair Labor Standards Act against certain state agencies. In *Edelman v. Jordan*, 415 U.S. 651 (1974), a 5-4 decision, the Court ruled that the Eleventh Amendment precluded the recovery of benefits wrongfully withheld by a state under a federal-state program of aid to the aged, blind, and disabled. The state's participation in the program was held not to constitute a waiver of its immunity. See also *Florida Dept. of Health v. Florida Nursing Home Assn.*, 450 U.S. 147 (1981); *Quern v. Jordan*, 440 U.S. 332 (1979).

In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), however, the Court ruled that the Eleventh Amendment would not bar an award of backpay to claimants who alleged that Connecticut had violated the Civil Rights Act of 1964, as amended. The principle of state sovereignty embodied in the Amendment was said to be limited by §5 of the Fourteenth Amendment. Insofar as Congress has, by a statute passed under §5, specifically authorized suits against states, the federal courts may entertain such suits. See also *Maher v. Gagne*, 448 U.S. 122 (1980); *Hutto v. Finney*, 437 U.S. 678 (1978).

strike out or reduce items in the Governor's Budget, including those items inserted to provide for the satisfaction of judgments.

In closing, we think it important to point out that the State is not powerless to remedy any difficulties that might be created by this result. For example, without any change in the statute, the Governor is free—although not required—to anticipate future judgments and, in his or her discretion, to include in the Budget for a particular year funds that could be used to pay any judgments that might become final in that year. Should a statutory amendment be thought necessary, the State can provide a funding mechanism based on insurance or some other similar means, not directly dependent on annual legislative appropriations.²⁷ If necessary, the State Constitution can be modified to take away the power of the General Assembly to strike out or reduce Budget items relating to the payment of judgments against the State and its agencies.²⁸

STEPHEN H. SACHS, *Attorney General*

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Opinions and Advice

²⁷ The State has chosen to do precisely this in subjecting itself to certain tort actions. See §§5-403 and 5-407(c) of the Courts Article [SG §§12-104 and 12-106].

The General Assembly might also amend Article 15A, §11 of the Maryland Code to preclude the Governor from reducing items of appropriation for the payment of judgments. See note 17 above.

²⁸ Article III, §52(6) of the Maryland Constitution already prohibits the General Assembly from amending the Budget Bill so as to affect debt obligations of the State, provisions for the public schools, or the payment of constitutionally mandated salaries.

TAXATION

RETAIL SALES TAX—EXEMPTIONS—VETERINARIANS—VETERINARY ITEMS—DIET ITEMS AND INSECTICIDE PRODUCTS FOR PETS NOT EXEMPT FROM SALES TAX.

June 22, 1983

Mr. Stephen M. Cordi
Director
Retail Sales Tax Division

You have asked for our opinion as to whether, under the Maryland Retail Sales Tax Act, the tax exemption for sales of medicines and medical supplies applies to sales of certain veterinary items. Specifically, you have asked (1) whether sales of prescription diets for dogs and cats by a veterinarian are within the exemption applicable to the sale of medicines, and (2) whether products such as powders and sprays designed to prevent flea and tick infestation of pets, when used or sold by veterinarians, are within the exemption applicable to the sale of medicines.

For the reasons given below, we have concluded that diet items and insecticide powders and sprays for dogs and cats sold by a veterinarian to a pet owner, or sold to a veterinarian for his or her own use in treating pets, are not exempt from the sales tax.¹

I

Statutory Background

The Maryland Retail Sales Tax Act levies a tax “[f]or the privilege of selling certain tangible personal property at re-

¹ Under the Maryland Use Tax Act, an excise tax must be paid for the privilege of using, storing, or consuming certain property and services. Article 81, §373 of the Maryland Code. However, “[t]angible personal property expressly exempted from the retail sales tax” is also exempt from the use tax. Article 81, §375(b). Thus, our conclusion about the status of these veterinary items under the exemption provisions of the Maryland Sales Tax applies equally to the Maryland Use Tax Act. Of course, if sales tax has been paid, the use tax need not be paid. Article 81, §375(a).

tail". Article 81, §325(a) of the Maryland Code. Under the Act, the amount of the sales tax is based on the price charged for the property or service and the tax is collected by the seller from the buyer.

In §326, the Act lists the kinds of transactions that are exempt from the tax. In considering whether any of these exemptions apply to the veterinary items in question, we follow the well-established rule that exemptions from taxation should be "strictly construed in favor of the State". *Supervisor of Assessments v. Trustees of Bosley Methodist Church Graveyard*, 293 Md. 208, 212 (1982). The Maryland Court of Appeals has frequently observed that "[t]o doubt an exemption is to deny it". *Suburban Propane Gas Corp. v. Tawes*, 205 Md. 83, 87 (1953). See also *Macke Company v. State Department of Assessments and Taxation*, 264 Md. 121, 133 (1972) ("real doubt" about applicability of exemption to be resolved in favor of the State).

Indeed, the Act itself specifies that:

"It shall be presumed that all sales of tangible personal property and services mentioned in this subtitle are subject to tax until the contrary is established, and the burden of proving that a sale is not taxable hereunder shall be upon the vendor or the purchaser as the case may be." Article 81, §333.

II

Applicability of Sales Tax Exemptions

With these principles for construing tax exemptions in mind, we examine whether sales of prescription pet foods and of products for the treatment of tick and flea infestation are within the exemptions established by Article 81, §326.

A. *Exemption for Medicines*

The particular exemption about which you inquire is Article 81, §326(l):

“Sales of medicines and disposable medical supplies sold on prescriptions of physicians, or medicines compounded, processed or blended by a druggist offering the same for sale at retail, or sales of drugs or medical supplies to physicians or hospitals or by physicians and hospitals to patients in connection with medical treatments, sales of baby oils and baby powders, and any other medicines as this term may be defined by regulations of the Comptroller.”

It is readily apparent that prescription pet foods and insecticides do not come within the first several of the alternative bases for exemption under Article 81, §326(l). These items are neither “medical supplies sold on prescriptions of physicians” nor “drugs or medical supplies [sold] to physicians or hospitals or by physicians and hospitals to patients in connection with medical treatments”, because a veterinarian is not a “physician”. Compare §2-301(f) and (i) of the Agriculture Article of the Maryland Code (“Ag” Article) (defining “practice of veterinary medicine” and “veterinarian”) with §14-101(h) and (i) of the Health Occupations Article of the Maryland Code (defining “physician” and “practice medicine”).² Moreover, the facts do not indicate that any of these products are “medicines compounded, processed or blended by a druggist offering the same for sale at retail”.

Thus, the purchase or sale of the products in question by veterinarians would be exempt under §326(l) only if they are “any other medicines as this term may be defined by regulations of the Comptroller”.³ The Comptroller’s Sales Tax Regulation governing sales of medicines, medical supplies, and physical aid and sick room equipment defines the term “medicine” as follows:

“‘Medicine’ means a preparation or substance intended for use in the cure, mitigation, treatment, or prevention of illnesses. The term includes drugs

² A veterinary hospital is likewise not a “hospital”, within the meaning of this provision. In context, this term plainly means a treatment facility for humans. See §19-301(e) of the Health-General Article of the Maryland Code.

³ The Comptroller also has more general authority under §365(a) of the Act to “make, adopt and amend such rules and regulations as he shall deem necessary to carry out the provisions of this subtitle and to define any terms used therein”.

sold on prescriptions of physicians, drugs for which no prescription is required, and proprietary and patent medicines. The term does not include cosmetics, dentifrices, shaving and hair care products, soaps, or deodorants. A product which is primarily cosmetic in nature is not 'medicine' even though it may contain medicinal properties." COMAR 03.06.01.19A(1).

In applying this regulatory definition, the Comptroller has consistently determined that both special diet foods and insect repellents for *human* use are not exempt from taxation under §326(1), because they are not "medicines". For example, in Bulletin 81-1 of the Comptroller of the Treasury, the Retail Sales Tax Division discusses what constitutes "medicine and medical supplies" under §326(1) and expressly states that insect sprays do not fall within that term. Accordingly, the sale of these products is considered to be taxable. If diet aids and insecticides for human use are not exempt under the Comptroller's regulation, we do not see how these kinds of products would be exempt when used for animals.⁴

The Comptroller's construction of this regulation is entitled to great weight:

"The sales tax is an excise tax imposed by the Legislature in the exercise of the police power of the State. The Legislature, in [then] Section 361 of the Retail Sales Tax Act, authorized the Comptroller to adopt such rules and regulations as he shall deem necessary to carry out the provisions of the Act and to define any terms used therein. It is universally recognized that it would be impossible for the Legislature to deal directly with the multitude of details in the complex conditions upon which it legislates, and so it has become customary for the Legislature to delegate to each administrative agency the power to make rules and regulations to carry legislation

⁴ We do not intend to suggest that the Comptroller lacks discretion to define various veterinary items as "medicines"; indeed, we understand that the Comptroller has in fact so defined some such items. Our point is the converse: when the Comptroller has properly determined that a type of product for human use is not a "medicine" under §326(1), there is no basis for assuming that a comparable product for animal use should be considered a "medicine".

into effect. Unless an administrative officer or department is permitted to make reasonable rules and regulations, it would be impossible in many instances to apply and enforce the legislative enactments, and the good to be accomplished would be entirely lost

....

We have recognized that the interpretation placed by the State Comptroller upon the Retail Sales Tax Act is entitled to great weight as an administrative interpretation acquiesced in by the Legislature.” *Comptroller v. Rockhill, Inc.*, 205 Md. 226, 232-33 (1954).

Cf. Comptroller v. American Cyanamid Co., 240 Md. 491, 504-05 (1965).⁵

Because prescription pet food and powders and sprays for flea and tick infestation are not within the purview of Article 81, §326(l), the sale of such products to or by a veterinarian is taxable unless another exemption applies.

B. *Exemption for Food*

Under Article 81, §326(c), certain “[s]ales of food for human consumption” are exempt from the sales tax. The prescription food in question is not “for human consumption”; this exemption, therefore, is inapplicable.

C. *Exemption for Agricultural Items*

Under Article 81, §326(h), “[s]ales of the following items for agricultural purposes” are exempt:

⁵ We note that many other states with retail sales tax acts similar to that enacted in Maryland likewise do not exempt prescription dog and cat foods or flea and tick powders and sprays from retail sales tax. *See, e.g.*, Idaho Code §63.3622 (Supp. 1982) and Reg. 22-11B, Sales Tax Rep. (CCH) ¶33-585B (Feb. 1979); Ind. Code Ann. §6-2.5-5-19 (Burns Supp. 1982) and Sales and Use Tax Circular ST-40, Sales Tax Rep. (CCH) ¶35-927 (May 1, 1973); 1977 Ky. Rev. Stat. & R. Serv. 139.472 and 139.485 (Baldwin) and Regulation 103 KAR 26:090, Sales Tax Rep. (CCH) ¶38-333 (Jan. 8, 1975); Minn. Stat. Ann. §297A.25 (West Supp. 1982) and Regulation 600, Sales Tax Rep. (CCH) ¶45-395 (Jan. 1979); Va. Code §58-441.6(s) (Supp. 1982) and Regulation Section 1-111, Sales Tax. Rep. (CCH) ¶73-611 (Jan. 1979).

“Livestock, poultry, seeds, *feed for livestock and poultry*, bedding or litter for poultry and livestock production fertilizers, lime and land plaster, fungicides, herbicides and *insecticides*, baler twine and baler wire; and the products of the farm, dairy, grove or garden, except those products which are usually sold by nurseries and horticulturists, including, but not limited to, flowers, sod, decorative trees and shrubs.”

Thus, sales of prescription food for livestock and poultry and sales of flea and tick insecticides are exempt from the sales tax, whether or not the transactions involve veterinarians, but only if the sales are “for agricultural purposes”.

Under the familiar canon of statutory construction: “The cardinal rule . . . is to ascertain and carry out the real legislative intent. In determining that intent, the Court considers the language of an enactment in its natural and ordinary signification.” *Smelser v. Criterion Ins. Co.*, 293 Md. 384, 388-89 (1982).

The term “agriculture” has been defined as follows:

“The act or science of cultivating the ground, and raising and harvesting crops, often including also feeding, breeding, and management of livestock; tillage; husbandry; farming; in a broader sense, the science and art of the production of plants and animals useful to man, including to a variable extent the preparation of these products for man’s use and their disposal by marketing or otherwise. In this broad use it includes farming, horticulture, forestry, dairying, sugar making, etc.” *Webster’s New International Dictionary* 52 (2d ed. 1953).

Certainly, the maintenance of household pets does not come within this definition.

Because the General Assembly expressly limited the exemption set forth in §326(h) to items used “for agricultural purposes”, it implicitly made the same items taxable when sold for other than agricultural purposes—for example, when sold for the care of household pets. Where a statute expressly provides for certain exclusions, others should not be inserted. *Pennsylvania Nat’l Mut. Ins. Co. v. Gartelman*, 288 Md. 151, 156 (1980).

The only case interpreting Article 81, §326(h) supports our reading. The issue in this unreported case was whether the raising of dogs falls within the "agricultural purposes" exemption set forth in §326(h). *Clifford Hughes v. State of Maryland, Comptroller of the Treasury*, No. 2489 (Cir. Ct. for Caroline County, April 13, 1966). The Court noted that, in *Van Clief v. Comptroller*, 211 Md. 191, 194 (1956), the Maryland Court of Appeals had quoted with approval the definition of the term "livestock" in *Webster's New International Dictionary* at 1446: "Domestic animals used or raised on a farm, esp. those kept for profit". Citing supporting cases from other jurisdictions, the Circuit Court for Caroline County specifically held that "the exemption of livestock and food for livestock does not include dogs and food for dogs".⁶

Thus, items sold for household pets do not qualify for the exemption set forth in Article 81, §326(h).

D. Exemption for Professional Services

Article 81, §326(j) contains the following exemption:

"Professional, insurance or personal service transactions which involve sales as inconsequential elements for which no separate charges are made."

The Comptroller has construed services rendered by a veterinarian as being within the scope of §326(j). Thus, for example, if in the course of rendering professional services a veterinarian chooses to dispense special food items or flea and tick preparations *without separate charge*, the transaction between the veterinarian and the pet owner would be exempt from sales tax. In such a situation, however, the veterinarian would be required to have paid sales tax when he or she first purchased the products for this use. COMAR 03.06.01.02. (Persons selling those items to veterinarians would, in turn, be liable to the State for the sales tax. Article 81, §328.)

⁶ In contexts other than the Retail Sales Tax Act, the General Assembly similarly has differentiated between farm animals and household pets. For example, Ag §2-313(6) specifically distinguishes between medicine given to "a household pet" and medicine given to "farm animals, poultry, fowl or other animals". See also Ag §1-101(e) ("Livestock" means living or dead cattle, equines, goats, sheep or swine"); Ag §3-301(c) ("Livestock" means cattle, swine, sheep, or goats").

On the other hand, if a veterinarian sells these products *as part of a separate retail sale*, that transaction itself would be subject to taxation. In such an instance, the veterinarian may give the supplier a resale certificate, indicating an intention to resell the items, and thereby avoiding having to pay sales tax on his or her own purchases. Article 81, §333. The veterinarian then would be required to charge the customer sales tax on these items when later sold at retail.

III

Conclusion

In summary, it is our opinion that diet items and insecticide powders and sprays for dogs and cats sold by a veterinarian to a pet owner, or sold to a veterinarian for his or her own use in treating pets, are not exempt from the sales tax.

STEPHEN H. SACHS, *Attorney General*

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Opinions and Advice

TAXATION—INCOME TAX—REGULATED INVESTMENT COMPANIES (MUTUAL FUNDS)—EXEMPT INTEREST DIVIDENDS—INTERGOVERNMENTAL IMMUNITY—DISTRIBUTIONS FROM MUTUAL FUNDS ARE SUBJECT TO STATE INCOME TAX EVEN THOUGH DERIVED FROM FUNDS' INVESTMENTS IN FEDERAL OBLIGATIONS.

December 21, 1983

Mr. George H. Spriggs, Jr.
Director, Income Tax Division
Comptroller of the Treasury

You have requested our opinion on the proper treatment, for Maryland income tax purposes, of distributions from regulated investment companies (mutual funds) that invest in United States obligations.

As a rule, interest earned on obligations of the United States is, by federal law, exempt from State income tax. 31 U.S.C. §3124. Thus, when such interest is received directly by a taxpayer who owns the obligations themselves, that interest may be subtracted from the taxpayer's federal adjusted gross income for purposes of determining his or her Maryland taxable income. *See* Article 81, §280(c)(1) of the Maryland Code. Because one's federal adjusted gross income is the basis for determining one's Maryland taxable income, this interest income on federal obligations is exempt from Maryland income tax. *See* Article 81, §280(a).

Your question is whether the same exemption from State income tax applies when the taxpayer does not directly own or receive interest from the federal obligations, but instead owns shares of and receives distribution from a mutual fund that itself owns the obligations, receives the interest, and then distributes that interest to the taxpayer.

For the reasons given below, it is our opinion that such a distribution from a mutual fund is taxable in Maryland when received, even if the source of that distribution is interest from federal obligations owned by the mutual fund.

I

Article 81, §280

Article 81, §280(a) establishes the general rule that taxable net income, for Maryland tax purposes, is the "taxpayer's federal adjusted gross income as defined in the laws of the United States, . . . with the modifications and less the deductions and personal exemptions provided in this subtitle".

Interest or dividends on United States obligations are normally included in federal adjusted gross income. *See* 26 CFR §1.103-4(b) (1982) (Internal Revenue).¹ Therefore, such interest would be normally included in the taxpayer's Maryland taxable net income. However, Article 81, §280(c)(1) authorizes the subtraction of "[i]nterest or dividends on obligations of the United States and its territories and possessions or of any authority, commission or instrumentality of the United States and any other income to the extent includable in gross income for federal income tax purposes, but exempt from State income taxes under the laws of the United States".

Thus, §280(c)(1) sets forth two categories of income that may be subtracted from a taxpayer's federal adjusted gross income in determining Maryland taxable net income: (i) interest on United States obligations "to the extent . . . exempt from State income taxes under the laws of the United States", as well as (ii) "any other income to the extent . . . exempt from State income taxes under the laws of the United States". These exemptions from State income tax may be broadly characterized as the constitutional exemptions available to certain types of income under the doctrine of intergovernmental immunity.

¹ Interest on certain United States obligations, issued before March 1, 1941, is exempt from federal income tax pursuant to terms of the issue. 26 CFR §1.103-4(a).

II

The Doctrine of Intergovernmental Immunity

The doctrine of intergovernmental immunity was first enunciated in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), and is presently codified at 31 U.S.C. §3124. Essentially, 31 U.S.C. §3124(a) provides: "Stocks and obligations of the United States Government are exempt from taxation by a State or political subdivision of a State."²

According to established precedent, this exemption from State tax is available only when the owner of the security directly receives interest from that federal obligation—not when the income from the obligation first is received by one entity or individual, then is paid over to another. Compare *Cleveland Trust Co. v. Lander*, 184 U.S. 111 (1902), and *Des Moines National Bank v. Fairweather*, 263 U.S. 103 (1923) (state tax on shareholder's distribution not equivalent to tax on property of corporation; therefore, shareholder not entitled to deduction based on bank's investment in United States obligations) with *Society for Savings in the City of Cleveland, Ohio v. Bowers*, 349 U.S. 143 (1955) (prohibiting indirect state taxation of bank property that included federal obligations; but recognizing exception for taxation of bank shareholder's "separate property interest from the corporation's ownership of its assets").

This principle of separation between taxable entities and the individuals owning interests in such entities is undisputed, unless "pass-through" treatment of a given type of income is specifically authorized. See *National Carbide Corp. v. Commissioner of Internal Revenue*, 336 U.S. 422 (1949); *Van Allen v. The Assessors*, 70 U.S. 229, 234 (1866). See also *Putnam's Estate v. Commissioner of Internal Revenue*, 324 U.S. 393, 399 (1945); 7 Mertens, *Laws of Federal Income Taxation*, §§38.04 and 38.05 (rev. 1976).³ The distinction between a taxable entity

² The exemption was enacted to "prevent taxes which diminish in the slightest degree the market value or the investment attractiveness of obligations issued by the United States in an effort to secure necessary credit". *Smith v. Davis*, 323 U.S. 111, 117 (1944).

³ See, e.g., 26 U.S.C. §652(b) (trusts distributing current income); §662(b) (estates and trusts accumulating income or distributing corpus); §702(b) (partnerships).

and individuals owning interests in and receiving distributions from that entity has been applied notwithstanding the doctrine of intergovernmental immunity. *See, e.g., Bess Schoellkopf*, 32 B.T.A. 88 (1935), *appeal dismissed*, August 25, 1936. Here, the court denied an exemption from federal income tax for certificates of indebtedness issued by a trust—even though the certificates were backed by state and local obligations, the income from which was normally tax exempt.

In light of this separation principle, the exemption from State income tax—available to the entity or individual actually owning the federal obligation—is not “passed through” to a taxpayer who receives a distribution from the entity that actually owns the obligation, absent express authorization. The taxpayer neither owns a United States obligation nor receives interest directly from such obligation, but instead owns shares in a mutual fund (a separate taxable entity) and receives distributions from that fund.

The federal law that regulates the taxation of mutual funds and fund distributions substantiates this distinction. Under the taxation scheme applicable to regulated investment companies, 26 U.S.C. §851, *et seq.*, if a mutual fund meets applicable criteria, it is not subject to a corporate income tax. Distributions generally retain their character as capital gains in the hands of the recipient shareholders. However, these distributions only retain their character as a particular type of income, such as capital gains, because of *express* authorization in the Internal Revenue Code. *See* 26 U.S.C. §§852(b)(3) and (5) (capital gains; exempt-interest dividends). *See generally* Comment, *Federal and State Taxation of Municipal Bond Mutual Funds*, 37 Md. L. Rev. 619, 623 (1978).

We recognize that this analysis can seem anomalous at first glance: it imposes the tax on the shareholder receiving distributions funded by interest from federal obligations because of the separate tax status of a mutual fund that, in the normal course of events, does not itself pay any tax at all. As noted above, however, the federal tax provisions governing mutual funds are specifically designed to treat such funds as separate entities. This same separation was formerly the basis for imposing both federal and state income tax on distributions from mutual funds that were funded by income from state and local obligations, even though income directly received from such obligations was normally tax exempt.

For example, interest income from state and local obligations is, when directly received, tax exempt. 26 U.S.C. §103(a).⁴ Prior to the 1976 Tax Reform Act, however, this tax exemption was not recognized, for either federal or state purposes, when the state obligation or bond was owned by a mutual fund that then paid the income from the bond to fund shareholders as a dividend. *See* Comment, 37 Md. L. Rev. at 629. This was true whether or not the underlying obligation was a Maryland obligation normally exempt from tax. In 1976, 26 U.S.C. §852 was amended. As amended, §852(b)(5) provided, for the first time, a form of pass-through treatment for income from state and local obligations that is received by a mutual fund and, in turn, distributed dividends to its shareholders. If certain qualifications were met, the dividend (termed an "exempt interest dividend") would be exempt for federal tax purposes as if the shareholders had owned the underlying obligations directly.

The Comptroller's response to this amendment (Income Tax Division, Memorandum Release No. 17 (February 17, 1977)) quite properly interpreted Maryland law, as affected by the 1976 federal amendment: (i) through Article 81, §280(a)(1), the additional modification to federal adjusted gross income, to tax those "exempt interest dividends" that were distributed to non-Maryland obligations; and (ii) to exempt from tax those "exempt interest dividends" that were attributable to Maryland obligations. Thus, in effect, Maryland indirectly taxed both its own and other governmental obligations prior to the federal amendment, and exempted only its own obligations after the amendment. The 1976 federal amendment broke down the separate entity barrier that previously existed for this type of mutual fund dividend, and Maryland law followed suit.

The key point, however, is not that barriers or separate entity status no longer exist. It is, rather, that they do exist unless specifically removed by either federal or state law. Quite clearly, federal law now provides pass-through treatment when a mutual fund receives income from *state and local* obligations. It is equally clear, however, that no provision in federal law, in the Internal Revenue Code or elsewhere, provides any similar

⁴ 26 U.S.C. §103(a) now provides:

"Gross income does not include interest on—

(1) the obligations of a State, a Territory, or a possession of the United States, or any political subdivision of any of the foregoing, or of the District of Columbia; and
(2) qualified scholarship funding bonds."

pass-through treatment when a mutual fund receives income from *federal* obligations. It would therefore be highly incongruous to allow such pass-through treatment for federal obligations, especially when the same treatment and benefits were denied to state obligations by both federal and state tax laws until the 1976 amendment to the Internal Revenue Code.

III

State Law

The refusal to recognize an income characteristic for state taxation purposes when that character is not mandated by federal law has been judicially recognized. *See, e.g., Woodruff v. Tax Commissioner*, 440 A.2d 854 (Conn. 1981). Here, a taxpayer received distributions from a regulated investment company, but failed to pay the Connecticut capital gains and dividend tax on that amount. The Connecticut revenue authorities contended that he had received a "dividend", taxable under Connecticut law. The taxpayer, however, contended that he had received "interest", exempt from state tax by Connecticut law, because these distributions came from interest received by the mutual fund and then turned over to him. The Connecticut Supreme Court refused to allow the pass-through exemption, holding that the distributions were merely taxable dividends and did not retail the character they possessed when received by the mutual fund. The court noted that, prior to the 1976 Tax Reform Act, pass-through treatment was not available at the federal level for interest on state and local securities, but that the specific amendments of the 1976 Act allowed such pass-through treatment. *Woodruff*, 440 A.2d at 856. As federal law contains no comparable pass-through treatment for interest received on mutual fund investments—which, for federal purposes, is considered a dividend in the hands of the shareholder—the court found the distribution to be subject to the state capital gains and distribution tax.⁵

⁵ The Court observed, in passing:

"A review of the federal tax scheme shows that the shareholders are not always taxed on distributions from the regulated investment company as though the distributions were received directly from the source from which the company derives them." *Woodruff*, 440 A.2d at 856.

Finally, no different result is mandated by the recent case of *Memphis Bank and Trust Company v. Garner*, 459 U.S. 392 [103 S.Ct 692] (1983). Here, the Supreme Court held invalid a Tennessee tax on bank earnings that excluded interest income from Tennessee securities but included interest income from federal securities. The Court viewed the disparate treatment of state and federal securities as discriminatory, and it held that such disparate treatment violated the doctrine of inter-governmental immunity as embodied in then 31 U.S.C. §742 (now 31 U.S.C. §3124).

In Maryland, also, an apparent disparity exists in the treatment—for State income purposes—of interest from State obligations as distinct from federal obligations, when that interest is first paid to a mutual fund. However, the discrepancy is the direct result of distinctions drawn by federal law. It is by federal law that income derived from interest on Maryland obligations owned by a mutual fund receives “pass-through” treatment and, as a result, is exempt from State taxation when received by a taxpayer from the mutual fund. *See* 26 U.S.C. §103(a); Article 81, §280(c)(1); Income tax Division, Memorandum Release No. 17 (February 17, 1977). By contrast, interest on federal obligations does not receive pass-through treatment under federal law. 26 C.F.R. §1.103-4(b).⁶ As noted above, however, this disparity arises solely from federal law—and did not even exist until federal law granted a tax exemption for state obligations, through explicit adoption of “pass-through” treatment under 26 U.S.C. §852(b)(5).

IV

Conclusion

In summary, it is our opinion that a Maryland taxpayer may subtract from his or her federal adjusted gross income the in-

⁶ 31 U.S.C. §3124(b) provides, in pertinent part: “The tax status of interest on obligations and dividends, earnings, or other income from evidences of ownership by the Government . . . is decided under the Internal Revenue Code of 1954 (26 U.S.C. 1 et seq.).” As indicated in note 4 above, 26 U.S.C. §103(a) specifically excludes from gross income interest on obligations of a State or its political subdivisions—but does not expressly exclude interest on federal obligations.

terest income received from federal securities that he or she owns, in accordance with 31 U.S.C. §3124 and Article 81, §280(c)(1) of the Maryland Code. To this extent, such interest income is exempt from Maryland income tax.

However, income that a taxpayer receives by virtue of distributions from a mutual fund that has invested in tax-exempt United States obligations is *not* similarly exempt from State income tax. This treatment results directly from (i) the federal treatment of the mutual fund as a separate taxpayer, and (ii) federal classification of the mutual fund's distributions as dividends, for which no specific pass-through treatment is authorized.

STEPHEN H. SACHS, *Attorney General*

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Opinions and Advice

VEHICLE LAWS

DRIVER'S LICENSES—NAMES—MARRIED WOMAN MAY
READOPT FORMER SURNAME EVEN ABSENT COURT
ORDER.

January 20, 1983

Mr. William T. S. Bricker
Motor Vehicle Administrator

You have requested our opinion on whether and under what circumstances a married woman may be issued a driver's license in her former surname if, when she married, she had assumed her husband's surname and, since her marriage, has not obtained a court order to readopt her former name.¹

In our opinion, the Motor Vehicle Administration should permit a married woman to obtain a driver's license in her former name, notwithstanding her prior use of her married name and even absent legal process to change her name, if she can show that the use of her former name is intended to be a consistent one and if the Administration has no reason to believe that the purpose of the change is a fraudulent one.²

I

Background

Section 11-137 of the Maryland Vehicle Law defines "name" as follows:

"(1) True or legal name; and

¹ We use the phrase "former name" to mean the woman's birthgiven surname or another surname used by her as a result of a prior marriage or court order.

² We advised you of this conclusion in a letter from Avery Aisenstark, Chief Counsel for Opinions and Advice, dated July 19, 1982. We understand that the Administration has changed its policy in accordance with that letter. This Opinion explains the reasons underlying our conclusion.

(2) In the case of an individual, the name given at birth to the individual by his parents or as changed by marriage or by court order; and

(3) In the case of an individual divorced a vinculo matrimonii, the individual may elect to use any legal or true name previously used by the individual if this name is used consistently and nonfraudulently." Transportation Article, §11-137.³

For some time, the Administration interpreted this definition to allow a married woman to obtain a driver's license in either her husband's surname or her former name. However, once a woman obtained a license using her husband's name, she was precluded by this policy from reassuming her former name without court order. *See, e.g., Application of Mary Emily Stuart*, (Motor Vehicle Administration, October 10, 1972).

In 1974, an Opinion of this Office held that the Administration's policy was lawful. 59 *Opinions of the Attorney General* 521 (1974). That Opinion apparently read into the statute a restriction on a married woman's right to reassert her former name, and it held that such a restriction was consistent with the case law concerning name changes. Because we believe that its analysis was incorrect, we decline to follow that Opinion.

II

Change of Name at Common Law

The Court of Appeals has summarized the general rule governing an individual's use of a name as follows: "We have heretofore unequivocally recognized the common law right of any person, absent a statute to the contrary, to 'adopt any name by which he may become known, and by which he may transact business and execute contracts and sue or be sued.'"

³ The language now in items (1) and (2) of this section was enacted in 1970. Chapter 534, Laws of Maryland 1970 (codified as former Article 66-1/2, §1-151 of the Maryland Code). Item (3) was added to the definition in 1978. Chapter 511, Laws of Maryland 1978. *See* note 6 below.

Stuart v. Board of Supervisors of Elections, 266 Md. 440, 446 (1972) (quoting *Romans v. State*, 178 Md. 588, 597 (1940)).

In *Stuart*, the Court held that a married woman had the right to be entered on the voter registry under her birthgiven name, provided that she used that name "consistently and non-fraudulently". 266 Md. at 449. A statute requiring notice to the Election Board of a woman's "change of name by marriage" did not *require* use of the husband's surname, as the Board claimed; the statute could not fairly be read to produce "such an effect in derogation of the common law". *Id.*

Indeed, statutes directly addressing name changes do not ordinarily supplant the common law.⁴ Rather, they typically "are in furtherance of and confer an official sanction upon a common law prerogative". *Klein v. Klein*, 36 Md. App. 177, 181 (1977).

III

Change of Name under the Maryland Vehicle Law

In our view, the definition of "name" in the Maryland Vehicle Law should be read in light of the common law right and the evident judicial reluctance to find "a statute to the contrary" of that right. Nothing in §11-137 restricts a married woman's common law right to revert to her former name after she had adopted her husband's surname.⁵

⁴ Article 16, §32 of the Maryland Code provides as follows:

"When the court grants a decree of final divorce, the court, on the request of a party who assumed a new name on marriage and desires to discontinue using it, and in the absence of an illegal, fraudulent, or immoral intent by the party, shall state in the decree of divorce either the birth given name or other previous name that the person desires to use."

See also Article 16, §123 (jurisdiction of chancery over name changes).

⁵ We do not here address the interplay of the common law with §11-137 in other situations in which someone seeks to change the name on his or her license. See generally *Forbush v. Wallace*, 341 F.Supp. 217, 221-22 (M.D. Ala. 1971), *aff'd mem.*, 405 U.S. 970 (1972) ("[T]he state has a significant interest in maintaining close watch over its licensees. The confusion which would result if each driver were allowed to obtain licenses in any number of names he desired is obvious.").

As applied to a married woman, §11-137(1) and (2) requires that the name on the license be "true or legal . . . and" one of the following: the name as given at birth, as changed by marriage, or as changed by court order. The statute does not expressly provide—or even clearly imply—that, once having obtained a license in one of these names, a woman may not later reapply for a license in another of them. Without a statutory basis, such a restriction would improperly abridge the woman's common law right.⁶

IV

Conclusion

In summary, it is our opinion that 59 *Opinions of the Attorney General* 521 (1974) was wrong. The Maryland Vehicle Law permits a married woman who has adopted her husband's surname to later obtain a license in a former name if she shows that the name falls within one of the three categories of §11-137(2) and is to be used consistently. The latter requirement can be met through financial records, voter registration records, other forms of identification, an affidavit by the applicant, or other evidence of use of her former name in her social and business community.⁷ If this showing is made, and if the Administration has no reason to believe that the purpose of

⁶ Perhaps such a restriction might be inferred by comparing §11-137(2) with §11-137(3). That is, the explicit right of a divorced person in §11-137(3) to assume a prior name may be thought to imply that other individuals do not have that right. However, we believe that §11-137(3) was enacted simply to clarify the status of divorced people. Chapter 511, Laws of Maryland 1978. The bill that added §11-137(3) did not address, and in our view does not diminish, the alternatives available to a married woman under §11-137(2). Indeed, §11-137(3) may only have been intended as a response to the 1974 Opinion referred to in Part I above—which we now overrule—and to the practice that the Opinion endorsed.

⁷ These examples are intended to be illustrative only. An applicant certainly need not submit *all* of these forms of evidence. Conversely, an applicant should not be precluded from submitting other relevant forms of evidence.

the change is a fraudulent one, a license in the former name should be issued.

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VEHICLE LAWS—ALCOHOL-RELATED OFFENSES—CONSTITUTIONAL LAW—DUE PROCESS—PROPOSED PRETRIAL ADMINISTRATIVE SUSPENSION OF DRIVER'S LICENSE FOR REFUSAL TO TAKE ALCOHOL TEST OR, UPON TAKING TEST, BEING FOUND TO BE INTOXICATED, NOT UNCONSTITUTIONAL.

March 10, 1983

The Honorable Elijah E. Cummings
The Honorable Robert G. Kramer
Maryland House of Delegates

You have each inquired as to the constitutionality and legal sufficiency of House Bill 1333 and Senate Bill 508.¹ Both bills provide for the administrative suspension of an individual's driver's license, if the driver either refuses to take a chemical test for alcohol, or takes the test and is found to be intoxicated. However, the two bills differ in at least one respect: Senate Bill 508 would cause the suspension to become effective before the driver has an opportunity for a hearing, while House Bill 1333 would require issuance of a temporary permit pending a hearing.

Specifically, you ask whether either proposed bill deprives the individual of property without due process of law.

For the reasons set forth below, it is our view that both Senate Bill 508 and House Bill 1333 generally meet due process requirements. However, particular aspects of both bills raise questions that we urge be addressed by the General Assembly.

I

Background

A. *Senate Bill 508*

Senate Bill 508 would amend §16-205.1 of the Transportation Article ("Tr" Article) to authorize the Motor Vehicle Administration ("MVA") to issue a notice of license suspension upon

¹ As introduced, Senate Bill 508 is identical to House Bill 880.

receipt of a police officer's sworn statement that a driver (i) refused to submit to a chemical test for alcohol, or (ii) was determined, by test, to be intoxicated. The bill specifies the length of suspension, based on the driver's prior record, and also requires additional information to be given about the reason for, effective date of, and term of the suspension, as well as the availability of a hearing.

If requested, a hearing would be held within 30 days.² At that time, the driver would be entitled to present evidence. The driver would have the right to appeal, if the suspension is continued without modification. At the hearing, the MVA would be authorized to alter or modify the initial suspension. For example, it could issue a restricted license, terminate the suspension upon a finding of not guilty, or give credit for time that the license has been suspended.

B. House Bill 1333

House Bill 1333 would amend Tr §16-205.1 to increase the length of time that a driver's license may be suspended. The bill would also authorize a police officer to take the individual's license and return it to the MVA, if, after being informed of the penalties for refusal, the individual refuses to submit to the chemical test, or evidences a blood alcohol content of equal to or greater than 0.13 percent.

The police officer would be required to advise the individual of his or her right to request a hearing within 15 days. The surrendered license would then be sent to the MVA by the officer within 48 hours, along with a sworn report of the incident.

The detained individual in turn would receive a temporary permit from the police officer. This permit would authorize the person to drive for 30 days or pending the outcome of the hearing.³

² Failure to request or to appear at a requested hearing would result in automatic suspension for the length of time specified in the notice.

³ As in Senate Bill 508, failure to request or to attend a requested hearing would result in automatic suspension of the license.

At the hearing, the individual would be allowed to proffer evidence. Nonetheless, if the MVA found that the person either failed to take the chemical test or had a blood alcohol content level of equal to or greater than 0.13 percent, the Administration would be required to suspend the license until final disposition of the charge of driving while intoxicated.⁴ If the MVA imposed a suspension after a hearing, the individual would have the right to appeal.

II

The Due Process Clause

The Supreme Court, in *Matthews v. Eldridge*, 424 U.S. 319 (1976), articulated the following balancing test for determining what procedural safeguards are necessary to protect against erroneous deprivations of liberty or property interests:

“First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” 424 U.S. at 335.

The Court has consistently recognized that suspension or revocation of a driver’s license by the State involves a property interest protected by the Due Process Clause of the Fourteenth Amendment. *Mackey v. Montrym*, 443 U.S. 1, 11 (1979); *Dixon v. Love*, 431 U.S. 105, 113 (1977); *Bell v. Burson*, 402 U.S. 535, 539 (1971). The question, then, is the nature of the procedural safeguards required to protect this property interest.

⁴ In limited circumstances—entirely unrelated to submission to the tests or the presence or absence of alcohol in the driver’s bloodstream—the MVA may modify the suspension.

In *Mackey v. Montrym*, 443 U.S. 1 (1979), the Court assessed the constitutionality of a Massachusetts implied consent law against a due process challenge. The Massachusetts statute authorized the Registrar of Motor Vehicles to summarily suspend a driver's license, upon receipt of a sworn, corroborated police report that the individual detained for driving while intoxicated had refused to submit to a chemical or breath-analysis test. However, unlike Senate Bill 508, the Massachusetts statute provided for an *immediate* postsuspension hearing, available from the moment that the driver surrendered his or her license. 443 U.S. at 8 n.5

Applying the factors set forth in *Eldridge*, the Court first identified the private interest affected by the state suspension as "the driver's interest . . . in continued possession and use of his license pending the outcome of the hearing due him." *Mackey*, 443 U.S. at 11. In view of the relative brevity of the suspension—90 days—and the availability of an immediate postsuspension hearing, the Court concluded that the nature of the private interest involved, although substantial, did not warrant an evidentiary hearing prior to adverse administrative action. 443 U.S. at 12. *See also* *Dixon v. Love*, 431 U.S. 105, 113 (1977).⁵

The Court then considered the likelihood or risk of an erroneous license suspension as a consequence of the procedure used. Again remarking on the availability of the prompt, postsuspension review, the Court approved "pre-deprivation procedures . . . designed to provide a reasonably reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be"—i.e., the corroborated, independently reviewed affidavit of a trained, experienced police officer that detailed both the probable cause for arrest and the refusal to submit to a chemical test. *Mackey*, 443 U.S. at 13, 14. Noting the relative infrequency of factual disputes over cause for arrest, the Court concluded that the risk of error inherent in the state's reliance upon the police report did not justify requiring a presuspension adjudicatory hearing. *See also* *Dixon*, 431 U.S. at 113-14.

⁵ We note that Senate Bill 508 and House Bill 1333 each contains provisions for the modification of a suspension or the issuance of a restrictive license in instances of hardship, as did the Illinois statute upheld in *Dixon*. *See also* *Mackey*, 443 U.S. at 12.

The third factor of the *Eldridge* test requires an identification of the governmental function involved and the state's interest served by the summary suspension procedure, as compared to the costs resulting from the alternative procedure sought. *Mackey*, 443 U.S. at 17. Here, the Court strongly affirmed the state's interest in preserving the safety of its highways. See also *Dixon*, 431 U.S. at 114. The Massachusetts statute, enacted pursuant to the state's police function, not only served as a deterrent to drunk driving, but also furthered the state's interest in "obtaining reliable and relevant evidence for use in subsequent criminal proceedings". *Mackey*, 443 U.S. at 18. Finally, the law effectively resulted in prompt removal of hazardous drivers from the road. The Court stated:

"The summary and automatic character of the suspension sanction available under the statute is critical to attainment of [the state's] objectives. A pre-suspension hearing would substantially undermine the state interest in public safety by giving drivers significant incentive to refuse the breath-analysis test and demand a presuspension hearing as a dilatory tactic. Moreover, the incentive to delay arising from the availability of a presuspension hearing would generate a sharp increase in the number of hearings sought and therefore impose a substantial fiscal and administrative burden on the [state]." 443 at 18. See also *Dixon*, 431 U.S. at 114.

In light of the state's compelling interest in highway safety, and the availability of a prompt, postsuspension hearing, the Supreme Court in *Mackey* upheld the constitutionality of the Massachusetts statute requiring summary suspension of the license of a driver who refuses to submit to a chemical test for alcohol.⁶

Moreover, several state court decisions have also sustained similar laws against constitutional challenge. For example, a California statute that provides for summary suspension of a driver's license 10 days after receipt of a police report detailing the refusal of a driver to submit to a chemical test when lawfully arrested for drunk driving has been sustained against

⁶ We here note that the proposed Maryland legislation does not contain many of the flaws pinpointed by Justice Stewart in his dissent.

broad constitutional attack. See *Mackler v. Alexis*, 181 Cal. Rptr. 613 (Ct. App. 1982); *Hernandez v. Department of Motor Vehicles*, 177 Cal. Rptr. 566 (Cal. 1981); *Burkhart v. Department of Motor Vehicles*, 177 Cal. Rptr. 175 (Ct. App. 1981).

In *Hernandez*, the California Supreme Court conclusively rejected an individual's claim that, given the importance of the right to drive, the legislature should have achieved its purpose by less drastic means than a six-month license suspension. Referring to *Mackey* as well as past California cases, the court emphasized the legislature's broad police authority to regulate with respect to highway safety hazards:

" 'Any appropriate means adopted by the state to insure competence and care on the part of its licensees and to protect others using the highway is consonant with due process.' " 177 Cal. Rptr. at 570 (quoting from *Escobedo v. Department of Motor Vehicles*, 222 P.2d 1 (Cal. 1950)).

In affirming the California statutory scheme, the court categorized as "specious" the petitioner's argument that the loss or regulation of a driver's license implicated interests important enough to trigger strict judicial scrutiny, rather than the "reasonable relation" standard that ordinarily applies to exercise of a state's police power. 177 Cal. Rptr. at 572, 573.

This reasoning is reflected in the decisions of other state courts. See, e.g., *Jones v. Schaffner*, 509 S.W.2d 72 (Miss. 1974) (revocation of driver's license because of refusal to take breath-analyzer test, availability of postsuspension hearing subject to judicial review comports with due process of law); *Daneault v. Clarke*, 309 A.2d 884 (N.H. 1973) (notice of suspension upon receipt of police report, hearing available within 10 days of request); *Robertson v. State ex rel. Lester*, 501 P.2d 1099 (Okla. 1972) (revocation upon sworn report of refusal to submit to blood alcohol test complies with due process).

The decision of the Rhode Island Supreme Court in *Dana v. Petit*, 386 A.2d 189 (R.I. 1978) is of particular pertinence to the constitutionality of House Bill 1333. In Rhode Island, when a driver refuses to submit to a breath-analyzer test, an administrative regulation provides for summary revocation of the license, unless the driver requests a hearing and surrenders the permanent license to the Division of Motor Vehicles in exchange for a temporary permit. The court found that the reg-

ulation did not violate petitioner's due process rights, because the individual at no time forfeits the ability to drive, pending resolution of the hearing. The court pointed out:

"The use of this license exchange procedure serves the rational state objective of attempting to avoid problems inherent in recovering licenses of those operators against whom an adverse decision has been rendered by the division." 386 A.2d at 192.

In summary, based on Supreme Court decisions and state legislative and judicial precedent, we conclude that the mandatory license suspension provisions of Senate Bill 508 and House Bill 1333 do not clearly deprive an individual of property without due process of law.⁷

III

Problems in the Legislation

A. *Senate Bill 508*

As we have noted, Senate Bill 508 would authorize the MVA to issue a notice of license suspension to a driver who, according to a sworn police report, either refused to take a chemical test or exhibited blood alcohol content of equal to or greater than 0.13 percent. If the driver requested a hearing within 15 days from receipt of the notice of suspension, the Administration would set the date within 30 days of the request.

In light of the Supreme Court's emphasis in *Mackey* upon the availability of an *immediate* postsuspension hearing [443 U.S. at 7, 12, 15, 18], a review process that may not take place for as long as a month after the driver's request runs some constitutional risk. We suggest that consideration be given to a shorter period within which the hearing would take place. See *Dixon*, 431 U.S. at 109-10 (postsuspension hearing available within 20 days after a written request).

⁷ We understand that comparable legislation has been enacted in several other states. See U.S. Department of Transportation National Highway Traffic Safety Administration, *Administrative Driver License Suspensions and Revocations Prior to Court Appearance* (August 9, 1982).

Also, Tr §16-205.1(g) in Senate Bill 508 would be amended to provide as follows:

“[(g)](H)(1) If the Administration imposes a suspension [after a hearing] IN ACCORDANCE WITH THIS SECTION AND, AFTER A HEARING REQUESTED BY THE INDIVIDUAL, THE ADMINISTRATION CONTINUES THE SUSPENSION WITHOUT MODIFICATION, the individual whose license or privilege to drive has been suspended may appeal the final order of suspension as provided in Title 12, Subtitle 2 of this article.”

This wording appears to preclude an individual whose license suspension is reduced in duration or otherwise modified from appealing the MVA order. Such a denial of appeal rights would raise serious constitutional questions.

B. *House Bill 1333*

As we have noted, House Bill 1333 avoids any due process issue involving deprivation of a property interest. An individual who refuses or fails the chemical test for alcohol must surrender his or her permanent driver's license to the officer in exchange for a temporary permit. Pending the outcome of an evidentiary hearing, the individual retains the privilege to drive.

However, House Bill 1333 contains an inconsistency that presents a due process problem of different nature. As drafted, Tr §16-205.1(g)(3) would allow an individual to present evidence at the hearing about his or her (i) refusal to submit to the chemical test, or (ii) blood alcohol content at the time of the test. Subsection (g)(4), on the other hand, *requires* the Administration to continue the suspension unabated if it finds that the person charged either refused to take the test or had a blood alcohol content equal to or greater than 0.13 percent.

Thus, the individual's opportunity to present evidence appears to be meaningless, for the proffer could have no substantive effect on the disposition of the hearing. Such an empty opportunity is inconsistent with procedural due process.

IV

Conclusion

In summary, we believe that both Senate Bill 508 and House Bill 1333 are generally compatible with the requirements of due process, although each has particular provisions that should be redrafted to avoid constitutional questions.

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Editor's Note: The preceding Opinion was originally written as a letter of advice. Neither S.B. 508 nor H.B. 1333 were enacted. Nonetheless, because of the importance of the issues raised by the bills, the letter has been published here in a slightly revised format.

VEHICLE LAWS—ALCOHOL-RELATED OFFENSES—ALCOHOL
TESTS—ADVICE ON CONSEQUENCES OF REFUSING TO
TAKE TEST—STANDARD FORM OF ADVICE (FORM DR-15)
COMPLIES WITH STATUTORY REQUIREMENTS.

April 14, 1983

The Honorable William R. Hymes
State's Attorney for Howard County

You have requested our opinion on the legal sufficiency, under the Maryland Vehicle Law, of the standard form of advice used by police officers to inform drivers about the consequences of refusing to submit to a chemical test for alcohol.¹

For the reasons given below, it is our opinion that the standard police advice in question—Form DR-15, "Advice of Rights and Administrative Penalties for Refusal to Submit to a Chemical Test"—complies with the applicable statutory requirements.

I

The Statute

Under §16-205.1(a) of the Transportation Article, a driver "is deemed to have consented . . . to take a chemical test to determine the alcohol content of his blood, if he should be detained on suspicion of driving or attempting to drive while intoxicated or while under the influence of alcohol".²

¹ Your letter states that this question is currently pending in a case before Judge Diane Schulte in the District Court. *State v. Becker*, Traffic Citations Nos. 8520484, 8520485. Although we would not ordinarily address a matter currently in litigation, you have advised us that Judge Schulte believes an Opinion of the Attorney General would, in this instance, be appropriate.

² The Maryland Vehicle Law prohibits both (i) driving while intoxicated and (ii) driving while under the influence of alcohol. §21-902(a) and (b) of the Transportation Article. Analysis showing the alcoholic content of the blood to be 0.13% or more is prima facie evidence of intoxication [§10-307(e) of the Courts Article]; an alcoholic content of 0.08% or more is prima facie evidence of being under the influence of alcohol [§10-307(d) of the Courts Article].

Despite this implied consent, §16-205.1 (b)(1) nevertheless permits a driver to refuse to take the test. This provision is as follows:

“Except as provided in subsection (c) of this section [, pertaining to accidents that result in the death of another person], a person may not be compelled to take a chemical test for alcohol. However, the detaining officer shall advise him that on receipt of a sworn statement from the officer that the driver was so charged and refused to take a chemical test for alcohol, the [Motor Vehicle] Administration shall . . . suspend his driver's license for a period of not less than 60 days nor more than 6 months”.

Section 16-205.1(b)(2), in turn, contains the following checklist of all of the detaining officer's duties—including the officer's duty under §16-205.1(b)(1) to warn a driver that the refusal to take the test will result in suspension of the driver's license:

“[T]he police officer shall:

- (i) Detain the individual;
- (ii) Request that the individual permit a chemical test to be taken of the individual's blood or breath to determine the alcoholic content of the individual's blood; [and]
- (iii) Advise the individual of the administrative penalties that shall be imposed for refusal to take the test[.]”³

A driver who refuses to take the test may appear at a hearing within 30 days to “show cause why the driver's license or privilege to drive should not be suspended”. §16-205.1(f)(1). “At the hearing, the driver may present evidence about the driver's refusal to take the test and may be represented by an attorney.” §16-205.1(f)(3). The statute continues:

³ If the driver refuses to take the test, the officer must also file a sworn report with the Motor Vehicle Administration. This report recites the reasonable grounds for the officer's belief that the driver was intoxicated or under the influence of alcohol and the fact of the driver's refusal to take the test “after being informed of the administrative penalties that shall be imposed for refusal”. §16-205.1(b)(2)(iv).

"(4) After the hearing, the [Motor Vehicle] Administration shall suspend the driver's license or privilege to drive for not less than 60 days nor more than 6 months if the Administration determines that the driver was charged . . . and refused to take a chemical test for alcohol . . .

(5) The Administration may modify this suspension or issue a restrictive license if:

(i) The licensee is required to drive a motor vehicle in the course of employment;

(ii) The license is required for the purpose of attending an alcoholic prevention or treatment program; or

(iii) It finds that the licensee has no alternative means of transportation available and without the license, the licensee's ability to earn a living would be severely impaired." §16-205.1(f)(4) and (5).

A suspension is reviewable on appeal to the Circuit Court. §§16-205.1(g) and 12-209.

II

Advice Form DR-15

We understand that the Maryland State Police and other law enforcement agencies use a standard form—Form DR-15, "Advice of Rights and Administrative Penalties for Refusal to Submit to a Chemical Test"—to inform a detained driver of the consequences of his or her refusal to submit to a chemical test. In pertinent part, Form DR-15 reads as follows:

"[Y]ou have the right to refuse to submit to any such tests, and on your refusal, no test shall be administered [Y]our refusal to submit to a chemical test shall result in the suspension of your driver's license and/or driving privilege for not less than 60 days nor more than 6 months."

Form DR-15 does not contain advice about the driver's right to a hearing and to appeal an adverse decision, nor does it

advise of the circumstances under which the Motor Vehicle Administration may modify a suspension or issue a restrictive license instead of ordering a complete suspension. The form also does not inform the driver that the fact of refusal is not admissible in a prosecution for driving while intoxicated or while under the influence of alcohol. See §10-309(a) of the Courts Article.⁴

III

Compliance with the Statute

A. *Statutory Text*

The sole issue presented is whether §16-205.1 requires a more detailed disclosure of the consequences of a refusal than appears on Form DR-15.⁵ Plainly, Form DR-15 does comport with the requirement set out in §16-205.1(b)(1):

⁴ The pertinent portion of §10-309(a) is as follows: "No inference or presumption concerning either guilt or innocence arises because of refusal to submit. The fact of refusal to submit is not admissible in evidence at the trial." This limitation on the evidentiary use of a refusal is a matter of statutory, but not constitutional, right. See note 5 below.

⁵ In *South Dakota v. Neville*, 459 U.S. 553 (1983), the United States Supreme Court held that a driver's refusal to take a chemical test could constitutionally be admitted as evidence of guilt in a criminal prosecution. The Court also rejected the argument that due process required the driver to be warned of this possibility before he or she refused the test:

"The officers explained that, if respondent chose to submit to the test, he had the right to know the results and could choose to take an additional test by a person chosen by him. The officers did not specifically warn respondent that the test results could be used against him in trial. Explaining the consequences of the other option, the officers specifically warned respondent that failure to take the test could lead to loss of driving privileges for one year. It is true that officers did not inform respondent of the further consequence that evidence of refusal could be used against him in court, but we think it unrealistic to say that the warnings given here implicitly assure a suspect that no consequences other than those mentioned will occur. Importantly, the

Continued on page 436.

"[T]he detaining officer shall advise [the driver] that on receipt of a sworn statement from the officer that the driver . . . refused to take a chemical test for alcohol, the Administration shall . . . suspend his driver's license for a period of not less than 60 days nor more than 6 months." (Emphasis added).

The DR-15 advice is nearly identical:

"[Y]our refusal to submit to a chemical test shall result in the suspension of your driver's license and/or driving privilege for not less than 60 days nor more than 6 months." (Emphasis added.)

Thus, the DR-15 advice is legally insufficient only if the scope of the required advice is enlarged by the provisions of §16-205.1(b)(2)(iii): "[T]he police officer shall . . . [a]dvice the individual of the administrative penalties that shall be imposed for refusal to take the test".

In our view, the most natural reading of the statute—and the reading intended by the General Assembly—is that both of the statutory provisions in question impose the same requirement on the police officer. That is, §16-205.1(b)(1) states the substance of the advice that the officer must impart: on a driver's refusal to take the test, "the Administration shall . . . suspend [the] driver's license". The following provision, §16-205.1(b)(2)(iii), simply uses a shortened phrase—"administrative penalties"—to refer to that mandatory suspension. Indeed, only by a forced and unnatural reading should the word

warning that he could lose his driver's license made it clear that refusing the test was not a 'safe harbor', free of adverse consequences." 459 U.S. at—[103 S.Ct. at 924].

If a police officer's failure to warn of the potential evidentiary use of a refusal in a criminal prosecution does not violate due process norms, we do not see how the omissions in question here could conceivably be of constitutional significance.

Thus, the issue here is solely one of statutory construction. If the disclosure requirements of §16-205.1 were not complied with prior to a driver's agreeing to submit to a test, then the test results are inadmissible in a prosecution for driving while intoxicated or under the influence of alcohol. §10-309(a) of the Courts Article. See *State v. Loscomb*, 291 Md. 424 (1981).

"penalties" be understood to refer to procedural rights, mitigating circumstances, or evidentiary exclusions.⁶

B. *Legislative History*

This reading is confirmed by the legislative history of the statute. The provisions of the Maryland Vehicle Law in question were originally enacted in 1969. Chapter 158, Laws of Maryland 1969. As then provided, the consequence of a driver's refusal to submit to a chemical test was as follows: "After a complete and thorough hearing, the Department [of Motor Vehicles] shall have the right to suspend the operator's license for a period not to exceed 60 days." Former Article 66½, §92A(d). The police officer's duty was to "[a]dvice the [detained driver] of the administrative penalties that may be imposed for such refusal". Former Article 66½, §92A(c)(3). The phrase "administrative penalties", although written in the plural, could only have referred to *one* thing—suspension—because the statute specified no other outcome.

In 1981, the General Assembly revised the law to its current scheme, mandating suspension but "allowing modification of the suspension under certain circumstances". Chapter 244, Laws of Maryland 1981. This enactment also added the specific requirement, as now found in §16-205.1(b)(1), that the detained driver be expressly advised that his or her license "shall [be] suspend[ed]" as a consequence of refusing to take the test. Yet this requirement, which specifies the officer's duty to provide

⁶ "A penalty is . . . [a] punishment imposed by statute as a consequence of the commission of an offense." *Black's Law Dictionary* 1020 (rev. 5th ed. 1979).

In this regard, it is noteworthy that, in §10-309 of the Courts Article, the evidentiary exclusion is treated in subsection (a), while subsection (b) refers to "the provisions of the vehicle laws regarding the consequences of refusal"—not "the *other* consequences of refusal". If the evidentiary exclusion is not one of the "consequences of refusal", it surely is not part of the "administrative penalties" either.

advice, contains no reference to possible modification of the suspension.⁷

At the same time, Chapter 244 retained, without change, the preexisting reference to "administrative penalties", as now found in §16-205.1(b)(2)(iii). We see no basis for concluding that the phrase "administrative penalties" was intended to refer to anything other than what it had always referred to—the suspension itself, not ancillary procedures or the newly added possibility of a modified suspension. Just as a requirement to advise about potential modification cannot be read into the newly enacted provision specifying the express advice to be provided, it cannot be read into a preexisting phrase that merely refers to that express advice as part of a cumulative checklist of the detaining officer's duties.

C. Case Law

Although no Maryland decision has addressed the level of detail called for by the disclosure requirement in §16-205.1, case law in other jurisdictions suggests that, when a statute requires advice about the adverse consequences of a refusal, only the basic penalty need be disclosed, not details about the full range of possible outcomes.

For example, a Pennsylvania statute requires a warning that driving privileges "will be suspended or revoked upon refusal to submit to a chemical test". This provision does *not* require advice about the exact length of time of the suspension. *Commonwealth Dep't of Transp. v. Sinwell*, 450 A.2d 235 (Pa. Commw. Ct. 1982). See also *Howard v. Cofer*, 258 S.E.2d 195 (Ga. Ct. App. 1979) (gist of statute sufficient); *Cruickshank v. Melton*, 440 N.Y.S.2d 759 (N.Y.App.Div. 1981) ("substantial compliance" with statutory warning requirement sufficient).

⁷ Indeed, even if the Administration "modifies a] suspension or issue[s] a restrictive license", the suspension mandated by §16-205.1(f)(4) remains at least partially effective in any event, because the Administration may not restore the privilege to drive for recreation or any other purpose not specified in §16-205.1(f)(5). Thus, the advice required by §16-205.1(b)(1) is entirely accurate.

But see People v. Castle, 310 N.W.2d 379 (Mich.Ct.App. 1981) (warning insufficient unless it includes recitation of material police regulations—e.g., that refusing driver cannot later decide to take test if more than one hour elapses).⁸

Perhaps the most instructive case is *State v. Ramsden*, 378 A.2d 1370 (N.H.1977). One section of New Hampshire's vehicle code, like Maryland's, warns that "refusal to permit the test will result in revocation of [the driver's] license" for 90 days. Another section directs police officers to inform a detained driver "of the consequences of his refusal to permit a test". The defendant argued that a warning was defective under the latter section because the officer failed to advise the driver that the state motor vehicle director had the authority to lift the suspension before 90 days elapsed.

The New Hampshire Supreme Court rejected this argument. It held that the driver had been properly advised of the "consequences of his refusal" when he was told that his license would automatically be revoked for 90 days on refusal:

"If the legislature had wanted an arrested person to be advised of all possible consequences, it could have so legislated. This it did not do but instead required only the advice of the outer penalty of refusal, *i.e.*, revocation." 378 A.2d at 1370.

We draw the same conclusion about the Maryland statute.

⁸ In California, refusal to take an alcohol test leads to license suspension, apparently with no possibility of subsequent modification. The California courts have split over whether a police officer's advice is defective if it indicates a possible outcome other than suspension. Compare *Thomson v. Department of Motor Vehicles*, 165 Cal. Rptr. 626 (Cal.Ct.App. 1980), and *Decker v. Department of Motor Vehicles*, 101 Cal. Rptr. 387 (Cal.Ct.App. 1972), with *Ormonde v. Department of Motor Vehicles*, 173 Cal. Rptr. 79 (Cal.Ct.App. 1981), and *Smith v. Department of Motor Vehicles*, 81 Cal. Rptr. 800 (Cal.Ct.App. 1969). But even those cases that found such advice to be legally defective are distinguishable, because the California cases dealt with alleged failures to warn accurately of the basic adverse consequences of refusal. No such problem is alleged with respect to Form DR-15.

IV

Conclusion

In summary, it is our opinion that Form DR-15—the standard form of advice used by police officers to inform drivers about the consequences of refusing to submit to a chemical test for alcohol—complies with §16-205.1 of the Maryland Vehicle Law.

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VEHICLE LAWS—ALCOHOL-RELATED OFFENSES—EVIDENCE
REQUIRED—PROOF OF UNSAFE VEHICLE OPERATION
NOT A NECESSARY ELEMENT OF DRIVING WHILE INTOX-
ICATED OR UNDER THE INFLUENCE OF ALCOHOL.

May 2, 1983

The Honorable Walter B. Dorsey
State's Attorney for St. Mary's County

You have requested our opinion on the scope of the evidence required to sustain a conviction for the offenses of driving while intoxicated or driving while under the influence of alcohol. Specifically, you ask whether the State, in order to obtain a conviction under the applicable provisions of the Maryland Vehicle Law, must establish that the driver was operating a vehicle unsafely and that such unsafe operation was caused by the driver's consumption of alcohol.¹

For the reasons given below, it is our opinion that proof of unsafe operation is not a necessary element of the offenses of driving while intoxicated or driving while under the influence of alcohol.

I

The Statute

The Maryland Vehicle Law, in §21-902 of the Transportation Article, specifies a number of offenses involving impaired driving. Section 21-902(a) provides that:

"A person may not drive or attempt to drive any vehicle while intoxicated."

Section 21-902(b), in turn, provides that:

"A person may not drive or attempt to drive any vehicle while under the influence of alcohol."

¹ You indicate that at least one District Court Judge has construed the statute to require that the State bear this burden of proof.

Finally, Section 21-902(c)(1) provides that:

“A person may not drive or attempt to drive any vehicle while he is so far under the influence of any drug, any combination of drugs, or a combination of one or more drugs and alcohol that he cannot drive a vehicle safely.”²

II

Analysis

As your inquiry notes, proof of unsafe operation is undoubtedly a necessary element of the State's case in a prosecution for a violation of §21-902(c)(1), driving under the influence of drugs or a combination of drugs and alcohol. In our view, however, the *presence* in §21-902(c)(1) of the restrictive clause “that he cannot drive a vehicle safely”, and the *absence* of that or a similar clause from §21-902(a) and (b), establish that the General Assembly did not intend to require proof of unsafe operation in a prosecution under §21-902(a) or (b).

As a matter of both grammar and statutory construction, the restrictive clause modifies *only* the immediately preceding provisions of §21-902(c)(1): “while he is so far under the influence of any drug, any combination of drugs, or a combination of one or more drugs and alcohol”. See *Sullivan v. Dixon*, 280 Md. 444, 451 (1977) (“the generally recognized rule of statutory construction [is] that a qualifying clause ordinarily is confined to the immediately preceding words or phrase”).³ Thus, proof “that [the driver] cannot drive a vehicle safely” is a statutorily required measurement of the degree of drug (or drug and alcohol) influence.

² The remaining provisions in §21-902 are not pertinent to the analysis of your question.

³ In *Sullivan v. Dixon*, the qualifying clause was held to modify only the last in a series of nouns *within the same sentence*. Surely the qualifying clause “that he cannot drive a vehicle safely” in §21-902(c)(1) cannot possibly modify language *in entirely different subsections*.

By contrast, neither §21-902(a) nor §21-902(b) contains that qualifying clause. Rather, the only specified measurements of intoxication and of driving under the influence of alcohol are those found in §10-307(d) and (e) of the Courts Article:

“(d) *Prima facie evidence of impairment.*—If at the time of testing there was in the person’s blood 0.08 percent or more by weight of alcohol, as determined by an analysis of the person’s blood or breath, it shall be *prima facie* evidence that the defendant was driving under the influence of alcohol.

(e) *Prima facie evidence of intoxication.*—If at the time of testing there was in the person’s blood 0.13 percent or more by weight of alcohol, as determined by an analysis of the person’s blood or breath, it shall be *prima facie* evidence that the defendant was intoxicated.”

In our view, having provided that intoxication and driving under the influence of alcohol may be measured by these forms of evidence, the General Assembly should not be understood to have imposed an unstated, additional evidentiary requirement such as proof of unsafe operation. To the contrary, under the principles of statutory construction reiterated by the Court of Appeals, the absence of the additional requirement from §21-902(a) and (b) implies its deliberate rejection. *See, e.g., American Security and Trust Co. v. New Amsterdam Casualty Co.*, 246 Md. 36, 41 (1967).

Here, the statutory language plainly conveys the elements—*all* of the elements—of each alcohol-related offense: (i) proof that the defendant drove or attempted to drive the vehicle; and (ii) proof that the defendant was, at the time, intoxicated [§21-902(a)] or under the influence of alcohol [§21-902(b)].⁴

⁴ Given the clarity of the statutory language, recourse to legislative history is unnecessary. In any event, the legislative history supports our construction of §21-902.

Formerly, then Article 66½, §206 declared it unlawful for “any person who is under the influence of intoxicating liquor or narcotic drugs to drive or attempt to drive any vehicle”. In 1969, this provision was amended to state two separate offenses: (a) driving while “in an intoxicated condition, or under the

Continued on page 444.

The different element of proof for the drug-related offense set out in §21-902(c)(1) presumably reflects a significant difference between alcohol and drugs. All forms of alcohol have similar, harmful effects on coordination and other driving skills, and these harmful effects can be accurately inferred from a blood alcohol test. Behavioral evidence, such as evidence of unsafe operation, is therefore unnecessary to the proof of the offenses under §21-902(a) or (b).⁵ By contrast, the wide variety of drugs and their widely varying effects mean that a scientific measure like blood alcohol testing is not feasible. Only behavioral evidence—proof that the driver “cannot drive a vehicle safely”—can establish the harmful effects of a given drug.

influence of narcotic drugs”; and (b) driving while one’s “driving ability is impaired by the consumption of alcohol”. Chapter 158, Laws of Maryland 1969.

In 1970, the General Assembly deleted the reference to “narcotic drugs” in subsection (a) of then Article 66½, §11-902. In its stead, the predecessor of current subsection (c)(1) was enacted: “It shall be unlawful for any person to drive . . . while he is under the influence of any narcotic drug or while under the influence of any other drug to a degree which renders him incapable of safely driving a vehicle.” Chapter 534, Laws of Maryland 1970. Thus, by 1970 the General Assembly had adopted essentially the current statutory scheme: two alcohol-related offenses, neither of which required proof of unsafe operation; and a drug-related offense, which (as to non-narcotic drugs) did not require proof of unsafe operation.

Although the lesser of the two alcohol-related offenses retained a vague reference to “driving ability”—“while [the defendant’s] driving ability is impaired by the consumption of alcohol”—even this reference was removed in 1981 when the General Assembly changed §21-902(b) to its current language: “A person may not drive . . . while under the influence of alcohol.”

⁵ We do not mean to imply that the results of a blood alcohol test are always needed to sustain a conviction under §21-902(a) or (b) or that evidence of a driver’s behavior is inadmissible in such a prosecution. *See generally Brooks v. State*, 41 Md. App. 123, 128 (1979) (Chemical evidence “is probative, but it is unnecessary for conviction. Other evidence, particularly the personal observations by a witness of the individual’s behavior may be sufficient.”)

III

Conclusion

In summary, it is our opinion that a showing of the unsafe operation of a motor vehicle is not a necessary element of proof in a prosecution under §21-902(a) or (b) of the Transportation Article of the Maryland Code.⁶

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⁶ Just as the State need not prove that the vehicle was driven unsafely to sustain a conviction under §21-902(a) or (b), it follows that the State need not prove any causative link between alcohol consumption and unsafe driving.

VEHICLE LAWS—ALCOHOL-RELATED OFFENSES—ALCOHOL
TESTS—FOUNDATION EVIDENCE—REVIEW OF CONTENT
AND FORM OF EVIDENCE REQUIRED AS FOUNDATION TO
INTRODUCTION OF TEST RESULTS.

June 1, 1983

The Honorable Walter B. Dorsey
State's Attorney for St. Mary's County

You have requested our opinion as to the evidence that the State must introduce as a foundation to its introduction of the results of a blood alcohol test in a prosecution. Specifically, you inquire whether the State has a legal duty to introduce the following evidence, even if the defendant has waived the right to the presence and testimony of the technician who administered the test:

(i) evidence that the test was administered by a qualified person;

(ii) evidence that the test equipment was approved by the requisite toxicologist;

(iii) evidence that the test was administered within two hours after the defendant was apprehended;

(iv) if a breathalyzer test was used, evidence that the chemical solution used in the test was approved by the toxicologist; and

(v) evidence that, prior to the test, the defendant was given the notice of constitutional rights set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966).¹

For the reasons given below, we have concluded as follows:

(1) The State must introduce, as a foundation to introduction of the results of a blood alcohol test, evidence that the test was administered by a person qualified to do so under the law. If the defendant has waived the right to require the testimony of the person who administered the test, these qualifications may be established by a written report of test results or otherwise by documentary evidence.

¹ You state that at least one District Court Judge has required all of this evidence to be introduced by the State prior to introduction of the blood alcohol test results, even in cases where the defendant had waived the right to the presence and testimony of the technician who administered the test.

(2) The State must introduce evidence that the test equipment was approved by the toxicologist on the staff of the Postmortem Examiners Commission. This approval may be established by a written statement from the toxicologist or otherwise by documentary evidence.

(3) The State must introduce evidence that the specimen of breath or blood used for the test was taken within two hours after the driver's apprehension. In some circumstances, this fact may be established by documentary evidence.

(4) The State must introduce evidence that the chemical solution used in a breath test was approved by the toxicologist. This approval may be established by a written statement from the toxicologist or otherwise by documentary evidence.

(5) The State need not introduce evidence that the driver was given a *Miranda* warning to the test.

I

Statutory Requirements

A. Courts Article

The evidentiary use of chemical tests for blood alcohol content is provided for in Subtitle 3 of Title 10 of the Courts and Judicial Proceedings Article ("CJ" Article) of the Maryland Code.

Under CJ §10-307(a), "the amount of alcohol in the person's breath or blood shown in chemical analysis as provided in this subtitle is admissible in evidence" and may give rise to certain presumptions about the effect of alcohol in the defendant. See CJ §10-307(b) through (e).

Under CJ §10-306(a), the State may introduce "an official copy of the results of a chemical test of breath or blood administered by a person authorized to administer the test . . . as substantive evidence without the presence or testimony of the technician who administered the test". To do so, however, the State must follow the procedure specified in CJ §10-306(b)—that is, at least 15 days prior to trial, it must (i) notify the defendant of its intention to offer a written report of test results and (ii) provide the defendant with a copy of the report.

The defendant then has the right, on timely notice, to insist on the technician's testimony. CJ §10-306(b). However, the defendant's "[f]ailure to give timely and proper notice constitutes a waiver of the defendant's right to the presence and testimony of the technician." *Id.*

Subtitle 3 also requires that certain safeguards be followed to assure the accuracy of the tests. First, CJ §10-303 imposes a time limit on the taking of the test sample:

"The specimen of breath or blood shall be taken within two hours after the person accused is apprehended."

Second, under CJ §10-304, the person administering the test must be qualified and the equipment used must be approved:

"(a)(1) In this section the following words have the meanings indicated.

(2) '*Qualified medical person*' means any person permitted by law to withdraw blood from humans.

(3) '*Qualified person*' means a person who has received training in the use of the equipment in a training program approved by the toxicologist under the Postmortem Examiners Commission and who is either a police officer, a police employee, or an employee of the office of the Chief Medical Examiner.

(b) The chemical test of breath shall be administered by a qualified person with equipment approved by the toxicologist under the Postmortem Examiners Commission at the direction of a police officer.^[2]

(c) The blood shall be obtained by a qualified medical person using equipment approved by the toxicologist under the Postmortem Examiners Commission acting at the request of a police officer. The

² Chapter 289, Laws of Maryland 1983, effective July 1, 1983, will amend CJ §10-304(b) to require, in addition, that: "The officer arresting the individual may not administer the chemical test of breath." This act also will amend CJ §10-305 to require that breath tests be administered to all detained drivers except in specified, limited circumstances.

chemical test of blood shall be conducted by a qualified person using equipment approved by the toxicologist under the Postmortem Examiners Commission in a laboratory approved by that toxicologist.

...

(e) For the purpose of establishing that the test was administered with equipment approved by the toxicologist under the Postmortem Examiners Commission, a statement signed by the toxicologist certifying that the equipment used in the test has been approved by him shall be prima facie evidence of the approval, and the statement is admissible in evidence without the necessity of the toxicologist personally appearing in court."

Finally, in a prosecution for driving while intoxicated or while under the influence of alcohol, CJ §10-309(a) requires that test results be excluded if they are obtained "contrary to" the statutory requirements. It provides, in relevant part:

"Except as provided in §16-205.1(c) of the Transportation Article, [pertaining to accidents that result in the death of another person,] a person may not be compelled to submit to a chemical analysis provided for in this subtitle. Evidence of chemical analysis is not admissible in a prosecution for a violation of §21-902 of the Transportation Article [i.e., a prosecution for driving while intoxicated or under the influence of alcohol,] if obtained contrary to its provisions."

B. Maryland Vehicle Law

Under §16-205.1 of the Transportation Article ("Tr" Article) of the Maryland Code, a police officer must follow certain procedures prior to having a chemical test administered to a driver who is detained on suspicion of driving or attempting to drive while intoxicated or under the influence of alcohol:

"(b)(1) Except as provided in subsection (c) of this section, [pertaining to accidents that result in the death of another person,] a person may not be com-

pelled to take a chemical test for alcohol. However, the detaining officer shall advise him that on receipt of a sworn statement from the officer that the driver was so charged and refused to take a chemical test for alcohol, the [Motor Vehicle] Administration shall . . . suspend his driver's license for a period of not less than 60 days nor more than 6 months

(2) . . . [T]he police officer shall:

(i) Detain the individual;

(ii) Request that the individual permit a chemical test to be taken of the individual's blood or breath to determine the alcoholic content of the individual's blood; [and]

(iii) Advise the individual of the administrative penalties that shall be imposed for refusal to take the test[.]”

As a general rule, then, a driver in Maryland has the right to refuse to take a chemical test for alcohol. That refusal will result in administrative penalties [Tr §16-205.1(f)(4)], but is not admissible in a prosecution for driving while intoxicated or while under the influence of alcohol [CJ §10-309(a)].

II

The State's Burden of Proof Concerning Foundation Evidence

At the outset, we note that restrictions on, or prerequisites to, the evidentiary use of blood test results are generally a matter of statutory requirement. The Constitution would not, for example, prevent the State from compelling every detained driver to submit to a chemical test and then introducing the results in evidence. *Schmerber v. California*, 384 U.S. 757 (1966); *State v. Moon*, 291 Md. 463, 473 (1981).³

³ We do not mean to suggest that constitutional violations could never occur. For example, the State's knowing use of inaccurate test equipment would undoubtedly be a violation of due process. But your inquiry does not require consideration of such extreme situations.

However, the current statute does impose a duty of compliance on the State. Only a "chemical analysis *as provided in this subtitle* is admissible in evidence". CJ §10-307(a). All of the provisions regarding test accuracy and required notice, set out in Part I above, use the mandatory term "shall". Most importantly, CJ §10-309(a) provides for the exclusion from evidence of test results obtained contrary to the specified requirements.⁴

Therefore, the results of a chemical test are not admissible if (i) the State fails to show that it complied substantially with the statutory requirements, *and* (ii) the defendant objects to the introduction of the test results. *See, e.g., State v. Griggy*, 440 N.E.2d 74, 76 (Ohio Mun. Ct. 1982) (results inadmissible if prosecution does not meet foundation requirements of statute, "unless the defendant fails to object"). *Cf. Ahsogaek v. State*, 652 P.2d 505 (Alaska App. 1982) (substantial compliance sufficient).

Foundation evidence is especially important to establish the accuracy of the test, for test results based on faulty equipment or procedures are of little value:

⁴ Prior to 1982, CJ §10-309(a) read, in pertinent part, as follows: "A person may not be compelled to submit to a chemical analysis provided for in this subtitle. Evidence of chemical analysis is not admissible if obtained contrary to its provisions."

In *State v. Loscomb*, 291 Md. 424 (1981), the Court of Appeals held that this exclusionary rule was applicable, in a prosecution for manslaughter by automobile and homicide by motor vehicle while intoxicated, "if there has been a failure to comply with the procedural requirements of §16-205.1(b) of the Maryland Vehicle Law". 291 Md. at 435. In so holding, the Court observed that "the legislative history of §10-302 through §10-309 and §16-205.1 shows that these sections are integrally interrelated". 291 Md. at 432.

At its next session, the General Assembly amended both Tr §16-205.1 and CJ §10-309 to assure that blood alcohol test results would be available in prosecutions for crimes involving the death of a person. Chapters 93 and 100, Laws of Maryland 1982. Tr §16-205.1(c) now requires the driver to submit to a test if an accident has resulted in death. Moreover, the exclusionary rule in CJ §10-309(a) is now limited to prosecutions for driving while intoxicated or while under the influence of alcohol. *See* CJ §10-309(c).

However, we do not understand the General Assembly to have altered the Court's conclusion that the exclusionary rule in CJ §10-309(a) applies if the requirements of *either* Subtitle 3 of Title 10 of the Courts Article or Tr §16-205.1 were violated.

"The proponent of a chemical or scientific test must establish that the test itself is reliable and that its administration in the particular instance conformed to the procedure necessary to ensure reliability Without a foundation guaranteeing the test's reliability, the test result is not probative as a measurement and hence is irrelevant." *State v. Dille*, 258 N.W.2d 565, 567 (Minn. 1977).⁵

Against this background, we now examine whether the statute requires the particular elements of proof about which you inquire.

III

Required Elements of Proof

A. Qualifications of Technician

If the State intends to introduce the results of a breath or blood test, it must first establish that the test was administered or conducted by "a qualified person"—i.e., "a person who has received training in the use of the equipment in a training program approved by the toxicologist under the Postmortem Examiners Commission and who is either a police officer, a police employee, or an employee of the chief Medical Examiner". CJ §10-304(a)(3), (b), and (c).

This fact can, of course, be established through the testimony of the technician who ran the test, with supporting evidence. But, if the defendant has waived the right to require the technician to testify, proof of qualification can properly be offered by other means. For example, the fact of qualification

⁵ We note that the State toxicologist has issued detailed regulations concerning personnel and equipment, with the purpose of assuring accurate test results. See Regulations of the Toxicologist, Office of the Chief Medical Examiner, Post Mortem Examiners Commission, State of Maryland, Regarding Tests of Breath and Blood for Alcohol (1983).

may be proved through its inclusion in the "official copy of the results of [the] chemical test" permitted by CJ §10-306(a).⁶

In interpreting a North Carolina statute that required the test to be performed "by an individual possessing a valid permit issued by the Department of Human Resources", the North Carolina Court of Appeals summarized the alternative means of compliance as follows:

"The mandate of the statute can be met in one of three ways: (1) by stipulation between the defendant and the State that the individual who administers the test holds a valid permit issued by the Department of Human Resources; or (2) by offering the permit of the individual who administers the test into evidence . . . ; or (3) by presenting any other evidence which shows that the individual who administered the test holds a valid permit issued by the Department of Human Resources." *State v. Mullis*, 247 S.E.2d 265, 266 (N.C. Ct.App. 1978).

The comparable Maryland requirement can likewise be met in these ways.

B. *Evidence of Equipment Approval*

The equipment used to test breath or blood must be "approved by the toxicologist [on the staff of] the Postmortem Examiners Commission". CJ §10-304(b) and (c). See §5-305(a)(2) of the Health-General Article of the Maryland Code.

This section goes on to specify the form of proof that will establish this fact: "[A] statement signed by the toxicologist certifying that the equipment used in the test has been approved by him shall be prima facie evidence of the approval, and the statement is admissible in evidence without the necessity of the toxicologist personally appearing in court." CJ

⁶ We do not think that the term "results" is limited simply to the numerical outcome (i.e., the percentage of alcohol in the defendant's blood). Some account of testing procedures, including proof of the qualifications of the technician (e.g., by reference to his or her current certification number), may certainly be a part of any report of test "results" and would be sufficient to meet the statutory requirement.

§10-304(e). This written statement is plainly sufficient to establish equipment approval, whether or not the person who administered the test testifies.⁷

C. Evidence of Timely Testing

The "specimen of breath or blood" on which the test is performed must have been "taken within two hours after the person accused is apprehended". CJ §10-303. The State's failure to so establish would, on the defendant's objection, lead to exclusion of the test results. See *Major v. State*, 31 Md. App. 590, 594-95 (1976).

The evidence required to make this showing would ordinarily consist of two elements: the testimony of the detaining officer as to the time of apprehension, and the testimony of the person who took the sample as to the time of its taking. For a breath test, in which the taking of the sample and the administration of the test are essentially simultaneous, the time can be included in the report of test results that may be admitted under CJ §10-306(a). With respect to blood tests, if the "qualified medical person" who draws the blood sample states the time in a hospital or similar record, that record would itself be admissible under the business record exception to the hearsay rule, contained in CJ §10-101. See, e.g., *Dietz v. Moore*, 277 Md. 1, 7 (1976).

D. Evidence of Approved Solution

In a breathalyzer test, breath from deep in the driver's lungs passes through a chemical solution that extracts any alcohol from the breath sample. Because the ratio of alcohol in the

⁷ Whatever the evidentiary status of such written materials under the common law rules of evidence, the General Assembly has the power to prescribe new rules similar to that contained in CJ §10-304(e). *Jones v. State*, 205 Md. 528, 533 (1954). As long ago as 1881, the Court of Appeals observed that "there can be no question of the power of the Legislature to change the common law rules of evidence, or to prescribe new rules, altogether different from those known to the common law; and it may declare what proof shall be deemed or taken as *prima facie* sufficient to establish any particular fact, even in criminal cases." *Johns v. State*, 55 Md. 350, 362 (1881).

breath to alcohol in the blood is constant, this chemical measurement can readily be converted into the percentage of alcohol in the driver's blood.⁸ Of course, if the chemical solution is incorrectly formulated, then the test results will be inaccurate.

In our view, the ampoules containing the chemical solution are an integral element of the test equipment. Therefore, they must be "approved by the toxicologist [on the staff of] the Postmortem Examiners Commission". CJ §10-304(b). As to evidence of such approval, see Part III B above.⁹

E. *Evidence of Miranda Warning*

Under *Miranda v. Arizona*, 384 U.S. 436 (1966), "when an individual is taken into custody . . . and is subjected to questioning . . . [h]e must be warned prior to any questioning that

⁸ A leading case on the admissibility of breathalyzer test results described the operation of the machine as follows:

"To operate the machine, the subject blows into the machine through a mouthpiece until he has emptied his lungs in one breath. The machine is so designed that it traps only the last 52½ cubic centimeters of air that has been blown into it. This air is then forced, by weight of a piston, through a test ampoule containing a solution of sulphuric acid and potassium dichromate. This test solution has a yellow hue to it. As the breath sample bubbles through the test solution, the sulphuric acid extracts the alcohol, if any, therefrom, and the potassium dichromate then changes the alcohol to acetic acid, thereby causing the solution to lose some of its original yellow color. The greater the alcoholic content of the breath sample, the greater will be the loss in color of the test solution. By causing a light to pass through the test ampoule and through a standard ampoule containing the same chemical solution as the test ampoule (but through which no breath sample has passed), the amount of the change in color can be measured by photo-electric cells which are connected to a galvanometer. By balancing the galvanometer, a reading can be obtained from a gauge which has been calibrated in terms of percentage of alcohol in the blood." *State v. Baker*, 355 P.2d 806, 809 (Wash. 1960).

⁹ Checking the formulation of the chemical solution requires breaking a sealed ampoule. Obviously, therefore, not every ampoule can be checked. However, the toxicologist's approval can certainly be based on a spot check within a large batch or on a manufacturer's certification. See *State v. DeVito*, 311 A.2d 753 (N.J. Super. A.D. 1973).

he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires". 384 U.S. at 478-79. This warning is required by the Fifth Amendment "to dispel the compelling atmosphere of [in-custody] interrogation". 384 U.S. at 465.

However, "[i]n the context of an arrest for driving while intoxicated, a police inquiry of whether the suspect will take a blood-alcohol test is not an interrogation within the meaning of *Miranda*". *South Dakota v. Neville*, 459 U.S. 553, -----n. 15 [103 S.Ct. 916, 923 n. 15] (1983). Therefore, no *Miranda* warning need be given nor evidence of it presented.¹⁰

IV

Conclusion

In summary, it is our opinion that:

(1) The State must introduce, as a foundation to introduction of the results of a blood alcohol test, evidence that the test was administered by a person qualified to do so under the law. If the defendant has waived the right to require the testimony of the person who administered the test, these qualifications may be established by a written report of test results or otherwise by documentary evidence.

(2) The State must introduce evidence that the test equipment was approved by the toxicologist on the staff of the Postmortem Examiners Commission. This approval may be established by a written statement from the toxicologist or otherwise by documentary evidence.

¹⁰ Under Tr §16-205.1, however, the detaining officer must advise the driver of the "administrative penalties" that are imposed if the driver refuses to submit to a test. See generally 68 *Opinions of the Attorney General* 432 (1983). If the officer fails to comply with the requirements of Tr §16-205.1, blood alcohol test results may be excluded from evidence in a prosecution for driving while intoxicated or while under the influence of alcohol. See note 4 above.

(3) The State must introduce evidence that the specimen of breath or blood used for the test was taken within two hours after the driver's apprehension. In some circumstances, this fact may be established by documentary evidence.

(4) The State must introduce evidence that the chemical solution used in a breath test was approved by the toxicologist. This approval may be established by a written statement from the toxicologist or otherwise by documentary evidence.

(5) The State need not introduce evidence that the driver was given a *Miranda* warning prior to the test.

In conclusion, we observe that the provisions construed in this Opinion were enacted, according to the Court of Appeals, for "the protection of the public". *State v. Moon*, 291 Md. 463, 477 (1981). They serve this end by requiring measures to assure the accuracy of chemical tests, so that prosecutions involving such tests will have fair outcomes. As we have discussed, the State must show its compliance with these requirements.

But just as importantly, these provisions streamline the form in which much of the State's foundation evidence may be presented—and a law that permits a written report instead of live testimony is one that permits law enforcement personnel to spend their time protecting the public, instead of sitting in a courtroom.

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 Court of Appeals has addressed closely related issues in the following two cases:

Moon v. State, 300 Md. 354 (1984)—defendant's right of confrontation denied when trial court failed to require testimony of hospital technician before admitting results of alcohol test, obtained as part of hospital treatment, where record of results, on its face, gave rise to question of record's reliability, techni-

cian was available to testify, and defendant introduced reasonable objection.

Sites v. State, 300 Md. 702 (1984)—where defendant's consent to take sobriety test was obtained in accordance with statute, no statutory basis exists for suppression of test results based on claimed denial of opportunity to consult with counsel; under Sixth Amendment, sobriety test not "critical stage" of prosecution so as to entitle defendant to consult counsel before testing; due process requires reasonable opportunity to consult with counsel before testing, but only if communication does not substantially interfere with timely and efficacious administration of test.

**SYNOPSIS OF OPINIONS
NOT PUBLISHED
IN THIS VOLUME**

SYNOPSIS OF OPINIONS

ASSESSMENTS AND TAXATION

COUNTY HOME RULE—DIFFERENTIAL TAX RATES FOR REAL AND PERSONAL PROPERTY.

Charter counties have authority to enact a differential tax rate for personal property. A statute limiting or conditioning the authority of one charter county to enact such a differential tax rate would violate Article XI-A of the Maryland Constitution.

Op. No. 83-008

To:

The Honorable Tim Maloney

February 15, 1983

Maryland House of Delegates

ALCOHOLIC BEVERAGES

LICENSES—TRANSFERS—BALTIMORE CITY.

Article 2B, §53C does not prohibit the transfer of a liquor license from a location within one of the two overall areas delineated in §53C to another location within that same area.

Op. No. 83-013

To:

The Honorable James W. Campbell

April 13, 1983

Maryland House of Delegates

BUDGETARY ADMINISTRATION

CASH MANAGEMENT—EXPENDITURE OF FEDERAL FUNDS—"DELAY IN DRAWDOWN".

The proposed change in the procedures by which the federal government transfers certain funds to the State for payment to individual beneficiaries of federal programs—procedures that

would involve "letters of credit with delay in drawdown provisions"—would not violate Maryland law.

Op. No. 83-019

To:

The Honorable William S. James

May 5, 1983

State Treasurer

CONDOMINIUMS

COMPULSORY ARBITRATION—RIGHT TO JURY TRIAL—WAIVER.

A legislative proposal that would require compulsory arbitration of certain disputes between the council of unit owners and a unit owner (1) would not necessarily be an impermissible denial of the right to jury trial preserved by Articles 5 and 23 of the Maryland Declaration of Rights; and (2) could be made retroactive.

Op. No. 83-039

To:

The Honorable Jerome F. Connell, Sr.

September 13, 1983

Senate of Maryland

CREDIT REGULATION

"CREDIT GRANTOR" CLOSED-END CREDIT—LICENSURE— SECOND MORTGAGES.

For a transaction in which a person sells his or her own residence and takes back a purchase money second mortgage, the person is not required to be licensed in order to extend credit under Title 12, Subtitle 10 of the Commercial Law Article.

Op. No. 83-034

To:

Mr. Alan T. Fell

August 12, 1983

Commissioner of Consumer Credit

ELECTIONS

BALLOT INSTRUCTIONS—STATE ADMINISTRATIVE BOARD OF ELECTION LAWS.

Article 33, §16-5(f) authorizes but does not require the State Administrative Board of Election Laws to print on a voting machine ballot as an instruction to the voter the words "Vote for no more than" a certain number of candidates instead of the statutorily sanctioned "Vote for" a certain number of candidates.

Op. No. 83-012

To:

The Honorable John Leopold

April 7, 1983

Maryland House of Delegates

HUMAN RESOURCES

SOCIAL SERVICES—PERSONNEL—CONFIDENTIAL RECORDS.

The Department of Human Resources has the authority to prescribe evaluation criteria and procedures for the evaluation of local directors by local boards, so long as the criteria and procedures are not inconsistent with those adopted by the Department of Personnel for State employees. For purposes of performing such evaluations, local boards have the right to examine and rely upon internal agency documents that relate to the performance of local departments and directors.

Op. No. 83-044

To:

The Honorable Ruth Massinga

November 23, 1983

Secretary of Human Resources

LOCAL GOVERNMENT

CHARTER COUNTIES—TAXATION—TAX LIMITATION.

The General Assembly may enact a Public General Law that would render inoperative a tax limitation in a county charter.

Op. No. 83-037

To:

The Honorable Albert R. Wynn

August 22, 1983

Maryland House of Delegates

SEWERAGE SYSTEMS—USER RATES—COUNTY CLASSIFICATIONS.

§15-22(1) of the Code of Public Local Laws of Carroll County unequivocally mandates a single sewer rate structure that, "insofar as possible", applies "uniform[ly] throughout Carroll County", and thereby requires that differences between the sewer user rates charged in the two Carroll County sewerage systems be eliminated to the extent possible.

Op. No. 83-045

To:

November 30, 1983

*Mr. John L. Armacost
President, Board of County
Commissioners of Carroll Co.*

MOBILE HOMES**TERMINATION OF RENTAL AGREEMENTS—"GOOD CAUSE"
TERMINATION RESTRICTIONS.**

A mobile home park owner may terminate a rental agreement, upon expiration of its term, by providing proper notice. Also, Senate Bill 692 of 1983, apparently designed to limit a park owner's right to terminate or refuse to renew a rental agreement, would be constitutional if enacted.

Op. No. 83-040

To:

September 20, 1983

*The Honorable Thomas Patrick O'Reilly
Senate of Maryland*

SOCIAL SERVICES**ADOPTION—GUARDIANSHIP—INVOLUNTARY TERMINATION OF
PARENTAL RIGHTS.**

Certain adoption regulations concerning the termination of parental rights, proposed by the Social Services Administration, do not impermissibly impair the due process rights of a parent, as

did the statutory presumption of Article 16, §76(c)(1) declared unconstitutional by the Court of Appeals.

Op. No. 83-038

To:

August 29, 1983

*Chairman John S. Arnick
Vice-Chairman Catherine I. Riley
Joint Committee on Administrative,
Executive, and Legislative Review*

CHILD SUPPORT ENFORCEMENT—SUPPORT COLLECTION UNITS.

Neither 42 U.S.C. §654 nor Article 88A, §59 of the Maryland Code authorizes the Circuit Court for Prince George's County to deduct a 5% fee from child support collections paid through the Support Collection Unit of that court.

Op. No. 83-046

To:

December 1, 1983

*The Honorable David P. Bird
The Honorable Joan B. Pitkin
Maryland House of Delegates*

VEHICLE LAWS

FEDERAL CLEAN AIR ACT—CONSTITUTIONAL LAW—EQUAL PROTECTION—VEHICLE EMISSIONS INSPECTION LAW.

Proposed legislation that would impose (i) higher registration fees on motor vehicles owned by Maryland residents residing outside a "nonattainment area" and (ii) lower registration fees for motor vehicles owned by residents residing within these areas would not clearly violate the provisions of the federal Clean Air Act or the equal protection guarantees of the United States Constitution or the Maryland Declaration of Rights. Nevertheless, the allocation of State clean air program costs must be accomplished in a reasonable and equitable fashion.

Op. No. 83-042

To:

September 28, 1983

The Honorable Anthony M. DiPietro, Jr.

WORKER'S COMPENSATION

SUBSEQUENT INJURY FUND—APPROVED SETTLEMENT AGREEMENTS—ANNUITY CONTRACTS.

The Maryland worker's compensation laws do not preclude the Subsequent Injury Fund from owning an annuity policy on behalf of a claimant, pursuant to the terms of an approved settlement agreement. However, absent specific terms of the agreement to the contrary, the Fund might be contingently liable to ensure that annuity payments to the claimant are continued if the insurance carrier responsible for making the periodic payments for some reason defaults on its obligation.

Op. No. 83-035

To:

The Subsequent Injury Fund

August 16, 1983

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AND
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