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**ANNUAL REPORT**  
**AND**  
**OFFICIAL OPINIONS**  
**OF THE**  
**ATTORNEY GENERAL**  
**OF**  
**MARYLAND**

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**1984**

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**STEPHEN H. SACHS**  
**ATTORNEY GENERAL**

22812

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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 Superseded by Carroll.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 of 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Plater I of St. Mary's County (Prot.), appears as acting Attorney General, for the crown, as early as 23 April 1691; superseded by Wynne.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 |
| <sup>1</sup> 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 |
| <sup>2</sup> Alexander Randall .....                              | 1864 |
| Issac D. Jones .....                                              | 1867 |
| Andrew K. Syester .....                                           | 1871 |
| Charles J. M. Gwynn .....                                         | 1875 |
| Charles B. Roberts .....                                          | 1883 |
| William Pinkney 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 |
| <sup>3</sup> 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 |
| <sup>4</sup> Hall Hammond .....                                   | 1946 |
| <sup>5</sup> J. Edgar Harvey .....                                | 1952 |
| <sup>6</sup> Edward D. E. Rollins .....                           | 1952 |
| <sup>7</sup> C. Ferdinand Sybert .....                            | 1954 |
| <sup>8,9,10</sup> Thomas B. Finan .....                           | 1961 |
| <sup>11</sup> Robert C. Murphy .....                              | 1966 |
| <sup>12</sup> Francis B. Burch .....                              | 1966 |
| Stephen H. Sachs .....                                            | 1979 |

<sup>1</sup> During the physical incapacity of Luther Martin, 1820-1822, the Governor appointed Nathaniel Williams, Assistant Attorney General, to act as Attorney General.

<sup>2</sup> 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).

<sup>3</sup> 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.

<sup>4,5</sup> 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.

<sup>6</sup> Mr. Edward D. E. Rollins qualified as Attorney General on the 14th of November, 1952.

<sup>7</sup> Resigned January 12, 1961, to accept an appointment to the Court of Appeals of Maryland.

<sup>8</sup> Appointed January 13, 1961, to serve unexpired term of former Attorney General.

<sup>9</sup> Elected at election of November, 1962.

<sup>10</sup> 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.

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

<sup>12</sup> Mr. Francis B. Burch was elected Attorney General in the November, 1966 election and was sworn in on December 16, 1966.



## OFFICE OF THE ATTORNEY GENERAL

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\*Resigned

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| Richard M. Kastendieck    | Ann E. Singleton          |
| Stephanie J. Lane         | Valerie M. Smith          |
| David Y. Li               |                           |

## ANNAPOLIS OFFICE—

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\*Resigned

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 Frank W. Wilson

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\*Resigned

# ANNUAL REPORT FOR 1984

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December 31, 1984

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

DEAR GOVERNOR HUGHES:

In accordance with Section 6-108(b) of the State Government Article, I am submitting this report of the business and proceedings of the Office of Attorney General for the calendar year 1984. A detailed financial statement of the Office, as well as caseload statistics and the official Opinions of the Attorney General, follow this report.

## *Department of Health and Mental Hygiene*

During 1984, the Assistant Attorneys General assigned to deal with Environmental Programs handled hundreds of civil cases brought by the State to protect the Chesapeake Bay, to prevent injury from hazardous waste, and to ensure compliance with Maryland's environmental laws and regulations.

Especially noteworthy was the successful criminal prosecution of American Recovery Company and one of its officers for discharging hazardous waste into State waters from its facility at Sparrows Point. The company was fined \$350,000 by the Baltimore County Circuit Court. In addition, the environmental unit of this division successfully brought a civil proceeding against American Recovery to revoke its permit to operate its hazardous waste processing facility in Curtis Bay. Because that company had failed for years to comply with Maryland anti-pollution laws, we believed it had forfeited its right to do business in the State.

Under Deputy Attorney General Eleanor M. Carey, a committee was created to coordinate the various Chesapeake Bay clean-up activities involving the Attorney General's Office. Attorneys for the Office of Environmental Programs in the Department of Health and Mental Hygiene, the Department of Natural Resources, the Department of Agriculture, and the Department of Planning have worked together to focus the resources of our office on this important task.

The Attorney General's Office has also been active on several new fronts in the areas of the law dealing with health and mental hygiene. For example, at the request of the Board of Medical Examiners, we played an instrumental role in developing a system for evaluating the quality of the training received by physicians who were educated in foreign medical schools and who now are seeking Maryland licenses. No national organization or governmental agency currently reviews the quality of medical education in overseas schools. Working with this Office, the Maryland Board of Medical Examiners has now successfully put in operation perhaps the nation's first procedure for evaluating foreign medical school programs.

The Attorney General's Office also undertook this year to initiate a major attack on the problem of lead paint poisoning. In cooperation with the law clinics of the University of Maryland School of Law, the State, through the Medical Assistance Program in the Department, has helped recoup State funds paid for the medical care of victims of lead paint poisoning, who almost always are young children. In addition, these efforts may help persuade those who are responsible for creating the risk of lead poisoning to eliminate this hazard.

The Assistant Attorneys General assigned to the Medical Assistance and the Mental Retardation and Development Disabilities Administration have worked together with their respective client agencies to implement a major deinstitutionalization program. Under a federal waiver of Medicaid requirements, former patients from State facilities are able to gain access to community based services to meet their medical care needs. The Attorney General's Office has played a critical role in assuring that Maryland's Medicaid waiver program would be approved by federal authorities.

When a deaf, mentally ill resident of a Mental Hygiene Administration facility filed a complaint alleging inadequate treatment, this Office, working with agency officials, agreed to resolve the case by providing service to those who are deaf and mentally ill that is more closely tailored to the needs of this special population. A special unit for the treatment of the deaf at Springfield State Hospital Center has now been established, and an extensive procedure for screening and identifying deaf clients has been devised.

Similarly, a long-standing and widespread practice which had the effect of denying Medicaid benefits to elderly persons in nursing

homes has been curtailed. In 1982, we issued a letter of advice declaring illegal the practice of imposing so-called private pay, duration-of-stay agreements on applicants to nursing homes. These agreements forced eligible patients entering some nursing homes to forego their right to Medicaid benefits for as long as a year. During that time, the patients were effectively coerced into paying a higher "private pay" rate to the nursing homes. Our opinion that this practice violated Federal law has received widespread national attention from the press, from other Attorneys General, and from the U.S. Senate. Legal challenges to the opinion by a few nursing homes in Maryland were resolved this year in favor of the position taken by this Office.

### *Antitrust Division*

The Antitrust Division is expanding its innovative effort to scrutinize anti-competitive practices in the health care field. In 1984, Maryland filed a federal antitrust suit against the national Blue Cross and Blue Shield Association; Blue Cross and Blue Shield of Maryland, Inc., and Group Hospitalization and Medical Services, Inc., the Blue Cross and Blue Shield entity in the District of Columbia. The suit alleges that the Blue Cross and Blue Shield Plans conspired with the national Association to allocate marketing territories in the State in violation of federal and State antitrust laws.

Blue Cross and Blue Shield Plans are the major providers of health insurance in Maryland. The Maryland and Washington-based Plans share approximately 50 percent of the private health insurance market in the State, having received more than \$1.5 billion in health insurance premiums in 1983.

According to the suit, the Plans entered in an arrangement whereby the Washington-based Plans would restrict their marketing of health insurance in Maryland to part of Prince George's and Montgomery counties and the Maryland Plans would market their insurance in the remainder of the State. The Antitrust Division further alleges that this arrangement is part of a long-standing, nationwide market allocation scheme, enforced by the national Association, in which local Blue Cross and Blue Shield plans agree to restrict their marketing to exclusive territories.

In addition to seeking an injunction disbanding the alleged marketing scheme, the Division is seeking damages on behalf of the State as a purchaser of health insurance provided to employees,

leadership of Assistant Attorney General Steven J. Cole, Director of Consumer and Investor Affairs. This provides for greater coordination and efficiency of both operations.

### *Consumer Protection*

The Consumer Protection Division launched significant initiatives in 1984 in the field of health care cost containment, senior citizen concerns, automotive repairs, mortgage lending abuse, and retail sales. Its arbitration program continued to expand, and its efforts to educate the public about its rights and responsibilities involved not only an attempt to reach consumers directly by going out into the marketplace itself, but the adaptation of its educational materials to a new and promising format: regular radio broadcasts.

In the belief that comparison shopping will encourage competition and cost containment in the medical field as it does in others, the Division cooperated with the State Office on Aging to begin a new statewide consumer education program and successfully sought the hitherto unreleased data that the federal government compiles on the fees charged by Maryland physicians who treat Medicare patients.

Our Freedom of Information Act request for the statistical information on Maryland doctors' fees was backed by the Union-Management Health Care Cost Containment Committee, representing numerous Maryland employers and health groups, and both the State's hospital and doctors' organizations have offered to help us distribute this material once it is put in a form that individual consumers can use. All of us — doctors, hospitals, patients, businesses and unions — are in the fight together to curb health care costs.

As part of that fight, the Division prepared a new booklet, "Consumer Guide to Medicare Assignment and Cutting Health Care Costs," which explains the importance of Medicare assignment and provides other useful health care shopping tips. Both the Division and the State Office on Aging have been distributing free copies of the booklet throughout the State, as well as providing consumers with information about doctors in their communities who have agreed to accept assignment, or what Medicare has determined is a "reasonable charge" for specific medical services, as payment in full for the treatment.

Medical care is perhaps the primary concern of our senior citizens, who spend more for it than for any other consumer item. But we are

retirees, and their dependents. The suit contends that the State has had to pay artificially inflated prices as a result of the alleged agreement because the Plans do not bid on the State's health insurance contract.

In another area of antitrust enforcement, the Division has recovered \$2.7 million in damages as a result of its four-year investigation into bid-rigging on State and county highway paving and supply contracts. Eight paying contractors and three individuals have entered into settlement agreements with the State.

This year, the Division also brought to a conclusion its price-fixing case against Mid-Atlantic Toyota Distributors, Inc. and 100 Toyota dealers in the mid-Atlantic region with the distribution of approximately \$1.3 million in restitution to 10,000 Maryland Toyota purchasers. The lawsuit, filed in 1980, alleged that the regional Toyota distributor had agreed with Toyota dealers in a five-state region to raise the starting prices for negotiations on 1980 Toyotas by automatically including a \$500 protective package on virtually all 1980 models of the car. Under the terms of the settlement, the defendants paid nearly \$5 million to injured purchasers in the region. Maryland consumers who bought a 1980 Toyota with a protective package had the option of choosing between a \$135 cash payment or \$250 worth of goods and services from a Toyota dealer.

### *Department of Agriculture*

In conjunction with the Assistant Attorneys General in the Antitrust Division, Assistant Attorneys General assigned to the Department of Agriculture settled a three-year-old antitrust suit brought by six private earthmoving firms against the State and five Eastern Shore soil conservation districts. The \$21 million law suit alleged that the State Secretary of Agriculture, the Department of Agriculture, and the districts conspired to take over and monopolize the land improvement business on the Eastern Shore. The companies agreed to a settlement that provides them with no money but involves a consent order that establishes limited restrictions on certain specific activities of the soil conservation districts. These restrictions are not applicable to the Department of Agriculture or to the Secretary.

### *Consumer and Investor Affairs*

For the past two years, the work of the Consumer Protection Division and the Securities Division has been combined under the



aware of many other consumer areas and problems of special interest to seniors, and in an effort to address these issues, the Division published another new, 41-page booklet in 1984, "The Senior Citizen Guide to Consumer Protection," which provides the kind of practical advice and information elderly consumers need to protect themselves from the few slick operators and occasional pitfalls they may encounter in the marketplace. Copies of the booklet are free from the Division, as well as from the Project Gateway centers of the State Office on Aging. The Division alone distributed over 20,300 copies of it in 1984.

Complaints about automobiles and car repairs remain one of the major areas addressed by the Division, and our aggressive methods for investigating these complaints involve sending undercover vehicles through repair facilities throughout the state. This technique has paid off in a number of cases, including the 1984 action against Middle River Garage, which agreed to pay \$3,476 in restitution to 13 consumers, many of whom were charged for unnecessary or unauthorized repairs. Other actions in the automotive field in 1984 include the issuance of a Cease and Desist notice to Towson Ford, a large Baltimore-area auto dealer and repair facility, which we accuse of telling consumers their cars require major repairs when in fact they do not. The Division also filed suit in August against Christopher Karl David Pritts, a Garrett County car dealer, for allegedly covering up a major structural defect in a used car that later broke in half while the consumer to whom he sold it was driving on a highway.

Finally, in an effort to help the thousands of Maryland consumers who have had long-standing problems with various mechanisms in their General Motors cars, the Division prepared a detailed mediation/arbitration booklet kit to assist them in using an arbitration program established by the Federal Trade Commission in cooperation with the Better Business Bureau. The kit, composed of a booklet on GM car complaints and four supplemental "memoranda to the arbitrator," was initially offered to consumers in September and provides important background material on the history of GM car complaints, as well as details regarding the specific problems consumers have had with their vehicles. The Division already has distributed free copies of these booklets to over 2,000 Marylanders, explaining the defects in their autos in plain language and telling them how to file what we hope will be successful claims.

In the fields of home building and mortgage lending, the Division has obtained significant restitution and relief for consumers who

were frustrated by shoddy workmanship and deceptive sales practices, as well as for those whose financial problems were exploited by unscrupulous lenders. The largest refund settlement was obtained in February when the Fred Pritt Building Company of Severna Park and its founder agreed to provide restitution totalling \$52,000 to 43 homeowners in Howard and Anne Arundel Counties who had complained that the builder sold them defective homes he later failed to repair properly. The restitution payments range from \$137 to \$6,000 and will go to homebuyers who had complained of wet basements, disintegrating driveways, defective plumbing and incomplete carpentry work in the homes they bought from Pritt.

Consumers who seek to obtain mortgages to buy a home or to renovate one they already own may be victimized by questionable lending practices. In 1984, the Division probed a number of these cases and filed charges that already have resulted in crucial relief for some hard-pressed consumers. Early in the year, we issued a Cease and Desist notice to Bogley, Harting, Mahoney and Lebling, a mortgage banking firm with offices in Maryland and Virginia, accusing it of reneging on mortgage loans with certain interest rates and points that it had offered to real estate brokers and agents. In another, unrelated case, we charged Colonial Mortgage Corporation of D.C., which is headquartered in Landover, of soliciting business from borrowers by promising that certain interest rates and points it quoted on mortgage loans were firmly established and would not fluctuate for a specified time. Later the company allegedly demanded higher interest rates and/or failed to honor its previous commitment.

As unfair and deceptive as these alleged practices may be, perhaps even more serious are the cases in which impoverished homeowners, desperate for money, allegedly have been tricked into obtaining commercial rather than consumer loans and then were charged exorbitant fees and interest rates. In the course of investigating and prosecuting Albert Blank, a former Baltimore-area mortgage broker who allegedly engaged in such unscrupulous practices, the Division and the State Banking Commission negotiated agreements with 10 mortgage lenders that could provide debt reductions of as much as \$5,000 to \$15,000 to homeowners who have filed complaints with us about allegedly being charged excessive fees and interest rates on consumer loans.

The purchase of a new home — and the repair of an existing one — are among the most significant and costly transactions most consumers will ever make. The problems they may encounter are particularly important ones for the Consumer Protection Division to address.

In the face of an increasing number of bankruptcies of health spas in the State, which deprived consumers of substantial amounts of advance membership fees, the General Assembly enacted in 1982 and strengthened in 1983 a registration/bonding law. That law assigned to the Division the administrative responsibility for registering all clubs in the State and otherwise enforcing the bonding law's requirements.

In just 18 months, with no additional staff (just one part-time volunteer paralegal and a substantial amount of work by one Assistant Attorney General), the Division has registered or bonded more than 100 health clubs, and has obtained bonds or other security of more than \$2 million from those clubs that take advance payments. This has not been easy. About 20 cease and desist enforcement actions have been brought to obtain compliance with the law, and about seven settlement agreements or assurances of discontinuance have been obtained. Approximately \$150,000 to \$200,000 in security bonds or other club assets will soon be distributed to consumers to cover losses incurred by members of clubs that have closed.

The Division's arbitration program, which provides a quick, cost-free procedure for the resolution of consumer complaints, has expanded its activities dramatically in recent years. By actively recruiting businesses to precommit themselves to the binding arbitration of disputes, the Division has more than quadrupled the number of merchants and companies that have agreed to submit future complaints to our program for a swift, even-handed decision. For example, in 1984 we succeeded in convincing the directors of the Automobile Trade Association of Maryland and the Greater Washington-Maryland Service Station Association to urge their 1,580 members to join our arbitration program. We also signed up all 15 members of the Cumberland Downtown Merchants Association.

Perhaps even more important to the program's further expansion was the publication of proposed rule changes that would permit non-lawyer citizen volunteers, such as civic leaders, merchants and housewives, to conduct arbitrations. The proposed rules also clarify other aspects of the program's procedures, including the use of expert consultants on some cases, and the availability in some instances of consequential damages. With the publication of the final rules in 1985, we expect to begin recruiting potential volunteer arbitrators. They will help to expand the program even more. Now it handles about 360 cases a year, a 50 percent increase over the number dealt with in 1982.

Just as automotive repair problems remain a constant bane to Maryland's consumers, so do occasional deceptive practices in the retail field. Most Maryland businesses are honest, but those few who have not complied with the law keep the Division busy. In 1984, the Division reached a settlement with Lerner Stores Corporation, a New York-based clothing firm with 22 outlets in Maryland, providing full refunds to an undetermined number of its former layaway customers, as well as \$38,608 for consumer education projects here. We had alleged (although Lerner did not admit) that the company violated Maryland law by failing to give refunds to consumers who cancelled their layaway agreements or defaulted on their payments. We also said the company had not given its customers a written layaway sales agreement that complied with Maryland law. In some other noteworthy cases, we obtained an agreement from Mr. Goodbuys, a Pennsylvania-based home improvement retailer, to discontinue what we found to be deceptive advertising that offered what turned out to be illusory bargains. We also got \$4,920 in restitution for 328 consumers who were bilked by Centennial Associates, a work-at-home scheme that was based in Ellicott City.

Finally, we continue to believe that well-informed consumers are the best-protected consumers. To that end, we have remained especially active in consumer education. In addition to our booklets for senior citizens and our General Motors mediation/arbitration kits, we distributed nearly 60,000 general interest consumer pamphlets dealing with everything from mobile home parks to health spas; mailed out our consumer education slide show and video tape program nearly 50 times, and distributed over 2,900 copies of a fact sheet on Maryland's new lemon law. The Division's Education Unit also participated in 32 consumer workshops or meetings in 1984. In addition to mailing 32 consumer-related newspaper columns to weekly papers throughout Maryland, covering topics ranging from the telephone company's divestiture, hair implants and phony geneological directories to deceptive advertisements for coins and diamonds, we also began distributing audio tapes based on this material to some 30 radio stations around the State. This is a new and particularly promising means of supplying timely advice and alerts to Maryland consumers.

### *Securities Division*

As a result of the tremendous growth in the securities industry, Securities Commissioner Susan Merrick Rittenhouse has im-

plemented several new policies in 1984 in an effort to accommodate the concurrent rise in securities, franchise and broker registrations being filed with the Division. The Division, which during the last year lost two positions designated for attorneys, has added two examiners to the existing staff in an effort to handle the increased workload. The Division staff now is composed of the Securities Commissioner, three attorneys, two examiners and four support staff members. The examiners devote full time to registration responsibilities, freeing the remaining attorneys to focus on enforcement and supervisory activities.

Steps also have been taken to reduce the amount of correspondence delivered to and sent by the Division, providing a more effective and efficient means for the Division to meet its day-to-day responsibilities. Securities receipt forms are now required to be sent to the Division. These are simply date-stamped and returned in pre-addressed stamped envelopes, thereby eliminating thousands of mailings each year and saving hundreds of hours of staff time.

As another part of these new policies, the Division adopted a regulation to provide a means for issuers to coordinate their State filings with the federal policy allowing continuous offerings by issuers. The regulation concerning registration by coordination of shelf registration under Securities and Exchange Commission Rule 415 became effective on May 7, 1984.

In 1984, the Securities Division received and reviewed 644 applications for registration, amendment, and renewal filings by franchisors under the Maryland Franchise Registration and Disclosure Law. In addition, the Division staff reviewed 305 applications for registration by broker/dealers; approximately 11,000 agent registration applications; approximately 2,750 applications for registration of securities, and 1,800 filings for exemptions from registration under the Maryland Securities Act. The Division collected \$82,750 in registration fees under the Franchise Law; \$1,474,243 in broker/dealer and agent registration fees, and \$1,931,927.64 in securities registration and exemption fees, for a total of \$3,488,920.64. Approximately half the agent registration fees must be returned to the largest broker/dealers under current Maryland law.

A study of the business activities of financial consultants and planners was instituted by the Division this year in cooperation with studies initiated by the North American Securities Administrators

Association, Inc. The studies are for the purpose of determining whether the financial planning industry should be regulated and, if so, by whom.

In an effort to promote greater uniformity between State and federal securities regulation, and to foster efficiency and economy in securities practice, the Division has worked closely with the Securities and Exchange Commission and the North American Securities Administrators Association to design a single form, copies of which could be filed in the states and with the Securities and Exchange Commission to claim coordinated exemptions under both State and federal laws.

The Division has continued its vigorous enforcement program under all three statutes it administers, the Securities Act, the Franchise Registration and Disclosure Law, and the Business Opportunities Sales Act. The Division initiated 68 formal administrative proceedings and investigated hundreds of customer complaints and inquiries in 1984. The sanctions imposed against violators of the laws included rescission, fines, cease and desist orders, settlements and criminal referrals.

For example, six Denver-area securities firms were ordered to pay \$39,000 in fines for unregistered sales of "penny stocks" to Maryland investors. In addition, two other firms were temporarily suspended from transacting business in Maryland for sales they made prior to registration. The administrative proceedings against these firms stemmed from a crackdown last year by state securities divisions throughout the country, conducted with the assistance of the North American Securities Administrators Association.

The Division also issued an uncontested Cease and Desist Order to Kenneth M. Heyman, a Baltimore businessman, and the Diamond Mortgage Co., Inc., one of his firms, for fraudulently offering and selling unregistered securities in Maryland. Information uncovered by the Division indicates that Heyman solicited funds from investors, promising to return the money along with interest of between 10 percent and 36 percent annually. Based on our investigation, the Division believes that Heyman obtained between \$3 and \$4 million from Marylanders without having a license to deal in securities and without detailing the risks involved in the investments, as required by law.

David Coleman, Jr., of Reisterstown, and Toyson Burruss, of Lanham, pleaded guilty in 1984 to securities fraud and the sale of

unregistered securities in a scheme that defrauded 243 investors of more than \$1.6 million between January and August, 1983. In some cases, the defendants obtained "offering materials" from legitimate companies by posing as potential investors, then used these documents to solicit money from actual investors without the knowledge or authorization of the bona fide firms. The defendants also sold investments in fictitious companies and used the services of unsuspecting financial planning firms to solicit investments. Some of the money they obtained was used to provide returns for a few investors in an effort to encourage additional investments, but most of the money was used for the personal benefit of Coleman and Burruss, evidence showed.

Baltimore County Circuit Court Judge Austin W. Brizendine sentenced Coleman to four years in prison and placed Burruss on probation for five years, requiring him to perform 1,000 hours of community service and pay \$10,000 in restitution.

Burruss, who sold at least \$1.5 million worth of unregistered, fraudulent securities to Marylanders, agreed to enter into a Consent and Order, signed by the Securities Commissioner and Judge Hovey Johnson of the Prince George's County Circuit Court, admitting full and personal liability for the sale of those securities and for restitution to all persons who invested money with him. He then filed for bankruptcy. A Proof of Claim was filed by the Securities Commissioner and Assistant Attorney General Clinton R. Black, IV, in the Federal Bankruptcy Court in Rockville on behalf of all defrauded Marylanders who invested money with Burruss.

Beginning this July, the Division instituted an expanded program of surveillance of persons filing applications to become stockbrokers. Under this program, the Division took the position that it would not issue a license to any agent who had past disciplinary problems which would form the basis for a statutory denial of the application. Applicants whom the Division declines to license are offered an opportunity for a hearing on their application. Each person is also given the opportunity to withdraw the application without penalty. Among the 48 applications considered under this program from July, 1984 through December 31, 1984, 38 applicants opted to withdraw, and three were approved with special conditions.

As a result of this program, the Division has noted a sharp decline in the number of applications filed that reflect a history of serious

disciplinary problems. The Division believes that this program has resulted in higher quality candidates filing for registration in Maryland, and it intends to continue the program in the future.

### *Medicaid Fraud*

The Medicaid Fraud Control Unit successfully concluded 14 criminal cases in 1984, recovering over \$79,000 in fines and more than \$272,000 in restitution. These criminal prosecutions resulted in the defendants' receiving a total of 30 months in jail sentences, 192 months in suspended terms, and orders to perform 4,020 hours of community service. Included in the number of health care providers prosecuted were five dentists, two nursing home owners, a nursing home, an optician and a physician. In addition, the Unit reached civil settlements with six Medicaid providers, recovering over \$196,000.

Since its inception in 1978, the Medicaid Fraud Control Unit has become increasingly experienced in detecting and prosecuting Medicaid fraud, and it has been able to successfully prosecute more sophisticated and complicated cases. For example, a four-month trial of a nursing home owner this year ended with the defendant's conviction on six counts of Medicaid fraud, resulting in a sentence of 18 months in jail; a \$60,000 fine; \$50,000 in restitution, and 3,120 hours of community service. The trial followed an investigation that took more than two years to complete and focused on expenses unrelated to patient care that were submitted in cost reports for reimbursement to the Medicaid program over a four-year period. These improperly sought reimbursements related mostly to construction work performed by nursing home contractors on the owner's personal residence, his beach house, and his daughter's condominium.

As the Medicaid Fraud Control Unit has prosecuted more health care providers, it has developed a reputation within Maryland as an aggressive enforcement arm of the Attorney General's Office. It also has been successful in persuading judges to view Medicaid fraud as a serious white-collar offense. As a result, in the past year we have obtained jail sentences in six cases against providers.

Among Medicare fraud units around the country, Maryland has been in the forefront in using computers for targeting potential frauds. Before targeting a case for investigation, the Unit often will schedule data for an entire class of providers in order to highlight those whose pattern of operation in a given area of care is unusual.



This approach already has proved successful in targeting dental cases, where the State's computers were used to spot unusual patterns of billing activity submitted by dentists. This allows our investigators to target those dentists likely to have committed fraud. To date, a total of six dentists have been convicted of Medicaid fraud as a result of this program, which currently is being used to target nursing home cases. In the future it will be used to target other providers.

The Medicaid Fraud Control Unit has accomplished a great deal in 1984. It has continued to build on the reputation it has developed as an aggressive force that weeds out fraud among health care providers. Its successes no doubt act as a deterrent to fraud and to abuse on the part of some health care providers. In an era of skyrocketing health care costs, the goal of the Unit must be to help contain price hikes by fighting fraud and abuse within the system and by deterring those who would otherwise abuse the Maryland Medical Assistance Program.

### *Legislative Office*

A special bill signing on May 29 brought to a close the Attorney General's 1984 bill review of nearly 900 enactments, including new laws to protect the Chesapeake Bay; establish a State corporation to market the former Fairchild Industries plant in Hagerstown; shift the burden of proof in the "insanity defense" from the State to the defense; guarantee an annual appropriation of \$500,000 to the Legal Services Corporation, and cover migrant farm workers under the State's workmen's compensation program.

Among the legal findings of the Attorney General's staff that permitted certain legislation to become law were that a tax on pay TV broadcasts of boxing and wrestling matches does not violate the Commerce or Supremacy Clauses of the U.S. Constitution (House Bill 290); that a bill barring the State Treasurer from investing State funds in banks with ties to South Africa does not interfere with interstate or foreign commerce or the conduct of foreign relations (House Bill 1267), and that a portion of a bill relating to pre-need burial contracts was not in conflict with the Federal truth-in-lending act (House Bill 906).

In addition, the Attorney General found that bills which provide that agricultural transfer taxes and interest due on them become a lien without affording the debtor a hearing do not violate due process (Senate Bill 894 and House Bill 1626); that a bill allowing an

alternate juror in a death penalty case to participate in sentencing deliberations even if he or she did not vote on the defendant's guilt or innocence does not violate the right to a jury trial (House Bill 797), and that legislation subjecting certain lawyers to the consumer protection provisions of the debt collection law does not invade the judiciary's role in regulating the practice of law (House Bill 723).

Those bills vetoed by the Governor for constitutional or legal defects upon the advice of the Attorney General included House Bill 1568, which would have required the Executive and Judicial branches to comply with recommendations of the Legislative Auditor; House Bill 1255, which would have permitted the Administrative, Executive, Legislative Review Committee to suspend the effectiveness of regulations upon a finding of unconstitutionality, illegality or unreasonableness; and House Bill 952 and Senate Bill 857, which would have established a 10-person committee — six of whom were legislators—to certify those State projects for which private donations may be solicited. All of these bills were found to violate the separation of powers doctrine.

The Attorney General also found that the General Assembly may not authorize the Montgomery County delegation by joint resolution to establish school board districts in the county without gubernatorial approval (House Bill 840); a bill on the return of confiscated property may have an unintended and far-reaching impact on existing case law and other forfeiture provisions of the Code (House Bill 618), and a bill which was intended to bring Maryland into compliance with Federal law on unemployment insurance had a defective title (House Bill 1541).

### *Criminal Appeals and Correctional Litigation*

In 1984, the Assistant Attorneys General assigned to the Criminal Appeals and Correctional Litigation Division participated in the in-depth investigation of conditions inside the Maryland Penitentiary, which we found appalling. The 142-page report we prepared in the wake of the murder of a Penitentiary guard in October will lead, we hope, to improvements not only in the abysmal conditions in the Penitentiary's South Wing, where the fatal stabbing occurred, but throughout the system.

The Assistant Attorneys General in the Division also continued to represent the State in all appeals in criminal cases before the Court of Appeals, the Court of Special Appeals, and the United States

Supreme Court. In addition, they represent State correctional officials in all habeas corpus actions in Federal court and in all civil actions brought in both State and Federal court by inmates in the State prison system. These lawyers also continue to work closely with prosecutors in the State's Attorneys' Offices around Maryland; participate in training programs; review proposed legislation; respond to the citizen inquiries, and generally share their expertise in the areas of criminal law and correctional litigation.

### *Department of Public Safety*

Federal civil rights laws provide that if a prison system has a procedure for resolving inmate complaints, the inmates may be compelled to exhaust the remedies provided in that procedure before filing suit in federal court.

During 1984, the Attorney General's Office, together with representatives of the Division of Correction, was instrumental in implementing within Maryland's prisons an "Administrative Remedy Procedure" to handle inmate grievances. The procedure now is operational in all of the State's prisons. We hope it will have a two-fold effect: first, to reduce the number of cases that have to be heard by the State Inmate Grievance Commission and which ultimately are often appealed to the State's courts; and, second, to reduce the number of federal court civil rights complaints filed against the State by inmates.

During 1984, the Department of Public Safety and Correctional Services also concluded litigation resolving disputes over the employment rights of female correctional officers in the State prison system. This litigation, which involved five consolidated cases, dealt with the conflict between the rights of male inmates to have a minimum amount of privacy, particularly in toilet and shower facilities, as opposed to the rights of the female correctional officers to have full employment. A decree approved by the U.S. District Court in Baltimore requires certain changes in the physical plant structure of some of the State's older correctional facilities, as well as certain modifications in institutional routine. The resolution of this litigation will provide greater opportunities for females to become line correctional officers and supervisors while at the same time preserving a degree of privacy for male inmates.

### *Assessments and Taxation*

During 1984, the Assistant Attorneys General assigned to the Department of Assessments and Taxation have handled their usual,

heavy caseload. One important group of cases involved investigation and litigation concerning applications for tax exemption filed by numerous life care facilities in the State.

In the first of these cases to be tried, *Friends House, Inc., v. Supervisor*, the State successfully advocated the denial of a property tax exemption to a facility that provides housing to elderly people who are healthy and financially comfortable. Several other cases involving similar facilities have been settled, while others are still in the process of litigation. These cases represent an effort by the legal staff to assist the Department in its attempt to implement its legislative mandate, as enunciated by the Court of Appeals, through rigorous enforcement of the exemption statute.

Assistant Attorneys General this year also successfully rebuffed an attempt by a Howard County developer to enjoin an assessment of the Agricultural Transfer Tax. The tax, often a trap for unwary practitioners, is imposed on written instruments conveying title to property assessed at agricultural use rates at the time of conveyance. In *Hunt Country Estates Ltd. Partnership v. Montgomery Landing Ltd., et al.* (Case No. 84-CA-0686 in the Circuit Court for Howard County), Hunt Country Estates argued that the State Department of Assessments and Taxation must look to the original seller of agricultural property to collect a tax due where the seller failed to inform the buyer of the possibility of the imposition of the tax. The State argued that since the imposition of the tax is upon "every written instrument" conveying title to property assessed at agricultural use, it could look to either the buyer or the seller for payment of the tax. Furthermore, statutory provision was made for liability on the part of the seller to the buyer for failure to advise the buyer of the possible imposition of the tax. This fact, coupled with the refund provisions of the Code, made the suit for injunctive relief improper in the eyes of the Department's legal staff. The matter was resolved by Hunt Country's agreement to pay the tax in the sum of \$19,000. The proceeds of the tax are used to purchase development rights to property for the preservation of open spaces throughout the State.

The Department's legal staff also successfully argued before the Court of Special Appeals that machinery held for lease under a rent-purchase plan is not inventory and, therefore, is subject to personal property taxation. *McClung-Logan Equipment Co., Inc. v. State Department of Assessments and Taxation* (No. 59, September Term, 1984).

### *Educational Affairs*

The Educational Affairs Division handles an extraordinary range of legal problems, issues, and litigation. The clients that the Division regularly represents collectively have an annual operating budget exceeding \$1 billion, a workforce of more than 25,000 employees, and an enrollment of more than 100,000 students. Among the entities and institutions it represents are: the University of Maryland, with 10 campuses and major components; the State Board and Department of Education, with seven major divisions; Bowie State College; Coppin State College; Frostburg State College; Salisbury State College; Towson State University; the University of Baltimore; Morgan State University; St. Mary's College; the Board of Trustees for State Universities and Colleges; the State Board for Higher Education; the Maryland Higher Education Loan Corporation; the State Scholarship Board; the State Board for Community Colleges; the Inter-Agency School Construction Committee; the Maryland Center for Public Broadcasting; the Maryland School for the Deaf; and the Lida Lee Tall School.

The Education Division's staff of nine Assistant Attorneys General, four staff attorneys and five secretaries handles a remarkable volume and variety of litigation, administrative proceedings, and day-to-day counseling matters. In addition to their role as advocates and advisors to all State public educational agencies, campuses, boards and commissions, the Division's attorneys negotiate a number of major agreements; draft complex legislation, rules and policies; and present a series of preventive counseling programs.

Since 1978, the Division has handled more than 300 court cases, split evenly between State and federal courts. Approximately 225 court cases have been dispositively resolved during this period. Division clients have ultimately prevailed — via dismissal, summary judgment, trial or appeal — in about 80 percent of these "closed" cases, while about 18 percent were settled on favorable terms. In fact, other than a handful of Administrative Procedure Act employee grievance appeals and the protracted *Moreno v. Toll* litigation, the Division's clients have not lost a single case on the merits. The Division's success rate in litigation over the past six years is about 98 percent — a remarkable statistic in light of the fact that as a defense-oriented division, Educational Affairs cannot control the character or volume of cases it litigates. In 1984, the Division maintained its pace and success in the courts: It handled a total of 95 cases, closing 50 of them, with 96 percent being favorably resolved.

In the past six years, Division attorneys also have managed hundreds of administrative proceedings before the Equal Employment Opportunity Commission; the Maryland Commission for Human Relations; the U.S. Department of Labor; the Maryland State Board of Contract Appeals; the State Department of Personnel; the Employees' Retirement Review Board, and the Public Ethics Commission. These proceedings involve a variety of disputes, including discrimination charges, employee grievances, procurement protests, audit disallowances, special education and affirmative action programs.

This year we have actively represented the State Board of Education in approximately 100 appeals from local school systems regarding teacher dismissals, school closings, co-curricular assignments and activities, and other issues of educational policy. In addition, we provide counsel for appeals to the Special State Board Hearing Review Panel regarding special education placements.

The Division devotes substantial attention to day-to-day counseling of clients covering more than a hundred distinct subject areas. Division attorneys have resolved numerous problems involving employees, students, contractor, and other third parties. Moreover, our attorneys have reviewed or drafted scores of institutional policies dealing with such matters as tenure, retrenchment, disciplinary codes, human research, grievance procedures, medical service plans, faculty contracts, affirmative action plans, post-retirement employment, home instruction, diploma programs, audit procedures, expulsion of handicapped children, and agency appeal procedures.

Division attorneys are also involved in the negotiation of many major agreements. In 1984, for example, these dealt with the financing arrangements for multi-million dollar computer equipment, "high tech" proprietary research agreements with major corporations, and the sale of university property to enable an industrial firm to enlarge its manufacturing plant.

The Education Affairs Division also has continued its unique preventive counseling program, designed to educate client administrators on practical ways to anticipate legal problems and avoid litigation. This series of seminars has thus far covered more than 75 topics and attracted up to 1,800 public college and school administrators. All of the seminars are hosted by client agencies, presented by knowledgeable Assistant Attorneys General, and provided at no cost to the participants.

### *Human Resources*

On the face of Reagan Administration cut-backs, we have devoted considerable energy to retaining the federal funds necessary to provide adequately for Maryland's needy citizens. This year, we have filed two major actions in the the U.S. District Court in Baltimore to block arbitrary or restrictive federal funding policies and practices. We have also established procedures to test the frequent audit exceptions and disallowances used to obtain the return of federal funds already spent in various Department of Human Resources programs. We generally contest any adverse audit or disallowance before the agency administrative review body, and often we will appeal the final disallowance to the federal court. These activities already have reduced proposed disallowances by several hundred thousand dollars, and seven cases now are pending, either before federal agencies or the courts, involving at least \$3 million in disputed expenditures. Also, by participating in joint litigation with other states, we have obtained the return of \$500,000 in Medicaid funds as a result of *New Mexico v. Heckler* (D. D.C. 1983).

We have established credibility and working relationships with Legal Aid, the Maryland Advocacy Unit for the Developmentally Disabled (MAUDD), and other advocates for needy citizens to resolve important issues before litigation is filed. As a result of this "preventive lawyering," for example, we have assisted our client in significantly reducing delays in processing applications for Medicaid, developing policies and procedures to allow homeless people to obtain public assistance, and postponing implementation of State regulations that would have reduced or denied Medicaid benefits to children in foster care.

The Department of Human Resources's child support enforcement program rates high on the list of national measurements of State performance. Currently, DHR collects about \$60 million a year in support payments for children not receiving funds through the Aid to Families with Dependent Children program, as well as for those already receiving such help. In the development of this complex, court-related program, we have worked closely with the State's Attorneys throughout Maryland; drafted numerous statutes and regulations; argued, and usually won, many cases before the State's appellate courts; had frequent negotiations with the federal oversight agency, and, of course, constantly furnished advice to the Department on a myriad of legal issues.

*Department of Transportation*

Claims and bid protests before the Board of Contract Appeals continued to add significantly to the caseload of the Department of Transportation in 1984. The Contract Litigation Unit, formed in 1983, now is responsible for over 30 claims before the Board of Contract Appeals involving some \$45 million in disputed amounts. The Unit also serves as a resource for procurement litigation statewide.

Assistant Attorneys General assigned to the Department of Transportation were involved this year in the successful defense of procedural challenges to the construction of a much-needed bridge over the Nanticoke River on the Eastern Shore (*Delaware v. Gracey, et al.*, U.S. District Court for the District of Delaware), and the successful defense of constitutional challenges in several jurisdictions to Maryland's Vehicle Emissions Inspection Program (*Armocost, et al. v. Department of Transportation, et al.*, Circuit Court for Carroll County). Department of Transportation attorneys also successfully defended a constitutional challenge to an increase in registration fees paid by the trucking industry. This statute was enacted in 1982 to provide financial stability to the State's transportation system.

Attorneys representing three DOT agencies — the State Railroad Administration, the Maryland Port Administration, and the Mass Transit Administration — are involved in the defense of lawsuits raising claims of "inverse condemnation," which accuse the State of appropriating or adversely affecting private property without adequately compensating the owners. All these suits are pending but, because of the novelty of the legal arguments raised, may result in setting new legal precedents in Maryland.

In the general area of procurement, we have participated actively in the negotiation, preparation, review and implementation of millions of dollars in Departmental contracts. A significant example in 1984 was the assistance the Attorney General's Office gave to the State Railroad Administration in the procurement of 15 new railroad cars, manufactured in Japan, to be used in its commuter rail service between Baltimore and Washington, as well as in the procurement of three new locomotives to be used in that service. As part of that transaction, a lease agreement was also negotiated with the government of Ontario, Canada, for the use of railroad cars for an interim period while the Japanese cars are being manufactured. The contract raised significant procurement, administrative law and



international commercial law issues and are typical of the complex commercial matters in which attorneys assigned to the Department become involved.

This year also produced some important advances in Maryland's evolving procurement law. There were two noteworthy decisions in the Court of Special Appeals: *Mass Transit Administration v. Granite Construction Company*, 57 Md. App. 766 and *Kennedy Temporaries v. Comptroller of the Treasury*, 57 Md. App. 22.

In *Granite*, a State contractor sought recovery for additional work allegedly attributable to defective specifications. His initial claim under the terms of the contract having been denied by the Maryland State Board of Contract Appeals, he asserted entitlement under the doctrine of unjust enrichment. The Court held that this claim, resting upon a "contract implied in law," was barred by sovereign immunity because the State's waiver of immunity extends only to authorized written contracts.

*Kennedy* decided a number of important procedural matters. A disappointed bidder orally objected to the award of a State contract to an offeror whose bid bond was slightly less than the statutory five percent requirement. Because the disappointed bidder failed to furnish any bid bond, his own bid was not eligible for award. Therefore, the Court did not afford him standing to complain. The Court also held that the procurement officer could not entertain an oral objection in the face of a regulation requiring that bid protests be in writing; that an aggrieved bidder waives his right of appeal to the Board of Contract Appeals by failing to file his appeal within the prescribed 15-day period, and that the statutory bid dispute resolution process culminating in a decision of the Board of Contract Appeals should be completed before a proposed award is presented for approval to the Board of Public Works.

In a case of first impression in Maryland, the Board of Contract Appeals sustained an agency decision to reject the bid of the low responsive offeror on the ground that the company lacked "the requirements, and the integrity and reliability which shall assure good faith performance." The agency's recent termination of a contract with the bidder under the default clause was the ground for this determination. In *Allied Contractors, Inc.*, MSBCA No. 1191, decided on August 16, the Board held that even if the default termination subsequently is found to be incorrect, the bid rejection was proper because it rested upon reasonable grounds.

With the advice and assistance of the Assistant Attorneys General assigned to the DOT, the Department qualified for a development and implementation grant for the Motor Carrier Safety Assistance Program of the U.S. Department of Transportation. This program involves the inspection of all tractor-trailer combinations over a gross weight of 10,000 pounds and the inspection of vehicles for hazardous wastes.

Assistant Attorneys General also continue to advise the Department and the Motor Vehicle Administration with regard to the implementation of the Vehicle Emissions Inspection Program in Maryland.

Late this year, our attorneys also became involved in advising the MVA with regard to questions arising from the importation of so-called "gray market" vehicles. These European luxury cars, which are being imported to the U.S. by side-stepping the authorized dealership system, have increased 15-fold since 1980, jumping from 2,400 cars then to about 40,000 cars now, according to the U.S. Department of Transportation. We have been asked to advise the MVA with regard to the licensing of a distributor not franchised by the manufacturer of the vehicles, and with regard to individuals acting as brokers and purchasing cars directly for buyers in the United States.

We also provided legal services in 1984 in connection with the issuance and sale of \$22,210,000 of County Transportation Bonds issued by the Department on behalf of Baltimore City and several counties to finance the cost of various transportation-related projects. Significant legal services have also been provided in connection with a departmental contract for the sale-leaseback of mass commuting vehicles under the Economic Recovery Act of 1981, as well as with a \$20 million, tax-free transaction in mid-1984 to assist Baltimore City in financing certain capital costs of the Ft. McHenry Tunnel.

### *Department of Employment and Training*

The Department of Employment and Training has now completed its first full year of operation, and it has been a productive 12 months. Assistant Attorneys General in this Division appeared on behalf of the Board of Appeals in 181 unemployment insurance appeals in the circuit courts throughout Maryland. In the administrative area, we filed over 160 records of appeal in our continuing effort to reduce

a substantial backlog. Because this is a new Department, all pending litigation was reviewed and contact was made with the various departmental divisions, informing them of newly developed guidelines and legal positions. All regulations were reviewed, and those determined to be obsolete were repealed. Proposed regulations were extensively reviewed, as is all proposed legislation.

We presently are representing the State in *Baltimore Lutheran High School, Inc. v. Employment Security Administration*, a case of national importance involving the issue of whether state unemployment insurance units can tax religious schools.

Complaints and hearings procedures of the Migrant and Seasonal Farm Worker Job Service have been developed under federal regulations, and we now are handling over 120 such cases. Our actions have resulted in the correction of serious deficiencies in this service, which is of vital importance to this disadvantaged segment of the workforce.

#### *General Services*

On September 20, 1984, our office filed a lawsuit in the Anne Arundel County Circuit Court on behalf of the State against 47 manufacturers, miners, distributors and installers of asbestos-containing products, seeking to recover \$500 million in compensation for asbestos abatement in State buildings. This is believed to be the first suit of its kind by a state government.

The lawsuit, which includes causes of action in negligence, gross negligence, strict liability, breach of warranties, civil conspiracy, concert of action and enterprise liability, alleges that the defendants knew or should have known of the hazards associated with exposure to asbestos products in public buildings and failed to provide adequate warnings. The suit also alleges that certain defendants conspired to manufacture and market their products, which were unsafe and lacked adequate warnings.

In addition to compensatory damages, the suit seeks punitive damages in an unspecified amount, injunctive relief, and indemnification from future liability. Various motions pending before the court will be heard and decided in early 1985, and a pre-trial order will be set to establish the timetable leading to trial of the case.

The State also will soon make a final decision on whether to file a claim for property damage relating to asbestos in the Johns Manville

bankruptcy proceeding, now pending in the U.S. Bankruptcy Court for the Southern District of New York.

Under an order dated July 16, the Bankruptcy Court Established a deadline of October 31 for filing all property damages claims on a special proof of claim form. In light of the lack of sufficient available data necessary to complete the special proof of claim form, we filed a motion on behalf of the State of Maryland requesting an extension of the filing deadline. Similar motions were filed by the Attorneys General of 30 other states, as well as by the Manville Creditors' Committee for Asbestos Related Property Damage School Claimants. The judge has granted an extension until January 31, 1985. This applies to the states as well as to school districts and all other public and private asbestos property damages claimants.

Since last May, the Attorney General's Office has served as a source of information for local school boards regarding important national developments in asbestos property damage litigation that specifically affects the schools. More recently, in response to requests from several school boards, we have offered to assist any interested board by planning and coordinating the filing of claims in the Manville proceeding, as well as in future litigation. At present, we are working with representatives from approximately 10 school districts in connection with this matter.

Businesses frustrated with their unsuccessful efforts to compete for contracts with the Department of General Services filed a record number of bid protests with the Department during 1984. Approximately 45 bid protests were filed, each requiring a review by the Attorney General's Office before the issuance of a procurement officer's decision. Fifteen of these decisions were appealed to the State Board of Contract Appeals, thus requiring formal representation of the Department by this office.

The most interesting bid protest appealed to the Board involved the State's attempts to deal with the telecommunications environment in the face of the revolutionary changes generated by the divestiture of the Bell System. In an appeal by the Chesapeake and Potomac Telephone Company (MSBCA 1194), C&P challenged the legitimacy of the State's efforts to effect certain cost reductions in its telecommunications relationship with the American Telephone and Telegraph Information Systems, Inc.

The appeal, affectionately nicknamed "sibling rivalry," was resolved by the Board in favor of the State. The Board concluded

that the State was entitled to enter into non-competitive negotiations with its existing telecommunications suppliers in an attempt to eliminate or reduce the potentially substantial budget deficits generated by the post-divestiture telecommunications environment. The Board therefore condoned the State's effort to effect cost reductions in the area of telecommunications.

In December, 1978, Titan Group, Inc., a construction firm, was awarded a \$24 million contract to build a 512-bed, medium security annex to the Maryland Correctional Institution in Jessup. The project was scheduled to be completed on October 1, 1980, but substantial completion did not occur until July, 1981. As a result, Titan Group, on its own behalf and on behalf of several of its subcontractors, filed a \$5.2 million claim for additional compensation, based on the fact that the job was extended. From a denial of its claim by the Department of General Services, Titan filed an appeal to the Board of Contract Appeals, where it now is pending. There has been extensive discovery of both entitlement and damage issues, and while the trial date has not yet been set, it is expected that the case will be tried beginning sometime toward the end of 1985.

### *Licensing and Regulation*

The 16-lawyer division in the Department of Licensing and Regulation is responsible for advising over 30 separate boards and commissions and for presenting evidence at over 600 administrative hearings each year. The areas of regulation with which they deal include the occupational and professional licensing of such individuals as architects, real estate agents, home improvement contractors and bay pilots; overseeing insurance carriers and agents, and financial institutions such as banks, savings and loan associations and consumer lenders; and supervising the thoroughbred and harness racing industries. We also enforce the Maryland Occupational and Safety Health Law.

The Division, of necessity, must perform separate roles as an advisor and presenter of evidence. When challenged, we have been consistently successful in refuting allegations that our dual roles are illegal or unfair to litigants in administrative hearings. Yet we are not satisfied with the minimum standards set by the law. Our office continues to improve both the reality and the appearance of fairness in administrative adjudications.

We have reorganized the Department's legal staff to eliminate potential conflicts in agency representation and advisory functions.

Our goals are simply stated but are of enormous import: first, we aim to provide an impartial forum to those affected by State agency action; second, to serve as litigators, vigorously presenting cases before the designated adjudicator; and third, to provide independent and objective advice to our clients. To this end, we have divided the office along functional lines into two specialized sub-groups: advisors and litigators. Each sub-group has its own immediate supervisor, and once formal proceedings are initiated, there are no *ex parte* communications between an agency's advisor and its litigator. All aspects of the advisor/litigator relationship are governed by specific and comprehensive guidelines promulgated by our office. Additionally, we have instituted a pre-charge review process whereby each administrative charge is reviewed for legal sufficiency by the litigator who will be assigned the case before that charge is filed by the board or commission. Such a procedure better ensures that the industry or the individual being reviewed is exposed to a consistent, non-arbitrary exercise of the State's police power.

Our office's continuing commitment to the principle that the Attorney General represents the citizens of Maryland, as well as its governmental institutions, was epitomized by our efforts in the potentially disastrous 1982 time-sharing scandal involving Seetime Associates, Inc. As a result of pervasive mismanagement and fraud, that corporation was placed in receivership at our behest. At stake was not only \$4 million in deposits, but also approximately 1,150 time-share intervals purchased by Maryland consumers in the Seetime condominium in Ocean City. The problems involved in this case appeared insurmountable — involving as they did the non-ownership of the units in question, conflicting sales, unpaid note holders, secured creditors and federal tax liens. But to date we have seen title to all but 12 of the intervals cleared. What has been most satisfying, however, is that throughout more than two years of legal wrangling, not one of the consumers involved has been denied the vacation at the ocean that the consumer paid for. Of the money advanced by the State Real Estate Commission to fund the operation, more than \$100,000 has already been returned and an additional \$100,000 to \$150,000 is expected to be returned within the year.

#### *Department of Personnel*

The Assistant Attorneys General assigned to the Department of Personnel participated in an investigation of the alleged abuse of Regulation .13, involving the reclassification and promotion of employees in the Department of Health and Mental Hygiene. An of-

ficial report was issued as a result of this investigation, and remedial steps were suggested and taken to remedy unfair and invalid personnel practices concerning the regulation.

The Legal Division of the Department of Personnel, in conjunction with Assistant Attorney General Jeanne Hitchcock, also has been reviewing and implementing an affirmative action plan for various State agencies. The purpose of this affirmative action initiative is to determine where, if any, systematic employment discrimination exists within the State government, and to take steps to eliminate it wherever it may appear.

This report reflects the accomplishments of the past and suggests the challenges that lie ahead. I am grateful to the lawyers and support staff of the Office for their dedication and professionalism. I also want to thank you and your staff for the many courtesies extended to us.

Sincerely,

Stephen H. Sachs  
Attorney General

# **CASES IN WHICH THE OFFICE OF THE ATTORNEY GENERAL HAS PARTICIPATED For Calendar Year 1984**

|                                                                                              |      |
|----------------------------------------------------------------------------------------------|------|
| Supreme Court of the United States<br>(Includes Petitions for Certiorari) .....              | 49   |
| United States Court of Appeals<br>for the Fourth Circuit .....                               | 201  |
| Other United States Courts of Appeal .....                                                   | 6    |
| Total .....                                                                                  | 207  |
| United States District Court<br>for the District of Maryland .....                           | 711  |
| Other United States District Courts .....                                                    | 41   |
| Total .....                                                                                  | 752  |
| Court of Appeals of Maryland<br>(Includes Petitions for Certiorari and Answers to Petitions) |      |
| Civil Appeals .....                                                                          | 139  |
| Criminal Appeals .....                                                                       | 71   |
| Total .....                                                                                  | 210  |
| Court of Special Appeals of Maryland                                                         |      |
| Civil Appeals .....                                                                          | 155  |
| Criminal Appeals .....                                                                       | 851  |
| Total .....                                                                                  | 1006 |
| Circuit Court of Maryland .....                                                              | 5126 |
| District Court of Maryland .....                                                             | 3456 |
| Maryland Tax Court .....                                                                     | 1362 |
| Workmen's Compensation Hearings .....                                                        | 6136 |
| Miscellaneous Administrative Hearings .....                                                  | 2099 |



**FINANCIAL STATEMENT**  
**OFFICE OF THE ATTORNEY GENERAL**  
 FOR THE FISCAL YEAR BEGINNING JULY 1, 1983  
 AND ENDING JUNE 30, 1984

|                                     |                        |
|-------------------------------------|------------------------|
| Appropriations and Budget Credits   |                        |
| Program .001 .....                  | \$ 3,740,094.00        |
| Program .004 .....                  | 277,937.00             |
| Program .005 .....                  | 1,049,547.00           |
| Program .006 .....                  | 461,419.00             |
| Program .008 .....                  | 80,934.00              |
| Program .009 .....                  | 1,151,950.00           |
| Total .....                         | <u>\$ 6,761,881.00</u> |
| <br>Total Appropriation .....       | <br>6,761,881.00       |
| Less Reversion & Cancellation ..... | 108,026.00             |
| Total Expenditures .....            | <u>\$ 6,653,855.00</u> |

*Program .001*

Legal Counsel and Advice

|                             |                        |
|-----------------------------|------------------------|
| Appropriation .....         | \$ 3,740,094.00        |
| Total Funds Available ..... | <u>\$ 3,740,094.00</u> |

Salaries:

|                                     |              |
|-------------------------------------|--------------|
| Attorney General .....              | \$ 62,159.00 |
| Deputy Attorney General (2) .....   | 108,007.00   |
| Principal Counsel (2) .....         | 138,116.00   |
| Executive Associate                 |              |
| Attorney General (5) .....          | 231,728.00   |
| Division Director (2) .....         | 134,860.00   |
| Assistant Attorney                  |              |
| General VII (3) .....               | 107,051.00   |
| Assistant Attorney                  |              |
| General VI (14) .....               | 430,981.00   |
| Assitant Attorney                   |              |
| General V (16) .....                | 458,025.00   |
| Assistant Attorney                  |              |
| General IV (4) .....                | 122,211.00   |
| Legal Assistant II (2) .....        | 35,219.00    |
| Adminstrative Officer II .....      | 25,141.00    |
| First Administrative Assistant .... | 23,804.00    |

|                                                 |                  |
|-------------------------------------------------|------------------|
| Administrative Specialist I .....               | 19,235.00        |
| Administrative Aide II (3) .....                | 41,033.00        |
| Administrative Aide I (8) .....                 | 130,362.00       |
| Fiscal Administrator .....                      | 30,056.00        |
| Operations Specialist II .....                  | 7,711.00         |
| Operations Specialist I .....                   | 21,331.00        |
| Associate Librarian II .....                    | 22,316.00        |
| Personnel Specialist III .....                  | 21,879.00        |
| Services Specialist .....                       | 16,638.00        |
| Stenographer, Law<br>and Legislative (13) ..... | 171,965.00       |
| Office Secretary III (2) .....                  | 26,512.00        |
| Office Secretary II (2) .....                   | 28,986.00        |
| Office Clerk I (2) .....                        | <u>22,193.00</u> |

Total Salaries ..... \$ 2,437,519.00

Expenses (Exclusive of Salaries):

|                                  |                   |
|----------------------------------|-------------------|
| Technical and Special Fees ..... | \$ 289,650.00     |
| Communications .....             | 215,821.00        |
| Travel .....                     | 23,217.00         |
| Motor Vehicle Operations .....   | 28,096.00         |
| Contractual Services .....       | 177,416.00        |
| Supplies .....                   | -864.00           |
| Equipment—Replacement .....      | 8.00              |
| Equipment—Additional .....       | 35,674.00         |
| Fixed Charges .....              | <u>533,557.00</u> |

Total Expenses ..... \$ 1,302,575.00

Salaries ..... 2,437,519.00

Total Expenditures ..... \$ 3,740,094.00

|                                           |                     |
|-------------------------------------------|---------------------|
| Original General Fund Appropriation ..... | 3,740,094.00        |
| Total General Fund Expenditures .....     | <u>3,740,094.00</u> |

*Program .004*

Securities Division

|                             |                      |
|-----------------------------|----------------------|
| Appropriation .....         | \$ 277,937.00        |
| Total Funds Available ..... | <u>\$ 277,937.00</u> |

Salaries:

|                                            |                      |
|--------------------------------------------|----------------------|
| Division Director II .....                 | 45,690.00            |
| Assistant Attorney General VI (2) ..       | 52,436.00            |
| Assistant Attorney General IV ....         | 27,767.00            |
| Administrator II .....                     | 24,714.00            |
| Administrative Aide I .....                | 16,638.00            |
| Stenographer, Law<br>and Legislative ..... | 14,281.00            |
| Office Secretary II .....                  | 11,040.00            |
| Typist Clerk IV .....                      | 10,919.00            |
|                                            | <u>\$ 203,485.00</u> |

Expenses (Exclusive of Salaries):

|                                  |                      |
|----------------------------------|----------------------|
| Technical and Special Fees ..... | \$33,696.00          |
| Communications .....             | 4,879.00             |
| Travel .....                     | 2,015.00             |
| Motor Vehicle Operations .....   | 716.00               |
| Contractual Services .....       | 22,117.00            |
| Supplies .....                   | 8,118.00             |
| Equipment—Additional .....       | 2,112.00             |
| Fixed Charges .....              | 799.00               |
| Total Expenses .....             | <u>\$ 74,452.00</u>  |
| Salaries .....                   | <u>\$ 203,485.00</u> |
| Total Expenditures .....         | <u>\$ 277,937.00</u> |

|                                           |                      |
|-------------------------------------------|----------------------|
| Original General Fund Appropriation ..... | \$ 277,937.00        |
| Total General Fund Expenditures .....     | <u>\$ 277,937.00</u> |

*Program .005*

Consumer Protection

|                                  |                        |
|----------------------------------|------------------------|
| General Fund Appropriation ..... | \$ 1,049,547.00        |
| Total Funds Available .....      | <u>\$ 1,049,547.00</u> |

Salaries:

|                                         |              |
|-----------------------------------------|--------------|
| Division Director II .....              | \$ 45,200.00 |
| Assistant Attorney<br>General VII ..... | 40,893.00    |
| Assistant Attorney<br>General VI .....  | 59,766.00    |

|                                       |                   |
|---------------------------------------|-------------------|
| Assistant Attorney                    |                   |
| General V (3) .....                   | 90,722.00         |
| Administrative Officer III .....      | 27,894.00         |
| Administrative Officer II .....       | 25,899.00         |
| Administrative Officer I .....        | 11,533.00         |
| Administrative Specialist II (2) .... | 41,236.00         |
| Administrative Specialist I (2) ..... | 32,906.00         |
| Chief Investigator                    |                   |
| Consumer Protection .....             | 22,452.00         |
| Administrative Aide II .....          | 19,235.00         |
| Administrative Aide I .....           | 16,638.00         |
| Public Affairs Officer II.....        | 27,894.00         |
| Consumer Affairs Supervisor.....      | 31,079.00         |
| Consumer Affairs                      |                   |
| Specialist III (3).....               | 20,885.00         |
| Consumer Affairs                      |                   |
| Specialist II (3).....                | 75,984.00         |
| Consumer Affairs Specialist I (3) ... | 45,737.00         |
| Services Supervisor III.....          | 20,179.00         |
| Stenographer Law and                  |                   |
| Legislative (4) .....                 | 63,817.00         |
| Office Secretary III Steno .....      | 15,559.00         |
| Office Secretary II .....             | 13,359.00         |
| Data Processor Operator               |                   |
| Tech II .....                         | 14,875.00         |
| Office Clerk II.....                  | 9,877.00          |
| Total .....                           | <u>773,639.00</u> |

Expenses (Exclusive of Salaries):

|                                  |                        |
|----------------------------------|------------------------|
| Technical and Special Fees ..... | 97,062.00              |
| Communications .....             | 15,673.00              |
| Travel .....                     | 11,842.00              |
| Motor Vehicle Operations .....   | 9,349.00               |
| Contractual Services .....       | 79,704.00              |
| Supplies .....                   | \$ 41,899.00           |
| Equipment—Additional.....        | 1,889.00               |
| Grants, Subsidies, and           |                        |
| Contributions.....               | 12,104.00              |
| Fixed Charges .....              | <u>6,386.00</u>        |
| Total Expenses .....             | <u>275,908.00</u>      |
| Salaries .....                   | <u>773,639.00</u>      |
| Total Expenditures .....         | <u>\$ 1,049,547.00</u> |

|                                            |    |                     |
|--------------------------------------------|----|---------------------|
| Original General Fund Appropriations ..... | \$ | 1,049,547.00        |
| Total General Fund Expenditures .....      | \$ | <u>1,049,547.00</u> |

*Program .006*

## Antitrust

|                             |    |                   |
|-----------------------------|----|-------------------|
| Appropriation .....         | \$ | 461,419.00        |
| Total Funds Available ..... | \$ | <u>461,419.00</u> |

## Salaries:

|                                            |    |                   |
|--------------------------------------------|----|-------------------|
| Division Director II .....                 | \$ | 43,316.00         |
| Assistant Attorney General VI (4) ..       |    | 122,644.00        |
| Assistant Attorney General V .....         |    | 46,549.00         |
| Assistant Attorney General IV .....        |    | 29,434.00         |
| Legal Assistant II .....                   |    | 14,894.00         |
| Accountant Auditor III .....               |    | 20,719.00         |
| Administrative Aide I .....                |    | 15,900.00         |
| Stenographer Law and Legislative (2) ..... |    | <u>29,173.00</u>  |
| Total .....                                | \$ | <u>322,629.00</u> |

## Expenses (Exclusive of Salaries):

|                                  |    |                 |
|----------------------------------|----|-----------------|
| Technical and Special Fees ..... | \$ | 49,238.00       |
| Communications .....             |    | 23,301.00       |
| Travel .....                     |    | 9,533.00        |
| Motor Vehicle Operations .....   |    | 972.00          |
| Contractual Services .....       |    | 43,122.00       |
| Supplies .....                   |    | 2,402.00        |
| Equipment—Additional .....       |    | 7,364.00        |
| Fixed Charges .....              |    | <u>2,858.00</u> |

Total Expenses .....

|    |            |
|----|------------|
| \$ | 138,790.00 |
|----|------------|

Salaries .....

|                   |
|-------------------|
| <u>322,629.00</u> |
|-------------------|

Total Expenditures .....

|    |                   |
|----|-------------------|
| \$ | <u>461,419.00</u> |
|----|-------------------|

|                                            |    |            |
|--------------------------------------------|----|------------|
| Original General Fund Appropriations ..... | \$ | 461,419.00 |
|--------------------------------------------|----|------------|

|                                         |    |                   |
|-----------------------------------------|----|-------------------|
| Total General Fund Appropriations ..... | \$ | <u>461,419.00</u> |
|-----------------------------------------|----|-------------------|

*Program .008*

## State's Attorneys' Coordinator

|                       |                  |
|-----------------------|------------------|
| Appropriation .....   | 80,934.00        |
| Funds Available ..... | <u>80,934.00</u> |

## Salaries:

|                                           |                     |
|-------------------------------------------|---------------------|
| State's Attorneys' Coordinator .... \$    | 36,500.00           |
| Stenographer Law and<br>Legislative ..... | <u>13,707.00</u>    |
|                                           | <u>\$ 50,207.00</u> |

## Expenses (Exclusive of Salaries):

|                                  |                     |
|----------------------------------|---------------------|
| Technical and Special Fees ..... | 7,468.00            |
| Communications .....             | 2,646.00            |
| Travel .....                     | 1,885.00            |
| Contractual Services .....       | 10,153.00           |
| Supplies .....                   | 7,021.00            |
| Equipment—Additional .....       | 613.00              |
| Fixed Charges .....              | <u>478.00</u>       |
| Total Expenses .....             | <u>\$ 30,264.00</u> |
| Salaries .....                   | <u>50,207.00</u>    |
| Total Expenditures .....         | <u>\$ 80,471.00</u> |

|                                           |           |                  |
|-------------------------------------------|-----------|------------------|
| Original General Fund Appropriation ..... | \$        | 80,934.00        |
| Total General Fund Appropriation .....    |           | 80,934.00        |
| Less General Fund Reversion .....         |           | 463.00           |
| Total General Fund Expenditures .....     | <u>\$</u> | <u>80,471.00</u> |

*Program .009*

## Medicaid Fraud Control Unit

|                             |           |                     |
|-----------------------------|-----------|---------------------|
| General Appropriation ..... | \$        | 239,617.00          |
| Federal Appropriation ..... |           | <u>921,333.00</u>   |
| Total Funds Available ..... | <u>\$</u> | <u>1,160,950.00</u> |

## Salaries:

|                           |    |           |
|---------------------------|----|-----------|
| Division Director I ..... | \$ | 38,294.00 |
| Principal Counsel .....   |    | 44,063.00 |

|                                           |                        |
|-------------------------------------------|------------------------|
| Assistant Attorney General VII ...        | 40,251.00              |
| Assistant Attorney General VI (2) .....   | 71,023.00              |
| Assistant Attorney General V (2) ..       | 57,556.00              |
| Chief Investigator                        |                        |
| Medicaid Fraud .....                      | 31,928.00              |
| Fiscal Administrator I (3) .....          | 56,607.00              |
| Fiscal Specialist III (3) .....           | 74,203.00              |
| Medicaid Fraud                            |                        |
| Investigator III .....                    | 24,922.00              |
| Medicaid Fraud                            |                        |
| Investigator II (4) .....                 | 74,723.00              |
| Administrative Specialist III .....       | 23,041.00              |
| Administrative Aide I .....               | 16,549.00              |
| Stenographer Law and                      |                        |
| Legislative (3) .....                     | 33,068.00              |
| Office Assistant III .....                | 10,169.00              |
| Total Salaries .....                      | <u>\$ 596,397.00</u>   |
| Expenses (Exclusive of Salaries):         |                        |
| Technical and Special Fees .....          | \$ 36,076.00           |
| Communications .....                      | 30,450.00              |
| Travel .....                              | 6,774.00               |
| Motor Vehicle Operations .....            | 30,179.00              |
| Contractual Services .....                | 40,828.00              |
| Supplies .....                            | 8,490.00               |
| Equipment—Additional .....                | 20,362.00              |
| Grants, Subsidies and                     |                        |
| Contributions .....                       | 192,917.00             |
| Fixed Charges .....                       | 81,914.00              |
| Total Expenses .....                      | <u>\$ 447,990.00</u>   |
| Total Salaries .....                      | <u>596,397.00</u>      |
| Total Expenditures .....                  | <u>\$ 1,044,387.00</u> |
| Original General Fund Appropriation ..... | \$ 239,617.00          |
| Less General Fund Reversion .....         | 26,593.00              |
| Total General Fund Expenditure .....      | 213,024.00             |
| Original Federal Fund Appropriation ..... | 921,333.00             |
| Less Federal Fund Cancellation .....      | 80,970.00              |
| Total Federal Fund Expenditure .....      | 831,363.00             |
| Total Expenditure .....                   | <u>\$ 1,044,387.00</u> |





**OFFICIAL OPINIONS**  
**of the**  
**ATTORNEY GENERAL**  
**of**  
**MARYLAND**



**OPINIONS PUBLISHED  
IN FULL**

**See also page 289 for Synopses of additional Opinions.**



## AGRICULTURE

### AGRICULTURAL LAND PRESERVATION PROGRAM—AGRICULTURAL TRANSFER TAX—LOCAL GOVERNMENT—COUNTIES MAY USE THEIR SHARES OF TRANSFER TAX FOR MATCHING PURCHASES OF EASEMENTS AND FOR ADMINISTRATIVE EXPENSES OF COUNTY AGRICULTURAL LAND PRESERVATION PROGRAM.

November 29, 1984

*Mr. Oscar A. Schulz, President*

*Mr. Thomas E. Pierson*

*Mr. Vernon B. Sultenfuss*

*The County Commissioners of Queen Anne's County*

You have requested our opinion on whether Queen Anne's County may properly use its share of the revenue generated by the agricultural transfer tax ("transfer tax"), imposed by Article 81, §278F of the Maryland Code, to make matching funds available to the Maryland Agricultural Land Preservation Foundation (the "MALPF") and to pay the administrative expenses of a county agricultural land preservation program. Specifically, you asked whether the county may use this transfer tax revenue (i) to pay its 40%-share of the cost of easements purchased under the MALPF's matching funds allotment; and (ii) to pay half the salary of a county employee, who would spend half of his or her time in establishing and administering a local agricultural preservation program.

For the reasons given below, we conclude that the county has the authority to use its transfer tax revenue in the way you have indicated.

## I

### Introduction

Article 81, §278F imposes an agricultural transfer tax on deeds conveying title to certain agricultural land, when that land is sold for development.<sup>1</sup> Subsection (g) requires each county to collect the tax, while subsections (h) and (i) specify that the revenue may be used by the MALPF and by the county for agricultural preservation purposes only. These subsections provide in relevant part:

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<sup>1</sup> The agricultural transfer tax was enacted, and the former agricultural development tax repealed, by Chapter 808, Laws of Maryland 1981.

“(g) The tax imposed by this section shall be paid to and collected by the tax collecting authorities of the various subdivisions before the written instruments conveying title are recorded among the land records.

(h) Two-thirds of the money collected by the tax collecting authorities of the various subdivisions . . . shall be held in a special account and paid over to the Comptroller of the Treasury as the Comptroller specifies. The Comptroller shall place all proceeds in the Maryland Agricultural Preservation Fund to be used for the purposes stated in §2-505 of the Agriculture Article.

(i) One-third of the money collected by the tax collecting authorities . . . shall be held in a special account by the subdivision and shall be used for an approved agricultural land preservation program, including bond annuity funds or matching funds.”

Agriculture (“AG”) Article, §2-505(c), to which Article 81, §278F(h) refers, specifies how the MALPF may spend its 2/3 share of the tax:

“(1) For costs associated with the staffing and administration of the Maryland Agricultural Land Preservation Foundation;

(2) For reasonable expenses incurred by the members of the Board of Trustees of the Maryland Agricultural Land Preservation Foundation in the performance of official duties; and

(3) For consideration in the purchase of agricultural land preservation easements beginning with fiscal year 1979 and each fiscal year thereafter.”

There are no equally specific statutory provisions regarding permissible uses for a county’s 1/3 share. Section 278F(i) simply provides that the county must use its share for an “approved agricultural preservation program, including bond annuity funds or matching funds”.<sup>2</sup> Nor do the administrative regulations governing either the

<sup>2</sup> Under §278F(i), the county may retain its share for three years. Thereafter, any unused money shifts automatically to the MALPF’s farmland preservation fund and, for the next five years, must be used by the MALPF for easement purchases in the county that collected it. After that time, the transfer tax revenue presumably may be used for any of the purposes specified in AG §2-505(c), including MALPF staff and easement costs.

transfer tax or the agricultural land preservation program further enumerate the uses to which a county's share of the tax may be put.<sup>3</sup>

Given the specific, express reference in Article 81, §278F(i) to use of a county's share for "matching funds", it is clear that the statute authorizes a county to use its share of the transfer tax revenue as a source of matching funds for purchases of agricultural land preservation easements.<sup>4</sup> The statute and regulations are far less specific, however, about whether that revenue also may be used to pay for the administrative costs of a local agricultural preservation program.

## II

### Use of Revenue for Administrative Expenses

"The polestar of statutory construction is to ascertain and carry out the real intent of the legislature when it enacts a statute". *Harbor Island Marina v. Calvert Co.*, 286 Md. 303, 311 (1979). This intent must ordinarily be determined from the words used. However, when a statute is ambiguous or vague, it should be interpreted to carry out the legislative object or purpose, considering "the effect of the proposed construction in light of the subject matter and purposes sought to be accomplished". *Id.* To that end, all relevant legislative enactments will be examined to determine the true legislative purpose. *Greenbelt Consumer Services, Inc. v. Acme Markets, Inc.*, 272 Md. 222, 227 (1974).

The agricultural transfer tax, like the development tax it replaced, was enacted both as a disincentive to removing agricultural land from productive use and as a means of funding the State's agricultural land preservation program.<sup>5</sup> The purposes of the agricultural land

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<sup>3</sup> Article 81, §278F(1) requires the Department of Assessments and Taxation to adopt regulations "to implement the provisions of this section"; those regulations are codified at COMAR 18.05.01.01. The MALPF, pursuant to AG §§2-504(4) and 2-509(a), has adopted regulations concerning the establishment of agricultural preservation districts and the administration of the State agricultural land preservation program; those regulations are codified at COMAR 15.15.01.01 through 15.15.01.06.

<sup>4</sup> See AG §§2-508 and 2-512, discussed below in the text accompanying notes 6 and 7.

<sup>5</sup> The MALPF was created and authorized to acquire preservation easements by Chapter 642, Laws of Maryland 1974. However, it was given no funding. In 1977, the Maryland Agricultural Land Preservation Fund was created and given power to receive grants from private or governmental donors for purchases of easements. Chapter 883,

preservation program, as described in AG §2-501, are to provide sources of agricultural products within the State; to prevent the loss of agricultural land to suburban expansion; to control urban sprawl; and to preserve agricultural land as open space.

To accomplish those purposes, the MALPF purchases easements on agriculturally productive land in each county, to restrict that land perpetually to agricultural use. At the beginning of each fiscal year, the MALPF allots  $\frac{1}{2}$  of its available funds, to be distributed in equal shares among all of the counties, for "general purchases" of easements. The remainder is allotted among "eligible counties" that agree to provide funds for "matching purchases" of easements. AG §2-508(b).<sup>6</sup>

Under AG §2-512, the MALPF must approve a local program of agricultural land preservation before it may allot any of its available funds to a particular county for matching purchases of easements. However, the statute permits approval of any local program that (1) has been submitted to the MALPF for approval within the statutory time limit; (2) includes the county's agreement to contribute 40% of the cost of any easement purchased by means of the matching funds allotment; and (3) will not lead to preservation of nonagricultural land. AG §2-512(b). Moreover, the MALPF must consider the recommendations of the local governing body in deciding whether to purchase easements on particular land. AG §2-510(e)(2)(ii). Indeed, the MALPF may designate the districts within which it will purchase easements only if the local governing body approves the designation. AG §2-509(b)(5)(ii). Thus, the agricultural land preservation program, on its face, was designed and intended to promote Statewide coordination of agricultural preservation without sacrificing local control.<sup>7</sup>

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Laws of Maryland 1977. Even this program, however, had no regular source of funding until 1979, when provisions were enacted for distributing the development tax revenue to the Fund and to local agricultural preservation programs. Chapter 702, Laws of Maryland 1979. *See generally*, Nielsen, *Preservation of Maryland Farmland: A Current Assessment*, 8 U. Balt. L. Rev. 429, 434-38 (1979) (outlining legislative history of agricultural land preservation program).

<sup>6</sup> These allotments are made from the money remaining in the Maryland Agricultural Land Preservation Fund after payment of the MALPF's administrative costs and the expenses of its board of trustees and after subtracting from the Fund any amounts previously committed for acquisition of land or easements.

<sup>7</sup> Such local control has led to a variety of programs, tailored to the varying needs of individual counties. In Calvert County, for example, a system permitting transfers of development rights authorizes owners of land in agricultural preservation districts



preservation program, including compensating an employee for work done in administering the program.<sup>8</sup>

### III

#### Conclusion

In summary, it is our opinion that Article 81, §278F(i) authorizes Queen Anne's County to use its share of the agricultural transfer tax to provide matching funds for easement purchases and to pay for employee services necessary to effectuate the county's agricultural land preservation program.

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AVERY AISENSTARK  
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*Opinions and Advice*

*Editor's Note:* The agricultural land transfer tax is now codified in Subtitle 3 of Title 13 of the Tax-Property Article. See Chapter 8, Laws of Maryland 1985.

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<sup>8</sup> We also note that such use of transfer tax revenue is not without precedent. Howard County, for example, currently uses its  $\frac{1}{3}$  share of the transfer tax to compensate the staff of its agricultural preservation program, as well as to fund easement purchases and to match funds with the MALPF. Conversation with Gerald Talbert, Executive Director of MALPF, and Dennis White, Program Administrator of Howard County Agricultural Preservation Program (August 31, 1984).

In line with this intent, the General Assembly made no attempt to restrict the local use of transfer tax revenue to any specific elements of a local agricultural land preservation program. In our view, this lack of statutory restrictions reflects a legislative determination that decisions as to the most effective use of the local share of that revenue should be left to local authorities. And, we note, such an intent comports well with a desire to allay fears of excessive State control of land use, fears that plagued early efforts to establish a Statewide program of agricultural land preservation. See Nielsen, *Preservation of Maryland Farmland: A Current Assessment*, 8 U. Balt. L. Rev. 429, 434-38 (1979).

In our view, the county's broad general authority to spend transfer tax revenue in support of a farmland preservation program necessarily implies and encompasses the authority to spend this revenue to implement and administer that program effectively. Although the powers of county commissioners are limited, they nonetheless encompass powers incidental to those expressly granted by the General Assembly, as well as powers essential to the accomplishment of the county's declared purposes. *Montgomery County v. Maryland-Washington Metropolitan District*, 202 Md. 293, 304 (1953) (quoting 2 Dillon, *Municipal Corporations*, §237). We believe that providing for the services of an administrative staff necessary to effectuate a local preservation program falls within these incidental and essential powers.

We conclude, therefore, that the county has the authority to use its share of agricultural transfer tax revenue for expenses reasonably necessary to carry out the purposes of its local agricultural land

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to sell the development rights pertaining to their land to owners of land in designated "transfer zones". When all the development rights on a parcel of land in an agricultural preservation zone have been sold, that land is permanently withdrawn from development. The purchaser of the development rights may use those rights to increase the density of residential development on the "transfer zone" land. Code of Public Local Laws of Calvert County, §§17-101 through 17-109.

Howard County plans to preserve its farmland by purchasing easements on at least 20,000 acres of agricultural land from local landowners. Howard County Code, §15-501. Once such an easement is purchased on a farm, it may not be developed for any nonagricultural use.

Other counties appear to rely principally on zoning to preserve local agricultural land. See, e.g., Public Local Laws of Frederick County, §1-19-239 (the purpose of agricultural zoning is "to preserve productive land and the character and quality of the rural environment and to prevent urbanization where roads and other public facilities are scaled to meet only rural needs").

## ANTITRUST

“STATE ACTION” IMMUNITY—LOCAL GOVERNMENT—CABLE TV—EXCLUSIVE FRANCHISE—“CLEARLY ARTICULATED” STATE POLICY—“ACTIVE STATE SUPERVISION”—RELEVANT PRODUCT AND GEOGRAPHIC MARKET—COMPETITIVE ANALYSIS—ATTORNEY GENERAL—LA PLATA FRANCHISE ENJOYS STATE ACTION IMMUNITY—ATTORNEY GENERAL MAY REPRESENT LOCAL GOVERNMENTS IN ANTITRUST MATTERS.

February 21, 1984

*Mr. Zakary A. Krebeck*  
*Town Manager*  
*Town of La Plata*

On behalf of the Town of La Plata, you have requested our assessment of the Town’s potential antitrust liability in connection with the termination of a cable television franchise and the grant of a new franchise to a different cable TV operator. You also have asked whether the Attorney General’s Office has the authority to represent La Plata in this matter.

Based on our understanding of the relevant facts, we have concluded as follows:

1. Under the “state action” doctrine, La Plata is entitled to assert immunity from any antitrust claim that might arise from the events surrounding the termination and new grant of a cable television franchise. Even if, in litigation, La Plata’s assertion of immunity were rejected, the Town nevertheless would likely prevail on the merits, particularly as to any claim for damages.

2. This Office has legal authority to represent La Plata in matters of this nature. And, under the circumstances of this case as we understand them, if an antitrust claim were brought against La Plata, we would be willing to represent the Town if asked to do so.

### I

#### Factual Background

As we understand them, the relevant facts are as follows:

In 1972, the Town of La Plata granted a cable television franchise to CATV General Corporation ("CATV General") of Fairfax, Virginia. The franchise gave CATV General the right to provide La Plata residents with cable service by using public rights of way. The original agreement was an exclusive franchise with a 10-year term; that term expired on May 25, 1982.

In September 1981, La Plata notified CATV General, in accordance with the original franchise, that it would not renew the franchise after the end of the term. La Plata's decision not to renew was apparently based on CATV General's violations of a number of the franchise provisions. We have been advised, for example, that CATV General did not maintain an office in La Plata; it failed to expand its cable system beyond the original 200 subscribers to the whole town; and it made allegedly substandard installations of equipment.

Consequently, La Plata solicited competitive bids from several firms for the installation and operation of a cable system. Among the bidders were CATV General and Chasco Cablevision, Ltd. ("Chasco"). In December 1981, La Plata granted a franchise to Chasco, effective May 25, 1982, for the operation of a cable system within the La Plata town limits. Chasco's franchise was similar to CATV General's, except that the new franchise had a 15-year term and was not expressly exclusive.

Even though its franchise expired on May 25, 1982, CATV General did not remove its cable equipment from utility poles or its receiving antenna from the town water tower. La Plata then demanded that CATV General remove the receiving antenna, which it did, but the cable equipment has still not been removed from the utility poles.

Until January 1983, the local electrical utility, Southern Maryland Electric Cooperative ("Southern Maryland"), refused to permit more than one cable company to use its poles for cable equipment. Because of CATV General's refusal to remove its equipment, and because utility poles are the only economically feasible means of routing cable lines, the practical effect of the utility company's position was to continue CATV General's exclusive operation. Consequently, Chasco was unable to exercise its franchise rights until January 1983, when it persuaded Southern Maryland to permit a second set of cable lines on its utility poles, subject to the condition that Chasco pay any additional costs necessary to conform the installation of the second line to utility industry standards.

According to La Plata officials, Chasco's entry into the cable television market has resulted in some degree of competition. While CATV General retains most of its original 200 hookups, Chasco has provided higher quality cable service to the remaining part of the town. Based on the comments of Chasco subscribers, these officials believe that Chasco's higher quality service might eventually prevail over CATV General's service in the La Plata cable television marketplace.

Although this arrival of competition in the market could ultimately result in CATV General being displaced without any outside intervention, La Plata still wishes to enjoin CATV General's operations, in order to end problems associated with that company's services and to establish the Town's power, if it exists, to prevent future unauthorized cable companies from operating in La Plata. The issue of La Plata's antitrust liability would arise if CATV General were to file a counterclaim in an action brought by La Plata.

## II

### State Action Immunity Doctrine

For a municipal corporation such as La Plata to avail itself of "state action" immunity in the award of cable television franchises, it must have acted "in furtherance or implementation of clearly articulated and affirmatively expressed state policy". *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 52 (1982).

Proper application of this standard requires consideration of its precedential foundation.

#### A. *Evolution of the State Action Doctrine*

##### 1. *State Activity*

In 1943, the Supreme Court first expressed the view that Congress did not intend to apply the proscriptions of the Sherman Act to state action. *Parker v. Brown*, 317 U.S. 341 (1943).

The question in *Parker* was whether an agricultural market allocation scheme, established pursuant to California statute to stabilize the price and production of California raisins and other crops, violated the Sherman Act. The Court held that, because there was "nothing in the language of the Sherman Act or in its history which suggests

that its purpose was to restrain a state or its officers or agents from activities directed by its legislature", the federal antitrust laws did not preclude such "state action". 317 U.S. at 350-51. The Court noted that, by enacting the underlying California statute, "[t]he state ..., as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit". 317 U.S. at 352.

This "state action" exemption from the antitrust laws was defined more precisely in a series of recent cases, beginning in 1975 with *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). In *Goldfarb*, the Supreme Court concluded that the antitrust laws could prohibit enforcement of a lawyer's minimum fee schedule, established by a county bar association and enforced by the Virginia State Bar. The Court pointed out that the state statute authorizing the State Bar to regulate the legal profession did not refer to lawyers' fees, and the Virginia Supreme Court had taken no action regarding fee schedules. 421 U.S. at 790-91. Thus, the fee schedule could not be said to have been imposed by the state acting as sovereign and, therefore, was not beyond federal antitrust prohibitions. *Id.* As the Supreme Court commented in a later case, the significance of *Goldfarb* was that it "made it clear that, for purposes of the *Parker* doctrine, not every act of a state agency is that of the State as sovereign" and thus entitled to immunity. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978).

In 1977, the Supreme Court decided another antitrust challenge to a regulation of the legal profession. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). In *Bates*, the Court considered the applicability of federal antitrust laws to a ban on attorney advertising, enforced by the state bar association at the direction of the Arizona Supreme Court. *Bates*, in contrast to *Goldfarb*, held that the antitrust laws did not apply, because the challenged restraint was "'compelled by the direction of the State acting as a sovereign'" through the state's supreme court. *Bates*, 433 U.S. at 360 (quoting *Goldfarb*, 421 U.S. at 791).<sup>1</sup>

## 2. Municipal Activity

In 1978, the Supreme Court first considered the *Parker* doctrine as applied to municipal activity. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

<sup>1</sup> The challenged restraint nevertheless was invalidated in *Bates*, although not on antitrust grounds. Rather, the Supreme Court held that the advertising ban in question violated the Free Speech Clause of the First Amendment.

The *Lafayette* case involved a privately-owned electrical utility company's antitrust challenge to several municipalities' operation of a competing public utility. The Court's plurality opinion concluded that, under our federal system of dual government, municipalities—unlike states—are not sovereign entities. Consequently, municipal conduct is not beyond the pale of the federal antitrust laws. 435 U.S. at 413. The plurality reasoned that “serious economic dislocation ... could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws”. 435 U.S. at 412-13.

For municipal conduct to be exempt, the Court explained, it must be undertaken pursuant to clear state direction:

“[I]n the absence of evidence that the State authorized or directed a given municipality to act as it did, the actions of a particular city hardly can be found to be pursuant to ‘the state[s] command’, or to be restraints that ‘the state ... as sovereign’ imposed.” 435 U.S. at 414.

Thus, in order for municipalities to successfully assert the state action exemption, they must be able to point to a specific, “clearly articulated and affirmatively expressed” state policy permitting the challenged municipal activity. 435 U.S. at 410. The municipalities in *Lafayette* had no such state authorization and, therefore, were subject to liability under the antitrust laws.

More recently, in *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982), the Supreme Court considered an antitrust challenge to a municipality's regulation of the local cable television industry—a challenge to a municipality's actions as a regulator rather than, as in *Lafayette*, a challenge to a municipality's actions as a competitor. The regulatory activity at issue in *Boulder* was a city ordinance that prohibited a cable television franchisee from expanding its existing network. In finding that the antitrust laws could also apply to municipal regulatory activities, a majority of the Court adopted nearly wholecloth the plurality opinion of *Lafayette* and, in doing so, clarified the Court's position with respect to municipal immunity.<sup>2</sup> Accordingly, the *Lafayette* “clear articulation” test was applied as a prerequisite to *Boulder*'s state action immunity. 455 U.S. at 52.

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<sup>2</sup> The majority thus apparently laid to rest the governmental-versus-proprietary test proposed in Chief Justice Burger's concurring opinion in *Lafayette*.

Defendant Boulder argued that the test was satisfied by the *carte blanche* grant of the state's sovereign power to municipalities under the Colorado Constitution's Home Rule Amendment. That provision, however, did not specifically permit anticompetitive practices such as Boulder's moratorium ordinance. The Court ruled that the Home Rule Amendment's general grant would not protect the local government from antitrust scrutiny, because the provision contained no "clearly articulated" state policy that permitted the local government to displace competition in the area of cable television or that otherwise specifically authorized the conduct in question. 455 U.S. 52-56. At best, the Court explained, the home rule delegation was "neutral" on the question of the authority to displace competition in the area of cable television.

### B. *Articulation of State Policy in Maryland*

Applying these precedents to the facts here, La Plata's ability to assert state action immunity must be tested, first, against its statutory authority in May 1982, when the Chasco franchise was granted; and, then, against its statutory authority as of July 1, 1982, the effective date of amendments designed to clarify any ambiguity regarding the State's preexisting competition policy.

#### 1. *State Law Prior to July 1, 1982*

Until July 1, 1982, Article 23A, §2(13) of the Maryland Code delegated to municipal corporations the power "to grant franchises as provided under existing public general or public local law".

This broad delegation fails the *Boulder* test. To be sure, a handful of cases in other states have suggested that the use of the word "franchise" contemplates the power to grant an exclusive right or a monopoly. See, e.g., *California State Telegraph Co. v. Alta Telegraph Co.*, 22 Cal. 398, 411 (1863), *overruled*, *San Francisco v. Spring Valley Water Works*, 48 Cal. 493, 523 (1874). Nevertheless, we consider it unlikely that the General Assembly's enactment of general authority for municipalities to grant "franchises" would be construed as authority to grant *exclusive* franchises—i.e., franchises that restrict competition. Cf. Article 41 of the Maryland Declaration of Rights ("monopolies ... ought not to be suffered").

Thus, like the Colorado Home Rule Amendment considered in *Boulder*, former §2(13) fails the "clear articulation" test because it



does not show that the State's policy is more than "mere *neutrality* respecting the municipal actions challenged as anticompetitive". *Boulder*, 455 U.S. at 55 (emphasis in original). A statute must clearly articulate a grant of power to restrict competition, not just the "general . . . power to enact ordinances". 455 U.S. at 56.

Accordingly, if La Plata's acts are to fall within the protective scope of the state action doctrine, they do so on the basis of the 1982 amendments.

## 2. *State Law as of July 1, 1982*

In 1982, the General Assembly enacted Chapter 562, Laws of Maryland 1982, for the purpose of "granting specific authority for counties, incorporated municipalities, and Baltimore City to engage in community antenna television and cable television franchising, including exclusive franchising".

As indicated in that Act's "statement of ... legislative policy", these amendments were clearly intended to provide the political subdivisions of this State with retroactive as well as prospective authorization to grant exclusive cable television franchises:

*"It has been and shall continue to be the policy of this State to authorize the counties, municipalities, and Baltimore City to supplant competition by granting one or more franchise(s) for cable television system(s) on an exclusive basis, to impose franchise fees, to establish certain rates charged to subscribers and to establish rules and regulations to govern the operation of the franchise(s)." Chapter 562, Laws of Maryland 1982, Section 1(2) (emphasis added).*

The language "has been" indicates that, even when La Plata granted its original franchise, there already existed a state policy permitting municipalities, acting as agents of the State "as sovereign", to supplant competition—even though, at that time, no statute "clearly articulated" this policy.

### (a) *Prospective Application*

Prospectively, at least, the amended statute surely satisfies the *Boulder* "clear articulation" requirement.

As amended, Article 23A, §2(13) now authorizes municipal corporations in this State:

“To grant franchises as provided under existing public general or public local laws; to grant one or more exclusive or nonexclusive franchises for a community antenna system or other cable television system that utilizes any public right-of-way, . . . to impose franchise fees, and to establish rates, rules, and regulations for franchises granted under this section.”<sup>3</sup>

The “clear articulation” test requires that there be statutory language that shows that the state, as sovereign, specifically “contemplated” and authorized the conduct challenged as anticompetitive. *Boulder*, 455 U.S. at 55; *Lafayette*, 435 U.S. at 413-15. This test is satisfied when, as here, the delegating statute directly addresses and permits anticompetitive municipal activities. Indeed, courts have found that the test may be satisfied even without language that directly discusses anticompetitive effects. *See, e.g., Town of Hallie v. City of Eau Claire*, 700 F.2d 376, 380-81 (7th Cir. 1983), [aff’d, 105 S.Ct 1713 (1985)] (test satisfied by language that specifically authorized the challenged conduct that restrained trade). *Cf. Catalina Cablevision Associates v. City of Tucson*, 1984-1 Trade Cas. (CCH) ¶65,789 (D. Ariz. 1983) (state statute authorizing city “to impose conditions, restrictions, and limitations . . . upon the construction, operation, and maintenance of cable television systems” held not sufficiently clear articulation of state anticompetitive policy so as to immunize exclusive franchise; question certified for interlocutory appeal).

Because the statute permits La Plata to franchise a cable television system and, in doing so, to supplant competition, it prospectively satisfies the clear articulation requirement with respect to La Plata’s actions here.

#### (b) *Retroactive Application*

The amended statute probably also retroactively satisfies the requirement that there be a clearly articulated state policy.

<sup>3</sup> Chapter 562 also enacted identical authority for the counties and Baltimore City. *See* Article 25, §3C(b) of the Maryland Code; Article 25A, §5(B) of the Maryland Code; Article II, §(35A) of the Charter of Baltimore City. *See also* Article 25B, §13 of the Maryland Code.

*Boulder* only requires that there be a clearly articulated state policy; it does not specifically preclude statutory clarification of preexisting state policy. Moreover, the amended statute—by its terms explicit evidence of the State's preexisting policy concerning anticompetitive regulation of cable television—readily enables a court to ascertain that La Plata's actions were, in fact, pursuant to State policy and not a form of unauthorized municipal conduct. *Cf. Lafayette*, 435 U.S. at 414.

A court's reliance upon a specific, but retroactive, immunity statute—a statute that otherwise conforms to the case law requirement that there be a clear articulation of policy permitting municipalities to supplant competition—would not “wholly eviscerate” the precedents supporting the national policy favoring competition in the same way that reliance upon a general, home rule grant of power does. *Cf. Boulder*, 455 U.S. at 56. In this regard, a retroactive statute clarifying existing state policy is quite unlike the Colorado Home Rule Amendment found ineffective in *Boulder*. A court, therefore, is much more likely to rely on it as satisfying the clear articulation test, even as applied to La Plata's pre-July 1, 1982 conduct.<sup>4</sup>

Nevertheless, because no court has yet specifically addressed this particular issue, there does remain a narrow element of doubt about whether such a statute could confer immunity retroactively.<sup>5</sup>

<sup>4</sup> Some courts have reasoned that when, as here, the challenged conduct is a “traditional” subject of municipal power, the state authorization need not be as precise as otherwise would be required to satisfy the clear articulation test. *See, e.g., Golden State Transit Corp. v. City of Los Angeles*, 563 F.Supp. 169, 172 (C.D. Cal. 1983). However, in light of the reasoning in *Boulder*, there is a serious question of whether this distinction is entitled to any weight. *See* note 2 above.

<sup>5</sup> In *Vickery Manor Service Corp. v. Village of Mundelein*, No. 82-C-5392 (N.D. Ill. December 12, 1983) (amending prior opinion reported at 1984-1 Trade Cas. (CCH) ¶65,790), the court ruled that a recent Illinois statute purporting to “clearly articulate and affirmatively express” state policy regarding the anticompetitive effects of all local government action did not immunize the town's conduct, because the statute was not in effect at the time of the challenged activities. Slip Op. at 20-21. Consequently, the court did not have to reach the issue of the validity of the statute; nor did the court expressly discuss the issue of whether the Illinois legislature intended to immunize conduct that occurred before the enactment of the statute. Unlike the Maryland statute at issue here, which is expressly retroactive, the Illinois legislation did not attempt to give retroactive effect to any clear articulation of state anticompetitive policy.

The *Vickery Manor* case is distinguishable from La Plata's situation on another ground as well. In *Vickery Manor*, the Illinois lawsuit had been filed before the statute was enacted. Indeed, the court's decision on the immunity issue had been rendered before the town even asserted the argument that its conduct was authorized by the new statute. La Plata, on the other hand, was not in litigation nor threatened with litigation when the 1982 Maryland legislation was enacted. Consequently, retroactive application would not interfere with the outcome of any pending lawsuit.

### C. Active State Supervision

#### 1. Introduction

In addition to the requirement that there be a "clearly articulated and affirmatively expressed state policy", the Supreme Court has imposed a requirement of "active state supervision" as a prerequisite for state action immunity, at least when private anticompetitive conduct is being challenged. *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

In *Boulder*, the Court expressly reserved the question of whether active state supervision is necessary when anticompetitive conduct of a local government is at issue. 455 U.S. at 52 n. 14.<sup>6</sup> At the same time, however, the Court reiterated the view expressed by the plurality in *Lafayette* that "a [s]tate may frequently choose to effect its policies through the instrumentality of its cities and towns". *Boulder*, 455 U.S. at 51. (In *Lafayette*, the Court had explained that the states have "freedom under our dual system of federalism to use their municipalities to administer state regulatory policies free of the inhibitions of the federal antitrust laws". *Lafayette*, 435 U.S. at 415.)

Resolving these conflicting judicial signals, we conclude that the State of Maryland does not have to supervise La Plata's grant of a franchise in order for La Plata to have state action immunity.<sup>7</sup> It is enough, we believe, that La Plata is acting as the State's instrumentality pursuant to a clearly articulated State policy.

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<sup>6</sup> There is some disagreement among the lower courts that have passed on this question. Compare *Town of Hallie v. City of Eau Claire*, 700 F.2d 376, 383-84 (7th Cir. 1983) (active state supervision requirement held not to apply to municipal conduct) with *Deak-Perera Hawaii, Inc. v. Department of Transportation, State of Hawaii*, 553 F.Supp. 976, 985 (D. Hawaii 1983) (in dictum, court applied active state supervision test while assuming that the governmental body in question was a "political subdivision", but concluded that the test was, in any event, satisfied). It is clear, however, that both prongs of the *Midcal Aluminum* test must be satisfied for a private actor to be immune. See, e.g., *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*, 562 F.Supp. 712 (D. Hawaii 1983) (no immunity for exclusive airport taxicab service not actively supervised).

<sup>7</sup> To conclude otherwise would require a finding that local government regulation is the equivalent of purely private conduct—private conduct that, in this case at least, even the State could not authorize due to preemption by the Sherman Act. See *Rice v. Norman Williams Co.*, 458 U.S. 654, 661-62 (1982); *Schwegmann Bros. v. Calvert Distillery Corp.*, 341 U.S. 384 (1951).

## 2. Analysis

The “active state supervision” requirement articulated in *Midcal Aluminum* is intended to ensure that private parties who would be protected by the state’s immunity are not simply shrouded with a “gauzy cloak of state involvement”. *Midcal Aluminum*, 445 U.S. at 106. Instead, active state supervision requires the displacement of “unfettered [private] business freedom” with “comprehensive regulation”. *Id.* 445 U.S. at 106 n. 9.

There is no need for this type of supervision over municipal regulation. Municipalities implementing clear state policy, unlike the private parties in *Midcal Aluminum*, are limited by their statutory grant. For this reason, to confer antitrust immunity on municipal regulation would not pose any serious threat to the national policy favoring unrestrained competition.

Two federal appellate courts have also reached this conclusion. Specifically, the Seventh Circuit has ruled that local governments need not be supervised by the state, because they already are strictly subject to “clearly articulated and affirmatively expressed restraints imposed by the state in its [statutory] policies and delegation of authority”. *Town of Hallie v. City of Eau Claire*, 700 F.2d 376, 384 (7th Cir. 1983), [aff’d, 105 S.Ct. 1713 (1985)].

Similarly, in a case challenging municipal regulation of an exclusive ambulance service, the Eighth Circuit concluded that “[r]equiring state authorization for local conduct is analogous to requiring active supervision of private conduct; it tests whether challenged local activity is truly state action and therefore entitled to immunity”. *Gold Cross Ambulance and Transfer and Standby Service, Inc. v. City of Kansas City*, 705 F.2d 1005, 1014 (8th Cir. 1983), [cert. denied, 105 S.Ct. 1864 (1985)] (quoting P. Areeda, *Antitrust Law* ¶212.2a (Supp. 1982)). Accord, *Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency*, 715 F.2d 419 (8th Cir. 1983).

## 3. Summary

In sum, active state supervision is not a prerequisite to La Plata’s immunity. Active state supervision is, however, a prerequisite to the private franchisee’s own state action immunity; in this case, that requisite is met by La Plata’s supervision of its franchisee.

## III

## La Plata's Potential Liability Absent Immunity

If La Plata were not immune under the state action doctrine, several different antitrust theories conceivably could be applied to La Plata's grant of an exclusive or exclusionary franchise.<sup>8</sup> The franchise arrangement with Chasco would be subject to analysis (i) under Section 1 of the Sherman Act, 15 U.S.C. §1, as a form of exclusive dealing arrangement;<sup>9</sup> and (ii) under Section 2 of the Sherman Act, 15 U.S.C. §2, as monopolization, attempted monopolization, or conspiracy to monopolize.<sup>10</sup>

Under any foreseeable antitrust analysis, however, La Plata's conduct is probably not illegal. Consequently, even if a court were to rule that state action immunity is not available to La Plata—perhaps, notwithstanding the analysis in Part II C above, by requiring “active state supervision” by the State of La Plata's conduct—the Town most likely would still not face liability for damages or an injunction. Unfortunately, a judicial decision to this effect would likely not be obtained until after substantial pretrial discovery and expenditure of litigation resources.<sup>11</sup>

<sup>8</sup> Although the present franchise to Chasco is not expressly “exclusive”, it nevertheless is exclusive, as a practical matter, until and unless La Plata chooses to grant an additional franchise.

<sup>9</sup> See note 8 above. Because exclusivity is the gravamen of the trade restraint at issue, La Plata could, of course, avoid potential liability under Section 1 simply by granting additional franchises on nondiscriminatory terms to competitors. But see note 10 below, regarding Section 3 of the Clayton Act, 15 U.S.C. §14, which makes exclusive dealing arrangements illegal even before they become full-blown restraints that would violate Section 1 of the Sherman Act.

<sup>10</sup> At the outset, we reject the possibility that the exclusive dealing arrangement at issue here could be challenged under Section 3 of the Clayton Act, 15 U.S.C. §14. We do so because the arrangement here does not involve the sale of “goods” or “other commodities”, a prerequisite to Section 3 application. The Maryland analogue to Section 3 of the Clayton Act, §11-204(a)(6) of the Commercial Law Article, does apply to “services” as well; but, as discussed in Part IV below, there are separate reasons for concluding that La Plata, as a political subdivision, has no liability under this State law.

<sup>11</sup> In this Part III, we do not discuss the State's antitrust law separately, because the basic analysis is the same. See §11-202(a)(2) of the Commercial Law Article (courts interpreting the State law should “be guided by” interpretations of federal antitrust laws), applied in *Quality Discount Tires, Inc. v. Firestone Tire & Rubber Co.*, 282 Md. 7, 10 (1978). In addition, it is clear that, as a matter of State statutory construction independent of federal law, La Plata's conduct at issue is not prohibited. See Part IV below.

We express no opinion, however, as to what liability, if any, State law might impose upon La Plata's cable TV franchisee.

A. *Section 1 of the Sherman Act: Exclusive Dealing Arrangement*

1. *Introduction*

Section 1 of the Sherman Act prohibits “[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce”. 15 U.S.C. § 1.

Since 1911, the Supreme Court has imposed a judicial gloss on this statutory language by requiring that a challenged trade restraint be tested by its net effect upon competition. This “Rule of Reason” analysis requires the fact finder to weigh all relevant circumstances pertaining to the trade restraint before deciding whether, on balance, it is more anticompetitive than procompetitive. *Standard Oil Co. v. United States*, 221 U.S. 1, 8-9 (1911).

In *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918), Mr. Justice Brandeis explained the basic Rule of Reason analysis:

“The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint is imposed; the nature of the restraint and its effect, actual or probable.” 246 U.S. at 238.

Certain restraints, because of their well-recognized pernicious effect upon competition, are considered unreasonable *per se*. These practices—price fixing, tying arrangements, horizontal market divisions, group boycotts—are “conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use”. *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958).

The restraint imposed by La Plata’s grant of an exclusive or exclusionary cable TV franchise does not fall into any of the *per se* illegal categories. At best, it can be described as a form of exclusive dealing arrangement that must be tested under the Rule of Reason. By granting a franchise, La Plata in effect allocates the market for cable TV services to its franchisee. The cable TV company, in turn, sells

to La Plata's residents cable TV services, at rates regulated by La Plata, and pays a franchise fee for the right to obtain access to this market. The principal benefit to the cable TV company is the marketing advantages obtained by being the "officially" sponsored, exclusive operator. The Town, in turn, obtains license fee revenues for its treasury and cable TV services, at controlled rates, for its citizens.<sup>12</sup>

The first step in assessing the competitive effects of La Plata's franchise arrangement under Section 1 of the Sherman Act involves defining the relevant product and geographic market in order to gauge whether this market has been or may become unreasonably restrained as a result of La Plata's conduct.<sup>13</sup>

## 2. Relevant Market

Generally stated, the relevant market is the "narrowest market which is wide enough so that products from adjacent areas or from other producers in the same area cannot compete on substantial parity with those included in the market". *Satellite Television & Associated Resources, Inc. v. Continental Cablevision of Virginia, Inc.*, 714 F.2d 351, 356 (4th Cir. 1983) (quoting L. Sullivan, *Handbook of the Law of Antitrust* §12, at 41 (1977)).

Here, the relevant market may be as narrow as "cable TV within the town limits of La Plata"—or it may be much broader, including commercial television, pay TV, and other entertainment sources in Southern Maryland. It must be remembered, however, that a potential plaintiff would bear the burden of proving the proper market definition. *Satellite Television*, 714 F.2d at 355.

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<sup>12</sup> La Plata's regulation of the rates that its cable franchisee charged subscribers is clearly authorized by Maryland law. In Chapter 562, Laws of Maryland 1982, Section 1(2), the General Assembly expressly authorized local governments to "establish rates and regulations to govern the operation of the franchise(s)". The rate-setting function is thus clearly immunized under the state action doctrine. Consequently, we do not need to decide whether, absent such immunity, the regulation of rates might present antitrust issues.

<sup>13</sup> The Sherman Act requires that the challenged conduct be in or affecting interstate commerce. 15 U.S.C. §§1 and 2. See *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U. S. 232, 242-43 (1980) (activities of real estate brokerages operating in New Orleans held to "affect" interstate commerce; test satisfied even though challenged conduct itself did not affect interstate trade). Clearly, the sale of cable TV programming in La Plata affects interstate commerce: for example, programming for delivery in La Plata comes from outside Maryland. This alone is sufficient to establish the requisite interstate nexus.



(a) *Product market*

The analysis of what constitutes the relevant market begins with a determination of what “products” should be included. The relevant product market is defined to include all products that are either identical to, or available substitutes for, the product sold by the party whose conduct is being challenged. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 613 (1953).

In defining the product market, the question is whether there is an available substitute that is in fact competitive with the subject product. There are two tests for whether a substitute is in fact competitive: (i) whether the products are “reasonably interchangeable”, and (ii) whether there is high cross-elasticity of demand for the products by consumers. *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 330-33 (1961); *Satellite Television*, 714 F.2d at 355-56. There is reasonable interchangeability if the products are “physically similar”. *United States v. Grinnell Corp.*, 384 U.S. 563, 574 (1966). There is high cross-elasticity of demand if consumers readily substitute one product for another in response to a change in prices. *United States v. E. I. Du Pont de Nemours & Co.*, 351 U.S. 377, 400 (1956).

Applying these criteria to the product at issue here—cable television—a court would likely identify some alternatives that do have a degree of reasonable interchangeability. These include both conventionally broadcast television and forms of pay TV other than cable, such as “Super-TV” or direct satellite transmission.

For example, the court in *Satellite Television*, relying in part on stipulations by the parties with respect to the product market, affirmed the trial court’s determination that competitive substitutes in the cable television product market covered a broad range, including “cinema, broadcast television, video disks and cassettes, and other types of leisure and entertainment-related businesses for customers who live in single-family dwellings and apartment houses”. *Satellite Television*, 714 F.2d at 355 (quoting court below, 1982-2 Trade Cas. (CCH) ¶64,733, at 71,567 (E.D. Va. 1982)). The product market determination in *Satellite Television*, however, would not be conclusive here. That court’s finding was based upon the specific facts of that case and relied on stipulations by the plaintiff that most likely would not be available here.

Without stipulations such as those in *Satellite Television*, a court weighing the relevant product market could well conclude that conventionally broadcast TV is not reasonably interchangeable with cable TV. Conventionally broadcast TV does not offer the "improved" programming or the better reception normally available with cable TV. To be sure, conventional TV does not impose a service charge, as does cable TV. But, if reception is very bad in La Plata, conventional TV might not even exist as a viable substitute, since it would be available only to the limited extent that consumers chose to purchase the antenna equipment necessary to obtain a satisfactory signal.

Further, conventional TV might not be held to satisfy the cross-elasticity test for competitive substitutes. Cable's boom in popularity did not begin until improved programming was added. This fact might suggest that consumers do not view cable TV and conventional TV as close substitutes, either one of which could satisfy the demand for the other.

Even though a court could thus conceivably conclude that conventionally broadcast TV is not a substitute for cable TV, a court is more likely to determine that noncable forms of pay TV, such as "Super-TV", are competitive substitutes; hence, these alternative forms of pay TV would probably be included in the product market even though they might offer fewer programming choices. Other substitutes that might be considered to be within the relevant product market are home video cassettes and video discs; both offer the consumer the ability to obtain home video entertainment in addition to that offered by conventionally broadcast television, albeit at greater cost.

In sum, the determination of the relevant product market is a complex factual question, the outcome of which is difficult to predict. Every substitute that a court is willing to include in the relevant product market increases the size of that market and proportionately decreases the market power of La Plata's cable franchisee. This, in turn, decreases the likelihood that La Plata's conduct would be held to be an unreasonable restraint.

(b) *Geographic market*

Like the product market, the relevant geographic market definition is a matter of judgment, not easily determined or predicted. The relevant geographic market is frequently described as the area in

which the party alleged to have restrained trade competes or does business. 3 Von Kalinowski, *Antitrust Laws and Trade Regulation*, §13.03[2][c] (1982).

Consequently, if the challenged conduct is the grant of an exclusive or exclusionary franchise by La Plata, an argument might be made that the geographic market for the product in question lies solely within the town limits of La Plata. One reason is that State and local regulation—that is, Article 23A, §2(13) and the local ordinances under that section—treat municipalities as distinct and separate markets for cable television. Furthermore, cable TV companies usually compete on a town-to-town basis, mainly because the cable rights for each town are usually individually franchised. For reasons such as these, at least one court has concluded that the relevant market for determining the effect of a monopoly over cable TV transmission facilities might be limited to the town limits of the municipality where the cable TV franchise is being operated. *T.V. Signal Company of Aberdeen v. American Telephone & Telegraph Co.*, 617 F.2d 1302 (8th Cir. 1980).

However, it is far more likely that the geographic market would be found to be significantly broader than “the town limits of La Plata”, depending in part on what parties are involved in the case. In *RCM Supply Co. v. Hunter Douglas, Inc.*, 686 F.2d 1074 (4th Cir. 1982), the court ruled that the geographic market also included the area in which competitive alternatives were reasonably available to the parties. Thus, for example, if the action were between CATV General and Chasco, the geographic market would include the entire “area of effective competition” shared by the two parties, an area perhaps covering several states. *Satellite Television*, 714 F.2d at 357 (quoting *Standard Oil Co. v. United States*, 337 U.S. 293 (1949)).

As with the product market, there is a broad range of conceivable geographic markets that might arguably be relevant. Indeed, the definition of the relevant product market will itself affect the size of the relevant geographic market. For example, if “Super-TV” or direct satellite transmission were included within the relevant product market, then a reasonable argument could be made that the relevant geographic market includes all of the area where these alternative services are available—an area covering several states or more.

### (c) *Summary*

In sum, a potential plaintiff would bear a very heavy burden in defining the relevant market narrowly enough to demonstrate substantial competitive foreclosure.

Several "reasonably interchangeable" products are available, even if the product market were limited to home video entertainment; also, there is no indication that consumers would not be willing to switch to alternative suppliers should they be confronted with excessive cable rates or poor quality. Regarding geographic boundaries, a good argument can be made that the relevant market extends beyond the town limits of La Plata and includes, at least, nearby communities in Southern Maryland and the Washington suburbs.

Nevertheless, given the significant number of factual issues to be resolved, a proper market definition does entail some uncertainty.

### 3. Market Effects

#### (a) Introduction

After the relevant geographic and product market has been identified, the finder of fact uses that market definition to determine whether the exclusive dealing arrangement constitutes an "unreasonable restraint of trade". Section 1 of the Sherman Act prohibits only actual restraints of trade.<sup>14</sup> Hence, the analysis of the arrangement is necessarily limited to the *actual* effects of the challenged restraint and need not involve an evaluation of the *potential* competitive effects of the arrangement.

In evaluating the legality of an exclusive dealing arrangement under Section 1 of the Sherman Act, the general test is whether the arrangement has unreasonably foreclosed competition in the relevant market. *United States v. Columbia Steel Co.*, 334 U.S. 495, 508 (1948). Where an exclusive dealing arrangement involves a party occupying a dominant position in the relevant market, the arrangement will be found to be unreasonable, without much additional inquiry, if a significant portion of the relevant market has been restrained. *Compare Columbia Steel*, 334 U.S. at 530 (11% market foreclosure not unreasonable where defendant did not hold dominant market position) with *Cherokee Laboratories, Inc. v. Rotary Drilling Services, Inc.*, 383 F.2d 97 (5th Cir. 1967) (complete foreclosure of national market).<sup>15</sup>

<sup>14</sup> This is in contrast to Section 3 of the Clayton Act, 15 U.S.C. §14, which prohibits exclusive dealing arrangements that "may . . . substantially lessen competition or tend to create a monopoly". Section 3 was designed to stop trade restraints in their incipency. See also notes 9 and 10 above.

<sup>15</sup> Exclusive dealing arrangements have most often been challenged under Section 3 of the Clayton Act, 15 U.S.C. §14. In analyzing the Section 3 cases that have involved

On the other hand, where neither party occupies a dominant position, the reasonableness of the restraint will be evaluated by reference to all competitive factors, only one of which is the extent to which competition is foreclosed in the relevant market. *Columbia Steel*, 334 U.S. at 524-25.<sup>16</sup> Other factors that may be relevant to the granting of an exclusive franchise include the market share of the franchisee, the period of foreclosure resulting from the term of the franchise agreement, the number of competing firms, the ease of entry into the relevant market, and the competitive structure of that market.

In applying these various factors to La Plata's termination of CATV General's franchise and the subsequent grant of a franchise to Chasco, it is clear that Chasco's market share in the relevant market is critical. If Chasco were found to occupy a dominant position, the inquiry would be limited to a determination of the portion of the market foreclosed by the franchise agreement. *Cf. Cherokee Laboratories, Inc. v. Rotary Drilling Services, Inc.*, 383 F.2d 97 (5th Cir. 1967) (remand for further factual inquiry largely because of dominant position of dealer in relevant market).<sup>17</sup>

However, we know of no facts that would suggest that Chasco is a dominant firm in the highly competitive cable TV market or that the households located in La Plata represent a disproportionately large share of the relevant market. Assuming that Chasco does not enjoy such a dominant market position and that the La Plata market is not competitively crucial, as our information suggests, the other competitive factors must be evaluated in assessing the franchise agreement.

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parties with dominant market positions, some commentators have referred to the test applied by the courts as the "quantitative test". See, e.g., 2 Von Kalinowski, *Antitrust Laws and Trade Regulation*, §6G.04 (1982). This test is akin to the *per se* test in its strict application. In contrast, the Section 3 "qualitative substantiality" test, which is applied when the defendant does not occupy a dominant market position, requires assessment of all competitive factors.

<sup>16</sup> This test is akin to the "qualitative substantiality" test applied under Section 3 of the Clayton Act. See *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327-28 (1961).

<sup>17</sup> It is difficult to reduce this test to numbers, because courts have not established clear-cut guidelines for permissible market shares. For example, in cases reviewing the market share of alleged monopolists under Section 2 of the Sherman Act, 15 U.S.C. §2, market shares of 18% and 50% have been held not to constitute dominance. *United States v. E. I. Du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956); *United States v. United Shoe Machinery Corp.*, 110 F.Supp. 295, 346 (D.Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

(b) *Degree of Foreclosure of Competition*

In any analysis, a critical factor will be the degree of market power that La Plata could exercise in granting an exclusive franchise and thereby foreclosing competition. As noted above, market power is measured in relation to the relevant market. *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1372-73 (6th Cir. 1980).

Because, in this case, the relevant market might ultimately be narrowly defined, the Town could be held to exercise great market power by virtue of its statutory power to franchise cable TV operators. On the other hand, if the relevant market is broadly defined as being, for example, "home video entertainment in Southern Maryland", La Plata simply does not have statutory power to unreasonably restrain competition in that market. See *Mutual Fund Investors, Inc. v. Putnam Management Co.*, 553 F.2d 620, 627 (9th Cir. 1977) (no unreasonable restraint where many other supply sources available).

(c) *Duration of Franchise*

Another important factor is the length of the restraint. See, e.g., *Quality Mercury, Inc. v. Ford Motor Co.*, 542 F.2d 466, 471 (9th Cir. 1976), *cert. denied*, 433 U.S. 914 (1976) ("perpetual exclusive franchise is suspect").

Although CATV General certainly has other towns to turn to as sites for its cable TV business, the 15-year term of the Chasco franchise raises concerns. The Chasco franchise is "non-exclusive"; nevertheless, as a practical matter, it effectively forecloses the La Plata market for a substantial period of time.<sup>18</sup> To the extent that a long-term franchise is necessary to garner an adequately capitalized cable operator capable of serving an entire town, it can be justified on a competitive basis and would pass antitrust scrutiny. In this regard, however, we have some reservations about whether a 15-year term is the minimum period necessary to draw satisfactory operators to the La Plata market.

Nevertheless, despite these cautionary concerns, a thorough competitive analysis of the La Plata situation leads us to the conclusion that the franchise arrangement in this case is reasonable.

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<sup>18</sup> See discussion in Part I above regarding the physical placement of cable equipment. See also note 8 above.

(d) *Competitive Analysis*

We believe that La Plata's regulation of cable, with the possible exception of the length of the franchise period, could ultimately serve to *promote* competition in the relevant market.

Absent regulation, cable TV delivery in a small town might result in the town being saddled with an undercapitalized entrant that would fail to provide adequate service—precisely as La Plata found to be the problem with CATV General. Such an undercapitalized operator could obtain a foothold position that, though tenuous, would either be sufficient to deter viable operators from entering the market or would result in several entrants, none of which would be able to compete effectively with other forms of pay TV. See *Lamb Enterprises, Inc. v. Toledo Blade Co.*, 461 F.2d 506, 513 (6th Cir. 1972) (court noting that only one cable company can serve Toledo market because operators cannot compete on a house-to-house basis).

Thus, La Plata can argue that, given the limited market potential it offers, it is reasonable—indeed, necessary—for cable TV to be regulated by franchise in order to ensure the adequate delivery of cable services to its citizens. Furthermore, if the *Lamb Enterprises* conclusion—that house-to-house competition among cable operators in the Toledo market would inevitably result in a natural monopoly—could be shown to apply in the La Plata market, then La Plata's regulation would not be an unreasonable restraint at all. There would be an exclusive operatorship, whether La Plata exercised its regulatory power or not.

Also relevant is the fact that competition is flourishing in this market. The introduction of technological advances, such as direct broadcast satellite television systems, continues to increase the level of competitiveness in this market.

In sum, the grant of an exclusive cable television franchise seems a prime example of reasonable regulation that might well promote, rather than suppress, competition by ensuring reputable and adequately capitalized operators who will effectively compete to serve the entire market. See *Report of the Governor's Task Force on Local Government Antitrust Liability* (1982), at 15.<sup>19</sup>

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<sup>19</sup> An alternative theory also warrants consideration. A line of cases, known as the "Terminal Cases", have held that, as a matter of law, a party with control over a unique location essential to the conduct of a certain kind of business can lease, or open, a part

## B. Section 2 of the Sherman Act: Monopolization

A competing cable TV vendor, such as CATV General, might also challenge La Plata's franchise grant to Chasco under Section 2 of the Sherman Act, 15 U.S.C. §2, which prohibits monopolization, attempted monopolization, and conspiracy to monopolize. In our view, however, it is unlikely that such a challenge would succeed in proving a violation under any of these theories.

### 1. Monopolization

Monopolization requires a showing of (i) monopoly power, and (ii) intent to exercise that power. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). "Monopoly power", in turn, is defined as "the power to control prices or exclude competition" in the relevant market. *United States v. E. I. Du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956).

Whether La Plata has sufficient control over prices and competition thus depends on the definition of the relevant market. Under Section 2 of the Sherman Act, the procedure for defining the relevant market is the same as that described in Part III A 2 above for purposes of defining the relevant market under Section 1 of the Sherman Act.

If a judicial determination were made that the relevant market is as narrow as "cable TV within the town limits of La Plata", then La Plata's exercise of its statutory authority would demonstrate that it has the power to control prices and exclude competition. If, on the other hand, as we believe is likely, the market is defined more broadly to include entertainment products other than cable TV, and geographic areas other than La Plata, then La Plata probably does not possess monopoly power.

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of that location to a single entity, such as a cab company or a shopkeeper, and thereby confer an effective monopoly without violating the Sherman Act. *Donovan v. Pennsylvania Co.*, 199 U.S. 279 (1905). See also *Export Liquor Sales, Inc. v. Ammex Warehouse Co.*, 426 F.2d 251 (6th Cir. 1970). And, even though these cases seem to contemplate that the exclusive outlet is in the form of a shop or taxicab service physically located on the defendant's railroad terminal, tunnel, or other transportation facility, it is difficult to differentiate a terminal operator's power to elect a taxi service monopoly from a town's ability to choose one cable company to serve its population. Nevertheless, it is not at all clear that this theory applies to public, as opposed to private, landowners. See *Woolen v. Surtran Taxicabs, Inc.*, 461 F.Supp. 1025 (N.D. Tex. 1978).



La Plata's statutory authority gives it the power to control prices and exclude competition over cable TV only in La Plata. Although La Plata might have some general, home rule authority to regulate or exclude noncable TV forms of home video entertainment within its jurisdiction, we have no indication that it has or will attempt to exercise this power.<sup>20</sup> At the same time, because La Plata lacks any statutory or regulatory authority over competition outside of La Plata, it is unlikely that La Plata exercises monopoly power in any broadly defined relevant market.

A plaintiff alleging monopolization must, in addition to showing monopoly power, also show the "intent to exercise that power". *United States v. Griffith*, 334 U.S. 100, 107 (1948). This, however, requires only a showing of a "general" intent to engage in practices that maintain a monopoly position. A showing of a "specific" intent to monopolize is not required. *United States v. Aluminum Co. of America*, 148 F.2d 416, 432 (2d Cir. 1945). Consequently, it would not be difficult for a potential plaintiff to satisfy this requirement if La Plata were held to have exercised monopoly power in a narrowly defined relevant market.

In sum, in the event that immunity is not available to La Plata, a claim that La Plata has engaged in actual monopolization would rest solely upon the unlikely showing that the relevant market is limited to "cable TV within the town limits of La Plata".

## 2. Attempted Monopolization

Even absent proof of actual monopolization, a potential plaintiff might attack the franchise grant as an "attempt" by La Plata to monopolize. Attempted monopolization requires (i) a "dangerous probability" that the defendant will obtain a monopoly, and (ii) a specific intent to monopolize. *Satellite Television*, 714 F.2d at 358; *Campbell Distributing Co. v. Jos. Schlitz Brewing Co.*, 208 F.Supp. 523, 529 (D.Md. 1962).

In order to satisfy the "dangerous probability" requirement, a plaintiff must demonstrate, first, that the defendant has sufficient market

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<sup>20</sup> Cable TV franchisors should exercise great caution in imposing restraints on non-cable TV video vendors. Given La Plata's obvious interest in ensuring the financial success of its franchised cable operator, such restraints could be construed as a conspiracy between La Plata and its franchised cable TV operator to foreclose competition. Thus, for example, a zoning ban on satellite dish antennas would be highly suspect and might not be covered by state action immunity.

power to create a significant likelihood of achieving a monopoly in the relevant market and, second, that the defendant has performed "overt acts" in furtherance of that effort. See *White Bag Co. v. International Paper Co.*, 1974-2 Trade Cas. (CCH) ¶75,188, at 97,357 (4th Cir. 1974). In order to satisfy the "specific intent" requirement, the plaintiff must show both that the defendant intended to do the acts it committed and that the defendant intended those acts to result in a monopoly. See *United States v. Aluminum Co. of America*, 148 F.2d 416, 431-32 (2d Cir. 1945).

In this case, it would be difficult with the evidence at hand to show that La Plata intended to monopolize any broadly defined relevant market. The Town, pursuant to legislative delegation, simply exercised its franchising powers to replace an unsatisfactory franchisee with a more suitable one. Without additional evidence of specific intent, we believe that any claim of attempted monopolization by La Plata must fail.<sup>21</sup>

### 3. Conspiracy to Monopolize

As with attempted monopolization, specific intent to monopolize is a primary requirement for proving a conspiracy to monopolize. *American Football League v. National Football League*, 205 F.Supp. 60, 65 (D.Md. 1962), *aff'd*, 323 F.2d 124 (4th Cir. 1963). For the reasons discussed above, the facts of this case as we understand them do not support a finding of specific intent to monopolize.

### C. Potential Relief

Even if a court were to disagree with our conclusion that the arrangement with Chasco was not violative of the Sherman Act, we doubt that the court would award damages to CATV General or issue an injunction against the arrangement.

#### 1. Damages

In order to recover damages, a plaintiff who has successfully shown a violation must also show, by a preponderance of the evidence, that the violation caused a direct injury to its business. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 124-25 (1969).

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<sup>21</sup> Cf. note 20 above.

For the pre-January 1983 period, when cable service in La Plata was still effectively exclusive as a result of Southern Maryland's "one-line" policy, the potential plaintiff, CATV General, retained full control of the lines. Consequently, it certainly cannot assert any loss of business during this time.

It is almost as difficult to imagine any cognizable injury that CATV General could assert for the period after January 1983.<sup>22</sup> For over ten years, CATV General has refused to expand beyond its 200-user system. Consequently, foreclosure of new subscribers to CATV General is not causally related to the grant to Chasco but, rather, to CATV General's own decision not to expand its market.<sup>23</sup>

## 2. Injunction

The possibility of an injunctive remedy against La Plata is unlikely, but perhaps not quite as remote as a damage award. The strict causation required to recover antitrust damages is not required for injunctive relief. Instead, the requirement is a demonstration of "threatened injury". *Hawaii v. Standard Oil Company of California*, 405 U.S. 251, 261 (1972).

For the reasons discussed above, CATV General would have but a remote chance of obtaining an injunction on the theory that the Chasco franchise violates federal antitrust law. Even this remote possibility, however, is of some concern, because Section 16 of the Clayton Act permits private parties who "substantially prevail" in an action for injunctive relief to recover reasonable attorney's fees and costs of suit. 15 U.S.C. §26.

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<sup>22</sup> In addition to the "no-damage" argument, La Plata could also argue that its conduct at the time did not unreasonably restrain competition, because Chasco was then a nonexclusive franchisee along with CATV General.

<sup>23</sup> Hence, damages would be inappropriate even if this case involved private parties only. There is some authority to suggest that damages, especially punitive treble damages, should not be awarded against a municipal defendant under any circumstances. P. Areeda, *Antitrust Law* ¶212.2 (Supp. 1982). No court, however, has yet accepted this view, and the Supreme Court in *Boulder* expressly reserved the question of appropriate remedies in actions against municipal officials. *Boulder*, 455 U.S. at 57 n. 20.

## IV

## State Antitrust Liability

The preceding analysis applies equally to the federal antitrust laws and the Maryland Antitrust Act, Title 11, Subtitle 2 of the Commercial Law Article ("CL" Article).<sup>24</sup> However, for two additional reasons, not discussed above, the Maryland Antitrust Act does not prohibit La Plata's franchising activities.

First, the Act specifically exempts activities of this State's political subdivisions "in furnishing services or commodities". CL §11-203(12). An argument, albeit somewhat tenuous, can be made that La Plata, in granting a cable TV franchise, was furnishing a service or commodity to its citizens and, therefore, would not be liable for doing so.

More compellingly, the 1982 amendment that specifically authorized anticompetitive cable TV franchising conduct should be interpreted to exempt that conduct from the State's antitrust laws. *See, e.g., Montgomery County, Maryland v. Lindsay*, 50 Md. App. 675, 678-79 (1982) ("It is well settled that specific terms [in a State statute] covering a general subject matter prevail over general language of the same or another [State] statute which might otherwise prove controlling.").

For these two reasons, in addition to those that otherwise apply to federal and Maryland law alike, La Plata is not subject to liability under the Maryland Antitrust Act.

## V

## Attorney General Representation

Last year, the General Assembly specifically authorized the Attorney General to represent municipalities and other political subdivisions of the State in antitrust matters. Chapter 396, Laws of Maryland 1983. This authorization, codified at Article 32A, §12V of the Maryland Code, reads as follows:

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<sup>24</sup> See note 11 above.

“The Attorney General may represent and render advice to any political subdivision of this State, its employees, officers, or agents in State and federal antitrust law matters, including defending them in any such action or administrative proceeding. In any case where the Attorney General actually defends a political subdivision in court or in any administrative proceeding, the Attorney General may require the political subdivision to reimburse the General Fund of the State for the actual costs of the defense. Nothing in this section shall be construed to deprive any political subdivision or its employees, officers, or agents of the right to select counsel of their own choice at their own expense.”

Under the circumstances of this case, if an antitrust claim were asserted against La Plata over its the cable television franchise activities, we would be willing to represent the Town of La Plata if requested to do so.

## VI

### Conclusion

In summary, it is our opinion that:

1. The Attorney General's Office is authorized to represent the Town of La Plata—and other political subdivisions—in matters of this sort. And, based on the relevant facts of this case as we understand them, if an antitrust claim were brought against the Town of La Plata, we would be willing to represent it if asked to do so.

2. Based on our understanding of the relevant facts, La Plata is entitled, under the “state action” doctrine, to assert immunity from any antitrust claim that might arise from its termination of CATV General's cable television franchise and its grant of a franchise to Chasco. Even if, in litigation, La Plata's assertion of immunity were rejected, the Town nevertheless would likely prevail on the merits, particularly as to any claim for damages.

Nevertheless, until the scope of the immunity afforded by Chapter 562, Laws of Maryland 1982, is fully settled by the courts, we strongly recommend that political subdivisions exercise caution in the area of cable television franchising, more because of the severity of

potential penalties than because of their likelihood. We recommend particular caution in setting the term of a franchise agreement, so as to avoid any longer term than is reasonably necessary to obtain a sufficiently capitalized cable TV operator.

As to a political subdivision's power to oppose the operations of unauthorized cable television operators, such as CATV General, it may do so with assurance that it has immunity, so long as its acts are within the specific delegation of power from the State, Chapter 562, Laws of Maryland 1982.

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*Opinions and Advice*

*Editor's Note:* Since the issuance of this opinion, the United States Supreme Court held, in *Town of Hallie v. City of Eau Claire*, 105 S.Ct. 1713 (1985), that "active state supervision is not a prerequisite to exemption from the antitrust laws where the actor is a municipality rather than a private party." 105 S.Ct. at 1721.

In addition, the authorization for Attorney General representation discussed in Part V of this opinion is now codified in §6-107(b) of the State Government Article. Article 32A of the Maryland Code has been repealed. See Chapter 284, Laws of Maryland 1984.

## BANKING INSTITUTIONS

COMMERCE CLAUSE—BANK HOLDING COMPANY ACT—MARYLAND  
LAW MAY NOT CONSTITUTIONALLY PROHIBIT ACQUISITION OF  
STATE BANK BY FOREIGN BANK.

March 2, 1984

*The Honorable Margie Muller*  
*Bank Commissioner*

You have requested our opinion concerning a proposed acquisition by Wilmington Trust Company ("Wilmington Trust") of Maryland State Bank ("Maryland State"). Specifically, you have asked if the proposed acquisition is prohibited by Maryland law.

For the reasons stated below, we conclude that Maryland law may not be applied—consistently with the Commerce Clause of the United States Constitution—to absolutely prohibit this transaction.

## I

## Factual Background

Wilmington Trust is a Delaware bank with its principal banking office located outside of Maryland. It proposes to acquire all of the common stock of Maryland State, a commercial bank chartered by and located in this State. By agreement, Maryland State will sell its entire commercial loan portfolio prior to closing the transaction, and it then will cease to make commercial loans altogether. After completing the proposed acquisition, Maryland State will continue as a subsidiary of Wilmington Trust, with its own board of directors and officers.

Wilmington Trust has applied to the Bank Commissioner for approval of the acquisition under §3-314 of the Financial Institutions Article ("FI" Article), which generally governs commercial bank stock acquisitions.<sup>1</sup>

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<sup>1</sup> FI §3-314(c)(1) provides that "[a] person who intends to make a stock acquisition shall apply to the Bank Commissioner for approval, at least 60 days before the acquisition becomes effective". Under FI §3-314(a)(3), "stock acquisition" means "[a]n acquisition

If your inquiry could be resolved by simple rote application of this State's statutory law, the Bank Commissioner would be precluded from approving the Maryland State transaction. FI §12-204 flatly prohibits a "foreign bank" from becoming a "bank holding company" in this State:

"A foreign bank or affiliated corporation may not become a bank holding company."<sup>2</sup>

Wilmington Trust, a "foreign bank", would become a "bank holding company" under Maryland law if it were to acquire Maryland State, thus coming directly within the purview of this specific prohibition.<sup>3</sup>

However, because FI §12-204 purports to prohibit absolutely an interstate transaction, our inquiry is not limited to State law. We must necessarily examine this provision against the backdrop of the Commerce Clause of the United States Constitution. Under the Commerce Clause, Congress has the power "[t]o regulate Commerce . . .

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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 cause the direction of the management or policy of any banking institution or bank holding company". Under FI §3-314(d), "[t]he Bank Commissioner may deny approval for a stock acquisition that the Bank Commissioner determines to be anticompetitive or to threaten the safety or soundness of a banking institution".

<sup>2</sup> "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] State banking institution that has its principal banking office in this State". FI §12-201(c)(1).

<sup>3</sup> In FI §12-207, Maryland law also generally prohibits a "foreign banking corporation" from "hav[ing] any office . . . in this State . . . [t]o solicit deposits . . . or . . . conduct . . . [a] general banking business". FI §12-207(b). "Foreign banking corporation" is defined to include "[a]ny corporation that . . . [i]s", as Maryland State would be, "controlled by a foreign bank". FI §12-201(f).

We have previously advised that FI §12-207 may not constitutionally prohibit indirectly that which FI §12-204 is constitutionally precluded from prohibiting directly. 68 *Opinions of the Attorney General* 75, 84 (1983). Consequently, given the constitutional infirmities associated with the direct prohibition imposed by FI §12-204, as discussed below in this Opinion, it is unnecessary to separately analyze the inapplicability of FI §12-207 to the Maryland State proposal.



among the several States". Article 1, §8, cl. 3 of the United States Constitution. Thus, as in most Commerce Clause analyses, we first address the congressional exercise of regulatory authority in the affected area of commerce. For this purpose, we begin with the Bank Holding Company Act of 1956 (as codified at 12 U.S.C. §§1841 through 1850) (the "BHC Act").

## II

### §3(d) of the Bank Holding Company Act

#### A. Introduction

Section 3(d) of the BHC Act (12 U.S.C. §1842(d)), popularly known as the "Douglas Amendment", limits the ability of bank holding companies to engage in interstate commerce. It provides, in pertinent part:

"Notwithstanding any other provision of this section, no application . . . shall be approved under this 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."<sup>4</sup>

Section 3(d) thus imposes a general federal prohibition on the acquisition or expansion of banking holding companies across state lines.<sup>5</sup> The only authority reserved for the states is the power to

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<sup>4</sup> This provision was offered as an amendment to the BHC Act by Senator Paul Douglas of Illinois. See 102 Cong. Rec. 6860 (1956) (remarks of Senator Douglas).

<sup>5</sup> The only exception to this ban under federal law is contained in the Garn-St. Germain Depository Institutions Act of 1982, at 12 U.S.C. §§1823(f)(1) and 1730a(m)(1)(A)(i). These provisions allow emergency acquisitions across state lines of failing institutions.

create exceptions to this general prohibition—that is, the power to *authorize* acquisitions across state lines where they otherwise would be *prohibited* by federal law. See *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980).

If §3(d) were applicable to the proposed transaction, it would prohibit this acquisition unless, in the words of §3(d), the laws of Maryland “specifically authoriz[e]” such an acquisition “by language to that effect and not merely by implication”. Because Maryland law contains no such statutory authorization—indeed, Maryland law now expressly prohibits such an acquisition—the transaction posed by your inquiry would be prohibited by federal law. Thus, Commerce Clause scrutiny of Maryland law would not be required.

For the following reasons, however, we must conclude that §3(d) is inapplicable to the Maryland State transaction.

#### B. BHC Act Definition of “Bank”

Maryland State proposes to divest itself of its commercial loan portfolio and to cease making commercial loans after it has been acquired. In so doing, it seeks to take advantage of an increasingly popular “loophole” created by the two-pronged definition of “bank” in the BHC Act.<sup>6</sup>

Section 2(c) of the BHC Act (12 U.S.C. §1841(c)) defines a “bank” as “any institution . . . which (1) accepts deposits that the depositor has a legal right to withdraw on demand, *and* (2) engages in the business of making commercial loans”. (Emphasis added.) By eliminating all commercial loans—one of the two functions required by the definition—Maryland State seeks to avoid being considered a “bank” for purposes of the BHC Act and, specifically, §3(d). It would become, in the anomalous financial argot of today, a “nonbank” bank.

#### C. Legislative History

The legislative history of the BHC Act supports this plain-meaning interpretation of “bank” and the correspondingly limited scope of §3(d).

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<sup>6</sup> The “loophole” designation and its successful utilization are discussed in Kaplinsky, *That “Loophole” in the BHC Act*, *American Banker*, January 27, 1983, at 4.

The BHC Act was enacted for the dual purposes of preventing the concentration of commercial banking activities and separating banking from commerce. *Wilshire Oil Co. v. Bd. of Governors*, 668 F.2d 732 (3rd Cir. 1981), *cert. denied*, 457 U.S. 1132 (1982).<sup>7</sup> Over the years, however, Congress has amended the definition of "bank" in a consistent effort to limit the Act's applicability.

As originally enacted, "bank" was defined to include all national banks, state banks, savings banks, and trust companies. P.L. 84-511, §2(c), 70 Stat. 133 (1956). In 1966, Congress redefined "bank" in an effort to narrow the Act's coverage by excluding institutions that did not take demand deposits. P.L. 89-485, §6, 80 Stat. 236 (1966). *See also Wilshire Oil Co.*, 668 F.2d at 736. The Senate Report described this change as follows:

"Section 2(c) of the act defines 'bank' to include savings banks and trust companies, as well as commercial banks. *The purpose of the act was to restrain undue concentration of control of commercial bank credit*, and to prevent abuse by a holding company of its control over this type of credit for the benefit of its nonbanking subsidiaries. This objective can be achieved without applying the act to savings banks. . . . [T]he bill redefines 'bank' as an institution that accepts deposits payable upon demand (checking accounts), a commonly accepted test of whether an institution is a commercial bank, so as to exclude institutions like industrial banks and nondeposit trust companies." S. Rep. No. 1179, 89th Cong., 2d Sess. (1966) *reprinted in* 1966 U.S. Code Cong. & Ad. News 2385, 2391 (emphasis added).

In 1970, Congress sought to further limit the Act's scope by adding the second element to the current definition of "bank": the specification that the institution be engaged "in the business of making commercial loans". The Senate Report reflected congressional concern with the practical effect that the 1966 definition had on commercial lending practices:

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<sup>7</sup> *See also* S. Rep. No. 1095, 84th Cong., 1st Sess. 22 (1955), *reprinted in* 1956 U.S. Code Cong. & Ad. News 2482, 2483.

"Banks as defined in the act must accept demand deposits and engage in the business of making commercial loans. The definition of 'bank' adopted by Congress in 1966 was designed to include commercial banks and exclude those institutions not engaged in commercial banking, since the purpose of the act was to restrain undue concentration of commercial banking resources and to prevent possible abuses related to the control of commercial credit. However, *the Federal Reserve Board has noted that this definition may be too broad and may include institutions which are not in fact engaged in the business of commercial banking in that they do not make commercial loans.* The committee, accordingly, adopted a provision which would exclude institutions that are not engaged in the business of making commercial loans from the definition of 'bank.'" S. Rep. No. 91-1084, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S. Code Cong. & Ad. News 5519, 5541 (emphasis added).

Accordingly, we must conclude that the proposed status of Maryland State as an exempt "nonbank" bank is consistent with the legislative history of the BHC Act.

D. "Nonbank" Banks—*The Federal Reserve Board*

The Board of Governors of the Federal Reserve System (the "Federal Reserve Board") is generally charged with exercising exclusive jurisdiction over the acquisition of existing banks under the BHC Act. *See Whitney National Bank v. Bank of New Orleans Trust Co.*, 379 U.S. 411 (1965). We are mindful of the well-established principle that considerable deference should be afforded interpretations of statutes by the agencies charged with their administration. Accordingly, recent rulings from the Federal Reserve Board on "nonbank" banks are particularly pertinent to your inquiry. *See Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980).<sup>8</sup>

<sup>8</sup> Although not directly involved with the administration of the BHC Act, the Comptroller of the Currency has granted several charters for "nonbank" national banks. These approvals were based on a finding that the BHC Act did not apply because the institutions would not make commercial loans. *See, e.g.,* Application of Citizens Fidelity Corporation (February 4, 1983) (News Release 83-75) and Application of American Investment Thrift (November 7, 1983) (News Release 83-75). Last year, the Comptroller imposed a moratorium on "nonbank" bank charters, extending from April 6, 1983 to January 1, 1984. *See* Fed. Banking L. Rep. (CCH) §99,528. More recently, this moratorium was extended by the Comptroller to March 31, 1984. *See* 41 Wash. Fin. Rep. 760 (November 21, 1983).

In 1981, the Federal Reserve Board reviewed a proposed acquisition of Fidelity National Bank by Associates First Capital Corporation, a subsidiary of Gulf and Western. Prior to the acquisition, Fidelity divested itself of all of its commercial loans and agreed not to make any new commercial loans after the acquisition.<sup>9</sup> Given those circumstances, the Federal Reserve Board concluded:

“Under section 3(a)(1) of the Act (12 U.S.C. §1842(a)(1)), it is unlawful, except with prior Board approval, for any action to be taken that causes any company to become a bank holding company. Since a bank holding company is defined under the Act as any company that controls a ‘bank’, Associates would have had to obtain the Board’s prior approval to become a bank holding company before acquiring [Fidelity], if [Fidelity] were a ‘bank’ under the Act. . . .

Based upon the information contained in your submissions, it appears that [Fidelity] is not a ‘bank’ within the meaning of section 2(c) of the Act, since it has divested itself of its commercial loan portfolio, has committed that it will not engage in commercial lending, and intends to limit its lending to loans to individuals for personal, family, household or charitable purposes.” Letter from James McAfee, Assistant Secretary of the Board, to Robert C. Zimmer, Esquire (March 12, 1981), *reprinted in American Banker*, March 13, 1981.<sup>10</sup>

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<sup>9</sup> Fidelity also made additional commitments to insure a complete separation of its deposit-taking activities from the commercial lending activities of Associates and Associates’ affiliates. See note 12 below.

<sup>10</sup> This precedent was followed by the Board later in 1981, when Chrysler Corporation proposed the formation of a limited-purpose bank (Automotive Financial Services, Inc.), to be chartered under the laws of Michigan as the bank of first deposit for drafts drawn by and payable to Chrysler under its cash draft collection system. Noting that Chrysler Corporation had made a commitment to “ensure that Financial Services will make no commercial loans”, the Board “determined that Financial Services will not be a bank for purposes of the Bank Holding Company Act”. Letter to R. S. Miller, Jr., Executive Vice President, Chrysler Corporation (May 28, 1981), *reprinted in* [1981-82 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶98,770.

More recently, the Federal Reserve Board considered the application of Citizen's Fidelity Corporation, a Kentucky bank holding company, to acquire all of the shares of Citizen Fidelity (Ohio), N.A., a proposed limited-purpose national bank chartered to engage in credit card operations. The Board was fully aware of the fact that the applicant's purpose in so limiting Citizens Fidelity (Ohio)'s activities was "to avoid bank status and the interstate banking prohibitions contained in the Act"; the Board nevertheless was "constrained to conclude, on the basis of the specific facts of this case, that [Citizens Fidelity (Ohio)] will not be a bank for purposes of the Act". 69 Fed. Res. Bull. 556, 557 (July, 1983). In dismissing objections raised by the Ohio Superintendent of Banks, the Board stated:

"In addition, the Ohio Superintendent has asserted that this application is inconsistent with the interstate banking prohibitions of section 3(d) of the BHC Act. However, because of the Board's finding under existing law and interpretations that [Citizens Fidelity (Ohio)] is not a bank under the BHC Act, section 3(d) of the Act is not applicable to the proposal." 69 Fed. Res. Bull. at 558.

#### E. Summary

In summary, this "loophole" in the coverage of the BHC Act—if such a characterization is accurate—is consistent with the legislative history of the Act and has received federal regulatory approval. We must therefore conclude that this "loophole" is currently the law.<sup>11</sup>

<sup>11</sup> On December 14, 1983, the Federal Reserve Board sought to tighten this "loophole" by expanding its definition of "commercial loan" under Regulation Y (12 C.F.R. §225 *et seq.*). Under this revised definition, a commercial loan includes any loan the proceeds of which are used for other than personal, family, household, or charitable purposes, including the purchase of commercial paper, bankers acceptances, certificates of deposit, the sale of federal funds, and other transactions that establish a debtor-creditor relationship. *See Bank Holding Companies and Change in Bank Control; Revision of Regulation Y*, 49 Fed. Reg. 794, 798 (1984) (to be codified at 12 C.F.R. §225). We have been advised, however, that this expanded definition will not affect the "nonbank" bank status of Maryland State.

In a related development, the Federal Reserve Board recently raised concerns over the application of Dimension Financial Corporation to charter 31 "nonbank" banks in 25 states (including Maryland). The Board's general counsel, in a letter dated November 15, 1983, to the chief counsel of the Comptroller, noted that "there is a substantial question whether the Dimension banks would be 'banks' for purposes of the BHC Act". Although there is a pending petition by Deerbrook Bank urging the Board to assume jurisdiction over the Dimension matter, the Board has not yet acted.

There are also several pending bills before Congress designed to end the "nonbank" bank device. *See* 41 Wash. Fin. Rep. 790 (November 21, 1983).

Accordingly, §3(d) of the Act would not apply to the proposed transaction if, as is contemplated, Maryland State would not be engaged "in the business of making commercial loans".<sup>12</sup>

### III

#### State Regulation and the Commerce Clause

##### A. Introduction

Absent applicability of §3(d) of the BHC Act, Maryland law may only prohibit the proposed transaction if it can survive a traditional

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<sup>12</sup> In past rulings on "nonbank" bank applications, the Federal Reserve Board has granted its approval contingent upon certain commitments going beyond simple divestiture of an existing commercial loan portfolio. These commitments—discussed in the Associates First Capital Corporation (March 12, 1981) and Chrysler Corporation (May 28, 1981) letters—are designed to ensure a complete separation of the "non-bank" bank's deposit-taking activities from the acquiring institution's commercial lending activities.

We here restate those commitments, modified hypothetically in terms of the pending Maryland State transaction, for your appropriate consideration: (1) Maryland State's charter would prohibit it from making commercial loans (authority to issue a limited charter under Maryland law has been previously recognized in 65 *Opinions of the Attorney General* 36 (1980)); (2) Maryland State's charter would prohibit Maryland State from in any way supplying or maintaining the availability of funds to Wilmington Trust or any affiliate of Wilmington Trust, except in the form of dividends and except for the relationship of depositor and bank that may exist between Wilmington Trust (and subsidiaries of Wilmington Trust not engaged in commercial lending) and Maryland State; (3) Wilmington Trust would not permit itself or its affiliates to enter into any extensions of credit, lending, or deposit relationships, joint ventures, or activities performed on a fee basis involving Maryland State, unless permitted by applicable statutes, rules, or regulations; (4) no commercial loan inquiries, opportunities, or referrals would be directed by Maryland State to Wilmington Trust or any affiliate of Wilmington Trust, and no deposits with or for the account of Maryland State would be loaned by Maryland State to, or used for the benefit of, any activity of Wilmington Trust or its affiliates that could be construed to involve commercial loans; and (5) Maryland State would adopt procedures to internally monitor compliance with each of these commitments.

These restrictions are consistent with both the purpose of the BHC Act and the general reservation of authority to the States stated in §7 of the Act (12 U.S.C. §1846)—namely, to avoid the concentration of commercial banking activities. Commercial banking may be subject to control or concentration not only through direct lending but also through tie-in referrals.

Commerce Clause analysis.<sup>13</sup> The underlying principles are constitutionally well-settled, and the analysis in the present context a familiar one.

In the "few simple words of the Commerce Clause", the Framers carried out their determination that commerce among the states be subjected to the power of the nation, in order to thwart "the tendencies toward economic Balkanization" that had plagued the country before independence and, later, under the Articles of Confederation. *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979). See also *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522-23 (1935) (Cardozo, J.).

For over a century, the Supreme Court has recognized that the Commerce Clause operates as a restriction on permissible state regulation, even in the absence of conflicting federal legislation. *Hughes v. Oklahoma* 441 U.S. at 326. "[A]t least since *Cooley v. Board of Wardens*, 12 How. 299, 13 L.Ed 996 (1852), it has been clear that 'the Commerce Clause . . . even without implementing legislation by Congress is a limitation upon the power of the States' ". *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 370-71 (1976).

#### B. *The BT Investment Case*

More recently, in *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980), the Court has applied traditional Commerce Clause principles to state laws that prohibit entry of out-of-state financial institutions providing investment services.

We find the present factual situation remarkably similar to the facts before the Court in *BT Investment*. Maryland law, like the Florida statute ruled unconstitutional by the Supreme Court, prohibits the ownership of banks by an institution possessing two characteristics: (1) a certain kind of business organization and purpose (a bank or

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<sup>13</sup> We have previously analyzed—and found wanting—the proposition that §7 of the BHC Act (12 U.S.C. §1846) provides independent authority for state regulation of interstate bank holding company acquisitions. Section 7 provides, in relevant 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 hereinafter have with respect to banks, bank holding companies and subsidiaries thereof." In light of the ruling in *B.T. Investment*, we must conclude that §7 provides no authority for insulating the provisions of FI §12-204 from a thorough Commerce Clause analysis. See generally 68 *Opinions of the Attorney General* 75, 83 (1983).



affiliated corporation); and (2) location of principal operations outside Maryland. See *BT Investment*, 447 U.S. at 37.<sup>14</sup>

In *BT Investment*, the Supreme Court recognized that regulation of banking and related financial activities are of profound local concern. The Court nevertheless observed that, in a Commerce Clause analysis:

“However important the state interest at hand, ‘it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.’” *BT Investment*, 447 U.S. at 36 (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978)).

The Court noted that the Florida statute created a disparity based on location that—like the Maryland statute we here consider—effectively precludes an out-of-state banking institution from operating in the State:

“Under the Florida statute, discrimination against affected business organizations is *not* evenhanded because only banks, bank holding companies, and trust companies with principal operations *outside* Florida are prohibited from operating investment subsidiaries or giving investment advice within the State.” *BT Investment*, 447 U.S. at 42 (emphasis in original).

Such parochialism directly affects a statute’s constitutionality:

“Both on its face and in actual effect [the Florida statute] thus displays a local favoritism or protectionism that significantly alters its Commerce Clause status.” *BT Investment*, 447 U.S. at 42.

The Court found it unnecessary to resolve whether the Florida statute was unconstitutional under the “per se” test set forth in

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<sup>14</sup> By recent legislation, Maryland now permits out-of-state bank holding companies to own a single local bank chartered after July 1, 1983. Chapter 143, Laws of Maryland 1983, codified at FI Title 5, Subtitle 9. From a constitutional perspective, however, the mere fact that a foreign bank holding company may now enter the State by chartering a new bank does not alter the Commerce Clause issues raised by a blanket prohibition against acquiring existing banking institutions.

*Philadelphia v. New Jersey*, 437 U.S. 617 (1978), because the challenged law could not even meet the less stringent constitutional test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970):

“We need not decide whether . . . the Florida legislation [is] 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.

### C. Application

In 68 *Opinions of the Attorney General* 75 (1983), we addressed the “incidental burden” posed by FI §12-204 in light of the “legitimate local concerns” that were analyzed and specifically found lacking in *BT Investment*.<sup>15</sup> In that Opinion, we considered the *BT Investment* holding to be dispositive in concluding that the provisions of FI §12-204, if applied to prohibit the transaction there in question, would violate the Commerce Clause. 68 *Opinions of the Attorney General* at 81.

We believe that the same is true of the proposed Maryland State transaction at issue here. In so concluding, we find it particularly relevant here that any other possible “legitimate local concerns”, including any not identified in *BT Investment*, would be significantly muted—if not mooted—by applying the approval process set forth in FI §3-314 to this transaction.<sup>16</sup>

In light of this approval process—and given the retained supervisory power of the Bank Commissioner over Maryland State—we cannot

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<sup>15</sup> The “local concerns” identified by the Court were: “an interest in discouraging undue economic concentration in the arena of high finance; an interest in regulating financial practices, presumably to protect local residents from fraud; and an interest in maximizing local control over locally based financial activities”. *BT Investment*, 447 U.S. at 43.

<sup>16</sup> See note 1 above and accompanying text. FI §3-314 applies equally to all persons desiring to acquire the stock of a local bank—and it does not at all differentiate among prospective purchasers based on their in-state or out-of-state origin or status. Hence, the application of FI §3-314 to this transaction does not raise the same Commerce Clause issues as does FI §12-204.

readily identify any constitutionally permissible “local concerns” that cannot be adequately addressed under other existing State laws.<sup>17</sup>

#### IV

#### Conclusion

In summary, it is our opinion that, under the Commerce Clause, Maryland law may not absolutely prohibit an interstate bank holding company acquisition that, as here, falls outside the purview of the Bank Holding Company Act.

Accordingly, we advise that FI §12-204 may not be applied to prohibit the Maryland State transaction in question.

STEPHEN H. SACHS, *Attorney General*

FRANCIS X. PUGH,  
*Assistant Attorney General*

ROBERT DE V. FRIERSON,  
*Assistant Attorney General*

AVERY AISENSTARK  
*Chief Counsel*  
*Opinions and Advice*

*Editor's Note:* Since the issuance of this Opinion, the General Assembly enacted the Reciprocal Interstate Banking Acquisitions Act. Chapter 113, Laws of Maryland 1985 (codified as Subtitle 10 of Title 5 of the Financial Institutions Article). This legislation authorizes acquisitions of Maryland banks and Maryland bank holding companies by certain out-of-state holding companies. *See also* Chapters 158 and 325, Laws of Maryland 1986.

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<sup>17</sup> Although Maryland State may be a “nonbank” for purposes of the BHC Act, it nonetheless remains a “bank” under Maryland law, subject to the supervisory and regulatory control of the Bank Commissioner.

## CIVIL RIGHTS

PUBLIC ACCOMMODATIONS—"WHITE CANE LAW"—DISCRIMINATION AGAINST BLIND OR DEAF—"PLACE OF PUBLIC ACCOMMODATIONS, AMUSEMENT, OR RESORT"—HEALTH AND EXERCISE CLUBS ARE PROHIBITED FROM DENYING BLIND OR DEAF FULL AND EQUAL ACCESS TO CLUB FACILITIES.

August 6, 1984

*The Honorable Elijah E. Cummings*  
*Maryland House of Delegates*

You have requested our opinion on whether the exclusion of a blind person from membership in a health club that is otherwise open to the general public violates this State's "White Cane Law", Article 30, §33 of the Maryland Code. More specifically, you ask whether such a health club is a "public facility" within the meaning of that law.

For the reasons given below, we have concluded that a health club which otherwise opens its membership to the general public is a public facility subject to the provisions of Article 30, §33. Accordingly, it is prohibited by law from denying the blind (or, indeed, any person with a visual or hearing impairment) "full and equal" access to and use of its facilities.<sup>1</sup>

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<sup>1</sup> You have not asked, nor do we here address, whether a health club might also be considered a "place of public accommodation" subject to this State's Public Accommodations Law, Article 49B, §5 of the Maryland Code. Article 49B, §5 defines "place of public accommodation" to include, among other things, a "place of exhibition or entertainment". It might well be that a health club is a "place of exhibition or entertainment" within the scope of that definition. See, e.g., *Daniel v. Paul*, 395 U.S. 298 (1969) (term "place of entertainment" in Civil Rights Act of 1964 not confined to spectator entertainment and includes a recreational facility that offers swimming, boating, miniature golf, and dancing). But see *Drews v. State*, 236 Md. 349, 354 (1964) ("there is no provision in the public accommodation law enacted by the State . . . with respect to amusement parks").

In any event, we believe that questions about the scope and applicability of the Public Accommodations Law are, in the first instance at least, best left to the expertise of the Human Relations Commission, the agency charged with enforcing and administering that law. See *Maryland Comm'n on Human Relations v. Bethlehem Steel Corp.*, 295 Md. 586 (1983); *Maryland Comm'n on Human Relations v. MTA*, 294 Md. 225 (1982).

## I

## The Statute

Article 30, §33(d)(1) and (g) of the Maryland Code makes it unlawful in this State to deny or interfere with the admittance to or enjoyment of "public facilities" by persons with visual or hearing impairments:

"(d)(1) The blind or the visually handicapped and the deaf or hearing impaired are entitled to full and equal accommodations, advantages, facilities, and privileges of all common carriers, airplanes, motor vehicles, railroad trains, motor buses, streetcars, boats or other public conveyances or modes of transportation, hotels, lodging places, places of public accommodations, amusement, or resort, or other places to which the general public is invited, subject only to the conditions and limitations established by law and applicable to all persons.

. . .

(g) Any person or persons, firm, or corporation, or the agent of any person or persons, firm, or corporation, who denies or interferes with admittance to or enjoyment of the public facilities enumerated in this section, or otherwise interferes with the rights of a blind or visually handicapped person or a deaf or hearing impaired person under this section, is guilty of a misdemeanor and subject upon conviction to a fine not exceeding \$500 for each offense."

As originally enacted in 1964, the law was designed to "prohibi[t] discrimination against blind persons in places of accommodations when such persons are accompanied by their dog guides". Chapter 137, Laws of Maryland 1964. The term "place of public accommodation" was then somewhat narrowly defined to include only an "establishment . . . regularly engaged in the business of providing sleeping accommodations, or serving food, or both, for a consideration, and which is open to the general public".

In 1966, the law was revised to "mak[e] it unlawful for any person to prohibit, hinder, or interfere with" the right of a blind person "to take a dog guide into certain public places". Chapter 190, Laws of Maryland 1966. Again, the range of "public places" subject to the law was a relatively narrow one, limited to "any public building, restaurant or eating place, conveyance, hotel, inn, tourist cabin or motel, elevator, or other similar public place".

But, just one year later, in 1967, the scope of this law was significantly broadened. No longer did the statute focus primarily on the right of the blind to use guide dogs. Rather, the statute was revised generally to "make it unlawful to interfere or deny admittance to or enjoyment of public facilities or to otherwise interfere with the rights of blind . . . persons". Chapter 663, Laws of Maryland 1967. And, for this purpose, the range of "public facilities" to which the blind were guaranteed "full" access was itself broadened to include "all . . . places of public accommodation, amusement or resort, and other places to which the general public is invited".

In 1971, this broad prohibition became part of a new "White Cane Law", "providing for equal rights and treatment for blind or visually handicapped persons in employment, public accommodations, and housing". Chapter 390, Laws of Maryland 1971. New rights with respect to housing and public employment were added, and what is now §33(d)(1) was expanded to provide both "the blind [and] the visually handicapped" with "full and equal" access to the broad range of public facilities there enumerated—including, again, "all . . . places of public accommodations, amusement, or resort, or other places to which the general public is invited".<sup>2</sup>

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<sup>2</sup> Three years later, in 1974, the provisions of the Public Accommodations Law, Article 49B, §5 [then §11], were expanded to encompass discrimination on the basis of "physical . . . handicap". See Chapter 875, Laws of Maryland 1974. That the General Assembly did not intend or consider the broad protections afforded by Article 30, §33 to be supplanted by this newly expanded Public Accommodations Law is evidenced by the fact that, since 1974, Article 30, §33 has itself been reenacted and amended several times by the General Assembly—most notably, in 1978 and 1979, to extend its protections to the deaf and hearing impaired [Chapter 929, Laws of Maryland 1978; Chapter 565, Laws of Maryland 1979] and, in 1983, to increase the criminal penalty from \$50 to \$500 [Chapter 649, Laws of Maryland 1983].

## II

## Analysis

A health club, quite obviously, does not fall within the statute's more specific listing of "common carriers, airplanes, motor vehicles, railroad trains, motor buses, streetcars, boats or other public conveyances or modes of transportation, hotels [and] lodging places". The question, then, is whether it falls within the statute's far broader reference to "places of public accommodations, amusement, or resort, or other places to which the general public is invited". We have no doubt but that it does.<sup>3</sup>

The phrase "places of public accommodations, amusement, or resort" is not uncommon to public accommodations laws. And, when following a list of specifically described places, this and similar phrases have been construed by courts around the country to be an enlargement upon that list and, as such, to encompass a wide range of other places and facilities not specifically listed. These include, for example, pool rooms, *Village of Atwood v. Otter*, 129 N.E. 573 (Ill. 1920); swimming pools, *State of New Jersey v. Rosecliff Realty Co.*, 62 A.2d 488 (N.J. Super. Ct. App. Div. 1948); race tracks, *Suttles v. Hollywood Turf Club*, 114 P.2d 27 (Cal. Ct. App. 1941); roller skating rinks, *Jones v. Broadway Roller Rink Co.*, 118 N.W. 170 (Wis. 1908); cemeteries, *Pennsylvania Human Relations Comm'n v. Alto-reste Park Cemetery Ass'n*, 306 A.2d 881 (Pa. 1973); little league baseball

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<sup>3</sup> A possible, narrow exception might exist for a health club facility that is, in the true sense of the term, a "private club"—e.g., one composed of a select group of members who themselves have a say in admitting or rejecting new applicants, who themselves exercise control over club operations and facilities, and who themselves own equity in club property or share in club profits. See, e.g., *Daniel v. Paul*, 395 U.S. 298, 301 (1969) (respondent recreational facility not a private club but "simply a business operated for a profit with none of the attributes of self-government and member-ownership traditionally associated with private clubs"). Cf. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (national membership organization, having local chapters that are neither small nor selective, is a "place of public accommodation" under Minnesota Human Rights Act).

Most modern health clubs, we suspect, fail to exhibit these indicia of a private club. Certainly, the particular health club to which your inquiry relates—the Grecian Health Spa and Fitness Center of laurel, maryland—is not a "private club". It is, rather, a commercial enterprise in which membership is open and nonselective, subject only to payment of a membership fee and adherence to the rules and regulations adopted by the facility's owner and operator, Grecian Health Spa, Inc.

organizations, *National Organization for Women, Essex County Chapter v. Little League Baseball, Inc.* 318 A.2d 33 (N.J. Super. Ct. App. Div. 1974); marathon courses, *New York Roadrunners Club v. State Division of Human Rights*, 437 N.Y.S. 2d 681 (N.Y. App. Div. 1981); amusement parks, *Drewe v. State*, 236 Md. 349 (1964); golf clubs, *Brown v. Loudon Golf and Country Club, Inc.*, 573 F.Supp. 399 (D. Va. 1983); recreational facilities, *Smith v. Young Men's Christian Ass'n of Montgomery*, 316 F.Supp. 899 (M.D. Ala. 1970); and reducing salons, *Browning v. Slenderella Systems of Seattle*, 341 P.2d 859 (Wash. 1959).

Indeed, at least one reported case has directly held the phrase "places of public accommodation, amusement, and recreation" to encompass health and exercise clubs. *Vidrich v. Vic Tanny International, Inc.*, 301 N.W.2d 482 (Mich. Ct. App. 1980). Coincidentally, that case also involved, as here, a blind person who had been denied access to the club in question:

"The issue is whether a legally blind person may validly be refused unrestricted membership in a health and exercise club on the ground that the physical limitations deriving from his blindness constitute a significant safety hazard effectively precluding his safe use of club facilities. We recognize no such 'safety exception' to the equal accommodations act and, consequently, reverse the trial court's determination that [the club's] exclusion of plaintiff was proper." 301 N.W.2d at 483.

In *Vic Tanny*, the court considered a Michigan equal accommodations law strikingly similar to Article 30, §33(d)(1):

"All persons within the jurisdiction of this state shall be entitled to full and equal accommodations, advantages, facilities and privileges of inns, hotels, motels, government housing, restaurants, eating houses, barber shops, billiard parlors, stores, public conveyances on land and water, theatres, motion picture houses, public educational institutions, in elevators, on escalators, in all methods of air transportation and all other places of public accommodation, amusement, and recreation, subject only to the conditions and limitations established by law and applicable alike to all citizens and to all citizens alike, with uniform



prices.” 301 N.W.2d at 483 (quoting M.C.L. §750.146; M.S.A. §28.343).<sup>4</sup>

The defendant argued that the law did not apply to health clubs given the absence of “specific language encompassing such facilities”. 301 N.W.2d at 484. The court responded:

“This argument is without merit in light of the comprehensive wording of [the statute,] providing for equal accommodations in ‘all other places of public accommodations, amusement, and recreation’. We hold that defendant’s business is within the purview of that language.” *Id.*

In reaching this conclusion, the court also rejected the defendant’s argument that a “safety exception” be judicially incorporated into the equal accommodations act:

“Where, as here, the language of the act is clear, unequivocal, and absolute on its face, judicial construction or interpretation of the statutory language in the manner argued for by defendant would be improper. Our function is to give full credence to ‘the legislative will as we find it, without regard to our own views as to the wisdom or justice of the act’.” 301 N.W.2d at 485 (citations omitted).

Article 30, §33 is, if anything, even broader than the Michigan statute construed and applied in *Vic Tanny*: §33 applies not only to “all . . . places of public accommodations, amusement, or resort” but, indeed, to “all . . . other places to which the general public is invited”. Like the court in *Vic Tanny*, then, we have no hesitation in concluding that Article 30, §33 applies fully to health clubs and similar facilities in which membership is generally open to the public. Those clubs, therefore, are required to provide blind persons, as well as persons with hearing impairments, “full and equal” access to their facilities, without discrimination in the scope, terms, or conditions of that access.

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<sup>4</sup> An accompanying provision, not unlike Article 30, §33(g), imposed criminal sanctions upon “[a]ny . . . owner, lessee, proprietor, manager, superintendent, agent or employee of any such place who shall directly or indirectly refuse, withhold from or deny to any person any of the accommodations, advantages, facilities and privileges thereof . . . on account of . . . blindness”. 301 N.W.2d at 483 (quoting M.C.L. §750.147; M.S.A. §28.344).

## IV

## Conclusion

In summary, it is our opinion that a health club or similar facility which otherwise opens its membership to the general public is a "public facility" subject to the provisions of Article 30, §33. As such, it is prohibited from denying persons with visual or hearing impairments "full and equal" access to and use of its facilities.

STEPHEN H. SACHS, *Attorney General*

AVERY AISENSTARK

*Chief Counsel*

*Opinions and Advice*

*Editor's Note:* Chapter 568, Laws of Maryland 1986 amended Article 30, §33(g) to provide for a civil action for injunctive relief against violations of the "White Cane Law," in addition to the criminal penalty mentioned in the opinion.

## CLERKS OF COURT

JUDICIARY—COMPTROLLER—PERSONNEL—DEPUTIES—APPOINTMENT AND SALARY OF DEPUTIES—BUDGETARY ADMINISTRATION—FEES OF OFFICE—JUDGES TO SET NUMBER OF DEPUTIES—COMPTROLLER TO SET SALARIES—CLERK TO PAY SALARIES FROM FEES OR ALTERNATIVE FUNDING SOURCES.

February 27, 1984

*The Honorable Warne C. Littleton*  
*Clerk of the Circuit Court*  
*for Worcester County*

You have requested our opinion on your responsibility as Clerk of the Circuit Court to provide for the salary of new deputy clerks when, as has recently occurred, the judges of your Court have ordered you to hire additional clerks but the State Comptroller has neither set nor approved a salary payment for them.<sup>1</sup>

For the reasons given below, we have concluded as follows: If the judges of your Court determine that the Clerk's office requires additional deputy clerks and order you to hire those clerks, you should (i) appoint the necessary personnel; (ii) request the Comptroller to set their salaries; and (iii) pay the salaries so set from the available fees of your office. If there are insufficient fees to pay the salaries and you are unable to secure alternative funding sources, you should include the additional positions and necessary funds in your next budget request, and seek to assure that the General Assembly appropriates the funds necessary to pay the salaries of those additional deputy clerks.

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<sup>1</sup> You have informed us that the judges of your Court believe it is necessary for you to hire one or two additional employees to assist in the court-related functions of the Clerk's office, but the Comptroller's office will not authorize the funding for those positions. You further indicate that, in your own opinion, there is indeed a need for additional positions and that your office has sufficient revenue to fund them.

We appreciate the delicacy of your position. Although a solution to this problem is perhaps most appropriately worked out among the parties, we will discuss below the relevant constitutional and statutory provisions for your guidance.

## I

*Dual Supervision of the Clerk of Court*

As Clerk of the Circuit Court you are a constitutional officer. Nevertheless, you are subject to supervision by both the judges of your Court and the State Comptroller.

First, the Maryland Constitution provides that "the office and business of said Clerks, in all their departments, shall be subject to the visitatorial power of the Judges of their respective Courts". Article IV, §10. This provision of the Constitution allows the judges "no other or greater power than supervisal, regulation and direction, through rules intended to insure the orderly, prompt, and efficient discharge of [the Clerk's] duty". *Peter v. Prettyman*, 62 Md. 566, 576 (1884).

In addition, by statutory enactment, the State Comptroller has been given certain oversight responsibilities with respect to the fiscal operations of the Clerks of the Circuit Courts. For example, under the Courts and Judicial Proceedings Article ("CJ" Article), "the Comptroller may set the compensation of" the Clerks' employees, CJ §2-505(a); and the expenses of the Clerks' offices are "subject to the approval of the Comptroller", CJ §2-202(b).<sup>2</sup>

From time to time, questions have arisen over whether the Comptroller or the judges have supervisory responsibility over the Clerk as to a particular matter. See e.g., *Smith v. Turner*, 101 Md. 584, 590 (1905); 58 *Opinions of the Attorney General* 69 (1973); 68 *Opinions of the Attorney General* 96 (1983); Letter of Advice from Frederick S. Koontz, Assistant Attorney General, to William Allen, Clerk of the Superior Court of Baltimore City (January 11, 1980).

The general rule, as this Office has previously indicated, is that "the Comptroller has authority over the offices of the Clerks of Court in those matters related to revenue", while "control over the day-to-day operation of the Clerks' offices...is vested in the courts under their visitatorial powers". 58 *Opinions of the Attorney General* 69, 73 (1973).

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<sup>2</sup> However, the Comptroller does not set the salaries of "employees of the Clerk's office in Washington County who are under the classified service." CJ §2-505(c).

## II

*Appointment and Salary of Deputy Clerks*

Article IV, §26 of the Maryland Constitution states, in relevant part:

“The Clerks shall appoint, subject to the confirmation of the Judges of their respective Courts, as many deputies under them, as the Judges deem necessary, to perform, together with themselves, the duties of the office, who shall be removable by the Judges for incompetency, or neglect of duty, and whose compensation shall be determined by law.”<sup>3</sup>

Thus, the framers of the Consitution placed on the Judges of the respective Circuit Courts the responsibility of determining the number of deputy clerks necessary to perform the duties of the Clerk's office. Article IV, §26 in effect requires the judges to set the number of deputy clerks, It also provides, however, that the deputy clerks' compensation “shall be determined by law”—that is, as or in the manner set by the General Assembly.

The General Assembly, in turn, has expressly authorized the Comptroller, on application of a Clerk or on the Comptroller's own initiative, to “set the compensation of an employee of the clerk's office”. CJ §2-505(a).<sup>4</sup> It is our understanding that, pursuant to this legislative mandate, the Comptroller's office has established criteria for determining appropriate salaries for deputy clerks, based on the size of the particular Clerk's office, the volume of work handled by that office, the responsibilities of the particular position, and the experience and length of service of the individual holding that position.

In *Smith v. Turner*, 101 Md. 584 (1905), the Court of Appeals addressed the division of authority between the judges and the Comptroller as to deputy clerks.<sup>5</sup> There, the Court explained:

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<sup>3</sup> However, Article IV, §26 also provides that the deputy clerks and other employees of the Clerks' offices in Washington County and Baltimore City are to be selected and removed under procedures established by law.

<sup>4</sup> *But see* note 2 above.

<sup>5</sup> In all material aspects, the then extant contitutional and statutory provisions were similar to those now in effect.

"There is no discretion as to employment of deputy clerks. Under the 26th section of Art. 4 of the Constitution, the duty to appoint is imperative. There is no absolute discretion as to whom the clerk shall appoint. He can appoint no one without the approval of the Judge of his Court, nor can he retain him if found by the Judge to be incompetent or negligent, and the only reason for these provisions is that the proper performance of the duties of the office, so many of which can only be performed with due promptness by the aid of deputies, may be guaranteed to the public. He cannot appoint a greater number of deputies than the Court deems necessary for the discharge of the duties of the office, and he cannot refuse to appoint such number as the Court may require. He cannot himself fix and limit the salaries to be paid to his deputies, but must allow such as the Comptroller of the State shall determine to be just and proper. The manifest purpose of this provision is to prevent the wrongful absorption of the receipts of the office by excessive salaries on the one hand, and to secure the services of competent persons by the assurance on the other hand of just and reasonable compensation. In no clerk's office in the State would it be possible for the clerk unaided to perform all the clerical work when and as it should be done for the protection of the public, and it was this consideration which cause the framers of the Constitution to embody in that instrument the duty of appointing deputies, and the power of confirmation and supervision conferred upon the Court." 101 Md. at 590-91.

The constitutional mandate is thus unequivocal: you cannot refuse to appoint the number of deputies that the Court considers necessary to discharge the duties of your office. However, to protect the fees of the office from "wrongful absorption...by excessive salaries", the General Assembly has separated the power to compensate from the power to appoint. See CJ §2-505; *Smith*, 101 Md. at 590. Although this separation establishes a balance of power and guards against potential abuse arising out of unnecessary appointments at high salaries, it also has created the dilemma you now face.

Nonetheless, the constitutional and statutory provisions of Maryland law are clear. The judges of each Circuit Court have the

authority to set the number of deputy clerks that they deem necessary to perform the functions of the Clerk's office for that Circuit Court, and Comptroller has the authority to set the salary of those deputy clerks.

### III

#### Source of Funds to Pay Salaries

The Constitution provides that the Clerks of the Circuit Court are to be paid from the fees of their offices. *See* Article IV, §10. Because the Clerks are paid in this fashion, they are subject to the provisions of Article XV, §1 of the Constitution. As such, the Clerk must keep an account book of all money received as payment or compensation for his or her official duties and submit that book yearly to the Comptroller. In addition, the Clerk must pay yearly to the State Treasurer any payment or compensation received that exceeds the amount allocated for the salaries and expenses of the office.

Thus, the Clerk's salary, set by the Board of Public Works pursuant to CJ §2-504(a), the salaries of the deputy clerks and other employees, and the other expenses of the office are all deducted from the fees relative to the "business and receipts" of the Clerk's office.<sup>6</sup> Any excess fees are paid over to the State Treasurer.

You have advised us that there is "more than enough revenue to provide for [the additional] positions" in question. Specifically, your office "sent to the General Fund sums in excess of one hundred thousand dollars on June 30, 1983, as well as over one and one-quarter million in transfer taxes in fiscal year 1983".

We assume that the "one hundred thousand dollars" constitutes excess fees over and above established salaries and other office expenses; in our view, such excess fees—otherwise to be sent to the General Fund—may be used to subsidize the salaries of those deputy clerks requested by the judges. By contrast, the "one and one-quarter million dollars in transfer taxes" collected by your office in

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<sup>6</sup> These include court fees assessed under CJ §7-202; fees for issuing marriage, alcohol, trader's, and other licenses; and commissions received for collecting public money.

fiscal year 1983 is not available to pay the salaries of the deputy clerks; these taxes are not fees of your office but, rather, are taxes that each clerk is statutorily required to collect and turn over to the State of Maryland.<sup>7</sup>

Therefore, if the judges of your Court direct you to hire additional deputy clerks, you should (i) appoint new deputy clerks, subject to the judges' approval; (ii) request the Comptroller to set their salaries in accordance with established procedures; and (iii) pay the salaries from the fees of your office.

If, however, there are insufficient fees in a Clerk's office to pay for additional deputy personnel, alternative salary sources must be secured. Absent either a transfer of funds from another part of the Clerk's office budget or approval from the Board of Public Works for emergency funds, a Clerk cannot fill deputy clerk positions until the General Assembly appropriates supplementary funds pursuant to CJ §2-504.1(c).<sup>8</sup>

Thus, as a general matter, if the judges of the Court order the appointment of additional deputy clerks and there are insufficient fees to pay the additional salaries, a Clerk should first attempt to secure an alternative source of funds—from elsewhere in that Clerk's budget or from the Board of Public Works. If this fails, the Clerk should (i) include a request for additional positions and funds in the next budget submitted to the Comptroller, in accordance with CJ §2-504.1; and (ii) take whatever steps are necessary to insure that the additional supplemental funding is included in the State budget.

#### IV

#### FY 1984 Budget Language

We understand that the Comptroller has refused to set a salary for any new deputy clerk positions, if not already requested in the

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<sup>7</sup> Of course, as you know, Article 17, §74 of the Maryland Code authorizes you to retain a 5% commission for collecting this tax. That commission does constitute a fee of your office and can be used as a source from which to pay the salaries of your deputy clerks.

<sup>8</sup> CJ §2-504.1(c) authorizes the Governor to "include in the State budget funds to supplement the fees and receipts of the clerks of the circuit courts".



budget for the last fiscal year, because of the restrictions appended to Program 24.06.00.01 of the Budget Bill for Fiscal Year 1984. Those restrictions provide:

“[T]hese funds shall not be expended by a Clerk of the Court for hiring additional personnel or incurring office expenses beyond the projected total funding budgeted for his office without prior written authorization of the Comptroller of the Treasury... In approving this appropriation it is the intent of the General Assembly that the Clerks shall make every effort to improve efficiency of operations and take all reasonable measure to reduce the need for general fund appropriation.” Chapter 63, Laws of Maryland 1983 at 264.

We are sympathetic to the Comptroller’s position that, inasmuch as the General Assembly has directed him to improve the efficiency of the Clerks’ offices and reduce general fund appropriations, he should not approve additional positions.

Nevertheless, this budgetary restriction applies only to funds that the General Assembly has appropriated to supplement the Clerks’ offices—not to the fees of their offices. Because no supplementary funds have been budgeted for your office, this restriction is not applicable. And, as to the unbudgeted fees of your office, this budget language cannot override the clear mandate of the Maryland Constitution, which places express responsibility to determine the number of persons necessary to conduct the duties of the Clerks’ offices on the judges of the Circuit Courts.

#### IV

#### Conclusion

In the final analysis, the position in which you find yourself is best resolved between the judges of your Court and the Comptroller’s office.

Nevertheless, it is our opinion that, if the judges of your Court determine that the Clerk’s office requires additional deputy clerks and order you to hire those clerks, you should (i) appoint the necessary personnel; (ii) request the Comptroller to set their salaries; and (iii) pay the salaries so set from the available fees of your office.

If there are insufficient fees to pay the salaries and you are unable to secure alternative funding sources, you should include the additional positions and necessary funds in your next budget request, and seek to assure that the General Assembly appropriates the funds necessary to pay the salaries of those additional deputy clerks.

STEPHEN H. SACHS, *Attorney General*

CATHERINE M. SHULTZ  
*Assistant Attorney General*

AVERY AISENSTARK  
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*Opinions and Advice*

## CONSTITUTIONAL LAW

PERSONNEL—GENERAL ASSEMBLY—FIRST AMENDMENT—EQUAL PROTECTION—PERSONNEL GUIDELINES BANNING POLITICAL ACTIVITY OF LEGISLATIVE EMPLOYEES NOT FACIALLY UNCONSTITUTIONAL—SOME APPLICATIONS MAY VIOLATE FIRST AMENDMENT.

April 16, 1984

*The Honorable Howard A. Denis*  
*Senate of Maryland*

*The Honorable Nancy K. Kopp*  
*Maryland House of Delegates*

You have each requested our opinion on the constitutionality of Section 12 of the Personnel Guidelines for the Department of Legislative Reference/Department of Fiscal Services, adopted by the Legislative Policy Committee on June 28, 1983.<sup>1</sup> Section 12 contains various restrictions on the political activities of the employees of these two departments. In responding to your inquiry, we have considered the following constitutional issues:

(1) Does Section 12, by treating legislative employees differently from other State employees, violate the Equal Protection Clause of the Fourteenth Amendment?

(2) Is Section 12, on its face, so vague or overbroad as to substantially deter constitutionally protected activity and thereby violate the First Amendment?

(3) Are there particular applications of Section 12 that would violate the First Amendment?

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<sup>1</sup> Your separate inquiries indicate that you have requested our opinion in your respective capacities as the chairman (Delegate Kopp) and a member (Senator Denis) of the Legislative Policy Committee's subcommittee that drafted these guidelines, as well as (in the case of Delegate Kopp) "[o]n behalf of the Speaker of the House, and the President of the Senate".

For the reasons given below, we conclude as follows:

(1) Section 12 does not violate the Equal Protection Clause of the Fourteenth Amendment.

(2) Section 12 is not, on its face, so vague or overbroad as to violate the First Amendment.

(3) The principal applications of Section 12 do not violate the First Amendment. However, certain potential applications of Section 12—to some political contributions, to some forms of involvement with ballot questions, and to some forms of off-duty political expression—raise serious constitutional doubts.

## I

### Background

Section 12 ("Political Activities") of the Personnel Guidelines for the Departments of Legislative Reference and Fiscal Services provides:

"The Departments are nonpartisan agencies designed to serve all members of the General Assembly efficiently, without favor or prejudice. The political neutrality of the staffs of the Departments must be maintained and protected, avoiding even the appearance of partiality. No employee shall receive favor or prejudice because of political consideration, [nor] shall any employee be subjected to pressure, express or implied, to support or oppose political candidates or positions. These guidelines are designed to achieve this necessary goal, while preserving the basic, inviolable rights of the employees as citizens.

- A. No employee of the Department[s] may be a candidate for nomination or election to a national, state, or local (political) office, either public or party, partisan or nonpartisan.
- B. No employee of the Department[s] may engage in any activity which reasonably may be construed as public support for or opposition to:

- (1) Any partisan or nonpartisan political campaign, candidate, committee or party; or
- (2) Any question on the ballot.

C. Paragraphs A. and B. do not in any way include:

- (1) Affiliating with a political party by registration;
- (2) Registering to vote: or
- (3) Voting.

D. Subject to paragraphs A. and B., the following activities are permitted:

- (1) Membership in a political club or any political organization;
- (2) Participation, membership, or holding of office in nonpolitical organizations or activities, e.g., civil, social, athletic, etc.”<sup>2</sup>

No penalties for violating Section 12 are specifically described, but presumably it can be enforced through employee disciplinary measures ranging from reprimand to dismissal. *See* Section 9 (“Discipline”) of the Personnel Guidelines.

The Personnel Guidelines were adopted pursuant to Chapter 818, Laws of Maryland 1982. Among other things, this legislation amended Article 40, §52(c) of the Maryland Code (relating to the Department of Legislative Reference) and Article 40, §59(d)(3) of the

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<sup>2</sup> An earlier draft of Section 12 expressly permitted (i) “[m]aking a contribution to any candidate or political committee, in any amount which is less than that which is required to be reported”, and (ii) “[a]ttending any gathering as an observer”. These exemptions, however, were deleted from the guidelines finally approved by the Legislative Policy Committee.

Maryland Code (relating to the Department of Fiscal Services) to provide that:

“The Legislative Policy Committee shall adopt guidelines not inconsistent with law governing hiring, tenure, promotion, grievance procedures, and political activity for all professional and nonprofessional employees of the Department.”

At the same time, Chapter 818 amended Article 33, §28-2 of the Maryland Code to effectively except Legislative Reference and Fiscal Services employees from the explicit permission to engage in partisan political activity that §28-1 grants to State employees generally.<sup>3</sup> Thus, Chapter 818 authorizes stricter regulation of the political activities of legislative employees than of other State employees, so long as the restrictions are not “inconsistent with” the federal and State constitutions or other “law”.<sup>4</sup>

## II

### Equal Protection

In our opinion, there is no question that, as a general rule, the General Assembly may subject its own employees to greater restrictions on political activity than those imposed on employees in the other branches of government. Such heightened regulation does not deny equal protection of law, in our view.

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<sup>3</sup> Article 33, §28-1 is sometimes referred to as an “anti-Hatch Act”, a play on the name of the federal statute that severely restricts partisan political activity by federal government workers.

<sup>4</sup> Of course, whether or not a statute so provides, rules, regulations, and guidelines issued pursuant to it may not be inconsistent with law. See *Comptroller v. M.E. Rockhill, Inc.*, 205 Md. 226, 233 (1954). We are aware of no inconsistency between Section 12 and any federal or State statute. The issue, then, is whether Section 12 is constitutional.

The Departments of Legislative Reference and Fiscal Services are perhaps the only State agencies expressly required by statute to be operated in a "nonpartisan" fashion. See Article 40, §§50(b) and 58(a). They are also the only agencies immediately responsible to 188 elected officeholders—legislators who represent practically all views on the political spectrum. Thus, the sensitive duties performed, and the potential pressures faced, by legislative employees differ significantly from the situation of other State employees.

We believe that these special circumstances afford substantial justification for regulating the political activity of legislative employees differently and, indeed, far more stringently. In *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), the Supreme Court dismissed in a footnote the claim that the regulation of the political activity of some, but not all, governmental employees denied equal protection to the regulated employees:

"Appellants also claim that [the restriction in question] violates the Equal Protection Clause of the Fourteenth Amendment by singling out classified service employees for restrictions on partisan political expression while leaving unclassified personnel free from such restrictions . . . . [But] the legislature must have some leeway in determining which of its employment positions require restrictions on partisan political activities and which may be left unregulated . . . . And a State can hardly be faulted for attempting to limit the positions upon which such restrictions are placed." 413 U.S. at 607 n. 5.

See also *Clements v. Fashing*, 457 U.S. 957, 971 (1982).<sup>5</sup>

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<sup>5</sup> In *Eaton v. Payne*, No. H81-2357 (D. Md. July 22, 1982) (oral opinion), the court rejected an equal protection claim based on the General Assembly's decision to treat its own employees differently from other State employees:

"Plaintiff here claims that the failure to provide a grievance procedure for non-classified employees of the legislative branch while providing one for similar employees of the executive branch, lacks a rational basis. This Court would disagree. Such a distinction made by the Maryland law does indeed have a rational basis. The Legislature could reasonably have believed that the nature of the services performed by non-classified employees of the General Assembly did not warrant a formal grievance procedure." Transcript at 10.

## III

## Vagueness and Overbreadth

In the companion cases of *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) and *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), the Supreme Court rejected vagueness and overbreadth attacks on certain political activity restrictions imposed by both federal and state laws. The teaching of these cases suggests that Section 12 would likewise survive scrutiny.

A. *Vagueness*

Put succinctly, Section 12 would be unconstitutionally vague only if it were "so vague that 'men of common intelligence must necessarily guess at its meaning.' " *Broadrick*, 413 U.S. at 607 (quoting *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926)). Otherwise, it " 'will not be struck down as vague, even though marginal cases could be put where doubts might arise.' " *Letter Carriers*, 413 U.S. at 579 (quoting *United States v. Harriss*, 347 U.S. 612, 618 (1954)).

Much of Section 12 provides at least as clear notice of what is proscribed as did several provisions in the state law upheld in *Broadrick*. For example, it is entirely plain that, under Section 12, candidacy in any election is prohibited (§12.A); but political affiliation, registering, and voting, on the other hand, are permitted (§12.C). Cf. *Broadrick*, 413 U.S. at 607-08 ("In the plainest language, [the statute] prohibits any state classified employee from being . . . a candidate for 'any paid public office.' ").

If there is a potential vagueness problem in Section 12, it is in the prohibition in paragraph B against "any activity which reasonably may be construed as public support for or opposition to: (1) [a]ny partisan or non-partisan political campaign, candidate, committee or party; or (2) [a]ny question on the ballot." Nevertheless, as discussed below, comparably inexact restrictions were sustained in *Letter Carriers* and *Broadrick*.

The Hatch Act, attacked as unconstitutionally vague in *Letter Carriers*, provides that no federal employee may "take an active part in political management or in political campaigns". 5 U.S.C. §7324(a)(2). This phrase is given more specific content by regulation. 5 C.F.R. §§733.111, 733.121, and 733.122. However, even the regula-



tions are themselves somewhat imprecise—e.g., as worded when *Letter Carriers* was decided, “actively participating in a fundraising activity of a partisan candidate” [5 C.F.R. §733.122(b)(4)] or “[t]aking an active part in managing the political campaign of a partisan candidate” [5 C.F.R. §733.122(b)(5)]. As to the meaning of these, the Supreme Court observed, “[t]here might be quibbles”:

“[B]ut there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.” *Letter Carriers*, 413 U.S. at 578-79.

Similarly, in *Broadrick*, the potential for dispute over the meaning of such terms as “partisan”, “take part in”, or “affairs of” political parties did not invalidate the statute on vagueness grounds. 413 U.S. at 608. The language of Section 12.B does not, in our view, pose a more serious vagueness problem.

Moreover, one avenue of clarification that was approved by the Supreme Court in *Letter Carriers* and *Broadrick* is available here: administrative interpretation at the request of individual employees. We construe Section 10 (“Grievance Procedure”) of the Personnel Guidelines, generally designed to resolve disputes, as permitting any employee who intends to engage in an activity that is arguably within the scope of Section 12’s prohibition to obtain an advance, binding “interpretation” of Section 12.<sup>6</sup> Cf. *Letter Carriers*, 413 U.S. at 580 (“It is also important in this respect [i.e., as to vagueness] that the [Civil Service] Commission has established a

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<sup>6</sup> “A grievance is a dispute between an employee and the Departments over the application, interpretation or violation of employee personnel rules, regulations or policies, whether prescribed in statute, guidelines, Department procedures or policies.” §10.B.

Of course, the existence of the formal grievance procedure does not preclude the use of other, informal means to clarify, case-by-case, the exact meaning of Section 12. Indeed, we understand that the Directors of the Departments of Legislative Reference and Fiscal Services intend to refer to specific inquiries on the applicability of Section 12 to the Legislative Policy Committee for its interpretation.

procedure by which an employee in doubt about the validity of a proposed course of conduct may seek and obtain advice from the Commission and thereby remove any doubt there may be as to the meaning of the law, at least insofar as the Commission itself is concerned."'). See also *Broadrick*, 413 U.S. at 608 n. 7.

### B. *Overbreadth*

In general, "[a] plausible challenge to a law as *void for overbreadth* can be made only when (1) the protected activity is a significant part of the law's target, and (2) there exists no satisfactory way of severing the law's constitutional from its unconstitutional applications so as to excise the latter clearly in a single step from the law's reach." L. Tribe, *American Constitutional Law* §12-24, at 711 (1978) (emphasis in original). We think that neither condition is met here.

#### 1. *Principal Applications of Section 12*

It is well-settled that a "ban on [government employees'] taking an active part in political management or political campaigns" is constitutional. *Letter Carriers*, 413 U.S. at 554. See also *United Public Workers v. Mitchell*, 330 U.S. 75 (1947). And it is equally clear that, to paraphrase Professor Tribe, exactly such manifestations of active political involvement are "a significant part" of Section 12's "target". That is, the following activities quite clearly—and constitutionally—fall within the prohibition of Section 12:<sup>7</sup>

(1) Engaging in political activity of any kind while on the job during working hours.

(2) Managing a partisan political campaign.

(3) Serving as an officer of a political party, central committee, or partisan political club.

(4) Organizing or reorganizing a political party or partisan political club.

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<sup>7</sup> Other permissible applications of Section 12, as to which some question exists but which we find constitutional, are discussed in Part IV A and B below.

(5) Soliciting, receiving, collecting, handling, disbursing, or accounting for assessments, contributions, or other funds for a partisan political purpose.

(6) Promoting or actively participating in a fundraising activity of a partisan candidate or political party.

(7) Soliciting votes in support of or in opposition to a partisan candidate.

(8) Acting as a poll watcher or challenger on behalf of a political party or partisan candidate.

(9) Driving voters to the polls on behalf of a political party or partisan candidate.

(10) Addressing or taking an active part in partisan political rallies or meetings.

(11) Serving as delegate or alternate in a caucus or convention of a political party.

(12) Participating in the distribution of partisan campaign literature.

(13) Initiating or circulating partisan nominating petitions.

(14) Riding in caravans for any political party or partisan political candidates.

(15) Becoming a candidate for partisan political office.

(16) Serving as an election judge.<sup>8</sup>

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<sup>8</sup> Under Article 33, §2-7(a) of the Maryland Code, election judges are selected to "represent" the majority and principal minority parties in the State.

(17) Endorsing or opposing a candidate for public or party office in a political advertisement, broadcast, or campaign literature.<sup>9</sup>

(18) Attending a political fundraising function, even on a free ticket.<sup>10</sup>

We think it likewise apparent that some constitutionally protected activity falls well *outside* the prohibition of Section 12, as drafted:<sup>11</sup>

(1) Being a member of a political party, political club, or political organization.

(2) Paying dues to a political club or organization.

(3) Voting or registering to vote.

(4) Participating in nonpolitical organizations.

(5) Privately expressing individual opinions on political subjects and candidates.<sup>12</sup>

Finally, it should be noted, Section 12 imposes no restrictions whatever on the political activity of the spouse or other relatives of a legislative employee.

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<sup>9</sup> Although troubled by a like restriction in the Hatch Act, the Court in *Letter Carriers* nevertheless upheld its constitutionality. 413 U.S. at 580.

<sup>10</sup> Because persons attending a political fundraiser ordinarily do not proclaim themselves as nonpaying guests, an employee who goes to such a function may be perceived by others in attendance (including legislators) to be partisan. In addition, receipt of a free ticket by an employee from a person who is a political supporter of the candidate raises questions of propriety that the General Assembly has a right to regulate.

<sup>11</sup> Certain other activity that appears to be *within* the prohibition of Section 12 but that constitutionally may not be prohibited is discussed in Part IV C, D, and E below.

<sup>12</sup> In *Wachsmann v. City of Dallas*, 704 F.2d 160, 162 (5th Cir. 1983), the court referred to an unappealed finding below that municipal employees could not be constitutionally prohibited from endorsing City Council candidates at small, private gatherings. See also Part IV E below.

## 2. Identification of Unconstitutional Applications

As more fully discussed in Part IV below, there are some gray areas in which the constitutionality of Section 12, as applied, is less clear. Indeed, one can identify potential applications of Section 12 that would be unconstitutional. However, it is precisely the purpose of Part IV, again paraphrasing Professor Tribe, to sever Section 12's constitutional applications from its unconstitutional ones. That is, in Part IV A and B, we identify applications of Section 12 that, while subject to some question, are in our view constitutional; in Part IV C, D, and E, we identify applications of Section 12 that present substantial constitutional doubt. Such a construction in an Attorney General's opinion helped save the state statute considered in *Broadrick* from overbreadth. *Broadrick*, 413 U.S. at 617-18.

But even if these gray areas are taken into account, Section 12 does not extend to "a substantial number of impermissible applications". *New York v. Ferber*, 458 U.S. 747, 771 (1982). Any overbreadth that might exist in Section 12 is not "substantial . . . judged in relation to [its] plainly legitimate sweep". *Broadrick*, 413 U.S. at 615. Thus, Section 12 cannot be "discarded *in toto* because some persons' arguably protected conduct may or may not be caught or chilled" by its prohibitions. *Broadrick*, 413 U.S. at 618.

## IV

### Particular First Amendment Issues

#### A. Restriction on Nonpartisan Activity

Section 12 specifically prohibits both "partisan" and "nonpartisan" candidacies and political support. We must therefore consider whether such a prohibition may constitutionally extend to nonpartisan activities—that is, to political activity undertaken without regard to party affiliation.<sup>13</sup>

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<sup>13</sup> For example, candidates for elected boards of education run "on a nonpartisan basis"—i.e., "without party designation and without regard to party affiliation". Article 33, §32-2 of the Maryland Code.

Both the *Letter Carriers* and *Broadrick* cases dealt with, and upheld, prohibitions on what were described as "partisan" activities of public employees. In the past, some courts have focused on the distinction between employee participation in partisan politics, on the one hand, and employee participation in political activities not directed toward party success, on the other, as the key to whether a restriction is constitutional or not. *See, e.g., Mancuso v. Taft*, 476 F.2d 187, 200 (1st Cir. 1973). *See generally* Annot., 28 A.L.R.3d 717 (1969, 1983 supp.). However, increasingly, courts are rejecting that distinction.

In *Magill v. Lynch*, 560 F.2d 22 (1st Cir. 1977), the United States Court of Appeals upheld a restriction in a city charter that kept a fireman from running for office in an election that, by law, was non-partisan. In doing so, the court took account of the political reality of the situation:

"The appearance (or reality) of favoritism that the charter's authors evidently feared is not exorcised by the nonpartisan character of the formal election process. Where, as here, party support is a key to successful campaigning, and party rivalry is the norm, the city might reasonably fear that politically active bureaucrats would use their official power to help political friends and hurt political foes." 560 F.2d at 28.

As the appeals court put it in *Morial v. Judiciary Comm'n of Louisiana*, 565 F.2d 295, 303 n. 8 (5th Cir. 1977) (en banc):

"We do not believe . . . that the restrictive language of *Letter Carriers* requires courts to ignore the reality of partisanship if the formality of party affiliation is absent . . . . A faction may form around a man as much as around a party label[.]"

Similarly, in *Smith v. Ehrlich*, 430 F.Supp. 818 (D.D.C. 1976), which upheld a federal law prohibiting staff attorneys of the Legal Services Corporation from engaging in both partisan and nonpartisan political activity, the court said:

"Apparently, it was the judgment of Congress that the distinction between partisan and nonpartisan politics is often one without a difference. Furthermore, our

representatives concluded that staff attorneys, who are on the firing line of a demanding profession, should not be diverted from their task by the influence of politics. We see nothing in the Constitution which prevents the Congress from making these policy determinations." 430 F.Supp. at 822.

See also *Mortillaro v. State of Louisiana*, 356 F.Supp. 521, 531-32 (E.D. La. 1972) (New Orleans could constitutionally prevent its employees from running as delegates to a nonpartisan state constitutional convention because "[t]he facts here show that the [employees] intend to or would engage in just about every campaign and political activity of which one desiring to successfully seek election to public office might conceive").

The most elaborate discussion of this question is contained in a recent opinion of the Fifth Circuit in *Wachsmen v. City of Dallas*, 704 F.2d 160 (5th Cir. 1983). The city charter prohibited various forms of involvement by city employees in non-partisan elections. The court rejected the argument that only "the problems raised by party involvement are what make such infringement constitutionally permissible":

"While *Letter Carriers* indisputably contains frequent references to partisan politics and political parties, it also contains several crucial passages, identifying the harms to important societal interests attendant on the politicization of governmental service. The discussion in these passages is in terms of politics generally rather than simply party or partisan politics." 704 F.2d at 165.

Indeed, the court expressly held that "[w]e decline to adopt as the touchstone for decision in this area an across-the-board distinction based purely on whether the elections are partisan or nonpartisan." 704 F.2d at 169.

We think that the reasoning of these cases supports the constitutionality of the Legislative Policy Committee's decision to include, within Section 12's prohibitions, nonpartisan as well as partisan activities.<sup>14</sup>

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<sup>14</sup> It is perhaps significant that the Supreme Court denied certiorari in *Magill*, *Morial*, and *Wachsmen*.

### B. *Prohibition of All Candidacies*

Some courts in the past have questioned the constitutionality of a ban on public employee candidacies for *all* offices —or, as Section 12.A phrases it, a ban on candidacies for any “national, state or local (political) office, either public or party”.<sup>15</sup> See *Mancuso v. Taft*, 476 F.2d 187, 199-200 (1st Cir. 1973); *Stone v. City of Wichita Falls*, 477 F.Supp. 581, 585 (N.D. Tex. 1979); *Hickman v. City of Dallas*, 475 F.Supp. 137, 141 (N.D. Tex. 1979); *Cummings v. Godin*, 377 A.2d 1071, 1079 (R.I. 1977).

However, both the Supreme Court’s more recent decision in *Clements v. Fashing*, 457 U.S. 957 (1982), and its previous decision in *Broadrick* suggest that the Legislative Policy Committee’s action in banning legislative employee candidacies for all offices is constitutional.

In *Fashing*, the Court upheld the constitutionality of a provision requiring certain state and county officers to resign if they became a candidate “for any office of profit under the laws of [Texas] or the United States”. Article XVI, §65 of the Texas Constitution. In the Supreme Court’s view, this provision did not “significantly impai[r] interests protected by the First Amendment”. 457 U.S. at 963. And, in *Broadrick*, the Court said that state employees could be prohibited from running for “any” paid public office. 413 U.S. at 617.

Lower courts have also upheld similarly broad candidacy restrictions. See *Morial v. Judiciary Commission*, 565 F.2d 295 (5th Cir. 1977); *Magill v. Lynch*, 560 F.2d 22 (1st Cir. 1977); *Smith v. Ehrlich*, 430 F.Supp. 818 (D.D.C. 1976); *Swinney v. Untreiner*, 272 So.2d 805 (Fla. 1973); *Crain v. Washington Parish Democratic Executive Committee*, 252 So.2d 752 (La.App. 1971).

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<sup>15</sup> We are not entirely certain about the significance of the parenthetical “political” in Section 12. Presumably, it is intended to indicate an office that exercises some function of government, as distinct from a nongovernmental office. Cf. §12.D(2). See 65 *Opinions of the Attorney General* 285, 290-93 (1980); 44 *Opinions of the Attorney General* 276 (1959).



As the court observed in *Wachsman v. City of Dallas*, 704 F.2d 160, 171 (5th Cir. 1983):

"We believe it unrealistic to assume that politics within the geographical boundaries of a city are divided into completely unrelated watertight compartments of city and noncity politics. On the candidate and officeholder level, it is certainly not unheard of for a person prominent in local partisan politics, as a former officeholder or otherwise, to become a city councilperson in a nonpartisan election, or for a member of the nonpartisan city council to thereafter become a local, state, or even federal elective officeholder through the partisan political process. Moreover, significant operating relationships frequently exist within the geographical area of a city, between the city government, whether partisan or not, and the county, state, and federal governments. City politics, then, whether or not 'partisan,' cannot be viewed as wholly divorced from the politics, within the area of the city, of the local, state, and federal governments."

In our opinion, the broad candidacy prohibition contained in Section 12 can be justified as a safeguard against the risk that campaigning employees would devote less than full time and energies to their responsibilities. See *Clements v. Fashing*, 457 U.S. at 968. Moreover, becoming a candidate for *any* office virtually ensures that the employee will be immersed in "just about every campaign and political activity", including the solicitation of contributions. *Mortillaro v. State of Louisiana*, 356 F.Supp. 521, 531 (E.D. La. 1972). This problem can arise at any level of politics. *Wachsman v. City of Dallas*, 704 F.2d at 171. In sum, the Legislative Policy Committee could validly conclude that such conduct should not be permitted for persons employed in sensitive, nonpartisan positions.

### C. Political Contributions

Section 12.B(1) generally prohibits "any activity which reasonably may be construed as public support for . . . [a]ny . . . political campaign, candidate, committee or party". The Legislative Policy Committee is evidently of the view that this prohibition encompasses the giving of political contributions. In her letter to us, the chairman of the subcommittee that drafted Section 12 explains:

"Because campaign contributions are subject to public disclosure requirements, and the contributor cannot assure the privacy of any contribution, [Section 12] will not permit employees to contribute financially to political campaigns."<sup>16</sup>

The act of contributing money to a candidate or cause is a significant form of political expression that unquestionably involves substantial First Amendment rights. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299 (1981); *Buckley v. Valeo*, 424 U.S. 1, 21 (1976); *Wachsman v. City of Dallas*, 704 F.2d 160, 173 (5th Cir. 1983). To be sure, this form of expression is not absolutely protected, particularly as far as public employees are concerned. See *Ex parte Curtis*, 106 U.S. 371(1882). Nevertheless, every court that has considered the point has found constitutional fault with an across-the-board ban on the making of political contributions by public employees.

For example, in *Hobbs v. Thompson*, 448 F.2d 456, 471 (5th Cir. 1971), the court struck down a municipality's across-the-board ban, observing that:

"[I]t seems patently obvious to us that the Macon charter and ordinance provisions sweep too broadly and proscribe a great deal of political activity which is unrelated to the effective workings of the fire department. [They] condemn[n] political contributions of money . . . by firemen in all campaigns, federal, state, and local."

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<sup>16</sup> See also note 2 above (deletion of proposed exception for contributions "in any amount which is less than that which is required to be reported").

Although a court would give deference to this construction of Section 12.B by the body that drafted and will implement it [see, e.g., *Maryland Commission on Human Relations v. Bethlehem Steel Corp.*, 295 Md. 586, 593 (1983)], the specific reference to "public" support could well be construed more narrowly. Indeed, a court might seek to avoid the serious constitutional problems associated with a ban on contributions by holding that Section 12.B(1) does not extend to contributions at all. See note 17 below.

Given this uncertainty, and in light of the line-drawing that we believe is constitutionally required in this area, we recommend that the Legislative Policy Committee consider a reformulation of Section 12 so that it addresses the subject of political contributions explicitly.

See also *Lecci v. Cahn*, 360 F.Supp. 759 (E.D. N.Y. 1973) and *Mancuso v. Taft*, 341 F.Supp. 574 (D. R.I. 1972), *aff'd*, 476 F.2d 187 (1st Cir. 1973) (contribution bans imposed on public employees held invalid).

Similarly, in *Bruno v. Garsand*, 594 F.2d 1062, 1064 (5th Cir. 1979), the Fifth Circuit expressed "strong doubts" that Louisiana could constitutionally prohibit its classified employees, "at least when acting as private citizens without any fanfare or publicity from making contributions to a political candidate or party". And, most recently, another panel of the Fifth Circuit, quoting *Bruno*, said "[w]e share this doubt as applied to across-the-board bans". *Wachsman v. City of Dallas*, 704 F.2d at 174.<sup>17</sup>

Although, in our view, an across-the-board ban on employee contributions to all offices would thus violate the First Amendment, we believe that a more limited prohibition would be constitutionally permissible. In *Ex parte Curtis*, 106 U.S. 371 (1882), the Supreme Court upheld the constitutionality of a federal law that prohibited certain executive branch officers and employees from giving money to any other officer or employee of the government "for political purposes". See also 18 U.S.C. §603 (a federal employee may not make a political contribution to another federal officer, employee, or legislator "if the person receiving such contribution is the employer or employing authority of the person making the contribution").

Moreover, in *Wachsman v. City of Dallas*, the Fifth Circuit upheld the constitutionality of a provision that prohibited city employees from making political contributions to city council candidates. In a passage highly pertinent here, the court discussed the rationale supporting that more limited prohibition:

"[T]he City's prohibition on campaign contributions is designed to prevent 'quid pro quo corruption between a contributor and a candidate,' . . . as well as the appearance of undue influence. It guards both against less qualified employees being given favored assignments

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<sup>17</sup> In both *Ex parte Curtis*, 106 U.S. at 838, and *Letter Carriers*, 413 U.S. at 572 n. 18 and 576 n. 21, the Supreme Court noted that the challenged restrictions on federal employees—though broadly prohibiting one from "tak[ing] an active part" in political activity, including fund-raising activity—did not serve to prohibit employees from making contributions to any candidate.

based on either their political contributions or their roles in an employee organization making such contributions, and against discrimination directed at qualified employees because they do not make or bring about such contributions. More generally, it prevents city council members from pressuring city employees, and prevents employees and their organizations from excessively or improperly influencing city council members or candidates. The latter also helps ensure that it does not appear to the public that political 'insiders' have undue effect on council elections." 704 F.2d at 174.<sup>18</sup>

On the basis of this authority, we believe it would be constitutionally permissible for the Legislative Policy Committee, in applying Section 12, to prohibit legislative employees from contributing to (i) persons running for election or reelection to the General Assembly and (ii) incumbent members of the General Assembly running for election to some other office. This more tailored prohibition, while not completely treating the possible "ripple effect" of politics at all levels of government, would nevertheless substantially achieve two compelling goals: eliminating "employer" pressure on employees of the Departments of Legislative Reference and Fiscal Services to make contributions, and reducing to a minimum the appearance of quid pro quo favoritism. And it would do so without imposing a total ban on significant, albeit passive, political expression.<sup>19</sup>

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<sup>18</sup> The *Wachsman* opinion concluded that:

"One might argue that the City is protecting employees who do not wish to be protected. This simply overlooks the general public's interest in an independent and efficient civil service. Appellants argue that upholding the lower court will make 'political eunuchs' of city employees. However, this is simply not so, as the lower court's findings correctly demonstrate that the City leaves unregulated a considerable scope of city employee political activity. . . . Rather than being emasculated, city employees are limited only to an extent that furthers their ability to perform optimally." 704 F.2d at 175.

<sup>19</sup> For the reasons stated in note 16 above, however, we recommend that this more tailored prohibition be incorporated explicitly in Section 12 itself.

#### D. *Referenda and Ballot Questions*

In *Wachsman v. City of Dallas*, the court, in the same breath in which it rejected a distinction between partisan and nonpartisan elections as the touchstone for regulation of public employee political activity, noted that:

“For purposes of judging the validity of restrictions on election-related activity in the light of first amendment considerations, we believe it more meaningful to distinguish between elections on the basis of whether they are candidate elections or noncandidate elections, such as referenda and constitutional amendment elections.” 704 F.2d at 169.

Indeed, in upholding broad restrictions on the political activity of public employees, some courts have particularly noted that the specific regulations in question did *not* infringe on any employee’s ability to be politically active in connection with ballot issues, such as constitutional amendments and referenda. See, e.g., *Letter Carriers*, 413 U.S. at 562, 568 n. 15, and 576; *Wachsman v. City of Dallas*, 704 F.2d at 169.

More important, in a growing number of cases the Supreme Court has appeared to regard activity with respect to ballot questions as virtually sacrosanct — not subject to the same type of regulation that has been held constitutional as applied to candidacy-related activity. In *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), the Court held that a State could not prohibit a corporation from making contributions to advocate views on ballot questions. In so doing, the Court rejected the contention that such legislation was necessary to prevent corruption. The Court observed that such a concern was valid only in the “quite different context” of political campaigns for public office, not where the “right to speak on issues of general public interest” was at stake. 435 U.S. at 788 n. 26. In *Firestone v. Let’s Help Florida*, 454 U.S. 1130 (1982), the Court summarily affirmed a decision striking down a Florida statute that had placed a \$1,000 limit on contributions to a single political committee in a referendum election. Finally, in *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), the Justices invalidated a similar restriction, noting that:

“Whatever may be the state interest or degree of that interest in regulating and limiting contributions to or

expenditures of a candidate or a candidate's committees[,] there is no significant state or public interest in curtailing debate and discussion of a ballot measure." 454 U.S. at 299.

*See generally* 67 *Opinions of the Attorney General* 192 (1982) (limit in Election Code on contributions for ballot questions is unconstitutional).

None of these Supreme Court ballot question cases, however, involved restrictions that were applicable to public employees only. There is arguably a significant constitutional difference between Section 12's restriction and the provisions struck down in *Bellotti*, *Firestone*, and *Citizens Against Rent Control*. The governmental interest in preventing political corruption by imposing general limitations on ballot question contributions is, as the Supreme Court has said, highly attenuated at best and, therefore, cannot justify a restriction on First Amendment rights. But the governmental interest underlying Section 12 is different, and perhaps stronger: the Legislative Policy Committee desires to prevent the harm to the legislative process that would attend active political involvement by certain of the General Assembly's own employees. Hence, the very reason that justifies, under the First Amendment, the extension of political activity restrictions to nonpartisan elections — preventing "the politicization of governmental service" [*Wachsman v. City of Dallas*, 704 F.2d at 165] — might also be viewed as sufficient to justify the extension of these restrictions to ballot questions generally.

Yet we acknowledge that *Wachsman* itself is to the contrary (albeit without substantive discussion). Thus, we can only advise that a broad application of Section 12 to employees' involvement in referenda and other ballot questions would be constitutionally suspect.

We think that Section 12 may safely be applied, for example, to prevent employees from engaging in ballot question activities while on the job; to prevent them from lobbying legislators on state ballot questions; and to prevent them from publicly advocating action on measures with which, as legislative employees, they are or have been directly involved (e.g., as drafter, researcher, or committee counsel). We caution, however, that any more expansive application of Section 12's ban in connection with ballot question activity raises serious questions of compliance with the First Amendment.<sup>20</sup>

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<sup>20</sup> See also 62 *Opinions of the Attorney General* 227 (1977) (prohibition on State employees' advocating passage or defeat of legislation unconstitutional, although some regulation might be permissible). Again, we recommend that the appropriate line(s) be drawn explicitly in Section 12.

### E. *Expression of Views*

Section 12 prohibits "any activity which reasonably may be construed as *public* support or opposition to" candidates and ballot questions. The implied distinction between public and private expression of political views will require careful application to avoid constitutional difficulty.

In *Broadrick v. Oklahoma*, the Supreme Court strongly suggested that, if Oklahoma's restrictions on political activity by state employees were applied to restrict the wearing of political buttons or the use of bumper stickers, those applications would be improper. 413 U.S. at 618. In an earlier case, *Hobbs v. Thomas*, 488 F.2d 456 (5th Cir. 1971), a federal appeals court struck down an ordinance that prohibited firemen from displaying political bumper stickers on their cars. And, in *Connealy v. Walsh*, 412 F.Supp. 146 (W.D. Mo. 1976), the court upheld a political bumper sticker restriction for judicial employees—but only because the employee in question, a probation officer, used her car to visit her clients on official business and parked it in a lot reserved for court employees.

Absent unusual circumstances such as in *Connealy*, it would appear that the presence of a political bumper sticker on a legislative employee's car in a general State employee parking lot does not raise the evils of partisanship sought to be avoided by Section 12 and might even be considered to be of such a low-key and *de minimis* nature, and so divorced from the individual's identity as a legislative employee, as to amount to private expression. The same might be said of, for example, posting campaign signs in the front yard of an employee's home (particularly in light of the fact that a spouse or other family member is free to post the sign); wearing a candidate button off the job; signing a petition as an individual; and attending a political gathering (other than a fundraiser) strictly as an observer or member of the audience.<sup>21</sup> It is difficult to discern how these activities would result in the harms that Section 12 is intended to avert.

Under the circumstances, the Legislative Policy Committee should seriously consider a further refinement of its distinction between "public" and "private" political support into, perhaps, categories of "active" political support and "passive", *de minimis* political activity.

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<sup>21</sup> As to this last form of passive political participation, however, the Legislative Policy Committee appears to have specifically intended to prohibit it. See note 2 above.

## V

## Conclusion

In summary, it is our opinion that:

(1) Section 12 of the Personnel Guidelines for employees of the Departments of Legislative Reference and Fiscal Services does not violate the Equal Protection Clause of the Fourteenth Amendment.

(2) Section 12 is not, on its face, so vague or overbroad as to violate the First Amendment.

(3) The principal applications of Section 12 do not violate the First Amendment. However, certain potential applications of Section 12—to some political contributions, to some forms of involvement with ballot questions, and to some forms of off-duty political expression—raise serious constitutional doubts. We recommend that the Legislative Policy Committee consider a refinement of Section 12 to expressly exclude from its scope these constitutionally doubtful applications.

STEPHEN H. SACHS, *Attorney General*

ROBERT A. ZARNOCH  
*Assistant Attorney General*

AVERY AISENSTARK  
*Chief Counsel,  
Opinions and Advice*

*Editor's Note:* The statutory provisions requiring adoption of the Personnel Guidelines have been recodified, without substantial change. See §§2-1207(c) and 2-1307(c) of the State Government Article. Opinion No. 86-006 (February 10, 1986) (unpublished) discusses other sections of the Personnel Guidelines.



CONSTITUTIONAL LAW—COMMERCE CLAUSE—FEDERAL PREEMPTION—FOREIGN AFFAIRS POWER—LEGISLATION PROHIBITING DEPOSIT OF STATE FUNDS IN BANKS MAKING LOANS TO SOUTH AFRICA IS CONSTITUTIONAL.

May 24, 1984

*The Honorable Harry Hughes*  
Governor

We have received and hereby approve for constitutionality and legal sufficiency House Bill 1267. That bill prohibits the State Treasurer from depositing State funds in any financial institution unless the financial institution certifies in writing that it does not have any direct loans, or "foreknowledge" of any indirect loans, outstanding to the government of the Republic of South Africa or to any national corporation of the Republic of South Africa.<sup>1</sup> The bill makes an exception for loans made by foreign or out-of-state financial institutions without the participation of the subsidiary or affiliated corporation with which the funds are to be deposited. The bill further provides that it does not apply to loans made prior to the effective date of the Act, which has been delayed until January 1, 1985.

The constitutional issues presented by House Bill 1267 are essentially threefold:

- (1) Does the statute conflict with the Commerce Clause, U.S. Constitution, Art. I, §8?
- (2) Does the statute contravene federal law, in violation of the Supremacy Clause, Art. VI, Cl. 2?
- (3) Does the statute infringe on the federal foreign affairs powers?

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<sup>1</sup> Similar legislation has been passed in several other jurisdictions. See Conn. Gen. Stat. §3-13f; D.C. Code Ann. §47-342; Mass. Gen. Laws Ann. Ch. 32, §23(1)(d)(vi); Mich. Res. 462, (Feb. 6, 1978); Neb. Legis. Res. 43, 86th Legis., 2d Sess. (1980). To the best of our knowledge, none of these provisions have been challenged.

For the reasons stated below, we conclude that the bill is not unconstitutional.

## I

### The Commerce Clause

Although Article I, §8 of the United States Constitution empowers Congress to "regulate Commerce with foreign Nations, and among the several States," it is well settled that the states may also regulate commerce except in areas preempted by Congress. In so doing, a state must balance the local interest with the burden on commerce and consider less burdensome alternatives. *Pike v. Bruce Church, Inc.*, 424 U.S. 366 (1976).

Furthermore, if a state enters the market place as a participant, it is not subject to the usual Commerce Clause restrictions. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). Later cases have confirmed the holding of *Alexandria Scrap*. In *Reeves Inc. v. State*, 447 U.S. 429 (1980), the Supreme Court recognized that the distinction between a state as market participant and a state as market regulator is based upon "considerations of State sovereignty, the role of each state as guardian and trustee for its people, and the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." 447 U.S. 438-439.

The most recent case in this area is *White v. Massachusetts Council of Const. Employers*, 460 U.S. 204 (1983). In that case, the Supreme Court upheld an executive order of the mayor of Boston requiring that at least half of work crews on construction projects funded by the city consist of Boston residents. The Supreme Court found that the city was acting as a market participant, and in light of that finding, declined to consider the impact of the executive order on interstate commerce. This characterization was made despite that fact that the city, in choosing the parties with whom it would deal, had imposed hiring limitations on private firms as a condition of obtaining public construction contracts. *White*, 460 U.S. at 217 (Blackmun, J., concurring in part and dissenting in part).

House Bill 1267 does affect foreign commerce. However, it is clear, under these decisions, that the State, in deciding where to deposit its own funds, should be treated as a market participant and

therefore is not subject to Commerce Clause restrictions. This is true even though the statute results in a limitation being placed on private financial institutions as a condition of acting as a depository for State funds.

## II

### Federal Preemption

Under the Supremacy Clause, state law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement. *United States v. Pink*, 315 U.S. 203 (1942). We have examined treaties in force with the Republic of South Africa and find no conflict with House Bill 1267.

We have also considered whether House Bill 1267 would conflict with the Export Administration Act, 50 U.S.C. §2401 *et seq.* or, in particular, the provisions of 50 U.S.C. §2407(c) that preempt certain state laws pertaining to "participation in, compliance with, implementation of or the furnishing of information regarding restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries." Because state investments would not appear to be exports under the Export Administration Act, we do not believe that House Bill 1267 offends the statute. Nor do we believe that the State is subject to the foreign boycott prohibitions of §2407(a) or that House Bill 1267 was intended to implement or participate in a boycott "fostered or imposed by foreign countries against other countries." This position is supported by Howard Fenton, of the Anti-boycott Division of the Commerce Department, who informs us that his office, in reviewing comparable statutes, has made an informal determination that such statutes have not been passed in conjunction with boycotts by foreign countries and therefore are not subject to the anti-boycott provisions of the Export Administration Act.<sup>2</sup>

## III

### The Foreign Affairs Power

Although the Constitution contains no specific grant of power to regulate foreign affairs, it has been recognized that such power,

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<sup>2</sup> The Commerce Department reviewed the Connecticut and District of Columbia statutes cited in note 1 above.

stemming from national sovereignty, rests in the President and the Congress. *Perez v. Brownell*, 356 U.S. 44 (1958). Thus, even though not every state law that has some effect in foreign countries is forbidden, legislation of this kind may not represent an impermissible intrusion into foreign affairs. *Clark v. Allen*, 331 U.S. 503 (1947); *KSB Technical Sales Corp. v. North Jersey District Water Supply Com'n*, 381 A.2d 884, 898 (N.J. 1977), *appeal dismissed because of settlement*, 435 U.S. 982 (1978) (upholding constitutionality of New Jersey "Buy American" statute, noting that the federal constitution permits certain regulation which does not "demonstrably" result in a direct impact on foreign affairs).

In *Zschernig v. Miller*, 389 U.S. 429 (1968), the Supreme Court invalidated an Oregon probate law conditioning a nonresident alien's right to inherit from Oregon residents on the alien's ability to show that his country would reciprocate as to United States citizens. In so doing, the Supreme Court voiced two separate concerns. One concern was that application of the statute, and others like it, had involved judicial scrutiny "concerning the actual administration of foreign law, into the credibility of foreign diplomatic statements, and into speculation whether the fact that some received delivery of funds should 'not preclude wonderment as to how many may have been denied the right to receive' ". The other was that the statute as applied had a direct and significant effect on foreign countries, and could lead to repercussion for the entire United States, thus affecting foreign relations.

House Bill 1267 does, to some extent, represent a determination by the General Assembly with respect to the practices of the government of South Africa. However, it does not call for the level of state intrusion found repugnant in *Zschernig*. The impact of House Bill 1267 is cushioned to some extent by its prospective effect and by the fact that only certain financial institutions are affected. And, while the legislation, if duplicated in other states, does raise some possibility of retaliatory action that would affect the entire country, that possibility seems no greater than that presented by the "Buy American" law upheld in *KSB*. One additional basis for differentiating *Zschernig* can be found in the differing nature of federal power with regard to the acts involved. While the federal government has traditionally left matters of descent and distribution to the States, it could clearly set standards for inheritance by nonresident aliens. It is more questionable whether the federal government could bar the State from considering given factors when investing its own funds. *Cf. South Carolina v. Regan*, 465 U.S. 367 (1984).

Finally, it is important to note that this bill can be seen as an economic measure, and the State's control over economic matters may justify regulations that, on their face, relate to areas reserved to the federal government. See *Pacific Gas & Elec. v. State Energy Resources Conserv. & Develop. Comm'n*, 461 U.S. 190 (1983).

#### IV

#### Conclusion

In our view, these considerations provide support for the constitutionality of this legislation.

STEPHEN H. SACHS, *Attorney General*

KATHRYN M. ROWE  
*Assistant Attorney General*

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*Editor's Note:* House Bill 1267 was signed into law as Chapter 775, Laws of Maryland 1984. See also Chapter 775, Laws of Maryland 1985 (restricting investment of State pension funds in companies doing business in South Africa). The preceding Opinion was originally written as a bill review letter. Because of the significance of, and public interest in, the legislation, the letter is published here in a slightly revised format.

CONSTITUTIONAL LAW—ESTABLISHMENT, FREE SPEECH, AND FREE EXERCISE CLAUSES—BOND BILLS—WESTMINSTER PRESERVATION TRUST—RESTRICTIONS ON USE OF BOND PROCEEDS FOR SECTARIAN PURPOSES DO NOT PROHIBIT OCCASIONAL RENTAL OF WESTMINSTER HALL FOR WEDDINGS, BAR MITZVAHS, CHRISTENINGS, AND SIMILAR EVENTS PURSUANT TO NONDISCRIMINATORY, OPEN-RENTAL POLICY.

May 24, 1984

*Mr. Michael J. Kelly, President*  
*Westminster Preservation Trust, Inc.*

You have requested our opinion on whether Section 5 of Chapter 699, Laws of Maryland 1980, prohibits the Westminster Preservation Trust, Inc., from renting Westminster Hall for occasional religious events, such as weddings, bar mitzvahs, and christenings.

For the reasons given below, we have concluded that the occasional rental by others of Westminster Hall for such religious events does not violate Chapter 699, nor does it violate either the Establishment Clause of the First Amendment to the United States Constitution or Article 36 of the Maryland Declaration of Rights.

## I

### Factual Background

The Westminster Preservation Trust, Inc., was incorporated in 1978 to hold property for the use and benefit of the University of Maryland School of Law. It owns Westminster Hall and the adjacent cemetery and makes that property available to the Law School and to community and cultural groups.<sup>1</sup> The Board of Trustees has no written policy defining who may use Westminster Hall, but it currently does rent the Hall to various groups and individuals to defray maintenance costs of the facility.<sup>2</sup>

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<sup>1</sup> Westminster Church was deconsecrated in 1977 and renamed Westminster Hall in 1983.

<sup>2</sup> Conversation with Doreen Sekulow, Director of the Westminster Preservation Trust, Inc. (Feb. 28, 1984).

Chapter 699, Laws of Maryland 1980, created a State debt in the amount of \$350,000 to be used to assist the Trust in its "purchase, preservation, reconstruction, alteration, and equipping of the Westminster Church, Baltimore City, and its grounds, tombs, vaults, and monuments."<sup>3</sup> Section 5 of Chapter 699 provides:

"No portion of the proceeds of the loan or any of the matching funds may be used for the furtherance of sectarian religious instruction, or in connection with the design, acquisition, or construction of any building used or to be used as a place of sectarian religious worship or used or to be used as a place for sectarian religious instruction, or in connection with any part of any program or department of divinity for any religious denomination. Upon the request of the Board of Public Works, Westminster Preservation Trust, Inc. shall submit evidence satisfactory to the Board that none of the proceeds of this loan or any of the matching funds have been or are being used for a purpose prohibited by this Act."

Substantially similar provisions appear in most, if not all, recent bond bills granting funds to religiously affiliated entities. These provisions are evidently prompted by concerns of possible violation of the Establishment Clause of the First Amendment or Article 36 of the Maryland Declaration of Rights.

## II

### The Establishment Clause

The Establishment Clause prohibits Congress and the states from enacting any law "respecting an establishment of religion."<sup>4</sup> In order not to contravene the mandate of the Establishment Clause, a statute or governmental activity must satisfy three principles:

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<sup>3</sup> The Hall and cemetery are of historical interest to the State, in part because Edgar Allan Poe is buried in the cemetery.

<sup>4</sup> The Establishment Clause has been made applicable to the states through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

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

*Widmar v. Vincent*, 454 U.S. 263, 271 (1981); *Stone v. Graham*, 449 U.S. 39, 40 (1980). If the statute or activity violates any one of these three principles, it will be struck down as unconstitutional. *Id.*<sup>5</sup>

Under *Widmar v. Vincent*, the occasional use of Westminster Hall for religious events, as an aspect of general public use of the Hall, complies with all three principles and does not violate the Establishment Clause. In *Widmar*, the Supreme Court found that the University of Missouri at Kansas City could (and, indeed, as discussed in part IV of this Opinion, must) grant a student religious group the same access to University facilities to conduct meetings and worship as the University granted to other student groups. The Court found that the University's neutral open-forum policy had a secular purpose and avoided entanglement with religion. 454 U.S. at 273. Moreover, "the [University's] forum is available to a broad class of non-religious as well as religious speakers"; consequently, the Court concluded, "[a]t least in the absence of empirical evidence that religious groups will dominate [the University's] open forum, . . . the advancement of religion would not be the forum's 'primary effect' ". 454 U.S. at 275.

If such use of state university facilities does not violate the Establishment Clause, then similar use of the facilities of a private corporation, whose connection with the State is but a one-time grant for purchase and preservation of the facilities, does not. Consequently, as long as the Trust follows an open-forum policy that does not discriminate against or in favor of religious activities, that policy would have a legitimate

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<sup>5</sup> The Supreme Court's most recent opinion concerning the Establishment Clause, *Lynch v. Donnelly*, 465 U.S. 668 (1984), suggests that the other "tests" might be used in appropriate circumstances, and implies that such other tests may be less stringent. However, because we conclude that the occasional use of Westminster Hall for religious events does not violate the traditional three-pronged test, any discussion of any possible more lenient test is unnecessary. See also *Marsh v. Chambers*, 463 U.S. 783 (1983).



secular purpose and would avoid excessive governmental entanglement with religion.<sup>6</sup>

Furthermore, the primary effect of the Trust's open-forum policy could not be the advancement of religion where, as here, religious groups do not in any way dominate the forum: According to information provided by the Trust, a total of thirty-six events have been scheduled from April, 1984, through December, 1984. Of these, only one is a religious event, a wedding. One event out of thirty-six is somewhat less than even occasional and, in our view, is permissible.

### III

#### Article 36 of the Declaration of Rights

Article 36 of the Maryland Declaration of Rights provides, in pertinent part:

"Nor ought any person to be compelled to frequent, or maintain, or contribute, unless on contract, to maintain, any place of worship, or any ministry . . . .

Nothing shall prohibit or require the making of reference to belief in, reliance upon, or invoking the aid of God or a Supreme Being in any governmental or public document, proceeding, activity, ceremony, school, institution, or place.

Nothing in this article shall constitute an establishment of religion."

In contrast with many other provisions of the Maryland Declaration of Rights that parallel provisions in the Bill of Rights, the Court of Appeals has never interpreted Article 36 as being in *pari materia*

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<sup>6</sup> Under Section 5 of Chapter 669, the Trust must furnish the Board of Public Works, on request, "evidence satisfactory to the Board that none of the proceeds of this loan or any of the matching funds have been or are being used for a purpose prohibited by this Act". The Trust is a private entity, and the State's involvement with the Trust's activities is limited to this power to review the schedule of the Hall's use. The potential "entanglement" arising out of such oversight would be minimal, at most.

with the Establishment Clause and, as such, to be elucidated by Establishment Clause cases.<sup>7</sup> In fact, the decisions of the Court of Appeals appear to use a more permissive standard when reviewing actions under Article 36 than when reviewing actions under the Establishment Clause. For example, in *Horace Mann League of the United States of America, Inc. v. Board of Public Works*, 242 Md. 645 (1966), *appeal dismissed, cert. denied*, 385 U.S. 97 (1966), the Court held that State construction grants to three sectarian colleges violated the First Amendment, but not Article 36.<sup>8</sup>

In any event, as discussed in Part IV of this Opinion, *Widmar* makes it clear that Article 36 cannot constitutionally justify a State-mandated exclusion of religious groups from a forum otherwise available to the public.

#### IV

##### Section 5 of Chapter 699

Language substantially the same as that in Section 5 first appeared in two 1976 bond bills that provided grants to sectarian institutions: (i) the Western Maryland College Loan of 1976, Chapter 576, Laws of Maryland 1976; and (ii) the Loyola College Loan of 1976, Chapter 834, Laws of Maryland 1976. But for this limiting language, those two bills were precisely the type of bill found unconstitutional in *Horace Mann League of the United States of America, Inc. v. Board of Public Works*, 242 Md. 645 (1966), and

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<sup>7</sup> In *Supermarkets General Corporation v. State*, 286 Md. 611 (1979), the Court of Appeals noted:

"[Appellant] makes no distinction in its argument between the establishment of religion clause of the First Amendment to the Constitution of the United States and the declarations of Article 36 of the Maryland Declaration of Rights. Therefore, we need not consider whether the two constitutional provisions are *in pari materia*. In light of [Appellant's] argument, we have assumed *arguendo* that the requirement of the two provisions are identical." 286 Md. at 625.

<sup>8</sup> The standards the Court used in its Establishment Clause discussion in *Horace Mann*, however, appear stricter than those now applied by the Supreme Court. See, e.g., *Roemer v. Board of Public Works*, 426 U.S. 736 (1976), which later upheld annual State subsidies to two of the schools involved in *Horace Mann*. See also notes 9 and 10 below.

even involve one of the same schools.<sup>9</sup> The General Assembly was clearly aware of the constitutional problems inherent in providing aid to sectarian institutions and, by adding the limiting language, was restricting the use of that aid in an attempt to avoid those problems and comply with constitutional requirements.<sup>10</sup> We thus believe that the limiting language, now standardized in the form found in Section 5 of Chapter 699, was intended to implement Supreme Court decisions on the Establishment Clause—but not to expand upon those decisions.

Indeed, in light of *Widmar v. Vincent*, 454 U.S. 263 (1981), we do not believe that Section 5 can constitutionally be interpreted in these circumstances to impose requirements stricter than those imposed by the Establishment Clause. In *Widmar*, the University of Missouri at Kansas City argued that the Missouri Constitution required stricter separation of church and state than does the federal Constitution. That provision of the state constitution, the University claimed, created a compelling interest sufficient to overcome any free speech rights of student religious groups; therefore, the University's regulation prohibiting use of its facilities for religious worship or teaching was constitutional, although not required by the Establishment Clause. The Court dismissed this argument and concluded:

“[T]he State interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well. In this constitutional context, we are unable to recognize the State's interest as sufficiently compelling to justify content-based discrimination against respondents' religious speech.” 454 U.S. at 276.

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<sup>9</sup> In *Horace Mann*, the Court of Appeals found unconstitutional, as a violation of the Establishment Clause, the following bills providing for construction grants: the College of Notre Dame Loan of 1962, Chapter 66, Laws of Maryland 1962; the Western Maryland College Loan of 1963, Chapter 546, Laws of Maryland 1963; and the St. Joseph College Loan of 1963, Chapter 545, Laws of Maryland 1963.

<sup>10</sup> In 1972, after *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and *Tilton v. Richardson*, 403 U.S. 672 (1971), the General Assembly amended its 1971 program of non-categorical grants to eligible colleges and universities to provide that “[n]one of the moneys payable under this subtitle shall be utilized by the institutions for sectarian purposes.” In *Roemer v. Board of Public Works*, 387 F.Supp. 1281, 1285 (D. Md. 1974), *aff'd*, 426 U.S. 736, 740, 741 (1976), grants under this program to Western Maryland College, Mt. Saint

Thus, to interpret the language of Section 5 to go beyond the requirements of the Establishment Clause raises a substantial constitutional issue of conflict with the Free Speech and Free Exercise Clauses—i.e., whether the State may *require* recipients of State aid to discriminate against religious speech in a forum otherwise made generally available to the public.<sup>11</sup> As the Court of Appeals has frequently noted, statutes should be construed whenever possible to avoid constitutional issues or doubts. *Davis v. State*, 294 Md. 370 (1982). And we seriously doubt the General Assembly actually intended Section 5 to impose stricter requirements on private recipients of State aid than are imposed on State agencies. Consequently, we conclude that, in this context, Section 5 should be read in *pari materia* with the Establishment Clause and not as extending beyond that clause.

## V

### Conclusion

In summary, it is our opinion that Section 5 of Chapter 699, Laws of Maryland 1980, which prohibits the use of State bond proceeds for sectarian purposes, is intended as a legislative restatement of Establishment Clause mandates, to be read in *pari materia* with those mandates. Neither the First Amendment to the United States

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Mary's College, the College of Notre Dame, Saint Joseph College, and Loyola College were found constitutional. The *Roemer* case was argued before the Supreme Court at the beginning of the 1976 Session of the General Assembly that passed the two bond bills with the new nonsectarian language.

<sup>11</sup> You have not asked whether the Trust, of its own volition, may (as opposed to must) deny access to religious groups for religious events, and we do not here address that issue. The actions of a private organization, which has received a one-time State grant, obviously differ substantially from the actions of the State.

Constitution nor its State counterpart, Article 36 of the Maryland Declaration of Rights, prohibits the Westminster Preservation Trust, Inc., from renting Westminster Hall to others for occasional religious events, such as weddings, bar mitzvahs, and christenings, pursuant to an open-rental policy that does not discriminate in favor of or against religious activities. Similarly, in our opinion, Section 5 of Chapter 699 does not prohibit such occasional use of the Hall.

STEPHEN H. SACHS, *Attorney General*

MARY N. HUMPHRIES  
*Assistant Attorney General*

AVERY AISENSTARK  
*Chief Counsel,  
Opinions and Advice*

CONSTITUTIONAL LAW—EDUCATION—PUBLIC SCHOOLS—STUDENT PRAYER/BIBLE STUDY GROUPS—FREE SPEECH/FREE EXERCISE/ESTABLISHMENT CLAUSES—“OPEN FORUM”/“FREE TIME”—EQUAL ACCESS—STUDENT USE FOR PRIVATE RELIGIOUS ACTIVITY PERMISSIBLE ONLY IF SCHOOL REMAINS WHOLLY UNINVOLVED—FEDERAL EQUAL ACCESS ACT UNCONSTITUTIONAL.

December 6, 1984

*Dr. Robert Y. Dubel, Superintendent  
Baltimore County Public School System*

You have requested our opinion concerning the constitutionality of student-initiated group religious practices in public high schools during students' free time.<sup>1</sup>

Your inquiry initially addressed a particular student group religious activity—a Bible study and worship session—during the lunch hour at Catonsville Senior High School. However, as you later pointed out, student-initiated religious meetings occur at other high schools in Baltimore County and, one might assume, in other parts of the State as well.

We therefore believe that our response will be more useful if it provides general guidelines that can be applied to various situations. We certainly do not expect that we can anticipate every possible question or circumstance, but we hope that this opinion will serve as a constitutionally sound frame of reference for resolving specific questions as they might arise.

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<sup>1</sup> The “free time” that is the focus of your inquiry refers to periods immediately before and after school hours, as well as during school hours when there are no prescribed curriculum-related activities for a student. The lunch hour is perhaps the clearest example of such free time. Indeed, the focus could hardly be otherwise, because religious practices (as distinct from, for example, comparative religion study) may not constitutionally be incorporated into instructional time under any circumstances whatever. See *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

## I

## Overview

Although the question you pose requires an exploration of issues at the frontier of First Amendment law, certain historical and constitutional truths mark our way. We know, for example, that "[t]he place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind". *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 226 (1963). And we know that the First Amendment's guarantees of free speech and the free exercise of religion are designed to protect that place against official intrusion.<sup>2</sup>

But from centuries of "bitter experience" we also know that religious freedom, including the freedom not to practice religion, can only be insured if government does not involve itself with religion. *Id.* For this reason, the First Amendment—principally through its Establishment Clause—mandates our strict adherence to the bedrock principle that "[i]n the relationship between man and religion, the State is firmly committed to a position of neutrality". *Id.*

Put another way, First Amendment adjudication over the years has been marked by efforts to maintain a fragile balance between two goals that are frequently in tension with one another. One of them is our purpose to honor, respect, and accommodate the desire of our citizens to express and practice their religious beliefs. The other is our determination not to implicate the State in any way as an underwriter or promoter of religion. Nowhere has the need to strike this appropriate balance been more insistent than in the public school, "the symbol of our democracy and the most pervasive means for promoting our common destiny". *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 227 (1948) (Frankfurter, J., concurring). It is a task of "magnitude, intricacy and delicacy". 333 U.S. at 237.

The Supreme Court has never addressed the specific issue of whether public high school students possess a First Amendment right

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<sup>2</sup> The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech". The Fourteenth Amendment makes the First Amendment binding on the states. *Everson v. Board of Education*, 330 U.S. 1, 15 (1947).

to hold student-initiated religious meetings, whether before, after, or during school hours. However, in *Widmar v. Vincent*, 454 U.S. 263 (1981), the Supreme Court held that a public university violated its students' rights to freedom of speech when it denied a student religious club access to university meeting facilities otherwise generally available for use by student organizations. The *Widmar* decision, though it concerned only a public university, nevertheless has spawned controversy and litigation on the issue of student religious activities in the public high schools.

We explore below the constitutional principles discussed in *Widmar* and in earlier pertinent Supreme Court cases. We also analyze numerous cases in the federal courts of appeal that deal with student religious activities in secondary schools—especially *Bender v. Williamsport Area School Dist.*, 741 F.2d 538 (3d Cir. 1984), reversing 563 F. Supp. 697 (M.D. Pa. 1983), [*vacated on jurisdictional grounds*, 106 S.Ct. 1326 (1986)], a particularly well-reasoned decision rendered after *Widmar*.<sup>3</sup>

We think we discern in the reported cases a constitutionally significant line of demarcation, a First Amendment meridian so to speak, that helps us repond to your inquiry and to suggest the guidelines below. It is a line that distinguishes between a school's passive toleration of nondisruptive student-initiated religious activity, on the one hand, and a school's underwriting, sponsorship, or recognition of such activity, on the other.

School authorities are not authorized, much less obliged, to police the private utterances and exchanges of students, in order to ferret out and suppress voluntary religious practices. The First Amendment does not permit, let alone impose, so perverse a duty. If a school allows its students free time at lunch to do what they wish, for example, it should no more interfere with a group of students

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<sup>3</sup> In addition to *Bender*, the principal recent cases involving student religious activities in public high schools are *Lubbock Civil Liberties Union v. Lubbock Indep. School Dist.*, 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983) and *Brandon v. Board of Educ. of Guilderland*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981). We have also reviewed all other pertinent cases, whether or not decided after *Widmar*. Examples of these are cited in note 15 below. However, we believe that the applicable constitutional principles can best be distilled from Supreme Court jurisprudence and from these recent decisions of the courts of appeal.



reading and discussing the Bible in the cafeteria than it would with a group of students at the next table studying for their history exam.

Nor may a school official interfere with students who wish to worship, in their free time, in a way that does not disrupt others. And it is immaterial whether this kind of private devotion occurs individually or in groups, whether it occurs in solitude or in "common areas", such as the school cafeteria, the school yard, or even, under limited circumstances, an otherwise vacant classroom.<sup>4</sup>

What is essential, however, is that the school remain rigorously separate, even distant, from these free time religious activities. It may not allow itself to become involved in any way in the students' religious activities, whether by scheduling them, by granting permission for the use of space, by allowing use of school bulletin boards or other means of school communications to announce religious meetings, or by monitoring religious gatherings in any but the most general way necessary to assure against misconduct.

The heart of the matter is this: Precisely to the extent that students may pursue whatever free time activities they wish in whatever areas a school treats as available for free time student use, students may then engage in whatever nondisruptive religious activities they wish. But school authorities may not, consistently with the Establishment Clause's command of neutrality, go beyond this form of passive toleration. Perhaps the most succinct illustration of the distinction we draw is to suggest that the appropriate response of school officials to a student group asking permission for a religious meeting is: "What you do with your free time is for you to decide, not us."

## II

### Free Exercise Clause

We begin by examining whether students who wish to engage in religious practices during their free time in school have a right to do so under that part of the First Amendment which bars the government from "prohibiting the free exercise" of religion. Put another way, is a

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<sup>4</sup> As explained below, religious activity may occur in unused classrooms if, but only if, a school's policy is to treat such classrooms as extensions of the school's common areas, such as school grounds and cafeterias, and the school routinely leaves those classrooms available for free time, unscheduled student activity.

school required by the Free Exercise Clause to allow such student religious activity? We think not.

Analysis of any Free Exercise claim "begins with recognition of the fundamental proposition that the freedom to hold religious beliefs is absolute, whereas the freedom to act on those beliefs is not". *McCarthy v. Hornbeck*, 590 F. Supp. 936, 939 (D.Md. 1984) (Harvey, J.). To demonstrate an infringement of a free exercise right, an individual must show that the state has conditioned the receipt of an important benefit upon conduct forbidden by a religious belief or that the state has denied the individual a benefit because of conduct mandated by a religious belief. *Thomas v. Review Bd. of the Indiana Employment Security Div.*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Forest Hills Early Learning Center v. Lukhard*, 728 F.2d 230 (4th Cir. 1984).

A school's refusal to permit student groups to meet for religious purposes does not force them to choose between adhering to their religious obligations or suffering possible sanctions. "While school attendance is compelled for several hours per day, five days per week, the students, presumably living at home, are free to worship together as they please before and after the school day and on weekends in a church or any other suitable place." *Brandon v. Board of Educ. of Guilderland*, 635 F.2d 971, 977 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1982). See also *Lubbock Civil Liberties Union v. Lubbock Indep. School Dist.*, 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983).

We recognize that there may be exceptions to this general picture of alternative religious opportunity outside school. These might include, for example, "the case of a Moslem who must prostrate himself five times daily in the direction of Mecca, or children whose beliefs require prayer before lunch, sports or other school activities". *Brandon*, 635 F.2d at 977. In such circumstances, a free exercise claim to religious activity at school might well prevail. Your inquiry, however, does not pose any comparable problem.<sup>5</sup>

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<sup>5</sup> Nor is this a situation similar to instances where an isolated member of the armed forces or a prison inmate has no access to the regular religious facilities of a community. "Since government has deprived such persons of the opportunity to practice their faith at places of their choice, . . . government may, in order to avoid infringing the free exercise guarantees, provide substitutes where it requires such persons to be." *School Dist. of Abington Township v. Schempp*, 374 U.S. at 297 (Brennan, J., concurring). But there is no comparable deprivation imposed by the State in the public high school setting.

As a general rule, therefore, a public school system that does not allow students to meet for student-initiated religious practices does not infringe on their right to the free exercise of religion.

### III

#### Free Speech Clause

##### A. General Principles

The more difficult question is whether a public high school's denial of its facilities to student religious groups would "abridg[e] the freedom of speech" of those students. There is no question that the First Amendment guarantee of freedom of speech is "the matrix, the indispensable condition, of nearly every other form of freedom". *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).<sup>6</sup> The Supreme Court has declared that, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content". *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (citations omitted).<sup>7</sup> And as the Supreme Court emphasized in *Widmar v. Vincent*, the First Amendment guarantee of free speech encompasses religious, as well as secular, forms of expression. 454 U.S. at 269 n. 6.

Moreover, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools".

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<sup>6</sup> In *Abrams v. United States*, 250 U.S. 616 (1919), Justice Holmes articulated best the "marketplace of ideas" justification for free expression:

"But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out." 250 U.S. at 630.

<sup>7</sup> The government is, however, permitted to enforce regulations of time, place and manner of expression, so long as these regulations are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 132 (1981); *Consolidated Edison v. Public Service Comm'n*, 447 U.S. 530, 535-36 (1980).

*Shelton v. Tucker*, 364 U.S. 479, 487 (1960). Freedom of expression has been given a high place in our nation's values, and laws will not be tolerated that cast "a pall of orthodoxy over the classroom". *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). No one doubts that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate". *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969). These free speech rights "do not embrace merely the classroom hours", but follow a student when "he is in the cafeteria, or on the playing field, or on the campus during the authorized hours". 393 U.S. at 512-513.

The Supreme Court has held, for example, that a public school student's liberty of conscience may not be infringed in the name of "national unity" or "patriotism", and it has, therefore, invalidated the actions of local authorities compelling the flag salute and pledge of allegiance. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 640-41 (1943). Similarly, in *Tinker v. Des Moines School Dist.*, the Supreme Court upheld the wearing of black arm bands protesting the Vietnam War, finding that the free speech rights of public school students could not be abridged by reliance upon an "undifferentiated fear or apprehension of disturbance" arising from such expression. 393 U.S. at 508.

Nevertheless, it has been generally recognized that the free speech rights of high school students may be modified or curtailed to some degree, if " 'reasonably designed to adjust these rights to the needs of the school environment' ". *Quaterman v. Byrd*, 453 F.2d 54, 58 (4th Cir. 1971) (quoting *Antonelli v. Hammond*, 308 F.Supp. 1329, 1336 (D.Mass. 1970)).<sup>8</sup> The Supreme Court has long recognized that local school boards have broad discretion in the management of school affairs; and the Court has consistently recognized the right

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<sup>8</sup> As one legal commentator has observed:

"The assumptions of the 'free marketplace of ideas' on which freedom of speech rests do not apply to school-aged children, especially in the classroom where the word of the teacher may carry great authority. It seems unwise to assume as a matter of constitutional doctrine that school children possess sufficient sophistication or experience to distinguish 'truth' from 'falsity'. Furthermore, since one function of elementary and even secondary education is indoctrinative—to transmit to succeeding generations the body of knowledge and set of

of school boards to prescribe their own curriculum, in acknowledgment of their function of "inculcating fundamental values necessary to the maintenance of a democratic political system". *Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 864 (1982) (plurality opinion). See also *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923). In short, the First Amendment rights of public school students are subject to limitations "in light of the special characteristics of the school environment". *Tinker v. Des Moines School Dist.*, 393 U.S. at 506; *Board of Educ. v. Pico*, 457 U.S. at 866.

In addition, the Supreme Court has stated that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government". *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981). It has long been recognized that the state, "no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated". *Adderly v. Florida*, 385 U.S. 39, 49 (1966).

Thus, just last year, the Supreme Court reaffirmed the proposition that the First Amendment does not require "equivalent access to all parts of a school building in which some form of communicative activity occurs. 'Nowhere [have we] suggested that students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for . . . unlimited expressive purposes' ". *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 117-18 (1972)).<sup>9</sup>

#### B. Free Speech Right to Conduct Group Meetings

The general principles summarized above apply most clearly to *individual* expression, religious or otherwise. Just as a high school

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values shared by members of the community—some measure of public regulation of classroom speech is inherent in the very provision of public education." Note, *Developments In the Law: Academic Freedom*, 81 Harv. L. Rev. 1045, 1053 (1968).

But see note 18 below.

<sup>9</sup> *Perry* involved a claimed right of access to an internal school mail system by a union.

student has a free speech right to wear political insignia [*Tinker v. Des Moines School Dist.*, 393 U.S. 503], so he or she has a right to wear religious insignia—or, for that matter, to pray, so long as other persons, and the instructional process, are not disturbed.

However, *group* expression, religious or otherwise, presents a more complex problem. By their nature, group meetings in school give rise to special concerns about appropriateness and orderliness. School authorities must have—and, constitutionally, *do* have—wide latitude to define the circumstances under which their students may use school facilities for group activities. “[T]hose responsible for directing a school’s educational program must be allowed to decide how its limited resources can best be used to achieve the goals of educating and socializing its students.” *Seyfried v. Walton*, 668 F.2d 214, 217 (3d Cir. 1981) (students have no free speech right to produce a certain play in a high school).

School authorities in one place may decide that their educational objectives are best served by closely regulating student group activities—for example, by limiting all student meetings to those that are tied to the formal curriculum of the school. On the other hand, school authorities elsewhere may decide that their educational objectives are best served by encouraging the students’ own free choice of activities—for example, by generally authorizing students group meetings for any purpose during some period of free time.

The Free Speech Clause of the First Amendment does not dictate how school authorities are to decide the appropriate link between educational goals and student meetings. That is, a restrictive policy does not offend the First Amendment, because a public high school is not the kind of place where, by tradition, people are entitled to gather to exchange views and express themselves collectively—i.e., the kind of place that is called, in the jargon of the cases, a “public forum”.<sup>10</sup> Indeed, that a public high school is not, by tradition or necessity, such a

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<sup>10</sup> “[C]ertain places—such as public streets, sidewalks, and parks—have achieved a special status in our law. Their classification as public forums serves as constitutional shorthand for the proposition that, in addition to its usual obligation of content-neutrality (an obligation that exists whether or not a public forum is involved), government cannot regulate speech-related conduct in such places except in narrow ways shown to be necessary to serve significant governmental interests.” L. Tribe, *American Constitutional Law* §12-21, at 689 (1978).

public forum has been generally recognized by the courts. See *Lubbock Civil Liberties Union v. Lubbock Ind. School Dist.*, 669 F.2d at 1046; *Brandon v. Board of Educ. of Guilderland*, 635 F.2d at 980. See also *School Books, School Boards, and the Constitution*, 80 Colum. L. Rev. 1092, 1106 (1980).

In this fundamental respect, among others, a public high school differs from the public university involved in *Widmar v. Vincent*. There, the Supreme Court held, when a public university has a policy of accommodating student meetings generally, the university may be said to have created a "limited open forum"—that is, "a [public] forum generally open for use by student groups", but not by others. 454 U.S. at 267. By its very nature as a "marketplace of ideas", a public university is almost inevitably an open forum, albeit one that may be limited to members of the university community. 454 U.S. at 267 n. 5. In contrast, a public high school is *not*, by its nature, inevitably an open forum of any kind.<sup>11</sup>

But, just as school authorities are constitutionally free to restrict student group activities in high school, they are equally free to broaden the permissible scope of such activities. If a school does decide to delegate to its students the decision about which group activities are to be carried on, the school then will have created an analogue to the "limited open forum" of *Widmar v. Vincent*. In other words, even though the high school setting does not of itself necessarily constitute a public forum, "nothing precludes the existence of a [public] forum in a high school setting". *Bender v. Williamsport Area School Dist.*, 741 F.2d at 548.

In *Bender*, the school authorities had adopted a regular "activity period" at the start of certain school days, a period during which various student groups were permitted to meet. "The only articulated qualification as to the nature of the activity allowed during this period [was] that it 'contribute to the intellectual, physical or social development of the students and is otherwise considered legal and constitutionally proper.'" 741 F.2d at 543-44 (quoting affidavit of school principal, court's emphasis omitted). Hence, a wide range

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<sup>11</sup> In *Widmar*, the Supreme Court carefully avoided any intimation that its holding about a *university* forum necessarily applied to public elementary or secondary schools. See 454 U.S. at 268 n. 5 and 274 n. 14.

of student-initiated group activities were undertaken—everything from curriculum-related groups like the Spanish Club and the school newspaper to extracurricular groups, like the Chess Club and the Aviation Club, that “ha[d] at best only tangential relation to a high school course of study”. 741 F.2d at 549 n. 18. One additional student group, a “non-denominational prayer fellowship”, sought permission to participate in the activity period. The threshold question before the court was whether school authorities, in having established this activity period, had created an “open forum”.

The court noted that the school might have adopted no activity period at all, or one carefully restricted to curriculum-related activities. But the school instead had decided that its students would benefit from greater freedom for individual endeavor:

“Thus, the latitude allowed to student groups, and the manner in which [the school] *encourages students to exercise independent judgment*, supports the conclusion that the [school authorities] did indeed create a forum—albeit a limited one—restricted to high school students at Williamsport and also restricted to the extent that the proposed activity promote the intellectual, physical or social development of the students.” 741 F.2d at 549 (emphasis added).

As the court observed, the “exercise of this qualified freedom to participate in the group of one’s choice is quite consistent with the special purpose for which the high school is intended—the preparation of youth for adult life and adult decisions”. *Id.*

Thus, *Widmar* and *Bender* exemplify two ways in which an “open forum” can come into existence in public educational institutions—the one because a public university in reality can be nothing else [*Widmar*], the other if a public high school decides to devote a portion of its school day to structured meetings of groups formed as a result of the students’ own “exercise [of] independent judgment” [*Bender*]. The court in *Bender* reasoned that a public school could—and, in that case, did—create an open forum in the constitutional sense, even though it maintained some degree of substantive control through its approval of proposed student activities.

We agree with the reasoning in *Bender*. And, from that reasoning, we think it follows that a school would similarly be found to have



created a "limited open forum" if it allowed its students some free time in which to carry out—either individually or in groups—whatever non-disruptive activities they wish. Indeed, one can scarcely imagine a more open forum than a time and place wholly devoted to the students' own choice of endeavors, devoid of any definition or approval by the school. It is, to be sure, a different, far less structured kind of forum than in *Bender*, but its constitutional status is the same.

### C. *Effect of Open Forum*

Once a public high school has created a limited open forum,—whether by establishing a formal activity period akin to that in *Bender* or, more simply, by affording students free time—it subjects itself to stringent constitutional limitations on the power to exclude a group from the forum based on the content of the group's speech—e.g., because the group engages in religious speech. As the Supreme Court stated in *Widmar* with regard to the limited open forum at a university:

"In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must . . . satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Widmar v. Vincent*, 454 U.S. at 269-70. *See also Bender v. Williamsport Area School Dist.*, 741 F.2d at 550.

In *Widmar*, however, the Supreme Court also indicated that compliance with the Establishment Clause of the First Amendment may be such a compelling interest. 454 U.S. at 271. Indeed, the courts of appeal in *Brandon* and *Lubbock* flatly held this to be so, and the court in *Bender* ultimately concluded that the Establishment Clause concerns involved in that case outweighed the free speech interest of the prayer group there in question. Therefore, we now turn to an analysis of the Establishment Clause and its application in the public school setting.

## IV

### Establishment Clause

#### A. *Introduction*

The Establishment Clause prohibits the federal government and the states from passing any law "respecting an establishment of religion".

The objective of the Establishment Clause is "to prevent, as far as possible, the intrusion of either church or state into the precincts of the other". *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). The three main evils against which the Establishment Clause was intended to protect are "sponsorship, financial support, and active involvement" of the government in religious activity. *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970). Its underlying principle is that the proper role of government is one of neutrality in religious theory, doctrine, and practice. *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 222 (1963). And, in contrast with the Free Exercise Clause, an Establishment Clause violation does not depend on a showing of coercion of individual religious belief. *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 786 (1973); *Schempp*, 374 U.S. at 223; *Engel v. Vitale*, 370 U.S. 421, 430-31 (1962).

The "first and most immediate purpose" of the Establishment Clause is the recognition that "a union of government and religion tends to destroy government and to degrade religion". *Engel*, 370 U.S. at 431. History has shown that, whenever government has aligned itself with any particular form of religious practice, the inevitable result has been that it has incurred "the hatred, disrespect and even contempt of those who held contrary beliefs". *Id.* This historical truth, as summarized by Justice Black, is worth remembering:

"A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on

top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed." *Everson v. Board of Education of Ewing*, 330 U.S. 1, 8-9 (1947).

The Supreme Court has sometimes described the Establishment Clause as erecting a "wall" between church and state. *See, e.g., Everson v. Board of Education*, 330 U.S. 1, 18 (1947). But it has also warned that the "wall" may be "a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship". *Lemon*, 403 U.S. at 614.

Thus, for example, in *Zorach v. Clauson*, 343 U.S. 306 (1952), the Supreme Court upheld a "released time" program in which New York City permitted its public schools to release students during the school day in order for them to leave the school grounds and receive religious instruction at various centers. A refusal to accommodate religious practice in this passive way would, according to the Court, "show a callous indifference to religious groups". *Zorach*, 343 U.S. at 314.<sup>12</sup>

In sum, every Establishment Clause case involves an effort to reconcile the "inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that, as the Court has so often noted, total separation of the two is not possible". *Lynch v. Donnelly*, 465 U.S. 668, 672 (1984).

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<sup>12</sup> The Supreme Court has also upheld benefits to parochial schools when the beneficiaries include all school children, those in public as well as in private schools. *See, e.g., Mueller v. Allen*, 463 U.S. 388 (1983) (permitting taxpayers to deduct expenses occurred in providing tuition, text books, and transportation for their children attending elementary or secondary schools); *Board of Education v. Allen*, 392 U.S. 236 (1968) (permitting the loan of secular text books to all school children within the state); *Everson v. Board of Education*, 330 U.S. 1 (1947) (permitting the reimbursement to parents for expenses occurred in transporting their children to school). Most recently, the Supreme Court has permitted the display of a creche or nativity scene by a city, *Lynch v. Donnelly*, 465 U.S. 668 (1984), and it has upheld the practice of a state legislature of opening each session with a prayer by a chaplain paid with public funds, *Marsh v. Chambers*, 463 U.S. 783 (1983).

This term, the Court will review at least three other cases that raise significant Establishment Clause issues: *Felton v. Secretary of Education*, 739 F.2d 48 (2d Cir. 1984) (*aff'd* 105 S.Ct. 3232 (1985)) (use of public school teachers to provide certain remedial instruction in religious schools held to be unconstitutional); *Americans United for Separation of Church*

### B. *The Public School Setting*

The Establishment Clause prohibitions have encountered "their severest test" when they have been applied in the public school setting. *Schempp*, 374 U.S. at 230 (Brennan, J., concurring).<sup>13</sup> Justice Frankfurter, concurring in *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1940), articulated the reason for the Court's strict enforcement of the separation of church and state in the school setting:

"The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children . . . in an atmosphere free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered." 333 U.S. at 216.

This Establishment Clause mandate of strict neutrality has resulted in the Supreme Court's consistent invalidation of various forms of religious practice in the public schools.

For example, in *McCollum*, the Court struck down a program that permitted religious teachers, employed by private religious groups, to enter the public schools during regular hours and teach religion for thirty minutes to students desiring religious instruction.

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and *State v. School Dist. of Grand Rapids*, 718 F.2d 1389 (6th Cir. 1983) [*aff'd*, 105 S.Ct. 3216 (1985)] ("shared time" and "community education" programs carried out by public school teachers in religious schools held to be unconstitutional); and *Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1984) [*aff'd*, 105 S.Ct. 2479 (1985)] (statute authorizing meditation and silent prayer held to be unconstitutional).

<sup>13</sup> We have analyzed and discussed those cases in previous opinions dealing with the interplay of the Religion Clauses in the public school environment. See 67 *Opinions of the Attorney General* 58 (1982) (official recognition of a student religious group violates the Establishment Clause); 67 *Opinions of the Attorney General* 37 (1982) (statute requiring public elementary school students to participate in period of prayer, Bible reading, or meditation would violate Establishment Clause); 67 *Opinions of the Attorney General* 26 (1982) (statute requiring "balanced" presentation of "creation-science" and "evolution-science" in public schools would violate Establishment Clause); 65 *Opinions of the Attorney General* 186 (1980) (distributing Gideon Bibles to public elementary school students violates the Establishment Clause); 64 *Opinions of the Attorney General* 134 (teaching ethical values in the public school is constitutionally permissible).

The classes were taught by Protestant teachers, Catholic priests, and a Jewish rabbi. Students who did not choose religious instruction were required to go to some other place in their school building for pursuit of secular studies. In short, “[t]he operation of the state’s compulsory education system . . . assist[ed] and [was] integrated with the program of religious instruction”. 333 U.S. at 209. The Court found that “[t]his is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith”. 333 U.S. at 210.<sup>14</sup>

Similarly, a policy that required a brief, denominationally neutral prayer to be said aloud by each class in the presence of a teacher at the beginning of each school day was struck down in *Engel v. Vitale*, 370 U.S. 421 (1962). The prayer was “voluntary” in the sense that those students who wished to do so were permitted to remain silent or be excused from the room. The Supreme Court, however, warned those who subscribed to the view that there was no “danger” given the “brief and general” nature of the prayer, to recall the words of James Madison, author of the First Amendment:

“[I]t is proper to take alarm at the first experiment on our liberties . . . . [T]he same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever’.” 370 U.S. at 436 (quoting *Memorial and Remonstrance against Religious Assessments*, II Writing of Madison 183, 185-86).

A year later, with just one dissent, the Court held that opening exercises providing for the reading of the Bible or the recitation of the Lord’s Prayer violated the Establishment Clause. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963). And more recently, the Court invalidated a statute requiring the posting of a copy of the Ten Commandments, purchased with private contributions, on the wall of each public classroom. *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam).

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<sup>14</sup> This holding should be contrasted with that in *Zorach v. Clauson*, 343 U.S. 306 (1952). As discussed in Part IV A above, *Zorach* upheld a “released time” program in which public school students were permitted to leave school during the school day and receive religious instruction elsewhere. The difference between a school’s active involvement, condemned in *McCullum*, and a school’s passive accommodation, approved in *Zorach*, is highly instructive in the present context as well. See Part IV C 3 below.

These cases are a reminder that the Supreme Court has never condoned any form of religious observance within the public schools.<sup>15</sup> They thus serve as a warning that student-initiated religious meetings in a high school during free time can be permissible only if the circumstances that give rise to an Establishment Clause violation are scrupulously avoided.

### C. *The Establishment Clause Criteria*

#### 1. *Introduction*

The Establishment Clause test that has evolved from the Supreme Court's decisions requires three determinations: (i) whether the challenged conduct lacks a secular purpose, (ii) whether its primary effect is to advance or inhibit religion, and (iii) whether it creates an excessive entanglement of government with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). If the activity meets *any* of these three criteria, then an Establishment Clause violation has occurred. *Stone v. Graham*, 449 U.S. at 40-41.

#### 2. *Purpose*

The "purpose" prong of the test requires that a government's activity have a secular purpose. It asks "whether government's actual

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<sup>15</sup> Many lower court decisions have also found that the Establishment Clause prohibits various forms of group religious activities by students in the public school setting. See, e.g., *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982); *Collins v. Chandler Unified School Dist.*, 644 F.2d 759 (9th Cir. 1981), *cert. denied*, 454 U.S. 863 (1981); *Stein v. Oshinsky*, 348 F.2d 999 (2d Cir. 1965); *Hunt v. Board of Educ.*, 321 F.Supp. 1263 (S.D.W.Va. 1971); *Treitley v. Board of Educ.*, 409 N.Y.S.2d 912 (App.Div. 1978); *Johnson v. Huntington Beach Union High School Dist.*, 137 Cal. Rptr. 43 (1977), *cert. denied*, 434 U.S. 877 (1978); *Commissioner of Educ. v. School Committee*, 267 N.E.2d 226 (Mass. 1971), *cert. denied*, 404 U.S. 849 (1971); *State Bd. of Educ. v. Bd. of Educ. of Netcong*, 270 A.2d 412 (N.J. 1970) (*per curiam*).

The lower courts have divided over the constitutionality of statutes such as §7-104 of the Education Article of the Maryland Code, which permits students and teachers to "read the holy scripture or pray" during a daily period of silent meditation. Compare *Gaines v. Anderson*, 421 F. Supp. 337, 344 (D. Mass. 1976) (statute held to be constitutional) with *Jaffree v. Wallace*, 705 F.2d 1526, 1535-36 (11th Cir. 1983) [*aff'd*, 105 S.Ct. 2479 (1985)]; *May v. Cooperman*, 572 F. Supp. 1561, 1574-76 (D.N.J. 1983); *Duffy v. Las Cruces Pub. Schools*, 557 F. Supp. 1013, 1020-21 (D.N.M. 1983); and *Beck v. McElrath*, 548 F. Supp. 1161, 1164-65 (M.D. Tenn. 1982), *vacated*, 718 F.2d 1098 (6th Cir. 1982) (statutes held unconstitutional).

purpose is to endorse or disapprove of religion". *Lynch v. Donnelly*, 465 U.S. at 690 (O'Connor, J., concurring).<sup>16</sup> A neutral policy granting to all student groups—including religious groups—access to facilities in order to encourage extracurricular activities, leadership skills, or communication skills, would, of course, have a secular purpose. *Bender*, 741 F.2d at 551; *Brandon*, 635 F.2d at 978.

On the other hand, if a school system creates an "activity period" for the primary purpose of permitting the meeting of student religious groups, then the purpose prong would be violated. *Lubbock*, 669 F.2d at 1044-45. In *Lubbock*, for example, given a long history of Establishment Clause violations by the school authorities of that city, the circuit court delved behind the facial neutrality of the school policy. The court found that, "when examined in the context of the total school policy", the policy was "more clearly designed to allow the meetings of religious groups". 669 F.2d at 1045.<sup>17</sup>

By contrast, a school administration's decision to give high school students free time during the lunch hour or at some other time has no religious purpose whatever. It is obviously intended to provide the students with a little "breathing space" during the school day. This free time is "recreational" in the broadest and most basic sense, allowing students to carry on their own personal forms of

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<sup>16</sup> The Court has regularly invalidated statutes having a "pre-eminent purpose" that is religious in nature. See, e.g., *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam) (posting Ten Commandments in public school classrooms); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 205 (1963) (Bible readings and recitation of the Lord's Prayer in public schools); *Epperson v. Arkansas*, 393 U.S. 97, 103 (1968) (prohibition of the teaching of evolution in public schools).

<sup>17</sup> The policy at issue in *Lubbock*, in the paragraph specifically addressing student gatherings, provided as follows:

"The School Board permits students to gather at the school with supervision either before or after regular school hours on the same basis as other groups as determined by the school administration to meet for any educational, moral, religious or ethical purposes so long as attendance at such meetings is voluntary." 669 F.2d at 1041.

This seemingly neutral statement, however, "appear[ed] in the middle of a policy concerned with religious activities in the schools. The preamble to the policy [was] obviously concerned with religious beliefs and the place of *religion* in the public schools." 669 F.2d at 1044 (emphasis in original).

relaxation, intellectual endeavor, or spiritual sustenance. We do not believe that the secular purpose underlying such a decision is vitiated by the fact that some students might choose to use their free time for religious expression.

### 3. *Effects*

In applying the “effects” test, we must ask whether a policy under which religious groups meet in a public high school has the primary effect of advancing or inhibiting religion. See *Lemon v. Kurtzman*, 403 U.S. at 612-13. It is well-established “that not every law that confers an ‘indirect’, ‘remote’, or ‘incidental’ benefit upon religious institutions is, for that reason alone, constitutionally invalid”. *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973). However, “[w]hat is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion”. *Lynch v. Donnelly*, 465 U.S. at 692 (O'Connor, J., concurring).

In *Widmar v. Vincent*, a student religious group sought to meet on the university campus—that is, it sought to avail itself of the university’s “open forum”. The university denied permission for the group to meet, in part out of a concern that the group’s use of the university’s facilities would itself communicate a message of governmental endorsement. But the Supreme Court concluded that “an open forum in a public university does not confer any imprimatur of State approval on religious sects or practices”, any more than the university would be understood to have endorsed the goals of the political or other secular groups that met on the campus. 454 U.S. at 274. Indeed, there were so many other, secular, groups meeting on campus that the mere addition of one group—albeit a religious one—could hardly be understood by a reasonable university student as implying the school’s imprimatur. 454 U.S. at 274 n. 14.

However, this aspect of *Widmar* is not directly transferable to the high school setting. “[D]ifferent considerations present a more serious question of state advancement or endorsement of religion than was present in *Widmar*.... [T]he special circumstances inherent in a high school create heightened dangers in the context of the Establishment Clause.” *Bender*, 741 F.2d at 552.

Because school attendance is compulsory, the public school must be especially free of religious influence, and its “machinery” must



not be employed to advance religion. *McCollum*, 333 U.S. at 212. Moreover, because, as is generally thought, high school students are more impressionable than university students, they are "less able to appreciate the fact that permission for [a religious group] to meet would be granted out of a spirit of neutrality toward religion and not advancement". *Bender*, 741 F.2d at 552. Thus, the very presence of a religious group in a high school setting carries with it a greater risk of implied state imprimatur than does the presence of a religious group on a university campus.<sup>18</sup>

It is, therefore, not suprising that the leading cases on student-initiated religious meetings have all found a violation of the "effects" prong of the Establishment Clause criteria. In *Brandon*, for example, the proposed prayer meetings would have occurred at the beginning of the official school day, under "official supervision". The court held that such "prayer meetings would create an improper appearance of official support, and the prohibition against impermissibly advancing religion would be violated." 635 F.2d at 979. And in *Lubbock*, "the articulated policy of allowing [supervised] religious meetings at a time closely associated with the beginning or end of the school day implies recognition of religious activities and meetings as an integral part of the [school district's] extracurricular program and carries with it an implicit approval by school officials of those programs". 669 F.2d at 1045.<sup>19</sup> See also *Nartowicz v. Clayton County School Dist.*, 736 F.2d 646 (11th Cir. 1984) (per curiam), in which the court upheld a preliminary injunction prohibiting a "Youth for Christ Club", or any other religious student group, from meeting on school premises after school hours under faculty supervision.

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<sup>18</sup> See also note 8 above and accompanying text. Some commentators, however, disagree with this conclusion. See, e.g., Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 Yale L. J. 499 (1983). In this Note, the author concludes that courts have invalidated student-initiated religious expression in the public schools because of their assumption that high school students lack sufficient intellectual and emotional maturity to distinguish between neutral accommodation and official endorsement. 92 Yale L. J. at 503-04. The author argues that recent psychological research concludes otherwise. 92 Yale L. J. at 507-09. See also Buchanan, *Accommodation of Religion In The Public Schools: A Plea for Careful Balancing of Competing Constitutional Values*, 28 UCLA L. Rev. 1000 (1981).

<sup>19</sup> The court in *Lubbock*, however, was also cognizant of—and gave substantial weight to—the school district's tenacious "desire to continue religious activities". 669 F.2d at 1046. See note 17 above and accompanying text.

In this regard, we examine with particular care the facts in *Bender*, and the court's analysis of those facts, because that case seems to us to be both especially attentive to the competing First Amendment considerations and especially painstaking in its judgment. In *Bender*, the court held that meetings of a nondenominational prayer group during a regularly scheduled activity period would violate the Establishment Clause.

As discussed in Part III B above, the school involved in the *Bender* case had set aside a regular time at the beginning of certain school days for meetings of student groups. Any group that sought to meet during this activity period *needed school approval* to do so. 741 F.2d at 544 n. 8. A proposed activity would be approved by the school principal only if it satisfied certain broad standards applied by the school authorities—i.e., that it “‘contribute to the intellectual, physical or social development of the students’”. 741 F.2d at 544 (court's emphasis omitted). Moreover, school policy required that each student group have an adult adviser, approved by the school principal, who would attend each meeting. “[G]enerally speaking, the adult supervisor participates in the student group meetings.” 741 F.2d at 544 n. 10.

The court especially disapproved the presence of a school-approved monitor at meetings of the religious group in question. As the court observed:

“At the first [religious group] meeting, a monitor was present, but took no part in the proceedings. While the students in their affidavits characterized the monitor's activities as benign and neutral, designed only to maintain order, it is readily apparent that a school teacher or someone associated with the school necessarily must impart the impression to students that the school's authority and that the school's endorsement is implicated in the relevant activity, since every monitor must be approved by the school.” 741 F.2d at 552.

We fully agree with the conclusion of the Third Circuit that, given these facts about a school system's student activity policy, the grant of permission for a religious group to meet “would be perceived as endorsing and encouraging religious practice”. 741 F.2d at 553. If a school system in Maryland adopted a comparable policy, it too would violate this aspect of the Establishment Clause.

However, it does not follow from *Bender* or the other cases that the “effects” test is necessarily violated merely by *any* religious activity occurring on the premises of a public high school.<sup>20</sup> Rather, the constitutional vice identified in these cases is the governmental sponsorship that attached to the proposed religious meetings. If there were no “appearance of official support” [*Brandon*], “implicit approval by school officials” [*Lubbock*], or “school[] endorsement” [*Bender*], there would be no breach of the “effects” test.<sup>21</sup>

The basic constitutional lesson, as we see it, is that school officials may not grant permission for religious activity at the behest of a student group. To do so is to mark that activity with the school’s endorsement. The Establishment Clause forbids this.

A school nonetheless may choose to adopt a neutral, free time policy under which students are free to engage in activities of their own choice during specified time periods. And if it has done so, the Establishment Clause would not necessarily preclude student-initiated religious activity during such periods. However, in order for religious activity to be constitutionally permissible during a period of free time, that period must differ in its fundamental character from the kind of formal “activity period” involved in *Bender*. “Free time” must be just that: a general policy under which students may engage in any nondisruptive activity *without* school approval, so that school authorities need not get involved in decisionmaking about proposed religious activities. Under such a policy,

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<sup>20</sup> *Bender* did not purport to address the applicability of the Establishment Clause in all conceivable school settings. Rather, the court carefully limited its holding to “group prayer activity, held on school premises, conducted as part of an organized high school activity program, at which a school monitor must be present, and which takes place during the hours of compulsory school attendance”. 741 F.2d at 560 n. 30 (emphasis in original).

<sup>21</sup> For this reason, nondisruptive prayer or other religious expression by an individual in school poses no constitutional problem. It is the element of school involvement and approval that is ordinarily a prerequisite to all group expression which raises serious constitutional problems when applied to group religious expression.

the students' choice of their activities would be wholly a matter of their own discretion, without any necessary link to goals articulated by the school authorities.<sup>22</sup>

The absence of school involvement, under such a constitutionally permissible policy, is easiest to see when students carry out their free time pursuits in the cafeteria or on the school grounds. If students at a table in the cafeteria decide to read the Bible together or to pray after eating, they simply go ahead and do so, just as they might proceed freely to form a study group on some secular subject. Unlike the situation in *Bender*, the school plays no role whatever.

Of course, no faculty or other school staff member may supervise or participate in student religious activity.<sup>23</sup> Any such participation would clearly violate the Establishment Clause. Indeed, for the reasons stated in *Bender*, even the silent presence of a school monitor at a student religious meeting impliedly endorses the activity. Therefore, if students do undertake their own free time religious activity in a common area, such as the cafeteria or the school yard, any faculty presence required for the maintenance of security or decorum must not be focused on the religious meeting.

The risk of implied official endorsement is greater when use of a classroom is involved. We emphasize that, just as a school may decline to provide free time for its students in the first place, it may restrict the places in which free time activities are to be carried out. A school is not required to open up its classrooms for free time activity. If it chooses to do so, however, then it must treat any classroom space that is available for religious meetings as simply a physical extension of other common areas like the cafeteria. That is, the school must play no greater role in religious meetings that students happen to hold in classrooms than it would, or could, in religious meetings that students happen to hold at tables in the cafeteria or under a tree in the school yard.

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<sup>22</sup> We reiterate that the creation and scope of such a free time period is a matter left to the discretion of school authorities. They are entirely free, for example, to limit student activities to only those that are closely tied to the curriculum, in which case no group religious activity could occur. *See generally* Part III B above.

<sup>23</sup> Such faculty involvement is already expressly prohibited in Baltimore County public schools. Board of Education of Baltimore County Rule No. 6113.1 (approved Oct. 31, 1969).

In the final analysis, then, it is not really the place of the activity that makes the critical difference; it is the school's noninvolvement that is crucial. In particular, the school may not reserve time or classroom space for religious activity; it may not announce religious activity over the public address system or through other means of communication that it controls; and it may not station a faculty or staff monitor in a classroom used for a religious meeting, although we see no legal problem with a monitor who merely patrols the hallway to assure that discipline is maintained.<sup>24</sup>

If a school system were to implement a policy regarding free time that adhered to these ground rules, the schools and their employees would remain sufficiently divorced from student religious activities to avoid the impermissible advancement of religion. Under these circumstances, the conduct of a student religious meeting during that time would pose no significant likelihood "that [the school would] communicat[e] a message of government endorsement of such activity". *Bender*, 741 F.2d at 555.<sup>25</sup>

The result we reach has its wellspring in the distinction between the in-school religious instruction held to be unconstitutional by the Supreme Court in *McCollum* and the "released time" program held to be constitutional by the Supreme Court in *Zorach*. These two cases "spotlight[t] the zone of permissible accommodation" [L. Tribe, *American Constitutional Law* §14-5 at 824]: The state may not use its schools to actively assist private religious endeavors or to imbue them with an aura of official approval, but it may passively accommodate those who wish to take part in religious activity.

As the Supreme Court has said of the interaction among the Religion Clauses generally: "[T]here is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist *without sponsorship and without interference*." *Walz v. Tax Comm'n.*, 397 U.S. 664, 669 (1970) (emphasis added). *See also*

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<sup>24</sup> Any direct monitoring also poses serious difficulties under the "entanglement" prong of the Establishment Clause criteria. *See* Part IV C 4 below.

<sup>25</sup> We nevertheless caution that even so neutral a free-time policy as we discuss would run afoul of the "effects" test if, in the facts of a particular case, it were to produce a religious atmosphere through a predominance of religious meetings. *See Widmar v. Vincent*, 454 U.S. at 275.

*Widmar v. Vincent*, 454 U.S. at 271 n. 10. In our view, if a school system were to implement a policy that adheres to the constraints outlined above, it would remain on the constitutional side of the "effects" line.

#### 4. *Entanglement*

The "entanglement" prong of the Establishment Clause test examines the extent to which there is "continuing state surveillance" over religious matters. *Lemon v. Kurtzman*, 403 U.S. at 619. See also *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 675-76 (1970); Note, *The Unconstitutionality of State Statutes Authorizing Moments of Silence in the Public Schools*, 96 Harv. L. Rev. 1874, 1878 (1983). "The usual setting for an entanglement [test] violation is when a state official, in order to avoid giving state aid to religion, must make determinations as to what activity or material is religious in nature, and what is secular, and therefore permissible." *Bender*, 741 F.2d at 555.

In *Widmar v. Vincent*, the Supreme Court found that, at a college or university level, there is no real entanglement issue; in most instances, there is no need for faculty supervision of student extracurricular meetings held on the campus. At the high school level, however, some monitoring of the activities of student groups is essential. Even for student meetings held during free time, a degree of faculty supervision is needed to "ensure the smooth functioning of the school's secular schedule and the maintenance of the school's safety and order". *Brandon*, 635 F.2d at 979.

If such monitoring is regarded by school officials as requiring a constant supervisory presence in any room where a religious meeting is held, excessive school entanglement with religion is nearly unavoidable. As the court in *Bender* observed:

"The discharge of [supervisory] functions by the school not only gives the appearance of official state endorsement of religion, but, in practice, would require involvement by school officials in activities proscribed by the Establishment Clause. If, for example, a student member [of a religious group] objected that a prayer would violate his or her religious beliefs, the school monitor could very well be put in a position of settling such a controversy and thereby involve the school's authority in reaching a determination with respect to the validity of various religious beliefs and practices". *Bender*, 741 F.2d at 557.

If, however, a school's interest in the maintenance of safety and order can be satisfied without a monitor present in the room where a religious meeting is held, we perceive no excessive school entanglement with religion. For example, the policy might direct that a teacher would merely patrol the corridor and would enter any classroom in which a student religious meeting is being held only to preserve order.

A policy governing free time must, in other respects, also be administered so as to avoid entanglement with religious issues. For example, if a school chooses to permit free time activities in classrooms, it cannot put itself in the position of granting or denying permission for a specific religious group to use a specific room, just as it cannot set priorities among different religious groups who seek classroom space. Cf. 65 *Opinions of the Attorney General* 186, 196 (1980) (permitting the distribution of religious literature in school would create serious entanglement problems because the school would be forced to decide what is a bona fide "religion"). But, if the school can assiduously keep its involvement in student religious activity to no more than passive accommodation, it will not violate the Establishment Clause bar to excessive entanglement with religion.

## V

### The Equal Access Act

The status of student-initiated religious activity in high schools is now affected not only by the Constitution but also by a new federal statute, the Equal Access Act. The gist of the Act is as follows:

"It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings." Pub. L. No. 98-377, §802(a), 98 Stat. 1302 (1984).<sup>26</sup>

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<sup>26</sup> The Act provides that a "public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more non-curriculum related student groups to meet on school premises during noninstructional time". §802(b).

Thus, if a secondary school voluntarily creates an open forum, the Act provides equal access to religious groups, as well as all those espousing any political or philosophical perspective.<sup>27</sup>

There are numerous interpretive questions concerning this statute. For example, it probably does not apply to lunch hour activities, although this point is somewhat muddled by the legislative history.<sup>28</sup>

Beyond these problems of statutory construction, we think it highly likely that the Act will be found to violate the Establishment Clause and, accordingly, to be unenforceable.<sup>29</sup> The clear tenor of the legislative history is that the Act was designed with a specific, sectarian purpose in mind: to enhance the status of religious meetings in public secondary schools. It does so by requiring these schools to grant religious groups the same privileges now accorded secular, noncurricular groups. So, for example, if a school reserves a room for a meeting of the chess club or publicizes a meeting of a student community service organization, the Act requires the school to provide reserved space and publicity for student religious groups. *See generally, e.g.*, 130 Cong. Rec. S8334-36 (daily ed. June 27, 1984) (statements of Sen. Hatch and Sen. Denton); *Equal Access: A First Amendment Question: Hearings on S.815 and S.1050 Before the Senate Comm. on the Judiciary*, 98th Cong. 1st Sess. 1 (1983) (statement of Sen. Denton).

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<sup>27</sup> During the Senate debate on the bill, there was an acknowledgment that the bill opened student activity periods to such groups as the Ku Klux Klan, the American Nazi Party, the Young Communist League, and "bizarre cults", as long as those groups agreed not to engage in violent activity. 130 Cong. Rec. S8343-44; 8345-46 (daily ed. June 27, 1984). One Senator predicted that, if the legislation were enacted, "the cult groups will utilize the provisions of this proposal far more proportionately than any religious group in this country." 130 Cong. Rec. at S8346 (statement of Sen. Metzenbaum).

<sup>28</sup> The Act applies to activities during "a limited open forum" at a secondary school. The Act states that "[a] public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum-related student groups to meet on school premises during noninstructional time". §802(b). "Noninstructional time" is defined as "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends". §803(4). This would seem to exclude the lunch hour. However, the Senate co-sponsor of the bill said that the definition included lunch periods. 130 Cong. Rec. S8356 (daily ed. June 27, 1984) (statement of Sen. Denton).

<sup>29</sup> It is not clear how the Act is to be enforced in any event. A private right of action provision in the predecessor bill was dropped from the version finally enacted into law. The Act itself stipulates that violations may not lead to the cut-off of federal funds.



However, as we have discussed in detail in Part IV above, a school may *not* involve itself constitutionally with religious groups in the ways that it traditionally has with secular groups. When a school goes beyond a neutral policy of passive accommodation of religion, it violates the Establishment Clause, notwithstanding what the Act purports to require.

The Act's simplistic rationale is that religious expression, as constitutionally protected "free speech", must be treated by the state as if it were no different than secular speech. But in the public school setting especially, religious expression is profoundly different from secular speech. It is the Establishment Clause that makes it so, and Congress cannot legislatively define away the constitutional commands of the Establishment Clause. The Act's apparent effort to do so is a constitutionally intolerable exercise in legislative nominalism.<sup>30</sup>

## VI

### Conclusion

As the preceding discussion has suggested, your inquiry touches unresolved questions of constitutional law. The issue of student-initiated religious meetings in the public schools stands at the confluence of First Amendment principles that are of vital importance and yet in fundamental tension with one another. We are in an area of the law when it often seems necessary to say two contradictory things at once. But the abiding principle is that the price of religious liberty is official neutrality.

In summary, then, we conclude that school authorities would comply with their constitutional obligations if they adhere to the following guidelines:

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<sup>30</sup> It is at least conceivable that the Act might be found constitutional were it read to require that schools *reduce* their traditional degree of involvement with secular, noncurricular activities to equal the degree of noninvolvement with religious activities that is mandated by the Establishment Clause. See 130 Cong. Rec. at S8343 (statement of Sen. Hatfield). But such a reading would ignore the evident purpose of the Act—to produce an *enhanced* role for religious activities. It would also lead to the ludicrous result that a school would be obliged by the Act to remain wholly uninvolved with the chess club or a student charity organization simply because it is constitutionally obliged to remain wholly uninvolved with the Bible club. We doubt that a court would bring about such an absurdity.

School authorities should decide, as a general matter and in advance of any request from a student religious group, whether to adopt a period of "free time" for public high school students—that is, a time when students may use specified school facilities for activities of their own free choice.

If a public high school does adopt a policy allowing free time, student groups may engage in student-initiated religious activity in any area open to general student use during that time. However, the school must remain wholly uninvolved in that religious activity. To assure that the school's role is in fact limited to passive accommodation of religion, certain safeguards are necessary—

1. The space being used for any religious activity—that is, the cafeteria, school yard, and (in the school's discretion) vacant classrooms—must be available to all individual students and student groups for any lawful, non-disruptive purpose.<sup>31</sup>
2. The policy must eliminate any need for school authorities to grant or refuse permission for a religious activity in a particular place or at a particular time.
3. No teacher or other staff member may supervise, monitor, or participate in any religious activity, although school personnel may monitor the general vicinity against disorder.
4. Neither religious activities nor meetings of religious groups may be announced through any medium of communications controlled by the school.
5. Persons other than students may not be permitted to participate in a religious activity.

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<sup>31</sup> If a school allows classrooms to be used for free time activities, it may permissibly restrict access to those classrooms to groups of a specific size.

A school that crosses the line from the passive accommodation reflected in these guidelines to active assistance or approval breaches its constitutional duty.

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*Editor's Note:* Since the issuance of this Opinion, the Supreme Court vacated the Third Circuit's decision in *Bender*, on the ground that the appellant lacked standing to prosecute an appeal. *Bender v. Williamsport Area School Dist.*, 106 S.Ct. 1326 (1986). The Supreme Court's decision, accordingly, did not reach the merits.

## EDUCATION

GENERAL ASSEMBLY—SCHOOL BOARDS—RESIDENT DISTRICTS—  
ESTABLISHMENT OF DISTRICTS BY “LAW ENACTED BY  
GENERAL ASSEMBLY” IS CONSTITUTIONAL.

December 19, 1984

*The Honorable Mary Boergers*  
*Maryland House of Delegates*

You have requested our opinion on the constitutionality and legal sufficiency of MC 514A-85 (Montgomery County Board of Education—Residence Districts). When fully implemented, this proposed bill would require five of the seven elected members of the Montgomery County Board of Education to reside in districts established by the General Assembly. All seven elected members of the board would continue, however, to be elected by the voters of the entire county.

For the reasons given below, we have concluded that there is no constitutional or other legal objection to the proposed bill.

## I

During its last session, the General Assembly considered and passed House Bill 840 (Montgomery County Board of Education—Residence Districts), which would have established a district residence requirement for five members of the Montgomery County Board of Education.

In our subsequent review of House Bill 840, we advised that the bill was constitutionally defective because, under the bill, the districts were to have been established by a joint resolution of the General Assembly rather than by law. We explained that the establishment of such districts is an exercise of the lawmaking power and, under the Maryland Constitution, this power could only be exercised by the enactment of a statute that is subject to the veto of the Governor. Bill Review Letter (H.B. 840) from Stephen H. Sachs, Attorney General, to Harry Hughes, Governor (May 24, 1984), *published in* Laws of Maryland 1984 at 4047-48. Relying on this advice, the Governor vetoed the bill. Veto Message (H.B. 840) from Harry Hughes, Governor, to Benjamin L. Cardin, Speaker of the House of Delegates (May 29, 1984), *published in* Laws of Maryland 1984 at 4046.

Your current proposal, however, unlike House Bill 840, specifically provides for establishment of the resident districts "by a law enacted by the General Assembly". Consequently, MC 514A-85 avoids the constitutional problems raised by House Bill 840.

## II

You also have asked whether it is legally correct to refer in MC 514A-85 to the proposed establishment of school board resident districts by a "law enacted by the General Assembly" rather than, for example, a "public local law" or a "public general law". We think that it is both correct and, perhaps, even preferable to do so.

In your letter, you mention the case of *Steimel v. Board of Election Supervisors of Prince George's County*, 278 Md. 1 (1976). In *Steimel*, the Court of Appeals held that a law enacted by the General Assembly to regulate Sunday closings in Prince George's County was a public local law that, unlike a public general law, could be submitted by the General Assembly to a referendum of county voters. 278 Md. at 4-6. The Court also held that, even though Prince George's County was a charter county, the General Assembly had preempted the regulation of Sunday closings and could, therefore, enact a public local law on the matter for the county. 278 Md. at 8-11.

It is quite likely that, based on the decision and analysis in *Steimel*, a law establishing school board resident districts for Montgomery County would similarly be considered to be a "public local law". And, although Montgomery County is a charter county, there would be no question that the General Assembly could enact such a law for the County: education and elections, except for municipal elections, are subjects that have been preempted by the General Assembly. See *McCarthy v. Board of Education of Anne Arundel Co.*, 280 Md. 634, 651 (1977); *County Council v. Montgomery Association*, 274 Md. 52, 60, 62 (1975).

Nonetheless, there is no case directly on point and, therefore, we cannot predict with certainty how a court might characterize a school board resident district law. In any event, for purposes of Md. 514A-85, the more general reference to "a law enacted by the General Assembly" is neither inaccurate nor inadequate. We therefore recommend its use. Indeed, use of the simple term "public local law", without reference to the General Assembly, could well be misleading; this is so because, with reference to a charter county at

least, the unqualified term "public local law" might be read to refer to a county ordinance. See *Forest Heights v. Frank*, 291 Md. 331, 350 (1981).

### III

In summary, we conclude that there is no constitutional or other legal objection to your proposed bill, MC 514A-85, requiring five Montgomery County School Board members to reside in districts to be subsequently established "by a law enacted by the General Assembly".

STEPHEN H. SACHS, *Attorney General*

RICHARD E. ISRAEL,  
*Assistant Attorney General*

AVERY AISENSTARK  
*Chief Counsel,*  
*Opinions and Advice*

*Editor's Note:* The bill discussed in this Opinion was enacted as Chapter 660, Laws of Maryland 1985.

## ELECTIONS

PRESIDENTIAL CANDIDATES—POLITICAL PARTIES—NOMINATIONS—THE PRESIDENTIAL NOMINEE OF THE NATIONAL CONVENTION OF A NEW POLITICAL PARTY MAY APPEAR ON THE GENERAL ELECTION BALLOT WITHOUT HAVING FIRST FILED NOMINATING PETITIONS.

January 6, 1984

*Mr. Williard A. Morris, Administrator*  
*State Administrative Board of Election Laws*

You have requested our opinion as to the requirements that the presidential nominee of a new political party must meet to appear on the ballot in the general election. Specifically, you ask whether the nominee of the national convention of such a party is required, as a prerequisite to participation in the general election, to file nominating petitions under Article 33, §7-1 of the Maryland Code.

For the reasons stated below, we conclude that the presidential nominee of the national convention of any “political party”, within the meaning of Article 33, §1-1(a)(15), is entitled to appear on the general election ballot without having first filed nominating petitions pursuant to Article 33, §7-1. This conclusion accords with that reached in *57 Opinions of the Attorney General* 210 (1972).

## I

## Candidates of New Political Parties

Under Article 33, §4B-1, a political party is formed in the State by the filing of petitions bearing the signatures of at least 10,000 qualified voters and by meeting various procedural requirements. If 10% or more of the registered voters in the State become affiliated with the new political party, it must “nominate all its candidates for public office” in primary elections. Article 33, §5-1(a).<sup>1</sup> If less than 10% of the registered voters affiliate with the new party, it selects its nominees as follows:

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<sup>1</sup> To our knowledge, no political party formed under Article 33, §4B-1 has ever achieved this degree of voter affiliation.

"[T]he nominees for public office of the party shall be selected in the manner provided in the interim constitution and bylaws of the party, but no such nominee shall appear upon the ballot at any general election unless the nominee has complied with all the requirements of the provisions of the subtitle 'Nomination by Petition' of this article, including the filing of petitions . . . which shall bear in addition to the name of the nominee, the name of the party, signed by not less than three percent (3%) of the registered voters who are eligible to vote for the office for which election at the general election is sought." Article 33 §4B-1(h).

*See also* Article 33, §4-1(a).

Thus, in general, "the [newly formed] party's nominee may not appear upon the ballot in a general election unless the nominee complies with the [petition] provisions of Article 33, §7". 62 *Opinions of the Attorney General* 411, 413 (1977). *See also Mathers v. Morris*, 515 F. Supp. 931 (D.Md.), *aff'd*, 649 F.2d 280 (4th Cir. 1981).

## II

### Presidential Candidates

The issue that you pose is whether this ballot access requirement, which undoubtedly applies to all of the new party's candidates for statewide and local office, also applies to its candidates for President (and, of course, Vice President). Because the Election Code contains provisions that recognize the unique method by which presidential candidates are nominated, we believe that the general requirement for nomination by petition of candidates of newly formed parties does not apply in this instance.

In 57 *Opinions of the Attorney General* 210 (1972), this office addressed the question of whether the presidential nominee of the American Party of Maryland was entitled to have his name placed on the ballot, despite the fact that he had not submitted nominating petitions. The American Party was a "political party", within the meaning of Article 33, §1-1(a)(15), because its candidates had polled more than the requisite vote (then, 1%, now 3%) in the preceding general election. However, the American Party was not required to hold primary elections to nominate its candidates. Therefore, the issue was whether its presidential nominee was required to file nominating petitions.



The Opinion concluded that the name of the presidential candidate was entitled to a place on the general election ballot even though the nominating petition procedure had not been followed. The gist of the Opinion's reasoning is that the Election Code recognizes the unique procedures by which presidential candidates are nominated—that is, in *national* conventions. Maryland voters affiliated with the various parties are represented at these conventions, but—unlike all other offices—the voters do not directly select the nominees. Indeed, in the case of parties that hold presidential primaries, the Election Code specifically recognizes that these primaries, unlike all others, do not necessarily determine who will represent the parties on the general election ballot:

“No person who has been defeated for the nomination for any office in a primary election . . . shall have his name printed on the ballot at the succeeding general election as a candidate for any office. *Nothing in this subsection shall be interpreted as being applicable to candidates for nomination of their party for President of the United States who have been defeated in a Presidential preference primary election.*” Article 33, §8-2(a).

The Code contains the following provision regarding the national conventions of parties other than the Democratic and Republican parties:

“In the case of a political party which is not entitled to nominate candidates for public office by means of primary elections, this subtitle shall not apply and in lieu thereof delegates and alternate delegates to represent the political party at its national convention shall be elected at a party convention in accordance with the lawful rules and practices of the party.” Article 33, §12-5.<sup>2</sup>

In addition, under Article 33, §12-7(a), “the state convention of *any party* shall nominate or provide for the nomination of candidates for presidential electors of the party in such manner as the convention

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<sup>2</sup> At the time of the 1972 Opinion, this provision was Article 33, §12-1(c). The substance, however, was essentially the same.

determines". Moreover, "*any party* may elect and hold a party meeting or convention", one purpose of which is the selection of presidential electors. Article 33, §10-1.

The 1972 Opinion summarized the import of these provisions as follows:

"Since Subtitle 12 of Article 33 regulates presidential primaries and conventions, i.e., the state's participation in the nominating procedures for President and Vice President, and since the purpose of national party conventions is to nominate party candidates for President and Vice President, it is our opinion that all political parties recognized as such under Article 33 have an equal right to have their nominees for President and Vice President on the Maryland ballot by complying with the relevant provisions of Article 33 of the Annotated Code of Maryland." 57 *Opinions of the Attorney General* at 214.

In our view, subsequent changes in the Election Code do not reflect an intention by the General Assembly to change this result.

Moreover, this conclusion is as applicable to a newly created political party as to one that has maintained its party status from one election to the next—i.e., the party involved in the 1972 Opinion. The Election Code's definition of "political party", §1-1(a)(15), includes both, and the provisions that describe the presidential nominating procedures of such parties do not differentiate between the two defined criteria of "political party" status.

### III

#### Conclusion

In summary, the unique status of presidential nominating procedures is recognized in the Election Code and must be given effect, notwithstanding that all other candidates for office of newly formed political parties may attain ballot status only by filing nominating petitions. Thus, it is our opinion that if a party (i) fully complies with the requirements for new party formation in §4B-1 of the Code and (ii) thereafter selects its presidential and vice presidential nominees

at a national convention, those properly certified nominees should be placed on the general election ballot in Maryland.

STEPHEN H. SACHS, *Attorney General*

JACK SCHWARTZ  
*Assistant Attorney General*

AVERY AISENSTARK  
*Chief Counsel,  
Opinions and Advice*

*Editor's Note:* The preceding Opinion was originally written as a letter of advice. Because the issue it discusses is a recurring one, it is published here in a slightly revised format.

ELECTIONS—REGISTRATION REQUIREMENT—A HOMELESS PERSON  
MAY REGISTER TO VOTE IF THE PERSON MAINTAINS A FIXED  
DOMICILE AND SPECIFIES A MAILING ADDRESS.

September 4, 1984

*Mr. Willard A. Morris, Administrator*  
*State Administrative Board of Election Laws*

You have requested our opinion regarding "voter registration by the homeless". Specifically, you ask about the circumstances, if any, under which a person who does not reside in any dwelling may register to vote.

For the reasons stated below, we conclude that a homeless person may register to vote if (i) the person presents satisfactory evidence that he or she presently maintains a fixed domicile, albeit not necessarily in a house or other dwelling; and (ii) the person specifies his or her regular mailing address.

I

Background

An unknown number of Maryland citizens do not live in houses, apartments, or other conventional dwelling places. Of these, some occupy shelters provided by religious and other charitable groups.<sup>1</sup> Others, though, live in some fashion "on the street".

In Washington, D.C., advocates on behalf of the "street people" there successfully pressed the D.C. Board of Elections and Ethics to allow the registration of certain of the homeless.<sup>2</sup> You anticipate that a similar effort may be made on behalf of Maryland's homeless.

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<sup>1</sup> There is no question that a person who in fact resides in a shelter may cite that shelter as his or her residence and mailing address for voter registration purposes. As we understand it, local boards have long permitted such registration.

<sup>2</sup> The D.C. Board's decision is substantially similar to our conclusion about Maryland law.

## II

## Residency Requirement

Article 7 of the Maryland Declaration of Rights provides that "every citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage". The "qualifications prescribed by the Constitution" are contained in Article I, §1 as follows:

"Every citizen of the United States, of the age of 18 years or upwards, who is a resident of the State as of the time for the closing of registration next preceding the election, shall be entitled to vote in the ward or election district in which he resides at all elections to be held in this State. A person once entitled to vote in any election district, shall be entitled to vote there until he shall have acquired a residence in another election district or ward in this State."

See also Article 33, §3-4(b)(3) and (4) of the Maryland Code.

Although the meaning of "resident" and "residence", for purposes of this provision and of analogous residency requirements, has been the subject of much litigation and several Opinions of the Attorney General, the essence is clear: residence means "a place of fixed, present domicile". *Gallagher v. Board of Supervisors of Elections*, 219 Md. 192, 207 (1959). "One's domicile, generally, is that place where he intends it to be." *Bainum v. Kalen*, 272 Md. 490, 497 (1974). See generally 69 *Opinions of the Attorney General* 238 (1984); 56 *Opinions of the Attorney General* 189 (1971).

The constitutional residency requirement serves two purposes: to "identify] the voter . . . as a protection against fraud"; and to assure that the voter "should become in fact a member of the community, and as such have a common interest in all matters pertaining to its government". *Shaeffer v. Gilbert*, 73 Md. 66, 70-71 (1890).

## III

## "Homeless" Domicile

Questions of residency usually involve a controversy over which of two conventional places of abode was really a person's true, legal residence. See, e.g., *Bainum v. Kalen* (whether a candidate had

abandoned his Maryland residence for residence in Michigan during a particular time period); *Gallagher v. Board of Supervisors of Elections* (whether a candidate for mayor had abandoned his Baltimore City residence for residence in Anne Arundel County during the period of his governorship); *Shaeffer v. Gilbert* (whether a student from Harford County had acquired a domicile in Baltimore City while attending college there); 69 *Opinions of the Attorney General* 238 (whether the Mayor of Berlin, Worcester County, was a resident of that town or of Salisbury, where his wife resided). Cf. *Howard v. Skinner*, 87 Md. 556 (1898) (whether a seaman from St. Mary's County acquired a domicile in Baltimore City as a consequence of his sleeping on board a ship that docked frequently in the City). Not surprisingly, then, many of the factors bearing on domicile are couched in terms of property ownership and other financial aspects of residency in a dwelling. See generally 69 *Opinions of the Attorney General* 238.

But there is no intrinsic reason why a person may not maintain a "fixed, present domicile" in a place without a conventional dwelling. To take but one example: if a man actually lived in the shell of an abandoned car on a vacant lot, kept his personal belongings there, and regularly returned there at night, that car is his residence.

Indeed, such a residence, however unconventional it may be, satisfies the purposes of the constitutional residency requirement, as explained by the Court of Appeals. It deters fraud by linking the person to a particular locale, and a person who really does maintain a fixed domicile in an out-of-doors location is as much "a member of the community" as the citizens of the community who are fortunate enough to have housing.<sup>3</sup>

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<sup>3</sup> We do not address the situation in which a person claims residence in a place where continued occupancy is a criminal offense. See, e.g., Article 27 §577A(1) (refusing to leave public buildings or grounds after closing). At a minimum, purported occupancy of a place in violation of State law or a local ordinance raises the issue of whether a true domicile exists. Moreover, there is some question whether an *illegal* residence can ever give rise to a *legal* right like voting. Cf. *Plyler v. Doe*, 457 U.S. 202 (1982) (distinguishing between "those whose very presence within the United States is the product of their own illegal conduct" and the children of illegal aliens, for purposes of access to public education). This problem is best considered only if and when a specific registration application raises it.

Nearly 90 years ago, the Court of Appeals ascribed to the drafters of Article I, §1 the knowledge "that number of citizens, through misfortune or otherwise, were without dwelling places, but there is no evidence to be found in any part of the Constitution that these were to be denied the privilege of the elective franchise". *Langhammer v. Munter*, 80 Md. 518, 526 (1895). So it is today.<sup>4</sup>

#### IV

#### Registration Requirements

The constitutional qualifications for voting discussed above "can neither be enlarged nor curtailed by the General Assembly". *Southerland v. Norris*, 74 Md. 326, 328 (1891). However:

"[T]here is no provision of the Constitution, as there is no principle of constitutional law, that denies to the Legislature the power to enact rules of evidence by which the facts establishing the right to vote may be proved. The Constitution itself merely designates the qualifications, and then leaves the Legislature free to declare by what evidence those qualifications must be shown to exist."

*Id.*

Indeed, the General Assembly is instructed by the Constitution to "provide by law for a uniform Registration of the names of all the voters in this State, which . . . shall be conclusive evidence . . . of the right of every person, thus registered, to vote at any election". Article I, §2. Thus, even an otherwise qualified voter who fails to follow the registration procedures set out in the Election Code is not entitled to vote.

Under the Code, officers of registration are entitled to pose to a voter appropriate questions about his or her qualifications, including residence. Article 33, §§3-6 and 3-13(b). So, if a person claims residence in some location without a dwelling, the registrars would

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<sup>4</sup> *Langhammer* held that even a person who wandered from place to place within a particular election district, "declin[ing] to fix himself upon some particular spot", was properly registrable as a resident of that district. We read later cases, however, as requiring that a residence be "fixed". See, e.g., *Gallagher v. Board of Supervisors of Elections*, 219 Md. 192 (1959); *Howard v. Skinner*, 87 Md. 556 (1898).

have the authority to obtain from that person concrete evidence of such residence. For example, the homeless who were accepted for registration in the District of Columbia submitted not only their own affidavits but also that of a regular visitor to their unconventional domiciles. Evidence of this kind is an important safeguard against potential fraud.

In addition, the Election Code requires that a voter supply a mailing address. Article 33, §§3-8(a)(3), 3-9, 3-12(a), and 3-16(c). Several other provisions reflect the assumption that the mailing address and the place of residence are identical—as, indeed, they are for the vast majority of voters. *See* Article 33, §§3-24(a) and (b) (“change of residence cards”), 11-1(d) (“addressed to the residence”), and 15-5 (“number of his residence”).<sup>5</sup>

But we find no *requirement* in the Code that they be identical. Voters must provide mailing addresses so that the local board can use the mails to communicate and to verify continued residence. *See* COMAR 14.02.02.06. These purposes are substantially served by a nonresidential address as well.<sup>6</sup> Indeed, even currently registered voters who maintain perfectly conventional domiciles might not enjoy residential mail delivery; it is inconceivable that, because a town’s qualified voters are obliged to pick up their mail at the post office, they could be denied the right to vote. The Code requirement that a mailing address be provided cannot reasonably be applied in so draconian a fashion, whether to voters in this example, to the homeless, or to anyone else.

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<sup>5</sup> The Code also reflects the common experience that most people maintain their residences in buildings. *See* Article 33, §3-18(a)(5).

<sup>6</sup> We recognize that the separation of mailing address from residence reduces the value of a mailing as a verification tool. That is, if a local board sends nonforwardable mail to a residential address and the mail is returned by the post office as undeliverable, the board learns that the voter has changed residences. But a voter who has a nonresidential mailing address can change residence and yet still pick up mail at the same location.

However, given other verification methods (*e.g.*, Article 33, §3-24(b)) and given the severe penalty for false registration (Article 33, §24-1(c), (d), and (e)), we do not believe that the General Assembly intended to disenfranchise all voters whose mailing address is at a place other than their residences.



Moreover, one must construe the Code whenever possible to avoid constitutional problems. If the Code *required* a residential address, it would effectively be imposing an additional qualification for voting: occupancy of a dwelling with mail service. But, as explained in Part III above, the Constitution does *not* require that particular form of residence; and the General Assembly may not “enlarg[e]” upon constitutional qualifications. *Southerland v. Norris*, 74 Md. at 328. Rather:

“[I]t [is] for the Legislature to devise and enact . . . provisions to accomplish the most desirable object of securing absolutely pure elections. But whatever may be done, no restrictions can be imposed that will require other or different qualifications for voting, than those prescribed by the first Article of the Constitution of the State.” *Langhammer v. Munter*, 80 Md. at 527.

We conclude that a homeless citizen must provide a mailing address as a prerequisite to registration. However, the address of an institution at which the voter regularly picks up mail would suffice.<sup>7</sup>

## V

### Conclusion

For the reasons stated above, it is our opinion that a person who is otherwise qualified to vote is entitled to register, notwithstanding

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<sup>7</sup> A mailing address outside the ward or election district of the purported residence would be a factor warranting special inquiry into the *bona fides* of the residence.

the fact that the person is homeless, if (i) the person presents satisfactory evidence that he or she presently maintains a fixed domicile, and (ii) the person specifies his or her mailing address.<sup>8</sup>

STEPHEN H. SACHS, *Attorney General*

JACK SCHWARTZ  
*Assistant Attorney General*

AVERY AISENSTARK  
*Chief Counsel,  
Opinions and Advice*

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

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<sup>8</sup> Given this result, we need not consider whether a contrary construction of the Maryland Constitution or Election Code would violate the U.S. Constitution. See generally *Harper v. Virginia Board of Elections*, 383 U.S. 663, 666 (1966) ("mak[ing] the affluence of the voter . . . an electoral standard" is unconstitutional).

ELECTIONS—FAIR ELECTION PRACTICES ACT—CONSTITUTIONAL  
LAW—FIRST AMENDMENT—“AUTHORITY LINE” REQUIRE-  
MENT INAPPLICABLE TO INDEPENDENT ADVERTISEMENT CON-  
TAINING NO EXPRESS ADVOCACY ABOUT ELECTION.

October 15, 1984

*John L. Dunnigan, Esq.*

*Assistant State's Attorney for Harford County*

You have requested our opinion on the applicability of Article 33, §26-16(a)(7) of the Maryland Code to a particular newspaper advertisement.

For the reasons stated below, we conclude that Article 33, §26-16(a)(7) must be construed as inapplicable to this advertisement. Were the statute construed otherwise, it would be unconstitutional.

I

The “Authority Line” Requirement

Article 33, §26-16(a)(7), a criminal statute, requires an “authority line” on all “campaign literature”:

“Every person who publishes or . . . causes to be published . . . any . . . advertisement . . . relating to or concerning any candidate . . . for public or party office [is guilty of a criminal offense] unless such . . . advertisement . . . indicates the name of the candidate or committee responsible for the literature and contains, but set apart therefrom, an authority line which shall include the name and address of the person, treasurer, or campaign manager responsible for the publication or distribution of the same”.

*See also* Article 33, §26-17(a).

We have previously described the purpose and effect of Article 33, §26-16(a)(7) as follows:

“Obviously, the reason for the requirement in §26-16(a)(7) that ‘campaign literature’ contain an authority line is to make each person accountable for the ‘written matter’ that

the person publishes or distributes. Thus, everyone—including voters and opposing candidates—is aware of the author of the written matter. Specifically, if the literature is thought to be untrue or biased, its author is identified and may be challenged.” Opinion No. 79-067 at 10 (November 30, 1979) (unpublished).

In other words, though the State is unable to police the content of campaign-related materials, it tries to promote fair elections by at least holding to potential public account those who issue such materials.

## II

### The Advertisement in Question

The advertisement about which you inquire appeared on a full page of *The Aegis* newspaper on September 20, 1984. The headline on the advertisement was: “Congressman Long Why Won’t You Stand Up and Defend America?”. The ad then discussed “four critical national defense issues” soon to be voted on by the Congress and criticized Congressman Long for his supposed positions on these issues. The ad urged citizens to write to the Congressman regarding these issues and to contribute to the ad’s sponsor, identified as the United States Defense Committee, located in Fairfax, Virginia. However, the ad did not contain an “authority line” of the kind specified in Article 33, §26-16(a)(7).

Despite its critical content, the advertisement did not expressly urge a vote against Congressman Long in the forthcoming election. Indeed, it made no mention of the election, Congressman Long’s party affiliation, or Congressman Long’s opponent in the election. There is no indication from the ad itself that it was prepared in coordination with any candidate.

## III

### Constitutional Principles

The right of individuals or groups to publicly advocate their views about political issues and events is at the very core of First Amendment protection. Indeed, they have a right not only to speak out on these matters but to do so anonymously, if they wish. *Talley v. California*, 362 U.S. 60 (1960). Thus, the State may not constitu-

tionally require anyone who publishes praise or criticism of an elected official to publish with it an identifying "authority line".

Yet the State also has a substantial interest in preserving the integrity of the electoral process. And, the Supreme Court has observed, "disclosure requirements, as a general matter, directly serve [this] substantial governmental interes[t]". *Buckley v. Valeo*, 424 U.S. 1, 68 (1976). The Supreme Court found no constitutional defect in provisions of the Federal Election Campaign Act that impose extensive disclosure requirements on candidates and political parties with respect to their own electoral activities. *Buckley*, 424 U.S. at 60-61 and 64-74.

However, a more serious constitutional issue arises when disclosure requirements are imposed on persons who express political views independently of any candidate. If a disclosure provision like Article 33, §26-16(a)(7) is to survive First Amendment scrutiny, it must be "narrowly limited to those situations where the information sought has a substantial connection with the governmental interests sought to be advanced". *Buckley*, 412 U.S. at 81. That is, it can only be applied to materials that are "unambiguously campaign related". *Id.*

In distinguishing independent communications that may constitutionally be subject to disclosure requirements from those that may not, the courts have drawn a bright line: Disclosures may constitutionally be required of persons acting independently of the candidates themselves only as to "communications that expressly advocate the election or defeat of a clearly identified candidate". *Buckley v. Valeo*, 424 U.S. at 80. Thus, in *Buckley*, the Supreme Court held that a provision requiring certain disclosures if money were used "for the purpose of . . . influencing" the nomination or election of candidates for federal office applied *only* to express advocacy. This limiting construction was necessary "to insure that the reach of [the section] is not impermissibly broad". 424 U.S. at 80. *See also Buckley v. Valeo*, 519 F.2d 821, 869-78 (D.C.Cir. 1975) (holding unconstitutional another provision of the Federal Election Act that required disclosure as to "completely non-partisan public discussion of issues of public importance" and that could not be given a narrower construction).<sup>1</sup>

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<sup>1</sup> This aspect of the circuit court's decision was not appealed to the Supreme Court. 424 U.S. at 10 n. 7.

The constitutional necessity for a narrow construction of disclosure statutes, as applied to independent political speech, is well-illustrated by a case involving a publication very similar to that in questions here. In *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2d Cir. 1980), the FEC sought to compel certain disclosures in a pamphlet published by a citizens' group. The pamphlet, distributed in the fall of an election year, set forth the organization's views on economic and social issues and presented, in a critical way, the voting record of the local incumbent Congressman. However, the leaflet did not refer to the upcoming election, to the Congressman's candidacy, or to the Congressman's electoral opponent. The FEC took the position that, in the context of the election campaign, this pamphlet amounted to a communication "expressly advocating the . . . defeat of a clearly identified candidate" and therefore required a disclosure to be made in the body of the publication akin to that required by Article 33, §26-16(a)(7). See 2 U.S.C. §441d (person expending money for such a communication must disclose his or her identity if the communication is not authorized by a candidate).<sup>2</sup>

The circuit court rejected the FEC's position as "totally meritless". The court held that the statutory language as to express advocacy meant just that—and could, constitutionally, not be given any broader meaning: "This [narrow construction] is consistent with the firmly established principle that the right to speak out at election time is one of the most zealously protected under the Constitution." 616 F.2d at 53. See also *ACLU of New Jersey v. New Jersey Election Law Enforcement Commission*, 509 F.Supp. 1123, 1133 (D.N.J. 1981).

#### IV

#### Application to Article 33, §26-16(a)(7)

In our view, a court construing Article 33, §26-16(a)(7) would likewise hold that a limiting construction is constitutionally required. For the reasons stated above, the statute would be unconstitutional if it were read as requiring anyone who published praise or criticism of an elected official during a campaign to also

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<sup>2</sup> The statutory language at issue in *Central Long Island Tax Reform* reflects amendments to the Federal Election Act after *Buckley v. Valeo*. That is, the Act was amended to embody the limiting construction placed on the original language of the Act by the Supreme Court.

publish an identifying authority line. Rather, the State may compel that disclosure only when a publication that is made independently of any candidate expressly advocates someone's election or defeat. We believe that the statutory language "relating to or concerning any candidate" would be so construed, under the familiar rule that a statute must if possible be construed to avoid constitutional infirmity. See, e.g., *Moberly v. Herboldsheimer*, 276 Md. 211, 217 (1975).<sup>3</sup>

## V

### Conclusion

The advertisement concerning Congressman Long contained no express advocacy of the election or defeat of any candidate. Therefore, assuming that the ad was prepared and published independently of any candidate, we conclude that Article 33, §26-16(a)(7) does not apply to it.

STEPHEN H. SACHS, *Attorney General*

JACK SCHWARTZ  
*Assistant Attorney General*

AVERY AISENSTARK  
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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 discussed, it is published here in a slightly revised format.

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<sup>3</sup> The pertinent language of Article 33, §26-16(a)(7), "relating to or concerning any candidate", is sufficiently flexible to permit this narrowing construction.

## EMPLOYMENT

AGE DISCRIMINATION—MANDATORY RETIREMENT—FEDERAL AGE DISCRIMINATION IN EMPLOYMENT ACT—STATE POLICE—CORRECTIONAL OFFICERS—STATE LAW MANDATING RETIREMENT AT AGES 60 AND 62 FOR STATE POLICE AND CORRECTIONAL OFFICERS MAY NOT BE ENFORCED.

February 15, 1984

*Mr. Lawrence J. Bach, Acting Secretary  
Board of Trustees for Maryland State Retirement  
and Pension Systems*

On behalf of the Board of Trustees for Maryland State Retirement and Pension Systems (the "Board"), you have asked whether certain mandatory retirement provisions of State law are legal and enforceable. The particular statutes in issue are: (1) Article 73B, §156(a)(2), applicable to certain maximum security attendants at Clifton T. Perkins Hospital Center and certain State correctional officers; and (2) Article 88B, §53(a)(3), applicable to Maryland State Police employees. Specifically, you ask whether these mandatory retirement provisions conflict with the federal Age Discrimination in Employment Act.

For the reasons given below, it is our opinion that Article 73B, §156(a)(2) and Article 88B, §53(a)(3) do conflict with the Age Discrimination in Employment Act and, therefore, should not be enforced.

## I

## Background

The Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§621 through 634, is designed both to promote the employment of older persons, based on ability rather than age, and to prohibit arbitrary age discrimination in employment. 29 U.S.C. §621(b). The ADEA provides, in relevant part:

"It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with



respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; [or]

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age[.]” 29 U.S.C. §623(a).

“Employer” is defined to include a state or local government, as well as any agency or instrumentality of that government. 29 U.S.C. §630(b). The scope of the ADEA is limited to individuals who are at least 40 years old but less than 70. 29 U.S.C. §631(a).

In general, Maryland law also prohibits employment discrimination on the basis of age.<sup>1</sup> And most State employees are free to work until at least the age of 70.<sup>2</sup>

However, two groups of State employees remain subject to mandatory retirement even before the reach age 70: Article 88B, §53(a)(3) requires members of the State Police who attain the age of 60 to retire “on the first day of the next calendar month after attaining that age”.<sup>3</sup> Article 73B, §156(a)(2) requires mandatory retirement of certain correctional officers and maximum security attendants at the age of 62, subject to year-to-year extensions with the approval of the Commissioner of Corrections, the Director of the Patuxent Institute, or the Secretary of Health and Mental Hygiene, depending on the institution involved.

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<sup>1</sup> According to Article 49B, §16(a)(1), it is “an unlawful employment practice” for an employer to “fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's 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”.

<sup>2</sup> See Article 73B, §11(1)(b), providing a procedure by which State employees otherwise subject to mandatory retirement at 70 may seek continued employment beyond that age.

<sup>3</sup> In addition, Article 88B, §53(a)(2) authorizes the State Police Superintendent, subject to Board approval, to order a member of the State Police “who has attained the age of 50 to retire on the first day of the next calendar month after which the member is notified of the Superintendent's order”.

The issue thus is whether the State may legally enforce these mandatory retirement provisions in light of the Age Discrimination in Employment Act.

## II

### The Federal Age Discrimination in Employment Act

#### A. Application to States

Although enacted in 1967, the ADEA did not apply to state and local governments until 1974, when Congress amended the law to include these entities within the definition of "employer". See Pub. L. 93-259, [1974] U.S. Code Cong. and Adm. News 2811. Two years later, however, in 1976, the constitutional validity of the ADEA's application to state and local governments was cast into doubt.

In *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Supreme Court struck down, on Tenth Amendment grounds, Congress's attempt to extend the wage and hour provisions of the Fair Labor Standards Act to state and local governments. The decision was based on a concern that imposition of certain federal regulations on state governments might allow the federal government to " 'devour the essentials of state sovereignty' "—i.e., the state's freedom to structure employer/employee relations in areas of traditional state governmental activity, such as police protection, public health, and wage and hour concerns. *National League of Cities*, 426 U.S. at 855 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 205 (1968) (Douglas, J., dissenting)).

Following this decision, several state and local governments made similar attacks on those provisions of the ADEA that extended coverage to their operations. In some instances, these attacks were successful. See, e.g., *Campbell v. Connelie*, 542 F.Supp. 275 (N.D. N.Y. 1982); *Taylor v. Montana Department of Fish and Game*, 523 F.Supp. 514 (D.Mont. 1981); *EEOC v. Wyoming*, 514 F.Supp. 595 (D.Wyo. 1981). In those cases, the courts held that the application of the ADEA to state and local workers was unconstitutional. Other courts, however, reached the opposite conclusion. See, e.g., *EEOC v. County of Calumet*, 686 F.2d 1249 (7th Cir. 1982); *EEOC v. County of Los Angeles*, 531 F.Supp. 122 (C.D. Cal. 1982); *Johnson v. Mayor and City Council of Baltimore*, 515 F.Supp. 1287 (D.Md. 1981).

On March 2, 1983, the Supreme Court's decision in *EEOC v. Wyoming*, 460 U.S. 226 (1983), ended the dispute. The *Wyoming* case involved a state statute that conditioned the continued employment of Fish and Game Wardens over 55 years old on the year-to-year approval of their employer. The Court held that the extension of the ADEA to state and local governments was a valid exercise of congressional authority under the Commerce Clause and did not violate the Tenth Amendment.

In so doing, the Court painstakingly distinguished its holding in *National League of Cities*.<sup>4</sup> It found the degree of federal intrusion under the ADEA into state retirement policies, as well as the ADEA's impact on state finances, to be minimal. *EEOC v. Wyoming*, 460 U.S. at 240-42. According to the Court, Wyoming's involuntary retirement statute did not clearly involve the state's ability to use employment relations as "a tool for pursuing social and economic policies beyond their immediate managerial goals". 460 U.S. at 242.

As a result of this decision, upholding the applicability of the ADEA to the states, it is clear that Maryland's mandatory retirement provisions must be tested against the standards set out in the ADEA. And, if Maryland's statutes conflict with the federal law, the State statutes will be unenforceable. See *Home Utilities Company, Inc. v. Revere Copper and Brass, Inc.*, 209 Md. 610, 619 (1956).

#### B. The ADEA Standards

An individual facing mandatory retirement establishes a prima facie case of age discrimination under the ADEA by proving that he or she (i) is a member of the protected age group, (ii) has been terminated, (iii) has been replaced by a person outside the protected group, and (iv) was qualified to do the job. *Johnson v. Mayor and City Council of Baltimore*, 515 F.Supp. 1287, 1294 (D. Md. 1981).

Once the individual establishes a prima facie case, the burden shifts to the employer to establish a "bona fide occupational qualification" defense. *Johnson*, 515 F.Supp. at 1295. See *Arritt v.*

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<sup>4</sup> Indeed, one of the concurring justices recommended that the *National League of Cities* decision be rejected in its entirety. *EEOC v. Wyoming*, 460 U.S. at 250 (Stevens, J., concurring).

*Grisell*, 567 F.2d 1267, 1271 (4th Cir. 1977). The "bona fide occupational qualification" defense ("BFOQ" defense) is set out at 29 U.S.C. §623(f)(1):

"It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age[.]"

If the employer can demonstrate that age is a "bona fide occupational qualification" for a specific job, then the employer can continue a policy of mandatory retirement based solely on age factors. See *EEOC v. Wyoming*, 460 U.S. at 240. Similarly, if the employer can demonstrate that the age differentiation reflects other factors—such as the result of cardiac stress testing, annual performance evaluations or physical examinations, stringent physical standards, and so on—a policy of mandatory retirement may be appropriate. See *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974).

In essence, a BFOQ defense requires a two-fold showing. The employer must first prove that the particular qualification invoked is "reasonably necessary to the essence of [the] business", and, second, that "the employer has reasonable cause, i.e., a factual basis for believing that all or substantially all persons within the class . . . would be unable to perform safely and efficiently the duties of the job involved, or that it is impossible or impractical to deal with persons over the age limit on an individualized basis". *Arritt*, 567 F.2d at 1271.

This evidentiary burden is a substantial one, as the BFOQ defense is generally said to be an "extremely narrow" exception to ADEA enforcement. See *Johnson*, 515 F.Supp. at 1295; *EEOC v. City of St. Paul*, 500 F.Supp. 1135, 1146 (D.Minn. 1980). See also *Dothard v. Rawlinson*, 433 U.S. 321, 333-34 (1977); *Orzel v. City of Wauwatosa Fire Dep't*, 697 F.2d 743, 748 (7th Cir. 1983).

A generalized concern for the public safety, based on a subjective belief that the aging process takes its toll particularly quickly on the

physical or mental skills of public safety employees, without supporting medical evidence, is not sufficient to establish the BFOQ defense. *Orzel*, 697 F.2d at 755. Even specific medical evidence demonstrating the debilitating effects of age on the general population is not sufficient to establish this defense. See *EEOC v. City of Minneapolis*, 537 F.Supp. 750, 757-58 (D. Minn. 1982). Rather, medical evidence must establish either that the class as a whole is unable to perform the particular public safety duties or that it is impossible or impractical to determine, on an individualized basis, whether persons over the age limit can properly perform their public safety functions. See *Hodgson v. Greyhound Lines, Inc.* 449 F.2d at 862-64.

### III

#### The Maryland Statutes

The class established by Article 88B, §53(a)(3) for mandatory retirement consists of Maryland State Police employees who are 60 years old or older. For the State Police age maximum to be valid as a BFOQ, it is necessary to show either:

(1) that retirement at age 60 is essential to maintaining an effective police force; or

(2) that there is a factual basis for believing that all, or substantially all, police employees of the Maryland State Police at age 60 are unable to perform their duties safely and efficiently, or that such employees cannot practically be evaluated on an individualized basis.

For Article 73B, §156(a)(2) to be valid, a similar showing must be made with respect to correctional officers and maximum security attendants who reach the age of 62.

Police agencies in general have found mandatory retirement based on age difficult to justify as a bona fide occupational qualification. For example, in *Campbell v. Connelie*, 542 F.Supp. 275 (N.D. N.Y. 1982), a federal district court stated that the forced retirement of New York State Troopers at age 55 was not justified as a BFOQ, absent evidence to show:

(i) that younger Troopers are “reasonably necessary to the functioning of a proficient state police force”, or

(ii) that "substantially all persons over the age of 55 are unable to perform safely and efficiently the duties of the job or that it is impractical or impossible to deal with the physical and mental qualifications of persons over the age of 55 on an individualized basis". *Campbell*, 542 F.Supp. at 279.<sup>5</sup>

In *EEOC v. City of Minneapolis*, 537 F.Supp. 750 (D.Minn. 1982), the court held that forced retirement at age 65 for a police captain was not justified by the BFOQ exception. And, in *EEOC v. City of Ecorse*, 29 F.E.P Cases 369 (E.D. Mich. 1981), the court granted a preliminary injunction to enjoin the city from retiring a deputy police chief pursuant to a city charter requirement that officers retire at age 60. Finally, in a case involving the Missouri Highway Patrol, *EEOC v. Missouri State Highway Patrol*, 555 F.Supp. 97 (W.D. Mo. 1982), the Missouri District Court held that an age ceiling of 60 for patrol officers was not a bona fide occupational qualification., *But see Beck v. Borough of Manheim*, 505 F.Supp. 923 (E.D. Pa. 1981).

In sum, the case law indicates that, under the ADEA, mandatory retirement is not illegal *per se*. However, if an employee successfully demonstrates that he or she was terminated solely because of age, the employer then must sustain the burden of establishing that "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business", 29 U.S.C. §623(f)(1)—an extremely narrow exception. No presumption of validity is accorded mandatory retirement statutes. *See EEOC v. City of Minneapolis*, 537 F.Supp. at 758. And, if challenged, the state has the burden of proof of establishing the BFOQ defense.

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<sup>5</sup> The court in *Campbell* nevertheless upheld the mandatory age retirement on the basis that the 1974 ADEA amendment, extending coverage to state and local governments, was unconstitutional. As discussed in Part II A above, however, that holding has since been superseded by the Supreme Court's subsequent decision in *EEOC v. Wyoming*.

## IV

## Conclusion

Based on the information now available to us, we question whether a “bona fide occupational qualification” defense could be established for the age maximums applicable to Maryland State Police, correctional officers, and maximum security attendants.

In our opinion, then, absent clear evidence supporting such a defense, Maryland’s mandatory retirement laws—Article 73B, §156(a)(2) and Article 88B, §53(a)(3)—are in direct conflict with the federal Age Discrimination in Employment Act and, consequently, may not be enforced.

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*Editor’s Note: National League of Cities v. Usery, discussed in Part II of the Opinion, has been overruled. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).*

## INSURANCE

## CONSTITUTIONAL LAW—CONTRACT CLAUSE—LEGISLATION PROHIBITING SEX-BASED DISCRIMINATION IN INSURANCE WOULD BE CONSTITUTIONALLY DEFENSIBLE.

October 15, 1984

*James O'C. Gentry, Esq.**Monumental Life Insurance Company*

You have requested our review of earlier advice from this office on the constitutionality of legislation such as House Bill 1155 (Insurance-Discrimination), introduced in the 1984 session of the General Assembly. That bill, if enacted, would have prohibited insurers from differentiating in premium rates or benefit payments on the basis of their insureds' sex. Specifically, you have asked us to reconsider the issue of whether such legislation would impair contract rights in violation of the Contract Clause of Article I, §10 of the United States Constitution.

In a letter of advice to Delegate Maurer, Assistant Attorney General Robert A. Zarnoch addressed this issue and concluded that the State could constitutionally enact House Bill 1155. Letter of Advice from Robert A. Zarnoch, Assistant Attorney General, to Lucille Maurer, State Delegate (February 21, 1984). We have carefully reviewed Mr. Zarnoch's analysis and the relevant authorities governing the issue, as well as Dean Erwin N. Griswold's analysis of a similar bill pending in Congress. Letter from Erwin N. Griswold, Esquire, to Jack H. Blaine, Chief Counsel to the American Council of Life Insurers (May 16, 1983).

Although we recognize that the matter is not entirely free from doubt, in the final analysis we concur with Mr. Zarnoch's conclusion that legislation prohibiting sex-based discrimination in insurance would be constitutionally defensible. The purpose of this Opinion is to summarize our reasons for that conclusion.

## I

## House Bill 1155

Currently, the Maryland Insurance Code permits an insurer (i) to issue life insurance on different terms for men and women, based on the two groups' different life expectancies, and (ii) to discriminate



between the sexes in other forms of insurance, if "there is actuarial justification for the differential". See Article 48A, §§223(a)(1), 223(b)(2), and 226(c)(2). House Bill 1155, as drafted, would have prohibited such sex-based distinctions after July 1, 1985.<sup>1</sup>

Far from recognizing any "actuarial justification" for sex-based discrimination, the bill would have expressly proscribed the use of "any statistical table, whether of mortality, life expectancy, morbidity, disability, disability termination, losses, or any other subject, or any other statistical compilation as a basis for" such discrimination. Proposed §223(d)(4) of Article 48A.

The bill would have permitted insurers to continue calculating and paying benefits according to sex-based differentials to the extent that the benefits were derived from premiums paid before July 1, 1985. However, the bill would have required that all premiums due after that date, and the benefits derived from those premiums, be calculated in the same way for both sexes—even under insurance policies executed before the bill's enactment.

## II

### The Contract Clause

The first question in analyzing the constitutionality of a statute under the Contract Clause is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship". *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978). "The severity of the impairment measures the height of the hurdle the state legislation must clear". 438 U.S. at 245. *Accord United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 n. 17 (1977).

However, as the Supreme Court has recently noted, "[i]n determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated

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<sup>1</sup> The bill also would have expressly prohibited discrimination based on an insured's race, color, religion, or national origin. However, as you have pointed out, the Insurance Code already in effect prohibits discrimination on those bases; thus, your only concern is with the proposed prohibition on sex-based discrimination.

in the past". *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 411 (1983). The Court found that changes in state law are not easily held to constitute *substantial* impairment when "the parties are operating in a heavily regulated industry". 459 U.S. at 413.<sup>2</sup> On that basis alone, it is at least arguable that Maryland's extensive regulation of insurance practices sufficiently mitigates the severity of the impairment that would be caused by legislation such as House Bill 1155.

Assuming, however, that a prohibition against sex-based discrimination in insurance would constitute a substantial impairment of contractual relationships, there remains yet another question to consider: whether the State has "a significant and legitimate public purpose behind the regulation, . . . such as the remedying of a broad and general social or economic problem", to justify the legislation. *Energy Reserves Group*, 459 U.S. at 411-12. "The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests." 459 U.S. at 412.

In *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), the Supreme Court found no legitimate state interest sufficient to support the contract impairment caused by a statute governing employee pension benefits. In that case, the statute appeared to have been narrowly drawn to benefit a particular employer's workers, whose employment contract did not entitle them to pensions. 438 U.S. at 248. However, the Court subsequently has held that sex-differentiated employee pension plans violate Title VII of the U.S. Code—in effect, recognizing the elimination of sex-based distinctions as a legitimate governmental interest. *Arizona Governing Comm. v. Norris*, 463 U.S. 1073 (1983).<sup>3</sup> The

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<sup>2</sup> In *Energy Reserves Group*, the Court upheld a Kansas statute prescribing prices for natural gas produced and sold in the state—a subject on which the state had never before legislated. The Court held that the statute did not substantially disrupt producers' legitimate expectations, in view of its similarity to federal regulation of interstate gas prices.

<sup>3</sup> The *Norris* case was decided after Dean Griswold prepared his analysis of proposed federal legislation to prohibit sex-based discrimination in insurance, in which he concluded that the legislation appeared to violate the Contract Clause. Letter from Erwin N. Griswold, Esquire, to Jack H. Blaine, Chief Counsel to the American Council of Life Insurers, at 53-54 (May 16, 1983). While *Norris*, of course, was not a Contract Clause case, it nonetheless affects our analysis—at least with respect to the legitimacy of a public policy of equalization.

governmental interest in equal treatment of the sexes is perhaps especially significant in Maryland, given this State's Equal Rights Amendment, Article 46 of the Maryland Declaration of Rights.<sup>4</sup>

We recognize that the State also has a legitimate interest in the solvency of insurance companies. *Automobile Trade Ass'n v. Insurance Comm'r*, 292 Md. 15, 31-32 (1981).<sup>5</sup> Absent evidence, however, that the impact of House Bill 1155 would be to render insurers insolvent, the mere fact that the bill might make their business less profitable would not, in our view, outweigh the strong countervailing public interest in eliminating sex-based discrimination.<sup>6</sup> Thus, although the matter is not altogether certain, we believe that a governmental interest in the equal treatment of men and women is significant enough in Maryland to make a statutory ban on sex-based discrimination in insurance justifiable in terms of the Contract Clause.

Finally, if there is a legitimate public purpose for the contract impairment, courts are to inquire "whether the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption' ". *Energy Reserves Group*, 459 U.S. at 412 (quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977)). However, in making that determination, "courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure". *United States Trust Co.*, 431 U.S. at 23.

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<sup>4</sup> We recognize, of course, that the Equal Rights Amendment is not directly controlling in this matter, since no state action is involved. See 68 *Opinions of the Attorney General* 164 (1983). Nevertheless, it does evidence a significant and legitimate State interest in favoring the equal treatment of men and women—or, as the Supreme Court has stated it, in "remedying . . . a broad and general social . . . problem". *Energy Reserves Group*, 459 U.S. at 411-12.

<sup>5</sup> In *Automobile Trade Ass'n*, the Court of Appeals upheld a limit on the amount of commissions that may be paid to agents or brokers for credit life and health insurance, finding that the state interest in insurers' solvency supported the challenged regulation, in view of its reasonableness. 292 Md. at 33.

<sup>6</sup> As discussed in Part III below, however, the bill could be designed to provide insurers with options that would permit them to fully comply with its requirements, without necessarily having to suffer reduced profits.

As drafted, House Bill 1155 would have required insurers to equalize benefits to men and women only insofar as the benefits were derived from premiums paid after July 1, 1985. In that respect, the bill tracked the decision in *Arizona Governing Comm. v. Norris*, which required equalization of only those benefits derived from employees' contributions made after the date of the decision.<sup>7</sup> Thus, in our view, the effect of House Bill 1155 would most probably be found reasonable and appropriate to the public purpose it was intended to serve.

### III

#### Effect on Preexisting Contracts

A specific point concerning the effect of House Bill 1155, which Mr. Zarnoch did not address, is worth mention. As you indicate, there are two ways to achieve equalization in insurance: (1) increase the benefits or decrease the premiums of the presently "disadvantaged" class; or (2) decrease the benefits or increase the premiums of the presently "advantaged" class. The question Mr. Zarnoch's letter did not directly address is whether, as to preexisting policies, the bill would have limited insurers to the first method or would have permitted insurers to use the second method as well.

We are not sure that, as drafted, the bill would have allowed insurers to unilaterally modify outstanding policies to the detriment of policyholders. although proposed §223(f) would have authorized insurers to use "any lawful method of complying" with the legislation's anti-discrimination provisions, the bill did not specify what methods would be considered "lawful"—that is, it did not indicate

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<sup>7</sup> The Supreme Court's decision to grant only prospective relief in *Norris* was not based on constitutional grounds, however, but on the heavy financial burden retroactive relief would have imposed on the employer or insurer in order to protect male retirees' expectations of receiving specified benefits. And the Second Circuit has recently concluded that *Norris* does not preclude retroactive relief in every case. *Spirit v. Teachers Ins. & Annuity Ass'n*, 735 F.2d 23 (2d Cir. 1984), reinstating *Spirit v. Teachers Ins. & Annuity Ass'n*, 691 F.2d 1054 (2d Cir. 1982). Under the benefits plan in *Spirit*, annuity payments varied with the performance of the plan's investment. Because annuitants had no expectation of benefits of any particular size, immediately equalizing payments to men and women would neither require the insurer to pay out additional sums nor disrupt male annuitants' expectations.

whether it would be considered "lawful" for an insurer, in seeking to achieve the required equalization, to unilaterally modify its outstanding policies so as to decrease the benefits or increase the premiums of the presently "advantaged" class. Moreover, we note that proposed §223(g)(1), concerning sanctions for violations, would have permitted a court to order modification of insurance policies, "except that a premium payment or contribution under the contract may not be increased and no benefits under the contract may be reduced to achieve compliance". That provision strongly suggests that, as to preexisting policies, the legislation would have barred insurers from adversely affecting the presently "advantaged" class of insureds: if courts were to be expressly precluded from so impairing insureds' contract rights, it seems doubtful that insurers were to have been allowed to do so.

To be sure, this result might not have been at all intended by the drafters of House Bill 1155. In any event, if such legislation is reintroduced, we suggest that careful consideration be given to this issue and that the legislation be clarified as to its intent in this regard.<sup>8</sup>

#### IV

#### Conclusion

In summary, it is our opinion that legislation banning sex-based discrimination in insurance would be constitutionally defensible. While such legislation, as applied to preexisting insurance policies, might constitute an impairment of contract rights, we believe it could be justified as reasonable and appropriate to serve the significant and legitimate state interest in equal treatment of the sexes.

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<sup>8</sup> For the reasons expressed in Part II above, we do not believe that the Contract Clause would preclude the General Assembly from authorizing insurers to modify their outstanding policies to decrease benefits/increase premiums of the "advantaged" class of insureds. But, if the General Assembly does intend to authorize this method of equalization, it should do so clearly and unambiguously.

We do suggest, however, that any such legislation address more clearly than did House Bill 1155 the means of compliance it would authorize insurers to adopt.

STEPHEN H. SACHS, Attorney General

AVERY AISENSTARK

*Chief Counsel,  
Opinions and Advice*

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

## JUVENILE CAUSES

RECORDS—CONFIDENTIALITY—"JUVENILE COURT RECORDS"—  
RECORDS OF JUVENILE SERVICES ADMINISTRATION—JSA  
RECORDS ARE SUBJECT TO CONFIDENTIALITY AS JUVENILE  
COURT RECORDS.

December 17, 1984

*Charles O. Fisher, Jr., Esquire*  
*Chairman, Committee on Availability and Use*  
*of Juvenile Records*

You have requested our opinion on whether the term "juvenile court record", as used in §3-828(b) of the Courts and Judicial Proceedings Article ("CJ" Article) of the Maryland Code, encompasses the records of the Juvenile Services Administration ("JSA"). While the statute makes no direct reference to JSA's records, the policy of the JSA has been to consider its records to be the equivalent of juvenile court records and, as such, subject to the confidentiality provisions of CJ §3-828(b).<sup>1</sup>

For the reasons given below, we agree with the Juvenile Services Administration that its records are protected by the provisions of CJ §3-828(b).

## I

## Introduction

Section 3-828(b) of the Courts and Judicial Proceedings Article, enacted as part of a general revision of the Juvenile Causes Subtitle by Chapter 554, Laws of Maryland 1975, states:

"A juvenile court record pertaining to a child is confidential and its contents may not be divulged, by subpoena or otherwise, except by order of the court upon good cause

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<sup>1</sup> Your inquiry concerns, of course, only JSA records that name or otherwise identify the children to whom they pertain. Records that do not identify individuals may be used for research or study and are not protected by confidentiality provisions. See CJ §3-828(f). See also Health-General Article §4-102(b).

shown. This subsection does not prohibit access to and the use of the court record in a proceeding in the court involving the child, by personnel of the court, the State's Attorney, counsel for the child, or authorized personnel of the Juvenile Services Administration."<sup>2</sup>

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<sup>2</sup> See also Maryland Rule 921. The complete text of CJ §3-828 is:

"(a) A police record concerning a child is confidential and shall be maintained separate from those of adults. Its contents may not be divulged, by subpoena or otherwise, except by order of the court upon good cause shown. This subsection does not prohibit access to and confidential use of the record by the Juvenile Services Administration or in the investigation and prosecution of the child by any law enforcement agency.

(b) A juvenile court record pertaining to a child is confidential and its contents may not be divulged, by subpoena or otherwise, except by order of the court upon good cause shown. This subsection does not prohibit access to and the use of the court record in a proceeding in the court involving the child, by personnel of the court, the State's Attorney, counsel for the child, or authorized personnel of the Juvenile Services Administration.

(c) The court, on its own motion or on petition, and for good cause shown, may order the court records of a child sealed, and, upon petition or on its own motion, shall order them sealed after the child has reached 21 years of age. If sealed, the court records of a child may not be opened, for any purpose, except by order of the court upon good cause shown.

(d) This section does not prohibit access to or use of any juvenile record by the Maryland Division of Parole and Probation or the Maryland Parole Commission when the Division or the Commission is carrying out any of their statutory duties either at the direction of a court of competent jurisdiction, or when the Maryland Parole Commission is carrying out any of its statutory duties, if the record concerns a charge or adjudication of delinquency.

(e) This section does not prohibit access to and use of any juvenile record by the Maryland Division of Correction when the Division is carrying out any of its statutory duties if: (1) the individual to whom the record pertains is committed to the custody of the Division; and (2) the record concerns an adjudication of delinquency.

(f) Subject to the provisions of §4-102 of the Health-General Article, this section does not prohibit access to or use of any juvenile record for criminal justice research purposes. A record used under the subsection may not contain the name of the individual to whom the record pertains, or any other identifying information which could reveal the individual's name."



Other provisions of CJ §3-828 have been enacted or revised since 1975.<sup>3</sup> This particular subsection, however, has remained unchanged since its enactment.

Before the JSA's creation in 1966 (Chapter 126, Laws of Maryland 1966), the functions now performed by its intake workers, juvenile counselors, and other court-services personnel were performed by employees of each juvenile court. Under the present system, these court-services personnel, while employed by the JSA, work under the direction of the juvenile court judges. Health-General Article ("HG" Article) §6-127. *See also* HG §§6-126 and 6-128. Thus, JSA records on individual children are integrally related to the proceedings of juvenile courts.

The records with which you are concerned fall into three basic categories: (1) copies of juvenile court records retained by the JSA; (2) records created by JSA court-services personnel that are not records of the juvenile courts; and (3) records created and maintained by the various institutions that the JSA manages.

## II

### Statutory Construction

#### A. *The Purposes of Confidentiality*

The Court of Appeals has given ample direction on the construction of statutes generally, and the Juvenile Causes Subtitle in particular:

"As we have indicated countless times, the cardinal rule of statutory construction is to ascertain and effectuate the legislative intent. . . . Of course, when construing a provision such as [CJ] §3-830, which is part of a single statutory scheme, the legislative intention must be gathered from the entire statute, rather than from only one part." *In re Stephen K.*, 289 Md. 294, 298 (1981).

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<sup>3</sup> Chapter 814, Laws of Maryland 1978, deleted from CJ §3-828(c) a provision for expunging juvenile court records; Chapter 124, Laws of Maryland 1982, enacted CJ §3-828(d); and Chapter 164, Laws of Maryland 1983, enacted CJ §3-828(e) and (f) and made stylistic changes in CJ §3-828(d).

*See also 55 Opinions of the Attorney General 320 (1970).*

Hence, to ascertain whether the General Assembly intended to include JSA records in the undefined term "juvenile court record", we first look to CJ §3-802, which states the purposes of the Juvenile Causes Subtitle:

"(a) The purposes of this subtitle are:

(1) To provide for the care, protection, and wholesome mental and physical development of children coming within the provisions of this subtitle; and to provide for a program of treatment, training, and rehabilitation consistent with the child's best interests and the protection of the public interest;

(2) To remove from children committing delinquent acts the taint of criminality and the consequences of criminal behavior;

(3) To conserve and strengthen the child's family ties and to separate a child from his parents only when necessary for his welfare or in the interest of public safety;

(4) If necessary to remove a child from his home, to secure for him custody, care, and discipline as nearly as possible equivalent to that which should have been given by his parents;

(5) To provide judicial procedures for carrying out the provisions of this subtitle.

(b) This subtitle shall be liberally construed to effectuate these purposes."

The confidentiality provisions of CJ §3-828 clearly are intended to remove the "taint of criminality" from persons who have been adjudicated delinquent children and to promote the rehabilitation of those persons.<sup>4</sup> In our view, those provisions are also intended to protect and

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<sup>4</sup> In an earlier Opinion concerning the confidentiality of juvenile records, this office noted:

to promote the rehabilitation of children who come within the ambit of the juvenile courts, but who are not adjudicated delinquent.

In a similar situation, the Court of Appeals held that a juvenile *arrest* record is inadmissible as character evidence in a civil action, although the applicable statute's literal terms barred only juvenile court *adjudications* from admissibility. *Montgomery Ward v. Cliser*, 267 Md. 406, 413 (1972). In response to the argument that the statute's scope should be narrowly construed according to its specific terms, the Court stated:

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"In directly focusing upon the area of 'privacy and confidentiality', and its underlying rationale, The President's Task Force on Juvenile Delinquency (of which the learned Judge J. Dudley Digges, now a member of the Maryland Court of Appeals, was an advisor) reported in its work *Juvenile Delinquency and Youth Crime*, page 38-40, that the case for 'confidentiality' of juvenile petitions, probation officer reports, social or clinical studies and related documents, rested upon the following two premises:

'First, it is generally believed that public disclosure of this material would interfere with the effectiveness of the Court's rehabilitation program.

The purpose of this confidentiality is:

to prevent the humiliation and demoralizing effect of publicity or unnecessary disclosure of private affairs heavily charged with feelings of anxiety, guilt and recrimination. Disclosure would make it more difficult for the court to utilize a child's feeling of self respect in effecting rehabilitation.

Second, the persistence of the stigma of delinquency, with its attendant adverse consequences upon the youth's ability to become reintegrated into the community—obtaining private and public employment, qualifying for bonds, being eligible for military service, obtaining licenses—stands as a self-defeating obstacle to effective rehabilitation and one that persists throughout his life. A basic flaw in our penal system is that "it fails to provide accessible or effective means of fully restoring the social status of the reformed offender' ".

*Continued on page 170*

“[T]he legislative intent to allow a person who *may* have committed an act of delinquency as a juvenile to truly rehabilitate himself would be distorted by appellant’s argument. We reject appellant’s construction as, in our view, it would subvert the manifest intent of the Legislature to protect citizens against public disclosure—at least in civil proceedings—of charges brought against them as juveniles.” 267 Md. at 414 (emphasis in original).

We believe that a narrow construction of CJ §3-828(b) would, likewise, subvert the intent of that section.

Like police records on juveniles [CJ §3-828(a)], juvenile court records [CJ §3-828(b)] are kept confidential to protect children (and adults who have juvenile records) from the “taint of criminality” and the “consequences of criminal behavior” and to promote their full rehabilitation. Confidentiality of JSA records serves the same purposes, for those records also pertain to “private affairs heavily charged with feelings of anxiety, guilt and recrimination” that may impose a lifelong stigma on the child concerned. *See 55 Opinions of the Attorney General* 320, 321 (1970). Moreover, since JSA records contain much of the same information found in protected police and court records, the purposes of §3-828(a) and (b) would be defeated if JSA records were not themselves protected from public scrutiny. Finally, we note particularly the mandate of CJ §3-802(b) that the provisions of the Juvenile Causes Subtitle “be liberally construed to effectuate [its] purposes”.

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When Sections 70 [the precursor of CJ §3-802(a)(1) and (2)] and 70-23 [the precursor of CJ §3-828(a)] are considered together, and in light of the general rationale as articulated by the President’s Task Force, it is clear that the Maryland Legislature intended not only to provide the most ideal rehabilitative environment possible for a child by making his acts of delinquency inviolate insofar as public disclosure is concerned, but also intended to protect an adult’s reputation from being damaged from transgressions which amounted to acts of delinquency during his youth.” *55 Opinions of the Attorney General* 320, 321-22 (1970).

Hence, as explained more fully below, we believe that the General Assembly intended the term "juvenile court records" to include the three categories of JSA records that we have identified above as being related to juvenile court proceedings.

## B. *The Nature of JSA Records*

### 1. *Copies of Juvenile Court Records*

Unquestionably, records in the first category—those that are copies of juvenile court records—are covered by CJ §3-828(b). Releasing those copies would be tantamount to releasing the original records of the court itself and, therefore, clearly contrary to the statute's intent.

### 2. *Records Created by JSA Court-Services Personnel*

Records in the second category—those created by JSA court-services personnel—do not necessarily encompass actual court records. Nonetheless, they are so integrally related to court records as to require the same protection.

The records in this category are created by intake officers, juvenile counselors, and their supervisors, whose functions are directly derivative of the juvenile court's functions. Thus, a JSA intake officer receives and investigates the initial complaint concerning a child. CJ §3-810(a) and (b)(1). And, in many cases, the intake officer is empowered to deny the complainant authorization to pursue judicial action, on the grounds that the juvenile court has no jurisdiction or that judicial action would not be in the child's best interest. CJ §3-810(g).<sup>5</sup> Thus, JSA intake workers often decide whether a juvenile court should exercise its jurisdiction in a particular case. See *In re Lawrence T.*, 285 Md. 621, 625-26 (1979) (intake officer has substantial discretion in considering whether to file petition with juvenile court). Moreover, the intake

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<sup>5</sup> If a complaint is brought by a local department of social services and alleges that the child is in need of the court's assistance because of parental neglect, the intake officer must immediately file a petition to that effect with the court. CJ §3-810(b)(2). If a complaint alleges that a child 16 or over has committed an act that would be a crime of violence if committed by an adult, the intake officer must immediately forward the complaint to the State's Attorney for review and possible action. CJ §3-810(b)(3)(i). In all other cases, the initial decision whether to file a petition with the court is the intake officer's.

officer may place a child in detention or in shelter care pending a hearing. CJ §3-815. If the intake officer believes judicial action would not be appropriate, the officer may propose and conduct an "informal adjustment" of the matter—including placing the child under the supervision of a JSA juvenile counselor, supervision analogous to probation. CJ §3-810(e) and (f).

JSA juvenile counselors similarly function as adjuncts of the juvenile court. At the court's direction and for its information, a juvenile counselor may carry out a study of the child and all matters relevant to the child's case. CJ §3-818(a). The counselor's report, which may include recommendations of appropriate court action, is admissible into evidence both at a hearing to determine whether the juvenile court should waive its jurisdiction and at a disposition hearing following an adjudication. CJ §3-818(c). Juvenile counselors supervise children pursuant to a court's disposition or an informal adjustment, find placements in foster homes or residential facilities for children committed to the JSA's custody, and visit children committed to institutions.

It is thus clear that the JSA records created by court-services personnel bear enough correspondence to the juvenile courts' records as to trigger the same legislative concern for confidentiality. Many of these JSA records, in fact, consist of the very information on which the court records are based; others record actions taken in carrying out a court's orders; still others are produced in the course of informal adjustments substituted for formal court action. In each of these cases, confidentiality serves the statute's primary purpose of treating and rehabilitating the children who come within the statute's ambit, whether or not they are subjects of juvenile court adjudications. *Cf. Montgomery Ward v. Cliser*, 267 Md. at 414. Conversely, release of JSA records in this category would effectively breach the confidentiality of juvenile court records, because the information contained in the JSA records is the same information, or would lead to the same information, as is contained in the juvenile court records.

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If a complaint alleges that the child has committed a "delinquent act"—defined in CJ §3-810(k) as any act that would be a crime if committed by an adult—the intake officer's denial of authorization is reviewed by the State's Attorney. CJ §3-810(b)(3)(ii) and (h)(1). In all other cases, a denial is reviewed by the intake officer's regional supervisor. CJ §3-810(i).

### 3. *Records Maintained by JSA Institutions*

Records in the third category—those maintained by JSA institutions—also must be kept confidential in our view, if juvenile court records are to be afforded the full protection intended by CJ §3-828(b).

These records include, for each child committed to an institution or detained there pending a hearing, copies of JSA records in the first two categories, as well as records created by the institution in the course of evaluating and treating the child. Such records are not only created and maintained pursuant to the court's proceedings regarding a child, but are also often forwarded to the court to aid it in determining whether the child should be released or transferred to a different type of facility. Clearly, any breach of the confidentiality of JSA institutional records would expose a child to publicity concerning the very matters that CJ §3-828(b) seeks to keep private. *See Westfall v. State*, 243 Md. 413, 423-24 (1966) (permitting jury to learn indirectly of witness's juvenile record, through question whether he had ever been confined in Maryland Training School, held reversible error).

### C. *Additional Considerations*

We find additional support for our conclusion in HG §§4-101 through 4-103. Those provisions safeguard the confidentiality of JSA records "assembled or obtained for research or study" that name or otherwise identify individuals. HG §4-101. Of necessity, some of those research records derive from records and information kept by JSA court-services personnel and JSA institutions, for the JSA's research and development unit is statutorily required to "[c]ompile accurate statistics and reliable information on all aspects of the juvenile program of this State". HG §6-114(1). Protecting the confidentiality of information after it has been "assembled . . . for research or study" would serve little purpose if the underlying records from which that information was obtained were not themselves confidential. Consequently, we believe, the General Assembly must have intended JSA records pertaining to individuals to be kept confidential under all circumstances.<sup>6</sup>

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<sup>6</sup> We note also that JSA's practice of maintaining the confidentiality of its records has been a long-standing and consistent one. Such an administrative practice, unless clearly erroneous, is entitled to considerable deference in determining the proper construction of a statute under which the administrative agency operates. *See, e.g., Maryland Comm'n on Human Relations v. Bethlehem Steel Corp.*, 259 Md. 586, 592 (1983); *Jackson Marine Sales v. State Dep't of Assessments*, 32 Md. App. 213, 217 (1976).

## III

## Conclusion

In summary, it is our opinion that the confidentiality afforded "juvenile court records" under CJ §3-828(b) should be construed to extend to the related records of the Juvenile Services Administration, to effectuate the protective and rehabilitative purposes of the Juvenile Causes Subtitle.

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## LICENSING AND REGULATION

NATURAL RESOURCES—HUNTING—COMMERCIAL HUNTING  
GUIDES—LICENSING REQUIREMENTS APPLY TO ALL COMMER-  
CIAL GUIDES, INCLUDING EMPLOYEES OF GUIDE SERVICES.

September 18, 1984

*The Honorable Michael H. Weir*  
*The Honorable Anthony M. DiPietro, Jr.*  
*The Honorable Joseph Bartenfelder*  
*Maryland House of Delegates*

You have requested our opinion on the interpretation of §10-309 of the Natural Resources Article of the Maryland Code and COMAR 08.03.01.27, both of which require commercial hunting guides to obtain licenses. Specifically, you have asked whether the license requirement applies only to self-employed hunting guides and operators of guide services or, in addition, extends to persons employed by hunting guide services to accompany hunters into the field.

For the reasons given below, we have concluded that the effect of the statute and regulation is to require all persons who assist hunters for compensation to have commercial hunting guide licenses, whether the guides are guide service operators, are self-employed, or are employed by guide services.

## I

## Introduction

Section 10-309(a) of the Natural Resources Article ("NR" Article) states: "A person desiring to be a commercial hunting guide shall first obtain a commercial hunting guide license." COMAR 08.03.01.27B reiterates that requirement by providing that "[e]very person desiring to act as a commercial hunting guide first shall obtain a commercial hunting license".

Although the statute does not itself define the term "commercial hunting guide", the regulation defines it as "a person who, directly or indirectly, receives any consideration for furnishing facilities and

services in the hunting of wild game birds and animals, whether or not the services are furnished by him personally, or by his agents or employees". COMAR 08.03.01.27A.

To date, the Department of Natural Resources ("DNR") has actively enforced the license requirement only as applied to self-employed guides and operators of guide services. Nonetheless, as explained below, even DNR's own view of the meaning and scope of the statute and regulation has not been consistently so narrow. And, also as explained below, it is our view that both the statute and the regulation are better read as applying to all persons who guide hunters in the field, whether or not self-employed, as well as to operators of guide services.

## II

### The Governing Statute and Regulation

#### A. NR §10-309

Section 10-309 of the Natural Resources Article requires a commercial hunting guide license to be obtained by *any* person "desiring to be a commercial hunting guide". This broad language, together with other parts of the statute, strongly suggests an intent to require licensure of everyone engaged commercially as a hunting guide, whether as a self-employed guide, as an employee of a guide service, or as the operator of such a service.

For example, NR §10-309(a) authorizes the Department of Natural Resources to "establish classifications of licensees and set the fee to be paid by each class". That legislative grant of authority would, for example, permit DNR to distinguish among, and set different fees for, self-employed guides, employee guides, and guide supervisors—or, indeed, to distinguish among commercial hunting guides in any other way necessary for appropriate regulation of the business's various aspects. But the mere power to *classify* licensees is not tantamount to the power to totally *exempt* persons from licensure and regulation. And, in our view, the grant of authority here to classify licensees was simply intended to recognize that there may well be different kinds of "commercial hunting guides"—as to whom

differing fees and regulations might be appropriate—while still requiring that *all* of those guides obtain licenses and, in accordance with NR §10-309(b), be subject to regulation by DNR.<sup>1</sup>

Further, NR §10-309 appears to use the term “commercial hunting guide” in its broadest sense. Thus, for example, NR §10-309(c) prohibits commercial guides from “aid[ing] or accompany[ing] any person hunting any game bird or mammal unless the hunter possesses a proper hunter’s license”. Clearly, the purpose of this particular proscription is to aid in the enforcement of the licensing requirements for hunters; that purpose is best served by applying the proscription broadly, to cover not only the supervising guide who employs field guides but also to encompass the particular field guide who personally accompanies a hunter into the field.

We conclude, therefore, that the term “commercial hunting guide”, as used in NR §10-309, is intended to include everyone whose business or employment is to assist hunters in their pursuit of game. *See Curtis v. State*, 284 Md. 132, 142 (1978) (statutes should be construed in light of their objectives and purposes). *Accord, Comptroller of the Treasury v. John C. Louis Co.*, 285 Md. 527, 538 (1979); *State v. Berry*, 287 Md. 491, 496 (1980).<sup>2</sup>

#### B. COMAR 08.03.01.27

The express terms of the applicable administrative regulation are consistent with our interpretation of the statute. The regulation defines “commercial hunting guide” to include everyone who receives any consideration for assisting in the hunting of game, “whether or not the services are furnished by him personally, or by his agents or employees”. COMAR 08.03.01.27A. In our view, that definition is intended to *include* the guide service operator who provides hunting services indirectly through agents or employees, not

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<sup>1</sup> NR §10-309(b) broadly authorizes DNR to “prescribe rules and regulations governing the duties of guides and requiring an oath that a licensee shall abide by the wildlife laws of the State”.

<sup>2</sup> In its last legislative session, the General Assembly considered House Bill 268, intended in part to more clearly require licensing of employee guides. The bill was not enacted.

Arguably, that bill’s failure might be regarded as legislative affirmance of DNR’s practice, indicating an intent to limit the scope of the statute. We do not believe, however, that such

to *exclude* the employee field guide who provides those same hunting services directly and personally. Put another way, we believe that the regulation's reference to any person "who, *directly or indirectly*, receives any compensation for furnishing facilities and services in the hunting of wild game birds and animals" includes *both* a guide whose compensation is paid directly by the hunters he or she assists, in the form of fees for services rendered, *and* the guide whose compensation is paid indirectly by hunters, in the form of a salary derived from fees paid by them to a guide service.

Similarly, as you have pointed out, the oath required of licensees under COMAR 08.03.01.27E also suggests that a license is required for everyone engaged in commercial guiding, including employee guides. The oath, adopted pursuant to NR §10-309(b), includes an affirmation that the licensee "will endeavor to prevent any party using my services from violating" State or federal game laws or regulations and will report any violation "in detail to the proper authorities". COMAR 08.03.01.27E. Thus, the commercial hunting guide regulations expressly enlist licensees' aid in enforcing game laws. Clearly, the employee guide who accompanies hunters into the field is in a far better position to give that aid than is a guide service operator who stays in the office. Indeed, exempting employee guides from the licensing requirement might well substantially undermine the efficacy of the licensees' oath as a means of preventing game law violations.

### III

#### Prior Administrative Practice

##### A. *General Principles*

It might be argued that DNR's practice of refraining from enforcing the license requirement with respect to guide-employees of

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an argument would be effective in this instance, for House Bill 268 would have made a number of changes in NR §10-309 beyond the licensing requirement. For example, the bill would have substantially increased the fee for a hunting guide's license, imposed a site-registration fee on operators of guide services, codified and somewhat enlarged the present recordkeeping requirement in the regulations, and required annual reports on hunting activities from all licensees. Moreover, as drafted, the bill apparently would have covered *all* employees of guide services, including not only employee guides but even, for that matter, office personnel such as clerks and secretaries. Thus, the bill's failure cannot confidently be attributed to a legislative intent that employee guides not be licensed.

guide services is an administrative interpretation of the statute and regulation that limits their applicability. An administrative agency's practice often is given considerable weight in determining the proper construction of that agency's regulations and the statute under which they were adopted. Indeed, the Supreme Court has indicated that an agency's interpretation of its own regulation may be of "controlling weight" in construing the regulation "unless [the interpretation] is plainly erroneous or inconsistent with the regulation". *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413-14 (1945), *cited in Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980). Nevertheless, we do not believe that Maryland courts would show such deference in this instance to DNR's practice.

In *Comptroller of the Treasury v. John C. Louis Co.*, 285 Md. 527 (1979), the Court of Appeals refused to adopt a long-standing practice of the State Comptroller as a valid interpretation of the Maryland Retail Sales Tax Act. Although the Court recognized that administrative interpretations in general, and the Comptroller's interpretation of tax statutes in particular, are entitled to great weight, the Court also noted that "an [administrative] interpretation is not binding upon the courts . . . Moreover, the weight accorded such an administrative interpretation or practice varies depending upon the circumstances." 285 Md. at 543 (citations omitted). According to the Court, the factors to be considered in determining the persuasiveness of an administrative practice include "the consistency of the administrative interpretation or practice with the purpose of the statute". 285 Md. at 544. In addition, "if an administrative interpretation has not resulted from a contested adversary proceeding, . . . or from a *promulgated* administrative decision, rule, regulation, or departmental statement, it is entitled to little weight". *Id.* (Emphasis in original.)

#### B. *Effect of DNR's Enforcement Practice*

On the basis of the factors considered by the Court of Appeals in *John C. Louis Co.*, we believe that DNR's past enforcement practice has not had the effect of limiting, by administrative interpretation, the actual applicability of the commercial hunting guide license requirement.

First, we believe that a regulation or an interpretation of a regulation that exempted employee guides from the licensing requirement would be inconsistent with the underlying statute, NR §10-309. As

explained above, the statute's apparent intent is to apply the licensing requirement broadly; excluding employee guides from that requirement, however, would effectively exempt a rather large segment of all those who are actively engaged in the practice of guiding hunters. Consequently, in our view, the Department's practice of refraining from enforcing the license requirement as to guide-service employees would not be given much weight in determining the scope of the requirement.

Second, DNR has not "promulgated" any "decision, rule, regulation, or departmental statement" to the effect that hunting guides employed by guide services need not obtain licenses. To the contrary, in October of last year the Department noted in a memorandum to holders of commercial hunting guide licenses that, under "the law and regulation", "you, as a Hunting Guide, and everyone employed by you to guide, must be licensed as a Commercial Hunting Guide". Memorandum from B. Bess Crandall, Director of Licensing and Consumer Services, DNR (October 24, 1983). Subsequently, the Department explained that its notice was "our attempt to reconcile our practice with the terms of our regulation". Memorandum from Donald E. MacLauchlan, Director of Maryland Forest, Park and Wildlife Service, DNR (November 4, 1983). In that later memorandum, DNR reversed its decision to actively enforce the regulation against employee guides; but, quite clearly, DNR did not at all reverse its earlier statement regarding the regulation's meaning. Thus, far from having "promulgated" any formal exceptions for employee guides, DNR in fact has clearly stated the contrary: that the terms of its regulation, as well as the statute, require these guides to have licenses.

In sum, the Department of Natural Resources has never affirmatively interpreted its regulation to mean that employee guides need not have licenses; it has merely refrained from enforcing the license requirement with regard to them. Such a practice of mere inaction cannot vitiate the express terms of the regulation. *Cf. Ewell v. State*, 207 Md. 288, 296 (1955) ("[W]here the language of a statute is clear and explicit and susceptible of a sensible construction, it cannot be controlled or nullified by custom or administrative practice."). In our view, the language of COMAR 08.03.01.27 is clear and unambiguous. A commercial hunting guide is any "person who, directly or indirectly, receives consideration for furnishing [hunting] facilities and services . . . personally, or by his agents or employees"; and "[e]very person desiring to act as a commercial

hunting guide" must obtain a license. Consequently, the regulation's meaning cannot be limited by an administrative practice that, even were it regarded as interpretive, would be "plainly . . . inconsistent with the regulation". *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413-14 (1945).

### C. *Equitable Estoppel*

Nor do we believe that DNR's past practice of nonenforcement would operate to estop it now from enforcing the license requirement as applied to employee guides. For the doctrine of equitable estoppel to apply, "the party claiming the benefit of the estoppel must have been misled to his injury and changed his position for the worse, having believed and relied on the *representations* of the party sought to be estopped". *Salisbury Beauty Schools v. State Board of Cosmetologists*, 268 Md. 32, 62-63 (1973) (quoting, with added emphasis, *Savonis v. Burke*, 241 Md. 316, 319 (1966)). Moreover, courts will not apply the doctrine of estoppel against the State where, as here, the State is acting "in the performance of its governmental, public or sovereign capacity or in the enforcement of police measures". 268 Md. at 63-64.

In *Salisbury Beauty Schools*, the Court of Appeals refused to find that the State Board of Cosmetologists was estopped from enforcing, even after years of administrative inaction, a statutory prohibition against the charging of certain fees. Because the schools were presumed to know of the statute, the Court held, they could not "successfully contend that there has been 'any change in the position of the parties' as a result of inaction . . . in enforcing compliance with the statute". 268 Md. at 67. Further, the Court held, such administrative inaction cannot in effect abrogate a statute validly enacted in furtherance of the police power. *Id.*

Clearly, the hunting guides license requirement is also a valid exercise of this State's police power. Therefore, in our view, estoppel cannot now operate to preclude full enforcement of that requirement, notwithstanding DNR's past practice of nonenforcement.

## IV

### Conclusion

In summary, it is our opinion that the commercial hunting guide license requirement of NR §10-309 and COMAR 08.03.01.27 applies to self-employed guides, guide service operators, and guides employed by guide services. In light of the language and purposes of

the statute and regulation, we believe that the intent of the General Assembly and the Department of Natural Resources was to require all persons engaged in providing hunting-guide services for compensation to obtain licenses.

STEPHEN H. SACHS, *Attorney General*

AVERY AISENSTARK  
*Chief Counsel,  
Opinions and Advice*

*Editor's Note:* In Chapter 505, Laws of Maryland 1985, the General Assembly repealed the provision discussed in this Opinion and enacted in its stead a new NR §10-309, containing detailed requirements for the licensing of "master hunting guides".



## LOCAL GOVERNMENT

PREEMPTION/CONFLICT—HEALTH, ENVIRONMENTAL—SEWAGE  
SLUDGE MANAGEMENT—COUNTIES—ZONING—REVIEW OF  
COUNTY AUTHORITY TO ENFORCE ZONING REGULATIONS ON  
SLUDGE USE.

January 31, 1984

*The Honorable Thomas L. Bromwell*  
*Senate of Maryland*

On behalf of the Senate Finance Committee, you have requested our opinion on the following questions:

1. Under current law, does Baltimore County have authority to enforce County zoning regulations on sludge use against a person who has a State permit to use or dispose of sludge in the County?
2. Would Baltimore County have authority to enforce County zoning regulations on sludge use if Senate Bill 171 (as introduced at the 1983 Regular Session) were enacted by the General Assembly?

You also requested guidance on appropriate language to include in a State sludge management bill that would give local governments a role in the State permit process without giving them veto power over sludge use in their jurisdictions.

For the reasons given below, we conclude as follows:

1. Under current law, Baltimore County may generally enforce County zoning regulations on sludge use, including disposal, against persons who have State sludge use permits. With respect to sludge composting facilities, the State has specifically deferred to all County zoning requirements. With respect to other sludge-related activities, the provisions of the County zoning regulations that reflect basic zoning concerns for the separation of incompatible land uses are generally enforceable against State permittees. The provisions of the zoning regulations that impose other requirements on particular sites and uses are enforceable against State permittees if (i) either the State imposes no regulation of its own or the County regulations are technically compatible with any State regulations, and (ii) the County regulations do not effectively prohibit activity within the scope of a State permit.

2. If Senate Bill 171 were enacted as introduced, it is uncertain whether Baltimore County's zoning regulations would be preempted. Legislative clarification of this point is essential. If there is no preemption, the County regulations would, in general, continue to be enforceable to the extent that they did not conflict with State decisions. However, the area of potential conflict would be widened if Senate Bill 171 were enacted; hence, it is likely that the County's regulations would more often be unenforceable in practice.

In our view, Senate Bill 171 offers a valid approach for achieving your stated goal of allowing the counties to participate in the State's licensing and permitting processes without giving the counties veto power. Senate Bill 171 is apparently designed to require the State to consider local zoning, but also to allow the State to override that local zoning if it chose; thus, no county could effectively veto, by zoning, a State decision to permit sludge-related activity in that county. In addition to requiring State officials to consider local zoning, Senate Bill 171 would also give localities a voice in the State's licensing and permitting processes through the public participation requirements that the bill would build into those processes.<sup>1</sup>

Although we believe that the approach of Senate Bill 171 might achieve your objectives, we recommend that any new bill be clearer in at least two respects. First, the General Assembly should leave no open question about its intention on the matter of preemption; it should state whether or not it wishes to preclude local zoning legislation, or all local legislation, on the subject of sludge use. Second, the General Assembly should clarify the participatory role that it desires for local jurisdictions. For example, rather than leaving local officials to participate along with the general public in hearings, the General Assembly might require that State officials consult with or respond to comments by local elected or other officials before issuing any State permit.

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<sup>1</sup> Senate Bill 171 would require notice and an opportunity for public hearing (i) for a sewage sludge generator's permit, (ii) for any application to spread sewage sludge on marginal land, and (iii) before construction of any permanent facility designed to receive sewage sludge. Proposed §9-1403(c) of the Health-Environmental Article of the Maryland Code.

## I

## Legal Background

Baltimore County is a "home rule" charter county under Article XI-A of the Maryland Constitution. As such, it may exercise those express powers granted to it by the General Assembly in Article 25A, §5 of the Maryland Code (the "Express Powers Act"). Included in the list of enumerated powers are:

- (1) The power "to prevent the introduction of contagious diseases into such county; [and] to regulate . . . any and all places where offensive trades may be carried on, or which may involve or give rise to unsanitary conditions or conditions detrimental to health", §5(J);
- (2) The power "[t]o enact local laws . . . for the protection and promotion of public safety, health, morals, comfort and welfare, relating to . . . the disposal of wastes", §5(T); and
- (3) The power "[t]o enact local laws, for the protection and promotion of public safety, health, morals, and welfare, relating to zoning and planning", §5(X).

However, the existence of State law on these topics might limit the exercise of the County's powers. First, the County might be precluded from legislating in a particular area because of preemption by the State. Preemption occurs when the General Assembly expressly denies a local government the right to legislate on a certain topic or when the General Assembly so extensively regulates an area as to "occupy the field" and thereby preclude local legislation. See *County Council v. Montgomery Ass'n, Inc.*, 274 Md. 52, 60 (1975).

In addition, Baltimore County's authority to enact local laws under the Express Powers Act is limited by Article XI-A, §3 of the Maryland Constitution:

"All such local laws enacted by . . . the Council of the Counties as hereinbefore provided, shall be subject to the same rules of interpretation as those now applicable to the Public Local Laws of this State, except that *in*

*case of any conflict between said local law and any Public General Law now or hereafter enacted the Public General Law shall control.*" (Emphasis added.)

This constitutional limitation clearly renders County legislation inoperative to the extent that it "conflicts [o]r is inharmonious with the provisions of the State law". *City of Baltimore v. Sitnick*, 254 Md. 303, 311 (1969). *Cf. East v. Gilchrist*, 296 Md. 368, 374 (1983) (same rule applicable to conflict between county charter and administrative actions taken pursuant to public general law).

Moreover, as to local legislation regarding potential health problems, this constitutional rule of conflict resolution is underscored by the following provision in the Express Powers Act itself:

"Nothing in this article or section contained shall be construed to affect in any manner any of the powers and duties of the Secretary of Health and Mental Hygiene or any public general laws of the State relating to the subject of health." Article 25A, §5(J).

Thus, in order for the Baltimore County legislation in question to be valid: (i) it must be authorized under the Express Powers Act, (ii) it must not be in an area preempted by the State, and (iii) it must not conflict with State public general law.<sup>2</sup>

## II

### Baltimore County Sludge Regulations

#### A. *Recent Sludge Amendments*

On April 7, 1982, Baltimore County enacted Bill 46-82, containing amendments to the Baltimore County Zoning Regulations ("Zoning Reg."). The effect of these amendments is (i) to allow certain activities related to sewage sludge to be conducted, by special exception only, in

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<sup>2</sup> As one commentator has observed: "Although some cases have confused conflict and preemption, they are distinct concepts." Comment, *State and Local Legislative Powers: An Analysis of the Conflict and Preemption Doctrines in Maryland*, 8 U. Balt. L. Rev. 300, 312 (1979). We treat these two concepts separately and distinctly in this Opinion.

certain zoning districts of the County and (ii) further, to regulate those activities with respect to "location, method, and quantity".<sup>3</sup>

As amended by Bill 46-82, the County regulations define "sludge" to include the stabilized, settled solids from a sewage or nonhazardous industrial wastewater treatment tank. Zoning Reg. §101.<sup>4</sup> They regulate the following specific sludge-related activities: co-landfilling, composting, handling in general, incineration, and landspreading.

The regulations identify the types of activities that may be conducted in the various zones and require advance approval, in the form of a special exception, for any specific project. To obtain a special exception in Baltimore County, a landowner must file a petition with the Zoning Commissioner, who holds a public hearing on the request. Zoning Reg. §§500.5 and 502.

Bill 46-82 also added to the County zoning regulations a new §412A, containing substantive requirements applicable to all sludge use in the County. Among the stated purposes of Zoning Reg. §412A is:

"to designate the location of the various disposal sites in such a manner that they will be consistent with designated land uses and will not adversely impact the health, safety, or environment of those who live or work in Baltimore County due to the presence of pathogenic organisms, parasites, heavy metals, or other materials which may have adverse effects on humans or may contaminate crops, ground-water, or surface water." Zoning Reg. §412A.1.

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<sup>3</sup> Because Baltimore County's zoning regulations, like most other local zoning ordinances in Maryland, specifically list permitted uses in the various zoning districts and impliedly forbid all unlisted uses, sewage sludge-related activities are prohibited from those County zoning districts (primarily, the residential districts) where they are not listed as special exception uses.

<sup>4</sup> Section 9-210(b) of the Health-Environmental Article regulates only activity with respect to sewage sludge, while the Baltimore County Zoning Regulations also apply to activity with respect to the sludge resulting from nonhazardous industrial wastewater treatment. The discussions in this Opinion relates only to the area where both the State and County have acted and about which you inquire—i.e., sewage sludge use.

This section establishes specific site and area requirements for each permitted type of sludge-related activity.<sup>5</sup> It includes minimum setbacks from residences and surface water, and it requires site plans and the filing of certain notices in the County land records. Zoning Reg. §412A also provides that the method of operation and maintenance of sludge-related facilities, as well as application rates for co-landfilling and landspreading, must be consistent with criteria established by the Baltimore County Department of Health.

### B. Statutory Authority for Amendments

The County has evident authority to enact these regulations under its express power to enact local laws relating to zoning and planning. Article 25A, §5(X) of the Maryland Code. The Court of Appeals has held the special exception to be a valid zoning mechanism. *Schultz v. Pritts*, 291 Md. 1, 11 (1981); *Turner v. Hammond*, 270 Md. 41, 54 (1973); *Creswell v. Baltimore Aviation Service, Inc.*, 257 Md. 712, 719 (1970).

Of course, the exercise of zoning and planning power is subject to constitutional and other limitations. For example, zoning regulations must be reasonably related in scope and operation to the protection of the public health, safety, morals, or general welfare, and they must apply without unnecessary discrimination. See *Aspen Hill Venture v. Montgomery County Council*, 265 Md. 303 (1972); *Baltimore v. Cohn*, 204 Md. 523 (1954).

We have no reason to doubt that the Baltimore County regulations fall within applicable legal limitations. Accordingly, we proceed on the assumption that they are a valid exercise of the County's authority, under the Express Powers Act, to enact zoning and planning regulations. Article 25A, §5(X).

Because there is authority for the Baltimore County sludge use regulations under the County's express power to zone and plan, we

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<sup>5</sup> For example, handling in general and landspreading may not take place on slopes greater than 15 percent, except that a stricter limitation may apply to landspreading if the Zoning Commissioner or County Health Officer so determines. In the case of landspreading, the regulations require that a sediment control plan, prepared by a professional engineer, be approved by the local soil conservation district. In addition, application rates on agricultural land must be consistent with long-term food crop productivity of the soil and must not exceed the published guidelines of the Agronomy Department of the University of Maryland. See Zoning Reg. §412A.2.E.

will not elaborate on other possible sources of authority. However, it is likely that additional authority may be found in Article 25A, §5(J) (health and nuisances) and §5(T) (waste disposal).

### III

#### Existing State Law on Sludge Use

Existing State law on the use of sewage sludge is codified at §§9-210(b) and 9-212 of the Health-Environmental Article ("HE" Article) of the Maryland Code. Paragraph (1) of HE §9-210(b) provides:

"An individual or corporation for commercial purposes and a municipality, county, district, or institution may not engage in collection, handling, burning, storage, or transportation of sewage sludge without a permit from the Secretary [of Health and Mental Hygiene]."

Paragraph (2) of that subsection authorizes the Secretary to adopt regulations relating to permissible uses and methods of collection, handling, burning, storage, and transportation of sewage sludge.

One specific type of sludge-related activity, sludge composting facilities, is covered by HE §9-212. That section requires that the Department of Health and Mental Hygiene hold a public hearing before a permit is granted under §9-210 for a sludge composting facility. HE §9-212(a)(1). Also, the Department may not issue a permit for such a facility unless (i) the proposed facility "has complied with all county zoning and land use requirements", and (ii) the county legislative body has affirmatively stated that it "does not oppose the issue of the permit". HE §9-212(a)(4).<sup>6</sup>

Implementing regulations are codified at COMAR 10.17.10. These regulations define relevant terms, set forth the procedures for obtaining the required permit, and specify permissible methods of sewage sludge use. Permissible methods include incorporation into

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<sup>6</sup> Two Circuit Courts have held the predecessor of HE §9-212(a)(4) to be unconstitutional, to the extent that it confers on county governing bodies unbounded discretion to forbid an otherwise lawful activity. See *Buck v. Boehm*, Eq. No. 27, 277 (Cir. Ct. Anne Arundel County, May 6, 1980); *Department of Health & Mental Hygiene v. Tyler*, No. 85583 (Cir. Ct. Baltimore County, Nov. 12, 1975).

the soil of agricultural land and other land application, trenching and covering, mixed refuse disposal, incineration, and composting and distribution of sewage sludge compost. COMAR 10.17.10.05.

An application for a permit must be accompanied by sufficient information to enable the Department to determine if the proposed activity will be consistent with Maryland laws and regulations for the protection of public health and safety. The Department may require the applicant to submit complete engineering reports, plans, and specifications, as well as plans for routine monitoring of sludge, groundwater, air, and compost quality. COMAR 10.17.10.04.

Before issuing a permit for "projects involving land utilization or disposal" of sewage sludge or for composting and distribution of sewage sludge compost, the Department must determine that this activity will not result in a public health hazard, deleterious effects on environmental health, or a health nuisance. In addition, sewage sludge compost must meet guidelines for the destruction of primary pathogenic organisms and heavy metal limitations. COMAR 10.17.10.05.

Even more detailed operational requirements are imposed by the Department of Health and Mental Hygiene, on a case-by-case basis, as conditions for State permits. For example, permittees who use sludge in agronomic projects are subject to the following, as part of "a stabilization process . . . to reduce pathogenic organisms to acceptable levels":

"For lands to which sludge has been applied, public access shall be controlled for at least 12 months and grazing by animals whose products are consumed by humans is prohibited for at least 1 month. Crops for direct human consumption must not be grown for a period of three years." Department of Health and Mental Hygiene, Procedural Aspects of Sludge Utilization on Land 2 (undated).

#### IV

#### State Preemption

The Baltimore County zoning regulations on sludge use would be totally invalid if the State has preempted the field of sludge use regulation. We conclude, however, that the State has not.



### A. *Introduction*

In general, preemption occurs when the General Assembly expressly prohibits local legislation in a field, or "when the legislature . . . so forcibly express[es] its intent to occupy a specific field of regulation that the acceptance of the doctrine of pre-emption by occupation is compelled". *City of Baltimore v. Sitnick*, 254 Md. 303, 323 (1969). See *County Council v. Montgomery Association, Inc.*, 274 Md. 52 (1975). See also 67 *Opinions of the Attorney General* 307, 312 (1982). In our opinion, existing State law does not preempt local legislation in the field of sludge use, either expressly or by implication.

The current Health-Environmental Article contains no express prohibition on local legislation with respect to sludge use. In fact, HE §9-212(a)(4) specifically acknowledges, and defers to, county zoning and land use requirements for sludge composting facilities.

Thus, it is clear that (i) the State has not preempted the zoning and land use regulation of sludge composting facilities at all, and (ii) for any preemption to exist with respect to other local regulation of sludge composting facilities or with respect to any regulation of other sludge-related activities, that preemption must be implied.

### B. *Sitnick*

*City of Baltimore v. Sitnick*, 254 Md. 303 (1969), was the first Maryland case to discuss the doctrine of implied preemption by occupation. That case involved a challenge to a Baltimore City minimum wage law that predated a similar State law. The City ordinance set the hourly minimum wage at \$1.25, while the State's minimum wage was \$1.00. The City ordinance also covered certain employers who were exempted from the State law. In deciding the case, the Court of Appeals considered but rejected the doctrine of implied preemption.

In *Sitnick*, the Court distinguished a New York case, in which a local minimum wage law was invalidated because state law was said to have preempted the field. The Maryland Court of Appeals found it significant that the New York state law itself—unlike the Maryland state law—contained a specific mechanism for adjusting the minimum wage to adapt to local conditions. The Court saw the local adjustment provision in New York's law as an important indication of that state's intent to occupy the field. The absence of a comparable provision in the Maryland statute suggested a contrary intent.

The Court also found the chronology of the State and local enactments significant in rejecting the implied preemption theory. The fact that the State law followed the local law and did not mention or repeal the local law argued against a State intent to occupy the field. As the Court said, "[t]here is a presumption of statutory construction that the Legislature acts with the knowledge of existing laws on the subject matter under consideration". *Sitnick*, 254 Md. at 322. See also *National Asphalt Paving Ass'n v. Prince George's County*, 292 Md. 75, 79 (1981).

### C. *Montgomery Ass'n*

In *County Council v. Montgomery Ass'n, Inc.*, 274 Md. 52 (1975), the Court of Appeals for the first time invalidated a local law on the basis of implied preemption. A county ordinance regulating the campaign finance practices of county officers was struck down because the Court found that the State had completely occupied the field by adoption of the State Election Code.

In reaching this decision, the Court found it significant that there were specific provisions in the Maryland Constitution giving the State responsibility for oversight of the electoral process. *Montgomery Ass'n*, 274 Md. at 60 (citing Article III, §§42 and 49 of the Maryland Constitution).

Another, particularly important factor in the Court's decision was the comprehensiveness of the Election Code. The Court observed that State law provided for a system of "pervasive State administrative control" and concluded that this was a "compelling indication that the General Assembly . . . intended that the conduct and regulation of elections be strictly a State function". *Montgomery Ass'n*, 274 Md. at 62.

Yet another factor relied on by the Court was the fact that, in addition to the overall regulation of the election process, the General Assembly had adopted detailed legislation in the same area covered by the County ordinance. If the County ordinance were upheld, the result would be a confusing dual system of regulation. The Court concluded that the General Assembly could not have intended to allow local legislation in the field "which would inevitably lead to utter confusion". *Montgomery Ass'n*, 274 Md. at 64.

#### D. Analysis

It seems clear from the cases that more than comprehensive State legislation in a field is necessary to support application of the implied preemption doctrine. There was a comprehensive State minimum wage law in the *Sitnick* case, but local law in the same field was still upheld. The Court in *Montgomery Ass'n* specifically found its action to be consistent with the *Sitnick* ruling. It was able to distinguish the *Sitnick* case, because that case dealt with an area of the law in which local control had traditionally been allowed and, as previously noted, the local law preceded the State law.

Applying the implied preemption doctrine here, we find that the existing State law governing sludge use fails the primary test for preemption. Far from establishing a comprehensive program of regulation, existing law merely requires a State permit to engage in any sewage sludge-related activity and generally authorizes the Secretary of Health and Mental Hygiene to adopt regulations for sludge-related activities. These provisions do not, in our view, demonstrate an intent by the General Assembly to occupy the field. See *National Asphalt Paving Ass'n v. Prince George's County*, 292 Md. 75, 78-79 (1981).<sup>7</sup> Since existing State law does not pass this primary test, we see no need to consider other factors before concluding that the State has not at this point preempted the field of sewage sludge use regulation.

#### V.

##### Potential Conflict Between Current State Law and Baltimore County Regulations

We next examine whether any portions of the Baltimore County sludge regulations conflict with current State law. To the extent of any conflict, the County legislation must yield. Article XI-A, §3 of the Maryland Constitution.

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<sup>7</sup> To be sure, the implementing regulations, codified at COMAR 10.17.10, are somewhat more detailed. They specify the procedures for obtaining a permit and state broad criteria to be used by the Department in issuing permits. Moreover, as discussed in Part III above, individual permits commonly contain extensive and detailed requirements. But we are unaware of any Maryland case that finds implied preemption on the basis of regulatory or administrative implementation of a statute, where the statute itself does not meet the criteria for implied preemption. For purposes of conflict analysis, however, the level of detail in the implementation of the State statute is certainly relevant to a consideration of potential conflict between State and local law. See Part V below.

### A. Background

There is no inevitable conflict between a local law and a public general law simply because both the State and the local governments have legislated in the same area.

The Court of Appeals has recognized that one of the purposes of home rule is to afford local governments some measure of control over their own affairs. In furtherance of this purpose, the Court has applied the rule of construction that, "when municipal ordinances are enacted in pursuance of competent authority, they should be upheld by every reasonable intendment, and reasonable doubts as to the validity of an ordinance should be resolved in its favor". *Mayor of Annapolis v. Annapolis Waterfront Co.*, 284 Md. 383, 391 (1979). If both the State and a home rule subdivision have legislated as to some subject matter, the Court examines the "functional interplay" between the two to determine if they may be given concurrent effect. *City of Baltimore v. Sitnick*, 254 Md. 303, 312 (1969).

An oft-quoted principle of decision applied to such questions is as follows:

"[O]rdinances which assume directly or indirectly to permit acts or occupations which the [public general laws] prohibit, or to prohibit acts permitted by [public general law] or constitution, are under the familiar rule for validity of ordinances uniformly declared to be null and void. Additional regulation by the ordinance does not render it void." *Rosberg v. State*, 111 Md. 394, 417 & 1909).

Compare also *City of Baltimore v. Sitnick*, 254 Md. at 317 ("[A] political subdivision may not prohibit what the State by general public law has permitted, but it may prohibit what the State has not expressly permitted") (emphasis in original) with *Town of Forest Heights v. Frank*, 291 Md. 331, 338 (1981) ("[T]he *Sitnick* court reiterated the rule that 'a political subdivision may not prohibit what the State by general public law has permitted' ".<sup>8</sup> See also 67 *Opinions of the Attorney General* at 313-14.

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<sup>8</sup> See note 9 below.

Except in simple cases, mere invocation of this or similar formulas does not yield a reasoned answer. "The difficulty lies not in a statement of the principles, but in their application." Rathkopf & Rathkopf, *The Law of Zoning and Planning* §31.01, at 31-2 (4th ed. 1983) ("*Rathkopf*"). Both the purposes and the effects of the Baltimore County sludge regulations—which present far from a simple case—must be carefully examined to understand their "functional interplay" with the State's regulatory scheme.

### B. *The County's Partial Prohibition of Sludge Use*

The County zoning regulations permit sludge-related uses in certain zones, but only if a special exception is granted. This commonplace form of zoning regulation prohibits sludge-related uses altogether from all other zones in the County. If a person obtains a State permit for a sludge-related use at a site in one of these other zones, may the County prohibition nonetheless be given effect? We think that it may.

Certainly, a locality, in direct contravention of a State decision to permit an activity, may not prohibit that activity across the board. See *Heubeck v. City of Baltimore*, 205 Md. 203 (1954) (State law permitted eviction of certain tenants; local ordinance prohibiting eviction of those tenants is impermissible).

In *Town of Forest Heights v. Frank*, 291 Md. 331 (1981)—one of the most recent decisions on conflict—the Court of Appeals viewed a county licensing requirement as permission for the licensee to engage in the licensed activity. Thus, when the county licensed Tillie Frank to operate a fortunetelling parlor within a municipality, a municipal ordinance flatly prohibiting fortunetelling was in conflict with the county license and could not be given effect.<sup>9</sup>

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<sup>9</sup> Although the conflict at issue in *Frank* involved a county ordinance and a municipal ordinance, the Court applied the principles of conflict resolution previously developed in cases of conflict between State law and local enactments. See 291 Md. at 337-38.

An ambiguity in *Frank* involves the question of how explicit the State permission must be. In *Sitnick*, the Court of Appeals stated that a political subdivision "may prohibit what the State has not expressly permitted". *Sitnick*, 254 Md. at 317 (emphasis in original). The Court in *Frank* suggested that such express permission might not be required as a rule. *Frank*, 291 Md. at 338. On the other hand, it held that the particular county licenses at issue did "expressly permit each licensee to engage in the practice of fortunetelling at a specified location". *Id.* (emphasis added).

Baltimore County's special exception procedure for sludge-related uses and its ancillary regulations are not analogous to the town ordinance in *Frank*, because they do not purport to prohibit the use of sewage sludge in Baltimore County.<sup>10</sup> So long as they are not administered so as to achieve such a prohibition in practice, they do not run directly afoul of *Frank*.

The problem actually presented by this aspect of the County regulations may be highlighted by a hypothetical version of *Frank*. Assume that the State licensed Tillie Frank to operate a fortune-telling parlor in an area of a county zoned for residential use only. Does the grant of this license mean that the county may not enforce its land use regulation against Tillie Frank's business establishment in that zone?

In our view, such a result is not compelled by *Frank* and would be inconsistent with the rationale of *City of Baltimore v. Sitnick*, which the Court in *Frank* treated approvingly. One aspect of *Sitnick* involved the application of minimum wage laws to taverns: the State law exempted taverns, the City ordinance covered them. A tavern owner argued that the State exemption was intended "to free those businesses in the excluded categories from any regulation, and it meant this privilege to extend to freedom from regulation by local law". 254 Md. at 324. The Court rejected this argument: "[T]he State exemption amounts to no regulation at all and accordingly leaves the field open for regulation at the local level." *Id.*

With respect to sludge-related activity, there is "no [State] regulation at all" as to the separation, through zoning, of incompatible land uses. That is, neither the statute, the implementing regulations, nor the Department's permit process takes account of basic zoning con-

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<sup>10</sup> The Court of Appeals has explained the nature of the special exception as "part of the comprehensive zoning plan sharing the presumption that as such it is in the interest of the general welfare and therefore valid". *Turner v. Hammond*, 270 Md. 41, 54 (1973).

cerns—the allocation of particular uses to some zones and their prohibition from others. The State's regulatory scheme simply does not involve this consideration. In this situation, local regulation is generally permissible:

“Where state policy is to permit the particular use, as consistent with the public welfare, the local legislative body can nevertheless regulate its location when the restriction is based upon sound zoning principles not involving the same considerations implicit in the state legislation.” *Rathkopf* §31.03 at 31-7.

*See, e.g., Greene Township v. Kuhl*, 379 A.2d 1383 (Pa. Commw. 1977) (issuance of state permit for construction of sanitary landfill did not preclude need for local zoning permit as well). *See also Schantz v. Rachlin*, 244 A.2d 328 (N.J. Super. 1968), *aff'd*, 299 A.2d 18 (App. Div. 1972) (state regulation of aircraft landing strips does not preclude municipal zoning as to location of landing strips).

Of course, zoning may not serve simply as a vehicle for county disagreement with a State decision that sludge use be permitted. In *Scheff v. Township of Maple Shade*, 374 A.2d 43 (N.J. Sup. 1977), the New Jersey Department of Labor and Industry, acting pursuant to statutory authorization, had adopted regulations and standards relating to the storage, handling, and use of liquid propane gas (“LPG”). Based on an engineer's inspection and detailed specifications, the Department approved a site in Maple Shade as safe for LPG storage. Under the town's zoning regulations, LPG storage was not allowed without a variance. The town zoning board denied the variance on the ground that the proposed storage was unsafe. The court struck down the board's denial as in direct conflict with state law, because the board's action was based on a finding that flatly contradicted the state's finding. In doing so, the court stated:

“Although the township's concern for the possible hazard attendant to the storage of LPG is understandable, its actions based thereon cannot be implemented when based solely upon a finding in direct conflict to determinations made pursuant to State law.” 374 A.2d at 47.

C. *The County's Additional Regulation of Sludge-Related Activity*

A more difficult problem is presented by those provisions of the County regulations that do *not* relate to the separation of incompatible land uses. These provisions—for example, “[n]o landspreading shall be permitted within a minimum of 200’ of any surface water” [Zoning Reg. §412.2.E.3]—involve substantially the same health and environmental considerations as are involved in the State permit process.

As far as we are aware, no Maryland case has explored the conflict implications of such cumulative regulatory schemes. The conflict cases do provide some limited guidance, however.

1. *Relevant Case Law*

In *Mayor & City Council of Baltimore v. Stuyvesant Ins.Co.*, 226 Md. 379 (1961), the Court of Appeals upheld the general authority of Baltimore City to regulate the conduct of all bail bondsmen, including those who were also licensed by the State. For example, the City prohibited bondsmen from “procuring or suggesting the employment of any attorney in a criminal case”. 226 Md. at 384. The State itself had issued no regulations whatever governing the conduct of its licensees. Thus, the Court readily concluded that there was no conflict as to the City regulations. *See also Billig v. State*, 157 Md. 185 (1929). Similarly, the Court in *Stuyvesant* found no conflict in the City’s licensure of those classes of bondsmen who were *not* licensed by the State. 226 Md. at 390. At the same time, however, the Court held invalid the City’s attempt to require a City license of bail bondsmen already licensed by the State. The Court reasoned that the City “attempts to prohibit what [State law] permits, unless a [City] license is first obtained and all of its provisions are complied with”. 226 Md. at 389.

*City of Baltimore v. Sitnick* also involved an issue of cumulative regulation. The City required a minimum wage of \$1.25 an hour; the State, only \$1.00 an hour. The Court held that “the purported conflicts properly lend themselves to the characterization of supplementation of the State law, rather than irreconcilable differences”. 254 Md. at 323-24. The Court quoted with approval the following explanation of the “functional interplay” between the local and State requirements:



“ [T]he city ordinance does not conflict with the state law, because the ordinance seeks to accomplish precisely the same purpose as does the state law, namely, to prohibit the payment of substandard wages. The higher cost of and more severe substandard housing problems in the city justify additional city regulations by setting a higher minimum wage, in the same way as additional limitations were permitted in *Stuyvesant*, *Billig* and *Rosberg* on the basis that the state and city might act concurrently on the subject matter.’ ” 254 Md. at 321 (quoting Moser, *County Home Rule—Sharing the State’s Legislative Power with Maryland Counties*, 28 Md. L. Rev. 327, 350 n. 79 (1968)).

Finally, *Town of Forest Heights v. Frank* apparently reflects a somewhat restrictive view of permissible local regulation. Of course, the Court in *Frank* had before it an easier case: a local, flat prohibition that wholly frustrated the licensed activity. But we think that the Court’s reasoning would apply as well if the Forest Heights regulation had amounted to a partial, rather than a total, prohibition of the permitted activity. Suppose that the license had specifically authorized Tillie Frank to operate her fortunetelling parlor between the hours of 9:00 A.M. and midnight. There is little doubt that, under the Court’s reasoning, a Forest Heights ordinance forbidding fortunetelling after 10:00 P.M. would be invalid, because it would conflict with the grant in the license.<sup>11</sup>

## 2. Conflict Analysis

To generalize—and, we acknowledge, extrapolate—from these cases, we conclude that a locality may regulate a State-licensed private activity if (i) either the State imposes no regulations of its own or the local regulations are technically compatible with any State regulations, and (ii) the local regulations do not effectively prohibit activity within the scope of the State license.<sup>12</sup>

<sup>11</sup> To pursue the hypothetical, Forest Heights might well have authority to enforce a more comprehensive ordinance generally prohibiting the conduct of *any* business after 10:00 P.M. Just as a State-permitted activity is, in our view, subject to reasonable land use regulation [see Part V B above], so it is subject to other reasonable, generally applicable exercises of local police powers.

<sup>12</sup> We do not address whether local regulation of a State-licensed, privately-operated facility is permissible if that facility is operated to “achieve a public purpose”. See 63 *Opinions of the Attorney General* 377, 398-99 (1978).

In this Opinion, we cannot attempt to examine the application of these guidelines to all aspects of the County sludge use regulations. Indeed, whether a particular provision within the regulations creates an impermissible conflict can only be determined on a case-by-case basis, because such a determination requires a comparison of the County regulation to a particular State permit.

However, we hope that the following examples, and the explanation that follows, will clarify our view of the applicable legal principles:

(1) If a State permit is silent about the enclosure of a site for sludge-related activity, the County may require fencing of the site.

(2) If a State permit requires a four-foot fence around the site, the County may require that a six-foot fence be erected instead.

(3) If a State permit specifies the rate at which sludge may be applied to a site, the County may not require that sludge be applied at a different rate.

(4) If a State permit allows sludge to be spread within 150 feet of a stream, the County may not enforce its 200-foot setback requirement.

(5) If a State permit specifies that a particular brand of calibration device shall be used to control the rate of sludge spreading, the County may not require that a different brand be used.

The differences among these examples reflect, in our view, the boundary between permissible supplementation and impermissible conflict. Examples (1) and (2) are examples of the County imposing additional requirements that are entirely compatible with the purposes, terms, and scope of the State permit. Examples (3) and (4) are examples of County efforts to deprive a sludge user of the full use to which he or she is entitled under the State permit, be it rate of application or land area; the County may not defeat the State's grant of permission in this way. Example (5) illustrates a direct conflict in technical requirements; the permittee cannot practically use both pieces of equipment, and the State requirement therefore prevails.

We do not pretend that the guidelines outlined above answer all questions. However, until the courts clarify the application of the

conflict doctrine to a problem of this kind, they reflect our best effort to synthesize and apply the law.<sup>13</sup>

## VI

### Future Legislation (S.B. 171)

The ambiguities of existing law can, of course, be most readily corrected by the General Assembly. Senate Bill 171, introduced in the 1983 Regular Session, would have replaced HE §9-210(b) with a comprehensive regulatory scheme for sewage sludge resource recovery.<sup>14</sup>

To answer your question of whether Baltimore County would have authority under Senate Bill 171 to enforce County zoning regulations on sludge use, we must engage in the same analysis we have just described in connection with current State law. That is, we must first decide whether Senate Bill 171 would preempt the field of sewage sludge use regulation; if not, we must examine whether there would be a conflict between the County and State legislation.

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<sup>13</sup> One Maryland case seems to reach a conclusion inconsistent with our analysis. In *Exxon, Inc. v. City of Frederick*, 36 Md. App. 703 (1977), a service station owner received a permit from the State allowing access both to and from a State highway. The City, in turn, granted a special exception for the use on the condition that there be no exit onto the State highway. The Court of Special Appeals found no conflict between the two requirements.

On the surface, it appears that the City was prohibiting what the State had specifically permitted and, therefore, the City's condition must be invalid. However, the State statute authorizing the permitting of access points to State highways specifically precludes the State from denying all access to a State highway for abutting landowners. Thus, while the State can designate points of ingress from and egress onto a State highway, it cannot deny ingress or egress altogether. The Court found that the statute did not preclude the exercise of concurrent powers by the City. The Court also specifically held that those concurrent powers included the right to deny access to the State highway in furtherance of local zoning power. We think that this decision, tied as it is to a unique statutory setting, is not controlling in other contexts.

<sup>14</sup> Although the title of Senate Bill 171 indicated that one of the purposes of the bill was to "repea[] certain provisions relating to a sludge composting facility" (presumably, some or all of the provisions of HE §9-212), the body of the bill contained no repealer. Therefore, HE §9-212 would have continued to exist after the adoption of Senate Bill 171. As discussed in Part III above, HE §9-212(a)(4) specifically defers to county zoning and land use requirements for sludge composting facilities.

*A. Preemption*

There is not language in Senate Bill 171 that would expressly preempt local jurisdictions from regulating sewage sludge-related activities, whether by zoning or otherwise. In fact, the only reference in the bill to local regulation is found in proposed §9-1408(h), which provides:

“In issuing or renewing a sewage sludge utilization permit, the Department [of Health and Mental Hygiene] shall consider local zoning requirements.”

Rather than precluding local regulation of sludge-related activities, this section specifically acknowledges the potential existence of such local regulation. However, proposed §9-1408(h) makes it clear that, while local zoning requirements must be “considered”, they nevertheless may be overridden by the Department when it issues or denies a sewage sludge use permit.

Because §9-1408(h) does not embody a clear statement of express preemption, we next consider whether there would be implied preemption under the language of Senate Bill 171, as introduced.

As was stated in Part IV above, the Maryland Court of Appeals has considered a number of factors to be significant in determining whether implied preemption exists in a particular situation. The basic criterion is that there exists comprehensive State legislation in a field. This criterion is certainly satisfied with Senate Bill 171. In addition to the permit program authorized by existing law, this bill provides for a Sewage Sludge Utilization Fund; a system for issuance of generators' licenses, including the payment of fees; and a bond requirement for all sewage sludge users. It imposes specific requirements applicable to license and permit holders, such as record-keeping, monitoring, and sampling. The bill also provides a right of entry and inspection by representatives of the Secretary of Health and Mental Hygiene, as well as detailed permit application procedures and public hearing requirements. Finally, the bill provides an elaborate enforcement mechanism, including injunctive relief and both civil and criminal penalties.

In short, the bill addresses all aspects of sewage sludge generation, use, and disposal, and it does so in detail. The comprehensiveness of the bill is stated in proposed §9-1402:

"The purpose of this subtitle is to initiate a comprehensive, efficient, and workable program for the regulation and management of the generation and utilization of sewage sludge in this State."<sup>15</sup>

Also, Senate Bill 171, if passed but not deemed preemptive, could lead to a confusing and inefficient dual regulatory system. For example, under Baltimore County's zoning regulations, there must be a public hearing on each application for a special exception. Senate Bill 171 would also provide an opportunity for a public hearing on each sewage sludge use permit. Given the controversial nature of sludge-related projects, a State hearing would be almost a certainty. Two public hearings would place a substantial burden, in terms of both finances and time, on a person wishing to engage in sludge-related activity.<sup>16</sup>

In addition to the dual hearing requirements, there would likely be duplication in fact finding. Senate Bill 171 would require the Secretary of Health and Mental Hygiene to consider local factors, such as the character of an affected area and nearby land uses, when

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<sup>15</sup> The preamble to Senate Bill 171 also contains language that might lead to the conclusion that the General Assembly intended to preempt local legislation. The preamble includes the following recitals:

"WHEREAS, An orderly and systematic regional approach is necessary to manage sewage sludge as a statewide concern; and

...

WHEREAS, The State should take an active role in research, testing, public education, uniformity of rules and regulations, and long-term planning concerning the generation and management of sewage sludge; and

WHEREAS, a centralized, efficient sewage sludge management program is needed...."

<sup>16</sup> Under Article 78A, §§56 through 67 of the Maryland Code, consolidated hearing procedures are available to persons who are engaged in certain projects that require permits from both State and local agencies. See Article 78A, §59 (if local government approves, a joint State-local hearing is conducted). However, these procedures are inapplicable to "an application for a . . . zoning special exception". Article 78A, §57(d).

adopting regulations for sludge management.<sup>17</sup> The bill would also require the Department of Health and Mental Hygiene to determine, before issuing a sewage sludge use permit, that there was no undue risk to the environment or to public health, safety, or welfare. These are similar to the findings that the Baltimore County Zoning Commissioner must make before granting a special exception. See Zoning Reg. §502.1. Since conflict principles would preclude the County from reaching conclusions that contradict the State's on the same facts, the County's decisionmaking role would largely duplicate the State's.

Despite these powerful indications of implied preemption, there are also some legitimate arguments against such a conclusion. The *Sitnick* and *Montgomery Ass'n* cases identify other pertinent factors, such as a long tradition of State regulation, a constitutional mandate for State supervision, and the chronology of State and local enactments.

One obvious argument against preemption is that Senate Bill 171 would be enacted later in time than the Baltimore County (and other, comparable) zoning regulations governing sewage sludge use. The likely question a court would ask is why the State law did not *expressly* preempt existing local law, if that was the General Assembly's intent. In *Sitnick*, the Court found a similar chronology to be a persuasive argument against implied preemption. Applying the same reasoning, the Court in *Montgomery Ass'n* cited the fact that State law preceded local law in the same area as a justification for preemption.

Other factors considered significant by the Court in prior preemption cases are absent in this situation. There is neither a long tradition of State regulation in the area nor a constitutional mandate for State supervision. To the contrary, the first statutory requirement to obtain a State permit for sewage sludge disposal was not enacted until 1974.

We simply cannot predict with confidence how a court would resolve the question of implied preemption. We therefore strongly

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<sup>17</sup> Presumably, the regulations adopted by the Secretary would also provide for consideration of these factors as a part of the decisionmaking process on particular sewage sludge permits.

urge the General Assembly to eliminate the uncertainty by a clear legislative expression of its intent, one way or the other.<sup>18</sup>

### B. *Conflict*

Having concluded that Senate Bill 171, as introduced, would not clearly preempt the field of sludge use regulation, we move on to the question of whether the bill would pose such facial conflict with the Baltimore County sludge use regulations that the County's legislation would be wholly invalid.

While we see great potential for conflict in the application of both laws to particular cases, we believe that Senate Bill 171 would leave room for some exercise of County authority. As we have pointed out, Senate Bill 171 contains a provision (proposed §9-1408(h)) requiring the Department of Health and Mental Hygiene to "consider" local zoning requirements in issuing or renewing a sewage sludge use permit. It is also likely that the County zoning regulations, to the extent that they require consideration of local factors not considered in the State process embodied in Senate Bill 171, would be valid. Nevertheless, to the extent that conflict would exist, the County legislation would be inoperative.

## VII

### Conclusion

In summary, it is our opinion that:

1. Under current law, Baltimore County may generally enforce County zoning regulations on sludge use, including disposal, against persons who have State permits. With respect to sludge composting facilities, the State has specifically deferred to all County zoning requirements. With respect to other sludge-related activities, provisions of the County zoning regulations that reflect basic zoning concerns for the separation of incompatible land uses are generally enforceable against State permittees. Other provisions of the zoning regulations that impose requirements on particular sites and uses

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<sup>18</sup> Because local jurisdictions may derive authority to regulate sludge-related activities through express powers other than the power to plan and zone [see Part II above], any language intended to preempt local regulatory authority should cover more than just local zoning regulations.

are enforceable against State permittees if (i) either the State imposes no regulation of its own or the County regulations are technically compatible with any State regulations, *and* (ii) the County regulations do not effectively prohibit activity within the scope of a State permit.<sup>19</sup>

2. If Senate Bill 171 were enacted as introduced, it is uncertain whether Baltimore County zoning regulations would be preempted. Legislative clarification of this point is essential. If there is no preemption, the County regulations would, in general, continue to be enforceable to the extent that they did not conflict with State decisions. However, the area of potential conflict would be widened if Senate Bill 171 were enacted; hence, it is likely that the County's regulations would more often be unenforceable in practice.

STEPHEN H. SACHS, *Attorney General*

JACK SCHWARTZ  
*Assistant Attorney General*

ANN MARIE DEBIASE  
*Assistant Attorney General*

AVERY AISENSTARK  
*Chief Counsel,  
Opinions and Advice*

*Editor's Note:* Since the issuance of this Opinion, the General Assembly has enacted a comprehensive provision on sewage sludge regulation, codified at NR §9-210.1. See Chapters 748 and 779, Laws of Maryland 1984.

The case referred to in note 19 was dismissed by the federal court on abstention grounds. *Ad+Soil Serv. v. Board of County Comm'rs*, 596 F. Supp. 1139 (D. Md. 1984). Subsequently, the Maryland Court of Appeals held that the State laws summarized in Part III of this Opinion neither preempted nor conflicted with Queen Anne's County's regulation of sewage sludge. *Ad+Soil, Inc. v. County Comm'rs*, 307 Md. 307 (1986).

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<sup>19</sup> We note that issues of preemption and conflict have been raised in a recent civil action, filed in federal court, involving certain sewage sludge regulations of another county. *Ad+Soil, Inc. v. Board of County Comm'rs*, Civil Action No. N-83-4413 (D. Md., filed Dec. 22, 1983). However, given the other issues in the case and the vagaries of litigation, we cannot predict whether any of the matters treated in this Opinion will ultimately be addressed by the Court in *Ad+Soil*.



LOCAL GOVERNMENT—CONFLICTS—DISCRIMINATORY PRACTICES—  
“SEXUAL ORIENTATION”—FIFTH AMENDMENT—STATE LAWS  
THAT PROHIBIT CERTAIN SEXUAL ACTIVITIES DO NOT  
PRECLUDE ENACTMENT OF CITY ORDINANCE TO PROHIBIT  
DISCRIMINATION BASED ON SEXUAL ORIENTATION— FIFTH  
AMENDMENT RIGHTS WOULD NOT BE INFRINGED BY  
ORDINANCE.

May 30, 1984

*The Honorable Anne S. Perkins*  
*Maryland House of Delegates*

You have requested our opinion on whether Council Bill 187 (“Discriminatory Practices—Sexual Orientation”), now pending before the Baltimore City Council, impermissibly conflicts with State law.

For the reasons given below, it is our opinion that State law does not preclude the enactment of a local ordinance of this kind.

I

Introduction

Council Bill 187 would prohibit discrimination based on “sexual orientation” in employment, education, public accommodations, and health and welfare services. For this purpose, the bill defines “sexual orientation” as “the status of an individual as to homosexuality, heterosexuality, or bisexuality”.

II

Conflict with State Law

Your principal question is whether Council Bill 187 would impermissibly conflict with those provisions of State law, Article 27, §§553 and 554 of the Maryland Code, that prohibit certain sexual practices. We do not believe that it would.

Criminal sanctions for particular behavior must be distinguished from laws addressed to status alone. *See Powell v. Texas*, 392 U.S. 514, 532-33 (1968). Under *Robinson v. California*, 370 U.S. 660

(1962), a statute that purports to criminalize mere status would violate the Eighth and Fourteenth Amendments. Article 27, §§553 and 554, however, are not such statutes. For example, in addressing the constitutionality of Article 27 §554, which prohibits "unnatural or perverted" sexual acts, the Court of Appeals carefully explained: "The State here has not attempted to punish 'mere status', but has imposed a sanction for behavior it deems harmful or offensive to the sensibilities of a large segment of the community. This it is entitled to do under the Eighth Amendment to the United States Constitution." *Neville v. State*, 290 Md. 364, 385 (1981). The same analysis obviously applies as well to Article 27, §553, which proscribes the crime of sodomy.

Council Bill 187, in contrast, addresses status rather than behavior. The bill does not purport to authorize any act made criminal by State law. Indeed, the proposed definition for "sexual orientation" explicitly disavows any such intent: "This section is not intended to permit any practice prohibited by State or local law." Thus, even though the bill would prohibit discrimination against any person because of that person's sexual orientation, it would not in any way attempt to protect anyone from prosecution for actions that the State has declared to be criminal.

Courts in other jurisdictions have had little difficulty in drawing just this distinction. For example, in *Gay Alliance of Students v. Matthews*, 544 F.2d 162 (4th Cir. 1976), the Fourth Circuit held that Virginia Commonwealth University could not constitutionally refuse to officially recognize a student organization that advocated liberalization of laws restricting homosexual practices. Characterizing the University's denial of recognition to prevent those practices as "overkill", the court pointed out that "[w]hile Virginia law proscribes the practice of certain forms of homosexuality, . . . Virginia law does not make it a crime to be a homosexual". 544 F.2d at 166 (emphasis in original). Similarly, the Supreme Court of Florida has held that a bar applicant's acknowledged homosexual "orientation or preference", notwithstanding even state laws that prohibit certain homosexual behavior, was not enough to disqualify the applicant from admission to the bar in the absence of evidence "that the applicant has acted or plans to act on his sexual preferences". *In re Florida Board of Bar Examiners*, 358 So.2d 7, 8 (Fla. 1978). See also *benShalom v. Secretary of Army*, 489 F.Supp. 964, 976 (E.D.Wis. 1980).

Consequently, in our opinion, there is no inconsistency between State law and Council Bill 187. The bill would neither prohibit acts expressly permitted by State law nor permit acts prohibited by State law. See *City of Baltimore v. Sitnick*, 254 Md. 303, 317 (1969).

### III

#### Related Issues

You have also asked us to address two related questions that have been raised about the bill.

First, you ask if Council Bill 187 might violate the Fifth Amendment by requiring proof of a complainant's particular sexual orientation as a prerequisite to relief from discrimination. In our view, the bill would not infringe constitutional rights, even in the unlikely event that it were somehow read to require such proof.<sup>1</sup> The Fifth Amendment, applicable to the states through the Fourteenth Amendment, protects against *compulsory* self-incrimination. *Hoffa v. United States*, 385 U.S. 293, 304 (1966). Filing a complaint under Council Bill 187 would, of course, be a purely voluntary act, not one compelled by governmental authority. See *United States v. Gardner*, 516 F.2d 334, 339 (7th Cir. 1975). Thus, even if a complainant were called upon to offer evidence that he or she in fact is, for example, a homosexual (or even, hypothetically, that he or she at one time or another has engaged in prohibited sexual activities), the lack of governmental compulsion to file or pursue the complaint necessarily precludes any conflict with the Fifth Amendment.<sup>2</sup>

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<sup>1</sup> Under Council Bill 187, any discrimination on the basis of sexual orientation would be unlawful, regardless of the precise nature of the victim's orientation. It is likely, therefore, that a violation could be found simply by showing that the respondent discriminated against the complainant and that the basis of this discrimination was the respondent's own perception of the complainant's sexual orientation—however accurate or inaccurate that perception might have been.

<sup>2</sup> Whether or to what extent the potential for such disclosures might inhibit an individual's use of the proposed law to protect his or her rights is essentially a question of policy—of practical effectiveness—and does not at all affect the legal sufficiency of the bill as proposed.

Second, you ask whether the bill's definition of "sexual orientation" is legally adequate. The proposed definition, which uses ordinary words with commonly understood meanings, clearly states the distinguishing characteristics of the persons to be protected. *Gaylord v. Tacoma School Dist. No. 10*, 559 P.2d 1340, 1343-44 (Wash. 1977). See *Blake v. State*, 210 Md. 459, 462 (1956). Consequently, in our view, the proposed definition is not unduly vague or imprecise.

#### IV

#### Conclusion

In summary, it is our opinion that State law does not preclude the enactment of Council Bill 187. Because Council Bill 187 would protect persons only against discrimination based on their sexual status, it would not conflict with State laws that prohibit certain sexual practices. The bill would not in any way infringe the Fifth Amendment rights of those seeking its protection, and the bill's definition of "sexual orientation" is not unduly vague or imprecise.

STEPHEN H. SACHS, *Attorney General*

AVERY AISENSTARK  
*Chief Counsel,  
Opinions and Advice*

## LOTTERY

LOCAL GOVERNMENT—"POLITICAL SUBDIVISIONS"—COUNTIES/  
MUNICIPALITIES—LOTTO REVENUES ALLOCATED TO "POLITI-  
CAL SUBDIVISIONS" ARE TO BE DISTRIBUTED ONLY TO  
COUNTIES AND BALTIMORE CITY, NOT TO MUNICIPALITIES.

January 17, 1984

*The Honorable Louis L. Goldstein*  
*Comptroller of the Treasury*

You have requested our opinion concerning the proper distribu-  
tion of the revenue generated by the "Lotto" game recently ini-  
tiated by the State Lottery Agency. Specifically, you have asked  
whether the revenue is to be distributed only to Maryland's 23 coun-  
ties and Baltimore City;<sup>1</sup> or, conversely, whether Lotto revenue is  
to be distributed among both the counties *and* the municipal cor-  
porations ("municipalities") in this State.

For the reasons given below, we conclude that Lotto revenues  
should be distributed to the counties only.

## I

## The Lotto Statute

Under Article 88D, §8A(a) of the Maryland Code, the Lottery  
Commission and Director "shall provide for a 'lotto' game to be con-  
ducted on a weekly basis", in accordance with regulations adopted  
by the Commission. This provision was enacted as Chapter 394,  
Laws of Maryland 1983 (House Bill 812).

Article 88D, §8A(c)(1) addresses the disposition of the revenue  
derived from Lotto:

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<sup>1</sup> Pursuant to Article 1, §14 of the Maryland Code, the word "county" includes  
Baltimore City. Throughout this Opinion, references to "counties" include Baltimore  
City.

“Notwithstanding any other provision of this article, all receipts from ‘lotto’ games shall be placed in a special separate account of the Comptroller. After payment of prizes and other expenses of operating the ‘lotto’ games, *the Comptroller shall distribute the remaining proceeds of the game to the political subdivisions of the State* on a quarterly basis.”

The term “political subdivision” is used again in §8A(c)(2):

“The amount to be distributed every 3 months to each *political subdivision* shall be the sum of the amounts determined as follows:

An amount for each *subdivision* which shall be a share of 100 percent of the revenues to be distributed bearing the same proportion to 100 percent of the revenues as the total amount of receipts from ‘lotto’ games in that *subdivision* during that 3-month period bears to the total of statewide receipts from ‘lotto’ games in that 3-month period.”<sup>2</sup>

The word “subdivisions” also appears twice in §8A(d), which is, in effect, an indemnification provision for lottery revenues allotted to the State’s general fund.<sup>3</sup> Additionally, the term “political subdivisions” is used in §8A(e), a sunset provision terminating this statutory program one year after the game commences.<sup>4</sup> Finally, uncodified Section 2 of Chapter 394 authorizes the “political subdivisions” to “accure as revenues for the 1984 fiscal year any distributions authorized pursuant to this Act”.

The statute nowhere defines the term “political subdivisions”.

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<sup>2</sup> We do not believe that any distinction was intended between the terms “political subdivision” and “subdivision”.

<sup>3</sup> Under §8A(d), if revenues to the general fund from lottery games are below a specified figure, the gap will be filled from Lotto receipts. Obviously, the General Assembly was protecting the State treasury against the possibility that the Lotto game would reduce the revenue from other lottery games, the proceeds from which are placed in the State’s general fund.

<sup>4</sup> We have been advised by the Lottery Agency that Lotto game ticket sales began on October 31, 1983.

## II

## Uncertain Meaning of "Political Subdivisions"

We begin with familiar principles of statutory interpretation:

"[I]t is the duty of the courts to declare the law as the General Assembly has made it, that is, to ascertain and give effect to the intention of the legislature. This we have said on many occasions is the cardinal rule of statutory construction. . . . In ascertaining the legislative intent we look to the language used, and when such language is clear and unambiguous, it must be held to mean what it expresses. However, where the language is ambiguous and of doubtful import, the duty of the courts is to ascertain and give effect to the true legislative intent. In short, the judicial function of statutory construction lies wholly within the domain of ambiguity and uncertainty. When exercising this function the courts may resort to extrinsic aids such as examining the history of the passage of the law, the reports of committees and commissions, the introduction of amendments and testimony given before legislative committees." *Bledsoe v. Bledsoe*, 294 Md. 183, 188-89 (1982).

See also, e.g., *Bradshaw v. Prince George's County*, 284 Md. 294, 300-301 (1979) ("If the words used are clear and unambiguous, our search for the legislative intent ends. If, however, the words are susceptible of more than one construction, they should be given the meaning intended by the legislature").<sup>5</sup>

Thus, we first consider whether the term "political subdivisions" is "clear and unambiguous", or whether the term is "susceptible of more than one construction".

In some contexts, the Court of Appeals has construed the term "political subdivisions" to include municipalities. For example, the Court has held that "incorporated municipalities are political

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<sup>5</sup> Aspects of *Bradshaw* unrelated to its discussion of statutory construction were modified in *James v. Prince George's County*, 288 Md. 315 (1980).

subdivisions within the contemplation of §4 of Article III of the Constitution of Maryland", which concerns the size and boundaries of legislative districts. *In the Matter of Legislative Districting of the State*, 271 Md. 320, 324 (1974).<sup>6</sup> See also *Maryland-National Capital Park and Planning Comm'n v. Montgomery County*, 267 Md. 82, 93 (1972) ("the general rule appears to be that cities are political subdivisions of a state"). Cf. 55 *Opinions of the Attorney General* 391 (1970). Yet, in a different context, the Court of Appeals has also used the term "political subdivisions" to refer only to the counties of this State. See *County Council v. Investors Funding*, 270 Md. 403, 419 (1973); *City of Baltimore v. Sitnick*, 254 Md. 303, 311 (1969). At no time of which we are aware has the Court of Appeals been called on to construe the term "political subdivisions" in the context of State revenue distribution.

More tellingly, the General Assembly itself has not ascribed any consistent meaning to "political subdivisions". At times the term is used or defined so broadly as to encompass not only municipalities but also school boards [§12-201(h) of the Real Property Article], sanitary districts [§3-904(i) of the Natural Resources ("NR") Article], and conservation districts [NR §1-501(c)].

In some statutory contexts, the terms "political subdivisions" and "subdivisions" clearly refer to both counties and municipalities. See e.g., Article 16A, §3(c) (Civil Defense and Disaster Preparedness Act); Article 41, §538(e) (Neighborhood Housing Services Fund). In other statutory contexts, the terms clearly refer to counties only. See, e.g., NR §5-901(h) (Program Open Space); Article 33, §16-2(b)(4) (tax-free bonds for purchase of voting machines); §7-104(a) of the Courts Article (allocation of costs on appeal). Indeed, in a single subtitle of the Natural Resources Article, the term "subdivision" is first defined to include both counties and municipalities [NR §3-904(i)] but is then used in one provision to mean jurisdictions *other than* municipalities [NR §3-919(a)].

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<sup>6</sup> Article III, §4 of the Constitution reads as follows:

"Each legislative district shall consist of adjoining territory, be compact in form, and of substantially equal population. Due regard shall be given to natural boundaries and the boundaries of political subdivisions."



Finally, we note that in another program for the distribution of State funds—the State Aid for Police Protection Fund, Article 15A, §§35 through 39—the terms “subdivision” and “municipality” are used and defined *separately*. Article 15A, § 37(a)(1) and (2). If the General Assembly routinely used “subdivision” to include municipalities, such separate definition would not have been necessary.<sup>7</sup> Moreover, the separate usage in the statute governing distribution of State aid for local police suggests that the General Assembly is especially cognizant of the need for careful specificity when it intends to distribute State revenues to municipalities.<sup>8</sup>

In sum, there is no fixed or unambiguous meaning that must be ascribed to the term “political subdivisions”. On the contrary, as evidenced by the varying uses of the term by both the Court of Appeals and the General Assembly, it is quite “susceptible of more than one meaning”. *Bradshaw v. Prince George’s County*, 284 Md. at 301. Therefore, we must look to the legislative history and other pertinent material to determine the meaning intended by the General Assembly.

### III

#### Legislative Intent

When we turn to the background, objectives, and purposes of Chapter 394 (House Bill 812), we are convinced that the General Assembly’s intent was to provide revenue from Lotto to the counties alone, not to any incorporated towns or municipalities.

#### A. *Legislative History*

We find clear support for this conclusion in the legislative history itself. “Where there is doubt as to the meaning of a statute, the court

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<sup>7</sup> See also §7-302(b) of the Courts Article (referring to a “political subdivision or municipality”).

<sup>8</sup> It is also significant that the General Assembly provided a clear formula for determining how this police protection aid is to be divided among each county and the municipalities in that county. Article 15A, §37(c). The absence of any such formula in Article 88D, §8A—and, indeed, the possibility that the term “political subdivision”, if construed broadly, might extend to yet *other* entities in a county, such as special tax districts—creates further ambiguity.

will resort to the history of the enactment in search of the legislative intention." *Welsh v. Kuntz*, 196 Md. 86, 93 (1950). *Accord, North Charles General Hospital v. Employment Security Admin.*, 286 Md. 115, 118 (1979). We have identified several elements in the statute's history that reflect this legislative intent:

1. The fiscal notes prepared for House Bill 812 contain a *county-by-county* breakdown for the distribution of all anticipated revenues from Lotto. The fiscal notes describe the recipients of these revenues as "the subdivisions". There is no suggestion whatever that any of the revenues were to be distributed to municipalities.

These fiscal notes provide an especially useful insight into the legislative intent because, by law "[a] bill or joint resolution shall not be voted upon by a standing committee unless it is accompanied by a fiscal note or waiver of a fiscal note". Article 40, §63. Such notes specifically address the revenue and expenditure impact of proposed legislation. Article 40, §64.

2. We have carefully reviewed the legislative committee files regarding House Bill 812. The file of the Ways and Means Committee contains a memorandum from the Department of Fiscal Services to a member of the Committee's staff, reporting an estimate "that a Lotto game would produce a net revenue of \$40 million". Memorandum from Jay Ladin to T. Eloise Foster (March 10, 1983). Attached to that memorandum is a chart setting forth an "estimated distribution to the subdivisions on the basis of FY 82 Sales". The attached chart lists only the 24 counties as the "subdivisions" to which an estimated distribution of the \$40 million revenue was projected. The projection was based upon the actual percentage of 1982 lottery sales for each of those counties.

We find it significant that there is no estimated breakdown for any municipalities. Nor does this memorandum or its attachment contain a breakdown of the 1982 lottery sales at the municipal level—figures that would have been necessary in order to project an estimate of Lotto revenue to such municipalities.<sup>9</sup> The conclusion we draw is that the information presented to the General Assembly

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<sup>9</sup> The Lottery Agency has advised us that, while its records identify all lottery vendors as to the county in which they are located, their records do not further identify

by the Department of Fiscal Services—and on which the General Assembly ultimately acted—assumed that only the counties would receive Lotto revenue.

3. The Ways and Means Committee file contains two other particularly relevant documents. One is a county-by-county breakdown of daily lottery agent terminals. Here again, the breakdown extends to the county level only; it does not proceed further to the level of municipalities. The other is a document, prepared by the Department of Fiscal Services, captioned “Estimated Lotto Game Distribution and Property Rate Equivalent (cents)”. Based on Department of Assessments and Taxation figures reflecting each county’s estimated assessable base, the chart reflects, for each of the 24 counties, the equivalent amount of property tax revenue to be realized from projected Lotto game distributions. Here again, the General Assembly’s focus was limited to the effect on the counties alone—not on the municipalities, as would be expected if they were intended to share in the revenue as well.

4. During the course of the legislative deliberations on House Bill 812, questions arose regarding its constitutionality.<sup>10</sup> A letter of advice on the subject listed the authorities supporting what the author termed “our conclusion that distributions of Lottery funds *to the counties*” is constitutional. Letter from Robert A. Zarnoch, Assistant Attorney General, to Gerard F. Devlin, State Delegate (March 29, 1983) (emphasis added). We do not, of course, mean to suggest that this letter addressed the very question that you have posed. Nevertheless, we find this to be another indication that the 1983 General Assembly, and its counsel, assumed that the legislation in question provided for distribution of Lotto revenue only “to the counties”.

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the vendors as to whether they are located in a municipality within a county. While it would be possible to determine such information, the Lottery Agency was not asked to do so during the legislative deliberations of House Bill 812.

The Comptroller’s Office has advised us that there are 166 municipalities and special tax districts in Maryland to which it distributes local income tax revenue. Some of these are quite small; three, for example, generate less than 50 annual State income tax returns. None of these 166 were referred to in the committee files.

<sup>10</sup> The constitutional issue was whether distribution of Lotto revenues to political subdivisions violated the provisions of Article III, §36 of the Maryland Constitution, requiring that lotteries in Maryland be operated for the “benefit of the State”.

### B. *Contemporaneous Construction by the Attorney General*

After the enactment of House Bill 812, the legislation was reviewed by this Office for legal sufficiency and constitutionality. In our bill review letter affirming the constitutionality of the bill, we wrote as follows:

"We have considered whether the mandated distribution to the *political subdivisions, i.e., the various counties and Baltimore City*, is in violation of Article III, Section 36 of the Maryland Constitution". Bill Review Letter (H.B. 812) from Stephen H. Sachs, Attorney General, to Harry Hughes, Governor (May 9, 1983) (emphasis added).

While the Court of Appeals has made it clear that an Opinion of the Attorney General is not binding on the courts, it has recognized that the Attorney General's view is entitled to some weight in construing statutes. *See Valentine v. Board of License Commissioners*, 291 Md. 523, 533-34 (1981); *Read Drug and Chemical Co. v. Claypoole*, 165 Md. 250, 257-58 (1933). We therefore believe that the bill review letter of May 9, 1983—as a contemporaneous expression of the Attorney General's view of the legislative intent—is relevant in ascertaining that intent.

### C. *Contemporaneous Construction by Lottery Agency*

The Department of Fiscal Services and the Attorney General were not alone in their beliefs that House Bill 812 was intended to provide for distribution of Lotto revenues only to the counties. Without question, this was also the interpretation of the agency charged with conducting the game, the State Lottery Agency. In publishing the regulations for operation of the game, as mandated by Article 88D, §8A(a), the Lottery Agency gave the following estimate of the economic impact of its Lotto regulations:

"In the Lotto game's first year, all net revenues will be returned to the 23 Maryland Counties and Baltimore City in an equal proportion to the sales from those counties and Baltimore City." 10:18 Md. R. 1629 (September 2, 1983).

In the same estimate of economic impact, the Lottery Agency identified the economic impact of the Lotto game "[o]n other State or local agencies" besides itself: in doing so, it refers to only the "State

Subdivisions (24)"—an unmistakable numerical reference to the 24 counties. Similarly, where required to list the direct and indirect effects of the Lotto game "on [the] public", the Lottery Agency again refers only to the effect on the "State Subdivisions (24)".

The Court of Appeals has "adopted the rule that the construction placed upon a statute by administrative officials soon after its enactment should not be disregarded except for the strongest and most cogent reasons". *Comptroller v. Rockhill, Inc.*, 205 Md. 226, 233 (1954). *Accord Smith v. Higinbotham*, 187 Md. 115, 132 (1946). The Lottery Agency's construction was published less than four months after House Bill 812 was signed into law by the Governor and nearly two months before the first sale of Lotto game tickets.

#### D. Conclusion

In sum, we are convinced that the General Assembly, in enacting House Bill 812, intended to provide for the distribution of Lotto revenues to the 24 Maryland counties, and not to the additional 166 incorporated towns, municipalities, and special tax districts. We believe this conclusion to be amply supported by the legal authorities reviewed above. Additionally, we believe it to be supported by what we and, we believe, the general public in fact understood House Bill 812 to be accomplishing: an additional revenue source to the counties.

### IV

#### Conclusion

In summary, it is our opinion that, under the distribution formula contained in Article 88D, §8A of the Maryland Code, Lotto revenue may be distributed only to Maryland's 23 counties and Baltimore City—not to any of the municipal corporations in the State.

STEPHEN H. SACHS, *Attorney General*

GERALD LANGBAUM  
*Assistant Attorney General*

AVERY AISENSTARK  
*Chief Counsel,  
Opinions and Advice*

## PREVAILING WAGE LAW

SCHOOL CONSTRUCTION PROGRAM—"COSTS OF CONSTRUCTION"—  
WAIVER OF STATE FUNDING—BOARDS OF EDUCATION MAY  
WAIVE STATE AID AND THEREBY AVOID APPLICATION OF  
PREVAILING WAGE LAW—ARCHITECTS' FEES NOT "COSTS OF  
CONSTRUCTION" FOR PURPOSES OF PREVAILING WAGE LAW.

October 5, 1984

*Dr. Yale Stenzler, Executive Director  
Public School Construction Program*

On behalf of the Interagency Committee on School Construction ("Interagency Committee"), you have requested our opinion on whether a local board of education may, by voluntarily waiving a portion of the State aid for which a school construction project is eligible, avoid the application of the State Prevailing Wage Law.

For the reasons stated below, we have concluded that (i) if a local board of education so chooses, it is free to finance all or any part of the cost of a school construction project with local funds, rather than with the State aid for which it might be eligible, and (ii) if, in doing so, it finances more than 25% of that cost with local funds, the Prevailing Wage Law is inapplicable to the project.<sup>1</sup>

### I

#### Introduction

The State Prevailing Wage Law—Title 8, Subtitle 5 of Article 21 of the Maryland Code—governs the circumstances under which state or local authorities must specify, in the call for bids for a public works project, that "prevailing wage" rates be paid to workers and

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<sup>1</sup> We previously advised you of this conclusion orally. This Opinion explains the reasons underlying our conclusion.

apprentices on the project.<sup>2</sup> If a project is subject to the statute, the Commissioner of Labor and Industry is required to determine the wage rates prevailing in the project's locality for work of the same class or type as that called for by the project. Article 21, §8-504(a). The contractor and subcontractors must pay at least those rates for work on the project. Article 21, §8-504(b).

The Prevailing Wage Law applies only to the actions of a "public body", which includes all State agencies. Article 21, §8-501(d)(1). Under the present program of State aid for school construction, contracts for school construction are made, not by a State agency, but by local boards of education. Nonetheless, for purposes of the Prevailing Wage Law, a local board of education is considered to be a "public body" if "State funds are used to provide 75 percent or more of the funds for the construction of the public elementary or secondary school". Article 21, §8-501(d)(3).<sup>3</sup>

The question, then, is whether a local board of education may—by voluntarily undertaking to pay more than 25% of the total cost of a school construction project—take itself out of the statute's definition of a "public body" and thereby avoid the application of the Prevailing Wage Law to the project.<sup>4</sup>

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<sup>2</sup> The term "public works" is broadly defined to include "all buildings, bridges, roads, streets, alleys, ditches, sewage disposal plants, waterworks and all other structures or works, constructed for public use or benefit or paid for wholly or in part out of public funds". Article 21, §8-501(c).

However, this statutory definition excludes public works contracts of less than \$500,000. The scope of this Opinion, therefore, is limited to school construction contracts of \$500,000 or more.

<sup>3</sup> Pursuant to Article 21, §8-501(d)(2), any political subdivision of the State may elect to be covered by the Prevailing Wage Law. Our Opinion does not address that situation: If a political subdivision has made such an election, there would be no question that the Prevailing Wage Law would apply to all public works projects in the political subdivision, because the subdivision itself would then be deemed a "public body" for purposes of the statute. *Id.*

<sup>4</sup> The Interagency Committee, as agent for the Board of Public Works, must approve all proposed awards of school construction contracts to be funded with State aid. *Rules, Regulations and Procedures for the Administration of the School Construction Program*, §9(b) (June 10, 1981). If a school construction project is subject to the Prevailing Wage Law, the Interagency Committee may not properly approve a contract permitting the payment of wages below prevailing wage rates. See 57 *Opinions of the Attorney General* 178, 184 (1972).

## II

## History of the Prevailing Wage Law

The requirement that workers on State construction projects generally be paid prevailing wage rates has been a part of Maryland law since 1969. Chapter 558, Laws of Maryland 1969.<sup>5</sup> Like similar laws in other states, Maryland's Prevailing Wage Law is apparently designed to prevent public works contractors from undercutting wage rates in the local construction industry. "The common rationale of [prevailing wage] statutes, including that of Maryland, seems to be one of wage stabilization—to assure that wage rates generally prevailing in the construction industry in particular areas are not adversely affected by major public works projects undertaken in those areas." *Barnes v. Commissioner of Labor and Industry*, 45 Md. App. 396, 404 (1980), *aff'd*, 290 Md. 9 (1981).

As originally enacted, the Maryland Prevailing Wage Law applied only to the State and those State departments, officers, boards, commissions, and agencies not "funded primarily from sources other than the State". Former Article 100, §96(d), as enacted by Chapter 558, Laws of Maryland 1969. Counties, municipal corporations, and their boards, commissions, and other agencies were excluded from the statutory definition of "public body" and, consequently, were entirely exempt from the Prevailing Wage Law. *Id.*

In 1971, however, the definition of "public body" was revised to bring county and municipal agencies within the statute's purview—but only "when state public funds are the *only* funds used for the construction of a particular public works". Former Article 100, §96(d)(1), as amended by Chapter 220, Laws of Maryland 1971.<sup>6</sup> The definition expressly excluded "any county or municipal corporation, or any department, officer, board, commission, or agency thereof,

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<sup>5</sup> Before the 1969 enactment, Maryland's prevailing wage law applied only to road construction in Allegany, Garrett, and Washington Counties. Former Article 89B, §25 (repealed by Chapter 558, Laws of Maryland 1969).

<sup>6</sup> That amendment also broadened the statute's coverage of State agencies to include all those not "funded wholly from sources other than the State"—that is, to include all State agencies that received some State funds, even if their primary source of funding was not the State. Former Article 100, §96(d)(1), as amended by Chapter 220, Laws of Maryland 1971.



when funds other than state funds are used either in whole or in part for the construction of public works". *Id.*

In 1983, the definition of "public body" was again revised, this time to add a special definition relating to public school construction:

"In the case of a public work which is a public elementary or secondary school, 'public body' means an agency, political subdivision, corporation, person, or entity of whatever nature when State public funds are used to provide 75 percent or more of the funds for the construction of the public elementary or secondary school, but . . . 'public body' does not include any county or municipal corporation, or any department, officer, board, commission, or agency thereof, when less than 75 percent of the funds used for the construction of a public elementary or secondary school are State funds." Article 21, §8-501(d)(3) (enacted by Chapter 70, Laws of Maryland 1983).<sup>7</sup>

The trend of the General Assembly's actions on the Prevailing Wage Law has clearly been in the direction of expanding the law's applicability to local agencies' projects. But, just as clearly, the General Assembly has consistently chosen to make the law inapplicable when a local agency contributes in some substantial form to a public works project.

### III

#### Analysis

##### A. *School Construction Program*

Under Maryland's program of State aid for school construction, "[t]he State shall pay the costs in excess of available federal funds of all public school construction projects and public school capital improvements", as approved by the Board of Public Works. Education

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<sup>7</sup> The 1983 revision also amended the statute's existing definition of "public body" to include all State agencies, regardless of the source of their funding, and to include "any other . . . entity of whatever nature when State public funds are used to provide 50 percent or more of the funds for the construction of a particular public works". Article 21, §8-501(d)(1).

Article, §5-301(b). And, with respect to “the administration of the public school construction program, the power of the Board of Public Works is plenary and supreme”. 64 *Opinions of the Attorney General* 118, 121 (1979).

Nonetheless, the State has not preempted the field of public school construction. *Ansell v. Howard Co. Council*, 264 Md. 629, 636 (1972). And the plenary power of the Board of Public Works to administer a State aid program does not impair the residual power of local authorities to expend local funds rather than request State aid. *See* 264 Md. at 636-37.

Nothing in the school construction program precludes a local board of education from expending local funds on a school construction project in preference to the State funds the local board could request. Put another way, §5-301(b) of the Education Article obligates the State to offer, but does not obligate the local board of education to accept, State aid for school construction.

#### B. *Prevailing Wage Law*

Article 21, §8-501(d)(3) exempts school construction projects from the Prevailing Wage Law whenever “less than 75 percent of the funds used for the construction . . . are State funds”. Thus, the General Assembly has established a wholly objective test for the law’s applicability to a particular project. In our view, such a test does not give the Interagency Committee occasion to examine how the level of State funding was determined or to inquire into the reasons for a local board’s decision to request less State aid than it might.

In 1972, this Office suggested that a local board’s “token contribution” to the cost of a school project, made for the purpose of removing the project from the Prevailing Wage Law’s ambit, would be ineffective for that purpose. 57 *Opinions of the Attorney General* 178, 183 (1972) (construing then Article 100, §96(d)(1)). The Attorney General considered that “such a subterfuge would not be condoned by the courts”, although the law’s terms then exempted local agencies’ projects unless they were funded wholly by the State. *Id.* The Attorney General therefore recommended that, to assure compliance with the law, the Commissioner of Labor and Industry “ascertain the existence of a bona fide purpose for the county board’s contribution”, in part by considering whether the contri-

bution is "more than just *de minimis*". Given subsequent events, however, we do not believe that this earlier concern for the purpose or relative insubstantiality of a local board's contribution is still viable.

In 1974, the Court of Appeals questioned the use of a "*de minimis* rule" in analyzing the effect of a local school board's actions. *Demory Brothers, Inc. v. Board of Public Works*, 273 Md. 320 (1974). In *Demory Brothers*, the Court of Appeals affirmed a Court of Special Appeals holding that the local board's payment of building permit fees for a construction project did not exempt the project from the Prevailing Wage Law. At the same time, however, the Court said that it was "troubled by [the lower court's] having reached that decision by the application of the doctrine of *de minimis non curat lex*". 273 Md. at 331.<sup>8</sup> Noting that the 1971 amendment to the Prevailing Wage Law "specifically provided that the law should be applicable 'when state public funds are the *only* funds used for the construction of a particular public works'", the Court of Appeals stated: "We assume, without deciding, that when the Legislature said 'only' it meant 'only.'" 273 Md. at 332. Accordingly, although the Court of Appeals arrived at the same conclusion as the Court of Special Appeals, it did so on an entirely different basis: on the fact that payment of the fees was not an actual expenditure of *any* county funds, but "merely a transfer of county monies from one county pocket to another". 273 Md. at 331.

Subsequently, the Court of Special Appeals ruled that two school construction projects were exempt from the Prevailing Wage Law, under the 1971 amendment, because some county funds were used on the projects. *Associated Builders and Contractors of Maryland, Inc. v. Commissioner of Labor and Industry*, 31 Md. App. 171 (1974), *aff'd per curiam*, 278 Md. 464 (1976). That court found both the relatively small size of the county's contribution, in one case, and the purpose for which county funds were used, in the other, to be immaterial to a determination of the Prevailing Wage Law's applicability. 31 Md. App. at 179-80.<sup>9</sup> The court did note, however, albeit in dicta, that the counties'

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<sup>8</sup> The phrase "*de minimis non curat lex*" means "the law does not . . . take notice of very small or trifling matters". *Black's Law Dictionary* 388 (5th ed. 1979).

<sup>9</sup> The Wicomico County Board of Education undertook to pay for specific improvements amounting to approximately 1% of the project's total cost. Talbot County's more substan-

contributions were "not . . . made for the purpose of avoiding" the Prevailing Wage Law. 31 Md. App. at 180.

Although these cases are not altogether clear on the matter, they do suggest that the Maryland courts would not apply the *de minimis* doctrine to local funding of a school construction project. That is, local funding of even slightly more than the statutory threshold would apparently be sufficient to remove a project from the Prevailing Wage Law's purview.

Moreover, whatever might have been the *de minimis* doctrine's appropriateness in 1972, the statute has since been significantly modified. We believe that the current statute's clear and unambiguous language now establishes a purely objective, percentage-of-contributions test for determining whether a local contribution is sufficiently "substantial" to exempt a project from the Prevailing Wage Law. By its own terms, the law does not apply—and, consequently, the project contracts need not include prevailing wage rates—"when less than 75 percent of the funds used for the construction of a public elementary or secondary school are State funds". Article 21, §8-501(d)(3). Thus, the statute itself now sets a precise standard of "substantiality": any local contribution of more than 25%.

In our view, such a precise standard affords no occasion for inquiry into the means or motive whereby the level of State funding might be held below the designated cut-off line, nor for considering whether a project is eligible for more State funds than are actually used. See *Baltimore Building and Constr. Trades Council v. J. Gordon Barnes, Inc.*, 290 Md. 9, 15 (1981) (to carry out the legislative intent, a court will consider statutory language in its "natural and ordinary signification").

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tial contribution—approximately 10% of the total project cost—was undertaken to make a new school auditorium usable as a community cultural center. The Commissioner of Labor and Industry had ruled that the local contribution to the Wicomico County project made the Prevailing Wage Law inapplicable to it; this ruling was sustained by the Court of Special Appeals. However, because the Commissioner found that the noneducational purpose of Talbot County's contribution was "not a bona fide purpose within the meaning of" the Prevailing Wage Law, he ruled that the law did apply to that project; this ruling was overturned by the Court of Special Appeals.

For these reasons, we believe that the Prevailing Wage Law in its present form allows a local board of education, if it so chooses, to remove a project from the law's ambit by paying more than 25% of the construction costs with local funds.

#### IV

#### Related Issues

There are two related points to which we wish to draw your attention.

##### *A. Assurances of Compliance*

First, when a local board plans to contribute more than 25% of the funds for a project and, on that basis, requests Interagency Committee approval of a contract that has not been bid with prevailing wage rates, the Committee can and should condition its approval on the local board's actually making the expected contribution.

Because we conclude that §8-501(d)(3) means neither more nor less than what it states, we believe the Prevailing Wage Law applies whenever State funds are actually used for 75% of a school construction project's final cost—including any change orders. Thus, if a change order would increase the anticipated cost of a project that was bid with less than prevailing wage rates, the change should be funded in a manner that will not raise total State funding to 75% of the project's final cost.

We therefore suggest that, if the Committee approves a proposed contract that does not include prevailing wage rates, the approval resolution provide that State funding must be limited to less than 75% of the project's total cost, including any change orders.<sup>10</sup> This advice applies equally (i) to school construction projects approved for immediate funding and (ii) to "forward funded" projects, which are initially funded by a local board of education but "recognized" by the Interagency Committee with the understanding that the Committee will consider reimbursement of eligible costs in some future fiscal year.

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<sup>10</sup> Again, our discussion here is limited to school construction contracts of \$500,000 or more. See note 2 above.

### B. Differing Statutory Standards

Second, we note that whether an item is "an approved public school construction or capital improvement cost" eligible for State funding under the school construction program does not determine whether it is a "cost of construction" for purposes of the Prevailing Wage Law.

Under the school construction program, "the Board of Public Works shall define by regulation what constitutes an approved public school construction or capital improvement cost". Education Article, §5-301(a). In contrast, the Prevailing Wage Law defines "construction", by statute, as "all construction, reconstruction, painting and decorating, alteration, maintenance or repair". Article 21, §8-501(b). Thus, the two terms have no direct bearing on each other and should not be confused.

Hence, for example, a school construction cost not eligible for State funding under the school construction program might still have to be included, for purposes of determining Prevailing Wage Law applicability, in calculating the size of the local board's contribution to the project. *See Associated Builders and Contractors of Maryland, Inc. v. Commissioner of Labor and Industry*, 31 Md. App. 171 (1974), *aff'd per curiam*, 278 Md. 464 (1976).<sup>11</sup>

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<sup>11</sup> In this regard, a special note is warranted regarding the role that architects' fees play in the equation. In 57 *Opinions of the Attorney General* 178, 183 (1972), the Attorney General advised that architectural plans and architectural services "should properly be considered as part of the 'construction of a particular public works' " for purposes of the Prevailing Wage Law.

However, architectural services are not performed by the general contractor or their subcontractors, and architects' fees are not included in the contract for the construction of a school. In *Associated Builders*, for example, the Court of Special Appeals determined that the counties involved had contributed to "costs of construction", thereby avoiding Prevailing Wage Law application, solely on the basis of costs they had paid under their general contracts. *See* note 9 above and accompanying text. We also note that the payment of architects' fees does not affect the applicability of the federal prevailing wage statute, the Davis-Bacon Act, which applies to contracts of \$2,000 or more involving the employment of "laborers and/or mechanics". 40 U.S.C. §276a(a). Similarly, Maryland's Prevailing Wage Law, patterned after the Davis-Bacon Act, was not designed to protect architects and their employees but "laborer[s], workm[en], and mechanic[s]" and their apprentices. *See* Article 21, §§8-501(f) and 8-502(a).

*Continued on page 229*

On the other hand, if a school construction cost is eligible for State funding, but a local board chooses to contribute its own funds instead, that contribution also may be considered in determining the proportion of the project's costs that are funded from non-State sources. The costs contributed by a local board need only meet the Prevailing Wage Law's definition of "construction" costs to be included in calculating the percentage of costs paid by the local board.<sup>12</sup>

## V

### Conclusion

In summary, it is our opinion that a local board of education may voluntarily waive a portion of the State aid for which a school construction project is eligible and thereby remove the project from the Prevailing Wage Law's purview. Under Article 21, §8-501(d)(3), the

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We believe, therefore, that architectural plans and services should not be considered "costs of construction" for purposes of the Prevailing Wage Law. Thus, we specifically overrule 57 *Opinions of the Attorney General* 178 (1972) to the extent that the Opinion advised that architectural plans and services should be considered "costs of construction" under the Prevailing Wage Law.

<sup>12</sup> Of course, a local board may not include in a "school project" some other county construction project, not a part of that particular elementary or secondary school, and then count the county funds contributed for that other construction project as local funds contributed for the construction of the school.

See also the discussion in note 11 above regarding architects' fees.

law applies to a school construction contract only if 75% or more of the funds actually used are State funds. Thus, the Interagency Committee may approve a proposed construction contract that does not provide for prevailing wage rates if the local authority commits itself to funding more than 25% of the total cost of construction.

STEPHEN H. SACHS, *Attorney General*

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*Assistant Attorney General*

AVERY AISENSTARK  
*Chief Counsel,  
Opinions and Advice*

*Editor's Note:* Since the issuance of this Opinion, the State Prevailing Wage Law has been recodified twice, without substantive change. The provisions of Article 21 cited in the text are now to be found, with identical section numbering, at Title 18, Subtitle 5 of the State Finance and Procurement Article. Effective July 1, 1987, the Prevailing Wage Law will be Title 12, Subtitle 3 of that Article.



## PUBLIC INFORMATION

ARCHITECTS AND ENGINEERS—CONSTRUCTION DRAWINGS—“CONFIDENTIAL COMMERCIAL DATA”—“TRADE SECRETS”—DRAWINGS SUBMITTED TO OBTAIN BUILDING PERMIT NOT NECESSARILY EXEMPT FROM PUBLIC DISCLOSURE, BUT SUBMITTER SHOULD BE GIVEN OPPORTUNITY TO SHOW POSSIBLE COMPETITIVE INJURY.

February 3, 1984

*Timothy E. Welsh, Esq., County Solicitor  
Ellicott City, Maryland*

You have requested our views as to the status of certain construction drawings under the Maryland Public Information Act.\* Specifically, you ask whether architectural and engineering plans that are submitted to the County as a prerequisite to issuance of a building permit are exempt from mandatory disclosure under the Act.

For the reasons given below, we conclude that these drawings are generally not exempt from mandatory disclosure. However, because such documents, in some instances, may contain confidential commercial data within the meaning of Article 76A, §3(c)(v) of the Maryland Code [SG §10-617(d)(2)], the submitter of any construction drawing of which inspection is sought should be afforded the opportunity, in advance of disclosure, to present evidence of any competitive injury that would likely result from disclosure of the drawings.

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\* [Editor's Note: Since the issuance of this Opinion, the Maryland Public Information Act has been recodified, without substantive change, as Title 10, Subtitle 6, Part III of the State Government Article ("SG" Article). Cross-references to the new codification have been added to the text in brackets. In addition, the *Public Information Act Manual* cited in the Opinion has been updated and reissued. Page references to the Fourth Edition of the *Manual* have been added to the text in brackets.]

## I

## Construction Drawings Under County Code

The Howard County Code provides as follows:

“[N]o building or structure of any kind . . . shall be erected, . . . repaired, . . . or demolished . . . without first obtaining a permit in writing signed by the department of public works of Howard County . . . No application for a permit shall be considered and no permit granted unless and until all information required by the department of public works is supplied, and plans and specifications showing the nature and character of the work to be done [are submitted].” §3.100(a).

For commercial or industrial projects, for example, the Department of Public Works requires “[t]wo . . . complete sets of construction drawings . . . sealed and signed . . . by a registered architect or engineer”. Commercial/Industrial Building Permit Submission ¶3 (undated).

## II

## Scope of the Maryland Public Information Act

The Maryland Public Information Act (“MPIA”) applies to all “public records”, defined to mean all documents received by the State or a political subdivision “in connection with the transaction of public business”. Article 76A, §1(b) of the Maryland Code [SG §10-611(f)(1)(i)]. The construction drawings in question are “public records”;<sup>1</sup> hence, they are subject to the Act.

The basic principle of the MPIA is disclosure:

“All public records shall be open for inspection by any person at reasonable times, except as provided in this article or as otherwise required by law.” Article 76A, §2(a) [SG §10-613(a)].

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<sup>1</sup> The definition of “public records” specifically includes “any . . . drawing, . . . including all copies thereof”. Article 76A, §1(b) [SG §10-611(f)(1)(ii)4].

In furtherance of this principle, the MPIA directs the custodians of records as follows:

“The custodian of any public records shall allow any person the right of inspection of such records . . . except . . . as [otherwise] provided in . . . this section[.]” Article 76A, §3(a) [SG §10-615].

### III

#### §3(c)(v): “Confidential Commercial Data”

##### A. *In General*

One exemption from mandatory disclosure that is potentially applicable to construction drawings is Article 76A, §3(c)(v) [SG §10-617(d)(2)], “confidential commercial data”:

“Trade secrets, information privileged by law, and *confidential commercial*, financial, geological, or geophysical data furnished by or obtained from *any person*[.]”

Your Office concluded that these drawings generally do come within §3(c)(v) [SG §10-617(d)(2)], because nondisclosure would assure the “free flow of information to the government . . . , protect[ed] . . . the work product of Architects and Engineers from plagiarism . . . , and [discourage] potentially unlawful activity, aided by access to construction drawings”. Opinion of the County Solicitor No. 83-31, at 3 (September 7, 1983).

We do not doubt that the construction drawings are “commercial” in nature, reflecting the architect’s or engineer’s professional expertise. Thus, the determinative question is whether they are “confidential”, within the meaning of §3(c)(v) [SG §10-617(d)(2)].<sup>2</sup>

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<sup>2</sup> We think that construction drawings of this type would fall within the narrower category of “trade secrets” only in extremely rare circumstances. See *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280 (D.C. Cir. 1983); 63 *Opinions of the Attorney General* 355, 359 (1978). But see note 4 below.

In our view, the proper test for confidentiality under this MPIA exemption is that applied under the analogous exemption in the federal Freedom of Information Act ("FOIA"):

"[C]ommercial or financial information is 'confidential' for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain the necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

This two-prong test has since been "widely adopted" in FOIA cases. 1 O'Reilly, *Federal Information Disclosure* §14.08 at 14-45 (1983). See 63 *Opinions of the Attorney General* at 361 (applying the FOIA test to MPIA §3(c)(v) [SG §10-617(d)]). See also Attorney General's Office, *Public Information Act Manual* 22 (1983). But see 9 to 5 *Organization for Women Office Workers v. Board of Governors of Federal Reserve Syst.*, 721 F.2d 1 (1st Cir. 1983) (other specific harms, in addition to those identified in *National Parks*, might permit assertion of the exemption).

#### B. *Impairment of Government Access to Information*

As to the first prong of the FOIA test, we do not believe that disclosure of the construction drawings in question would "impair" Howard County's "ability to obtain the necessary information in the future".

Submission of the drawings to the Department of Public Works is a statutory prerequisite to the issuance of a building permit—so anyone who wants a permit has no choice but to submit the drawings, whether they are subject to subsequent disclosure or not. Put another way, the information is "necessary" to the County only when it considers whether to issue a requested permit; and the County can readily compel the submission of the drawings, regardless of their MPIA status, by simply refusing to issue a permit if the drawings are not submitted.

In short, this is not a situation in which disclosure would cause "persons having necessary information . . . [to] decline to cooperate with officials". *National Parks & Conservation Ass'n v. Morton*, 498 F.2d at 767.

*C. Likelihood of Competitive Injury*

The other potential basis for nondisclosure under MPIA §3(c)(v) [SG §10-617(d)(2)] turns on the likelihood of substantial competitive injury to the submitter of the documents. We have found no cases, federal or State, that apply the competitive injury test to construction drawings of precisely the kind in question here. However, an analogous FOIA case does provide some guidance.

In *Air Line Pilots Ass'n v. FAA*, 552 F.Supp. 811 (D.D.C. 1982), some of the documents at issue were engineering drawings relating to the design of a passenger aircraft, which had been prepared and submitted to the government by the manufacturer:

"The representative engineering drawing . . . consists of three pages of blueprints portraying technical design information about, evidently, the aircraft's door assembly and thrust reverser mechanisms. The drawings demonstrate such things as the spatial relationship of the components, the types of parts used, the manner in which the various parts were attached, metallurgical specifications, manufacturing tolerances, and so on. The title block for each drawing includes the subject or title of the drawing, identification numbers for parts and revisions, the date of preparation, and the names of the officials involved in the preparation of the drawing." 552 F.Supp. at 813.

The court decided that these drawings were exempt from mandatory disclosure under the FOIA. "Disclosure of this information would give potential competitors . . . in the market for . . . replacement parts an unfair advantage", because the drawings would reveal the manufacturer's design "modifications" and "secrets". 552 F.Supp. at 814-15. *Cf. Worthington Compressors, Inc. v. Costle*, 662 F.2d 45 (D.C. Cir. 1981) (design and engineering specifications exempt).

The principle of this case is applicable here. A construction drawing is exempt under §3(c)(v) [SG §10-617(d)(2)] to the extent that the drawing embodies a technique or a building component that (i) is not a common or obvious element of the type of construction in question and (ii) if disclosed, would give the competitors of the architect or engineer a concrete advantage in obtaining future work on that or a similar project.

Conversely, if a drawing merely reflects the routine practice of the profession, or if evidence of competitive injury is no more than unsupported speculation, the exemption may not be asserted. See generally *Continental Stock Transfer & Trust Co. v. SEC*, 566 F.2d 373 (2d Cir. 1977) (widely available information not exempt); *Miami Herald Publ. Co. v. SBA*, 670 F.2d 610 (5th Cir. 1982) ("unsupported speculation" about competitive injury insufficient).

As a practical matter, we question whether many construction drawings will be exempt under this test. It seems unlikely that construction projects very often entail unique know-how. Indeed, the profession itself does not view all such documents as necessarily confidential:

"[The American Institute of Architects] does not have an official policy on the confidentiality of drawings . . . I am personally unaware of any other requirements of confidentiality within the profession but would suggest that each such case must be individually examined." Letter from Alan B. Stover, General Counsel of the American Institute of Architects, to Jack Schwartz, Assistant Attorney General (January 25, 1984).<sup>3</sup>

Nevertheless, we certainly cannot rule out in advance the possibility of an exempt construction drawing.<sup>4</sup> We agree with the American Institute of Architects that "each case must be individually examined". Thus, when an MPIA request for access to construction drawings is received, we suggest that the custodian of the records should inform the person who submitted the drawings and solicit any evidence of unusual competitive sensitivity. See Attorney General's Office, *Public Information Act Manual* at 23 [34].

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<sup>3</sup> On the other hand, the architects and engineers with whom the County deals apparently do regard all of their drawings to be confidential. Opinion of the County Solicitor No. 83-31, at 3. In any event, the confidential status of information within a trade or company is relevant to, but not determinative of, the information's status under the MPIA. See 63 *Opinions of the Attorney General* at 361.

<sup>4</sup> For example, a drawing might reveal the details of an innovative heating system and thereby permit competitively injurious copying by competitors. See 1 O'Reilly, *Federal Information Disclosure* §14.08 at 14-63 n. 53. In very rare situations, a drawing might even reveal a "trade secret" within the meaning of §3(c)(v) [SG §10-617(d)(1)]—for example, some details of an advanced production method in a manufacturing facility. Cf. note 2 above.

## IV

## Conclusion

In summary, it is our view that construction drawings submitted to Howard County as a prerequisite to issuance of a building permit are generally not exempt from mandatory disclosure under the Maryland Public Information Act. However, because such documents, in some instances, may contain confidential commercial data within the meaning of Article 76A, §3(c)(v) of the Maryland Code [SG §10-617(d)(2)], the submitter of any construction drawing of which inspection is sought should be afforded the opportunity, in advance of disclosure, to present evidence of any competitive injury that would likely result from disclosure of the drawings.<sup>5</sup>

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<sup>5</sup> By focusing on §3(c)(v) [SG §10-617(d)(2)], the most likely basis for withholding, we do not mean to suggest that other possible reasons for nondisclosure are absolutely foreclosed. If, in extraordinary circumstances, §3(c)(v) [SG §10-617(d)(2)] is inapplicable, but nevertheless "disclosure of the contents of [the drawing] would do substantial injury to the public interest", the "the official custodian may temporarily deny disclosure[,] pending a court determination", under the procedures set out in Article 76A, §3(e) [SG §10-619]. See Attorney General's Office, *Public Information Act Manual* at 28-29 [34-35].

## PUBLIC OFFICERS

RESIDENCY REQUIREMENTS—LOCAL GOVERNMENT—MUNICIPALITIES—MAYOR—UNDER FACTS OF PARTICULAR CASE, MAYOR MEETS TOWN RESIDENCY REQUIREMENT EVEN THOUGH SPOUSE RESIDES OUTSIDE OF TOWN.

March 26, 1984

*The Honorable John Howard Burbage*  
*Mayor of Berlin*

You have requested our opinion on whether you are a legal resident of the Town of Berlin within the meaning of §C4-2 of the Town Charter.

Section C4-2 of the Town Charter expressly requires that a candidate of the office of Mayor “have resided in the town for at least one . . . year immediately preceding his election”; implicitly, this also requires that the Mayor maintain a residence in the town throughout his or her tenure.<sup>1</sup> Although you have been the Mayor of Berlin for some 22 years—and you consider yourself to have been a lifelong resident of Berlin since the age of 7—questions periodically have been raised by others as to whether you in fact meet the Charter’s residency requirement.

At the outset, we should emphasize that questions like this are not normally the kind that can be answered definitively in an advisory opinion. Rather, as the courts have indicated, determinations of residency require an intensive and complete scrutiny of all of the facts and circumstances of a given case.<sup>2</sup> Moreover, some of the facts and circumstances of your case are somewhat atypical—necessarily preventing

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<sup>1</sup> See *Dorf v. Skolnik*, 280 Md. 101, 115 (1977): “[W]hen residence is a prerequisite to a given office[,] then a change of residence vacates that office, absent a legislative expression to the contrary.”

<sup>2</sup> See, e.g., *Comptroller of the Treasury v. Haskin*, 298 Md. 681, 691 (1984) (“Domicile by its very nature depends upon . . . a multitude of factors associated with th[e] particular individual.”) Normally, those factors can best be developed only through an adversarial proceeding—such as in a court of law. Absent such a proceeding, one can never be sure of knowing *all* of the relevant facts and circumstances of a particular case.



us from predicting with complete certainty how a court ultimately might rule. Nevertheless, because of the unusual nature of your situation, we will try to advise you of our views on the matter.

As explained more fully below, based on the relevant facts and circumstances known to us, we believe that you are a resident of the Town of Berlin. Put another way, if your residency qualifications were challenged in court, we believe that you would likely prevail.

## I

### Factual Overview

The basic factual background, as you have explained it to us, can be summarized as follows:<sup>3</sup>

You were born in Snow Hill, Maryland in 1916. In 1923, when you were 7 years old, your family moved to the Town of Berlin, Worcester County, Maryland. You grew up and went to school in Berlin.

In 1935, you married your first wife in Berlin. Your son and daughter were born in Berlin. From 1935 until 1959, when your first wife died, you lived with your wife and children in a house located in Berlin. After your wife's death, you continued to live in that house with your children. Until their high school graduation, your children attended school exclusively in Berlin.

In 1962, you were first elected Mayor of Berlin. You have continuously served in that capacity to date, for some 22 years. At the time you were first elected Mayor, the Town Charter required—as it still does—that the Mayor both “have resided in the town” and “be a qualified voter of the town”. See §32 of the Code of Public Local Laws of Worcester County (1961 ed.). And, at that time, a “qualified voter of the town” was required, among other things, to “ha[ve] resided within the corporate limits of the town for six months next

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<sup>3</sup> In Part III below, we will review these and several other, more specific facts and circumstances relevant to this inquiry. The following introductory overview, however, might be helpful to place the issue in proper perspective.

preceding any town election". *See* §38 of the Code of Public Local Laws of Worcester County (1961 ed.).<sup>4</sup>

In 1964, you married your present wife, who owned a home in Salisbury, Wicomico County, Maryland. Although your present wife decided to continue living in Salisbury, you nevertheless retained your house in Berlin—where you maintained a residence for yourself and for your two children, who continued to attend school in Berlin.

A few years later, after your children were graduated from high school and had begun to attend college away from home, you sold this house and moved your Berlin living quarters to a furnished apartment located at 11 Williams Street/7 North Main Street, Berlin, Maryland.<sup>5</sup>

Although you do, of course, spend time with your wife in Salisbury, you nevertheless have continuously maintained your apartment in Berlin as your intended legal residence. You use this apartment regularly—albeit not exclusively—for living, eating, and sleeping, and it is fully furnished for those purposes. The house in Salisbury where your wife resides is titled in her name alone; you have no legal or equitable interest in that property.<sup>6</sup>

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<sup>4</sup> In 1964, §38 was amended to delete town residency as a requirement for voting in town elections, while retaining a requirement that a voter own property in the town with an assessed value of at least \$100. *See* §38 of the Public Local Laws of Worcester County (1961 ed., 1965 supp.). As even later amended, the Town Charter now permits voting in town elections by anyone who either resides in the town or owns property in the town with an assessed value of at least \$200. *See* §C6-1 of the Town Charter.

<sup>5</sup> This apartment is in the same building as is your business office. The building is located at the corner of Main and Williams Streets—hence the alternative street addresses.

<sup>6</sup> You acknowledge that, on an average, you might spend more nonbusiness hours in Salisbury than in Berlin. Nevertheless, you have indicated that this is solely as an accommodation to your wife, who does not wish to reside in Berlin, and that it does not at all reflect any intent on your part to abandon your previously established residence in Berlin and acquire a new residence in Salisbury. *See* notes 15 and 16 below and accompanying text.

The issue, in sum, is whether your true, legal residence is in Berlin or Salisbury.<sup>7</sup>

## II

### Legal Overview

The most instructive case involving issues of residence—and the factors to be considered in resolving those issues—is *Bainum v. Kalen*, 272 Md. 490 (1974). In this Part, we will review the applicable definitions, presumptions, and factors to be considered, as identified in that case.

#### A. *Residence as Domicile*

As indicated in *Bainum*, the term “residence”, when used in the context of a qualification for public office, means “domicile”:

“[T]his Court has consistently held that the words ‘reside’ or ‘resident’ in a constitutional provision or statute delineating rights, duties, obligations, privileges, etc., would be construed to mean ‘domicile’ unless a contrary intent be shown. Thus, our predecessors stated in *Howard v. Skinner*, [87 Md. 556, 559 (1898)]: ‘Residence, as contemplated by the framers of our Constitution, for political or voting purposes, means a *place of fixed present domicile*.’ ” *Bainum*, 272 Md. at 496 (emphasis in original).

Thus:

“A person may have several places of abode or dwelling but [h]e can have only one domicile at a time.’ *Shen-ton v. Abbott*, [178 Md. 526, 530 (1940)]. A person’s domicile has been defined as the place ‘with which he has a settled connection for legal purposes’ and the ‘place where a man has his true, fixed, permanent home, habit-

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<sup>7</sup> You also own vacation homes in Ocean City, Maryland, and in Florida. However, there appears to be no factual basis for considering either of these places as your legal residence—nor, apparently, has anyone contended otherwise.

ation and principal establishment, without any present intention of removing therefrom, and to which place he has, whenever he is absent, the intention of returning.' *Shenton v. Abbott*, *supra*, 178 Md. at 530." *Bainum*, 272 Md. at 497.

### B. Presumptions

The "controlling factor" in determining a person's domicile is his or her intent. *Comptroller of the Treasury v. Haskin*, 298 Md. 681, 691 (1984). Thus, as the Court of Appeals explained in *Bainum*:

"One's domicile, generally, is that place where he intends it to be. *Harrison v. Harrison*, [117 Md. 607, 614 (1912)]; *Wagner v. Scurlock*, [166 Md. 284, 292 (1934)]; *Gallagher v. Bd. of Elections*, [219 Md. 192, 198 (1959)]. However, the determination of intent is not dependent upon what one says at a particular time. As this Court has stated, intent regarding domicile 'may be more satisfactorily shown by what is done than by what is said.' *Wagner v. Scurlock*, *supra*, 166 Md. at 292; *Harrison v. Harrison*, *supra*, 117 Md. at 614." *Bainum*, 272 Md. at 497.

There are certain "well established principles", or presumptions, used in determining a person's intent with regard to his or her domicile:

First, there is the presumption that "once a place of domicile is determined or established, a person retains his domicile there unless the evidence affirmatively shows an abandonment of that domicile." *Bainum*, 272 Md. at 498. *See also Comptroller v. Haskin*, 298 Md. at 690-91.

Second, "[t]he presumption of the law is that where a person actually lives is his domicile, though this is a rebuttable presumption." *Bainum*, 272 Md. at 498 (quoting *Harrison v. Harrison*, 117 Md. at 615).

Finally, the "'highest evidence of domicile'" is where a person votes. *Bainum*, 272 Md. at 498 (quoting *Wagner v. Scurlock*, 166 Md. at 292).

In cases where these presumptions coincide in pointing to but one jurisdiction, the inquiry usually is at an end. Where, however, these

factors do not coincide or are themselves less than clear, or where—as, perhaps, is the case here—“there are special circumstances explaining a particular place of abode”—the court will “look to and weigh a myriad of other factors in deciding a person’s domicile”. *Bainum*, 272 Md. at 498-99.

### C. Additional Factors

In *Bainum*, 272 Md. at 499, the Court of Appeals listed a number of the specific factors that, in addition to “any other facts revealing contact with one or the other jurisdiction”, a court would look to. And, in 56 *Opinions of the Attorney General* 189, 197-98 (1971), this Office also listed a number of factors that have been considered by the courts for this purpose. The following is a synthesis of those two lists:

1. Where the person is or has been registered to vote.
2. Whether the person has ever claimed any other place of residence for any reason.
3. Whether the person has taken an oath as to his or her residence.
4. Where the person pays taxes and the address given as his or her residence on tax returns.
5. Where the person is employed.
6. Where the person owns property.
7. Where the person’s automobile is registered.
8. What address is given on the person’s driver’s license.
9. What address is given on other licenses or governmental documents.
10. Where the person banks.
11. Where the person keeps charge accounts.
12. What address is given in contracts or documents.

13. The address at which the person receives mail.
14. Where furniture and other personal belongings are kept.
15. Which professional, fraternal, religious, or social organizations does the person belong to.
16. Where the person's children attend school.
17. Where the person's spouse and family reside.
18. Where the person's regular physicians and dentists are located.
19. How often the person returns to his or her purported place of residence.
20. In and to which community is the person best known.<sup>8</sup>

In applying these factors to any particular case, there is no requirement that the answers to all or any particular number of them uniformly point to a particular result. Rather, "[i]n the final analysis, the question of residency is a matter of judgment", based on the balanced application of these factors to the particular case. 56 *Opinions of the Attorney General* at 198. See also *Comptroller v. Haskin*, 298 Md. at 691 ("No single circumstance has ever been deemed conclusive.").

### III

#### Consideration of Specific Factors

Applying the information that you have provided us to the various factors listed in Part II C above, we find that, on balance, a Berlin domicile is suggested. We will review each of the factors in the order listed above.

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<sup>8</sup> Even this combined list is not exhaustive of the many possible factors that might be considered by a court as "revealing contact with one or the other jurisdiction". See note 2 above and accompanying text.

1. *Where the person is or has been registered to vote.*

As previously indicated, the “highest evidence of domicile” is where one votes. It is particularly significant, therefore, that for all of your adult life—for over 45 years—you have been registered in Berlin for purposes of voting in all town, county, state, and federal elections. That is, as you have advised us, you have never registered to vote as a resident of any locality other than Berlin; and you have never voted in any county, state, or federal election other than in, and as a resident of, Berlin.<sup>9</sup> To be sure, since 1964, residency in Berlin has not been a necessary prerequisite to voting in town elections; property ownership is enough.<sup>10</sup> Nevertheless, for purposes of county, state, and federal elections, property ownership is irrelevant; for those elections, one may only register to vote in the particular county and election district where one is domiciled.<sup>11</sup> In your case, you are registered as being domiciled in Berlin—specifically, in District 3, Precinct 1/Legislative District 38/Congressional District 1, where your apartment is located.<sup>12</sup>

2. *Whether the person has ever claimed any other place of residence for any reason.*

Since the age of 7, you have never claimed any place but Berlin as being your place of residence.

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<sup>9</sup> You have voted in Ocean City and Salisbury town elections, but you have done so solely in your capacity as a local property owner, never as a purported resident of either town.

<sup>10</sup> See note 4 above.

<sup>11</sup> See Article I, §1 of the Maryland Constitution; Article 33, §3-4(b)(4) of the Maryland Code.

<sup>12</sup> We understand that, sometime in the early 1970s, a dispute arose over your residence in Berlin and your consequent ability to vote in Worcester County elections. (Salisbury, of course, is in Wicomico County.) A hearing on the matter was held by the county board of supervisors of elections, which ultimately concluded that your residence in Berlin was legitimate, entitling you to register and vote as a county resident.

3. *Whether the person has taken an oath as to his or her residence.*

In registering to vote, you took an oath that your residence was in Berlin. See Article 33, §3-6 of the Maryland Code. Such an oath "is not a meaningless form". *Rasin v. Leaverton*, 181 Md. 91, 94 (1942).

4. *Where the person pays taxes and the address given as his or her residence on tax forms.*

Your state and federal tax returns all give your Berlin apartment as your place of residence, and you pay local income tax as a resident of Berlin, Worcester County.

5. *Where the person is employed.*

Although you have several business interests, your primary business for over three decades has involved the ownership and operation of a chain of department stores, "Style Guide", which has its principal office in Berlin. You also serve as a director of Calvin B. Taylor Bank in Berlin. You do not have any business office in Salisbury.

6. *Where the person owns property.*

You own property in Berlin, although you also own property in Salisbury, Ocean City, and elsewhere.<sup>13</sup>

7. *Where the person's automobile is registered.*

The registration card for a motor vehicle is required to contain "[t]he name and address of the owner". §13-408 of the Transportation Article. In your case, however, you do not have an automobile registered in your name.

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<sup>13</sup> You have told us that the property you own in Salisbury is investment property. And, as already indicated above, you have no financial interest in the house that your wife owns and lives in.



8. *What address is given on the person's driver's license.*

An applicant for a driver's license must "certify" his or her "residence address". §16-106 of the Transportation Article. In your case, that residence address is 11 Williams Street/7 North Main Street, Berlin.

9. *What address is given on other licenses or governmental documents.*

On your pilot's license, as well as all other licenses and governmental documents, your Berlin address is given as your residence.

10. *Where the person banks.*

You bank in Berlin. You do not maintain any bank accounts in Salisbury.

11. *Where the person keeps charge accounts.*

All of your credit cards (American Express, Master Charge, Telephone Charge Card, Hilton Hotel, etc.) are issued to you at your Berlin address.

12. *What address is given in contracts or documents.*

All of your other business and personal contracts and documents give your Berlin address as your residence.

13. *The address at which the person receives mail.*

Your mailing address is 11 Williams Street/7 North Main Street, Berlin, Maryland 21811.

14. *Where furniture and other personal belongings are kept.*

You keep personal belongings both in Berlin and in Salisbury.

15. *Which professional, fraternal, religious, or social organizations does the person belong to.*

You belong to several such organizations in Berlin—e.g., Lions Club, Masonic Lodge, and Chamber of Commerce. The library to

which you belong is in Berlin. You belong to churches in Berlin, Salisbury, and Ocean City. You are not a member of any professional, fraternal, or social organization in Salisbury.

16. *Where the person's children attend school.*

Before attending college, both of your children attended school exclusively in Berlin. Indeed, they did so even after your marriage to your present wife; and, even while your new wife lived in Salisbury, your children continued to reside and go to school in Berlin.

17. *Where the person's spouse and family reside.*

It is ordinarily presumed that the domicile of a married man is at the place where his wife and family reside. *Hill v. Board of Registry*, 171 Md. 653, 656 (1936). That presumption, however, is rebuttable. *Id.* In this regard, we note that, even after your second marriage and while your wife resided in Salisbury, your children continued to reside and attend school in Berlin. This factor, in addition to the several others discussed here, might well serve to rebut this presumption. *See also* Part IV C below.

18. *Where the person's regular physicians and dentists are located.*

Your regular physician and dentist are located in Berlin.

19. *How often the person returns to his or her purported place of residence.*

Obviously, you do spend as much time as possible with your wife in Salisbury. Nevertheless, you regularly return to and frequent your Berlin apartment.<sup>14</sup>

20. *In and to which community is the person best known.*

We do not know, and thus cannot evaluate, the full extent of your reputation in Salisbury. It is clear, however, that you are generally known, both in Berlin and in Salisbury, as a long-time

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<sup>14</sup> See note 6 above.

Berlin businessman and, for some 22 years, Mayor of Berlin. Indeed, given the charter requirement that the Mayor of Berlin be a resident of the town, it follows that the people of Berlin, who have repeatedly elected you as their Mayor, know and consider you to be a part of, and a resident in, their community.

#### IV

#### Analysis

##### A. *Introduction*

From our review of the facts reported to us, as set forth in Parts I and III above, it seems evident that your *intent* is, and always has been, to consider Berlin as your place of residence/domicile. It seems equally evident that, at least until 1964—when you married your present wife, and after you were first elected to be Mayor of Berlin—your place of domicile unquestionably was in Berlin.

The issue, then, is whether “the evidence affirmatively shows an abandonment of that domicile”. *Bainum*, 272 Md. at 498. That is, after your marriage in 1964, did you take up a new place of abode in Salisbury and, if so, did you do so with the intent of abandoning your domicile in Berlin? We think not.

##### B. *Discussion*

As indicated above, a person may have “several places of abode or dwelling”, but “only one domicile”. *Bainum*, 272 Md. at 497. And, as the Court of Appeals has repeatedly indicated:

“ ‘When one takes up a new residence, in order to avail himself of the rights which such change of domicile confers, it must not be so much with the intention of there remaining, but [with the intention] of the abandonment of his former domicile as a place of residence, and “excludes any definite intention to return to the place of the previous domicile.” ’ ” *Bainum*, 272 Md. at 498 (quoting *Wagner v. Scurlock*, 166 Md. at 292-93).

In your case, even if you were considered to have taken up a new or additional place of abode or dwelling with your wife in Salisbury, there appears to be no indication that you did so “to avail [yourself]

of [any] rights which [a] change of domicile confers". Simply put, you do not appear to have ever benefited from any legal right or privilege that might attend a domicile in Salisbury—or in any other place than Berlin.<sup>15</sup>

Even if you were said to "actually live" in Salisbury, the presumption of law that equates this to domicile "is a rebuttable presumption", particularly "where there are special circumstances explaining a particular place of abode". *Bainum*, 272 Md at 498-99. In our view, the several factors outlined in Part III above, might well serve to rebut such a presumption.<sup>16</sup>

Again, the "highest evidence of domicile" is the place where one votes. *Bainum*, 272 Md. at 498. In your case, that place is, and always has been, Berlin. Moreover, we do not believe that a court would lightly overlook the fact that, for some 22 years, you have in fact served as the Mayor of the Town of Berlin, elected to that position under a charter that requires the Mayor to be a town resident.

Finally, from the many other facts and circumstances reported to us, as outlined above, it appears that your contacts with Berlin are far more extensive than are your contacts with Salisbury.

### C. *The Hill Case*

We have found one reported case in Maryland with a fact pattern that is remarkably similar to yours. And that case strongly suggests that your claim to a domicile in Berlin is a legitimate one.

In *Hill v. Board of Registry*, 171 Md. 653 (1936), the Court was asked to resolve a dispute involving the residence of John P. Schultheis. Schultheis, professing to reside at 635 West Fayette Street, was registered to vote in the then Ninth Precinct of the Fourth Ward of Baltimore City. Schultheis's wife and family, however, resided at 140 North East Avenue in the then Twentieth Precinct of the Sixth Ward.

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<sup>15</sup> Indeed, as you have explained it, the sole reason for your "presence" in Salisbury is the fact that your wife wanted to continue living in the house that she had inherited prior to her marriage to you. See note 6 above.

<sup>16</sup> See also note 15 above.

The Court summarized the relevant facts of that case as follows:

“Schultheis is and for many years has been a saloon keeper. He formerly conducted a saloon at 22 Pearl Street, which is also in the Ninth Precinct of the Fourth Ward, in which he has been a registered voter for fourteen or fifteen years. Some three years ago he left the Pearl Street place and opened a saloon and restaurant at 635 West Fayette Street [in the same precinct and ward]

....

Notwithstanding the fact that he maintained a home for his wife and family on North East Avenue, Schultheis claims that he himself resided first at the Pearl Street saloon when he was in business there, and later at the Fayette Street place when he removed from Pearl Street. He had a room over the Fayette Street saloon, kept his clothes either there or at a tailor's place ‘across the street,’ he slept there, he was ‘there more than anywhere else,’ and although he spent a couple of evenings a week with his family, he regarded it as his home. He did that, he said, because the nature of his business kept him up late at night, and ‘rather than go home’ he would ‘stay up there.’ He had been registered from that precinct for many years, and the precinct itself is in the same legislative and congressional district and councilmanic ward as the home of his wife and family.” 171 Md. at 655.

Given those facts, the Court of Appeals concluded:

“Upon these facts it cannot be said as a matter of law that Schultheis was illegally registered as a voter in the Ninth Precinct of the Fourth Ward of Baltimore City. Apart from the fact that his wife and family reside in another precinct there could not well be any doubt of the soundness of that conclusion. But while it is presumed ordinarily that the domicile of a married man is at the place where his wife and family reside (19 C. J. 433), that presumption is rebuttable (*Ibid.*), for there is no principle of law which prevents a husband from having a legal residence apart from his wife and family.” 171 Md. at 656.

The facts in *Hill* are obviously quite similar to yours. The precedential value of this decision, however, is somewhat uncertain. In *Hill*, the Court quoted from—and seemingly relied in part on—a definition of “residence” found in the earlier case of *Schaeffer v. Gilbert*, 73 Md. 66 (1890). As later explained in *Bainum*, “[s]ome language in the opinion in *Schaeffer* . . . , arguably supports” the proposition that the term “reside”, as used in statutory qualifications for political office or voting, “means actual physical presence or abode rather than domicile”; and, “to the extent that it does, the language from the *Schaeffer* case [has since been] specifically disapproved” by the Court of Appeals in *Gallagher v. Board of Elections*, 219 Md. 192, 206 (1959). *Bainum*, 272 Md. at 496.

Nevertheless, the *ruling* in *Hill* has never been disapproved. And the other principles of law on which *Hill* relied—e.g., that a wife who lives apart from her husband can have a separate domicile of choice—are still valid today.<sup>17</sup> Finally, although there conceivably could have been other facts and circumstances present in *Hill* that were not described by the Court in its opinion, it nevertheless appears that there are considerably more factors in your case to support your claim of residence in Berlin than were described by the Court of Appeals as being sufficient to support the quite similar claim of residence in *Hill*.

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<sup>17</sup> Compare, e.g., *Restatement of Conflict of Laws* §28 (1934) (quoted in *Hill*, 171 Md. at 656-57) with *Restatement (Second) of Conflict of Laws* §21 (1971).

Moreover, the particular part of the *Schaeffer* definition of “residence” that the Court in *Hill* especially emphasized—that “one’s voting residence is ‘one’s actual home, in the sense of having no other home’ ”, *Hill*, 171 Md. at 658—is not unlike the currently accepted definition of “domicile”—the “place where a man has his true, fixed, permanent home, . . . without any present intention of removing therefrom”, *Bainum*, 272 Md. at 497.

We also note that, even since *Gallagher*, the *Hill* case has been cited with approval by both this office and the federal courts. See *Drueding v. Devlin*, 234 F.Supp. 721, 724 (D. Md. 1964), *aff’d*, 380 U.S. 125 (1965) (per curiam); 56 *Opinions of the Attorney General* 189, 194 (1971).

## V

## Conclusion

In the final analysis, based on our understanding of the relevant facts and circumstances of your case, as described to us—and necessarily subject to the caveat that there might be other facts and circumstances that we do not know about—it is our opinion that you are a legal resident of the Town of Berlin within the meaning of §C4-2 of the Town Charter. Hence, although the rather unusual nature of your situation prevents us from predicting with complete certainty how a court ultimately might rule on this question, we nevertheless believe that, if your residency qualifications were challenged in court, you would likely prevail.

STEPHEN H. SACHS, *Attorney General*

AVERY AISENSTARK,  
*Chief Counsel,  
Opinions and Advice*

## REAL ESTATE COMMISSION

REAL ESTATE BROKERS/SALESMEN—MERCHANDISING DISCOUNTS—  
“PRIZES”/“GIFTS”—PROHIBITION AGAINST LICENSEES’ GIVING  
OF “PRIZES” LIMITED TO AWARDS INVOLVING CHANCE—DIS-  
COUNT COUPONS FOR MERCHANDISE GIVEN TO ALL PURCHASER-  
CLIENTS NOT PROHIBITED.

February 23, 1984

*Mr. Donald E. Howard, Chairman,  
Maryland Real Estate Commission*

You have requested our opinion on whether a real estate licensee is prohibited by Maryland law from offering discounts on merchandise to persons who buy real property through the licensee. Specifically, you have asked whether a marketing program currently offered by Coldwell Banker is in violation of Article 56, §224(o) of the Maryland Code.

For the reasons given below, we have concluded that §224(o) does not prohibit a licensee from giving coupons for discounted merchandise through a marketing program that, like that of Coldwell Banker, is not a contest and does not involve an element of chance in order to receive the coupons.

In so concluding, we are aware that this response differs from that given in 44 *Opinions of the Attorney General* 316 (1959). Nevertheless, it is our view that the 1959 Opinion was wrong in this regard.

## I

## Background

*A. The Discount Program*

Sears Roebuck and Company is currently offering substantial discounts on merchandise to persons who buy real property through Coldwell Banker, a recently acquired real estate subsidiary of Sears.

Under this program, a real estate licensee associated with Coldwell Banker provides the purchaser-client at settlement with a “Home Buyer’s Savings Book” and a validation card. These documents entitle the client to receive a discount of up to 25% when buying specified merchandise from Sears; many of the discounted items are of special interest to homeowners.



All Coldwell Banker purchaser-clients receive the same coupon books, and all coupon books entitle these clients to identical discounts. Thus, there is no difference in value received by any one or another client, except to the extent that a client might choose not to buy a particular discounted item.

### B. *The Statute*

Article 56, §224(o) of the Maryland Code prohibits real estate licensees from "[s]oliciting, selling, or offering for sale real property by offering 'free lots' or conducting lotteries or contests, or offering prizes for the purpose of influencing a purchaser or prospective purchaser of real property".

Since there can be little doubt that the purpose of the discount program in question is to influence prospective homebuyers to deal with Coldwell Banker, the legal issue presented for resolution is simply stated: Do the proffered discounts on merchandise constitute prohibited "prizes" under §224(o)?

## II

### Analysis

#### A. *The 1959 Opinion*

The 1959 Opinion concluded, without any analysis, that a licensee who advertised free gifts contingent upon the purchase of a home through the licensee violated §224(o):

"It would seem that the practice of the real estate firms of offering free gifts . . . clearly violates the provisions of Section 224." 44 *Opinions of the Attorney General* 316, 316 (1959).

We believe that this conclusion was wrong, because the Opinion failed to consider a well-established distinction between "prizes" and "gifts"—the element of competition or chance.

#### B. *Chance as an Element of "Prize"*

Cases considering this and similar issues have consistently identified chance as being a necessary element when designating a reward as an

illegal "prize". For example, in *Great Atlantic & Pacific Tea Co., Inc. v. Cook*, 240 N.E.2d 114 (Ohio 1968), the court was asked to consider whether a contest constituted a prohibited lottery. It found:

"The courts are in general agreement that a prize is some advantage or inequality in amount or value, accruing to some, but not all, of the participants in the game or contest. No lottery exists if every contestant receives something of value of precisely the same nature . . . Ordinarily, no element of chance exists if there is equality of distribution. *Chance is a condition precedent to the existence of a prize.* Inequality of distribution is therefore the very basis of the prize requirement." 240 N.E.2d at 118 (emphasis added).

Similarly, in *Equitable Loan & Security Co. v. Waring*, 44 S.E. 320, 326 (Ga. 1903), the court held that "the word 'prize' comprehends anything of value gained (or, correspondingly, lost) by the operation of chance". See *Russel v. Equitable Loan & Security Co.*, 58 S.E. 881 (Ga. 1907). See also *Webster's New International Dictionary of the English Language* 1970 (2nd unabridged ed. 1953) (defining "prize" to mean "[s]omething offered or striven for in competition or in contests of chance . . .; [t]hat which may be won by chance, as in a lottery"); *Black's Law Dictionary* 1080 (rev. 5th ed. 1979) (defining "prize" as "[a]nything offered as a reward of contest").

In *Cook*, the court held that the following circumstances were required in order for chance to become a factor:

"The element of chance is supplied by having the happening of some future event to determine who gets the prize or how much he gets. If the winner's success is due primarily to his own skill or ability, the contest is not a lottery—if, on the other hand, the winner's success is due to something beyond his control then 'chance' appears and becomes a part of the game or contest." 240 N.E.2d at 118.

The Maryland Court of Appeals has drawn a similar distinction in the context of so-called "gift enterprises". Under Article 27, §369 of the Maryland Code, it is unlawful to induce a sale of goods by means of a gift enterprise.<sup>1</sup> In *Long v. State*, 74 Md. 565 (1891), the Court held this

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<sup>1</sup> Article 27, §369 provides:

section to be invalid as to any gift enterprise that did not involve an element of chance.

In commenting on the purview of §369, the Court recognized chance as a distinguishing element normally associated with prizes:

“This broad and sweeping language would seem to include not only a lottery in which a valuable consideration is given for the chance to win a prize, but also a gratuitous distribution not involving the element of chance.” 74 Md. at 571.

That is, the Court found, the term “gift enterprise” refers broadly to “ [a] business, as the selling of books or works of art, the publication of a newspaper, etc., in which presents are given to purchasers as an inducement’ ”. 74 Md. at 571 (quoting *Century Dictionary*). Because “the words ‘gift enterprise’ [do not] necessarily imply a scheme involving chance”, 74 Md. at 572, the Court found the statutory prohibition to be impermissibly broad:

“It follows that [the statute,] by reason of its general terms, including as it does all gift enterprises, those involving the element of chance, as well as those that do not, is invalid so far as it relates to gift enterprises not involving chance. . . .” 74 Md. at 572-73.

### C. Application

We believe that the distinguishing characteristic of chance—recognized in other jurisdictions and by the Maryland Court of Appeals in *Long*—is dispositive of your inquiry.<sup>2</sup>

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“No person or body corporate shall be permitted, either directly or indirectly, by agent or otherwise, to barter, sell or trade, or to offer for barter, sale or trade, by any publication, or in any way, any wares, goods or merchandise of any description, in package or bulk, holding out as an inducement for any such barter, sale or trade, or the offer of the same, any scheme or device by way of gift enterprise of any kind or character whatsoever”.

<sup>2</sup> We note that such a distinction also has been drawn by the Real Estate Commission in recent declaratory rulings. Compare *In the Matter of David Vincent, Broker t/a David Vincent Realty* (July 21, 1982) with *Request for Declaratory Ruling by Albert M. Chasnou, Esquire, and Ingersoll and Block, Chartered* (November 10, 1982).

We have carefully reviewed the program offered by Coldwell Banker and find that it is not a contest and that there is no element of chance associated with the receipt of the discount coupons.<sup>3</sup> At settlement, all clients receive a benefit of equal value in the form of a discount coupon book. There is, quite simply, no "inequality in amount or value" accruing to some, but not all, of the clients, nor is there the "happening of some future event" beyond the control of the client to determine who receives the coupons. We conclude, therefore, that these coupons do not constitute prohibited "prizes" under §224(o).

This conclusion, we find, is consistent with a recent court decision construing an Oregon statute that, while worded similarly to §224(o) and designed for the same purpose, was far broader in its reach. That statute provided for disciplinary action against any real estate licensee who has "solicited, sold or offered for sale real property by offering 'free lots' or conducted lotteries or contests, or offered prizes or other inducements for the purpose of influencing a seller or purchaser or prospective seller or purchaser of real property". Or. Rev. Stat., §696.301(9).

In *Hodges v. Real Estate Div., Dep't of Commerce*, 594 P.2d 1286 (Or. 1979), the court addressed the broad catchall phrase "or other inducements"—not found in §224(o). The court noted that the other activities specifically identified in the statute—activities that are identically listed in §224(o)—have a potential for abuse that might border on fraud. The court then concluded that a licensee's promise to reimburse the seller of realty for a portion of the sales commission, if the seller purchased a new home through the licensee, "does not fall within the class of activities the legislature sought to prohibit". 594 P.2d at 1289. The court explained:

"It is only those inducements which fall into the latter end of the spectrum which the legislature intended to prohibit: lotteries, contests, prizes, free lots. Such activities, and those of a similar type or class, fall within the statutory proscription to prevent persons from being induced to buy or sell by being misled by such schemes."  
*Id.*

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<sup>3</sup> Cf. 43 *Opinions of the Attorney General* 277 (1958) (prize offered by licensee to the first 10 persons solving a crossword puzzle is a "contest" prohibited by §224(o)).

In our view, the same principles underlie the enactment of §224(o). The program described in your inquiry—unlike promotional schemes for the sale of real estate that involve elements of competition and chance—is not fraught with the same potential for abuse or misleading the public. The discount coupons offered here are substantially little different than the commission reimbursements offered in *Hodges* and, therefore, as in *Hodges*, “d[o] note fall within the class of activities the legislature sought to prohibit”.

Accordingly, it is our opinion that the Coldwell Banker program is outside the purview of §224(o).

### III

#### Conclusion

In summary, it is our opinion that Article 56, §224(o) of the Maryland Code does not prohibit real estate licensees from offering prospective homebuyers a discount on merchandise through a marketing program in which all homebuyers receive the same discount coupons, on an equal basis, and no element of competition or chance is involved in their entitlement to the discounts offered under the program. We thus disagree with the contrary conclusion reached in 44 *Opinions of the Attorney General* 316 (1959).

STEPHEN H. SACHS, *Attorney General*

ROBERT DE V. FRIERSON  
*Assistant Attorney General*

AVERY AISENSTARK  
*Chief Counsel,  
Opinions and Advice*

## RETIREMENT SYSTEMS

JUDICIAL PENSION PLAN—CONSTITUTIONAL LAW—EQUAL PROTECTION—DEPRIVATION OF PROPERTY RIGHTS—“DOUBLE-DIPPING”—STATUTE REDUCING PENSION BENEFITS FOR JUDICIAL RETIREES LATER EMPLOYED BY STATE, LOCAL, OR FEDERAL GOVERNMENT IS NOT INFIRM AS APPLIED TO RETIRED STATE JUDGE APPOINTED TO FEDERAL BENCH.

October 3, 1984

*Mr. Ernest L. Bailey, Jr.*  
*Assistant State Court Administrator*

On behalf of Judge John R. Hargrove, you have asked whether the provisions of the State's Judicial Pension Plan (“the Plan”) contained in Article 73B, §56(c)(1) of the Maryland Code apply to a retired State judge who accepts appointment to the federal bench. If §56(c)(1) does so apply, you further ask whether it is invalid on the grounds that it: (1) prevents a retired judge from pursuing his profession; (2) was beyond the authority of the General Assembly to enact; (3) deprives a retired judge of a vested property right; (4) deprives a retired judge of equal protection; or (5) restricts a retired judge's right to receive deferred compensation.<sup>1</sup>

For the reasons given below, it is our opinion that Article 73B, §56(c)(1) applies to a retired State judge who accepts appointment to the federal bench and that, as so applied, it is valid.

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<sup>1</sup> Several of these issues drive from the decision of the Maryland Court of Appeals in *Attorney General v. Waldron*, 289 Md. 683 (1981) (*Waldron II*), holding invalid under the Maryland Constitution former §56(c), which prohibited retired State judges from practicing law for compensation while receiving judicial pensions. In *Chairman of Board v. Waldron*, 285 Md. 175 (1979) (*Waldron I*), the Court of Appeals had declined to decide the challenge to that statute's validity, holding that the plaintiff had failed to join necessary parties. The General Assembly has since repealed former §56(c) by Chapter 508, Laws of Maryland 1982.

## I

## Background

Judge John R. Hargrove began his judicial service as a judge of the People's Court of Baltimore City. He was appointed to the Municipal Court of Baltimore City in 1968 and served on that court (and its successor, the District Court of Baltimore City) until his appointment to the Supreme Bench of Baltimore City in 1974.<sup>2</sup> Judge Hargrove resigned from the Circuit Court for Baltimore City on February 17, 1984, to accept appointment to the United States District Court for the District of Maryland.

Judge Hargrove enrolled in the Judicial Pension Plan in 1971, when he became a District Court judge; he remained in the Plan until his resignation from the Circuit Court. At the time of Judge Hargrove's resignation, he met the Plan's age and service requirements for full benefits; hence, he would not be eligible to draw a full pension from the Plan if it did not include the limitation stated in §56(c)(1).

Under that section, if a retired judge "accept[s] employment in which all or part of the compensation for the employment comes from municipal, county, State, or federal funds", his or her Plan benefits are to be reduced by the amount by which the Plan's benefits plus the salary from the new public employment exceeds the compensation on which the former judge's retirement allowance is based. In Judge Hargrove's case, the required reduction would completely offset his Plan benefits. Hence, if §56(c)(1) applies to him, Judge Hargrove is not presently entitled to receive any retirement allowance under the Plan.<sup>3</sup>

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<sup>2</sup> The Municipal Court of Baltimore City became the District Court for Baltimore City in 1971, pursuant to Chapter 789, Laws of Maryland 1969. The City's Supreme Bench became the Circuit Court for Baltimore City in 1983, pursuant to Chapter 523, Laws of Maryland 1980.

<sup>3</sup> Judge Hargrove's Plan benefits (\$42,000) plus his federal salary (\$76,000) exceed the compensation on which his Plan benefits are based (\$63,300) by \$55,200—\$13,000 more than his current Plan benefits.

## II

## Application of §56(c)(1) to Federal Judges

You first ask whether §56(c)(1) was intended to apply to federal judges, pointing out that they are appointed for life and that the application of §56(c)(1) might thus preclude a federal judge from ever receiving benefits from the Plan.<sup>4</sup> However, §56(c)(1) expressly applies to *any* "employment in which all or part of the compensation . . . comes from municipal, county, State, or federal funds".

Although, as you have indicated, a federal judgeship may differ in certain respects from other types of public employment—federal judges, for example, are appointed by the President, with the advice and consent of the Senate, for life terms—nothing in the language of §56(c)(1) indicates that the General Assembly intended to except service on the federal bench from the purview of that provision. There is no ambiguity whatever in the wording of §56(c)(1), and we cannot, under the guise of statutory construction, create exceptions to the statute's plain meaning. *Mauzy v. Hornbeck*, 285 Md. 85, 93 (1979); *Clark v. Tawes*, 187 Md. 195, 199 (1946).

In sum, the language of §56(c)(1) unambiguously applies to any form of public employment, including federal judgeships. We are not at liberty to construe that provision so that Judge Hargrove may draw both full Plan benefits and his federal salary.

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<sup>4</sup> Even though there is no mandatory retirement age for federal judges, a federal judge who has reached the age of 70 and has served at least 10 years may resign and continue to receive a full salary. 28 U.S.C. §371(a). Alternatively, a federal judge may retain his or her office but retire from regular active service upon reaching age 70, if the judge has served at least 10 years, or upon reaching age 65, if the judge has served at least 15 years. 28 U.S.C. §371(b). A judge who becomes permanently disabled may retire on full salary if he or she has served 10 years, on half salary if he or she has served less than 10 years. 27 U.S. §372(a).

It is thus true that, if Judge Hargrove continued to receive his full federal salary throughout his lifetime, he might never be paid any benefits from the State Plan. However, it is equally true that he might be eligible for at least a partial Plan benefit if he voluntarily resigns or retires before serving on the federal bench for 10 years. In addition, should Judge Hargrove's wife survive him, she would be eligible for spouse's benefits from the Plan under Article 73B, §56(d).



## III

## Validity of §56(c)(1)

Given our conclusion that §56(c)(1) applies to Judge Hargrove, your next question is whether that statute is invalid under the holding of *Attorney General v. Waldron*, 289 Md. 683 (1981) (*Waldron II*).<sup>5</sup> Because the statute examined in that case differed so significantly from §56(c)(1), we believe the decision in *Waldron II* is not directly pertinent.

In *Waldron II*, the Court of Appeals held unconstitutional a statute that prohibited retired State judges who received judicial pensions from practicing law for compensation. The Court found that the statute violated the doctrine of separation of powers, by effectively revoking the licenses of certain members of the bar, and denied equal protection to those retired judges to whom it applied, by prohibiting them from practicing their profession. 289 Md. at 703, 727. In contrast, §56(c)(1) merely sets the level of Plan benefits retired judges will receive under certain circumstances; it neither regulates the practice of law nor prohibits any retired judge from pursuing his or her chosen profession. Thus, even in light of *Waldron II*, §56(c)(1) is not invalid on any of the grounds you have indicated.

*A. Pursuit of Profession*

First, you suggest that the statute might be invalid because it “prohibits a person . . . from pursuing his avocation or profession”.

However, §56(c)(1) does not contain any such prohibition. It merely controls an aspect of the compensation of State judges, not their right to practice a vocation. And, far from restricting the right of retired State judges to accept any type of employment or pursue any profession, including service on the federal bench, §56(c)(1) explicitly recognizes their right to accept public employment after retirement: “[A] retired judge eligible for benefits under this subtitle *may accept employment* in which all or part of the compensation for the employment comes from municipal, county, State, or federal funds. . .”.

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<sup>5</sup> See note 1 above.

This perhaps subtle, but important, distinction is one that the Court of Appeals itself drew in *Waldron*. The statute struck down in *Waldron II*, former §56(c), provided that “[a] judge who retires and accepts the pension provided by this subtitle *may not, thereafter, engage in the practice of law for compensation*”. The Court of Appeals characterized the statute’s basic infirmity in these words: “The statute does not establish a precondition for receipt of the pension; rather, it flatly prohibits this group of state pensioners from engaging in their profession for pay.” *Waldron II*, 289 Md. at 716. Section 56(c)(1), however, does just the opposite: it *does* “establish a precondition for receipt of [a] pension”, and it *does not* “flatly prohibi[t any] group of pensioners from engaging in their profession for pay”.<sup>6</sup>

For these reasons, therefore, we cannot conclude that §56(c)(1) is invalid on the basis that it somehow “prohibits” a retired judge from pursuing his or her profession.

#### B. Authority of General Assembly

Second, you ask whether §56(c)(1) may be invalid because “the *Waldron* case prohibits the state from legislative matters beyond its jurisdiction [—]that is, the practice of law in another court”.

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<sup>6</sup> In support of its characterization of former §56(c), the Court cited to its earlier decision in *Waldron I*. Significantly, in the cited portion of *Waldron I*, the Court of Appeals went out of its way to distinguish the language, import, and effect of the infirm statute, former §56(c), from that of its predecessor, former §55(e). The predecessor statute provided, in relevant part, that a retired judge “who decides to engage in the practice of law may notify the Governor and Comptroller of such fact, and on the indicated date of his engaging in the practice of law his benefits under this section shall cease and no longer be paid”. According to the Court, §55(e)—quite unlike former §56(c)—“did” merely “seek to precondition [a retired judge’s] obtention of his pension” and did not “plainly prohibi[t] a retired judge . . . from engaging in the practice of law for compensation”. *Waldron I*, 285 Md. at 180-81 and n. 6.

In our view, the provisions of present §56(c)(1) are clearly akin to those of former §55(e). That is, unlike the statute struck down in *Waldron II*, §56(c)(1) merely “establish[es] a precondition for receipt of the pension” and does not “flatly prohibi[t]” retired judges “from engaging in their profession”.

As you indicate, in *Chairman of Board v. Waldron*, 285 Md. 175 (1979) (*Waldron I*), the Court of Appeals noted that “the General Assembly of Maryland has no power to regulate whom our sister jurisdictions may authorize to engage in the practice of law within their borders”. 285 Md. at 184. However, §56(c)(1) does not purport to regulate the practice of law in any court; it simply establishes preconditions for receipt of a full State judicial pension. It is unquestionably within Maryland’s legislative authority and discretion to provide pension benefits for Maryland judges and, in doing so, to set the conditions for the receipt of those benefits.

In *Waldron II*, the Court of Appeals pointed out that it was “not here faced with a statute which . . . conditions the receipt of a judicial pension on specified requisites; of course, [such] an enactment . . . would not pose the Article 8 separation of powers problem presented by this case”. 289 Md. at 688 n. 4. See also *Mazor v. State Dep’t of Correction*, 279 Md. 355, 367-68 (1977); *Clark v. Tawes*, 187 Md. 195, 200-01 (1946) (upholding conditions attached to receipt of judicial pension).

Thus, we cannot conclude that, in enacting §56(c)(1), the General Assembly in any way overstepped the bounds of its legislative authority.

### C. *Deprivation of Property Right*

Third, you question whether §56(c)(1) unlawfully deprives Judge Hargrove of a vested property right—an issue not presented in either *Waldron* decision.

The statute at issue in that case prohibited a former judge from practicing law for compensation while receiving a State pension, and, as the Court of Appeals noted, the statute “in no way purport[ed] to restrict, limit or otherwise control” the pension itself. *Waldron I*, 285 Md. at 180, *quoted in Waldron II*, 289 Md. at 716. In contrast, §56(c)(1) clearly establishes a condition Judge Hargrove must meet to be eligible for full Plan benefits—that is, “[t]he annual retirement allowance receivable by the former judge plus the annual compensation for [a post-retirement, public] position may not exceed in amount the compensation upon which the retirement allowance is based”.<sup>7</sup>

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<sup>7</sup> See also note 6 above and accompanying text.

A retired judge's right to full benefits from the Plan becomes absolute or vested only when he or she has met all the Plan's conditions for those benefits., See *Baker v. Baltimore County*, 487 F.Supp. 461, 467 (D. Md. 1980); *Saxton v. Board of Trustees*, 266 Md. 690, 694 (1972). But so long as Judge Hargrove holds another position compensated in whole or in part from public funds, he does not meet all the conditions for full benefits. Thus, §56(c)(1) does not withdraw any benefits previously granted unconditionally to the judge; rather, it establishes a precondition for their receipt that, at present, precludes him from entitlement to any benefits. See *Robinson v. New York State Employees' Retirement System*, 46 N.Y.2d 749, 413 N.Y.S.2d 644 (1978); *State v. Lee*, 24 So.2d 798, 802 (Fla. 1946); *Franklin v. Savannah*, 34 S.E.2d 506 (Ga. 1945).

If §56(c)(1) had been enacted after Judge Hargrove had enrolled in the Plan, the question of whether it unconstitutionally deprived him of a vested right would be a closer one. And, even then, the statute might well be considered constitutional. See *Maryland State Teachers Association v. Hughes*, 594 F.Supp. 1353 (D. Md. 1984). But §56(c)(1) does not even present such a close question. It is not some recent amendment to the Plan setting new conditions for Judge Hargrove's receipt of full benefits. To the contrary: these restrictions were originally enacted in 1941 [Chapter 390, Laws of Maryland 1941]—some 30 years before Judge Hargrove first enrolled in the Plan.

Indeed, when Judge Hargrove enrolled in the Plan in 1971, a retired judge could receive *no* benefits from the Plan while receiving a salary from public employment, no matter how small that salary might be. In 1976, after Judge Hargrove's enrollment, that harsher provision was changed to the present set-off provision "for the purpose of permitting a retired judge to accept salaried employment or office without loss of retirement benefits, subject to certain limitations and conditions". Chapter 501, Laws of Maryland 1976.

The judge must be presumed to have known, at the outset of his State service, that one of the conditions for his receipt of full Plan benefits was that he not accept public employment after his retirement. And, therefore, the application now of that long-standing condition can in no way be said to divest the judge of any benefit to which he had, at any time previously, any vested or other right of expectation.

#### D. *Equal Protection*

Fourth, you inquire whether §56(c)(1) violates constitutional guarantees of equal protection.

To be sure, in *Waldron II*, the Court of Appeals held a statutory prohibition against retired State judges' engaging in the practice of law for compensation to be invalid on equal protection grounds. 289 Md. at 727. However, we do not believe that that decision in any way calls into question the validity of §56(c)(1).

Because the statute at issue in *Waldron II* substantially affected "vital personal interests" by preventing judges from practicing their profession, the Court declined to "reach out and speculate as to the existence of possible justifications for the challenged enactment". 289 Md. at 717. Rather, the Court evaluated the statute's reasonableness in light of "those statutory purposes which are readily discernible or a legitimate purpose that, presumably, motivated an impartial Legislature". 289 Md. at 722.<sup>8</sup> In contrast, pension statutes—including §56(c)(1)—need only have a rational basis and will not be set aside if any state of facts reasonably may be conceived to sustain the classification. *Railroad Retirement Board v. Fritz*, 449 U.S. 166, 175-76 (1980); *Department of Transportation v. Armacost*, 299 Md. 392, 410-11 (1984); *Hornbeck v. Somerset Co. Board of Education*, 295 Md. 597, 642 (1983). In our view, §56(c)(1) clearly meets this test.

By reducing State pensions to retired judges who subsequently accept other public employment, the statute serves the General Assembly's policy of minimizing "double dipping" from public funds—even when the funds are derived from different levels of government. *Waldron II*, 289 Md. at 723 n. 21. Significantly, that policy is not uniquely applied to only one class of retirees. Rather, it is a policy similarly reflected in other statutes, applicable to other State retirees, that act to terminate State pension benefits to retirees who subsequently accept permanent positions "with the State, local school

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<sup>8</sup> At the same time, the Court noted that the statute neither infringed "rights recognized as 'fundamental' nor classifie[d] along lines determined to be 'suspect' ". 289 Md. at 717. Consequently, it did not subject the statute to strict judicial scrutiny, under which the statute could have been justified only by a showing that it was necessary to promote a compelling governmental interest. See 289 Md. at 705-06.

system, library, community college or a participating municipal corporation". Article 73B, §§11(15)(b), 86(9)(b), 117(14)(b), and 145(13)(b).<sup>9</sup>

It is true that Article 73B does distinguish between retired State judges who accept public employment after retirement and other retirees whose situations arguably are similar: (1) State judges who are employed in the private, rather than the public, sector after their retirement; (2) State judges who were employed at another level of government before, rather than after, entering the State judicial service; and (3) other State employees who accept federal employment after retirement. However, we believe that there are rational bases for statutorily distinguishing each of these three groups from those judges who are affected by §56(c)(1).

The last group, State employees other than judges, are in retirement systems that differ significantly from the Judicial Pension Plan—the Judicial Plan being, on the whole, far more generous in its terms, conditions, and benefits than are the other retirement systems. And, although other retired State employees' pensions are not offset if they accept federal employment, their pensions—unlike judges' pensions—nonetheless terminate *entirely* if they accept post-retirement employment with any one of the specified State or local entities, no matter how small the salary. Certainly, the State is not required to provide identical retirement benefits to all its employees. *Clark v. Tawes*, 187 Md. 195, 200 (1946). *See also Mazor v. State Dep't of Correction*, 279 Md. 355, 369 (1977). *Cf. Jackson Firefighters Ass'n Local 87 v. City of Jackson*, 736 F.2d 209 (5th Cir. 1984). And the General Assembly could rationally have concluded that the differences between the "double dipping" provisions applicable to State judges and those applicable to other State employees are appropriate to the two groups' different situations, given especially the substantial differences in their underlying benefits.

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<sup>9</sup> That policy also finds expression in statutes under which the State pension of an employee who retired because of a disability is reduced by the amount of any workers' compensation benefits payable to the employee. Article 73B, §§11(20), 86(7a), 117(18), and 145(18). And, apparently for the same reason, workers' compensation benefits are offset by the amount of an employee's pension from any publicly funded retirement system—even if the workers' compensation and the retirement benefits are not traceable to the same governmental entity. Article 101, §33; *Tsottles v. City of Baltimore*, 55 Md. App. 58, 63 (1983).

Similarly, we believe, there is a clearly rational basis for distinguishing between State judges who retire to enter other public employment and those who retire to enter private employment. As pointed out, the purpose of §56(c)(1) is to prevent "double dipping" from public funds. A former judge who is receiving a State pension but no other form of publicly funded compensation is, of course, receiving only a "single dip" of public funds—even if the former judge is also receiving a privately paid salary.

As for the remaining group—those judges who were in other public positions before entering the State judiciary—the General Assembly could rationally have concluded that the need to attract able government employees to the State bench outweighed its concern for "double dipping". A statute that would prevent State judges from receiving a full State judicial pension in addition to any pension payable on account of prior service with another level of government would tend to discourage government employees from leaving their jobs for the bench. For this reason, the General Assembly might well have regarded the exemption of those judges from the operation of §56(c)(1) as an appropriate inducement to entering the State's judicial service.

In sum, we cannot conclude that §56(c)(1) violates equal protection, for its distinction between State judges who accept public employment after retirement and other classes of State judges or nonjudicial public employees is rationally related to its purpose of minimizing "double dipping" from public funds.<sup>10</sup>

#### *E. Pension as Form of Deferred Compensation*

Finally, you note that a judge's pension is a form of deferred compensation. We certainly do not argue with that characterization. However, we can find no constitutional or other legal impediment to the General Assembly's determining the conditions under which that compensation will be paid. See *Mazor v. State Dep't of Correction*, 279 Md. at 367-68. Provisions similar to §56(c)(1) are apparently not uncommon in other public pension plans. See, e.g., *Application of Rachow*, 240 N.Y.S. 2d 680, 682 (Sup. Ct. 1963); *Hickey v. Pension Board*, 106 A.2d 233, 234

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<sup>10</sup> In addition, under the "rational basis" test, underinclusiveness does not render unconstitutional an otherwise valid law. See *Railroad Retirement Board v. Fritz*, 449 U.S. 166, 175 (1980); *Department of Transportation v. Armacost*, 299 Md. 392, 413 (1984).

(Pa. 1954); *State v. Lee*, 24 So.2d 798, 802 (Fla. 1946). *Franklin v. Savannah*, 34 S.E.2d 506, 507 (Ga. 1945). See also Cal. Gov't Code, §75080 (West); N.Y. Retire. & Soc. Sec. Law, §§101, 211, 212 (McKinney). Yet we have not found any case holding such a provision invalid as applied to a plan participant enrolled after the provision took effect.

#### IV

#### Conclusion

In summary, it is our opinion that §56(c)(1) unambiguously applies to Judge Hargrove and that it is constitutional as so applied. Consequently, so long as Judge Hargrove is paid his federal salary, he may not be paid full benefits from this State's Judicial Pension Plan. Rather, because he does not meet all the Plan's conditions for receipt of full benefits, the retirement allowance payable to him must be offset in accordance with the Plan's terms.

STEPHEN H. SACHS, *Attorney General*

NANCY KNISLEY  
*Assistant Attorney General*

AVERY AISENSTARK  
*Chief Counsel,  
Opinions and Advice*

*Editor's Note:* A suit challenging the conclusion reached in this Opinion is pending in the Court of Appeals. *Hargrove v. Board of Trustees*, cert. granted 304 Md. 438 (1985).



## STATUTES

CONSTITUTIONAL LAW—EMERGENCY LEGISLATION—“CHANGE IN DUTIES”—STANDARD FOR DETERMINING WHETHER NEW FUNCTIONS AMOUNT TO PROHIBITED CHANGE IN DUTIES.

March 7, 1984

*The Honorable Harry Hughes*  
Governor

We have reviewed and hereby approve for constitutionality and legal sufficiency House Bill 82, an emergency bill, which alters various legal requirements with respect to absentee ballots. In so doing, we have concluded that the subject matter of House Bill 82 is a proper subject of emergency legislation and does not violate the prohibition in Article XVI, §2 of the Maryland Constitution against “changing the . . . duty of any officer . . . [by] emergency law.”

## I

## Description of Bill

Among the changes House Bill 82 would bring to existing law are the following:

- (1) the board of canvassers would be required to keep absentee ballots safe from tampering until the canvass is completed;
- (2) the board would be required to reject certain absentee ballots under certain circumstances; and
- (3) the board would be required to place absentee ballots “in a secure place to which the public has no access,” rather than in a ballot box.

## II.

## Changes in Duties

Article XVI, §2 of the Constitution provides that:

"[N]o measure creating or abolishing any office, or *changing the salary, term or duty of any officer*, or granting any franchise or special privilege, or creating any vested right or interest, shall be enacted as an emergency law." (Emphasis added.)<sup>1</sup>

In our view, none of the provisions of House Bill 82 "change" the duty of board members within the meaning of Article XVI, §2.

Under Maryland cases, additional duties imposed by an emergency bill upon a public officer that are already within the general duties of his or her office do not violate Article XVI, §2. *Hammond v. Lancaster*, 194 Md. 462, 477 (1950). Arguably, some of the "duties" specified in House Bill 82 would merit this characterization. However, even if they did not, we do not believe that the legislation in question would offend Article XVI, §2.

In the past, in the absence of any guiding case law in Maryland, we have concluded that §2 does not prohibit emergency legislation conferring a "power" or "authority" on an officer, as opposed to imposing a "duty". We have also said that a duty imposed on an officer "incidental" to the conferral of a power is not within the prohibition.<sup>2</sup> Such metaphysical distinctions, we believe, do not provide a sufficient legal guidepost to construing §2 in a workable fashion. We find much more helpful a series of decisions of California courts construing a constitutional requirement virtually identical to Article XVI, §2.<sup>3</sup>

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<sup>1</sup> The purpose of this provision of §2 of Article XVI is "to obviate the public and private uncertainty, disorder, and confusion which would result from an emergency measure which might . . . change the . . . duty of an officer." *Dorsey v. Petrott*, 170 Md. 230, 249 (1940).

<sup>2</sup> We have also considered whether §2 applies only to individual officers rather than boards or commissions. However, such a distinction has been rejected with respect to other constitutional provisions. See *County Commissioners v. Westphal*, 232 Md. 334, 340-41 (1963).

<sup>3</sup> California appears to be the only state other than Maryland whose Constitution prohibits emergency legislation changing the duties of any office. See California Constitution, Art. 4, §8.

In *Martin v. Riley*, 123 P.2d 488 (Cal. 1942), a California appellate court held that an addition or subtraction in relation to the volume of duties required to be performed by an officer, not substantially affecting the primary duties of the office, is not such a "change of duties" as would prevent immediate effectiveness of legislation. See also *Behneman v. Alameda-Contra Costa Transit Dist.*, 6 Cal.Rptr. 382 (1960). In *Davis v. Los Angeles County*, 84 P.2d 1034 (Cal. 1939), the court held that a prohibited "change in duties" did not occur where the legislation simply conferred such additional duties as would naturally devolve on the officer had no express mention been made of them in the measure and as otherwise would be incidental to his office. See also *Flournoy v. Priest*, 486 P.2d 689 (Cal. 1971) (emergency legislation changing procedures whereby an officer discharges his duties is not constitutionally prohibited); *People v. Robertson*, 655 P.2d 279 (Cal. 1982).

### III

#### Conclusion

Gauged by these principles, House Bill 82 is clearly a proper emergency bill and not violative of Article XVI, §2.<sup>4</sup> The addition to the duties of the board of canvassers does not substantially affect the primary duties of the board. Nor are the new functions those that might not naturally devolve on board members in light of the other changes to the law brought about by the bill.

For these reasons, we conclude that House Bill 82 is constitutional and legally sufficient.

STEPHEN H. SACHS, *Attorney General*

ROBERT A. ZARNOCH  
*Assistant Attorney General*

*Editor's Note:* House Bill 82 was signed into law as Chapter 2, Laws of Maryland 1984. The preceding Opinion was originally written as a bill review letter. Because of the importance and recurring nature of the issue addressed, it is published here in a slightly revised format.

<sup>4</sup> We assume, without deciding, that members of the board of canvassers are "public officers". The board is composed of election supervisors, who are public officers. *Riggin v. Lankford*, 134 Md. 146 (1919). However, as canvassers they perform ministerial functions. *Board of Canvassers of Elections v. Noll*, 127 Md. 296 (1915).

STATUTES—CONSTITUTIONAL LAW—TITLE OF BILL—SIGNIFICANT  
DISCREPANCY BETWEEN TITLE DESCRIPTION AND ACTUAL  
SCOPE OF BILL RENDERS TITLE MISLEADING AND BILL  
UNCONSTITUTIONAL.

May 25, 1984

*The Honorable Harry Hughes*  
Governor

We have reviewed House Bill 1541 (Unemployment Insurance—Taxable Wages) for constitutionality and legal sufficiency. Unfortunately, because of a serious defect in its title, we are unable to approve this bill.

I

House Bill 1541 And Its Title

House Bill 1541 was introduced to amend the statutory definition of “wages” in Article 95A, §20(n) of the Maryland Code. The primary purpose of the bill was to modify the State unemployment tax required to be paid by employers under Article 95A, §8.

The Federal Unemployment Insurance Tax Act was recently amended to provide that, effective January 1, 1985, payments made under an employer’s plan for sickness or accident disability benefits, other than “payments which are received under a workm[e]n’s compensation law”, are to be considered wages for purposes of federal unemployment insurance tax. 26 U.S.C. §3306(b)(2)(A), as amended by Pub. Law No. 98-21, 97 Stat. 123, 125 (1983). Article 95A, §20(n)(2) currently defines “wages” to exclude, among other types of employers’ benefit plan payments, all sickness and accident disability payments.

House Bill 1541 would amend Article 95A, §20(n)(2), effective January 1, 1985, to add the following:

“If payments are made to an employee or an employee’s dependents for sickness or accident disability, this paragraph (2) excludes from ‘wages’ *only* payments that are received under a workmen’s compensation law[.]”  
(Emphasis added.)

This change, which substantially tracks the language of the federal law, would effectively modify the term "wages" to include sickness and accident disability payments made by an employer, except those made under a worker's compensation law. Although this change in State law is not mandated by federal law, the net effect of such a conforming change would be to greatly reduce an employer's federal tax liability. See Position Statement of Department of Employment and Training on House Bill 1541 (February 22, 1984).

This primary purpose of House Bill 1541 is reflected in the bill's short title: "Unemployment Insurance—Taxable Wages". That short title is nevertheless somewhat misleading. Although the impetus behind House Bill 1541, as explained above, was to amend the definition of "wages" for taxation purposes, the amendment of this quite basic definition necessarily would have other effects that, while intended, are not reflected in the short title. For example, the defined term "wages" is also used in the law governing an employee's weekly benefit amount (Article 95A, §3(b)); by redefining "wages" to include sickness and accident disability benefits, employees will earn additional wage credits to be used in determining their weekly benefit amounts. Thus, the bill ultimately affects more than merely "taxable wages".

A far more serious problem, however, is the title's purpose clause:

"F[or] the purpose of including in an employee's wages, under the Unemployment Insurance Law, payments made under an employer's plan on account of illness or accident disability under a workmen's compensation law."

This title indicates that the only sickness or accident disability payments to be "included in . . . wages" are those "made . . . under a workmen's compensation law". In fact, the bill would do the exact opposite: it would "exclud[e] from 'wages' " those payments—and "only" those payments—that are "[made] under a workmen's compensation law". In other words, the bill is intended, and was specifically drafted, to include as wages *all* sickness or accident disability payments *other than* those made under a worker's compensation law; the title, on the other hand, states, that the bill is intended to include as wages *only* those sickness or accident disability payments that are made under a worker's compensation law.

## II

## Constitutional Requirements For Bill Titles

Article III, Section 29 of the Maryland Constitution requires that "every law enacted by the General Assembly shall embrace but one subject, and that shall be described in its title." The purpose of the second part of this provision is to fairly advise the General Assembly and the public of the real nature of pending legislation. *Kelly v. State*, 139 Md. 204 (1921). One of the essentials of a good title is that it not be misleading. *Baltimore v. Deegan*, 163 Md. 234 (1932). The title must not apparently limit the enactment to a much narrower scope than the body of the bill embraces. *State v. King*, 124 Md. 471 (1914).

Clearly, the discrepancy between the title of House Bill 1541 and the body of the bill is so great and obvious that there can be no doubt that the title fails altogether to comply with the constitutional requirements.

## III

## Conclusion

In sum, then, we are unable to approve House Bill 1541 for constitutionality. We note, however, that the federal law with which House Bill 1541 was designed to conform does not become effective until January 1, 1985. (For this reason, House Bill 1541 itself was introduced with a proposed delayed effective date of January 1, 1985.) We believe, therefore, that the purposes of House Bill 1541 can be accomplished at the next Regular Session of the General Assembly by enactment of an emergency bill, with a corrected title, that would amend Article 95A, §20(n) so as to apply to all benefits paid on or after January 1, 1985. An emergency bill is urged so that it could be enacted early in the session and become effective well before employers are required to make their first federal or state quarterly reports for calendar year 1985.

STEPHEN H. SACHS, *Attorney General*

AMY S. SCHERR  
*Assistant Attorney General*

LINDA H. LAMONE  
*Assistant Attorney General*

*Editor's Note:* House Bill 1541 was vetoed by the Governor on May 29, 1984. Laws of Maryland 1984 at 4146-47. The emergency legislation suggested in the last paragraph of the preceding Opinion was enacted as Chapter 48, Laws of Maryland 1985.

The Opinion was originally written as a bill review letter. Because of the recurring nature of the issue addressed, it is published here in a slightly revised format.

## TRANSPORTATION

MASS TRANSIT ADMINISTRATION—50% FARE BOX RECOVERY RATIO—"OPERATING COSTS"—MTA EXCLUSION OF DEPRECIATION AND INTEREST FROM COMPUTATION OF OPERATING COSTS IS REASONABLE INTERPRETATION OF GOVERNING STATUTE.

October 8, 1984

*The Honorable Julian L. Lapides*  
*Senate of Maryland*

You have requested our opinion on whether the Mass Transit Administration ("MTA") may exclude capital costs such as depreciation and interest from its calculation of the "50% fare box recovery ratio" required by §7-208(a)(2)(i) of the Transportation Article.

For the reasons given below, it is our opinion that the exclusion of such costs is consistent with the design and intent of that section.

## I

## Discussion

Section 7-208(a)(2)(i) of the Transportation Article ("TR" Article) provides, in relevant part, as follows:

"For fiscal year 1983 and each fiscal year thereafter, the [Mass Transit] Administration shall establish in the Baltimore region bus transit fares at rates projected to recover from such fares and other operating revenues at least 50 percent of the total operating costs for mass transit bus services under its jurisdiction."

The MTA was audited by the Legislative Auditor for the period from July 1, 1981, to June 30, 1983. In his Audit Report of February 27, 1984, the Legislative Auditor referred to this statute and noted:

"The Administration excluded certain expenses (e.g., depreciation) from total operating costs in determining the percentage of the recovery of such costs from fares and operating revenues. In our opinion, such expenses



are valid costs of operating the bus transit system and should be included in computations to determine compliance with the law." Audit Report at 2.<sup>1</sup>

Responding to the Legislative Auditor's concerns, the Department of Transportation requested advice from its counsel. In a Memorandum of Advice, Assistant Attorney General Janis Ashman concluded that MTA's construction of the term "operating costs" as excluding depreciation and interest was not inconsistent with the law. Memorandum from Janis Ashman, Assistant Attorney General, to Frederick L. Dewberry, Acting Secretary of Transportation (May 23, 1984). Specifically, she found that:

1. Although the term "operating costs" usually encompasses depreciation in a business accounting context, the statute in question here applies to a governmental regulatory situation. Thus, the meaning of the term hinges on the particular intent of the General Assembly in this particular, regulatory context.

2. The February 1983 Report of the Special Committee on Transit Operating Costs (Technical Supplement), issued shortly after the enactment of TR §7-208(a)(2)(i), did not include depreciation or interest in its report of "MTA Operating Expenditures". See Technical Supplement at 41 and 42.

3. Legislation enacted during the same Session as TR §7-208(a)(2)(i) requires the Department of Transportation to distinguish between capital and operating expenditures for purposes of annual reporting and budget preparation. TR §§2-103.1 and 2-103.2. Thus, "[g]iven the fact that the Legislature has mandated a dichotomy of capital and operating expenditures and costs in areas which have a pervasive effect upon the workings of the Department, it follows logically that the Legislature intended this dichotomy to apply as well to the calculation of operating expenses in the fare cost recovery statut[e] in question".

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<sup>1</sup> Recognizing, however, that "the law does not define operating costs," the Legislative Auditor recommended that an Attorney General's Opinion be sought on the question. Audit Report at 2.

4. TR §7-208(a)(2)(i) should not be construed to reach an unreasonable or unintended result: "If depreciation expenses for high-priced capital assets such as . . . buses were factored into the calculation of the operating costs of the MTA . . . , the operating costs would rise significantly, in turn producing a marked increase in fares with a sizable decline in ridership. As a result, the whole purpose of mass transit services would be thwarted. It is doubtful that the General Assembly would intend such a consequence."<sup>2</sup>

We have carefully reviewed Ms. Ashman's advice and the authorities and principles upon which it relies. For the reasons stated in her memorandum, we agree that TR §7-208(a)(2)(i) does not require the MTA to include depreciation and interest as "operating costs" for purposes of calculating the 50% fare box recovery ratio. Indeed, during the course of our own independent review of this matter, we found yet additional support for this conclusion:

5. The 1979 Report of the Subcommittee on Transportation of the Task Force to Study State-Local Fiscal Relationships, which apparently first recommended the 50% fare box recovery ratio, clearly differentiated operating subsidies from capital subsidies and operating deficits from capital deficits. *See A Study of Maryland's Transportation Needs and Financing* (December 12, 1979) at 38-39.

6. The 50% fare box recovery ratio appears to have been patterned after 1981 legislation that required the Department of Transportation to recover from fares and operating revenues at least 50% of "total operating costs" for all commuter rail operations under its control. *See* TR §3-217(b). The fiscal notes for the identical bills that enacted TR §3-217 compute projected "operating costs" without the inclusion of depreciation or interest. *See Exhibit A to Revised Fiscal Notes for House Bill 201 and Senate Bill 1048* (1981).

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<sup>2</sup> We have since been advised by MTA of its current estimate that, in order to comply with the Legislative Auditor's recommendation, the base fare would have to be increased by more than 26%—from 75¢ to almost 95¢.

## II

## Conclusion

For all of these reasons, it is our opinion that the exclusion of depreciation and interest from the calculation of the 50% fare box recovery ratio is consistent with a reasonable and proper construction of TR §7-208(a)(2)(i).

STEPHEN H. SACHS, *Attorney General*

ROBERT A. ZARNOCH  
*Assistant Attorney General*

AVERY AISENSTARK  
*Chief Counsel,  
Opinions and Advice*

*Editor's Note:* Since the issuance of this Opinion, the General Assembly amended TR §7-208(a)(2)(i) to require a fare recovery ratio of "at least 50 percent of the total operating costs for the mass transit bus *and rail* services under [the MTA's] jurisdiction." Chapter 397, Laws of Maryland 1986.

## WORKER'S COMPENSATION

## EXEMPTIONS—MIGRATORY FARM WORKERS—ANALYSIS OF PROVISION ON COVERAGE.

May 24, 1984

*The Honorable Harry Hughes*  
Governor

We have reviewed and hereby approve for legal sufficiency and constitutionality Senate Bill 869. We do, however, wish to point out several interpretive questions that are raised by the bill for which remedial legislation is clearly warranted.

## I

## Discussion

The purpose of Senate Bill 869 is affirmatively expressed in its title—to extend workers' compensation coverage to seasonal and migratory farm laborers under certain circumstances. To accomplish this purpose, the bill amends Article 101, §21(b)(8) of the Maryland Code, which currently exempts seasonal and migratory farm laborers from coverage, except for those who operate machinery. In doing so, Senate Bill 869 defines "seasonal or migratory farm laborer"; no definition is provided in the current law.

As §21(b)(8) is currently worded, it is hardly a model of clarity. First, the introductory sentence provides that "[t]he following shall constitute employees subject to the provisions of this act, *except as exempted under subsection (c) of this section*". (Emphasis added.) There follow eleven paragraphs setting forth categories of employed persons who are *covered* by the Act. Only paragraph (8) provides both for coverage and its own exemption—"provided, however, that this section shall not apply to seasonal or migratory farm laborers who do not operate machinery or equipment". No exemption for any category of seasonal or migratory workers is provided in subsection (c).

Second, although every other paragraph of §21(b) refers to the type of employees covered,—e.g., "any person", "every officer",

“student teachers”, “members”—paragraph (8) refers to an industry, “farming and dairy farming”. The inconsistent reference to an industry in paragraph (8) alone is curious in light of the introductory sentence, which provides that specified persons constitute employees subject to the act. Even more curious is that paragraph’s definition of “farmer,” when the term “farmer” is nowhere used in the paragraph.

Senate Bill 869 does not remedy the above described problems with §21(b)(8). Rather, it amends the section in two major respects. First, persons involved in the “operation of any machinery connected with any phase of soil, crop, or animal management, construction and repairs of machinery and fixtures, and the handling of any crops or animals with or without machinery” are employees covered by the Workmen’s Compensation Act “whether or not [those activities are] performed by a seasonal or migratory farm laborer”. Second, the bill defines “seasonal or migratory farm laborer” and excludes from that definition certain farm workers:

“(ii) For purposes of this section, ‘seasonal or migratory farm laborer’ means a person who is engaged in agricultural employment of a seasonal or other temporary nature and who is either (a) absent overnight from his permanent place of residence or (b) transported or caused to be transported to and from the place of employment by means of a day-haul operation.

“(iii) For purposes of this section, ‘seasonal and migratory farm laborer’ shall not include any person who is employed within a 25-mile radius of his or her permanent place of residence and for not more than 13 weeks per year.”

There are several possible ways of reading the bill, none of which comport literally with the muddled and ambiguous language of §21(b)(8). For the reasons discussed below, however, we believe that the bill, if signed, must be interpreted as follows: Any person, including a seasonal or migratory farm laborer, who performs farm work for a farmer who has three or more full-time employees or a yearly payroll for his or her full-time employees of \$15,000 or more is covered by the Workmen’s Compensation Act *unless* that person is employed within a 25-mile radius of his or her permanent place of residence *and* is employed for 13 weeks a year or less. As explained more fully below, this reading of the bill is consistent with the evident intent of the General Assembly.

The difficulty with Senate Bill 869 lies with its definitions. It does not make much sense to narrowly define a class of farm workers ("seasonal or migratory farm laborers") in a bill that, at the same time, broadly provides for workers' compensation coverage for all farm work "whether or not" performed by that particular class. We nevertheless must presume that the General Assembly defined the term "seasonal or migratory farm laborer" for some purpose and, therefore, that that purpose—notwithstanding the use of the broad "whether or not" language—was to include *certain* seasonal and migratory farm laborers, but not all, within the protections afforded by the Workmen's Compensation Act. This interpretation is consistent with the title of the bill, which describes the bill as "providing coverage for seasonal and migratory farm laborers under the workmen's compensation law *under certain circumstances*." (Emphasis added.) Thus, not all seasonal and migratory farm laborers were intended for coverage.

The next step in the analysis is to determine exactly who the General Assembly intended to exclude. There are only two possibilities. Neither construction is free from doubt; the bill on its face is susceptible of more than one meaning.

One possible interpretation is that the General Assembly intended to exclude from coverage only those persons who are "seasonal or migratory farm laborers" as defined in subparagraph (ii) *and* who meet the criteria set forth in subparagraph (iii). The fact that subparagraph (iii) uses the defined term in stating who is not included supports this interpretation. That is, subparagraph (iii) does not, for example, simply and clearly provide that "any person who works within 25 miles of his or her home for 13 weeks or less is not an employee subject to the provisions of this Act." Rather, it uses the defined term and states "'seasonal and migrant farm laborer' shall not include" certain persons. Thus, in effect, it provides that of those defined as "seasonal or migratory farm laborers", only those who meet certain criteria are excluded from coverage. Arguably, however, this interpretation would lead to an absurd and illogical result, excluding from coverage only a handful of people: those persons who work within 25 miles of their residence for 13 weeks a year or less *and* are either absent overnight from their residence or transported by means of a day-haul operation.<sup>1</sup> Virtually no workers

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<sup>1</sup> Although "day-haul operation" is not defined in Senate Bill 869, we understand that the term is a term of art. It is defined in the federal Migrant and Seasonal Agricultural

who live within 25 miles of a farm would be absent overnight from their homes. And only a few who live within 25 miles would travel by day-haul. Moreover, it is illogical to ascribed to the General Assembly the intention to require coverage for a seasonal farm worker who walks or drives less than 25 miles to work while excluding from coverage those workers who are picked up by a van or bus operated by someone else. Construction of a statute which is "unreasonable, illogical or inconsistent with common sense" must be avoided. *Kindley v. Governor of Maryland*, 289 Md. 620, 625 (1981). No statute should be construed in such a way to reach an absurd result. *Pan American Sulphur Co. v. Department of Assessments and Taxation*, 251 Md. 620, 627 (1967).

The other possible interpretation is that the General Assembly intended that all persons who meet the criteria in subparagraph (iii) be excluded from coverage, whether or not they otherwise are "seasonal or migratory farm laborers" within the meaning of subparagraph (ii). Arguably, this interpretation would render both subparagraph (ii) and the phrase "whether or not performed by a seasonal or migratory farm worker" superfluous and violate the standard principle of statutory construction that statutes must be interpreted so that no word, clause, sentence, or phrase be rendered nugatory. See *State v. Berry*, 287 Md. 491, 495 (1980); *Karns v. Liquid Carbonic Corp.*, 275 Md. 1, 18 (1975); *Welsh v. Kuntz*, 196 Md. 86, 98 (1950).

Both interpretations have the apparently unintended result of excluding from coverage various persons currently covered by the act—e.g., those local (i.e., within 25 miles), seasonal or temporary (i.e., 13 weeks a year or less) workers who operate machinery. While unfortunate, that fact creates no constitutional defect. The title adequately gives notice of this possibility. The title describes the bill as "providing coverage for seasonal and migratory farm laborers under the workmen's compensation law *under certain circumstances*." (Emphasis added.) The phrase "under certain circumstances" provides sufficient notice that coverage is required for certain, but not all, seasonal and migratory farm workers. *Kelly v. State*, 139 Md. 204, 208 (1921).

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Worker Protection Act as "the assembly of workers at a pick-up point waiting to be hired and employed, transportation of such workers to agricultural employment, and the return of such workers to a drop-off point on the same day." 29 U.S.C. §1802.

As stated above, neither interpretation is free from doubt. Moreover, each violates one or more principles of statutory construction. Thus, because the language of the bill is ambiguous and susceptible of more than one more meaning, the legislative history of the bill must be examined in order to ascertain the intent of the General Assembly. *Hornbeck v. Somerset County Board of Education*, 295 Md. 597, 619-20 (1983). That history clearly reveals that the General Assembly intended to exclude from workers' compensation coverage all those farm workers who are employed within a 25-mile radius of their permanent places of residence and for 13 weeks a year or less.

The file in each committee that held a hearing on Senate Bill 869 supports this conclusion. The Bill Analysis filed in the records of the Senate Economic Affairs Committee states that "the definition excludes from coverage *any person* who is employed within a 25-mile intrastate radius of his or her permanent place of residence for not more than 13 weeks per year." (Emphasis added.)<sup>2</sup> See Committee Report System Bill Analysis—Senate Bill 869 at 2. Similarly, the Summary of Committee Report filed in the records of the House Constitutional and Administrative Law Committee states that "[a]s introduced, the bill would still exclude *persons* employed within a 25 mile intrastate distance from home for 13 weeks a year or less". (Emphasis added.) See Committee Report System Summary of Committee Report—Senate Bill 869 at 1. It is significant that both Committees broadly referred to the excluded class as "any person" and "persons" rather than more narrowly as "seasonal or migratory farm workers". This demonstrates the legislative intent not to limit the excluded class to those farm workers who first meet the criteria set forth in subparagraph (ii).

## II

### Conclusion

In summary, as currently worded, the Workmen's Compensation Act covers only certain seasonal and migratory farm labor—those who operate machinery. Senate Bill 869 extends the Act's coverage to farm workers whether or not they operate machinery, while excluding from coverage those farm workers who are employed within

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<sup>2</sup> The word "intrastate" was deleted by the Senate Economic Affairs Committee.



a twenty-five mile radius of his or her principal place of residence for 13 weeks a year or less. As we have pointed out, neither the current statute nor this bill is a model of statutory drafting. If this bill is signed, we strongly urge that §21(b)(8) be rewritten in its entirety during the next session so as to specify those included and those excluded.

STEPHEN H. SACHS, *Attorney General*

CATHERINE M. SHULTZ  
*Assistant Attorney General*

*Editor's Note:* Senate Bill 869 was signed into law as Chapter 751, Laws of Maryland 1984. Subsequently, the General Assembly has twice enacted clarifications of its intent with respect to Chapter 751 (Senate Bill 869). See Chapter 105, Laws of Maryland 1985 and Chapter 242, Laws of Maryland 1986. In order to provide useful background to this series of enactments, the bill review letter on Senate Bill 869 is published here in a slightly revised format.



**SYNOPSES OF OPINIONS  
NOT PUBLISHED  
IN THIS VOLUME**



## SYNOPSIS OF OPINIONS

### CORRECTIONS

#### COMMUNITY ADULT REHABILITATION CENTERS (CARCs)—CECIL COUNTY

Article 27, §710C, as presently formulated, does not permit placement in the Cecil County CARC of inmates committed to the Commissioner of Correction.

Op. No. 84-029

To:

*The Honorable John F. DeWitt*

November 26, 1984

*Sheriff of Cecil County*

### ELECTIONS

#### PUBLIC OFFICERS—GENERAL ASSEMBLY—CONTESTED ELECTIONS

The opinion reviews the meaning, scope, and effect of various provisions of the Maryland Constitution authorizing the determination of the election and qualifications of certain officers and relating to election contests, particularly those contests in which a House of the General Assembly is the judge.

Op. No. 84-004

To:

*The Honorable Helen L. Koss*

January 30, 1984

*Maryland House of Delegates*

## EMPLOYMENT AND TRAINING

### JOB TRAINING PARTNERSHIP ACT—SERVICE DELIVERY AREAS— GOVERNOR'S AUTHORITY TO REDESIGNATE—HOWARD COUNTY.

The Governor does not have the authority to grant Howard County's current request for immediate redesignation as a separate service delivery area under the Job Training Partnership Act. Any such redesignation may only be made, at the earliest, for the program year beginning July 1, 1985.

Op. No. 84-023

To:

*The Honorable Brent M. Johnson  
Secretary of Employment  
and Training*

September 26, 1984

## HEALTH

### LOCAL GOVERNMENT—COUNTY HEALTH OFFICERS— WICOMICO COUNTY

The Wicomico County Council may nominate a nonphysician for appointment as the County Health Officer. If a nonphysician is appointed to that position, however, the deputy health officer must be a licensed physician who also meets the qualifications required of a health officer. The law does not specifically require this physician to be a full-time employee.

Op. No. 84-003

To:

*Mr. Henry S. Parker  
President*

January 19, 1984

*Wicomico County Council*

## LOCAL GOVERNMENT

### COUNTIES—TAXATION—SPECIAL TAX DISTRICTS— HOWARD COUNTY

Howard County presently possesses the authority to create special taxing districts and has broad discretion to determine the purpose for which a special taxing district is to be created.

Op. No. 84-002

To:

*The Honorable William C. Bevan  
Maryland House of Delegates*

January 18, 1984

**BUDGETARY ADMINISTRATION—CAPITAL BUDGET—  
HOWARD COUNTY**

The Howard County Charter limits the authority of the Council, in adopting its annual budget and appropriation ordinance, to items specified in the annual capital budget under current consideration, which does not include prior years' appropriations.

Op. No. 84-019

June 21, 1984

To:

*The Honorable Elizabeth Bobo  
Chairperson, County Council  
of Howard County*

**PERSONNEL****MARYLAND TRANSPORTATION AUTHORITY—MERIT SYSTEM**

The Maryland Transportation Authority has the authority to establish a personnel system, including classification and compensation, that is independent of the State Merit System.

Op. No. 84-012

February 27, 1984

To:

*The Honorable Lowell K. Bridwell  
Chairman, Maryland  
Transportation Authority*

**SOCIAL SERVICES****LOCAL DEPARTMENTS—BUDGETARY ADMINISTRATION—"MONEYS  
OF THE STATE"**

(1) Funds contributed by local governments to local departments of social services must be handled in accordance with regular State fiscal procedures; and (2) these funds must not be used to supplant State general funds, but must instead be expended as directed by the contributing local governments.

Op. No. 84-028

October 31, 1984

To:

*The Honorable Ruth Massinga  
Secretary of Human Resources*

## STATE LOTTERY

### BUDGETARY ADMINISTRATION—SOVEREIGN IMMUNITY—PRIZES— ANNUITIES

1. A lottery winner for which the Lottery Agency has purchased an annuity that has subsequently failed would be entitled to collect the stated amount of his or her annuity out of the State share of the State Lottery Fund. The lottery winner, however, would have no claim against the general funds of the State.
2. There are no restrictions in the Lottery law limiting the investment instruments in which the Lottery Agency may invest on behalf of the lottery winner.
3. The director of the Lottery Agency is authorized by law to make the investment purchases.

Op. No. 84-021

September 5, 1984

To:

*The Honorable Leo E. Green*

*Chairman, Joint Committee on the  
Management of Public Funds*

## TAXATION

### SPECIAL ACT CORPORATIONS—EXEMPTIONS—UNIFORMITY— SPECIAL LAWS—CURATIVE ACTS—B&O RAILROAD

Article 81, §11 of the Maryland Code (i) does not violate the uniformity requirement of Article 15 of the Maryland Declaration of Rights, (ii) is not a "special law" of the type prohibited by Article III, §33 of the Maryland Constitution, and (iii) does not abridge any of the contract rights of the B&O Railroad.

Op. No. 84-014

March 19, 1984

To:

*Geoffrey D. Cant, Esquire*

*Director, Commission to Revise  
the Annotated Code*



## VEHICLE LAWS

### CLEAN AIR ACT—VEHICLE EMISSIONS

The recent decision in *General Motors Corporation v. Ruckelshaus*, involving the recall provisions of the federal Clean Air Act, neither requires nor permits the State to reduce the coverage of its vehicle emissions inspection program to vehicles that are less than 5 years/50,000 miles old.

Op. No. 84-007

To:

*The Honorable John Leopold*

February 6, 1984

*Maryland House of Delegates*

## WASHINGTON SUBURBAN SANITARY COMMISSION

### CONSTITUTION LAW—EQUAL PROTECTION—RETIREMENT/PENSION PLANS—"EMPLOYEES"

The WSSC does not have the authority to adopt and finance a pension or retirement plan for WSSC Commissioners. The authority granted in Article 29, §11-113 of the Maryland Code to adopt and contribute to such a plan for WSSC employees does not extend to the Commissioners themselves.

Op. No. 84-024

To:

*Mr. Leonard Teitelbaum, Chairman*

*Ms. Johanna S. Norris, Vice Chairman*

September 27, 1984

*Washington Suburban Sanitary*

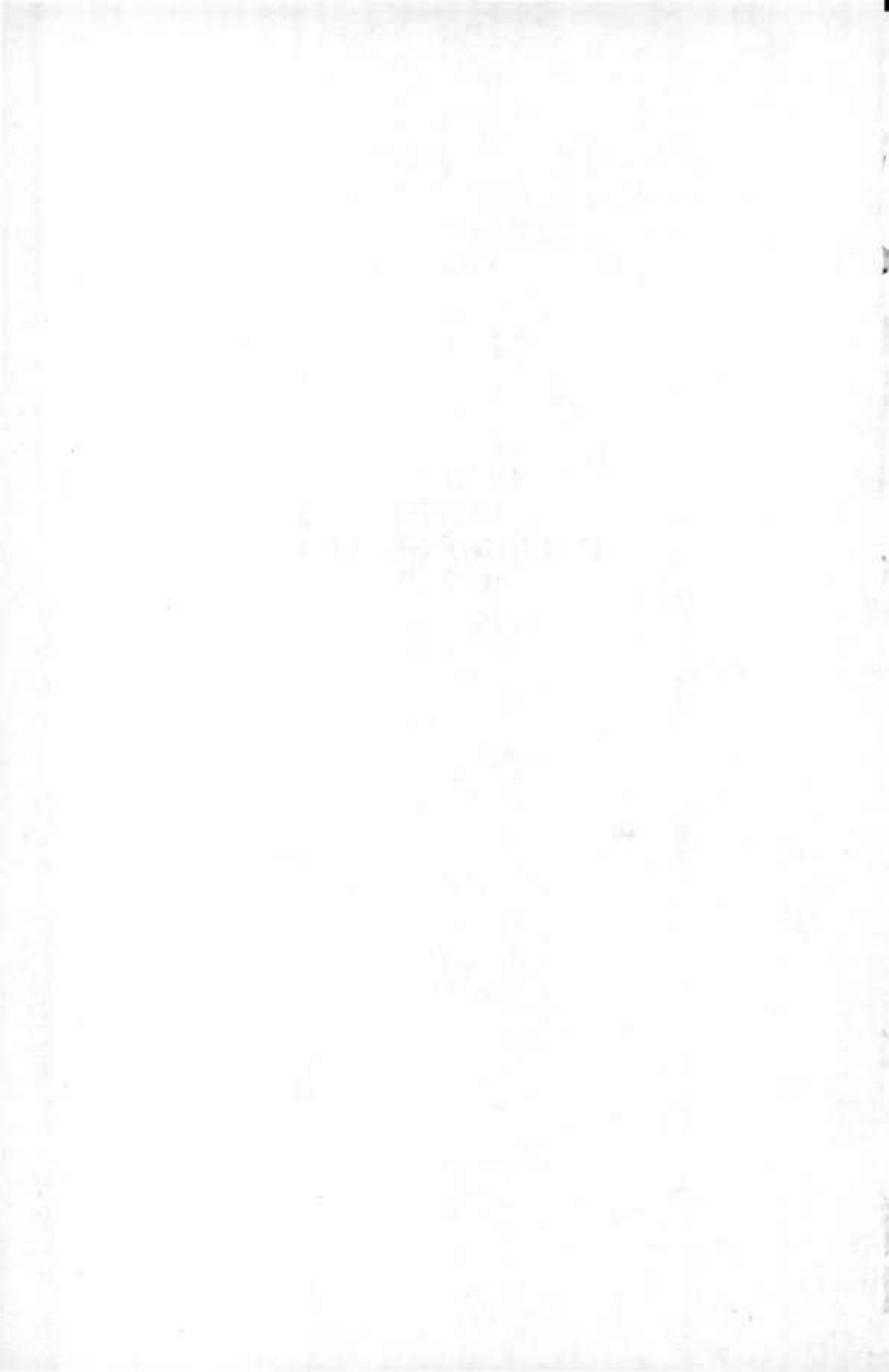
*Commission*



**CITATORS  
AND  
INDEX**



**OPINIONS  
OF THE  
ATTORNEY GENERAL  
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**CONSTITUTION OF THE  
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