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ANNUAL REPORT
AND
OFFICIAL OPINIONS
OF THE
ATTORNEY GENERAL
OF
MARYLAND

1986

STEPHEN H. SACHS
ATTORNEY GENERAL

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- 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.

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 continued 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.

Luther Martin	1778
William Pinkney	1805
John Thomas Mason	1806
John Johnson	1806
John Montgomery	1811
Luther Martin	1818
¹ Nathaniel Williams, Assistant Attorney General	1820
Thomas B. Dorsey	1822
Thomas Kell	1824
Roger B. Taney	1827
Josiah Bayley	1831
George R. Richardson	1845
Robert J. Brent	1851
² Alexander Randall	1864
Issac D. Jones	1867
Andrew K. Syester	1871
Charles J. M. Gwynn	1875
Charles B. Roberts	1883
William 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
³ Ogle Marbury	1918
Alexander Armstrong	1920
Thomas H. Robinson	1924
William Preston Lane, Jr.	1930
Herbert R. O'Connor	1934
William C. Walsh	1938
William Curran	1945
⁴ Hall Hammond	1946
⁵ J. Edgar Harvey	1952
⁶ Edward D. E. Rollins	1952
⁷ C. Ferdinand Sybert	1954
^{8,9,10} Thomas B. Finan	1961
¹¹ Robert C. Murphy	1966
¹² Francis B. Burch	1966
Stephen H. Sachs	1979

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

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

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

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

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

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

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

⁹Elected at election of November, 1962.

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

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

¹²Mr. 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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Motor Vehicle Administration—

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J. Marks Moore, III

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 Henry F. Leonnig

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 *Thomas E. Marshall
 *Emil A. Nichols
 Peyton Paul Phillips
 *Clater W. Smith, Jr.
 George H. White
 Frank W. Wilson

Uninsured Employers Fund—

Charles R. Goldsborough, Jr.

Exceptional Service Awards

In 1981, Attorney General Stephen H. Sachs inaugurated a special awards program to recognize unique achievements on behalf of the State. Each year, Exceptional Service Awards are presented to Assistant Attorneys General who have demonstrated special "ability, dedication, leadership and imagination" in carrying out their work for the State. The recipients of these awards are:

1981

Ellen A. Callegary	Department of Health and Mental Hygiene
Louis J. Kozlakowski, Jr.	Department of Transportation
Cheri Wyron Levin	Consumer Protection Division
James J. Mingle	Educational Affairs Division
Peter W. Taliaferro	Department of Assessments and Taxation
Charles R. Taylor	Department of Personnel

1982

Philip M. Andrews	Criminal Appeals Division
Robert deV. Frierson	Department of Licensing and Regulation
Paul W. Grimm	Department of Licensing and Regulation
Linda H. Lamone	Maryland General Assembly
Thomas M. Meachum	Central Collection Unit, Dept. of Budget and Fiscal Planning
James L. Shea	Civil Division
Alexander Wright, Jr.	Department of Personnel

1983

Alma L. Borenstein	Department of Licensing and Regulation
Michael F. Brockmeyer	Antitrust Division
Brian Cohen	Mass Transit Administration, Dept. of
Susan K. Gauvey	Civil Division
Diane G. Goldsmith	Criminal Appeals and Correctional Litigation Division
Nancy Knisley	Department of Personnel
Daniel J. O'Brien, Jr.	Department of Health and Mental Hygiene
Jennifer Lauterbach Robbins	Department of Health and Mental Hygiene

1984

Gertrude Bartel	Criminal Appeals and Correctional Litigation Division
Stefan D. Cassella	Medicaid Fraud Control Unit
Bruce P. Martin	Department of Personnel
Kathleen Howard Meredith	Civil Division
Frederick G. Savage	Educational Affairs Division
Michael J. Scibinico	Department of Natural Resources

Catherine M. Shultz
Ralph S. Tyler

Civil Division
Department of Human Resources

1985

Jane F. Barrett

Hazardous Waste Unit, Dept. of Health
and Mental Hygiene

Ben C. Clyburn

Department of Transportation

Louisa H. Goldstein

State Highway Administration, Dept. of
Transportation

Illona Sheffey Rawlings

Department of Personnel

Richard B. Rosenblatt

Criminal Appeals and Correctional
Litigation Division

David M. Sheehan

Civil Division

Marlene Trestman

Civil Division

Susan Zimmerman

Maryland Industrial Development

Whitman

Financing Authority, Dept. of Economic
and Community Development

1986

Peter V. Berns

Consumer Protection Division

Edward S. Harris

Contract Litigation Unit, Departments of
Transportation and General Services

Peter E. Keith

Civil Division

Norman E. Parker, Jr

Department of Economic and Community
Development

Christine Steiner

Educational Affairs Division

ANNUAL REPORT FOR 1986

December 31, 1986

*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 the Attorney General for the calendar year 1986. A detailed financial statement of the Office, as well as caseload statistics and the official Opinions of the Attorney General, follow this report.

Annapolis Office

On May 27, at the last of three major bill signings, 240 bills were signed into law and another 123 were vetoed. At the same time, the Attorney General's six-week pre-signing review of 1986 legislation for constitutionality and legal sufficiency came to an end.

In the 90-day legislative session that concluded April 7, the General Assembly enacted nearly 1,000 pieces of legislation, tackling such thorny questions as reform of the savings and loan laws, mandatory automobile seat belt usage, the creation of a State Sports Authority, a ceiling on certain "pain and suffering" awards in personal injury lawsuits, the medical malpractice insurance crisis, low income housing initiatives, and approval of the Critical Areas Commission guidelines for cleaning up the Chesapeake Bay.

The legal questions addressed by the Annapolis contingent in the Attorney General's Office were as varied as the subject matter of the enacted bills. Among the advice rendered during the session was that:

- a bill authorizing juvenile court judges to designate a facility for placement of a child without regard to executive budget restrictions violated the Separation of Powers doctrine;
- members of the General Assembly could not be appointed to serve as members of the Maryland Sports Authority;

- legislation providing for the admissibility of out-of-court statements in child abuse cases would not violate a defendant's constitutional right to confront his accusers;
- the General Assembly could not hinge the effectiveness of a statute repealing Baltimore City's blue law to a similar Sunday closing repeal for another subdivision which required approval by voters at referendum;
- the Legislature could not subject Health Department gasoline vapor recovery regulations to a legislative veto;
- a bill denying bail to accused drug traffickers did not violate the 8th Amendment to the U.S. Constitution;
- a State constitutional amendment to assure that each Maryland county, especially on the Eastern Shore, had a resident delegate, would not violate federal one-man/one-vote requirements;
- the Fair Campaign Financing Act could be amended to apply only to candidates for Governor and Lt. Governor and in the 1990 election, and
- the existing State law on distribution of obscene matter to minors did not conform to the Supreme Court's obscenity standards.

Difficult legal issues were also raised by a number of bills passed by the General Assembly. During the bill review process, 131 special letters to the Governor were prepared, resolving questions of constitutionality and legal sufficiency. Among the findings:

- a bill authorizing the State to withdraw from the Northeast Interstate Low-Level Radioactive Waste Compact did not violate the "Compact" clause of the U.S. Constitution;
- the repeal of legislation enabling sentenced inmates to petition for commitment as drug addicts, and thus possibly obtain early release, was not an *ex post facto* law.
- a measure banning the sale of clove cigarettes did not impermissibly burden interstate commerce;
- a \$350,000 cap on "pain and suffering" damages in personal injury cases did not violate due process or unconstitutionally deny litigants a remedy;
- a \$150 tax on lawyers to establish a Legal Mutual Liability Insurance Society was a tax for a public not a private purpose and the bill's lien provisions did not offend due process;

- a bill setting State standards for signal lights on broadcast transmission towers was not preempted by federal law;
- controversial legislation transferring jurisdiction over charges of sex discrimination by insurers from the Human Relations Commission to the Insurance Commission did not curtail eleven-year-old proceedings against an insurer pending before the Human Relations Commission;
- a bill precluding waiver of juvenile court jurisdiction in cases involving contributing to the delinquency of a minor would deny a right to a jury trial to those charged in juvenile court;
- legislation making it a crime to interfere with the transmission of a two-way emergency communication is probably preempted by the Federal Communications Act, and
- a prohibition on sex discrimination by tax-exempt country clubs was severable from a portion of existing law authorizing clubs to have separate starting days and times for men and women.

Members of the Annapolis office also advised various agencies, such as the State and Baltimore City Election Boards, the Board of Review of the Department of Agriculture, and the Maryland Stadium Authority. In addition, the office participated in major litigation involving the 1986 election (*Schaefer v. State Administrative Board of Election Laws*); the savings and loan crisis (*Chevy Chase Savings and Loan v. State*, *United Wire v. MDIF*, *Second National and John Hanson Savings and Loan v. State*); pension reform (*MSTA v. Hughes*); civil rights (*MNCPPC v. Crawford*), and constitutional challenges to legislation enacted by the 1986 General Assembly (*Burning Tree Club v. State*, *Ogrinz v. James* and *Specialty Tobacco Council v. Sachs*).

Consumer and Investor Affairs

The Consumer Protection Division resolved several important cases, launched new initiatives and neared completion on a unique project during 1986.

As of this date, our comprehensive, Statewide list of physician fees—the first of its kind in the nation—is virtually complete. We hope to be able to release it and a special, 36-page *Health Care Shopper's Guide* within the next few weeks. The price lists, which give the “customary charges” that some 4,225 doctors charged Marylanders in 1985 for commonly performed procedures covered by Medicare, show wide variations in cost within nine geographical

regions in the State. It is our belief that the price lists and shopper's guide will encourage consumers to comparison shop for health care, just as they do when buying other consumer services. We also hope the lists will promote competition among health care providers. Naturally, we readily acknowledge that price is only one factor consumers should consider when choosing a physician—and it should never be the controlling one. But health care is increasingly expensive, and it is important for consumers to realize that they don't necessarily get the best care by paying high prices or poorer care if they pay lower prices.

The price lists and shopper's guide are the fruits of a two-year project we began in September, 1984 by filing an unusual Freedom of Information Act request with the U.S. Department of Health and Human Services (HHS), seeking the statistical information the federal government keeps on the fees charged by Maryland physicians who treat Medicare patients. Less than a month later, HHS agreed to give us—for free—its computer tapes containing tens of thousands of entries concerning Medicare claims filed by Maryland health care providers, including non-physician practitioners.

A specially-appointed panel of advisors assisted us with this project, including representatives from the business community, labor unions, consumer organizations, health care industry, state and federal government, and the academic community. Of particular significance was the support and encouragement from the Labor-Management Health Costs Coalition; the Koppers Company, Inc., and the more than \$50,000 contributed to the project by the American Federation of State, County and Municipal Employees; Maryland State Teachers Association; the AFL-CIO; the UAW Community Action Council; Equitable Bank; General Motors; USF&G; the Baltimore and Frederick Counties Boards of Education; Western Electric Corporation; Baltimore Gas & Electric Company; Maryland Department of Health and Mental Hygiene, and the Villers Foundation in Washington. Technical assistance also was provided by the Medical and Chirurgical Faculty of Maryland; the Maryland Hospital Association; the Johns Hopkins University Center for Hospital Finance and Management; C & P Telephone; Maryland Blue Cross and Blue Shield, and Pennsylvania Blue Shield.

Among the major cases settled in 1986 was a 1984 action against Towson Ford, an auto dealership and repair facility, which agreed to pay a total of \$6,820 in restitution to 10 former customers to whom it had sold unnecessary car repairs, as well as an additional \$30,000 to the Division for use in consumer education programs. In March of this year, a hearing officer who had presided over 36

hearings on the case between August, 1984 and June, 1985, issued a 240-page report which found that Towson Ford had repeatedly violated the State's consumer laws by telling customers their cars needed major repairs when in fact they did not; failed to honor express and/or implied warranties on parts, services and repairs; failed to provide consumers with invoices for work done, and charged them for unauthorized repairs. The dealership initially filed exceptions to the hearing officer's report, but in November agreed to accept it.

When 1986 was little more than a week old, the Division filed the first legal action brought by the State under a special provision of the federal odometer rollback law, charging in a U.S. District Court suit that a Glen Burnie couple and their son allegedly rolled back the odometers on used cars they sold. The suit seeks an injunction against and fines and restitution from James P. Elam, Sr.; his wife, Myrna Emily Elam, and their son, James P. Elam, Jr., for defrauding consumers by altering, resetting or disconnecting the odometers on used cars for which they charged high prices. For example, the suit says the elder Elam paid \$800 in 1982 for a 1976 Datsun pick-up with 96,971 miles on it. Less than a month later, he falsely represented himself as the original owner of the truck and sold it for \$2,250, citing an odometer reading of 57,070 miles.

In April, the Division filed another odometer tampering suit in Baltimore federal court, seeking more than \$450,000 in restitution from a Silver Spring man, his son, and several associates who allegedly defrauded hundreds of consumers by tampering with the odometers on more than 300 used vehicles they have sold since 1981. The suit against Walter Robert Dickson; his son, Douglas Craig Dickson; auto dealers Haynes Lee Locklear and Carl R. Wells, and Marcus Garvey Guy of Washington, D.C., allegedly the actual odometer tamperer, charges that they conspired to alter odometers on used cars, as well as misrepresented who actually owned the vehicles.

The innovative initiatives against the alleged odometer tamperers were only part of the Division's ongoing monitoring of the State's auto repair industry, a perennial source of numerous consumer complaints. Cease and Desist notice also were issued against Campbell's Auto Engineering in Baltimore, accused of repairing cars with used parts that were passed off as new; Churchville Exxon Station, charged with selling unnecessary repairs, and D.C. Repairs, a Towson automobile repair shop that allegedly sold re-conditioned car air conditioners as new.

Important cases dealing with such diverse consumer areas as career training, homebuilding, health spas and hearing aids also were dealt with in 1986.

In July, the Baltimore City Circuit Court ordered Global Career Academy, a now-defunct, Silver Spring-based training school for prospective travel agents and airline workers, to pay more than \$242,000 in restitution to 164 former students, as well as \$73,000 in civil penalties for violating the consumer protection law. The former school's owners, William and Wilma Boyd of Naples, Florida, also were ordered to pay \$13,206 to the State Board of Higher Education to reimburse its Student Tuition Guaranty Fund for the amount it had paid to former Global Career Academy students. The higher education board and State Commissioner of Education Sheldon H. Knorr joined the Division in its 1985 suit against the school and the Boyds, accusing them of misleading consumers by using "extraordinarily" inflated figures to measure the success it had in finding jobs for its graduates; falsely claiming it could extend federal aid to students, and saying it was authorized to conduct a full training program at its Silver Spring headquarters when it was not. The defendants also claimed they were licensed to do business in some states where they were not and failed to provide promised tuition refunds.

In the home building field, the Division issued a Cease and Desist notice to James W. Williams, owner of J.W. Builders, Inc., a Mechanicsville home building firm, who we allege has violated consumer laws by failing to finish building a home for a Mechanicsville couple and then reneging on an agreement negotiated by the Division to make repairs on the residence after its foundation collapsed.

On the health front, in addition to the ground-breaking work the Division is doing on the physician fee project, cases were instituted and completed involving a deceptive seller of hearing aids who preyed on elderly consumers in Montgomery, Prince George's, Charles and Frederick Counties; a seller of contact lenses who failed to deliver his product as promised or did so months late, and the operators of health spas who failed to abide by the State's registration and bonding requirements.

In January, the Prince George's County Circuit Court ordered Burt Miller, Jr., a Virginia-based, one-time door-to-door salesman of hearing aids, to pay civil fines and restitution totaling \$23,100 for violating the Consumer Protection Act and the door-to-door sales law, plus \$19,061 in restitution to 25 elderly consumers. Miller had falsely claimed to be affiliated with local hearing aid dealers

and told the consumers they would benefit from using a hearing aid when they would not or that they needed a hearing aid when they did not. He also told them they were buying new hearing aids when in fact he gave them used ones; falsely claimed he was selling custom-made hearing aids, when he was not, and failed to tell consumers they could cancel their door-to-door sales order within a three-day cooling-off period.

In April, a Cease and Desist notice was sent to John Edmond, owner of Landover Contact Lens Center and Landover Labs in Marlow Heights, accusing him of failing to honor his promises to deliver mail order contact lenses within two weeks or fulfill pledges to provide an unconditional refund within 30 days if a customer is dissatisfied.

Significant civil fines and restitution payments were obtained in cases involving now-defunct health spas in Columbia, Randallstown and Cockeysville. In March, Thomas E. Lyle and his wife, Rea Lyle, the former owners of Nautilus Woman, a now-closed health spa with outlets in Columbia and Randallstown, admitted that they violated the state's health club law by illegally collecting long-term payments without being bonded. They agreed to pay a \$10,000 civil penalty to the Division, as well as an undetermined amount in refunds to an estimated 710 former members of the club, which was also known as the Women's Professional Fitness Center and closed down in June, 1985.

In another case last month, the Baltimore County Circuit Court ordered Louis Andrews, the one-time owner of the now-defunct Grecian Spa health club in Cockeysville, to pay a total of \$10,821 in restitution to 34 former members of the facility who sustained losses when the club closed unexpectedly due to an ownership dispute between Andrews and his estranged wife. Evidence showed that Andrews had run the club in an unscrupulous manner, severely depleted its assets, and sold long-term memberships to it even when it was on the brink of collapse.

In June, the Division also filed suit in Baltimore County Circuit Court against Gumpty Corporation, the former owner of the Nautilus at the Hilton Health Spa in Pikesville, seeking to enforce a subpoena for the names of former members who are due refunds because the club closed. At least 150 claims for more than \$20,000 in restitution already have been filed with the Division, but we believe that many more former customers of the club do not know they are entitled to file a claim. The Division needs the subpoenaed records in order to determine whether Gumpty Corporation decep-

tively or fraudulently continued selling memberships in the club after it was insolvent. The company allegedly sold 15-month memberships less than three weeks before it closed the club in March, 1985.

The volunteers in our Consumer Assistance Unit continue to be the frontline soldiers in our battle to resolve consumer grievances, but in 1986 they got a new commander. Wendy Ginsburg, who brilliantly oversaw the creation of our all-volunteer force of consumer affairs specialists, decided to seek other challenging opportunities, and we were fortunate to find Rebecca Bowman, a Washington-trained attorney, to serve as her successor. Ms. Bowman, a graduate of American University Law School, previously headed a consumer mediation agency in Charlottesville, Virginia. She came on board just two days ago, and we're delighted to have her join us.

Securities Division

In 1986, there were approximately 4,016 securities filings and renewals and 1,364 exemption filings which brought a total of \$1,680,996 in revenue for the State.

In addition, 773 franchise registrations, renewals, amendments and exemptions were filed with the Division, bringing in approximately \$101,700 in revenue. Only 7 filings under the Business Opportunities Act were filed with the Division, providing \$1,300 in revenue for the State.

The Division received 295 initial broker/dealer applications for registration and 6,917 applications for securities agent registration in 1986. Fees in the amount of \$209,800 were collected by the Division and forwarded to the State for all broker/dealer registrations and renewals and agent registrations and renewals. Total registration fees collected by the Division exceeded \$13,993,796.

During the 1986 legislative session, the General Assembly passed a bill amending the Maryland Securities Act for the purpose of deleting the maximum fee provisions for broker/dealer and agent renewals. Essentially, the maximum fee provision provided that the maximum initial or renewal registration fee payable by any broker/dealer and its agents is \$2,500. Because of this provision, the Division was required to refund to many large broker/dealer hundreds of thousands of dollars in registration fees, a process which encompassed audits, telephone calls and correspondence over a period of six months. The filing fee amendment which was passed by the General Assembly did away with any requirement that the Division refund registration fees to any bro-

ker/dealer or agent. In addition, the amendment reduced all renewal fees by \$5 so that agents are now required to pay a fee of \$20 on renewal rather than \$25 as required in prior years.

The Division proposed comprehensive amendments to its regulations promulgated under the Maryland Franchise Registration and Disclosure Law, which were made effective June 3, 1986. The amendments to the franchise regulations were made to update current forms and guidelines used by applicants to register franchises with the Division of Securities. In addition, the Division proposed a number of exemptions from registration requirements where it can be established that franchisors are financially stable and that franchises are purchased by institutional investors or, in certain situations, by a broker/dealer. The transition from the old regulations to the new regulations has been smooth and efficient, and a number of franchisors have availed themselves of the new exemptive provisions.

The Division has responded to calls for additional regulation of investment advisors in the State by working closely with the North American Securities Administrators Associations, Inc. and members of industry in drafting legislation providing for the registration and regulation of investment advisors.

The Division has continued to pursue enforcement matters actively during 1986. A Final Stop Order was issued denying an application by the American Board of Trade National Marketing Systems, Inc. and its president Arthur N. Economou to sell securities here. The Commissioner issued the Order after Economou and the American Board of Trade failed to appear at a scheduled hearing. An Order summarily suspending the registration had previously been issued after an investigation conducted by the Division revealed that Economou and the American Board of Trade had offered millions of dollars in securities to Maryland residents in violation of the Securities Act.

On June 10, the Division issued an Order to Show Cause against Michael Clott and the First American Mortgage Company, Inc., in which the Division alleged that Clott and FAMCO illegally offered and sold securities to Maryland residents in violation of the anti-fraud provisions of the Securities Act and without registering the securities, or the brokers and agents selling them. The Division alleged in the Order that Clott's sale of investments in mortgages constituted the sale of investment contract securities. The Division subsequently entered into a Consent Order in which Clott agreed to be barred from offering and selling securities in Maryland for 5 years.

On February 11, the Division entered into a Consent Order with Recreational Industries, Inc., Thoman Motel Corporation, William A. Thoman, Helmuth M. Heise and John W. Dever, in which Recreational Industries, Inc. and Thoman Motel Corporation agreed to offer rescission to 69 purchasers who invested in condominium units at the Wisp Resort in Deep Creek Lake, Maryland. The rescission offers totaled approximately \$4,830,000. Recreational Industries, Inc., Thoman Motel Corporation, Thoman, Heise and Dever also agreed not to offer and sell condominium units in the future in connection with management services or rental pools.

A Cease and Desist Order was issued against Caucus Distributors, Inc., a firm associated with Lyndon M. LaRouche, and two of its representatives, Kathy S. Wolfe, and Paul Gallagher, alleging that the offer and sale of promissory notes by Caucus, Wolfe and Gallagher constituted the offer and sale of securities that were not registered. The Order also alleged that Wolfe and Gallagher were not registered as agents to offer and sell securities, and that the securities were sold in violation of the antifraud provisions of the Act. The Division also issued a Summary Revocation of Exemption Order, which summarily revoked the exemption which may have been available to Caucus under the Securities Act. A hearing was held on the Orders on June 6, 1986.

The Division completed approximately 46 enforcement investigations during 1986, obtaining a variety of sanctions and resolutions including rescission offers, fines, consent orders, cease and desist orders, and criminal referrals. The Division obtained more than \$12.5 million in offers of rescission to Maryland residents and other aggrieved investors during the year.

Antitrust

In 1986, the Antitrust Division led nationwide litigation against the Minolta Corporation, challenging that company's retail pricing policies for their innovative auto-focus Maxxum and AF-Tele camera products. The Division investigated allegations that Minolta and its retailers had agreed to maintain minimum retail price levels on these products. The litigation was launched in February, 1986 with a suit filed in the United States District Court in Baltimore. The State sought monetary damages on behalf of Maryland's consumers of these Minolta products, as well as injunctive relief seeking termination of the alleged retail price-fixing agreements.

After months of intensive negotiations, Assistant Attorneys General in the Antitrust Division signed a settlement agreement

in July, 1986, obtaining both a monetary recovery for injured Maryland consumers and a consent decree enjoining Minolta from engaging in such retail pricing practices for five years. Under the settlement, which has received preliminary approval from the Court, qualified purchasers of the Minolta Maxxum 7000 camera will receive a check for \$15.00 and qualified Minolta AF-Tele camera purchasers will receive a check for \$8.00. These checks will be mailed to qualified claimants after the settlement has received a final court approval, which is expected in the summer of 1987.

After the settlement of both Maryland's suit and a similar suit filed by the New York Attorney General, attorneys general from thirty-five other states filed and settled lawsuits against Minolta on the same broad terms. Division attorneys are coordinating these thirty-five lawsuits, involving up to \$6 million in payments by Minolta, before Judge Walter Black in the federal court in Maryland.

During the past year, Division attorneys continued to litigate the State's antitrust lawsuit against Blue Cross and Blue Shield. The suit, originally filed in 1984 and scheduled for trial in 1987, alleges that the national Blue Cross and Blue Shield Association conspired with the Maryland-based Plans and the D.C.-based Plans to restrict the marketing of health insurance in Maryland. According to the suit, the D.C. Plans agreed to restrict their marketing of health insurance in Maryland to part of Prince George's and Montgomery counties, while the Maryland plans agreed to market their health insurance only in the remainder of the State. The suit further alleges that this arrangement is a part of a long-standing nationwide market allocation scheme, enforced by the National Association, by which local Blue Cross and Blue Shield Plans agree to restrict their marketing to exclusive territories.

In 1986, Division attorneys also counseled the Board of Trustees of the Maryland Energy Overcharge Restitution Trust Fund on the allocation and expenditure of approximately \$36 million received by the State from *United States v. Exxon* and related energy overcharge lawsuits. These monies fund projects designed to provide restitution to users of oil and other energy products who were illegally overcharged for these goods. The primary use of these funds has been to provide residential weatherization assistance to low income households. The Division has assisted the Board in conducting hearings on proposals for the expenditure of this money, reviewing and approving project proposals, and complying with the Federal and State regulations governing the use of the refunds.

The Antitrust Division has continued to play an important role in providing preventive law advice to State regulatory and licensing boards. During the year, the Division published reviews of the practices of the Maryland State Board of Dental Examiners and the Maryland State Board of Veterinary Medical Examiners, recommending important changes in the Boards' regulations. Antitrust reviews of Maryland's professional licensing boards ensure that the boards do not limit competition in Maryland any more than the General Assembly has expressly empowered them to do.

Department of Human Resources

This past year was a productive one for DHR, the State agency which provides benefits and services to low-income people. The same was true for the unit of Assistant Attorneys General assigned to represent the agency.

Consistent with DHR's goals, attorneys here have continued their aggressive representation to resist the intensified efforts by federal agencies to impose fiscal penalties on DHR's cash benefit programs. Similarly, the Assistant Attorneys General assigned to the Department have vigorously represented DHR in its efforts to enhance its collection of child support from absent parents. Among important court rulings obtained this year were ones that upheld the tolling of a three-year limitations period during the minority of a child involved in a paternity case (*Payner v. DDS*), and a finding that upheld the constitutionality of Maryland's procedures for intercepting tax refunds (*McClelland v. Massinga*).

In connection with services offered by DHR, Assistant Attorneys General have provided zealous representation in institutional reform litigation, such as that concerning the operation of the foster care system. This aspect of representation poses challenging questions unique to a public interest practice. As a consequence, we have gained substantial experience in balancing institutional agency clients' needs and legal rights with those of individuals served by the programs DHR provides.

Lastly, the Assistant Attorneys General working on behalf of DHR have become increasingly involved in equal employment opportunity litigation. They have defended DHR successfully in challenges to the agency's employment practices. Also, we have helped the agency improve race relations among its employees by encouraging increased human relations training in the Department.

In sum, the Attorney General's representation of DHR continues to strengthen the agency's ability to perform its mandated func-

tion, while maximizing the closely scrutinized federal and State funds appropriated for this purpose.

Health and Mental Hygiene

In *PEPCO v. Sachs*, the Maryland District Court upheld Maryland's regulations concerning toxic PCBs. PEPCO had alleged that the regulations were preempted by federal statutes. On appeal, PEPCO's challenge was supported by amicus briefs on behalf of the major electric utility trade associations. Maryland's brief, prepared by Assistant Attorneys General Ralph Tyler, Richard Hall, Michael Powell, Charles Taylor and Kathie Stein, was supported by amicus briefs from the Environmental Protection Agency, Chesapeake Bay Foundation, Natural Resources Defense Council and 18 states. The Fourth Circuit dismissed the appeal on abstention grounds, deferring to an ongoing state grand jury investigation. PEPCO is now seeking review by the Supreme Court.

In a different case, Allied Chemicals has agreed to pay a fine of \$50,000 for water pollution violations at its plant located in Baltimore's Inner Harbor. The settlement, negotiated by Assistant Attorney General Powell, also required the company to take steps to prevent further violations.

Another \$50,000 fine will be paid by Armco, Inc., in a settlement negotiated by Assistant Attorney General Jeff Howard stemming from water pollution violations at the company's plant in East Baltimore.

During 1981, Trans-Tech, Inc. also signed a consent order with the Waste Management Administration, requiring the company to reimburse the State for money expended in providing public water to homes in Adamstown, Frederick County. The order, negotiated by Assistant Attorneys General Charles Taylor and Michael Powell, required the company to pay the State \$775,000 reimbursement and \$100,000 in fines. The company also agreed to expend up to \$100,000 for additional clean up at the site.

In another case, Angelo John Casolo was ordered to remove and properly dispose of hazardous waste discovered on his property in Howard County. Casolo was later held in contempt for violations of an interlocutory injunction. The case is continuing under the direction of Staff Attorney Pam Marks and Assistant Attorney General Jean Belt.

The Maryland Health Resources Planning Commission was involved in two appellate decisions interpreting the State's health

planning statute—*Southern Maryland Hospital Center v. Fort Washington Community Hospital*, 308 Md. 323, 579 A.2d 727 (1987) and *Doctor's Hospital of Prince George's County v. MHRPC*, 65 Md. App. 656, 501 A.2d 1324 (1986). Taken together, these decisions require certificate of need applicants to adhere to threshold and service-specific regulatory requirements on all agency authority to conditionally approve specific projects. Applicants are required to submit necessary information on all regulatory criteria. Those that fail to do so may not receive "conditional" approval by the regulatory agency without specific authority in the applicable regulations.

Educational Affairs Division

The Educational Affairs Division continues to handle a remarkable volume and variety of court litigation, administrative proceedings and day-to-day counseling matters for numerous public educational agencies and institutions. The Division's clientele includes the University of Maryland, the State Department of Education, the State University and College System, Morgan State University, St. Mary's College, Maryland Public Television, the Maryland School for the Deaf, the Maryland Board for Higher Education, and several other educational boards and commissions.

In 1986, the Division handled more than 75 federal and State court cases. More than two dozen new cases were filed during the year, while 37 were resolved all on terms favorable to Division clients. As in past years, the Division's caseload encompassed a range of constitutional, statutory, contractual, and tort claims initiated by employees, students, patients, and contractors.

In addition, Division attorneys represented clients in hundreds of administrative proceedings before an array of federal and State agencies. These proceedings entailed a variety of disputes, including personnel grievances, discrimination charges, procurement protests, audit disallowances, school closings, tenure dismissals, special education hearings, and student disciplinary cases.

The Division also devoted substantial attention to day-to-day advice and counsel matters. Attorneys regularly reviewed and drafted an assortment of institutional policies and procedures; legislative proposals; procurement contracts and real property leases; financing documents; equipment lease/purchase agreements; special personnel contracts and proprietary research contracts.

In addition to negotiating and drafting various types of agreements, Division attorneys advised administrators on a variety of

topical and potentially troublesome issues including academic freedom and tenure; environmental risks and liabilities; athletic program issues; home instruction; student discipline; risk management; lay-off and retrenchment; comparable worth; copyright and trademark; licensing and academic institutions; aid to religious institutions; First Amendment issues; affirmative action; drugs, alcohol and AIDS; defamation, libel and invasion of privacy; confidentiality and conflicts of interest; federal tax law implications; lease/leaseback transactions; revenue bond financing; early retirement incentives; special education and the handicapped; personnel disputes; due process and equal protection, and public information and open meetings law.

As it has done since 1981, the Educational Affairs Division has sponsored a unique preventive counseling program designed to educate client administrators on practical ways to anticipate legal problems and avoid litigation. For example, Division attorneys work closely with client administrators on formulating early retirement incentive programs, streamlining the classified employee grievance system, fashioning suitable affirmative action plans, and implementing the State-wide desegregation plan. Moreover, this year the Division hosted a special seminar briefing for education administrators on copyright and trademark issues, negotiating proprietary research agreements, and protecting the institution's interest in patentable research discoveries and computer software. Finally, Division attorneys choreographed a "MICPEL Education Law Workshop" for local school lawyers, teachers, board members and administrators, on legal developments affecting elementary and secondary education.

Criminal Investigations

The most significant development for the Criminal Investigations Division during 1986 concerns the prosecutions arising out of the Maryland savings and loan crisis and the collapse of Old Court Savings and Loan. Six individuals associated with Old Court were indicted in 1986. Four of them—Jeffrey Levitt, Allan Feinberg, James Land, and Dennis Guidance—pled guilty. Levitt received a sentence of 30 years incarceration and was ordered to pay restitution of \$14.7 million. The other three individuals are awaiting sentencing. Jerome Cardin and Walter Otstot pled not guilty. Cardin was convicted following a jury trial and is awaiting sentencing. Walter Otstot became ill during jury selection and his case is still pending. Additional Old Court indictments and more prosecutions are planned during 1987 involving other savings and loans.

The significance of the savings and loan prosecutions lies in the speed and vigor with which State prosecutors have responded to criminal conduct directed at State institutions.

Medicaid Fraud

The Medicaid Fraud Control Unit successfully concluded 15 prosecutions in 1986. Among those convicted were four pediatricians, three psychiatrists, three dentists, one funeral home director, one nursing home administrator, and three non-providers. As part of a trend toward stricter sentencing in Medicaid fraud cases and white-collar crime cases generally, one psychiatrist received 12 months in jail (4 months suspended) while another psychiatrist received 90 days in jail. A pediatrician receive a year in jail (6 months suspended).

Criminal fines and restitution ordered totaled \$253,773, and civil overpayments established totaled \$165,331, bringing the yearly total to \$419,104. Community service totaling 1,750 hours was ordered in 1986.

Since its inception in 1978, the Medicaid Fraud Control Unit has become increasingly more experienced in detecting and prosecuting Medicaid fraud, and it has been able to successfully prosecute more sophisticated, complex cases. As the Medicaid Fraud Control Unit has prosecuted more health care providers, it has developed a reputation within the State as an aggressive enforcement arm of the Attorney General's Office. The Unit has also sensitized State judges to the concept of Medicaid fraud as a serious white-collar criminal offense.

Among Medicaid Fraud Control Units, the Maryland Unit is in the forefront in using computers for case targeting. Before targeting cases for investigation, the Unit will often want to schedule data for an entire class of providers so as to highlight providers whose characteristics in a given area are unusual. This procedure is currently being used to target nursing home cases and will be used in the future to target other providers. This approach has already proved successful in targeting dental cases, where the State's computers were used to spot unusual patterns of billing activity submitted by dentists, allowing investigators to target those dentists likely to have committed fraud. To date, a total of eight dentists have been convicted of Medicaid fraud as a result of this program.

The Medicaid Fraud Control Unit has accomplished much over the last year. The Unit has continued to build on the reputation it

has developed as an aggressive agency which weeds out fraud among health care providers. This perception no doubt acts as a deterrent to fraud and abuse on the part of some health care providers. In an era of skyrocketing health care costs, the goal of the Medicaid Fraud Control Unit must be to help contain costs by fighting fraud and abuse within the system and by deterring those who would otherwise abuse the Maryland Medical Assistance Program.

The Unit is an active member of the National Association of Medicaid Fraud Control Units, frequently participating in and contributing to its national educational seminars and programs.

Criminal Appeals

In 1986, the Supreme Court granted review in two Maryland criminal cases. On November 5, I presented the State's position in *Maryland v. Garrison*, which involves the constitutionality of the search of a man's apartment when the police thought they were searching his neighbor's apartment, for which they had a warrant. The second case is *Booth v. Maryland*, in which the Court will consider the constitutionality of the use of victim impact evidence at a death penalty sentencing proceeding. Although review was granted in 1986, argument will not take place until March, 1987.

For many years, the Assistant Attorneys General who were defending the State in civil rights actions against correctional officials were part of the Criminal Appeals and Correctional Litigation Division. In July, 1986, the six attorneys handling those prisoner suits became a unit of the Civil Division, since the type of work with which they are involved requires closer coordination with other civil litigators. The Criminal Appeals Division now consists of 12 attorneys who handle an annual caseload of 800 criminal appeals in the Court of Special Appeals, 50 cases in the Court of Appeals, and over 100 petitions for writs of habeas corpus in federal court. These attorneys also provide advice and assistance daily to prosecutors and other people interested in the criminal justice system.

Criminal Assistance Program

Each year, the Attorney General's Office represents the State in approximately 600 appeals of the cases prosecuted by the State's Attorneys for crimes of violence.

On July 1, 1986, the Office established a Victim Assistance Program under guidelines passed during the 1986 legislative session. The guidelines provided, among other things, that the Office of the Attorney General should provide information to victims of violent

crime who wish to follow direct appeals and other post-sentencing proceedings.

At the appellate level, the Victim Assistance Program has three goals: notification, education and service referral. The primary goal is to develop an efficient method for notifying the victims of a crime about the current status of the case, such as the final disposition of direct appeals and other post-sentencing events. A second goal is to educate the public and victims about the appellate process generally. The third goal is to provide information about support services that will help meet the ongoing physical, psychological and financial needs of victims.

*Department of Public Safety and
Correctional Services*

During the past year, counsel assigned to represent the Department of Public Safety and Correctional Services experienced a large increase in the number of Circuit Court suits filed by inmates challenging denial and revocation of parole; calculation of their sentences, and entitlement to credits against their sentences. This development follows the general trend of increasing numbers of inmate suits being filed in both the federal and State Courts.

Considerable support and time were devoted to assisting the Maryland State Police with the revamping of their promotional system and with pending litigation challenging many aspects of the State Police promotional, training and discipline system.

There also was an increase in the number of serious disciplinary cases being handled by staff attorneys assigned to the Department of Public Safety and Correctional Services. These cases are attributable in part to continuing investigations in the aftermath of the stabbing of two correctional officers at the South Wing of the Maryland Penitentiary in 1985.

On a more positive note, the Department of Public Safety and Correctional Services is on the verge of having its internal grievance mechanism for inmates certified by the federal district court. As soon as that certification is received, inmates will be required to first exhaust the grievance remedies available to them within the Division of Correction's established procedures before they file suit in federal court. It is hoped that when this procedure is fully operational, the volume of civil cases filed in federal court can be reduced.

Assessments and Taxation

The Assistant Attorneys General assigned to the Department of Assessments and Taxation continue to represent their clients in a variety of administrative and court actions, including cases concerning real and personal property taxations; tax exemptions and credits; the interpretation of Maryland's corporate law; franchise taxes on financial institutions and savings banks; building, saving and loan associations, and gross receipts tax. In addition, assistance and advice is given to local governments in matters concerning property taxation.

In recent years, litigation concerning tax exemptions has increased substantially. In a significant tax exemption case, *Supervisor of Assessments of Montgomery County v. Group Health Association, Inc.*, the Court of Appeals has recently affirmed the Tax Court's decision that a nonprofit health maintenance organization (HMO), which operates primarily to provide health care services to its prepaid members, did not provide sufficient benefit to the community to justify an exemption from property taxation as a charitable organization.

Other recent decisions of note include the Court of Appeals decision in *Supervisor of Assessments of Calvert County v. St. Leonard Shores Joint Venture*, in which the court affirmed the refusal of the assessor to take into account a projected "sell-out period" in valuing a large number of subdivision lots held by a developer for resale. Recognizing that the assessor is required to assess each lot as if a willing buyer exists, the court concluded that the condition of the real estate market was adequately reflected in the hypothetical sale price.

Department of Agriculture

In the first action of its kind in Maryland, the State Departments of Agriculture and Health and Mental Hygiene filed suit against the owners and operators of a 168-acre horse farm in Anne Arundel County for nonpoint source pollution and a violation of State water pollution laws. In *Departments of Health and Mental Hygiene and Agriculture v. Stonepath Development and Construction Company et al.*, Anne Arundel County Circuit Court, Case No. 3108680, the State asks the court to order the defendants to adopt conservation measures recommended by the State to control the movement of soil and animal waste discharge. This suit will probably be settled out of court. The defendants already have agreed to pay a civil penalty and to clean up and stabilize the farm to prevent sediment and animal waste runoff.

In *Haacke v. Wayne A. Cawley, Jr., Secretary of the Department of Agriculture et al.*, Court of Special Appeals, Case no. 626, September Term (1986), the court affirmed the judgment of the Somerset County Circuit Court dismissing a suit for regulatory negligence against the Secretary of Agriculture and the State of Maryland. Haacke, the Trustee of the bankruptcy estate of Haynie Grain Services, Inc., brought suit for \$475,000 against the State and Wayne A. Cawley, Jr., in his official capacity, alleging generally that the defendants were negligent in carrying out their statutory responsibilities under the State grain buyer's law in regulating Haynie Grain Company. The Court of Appeals affirmed the judgment of the lower court, dismissing the suit on the grounds that sovereign immunity barred its filing against the State and against Secretary Cawley in his official capacity. The court also considered whether Secretary Cawley, if sued personally, would have been liable to the defendants. The court held that enforcement of the grain buyer's law involved discretionary activities and that the Secretary was immune from suit under the doctrine of public official immunity. The court also considered whether Secretary Cawley would be personally liable to the defendants absent any immunity. The court held that in any case Secretary Cawley would not be liable to the defendants in negligence, since he breached no duty owed to them.

Contract Litigation

In 1986, the Assistant Attorneys General representing the Department of General Services continued to pursue compensation from architects, engineers, and contractors for building defects caused by their negligence. During the past year, two new suits were filed to seek such recoveries. Suit was filed in the Circuit Court for Baltimore County against the design joint venture of Henningson, Durham & Richardson and Kidde Consultants, Inc. and the masonry subcontractor, Bricklaying, Inc., to recover damages of \$2.5 million caused by design and workmanship defects in the roofs and other areas of the 500-bed medium-security annex at the Maryland House of Correction in Jessup. Suit was also filed in the Washington County Circuit Court against Floyd R. Kline, Inc. and its bonding company, USF&G, seeking \$400,000 in damages caused by workmanship defects in the roof of the Western Maryland Hospital Center in Hagerstown.

During 1986, the attorneys representing the Department recovered \$775,000 for the State from various architects, engineers, and contractors. In addition, they assisted in the negotiation of other non-cash settlements.

This Office has also been actively involved in negotiating and litigating pending claims arising from construction contracts administered by the Department of General Services, including a claim filed against DGS by Titan Group, Inc. arising from the construction of the 500-bed medium security annex to the Maryland House of Correction. The Office settled the \$7 million claim for \$1.6 million.

Department of Transportation

The 1986 activities of the Contract Litigation Unit assigned to the Department of Transportation were characterized by the conclusion of post-trial activity in the largest and longest case (\$16 million and 91 trial days) thus far presented to the Maryland State Board of Contract Appeals, and by the favorable resolution, through decision or settlement, of a number of other cases of large dollar value.

The Unit's most significant accomplishment was the settlement of a contractor's challenge to a termination for default of a Maryland Transportation Authority contract for reconstruction of the Canton viaduct approach to the Baltimore Harbor tunnel. The contractor contended that it was entitled to \$6 million as compensation for alleged State-caused delays. The case was settled, with \$100,000 to cover the modest costs of which the State was actually responsible, and with the termination for default surviving.

The Unit also represented the Maryland Department of Transportation (MDOT) in a number of original and appellate proceedings in the courts. The most significant was an attempt by a Pennsylvania contractor, who furnished subway cars for the Baltimore subway, to resolve its disputes with the Mass Transit Administration in a jurisdiction foreign to the contract. The United States District Court for the Eastern District of Pennsylvania held that such a suit against the Administration, as a State agency, was barred on constitutional grounds. This result was affirmed on appeal, 806 F.2d 251 (3d Cir. 1986).

In the field of environmental litigation, Assistant Attorneys General assigned to the State Highway Administration and the Civil Division successfully defended a challenge under the National Environmental Policy Act and other environmental laws by several environmental groups opposed to the State Highway Administration's commencement of the I-270 project in Montgomery County. This project involves the widening of more than 16 miles of I-270 at a cost of \$125 million.

In July, 1986, the United States District Court for the District of Columbia granted the State's Motion for Summary Judgment on all counts. The Plaintiffs appealed from this decision.

Assistant Attorneys General from the Civil Division and the Office of General Counsel for MDOT were involved in the successful resolution of a 55 MPH Compliance Hearing. The Federal Highway Administration and the National Highway Traffic Safety Administration had made proposed determinations that the State of Maryland was in noncompliance with the National 55 MPH Speed Limit Law because data submitted for the 1984 fiscal year indicated that more than 50 percent of Maryland residents exceeded the 55 MPH speed limit. The federal agencies had proposed that monetary sanctions be imposed for the alleged noncompliance.

Upon the advice of the Assistant Attorneys General involved, improvements were made to the State's speed monitoring plan to represent more accurately the effects of congestion, weather and terrain. Based on those improvements, data were submitted showing compliance with the requirements of the speed limit law for fiscal year 1986.

Section 154(h) of Title 23 of the United States Code requires that any funds withheld under Section 154(f) be apportioned promptly to the State if the percentage of motor vehicles exceeding 55 MPH drops to or below 50 percent. Accordingly, the State of Maryland was found in compliance, and the funds for primary and secondary highways which had been reserved from obligation for fiscal year 1986 were released.

In conjunction with the Office of General Counsel for MDOT and the Civil Division of the Attorney General's Office, MDOT established a department-wide Task Force to conduct a comprehensive review of the MDOT Minority Business Enterprise (MBE) Program. The work of the Task Force resulted in: (1) the drafting of clearer compliance standards and procedures; (2) recommendations for proposed legislation to broaden and clarify the fraud provisions of the MBE statute; and (3) the institution of an outreach program for both prime and minority contractors.

The Office of General Counsel has also conducted several investigations of alleged abuses in the MBE Program. To date, several companies have been sanctioned administratively for abusing the MBE Program.

Assistant Attorneys General for MDOT provided advice to the Secretary of Transportation and other Department and Maryland

Port Administration officials and actively negotiated the long-awaited "local cooperation agreement" between the Department of the Army and the State of Maryland relating to the dredging of the Baltimore Harbor and channels to a depth of 50 feet. This landmark agreement was executed by the parties on June 17, 1986.

With respect to other Port Administration expansion projects, Assistant Attorneys General assigned to the Office of General Counsel of MDOT, the Maryland Transportation Authority and the Maryland Port Administration continue to advise MDOT and the Transportation Authority on a number of highly complex real estate transactions intended to expand existing Port facilities and the future expansion of the new Seagirt Marine Terminal, which is scheduled to open in 1989. Assistant Attorneys General participated in the negotiation and drafting of contract documents, obtaining necessary government approvals, and the negotiation of agreements with respect to payment in lieu of taxes (PILOT agreements) for various Port properties.

Assistant Attorneys General for the Port Administration also participated in the negotiation of several long term leases for ocean carriers and for terminal operators. They also advised the Administration with respect to the ACROSS project (Automated Cargo Release and Operations Service System) and negotiated a contract for the development of necessary computer hardware and software to implement this system.

In the area of containerized cargo, we drafted legislation which was enacted in the 1986 General Assembly Session to grant exemptions from the gross weight limitations to containers transporting manifested international cargo. The legislation was designed to stimulate the shipment of international cargo and to enhance the competitive position of the Port of Baltimore.

With regard to motor vehicle related issues, the Assistant Attorney General assigned to the Motor Vehicle Administration assisted that agency in an extensive joint investigation with the Federal Bureau of Investigation of a licensed automobile dealer suspected of odometer fraud. The result was that the dealer was convicted in the U.S. District Court of violating the federal odometer tampering statute. As a condition of probation, the dealer voluntarily surrendered his license. In addition, a civil suit for restitution was brought by the Consumer Protection Division and is now pending in federal court.

On January 28, 1986, the Motor Vehicle Administration issued final regulations with respect to dealer advertising. Assistant At-

torneys General for the Office of General Counsel, Motor Vehicle Administration and the Consumer Protection Division advised the Administration extensively while these regulations were being drafted and revised.

The new regulations are intended to make clear that a dealership may not advertise that it has a special relationship with a manufacturer or distributor unless such a relationship does, in fact, exist. Enforcement efforts have begun and administrative proceedings against dealers who are not in compliance with the advertising regulations will be initiated.

Assistant Attorneys General assigned to the Office of General Counsel and the Motor Vehicle Administration continued to advise the Administration with respect to the implementation of the Vehicle Emissions Inspection Program in Maryland.

Finally, the Assistant Attorneys General assigned to the Office of General Counsel, the State Aviation Administration, the Department of Health and Mental Hygiene, and the Civil Division have been involved in the defense of the State Aviation Administration in lawsuits alleging damages and the unconstitutional taking of property arising out of airport related noise. In addition, the Aviation Administration's attorney has been working closely with airport planners to develop a program to provide relief to certain property owners adjacent to the airport whose properties have been affected by such noise.

This is my last report to you as Attorney General. My eight years in office have been immensely satisfying, in no small measure because of the unswerving dedication to the public interest that you and the members of your Administration have maintained throughout that time. I thank you for your support.

Most of all, I am grateful to the men and women who have made the Attorney General's Office the finest law firm in the State. My staff—attorneys, paralegals, investigators, support staff, volunteers—collectively give meaning to the ideal of public service. I am honored to have served the people of Maryland with them.

Sincerely,

Stephen H. Sachs
Attorney General

CASES IN WHICH THE OFFICE OF THE ATTORNEY GENERAL HAS PARTICIPATED For Calendar Year 1986

Supreme Court of the United States (Includes Petitions for Certiorari).....	38
United States Court of Appeals for the Fourth Circuit.....	162
Other United States Courts of Appeal	10
Total.....	210
United States District Court for the District of Maryland	1049
Other United States District Courts	41
Total.....	1090
Court of Appeals of Maryland (Includes Petitions for Certiorari and Answers to Petitions)	
Civil Appeals.....	106
Criminal Appeals	62
Total.....	168
Court of Special Appeals of Maryland	
Civil Appeals.....	229
Criminal Appeals	939
Total.....	1168
Circuit Court of Maryland.....	5375
District Court of Maryland	2271
Maryland Tax Court	812
Workmen's Compensation Hearings	5104
Miscellaneous Administrative Hearings	2565

**FINANCIAL STATEMENT
OFFICE OF THE ATTORNEY GENERAL
FOR THE FISCAL YEAR BEGINNING JULY 1, 1985
And Ending June 30, 1986**

Appropriations and Budget Amendments	
Program 001	\$ 5,617,961
Program 002	0
Program 003	369,609
Program 004	393,601
Program 005	1,466,279
Program 006	616,920
Program 008	105,640
Program 009	1,059,665
Total	<u>\$ 9,629,675</u>
 Total Appropriation	 \$ 9,629,675
Less Reversion & Cancellation	<u>\$ 112,758</u>
Total Expenditures	<u>\$ 9,516,917</u>

Program 001

Legal Counsel & Advice

Appropriation	\$ 5,329,111
Budget Amendments	288,850
Less Reversion	98,676
Total Funds Available	<u>\$ 5,519,285</u>

Salaries

Attorney General	\$ 62,500
Deputy Attorney General (3)	117,385
Senior Executive Associate Atty General (3)	163,864
Division Director II (3)	150,000
Asst Attorney General VII, General Counsel (6)	223,551
Asst Attorney General VI, General Counsel (17)	580,191
Executive Associate Attorney General (1)	69,989
Principal Counsel (2)	100,449
Asst Attorney General V, General Counsel (12)	397,089
Asst Attorney General IV, General Counsel (4)	111,278
Fiscal Administrator I (1)	41,831
Fiscal Specialist II (1)	5,523
Administrative Officer II (1)	28,552

Associate Librarian II (1)	28,552
Personnel Officer I (1)	26,507
Accountant Auditor IV (1)	17,263
Administrative Officer I (2)	72,948
Legal Assistant II (3)	60,460
First Administrative Assistant (1)	26,502
Management Associate (3)	67,865
Administrative Aide I (7)	139,878
Office Secretary III (2)	43,490
Services Specialist (1)	18,343
Stenographer, Law & Legislative (13)	232,438
Fiscal Clerk III (1)	13,459
Office Secretary II (3)	44,641
Office Clerk I (1)	12,244
Office Assistant III (1)	10,651
Total Salaries	<u>\$ 2,867,443</u>
Additional Salary Related Expenses	
Overtime	\$ 6,071
Miscellaneous Adjustment	33,868
Fringe Benefits	729,425
Total Additional Expenses	<u>\$ 769,364</u>
Total Salaries & Related Expenses	<u>\$ 3,636,807</u>
Other Expenses	
Technical and Special Fees	\$ 229,961
Communications	352,671
Travel	32,619
Motor Vehicle Operation & Maintenance	24,976
Contractual Services	267,888
Supplies and Materials	92,395
Equipment-Additional	113,608
Grants, Subsidies & Contributions	1,730
Fixed Charges	766,630
Total Other Expenses	<u>\$ 1,882,478</u>
Total Expenditures - 001	<u>\$ 5,519,285</u>

Program 002

Division of Asbestos

Appropriation	\$	0
Total Funds Available	\$	0

Salaries

Asst Atty General VII, General Counsel (1)	\$	-4,038
Asst Atty General V, General Counsel (1)		-4,038
Stenographer, Law and Legislative (1)		-2,000
Total Salaries	\$	-10,076

Additional Salary Related Expenses

Miscellaneous Adjustments	\$	2,739
Fringe Benefits		11,287
Total Additional Expenses	\$	14,026
Total Salaries & Related Expenses	\$	3,950

Other Expenses

Technical and Special Fees	\$	5,619
Communication		9
Travel		-4,541
Motor Vehicle Operation and Maintenance		1,261
Contractual Services		-10,340
Supplies and Materials		-108
Equipment-Additional		4,374
Fixed Charges		-224
Total Other Expenses	\$	-3,950

Total Expenditures - 002	\$	0

Program 003

Division of Savings and Loan

Appropriation	\$	114,000
Budget Amendments		255,609
Total Funds Available	\$	369,609

Salaries

Asst Atty General VI, Special Counsel (1)	\$	139,767
Administrator II (1)		8,624
Fiscal Specialist III (3)		6,222
Legal Assistant I (1)		3,726
Total Salaries	\$	<u>158,339</u>

Additional Salary Related Expenses

Fringe Benefits	\$	7,702
Total Salaries & Related Expenses	\$	<u>166,041</u>

Other Expenses

Technical and Special Fees	\$	60,171
Travel		2,864
Contractual Services		115,828
Supplies and Materials		83
Equipment-Additional		14,749
Fixed Charges		9,873
Total Other Expenses	\$	<u>203,568</u>

Total Expenditures - 003	\$	<u>369,609</u>

Program 004

Division of Securities

Appropriation	\$	376,203
Budget Amendments		17,398
Total Funds Available	\$	<u>393,601</u>

Salaries

Division Director II (1)	\$	50,000
Asst Atty General VI, General Counsel		40,519
Asst Atty General V, General Counsel (2)		65,444
Administrator II		30,612
Administrative Aide I (1)		19,702
Office Secretary III (1)		5,249
Stenographer, Law and Legislative (1)		25,115
Typist Clerk IV (1)		14,417
Total Salaries	\$	<u>251,058</u>

Additional Salary Related Expenses	
Overtime	\$ 166
Miscellaneous Adjustments	2,036
Fringe Benefits	57,279
Other Adjustments/Turnover	16,793
Total Additional Expenses	\$ 76,274
Total Salaries & Related Expenses	\$ 327,332
Other Expenses	
Technical and Special Fees	\$ 26,616
Travel	772
Motor Vehicle Operation & Maintenance	485
Contractual Services	30,404
Supplies and Materials	156
Equipment-Additional	4,520
Grants, Subsidies and Contributions	140
Fixed Charges	3,176
Total Other Expenses	\$ 66,269
Total Expenditures - 004	\$ 393,601

Program 005

Division of Consumer Protection

Appropriation	\$ 1,412,902
Budget Amendments	50,736
Total	\$ 1,463,638
Special Fund Expenditure	2,641
Total Funds Available	\$ 1,466,279

Salaries

Asst Atty General VII, General Counsel (1)	\$ 46,000
Asst Atty General VI, General Counsel (4)	94,046
Executive Associate Attorney General (1)	51,400
Asst Atty General V, General Counsel (2)	58,540
Chief Investigator Consumer Fraud (1)	29,858
Administrative Officer III (1)	30,751
Public Affairs Officer II (1)	30,751
Administrative Officer II (1)	28,552
Administrative Officer I (1)	26,502

Consumer Affairs Supervisor (3)	68,527
Administrative Specialist II (2)	47,249
Consumer Affairs Specialist III (7)	116,235
Publications Specialist II (1)	16,639
Services Supervisor III (1)	22,842
Consumer Affairs Specialist II (3)	58,411
Data Processing Operations Technician II (1)	17,633
Administrative Aide I (1)	19,702
Office Secretary III, Stenographic (1)	18,343
Stenographer, Law and Legislative (4)	73,649
Office Secretary II (1)	14,672
Office Clerk II (1)	13,023
Total Salaries	<u>\$ 883,325</u>
Additional Salary Related Expenses	
Overtime	\$ 2,192
Fringe Benefits	227,958
Total Additional Charges	<u>\$ 230,150</u>
Total Salaries & Related Expenses	<u>\$ 1,113,475</u>
Other Expenses	
Technical and Special Fees	\$ 122,802
Communication	4,108
Travel	16,389
Motor Vehicle Operation and Maintenance	7,877
Contractual Services	153,994
Supplies and Materials	3,551
Equipment-Additional	3,793
Grants, Subsidies and Contributions	15,467
Fixed Charges	24,823
Total Other Expenses	<u>\$ 352,804</u>
Total Expenditures - 005	<u>\$ 1,466,279</u>

Program 006

Antitrust Division

Appropriation	\$ 595,254
Budget Amendments	21,666
Total	<u>\$ 616,920</u>

Federal Fund Expenditure	\$ -14,082
Total Funds Available	<u>\$ 602,838</u>

Salaries

Division Director II (1)	\$ 50,000
Asst Atty General VI, General Counsel (3)	89,646
Asst Atty General V, General Counsel (3)	97,265
Administrative Officer I (1)	20,179
Accountant/Auditor III (1)	18,472
Legal Assistant I (1)	13,708
Administrative Aide I (1)	19,702
Stenographer, Law and Legislative (1)	33,284
Total Salaries	<u>\$ 342,256</u>

Additional Salary Related Expenses

Overtime	\$ 632
Miscellaneous Adjustments	6,091
Fringe Benefits	85,087
Other Adjustments/Turnover	-1
Total Additional Expenses	<u>\$ 91,809</u>
Total Salaries & Related Expenses	<u>\$ 434,065</u>

Other Expenses

Technical and Special Fees	\$ 42,721
Communication	-70
Travel	10,164
Motor Vehicle Operation and Maintenance	603
Contractual Services	108,404
Supplies and Materials	417
Equipment-Additional	1,123
Fixed Charges	5,411
Total Other Expenses	<u>\$ 168,773</u>

Total Expenditures - 006	<u>\$ 602,838</u>

Program 008

State's Attorneys' Coordinator

Appropriation	\$ 98,034
Budget Amendments	<u>7,606</u>

Total Funds Available	\$	<u>105,640</u>
Salaries		
State's Attorneys' Coordinator (1)	\$	45,200
Stenographer, Law and Legislative (1)		<u>17,805</u>
Total Salaries	\$	<u>63,005</u>
Additional Salary Related Expenses		
Fringe Benefits	\$	<u>15,728</u>
Total Salaries & Related Expenses	\$	<u>78,733</u>
Other Expenses		
Technical and Special Fees	\$	7,712
Communication		2,520
Travel		3,610
Contractual Services		10,679
Supplies and Materials		335
Equipment-Additional		785
Fixed Charges		<u>1,266</u>
Total Other Expenses	\$	<u>26,907</u>
Total Expenditures - 008	\$	<u>105,640</u>

Program 009

Medicaid Fraud Control Unit

General Fund Appropriation	\$	265,033
Budget Amendments		<u>9,076</u>
Total	\$	<u>274,109</u>
Federal Fund Expenditure	\$	<u>785,556</u>
Total Funds Available	\$	<u>1,059,665</u>
Salaries		
Division Director I (1)	\$	42,600
Asst Atty General VII, General Counsel (1)		27,908
Asst Atty General VI, General Counsel (2)		41,329
Principal Counsel (1)		48,900
Chief Investigator, Medicaid Fraud (1)		35,500
Asst Atty General V, General Counsel (1)		64,849
Fiscal Administrator II (1)		24,325

Fiscal Administrator I (2)	32,808
Fiscal Specialist III (3)	80,473
Medicaid Fraud Investigator III (1)	26,883
Administrative Specialist III (1)	24,603
Medicaid Fraud Investigator II (4)	92,468
Administrative Aide I (1)	19,702
Stenographer, Law and Legislative (3)	50,009
Office Assistant III (1)	11,421
Total Salaries	<u>\$ 623,778</u>
Additional Salary Related Expenses	
Overtime	\$ 20
Miscellaneous Adjustments	1,910
Fringe Benefits	<u>155,619</u>
Total Additional Expenses	<u>\$ 157,549</u>
Total Salaries & Related Expenses	<u>\$ 781,327</u>
Other Expenses	
Technical and Special Fees	\$ 13,984
Communication	19,840
Travel	10,324
Motor Vehicle Operation and Maintenance	27,025
Contractual Services	44,649
Supplies and Materials	11,444
Equipment-Replacement	292
Equipment-Additional	5,483
Grants, Subsidies and Contributions	59,993
Fixed Charges	<u>85,304</u>
Total Other Expenses	<u>\$ 278,338</u>
Total Expenditures - 009	<u>\$ 1,059,665</u>
<u>Total Expenditures</u>	
Program 001	\$ 5,519,285
Program 002	0
Program 003	369,609
Program 004	393,601
Program 005	1,466,279
Program 006	602,838
Program 008	105,640
Program 009	<u>1,059,665</u>
Total FY 86 Expenditures	<u>\$ 9,516,917</u>

OFFICIAL OPINIONS
of the
ATTORNEY GENERAL
of
MARYLAND

**OPINIONS PUBLISHED
IN FULL**

See also page 415 for Synopses of additional Opinions

BUDGETARY ADMINISTRATION

BUDGET AMENDMENT—TRANSPORTATION TRUST FUND—A TRANSFER FROM THE TRANSPORTATION TRUST FUND TO THE MARYLAND DEPOSIT INSURANCE FUND MAY BE ACCOMPLISHED BY BUDGET AMENDMENT.

February 6, 1986

The Honorable Howard A. Denis
Senate of Maryland

You have requested our opinion on whether certain funds in the Transportation Trust Fund ("Trust Fund") may be transferred by the Governor to the State of Maryland Deposit Insurance Fund Corporation ("Insurance Fund") by budget amendment, or whether such a transfer may be accomplished only by enactment of a statute authorizing it.

Previously, a transfer from the Trust Fund to the general funds was accomplished through the enactment of a statute expressly authorizing the transfer. A comparable statutory amendment could, of course, be used to effect the proposed transfer from the Trust Fund to the Insurance Fund. However, it is our opinion that the proposed transfer may also be accomplished pursuant to the budget amendment procedure.

I

Background

As part of a financing plan under which the Insurance Fund would provide cash payments to savings and loan depositors in anticipation of insured losses, the Governor has proposed transferring certain funds in the Trust Fund to the Insurance Fund. According to a statement issued by the Governor's office, the funds to be transferred are accruals from an increase in receipts over the projected estimate for fiscal 1985, a revised estimate of receipts for fiscal 1986, and proceeds from the exchange of certain securities. Administration's Savings and Loan Financing Plan at 7-8 (Jan. 10, 1986).

II

Transportation Trust Fund

The Trust Fund is composed of "all taxes, fees, charges, and revenues collected or received by or paid, appropriated, or credited to the account of the Department [of Transportation] or any of its units." §3-216(b) of the Transportation Article ("TR" Article). The Trust Fund may be used by the Department, after meeting its debt service obligations, "for any lawful purpose related to the exercise of its rights, powers, duties, and obligations." TR §3-216(d)(1) (emphasis added). Expenditures for these purposes are to be made in accordance with "any applicable budget bill or supplementary appropriation bill." TR §3-216(d)(2).

Moreover, no portion of the Trust Fund may be transferred to the general funds of the State, in aid of depositors or for any other purpose, except pursuant to an amendment to the Trust Fund statute. TR §3-216(f) expressly provides that: "No part of the Transportation Trust Fund may revert or be credited to the general funds of this State." In order to accomplish a transfer of \$29 million from the Trust Fund to the general funds for fiscal year 1984, the General Assembly amended TR §3-216(f) to direct that particular limited transfer. Chapter 62, Laws of Maryland 1983. A comparable amendment would, of course, be a legally certain means of accomplishing the proposed transfer.

However, the prohibition in TR §3-216(f) applies to transfers "to the general funds"; it does not prohibit transfers to special funds.¹ The Insurance Fund is "a special nonlapsing fund." §10-110(a)(1) of the Financial Institutions Article ("FI" Article). Hence, transfers to it are not prohibited by TR §3-216(f).²

¹The prohibition in TR §3-216(f) has, since its original enactment, referred only to reversion or crediting "to the general funds," not to special funds. *See* Chapter 526, Laws of Maryland 1970. Appropriations to the various special funds are so identified in the annual budget bill. *See, e.g.,* Chapter 106, Laws of Maryland 1985.

²The Governor could not have diverted money from the Trust Fund to the Insurance Fund in the budget bill itself—even if the Insurance Fund had existed last January, when the budget bill was presented. 20 *Opinions of the Attorney General* 201, 203 (1935). However, money that is the subject of an appropriation may be expended through the budget amendment procedure for a purpose not contemplated in the budget bill. This apparent anomaly may be explained by the purpose of the budget amendment procedure, which is to provide a way to deal with the unexpected.

III

Budget Amendments

A. *Introduction*

The budget amendment procedure is established by §7-209 of the recently enacted State Finance and Procurement Article ("SF" Article).³ The predecessor of SF §7-209 was first enacted in 1939 as an aspect of the General Assembly's power to implement the Executive Budget Amendment. *See* Article III, §52(13) of the Maryland Constitution. *See also* 34 *Opinions of the Attorney General* 105, 106 (1949).

In general terms, SF §7-209 allows the various schedules of appropriations for units within the Executive Branch to be amended with the approval of the Governor. The procedure is as follows:

(1) "[W]henever an officer or unit of the Executive Branch of the State government wants the schedule for an appropriation to the officer or unit amended, the officer or unit shall submit a proposed amended schedule to the Secretary of Budget and Fiscal Planning.

(2) The Secretary of Budget and Fiscal Planning shall endorse on or attach to the proposed amended schedule a recommendation and send the schedule and recommendation to the Governor.

...

(4) Whenever the Governor approves a proposed amended schedule, the Governor shall endorse it as 'approved'." SF §7-209(b).⁴

These budget amendments "may not exceed the limits of an appropriation." SF §7-209(c). Moreover, "[a] budget amendment may not change any language or substantive provision in the State budget." SF §7-210(a).

³Prior to the enactment of the State Finance and Procurement Article (effective October 1, 1985), this procedure was codified in Article 15A, §8(e), (f), and (g) of the Maryland Code.

⁴"An amended schedule is effective when the Governor sends the schedule to the Comptroller." SF §7-209(g).

B. *Scope of budget amendment procedure*

An initial question is whether the procedure for budget amendments applies only to funds that are the subject of an existing appropriation schedule. Such a reading is suggested not only by the use in SF §7-209(a) and (b) of the term “schedule for an appropriation” but also by the prohibition in SF §7-209(c) on amending a schedule to “exceed the limits of an appropriation.” The funds the Governor proposes to transfer are not the subject of an existing schedule and are essentially unanticipated funds.

However, so limited a reading of the scope of SF §7-209 would be inconsistent with provisions in the current budget bill that broadly appropriate unanticipated funds and that provide for the expenditure of these funds through the budget amendment procedure. Section 5 of Chapter 106, Laws of Maryland 1985, the budget bill for fiscal year 1986, provides as follows:

“Amounts received pursuant to [SF §§2-201(b) and (c) and 7-217(a)] may be expended by approved budget amendment.” (Emphasis added).⁵

The term “approved budget amendment” clearly refers to the procedure now embodied in SF §7-209. *See* 46 *Opinions of the Attorney General* 13, 14 (1961).

A portion of the funds contemplated for transfer are “unestimated receipts”—that is, receipts from sources not included in the budget—under SF §7-217(a), which provides as follows:

“Subject to [appropriation by an appropriation act], an officer or unit of the State government may spend money that is paid into the State Treasury for the use of the officer or unit and that is derived from a source not estimated or included in the State budget:

(1) for the specific purpose to which the money is dedicated by State law or act of Congress.”

Although SF §7-217(a) does not itself refer to the possibility of dedicated funds being transferred by budget amendment for a different purpose, unestimated receipts under SF §7-217(a) are explicitly

⁵Section 5 of Chapter 106 actually refers to the now-repealed predecessor provisions, Article 15A, §§5, 6, and 7. Because the recodification entailed no substantive change, the statutory cross-references in the budget bill should be read as references to the corresponding provisions of the new State Finance and Procurement Article.

made subject to the budget amendment procedure by Section 5 of Chapter 106, the budget bill. Because the budget bill is itself a law, the qualification of existing law is effective. See 34 *Opinions of the Attorney General* 105, 110 and 112 (1949) ("there can be no doubt that the Legislature may, by the processes of the budget bill, repeal or amend an existing law.")⁶

Other funds intended for transfer fall within the authority of Section 7 of Chapter 106, which deals with revenue in excess of estimates from sources that were included in the budget:

"[E]xcept as otherwise provided, amounts received from sources estimated or calculated upon in the budget in excess of the estimates for any special or federal fund appropriation listed in this bill may be made available by *approved budget amendment*." (Emphasis added).

Again, the term "approved budget amendment" clearly refers to the procedure set out in SF §7-209, including the authority for the transfer of funds between departments.

In summary, Sections 5 and 7 of Chapter 106 and SF §7-209 permit the transfer from the Trust Fund to the Insurance Fund of unestimated bond exchange proceeds and unanticipated additional receipts.

C. *Limitations on transfers between departments*

Budget amendments generally may not be used to "transfer any part of an appropriation among any of the principal departments or any of the units in the Executive Branch that are not assigned to a principal department." SF §7-209(e)(1). However, there are various exceptions to the general prohibition in SF §7-209(e)(1). One of these is that the prohibition does not prevent a transfer that, "because of an emergency declared by the Governor, is needed to protect the health, welfare or property of the public." SF §7-209(e)(2)(iii).

⁶The budget bill became law as soon as it passed the General Assembly, April 1, 1985. Article III, §52(6) of the Constitution. Although Article 15A, §6 was at that time part of the existing law, it was subsequently repealed by Section 1 of Chapter 11, Laws of Maryland 1985, which became law on April 9, 1985 and took effect Oct. 1, 1985. However, as noted, Article 15A, §6 was recodified, without substantive change, as SF §7-212(a). Accordingly, Section 5 of Chapter 106 can still be regarded as a qualification of the existing law. Moreover, as a law for a particular year, Chapter 106 can be said to qualify general provisions of law of an indefinite duration.

As discussed in Part II above, the Trust Fund is within one principal department in the Executive Branch, the Department of Transportation, TR §3-216(a). The Insurance Fund is within another principal department, the Department of Licensing and Regulation, FI §10-102. Therefore, a budget amendment may be used to make the transfer between the Funds only if the “emergency” exception in SF §7-209(e)(2)(iii) applies.⁷

In our view, the Governor has broad discretion to determine that an “emergency” in fact exists. The term is undefined, and must be viewed as implying the flexibility that is essential if the resources allocated to the Executive Branch are to be available to meet unexpected or unusual needs. *Cf. First Continental Sav. & Loan Ass’n v. Director, State Dept. of Assessments*, 229 Md. 293, 302 (1962) (deferring to General Assembly as to existence of “emergency” for purposes of Article XVI of the Constitution); 52 *Opinions of the Attorney General* 176, 179 (1967) (emergency must be in existence for purposes of Article III, §52(14) of the Constitution).

Undue hardship on savings and loan depositors, which could not have been anticipated at the presentation and enactment of the current budget, could reasonably be said to create an “emergency,” within the meaning of SF §7-209(e)(2)(iii). Indeed, the “welfare of depositors” is a key element in the Governor’s exercise of emergency powers over the operation of savings and loan associations. Article 41, §15B-3(a)(2) of the Maryland Code. In our view, similar considerations may properly underlie the Governor’s determination that an “emergency” requires an interagency transfer.

IV

Conclusion

In summary, it is our opinion that there is a legal basis for transferring funds from the Transportation Trust Fund to the State of Maryland Deposit Insurance Fund Corporation entirely through the statutory budget amendment procedure, to enable the Insurance Fund to reimburse savings and loan depositors.

⁷None of the other exceptions in SF §7-209(e)(2) could possibly apply.

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Opinions and Advice

Editor's Note: As amended by Chapter 291 of the Laws of Maryland 1987, TR §3-216(f) now directs that "[n]o part of the Transportation Trust Fund may revert or be credited to a special fund of the State, unless otherwise provided by law." TR §3-216(f) goes on to provide for a mechanism by which the Legislative Policy Committee is to approve budget amendments that transfer funds from the Transportation Trust Fund to special funds.

BUDGETARY ADMINISTRATION—"MONEYS OF THE STATE"—THE
CHESAPEAKE BAY TRUST IS AN AUTONOMOUS ACTIVITY FOR
FISCAL PURPOSES AND THEREFORE IS NOT SUBJECT TO THE
CONSTITUTIONAL "MONEYS OF THE STATE" REQUIREMENTS.

October 29, 1986

The Honorable Harry Hughes
Governor

Your office has requested that we reconsider the status of the funds of the Chesapeake Bay Trust. In 70 *Opinions of the Attorney General* 35 (1985) we concluded that the funds of the Trust are "moneys of the State," within the meaning of Article VI, §3 of the Maryland Constitution, and consequently are subject to deposit in the State Treasury and withdrawal only in accordance with the appropriations process.¹

70 *Opinions of the Attorney General* 35 (1985) assumed, without discussion, that the Chesapeake Bay Trust was a State agency, although the statute creating the Bay Trust does not expressly characterize its relation to the State. That assumption has since been questioned. Thus, we will specifically examine the status of the Bay Trust. In order to do so, we will try to identify criteria that will aid in categorizing State-created activities for purposes of Article VI, §3.

Under this approach to "moneys of the State" problems, one first examines whether the activity itself is subject to the constitutional requirement. If not, the constitutional inquiry ends.² If so, one then examines whether the particular "moneys" in question, though held by an activity generally subject to the requirement, are nonetheless not "moneys of the State." This latter inquiry turns on whether the funds are of such a character that application of the State's budgetary and fiscal control procedures would be inconsis-

¹Article VI, §3 reads as follows, in pertinent part: "The Treasurer shall receive the moneys of the State, and, until otherwise prescribed by law, deposit them, as soon as received, to the credit of the State, in such bank or banks as he may, from time to time, with the approval of the Governor, select ..., and he ... shall disburse the same for the purposes of the State according to law."

²An activity that is not subject to Article VI, §3 might nonetheless be subject to specific *statutory* procedures for fiscal accountability—as the Trust is, with respect to any State appropriations that it receives. See note 19 below.

tent with the nature of the funds or pointless in terms of the constitutional requirements governing State finances. *See Wyatt v. State Roads Comm'n*, 175 Md. 258 (1938).

In brief, we believe that an activity created by the General Assembly is subject to the "moneys of the State" requirement of Article VI, §3 unless the statute authorizing the activity (1) manifests an intent that the activity function autonomously for fiscal purposes, by excluding the activity from State oversight and fiscal accountability; or (2) manifests an intent that the activity function as part of local, rather than State, government.³

For the reasons stated below, we conclude that the Chesapeake Bay Trust is an autonomous activity for fiscal purposes and is therefore not subject to the "moneys of the State" requirement. Hence, the result reached in 70 *Opinions of the Attorney General* 35 was incorrect.⁴

I

Introduction

The General Assembly unquestionably has authority to create corporations or similar bodies that serve a public purpose but that are not a part of State government. Article III, §48 of the Maryland Constitution. *See generally Moberly v. Herboldsheimer*, 276 Md. 211 (1975).

"[A]s the objects of governmental interest change, so, often, do the institutions through which government seeks to achieve its new, or altered, purposes ..., each [institution] with its own special structure and special public purposes." 49 *Opinions of the Attorney General* 164, 172 (1964). *See also* 70 *Opinions of the Attorney General* 180, 183 n.2 (1985). To cite but one example from the 1986 Session, the General Assembly created the Commercial Casualty

³This latter possibility is not pertinent to the status of the Bay Trust and is therefore not discussed in this opinion except, briefly, at note 18 below and accompanying text.

⁴70 *Opinions of the Attorney General* 35 sets forth several factors pertinent to determining whether funds held by a State agency are "moneys of the State." We do not depart from this aspect of that opinion; although we anticipate exploring the issue further in a future opinion, we believe that these factors remain useful benchmarks.

Underwriting Association, expressly stated to be "not a department, unit, agency or instrumentality of the State." Article 48A, §601(b)(1) of the Maryland Code, as enacted by Chapter 663, Laws of Maryland 1986.

In 68 *Opinions of the Attorney General* 86, 91 (1983), we concluded that "under Article VI, §3, the General Assembly lacks power to prescribe that 'moneys of the State' not enter the Treasury." However, it does not follow that the General Assembly lacks power to create activities whose funds are simply not "moneys of the State" at all, because the activity itself is not a component of State government.

If the General Assembly expressly identifies an activity as part of State government, the activity is generally subject to Article VI, §3. Conversely, if the General Assembly expressly identifies an activity as excluded from State government and creates a funding mechanism reflecting that exclusion, the funds of the activity cannot be said to be "moneys of *the State*."⁵

But express identification of an activity's status is often lacking:

"[O]n some occasions, the General Assembly has expressly characterized certain entities that it has established as State 'agen[cies]' ... or 'instrumentalit[ies]' Other entities established by the General Assembly have been expressly characterized as 'not a department, agency, or instrumentality of the State' In some cases, the General Assembly has not expressly stated whether an entity that it has established is or is not an agency or instrumentality of the State." *A.S. Abell Publishing Co. v. Mezzanote*, 297 Md. 26, 39 (1983).

Often, then, the determination of an activity's status can be made only by examining "all aspects of the interrelationship" between the State and the activity, viewed in light of the particular purpose for which the determination is to be made. *Id.* See also 71 *Opinions of the Attorney General* 128, 128 n. 1 (1986).⁶

⁵For example, the Commercial Casualty Underwriting Association is funded by assessments from its members. Article 48A, §601(d). See 71 *Opinions of the Attorney General* 160, 164-66 (1986).

⁶The pertinent, though scant, case law from other jurisdictions likewise indicates that questions of this kind are to be resolved by examining the precise nature of the relationship between the activity and the state, in light of the particular provision at issue. See *Kentucky Region Eight v. Commonwealth*, 507 S.W.2d 489, 491 (Ky. 1974) (certain charitable, nonprofit corporations are not "such integral parts

The General Assembly established the Chesapeake Bay Trust in Chapter 789, Laws of Maryland 1985, "to promote public awareness and participation in the restoration and protection of the water quality and aquatic and land resources of the Chesapeake Bay." §8-1901 of the Natural Resources Article ("NR" Article). Although the Trust is described as "a body corporate," with "perpetual existence, subject to modification or termination by the General Assembly if necessary to effectuate its purpose or when and if its substantial purpose ceases," its relationship with the State is not characterized in the statute. NR § 8-1902.

As a recent opinion summarized, "it is well established that an entity may be considered an agency, unit, or instrumentality of government for one purpose, but not for another." 70 *Opinions of the Attorney General* 30, 32 (1985). The conclusion that an activity is not a State entity for the purposes of one statute has "no bearing on whether [the activity] might be considered a State entity for other purposes." *Id.*

Thus, in order to decide the status of the Bay Trust in this context, we must look first to the purposes of the "moneys of the State" provision in Article VI, §3 of the Constitution and of the related budgetary procedures in Article III, §52.

II

Purpose of State Fiscal Controls

In 68 *Opinions of the Attorney General* 86 (1983), the block grants opinion, we discussed the history of Article VI, §3. See 68 *Opinions of the Attorney General* at 90-91.

From that history, we discerned that, in one respect, Article VI, §3 is simply a housekeeping procedure: The requirement as to receipt and deposit of funds is straightforwardly intended to assure the security of the money. Cf. Opinion No. 85-026 at 4 (November 18, 1985) (unpublished) (analogous provision for deposit of county funds by Cecil County Treasurer requires that treasurer "handle

of state government as to come within regular patterns of administrative organization and structure," for purposes of pension statute applicable to state agencies); *Matter of Wash. State Bar Ass'n*, 548 P.2d 310, 314 (Wash. 1976) ("traditional purposes" of state audit not served by audit of bar association; association not a "state agency" under audit statute).

the public funds in his or her possession in a prudent manner, putting them into safekeeping as soon after their receipt as is practicable").

In addition, the phrase "until otherwise prescribed by law" in Article VI, §3 invokes the provisions of the Constitution that prescribe the appropriations process. That is, "this language was intended to reflect ... the authority of the General Assembly (and later, on passage of the Executive Budget Amendment, the Governor) to prescribe, through the budgetary process, the appropriations of funds from the Treasury." 68 *Opinions of the Attorney General* at 90 (emphasis in original).⁷

Thus, the overall purpose of Article VI, §3 is accountability—in the most basic sense of assuring that receipts are handled securely and are documented properly and, more broadly, that the expenditure of the funds is controlled by the appropriations process.

The budgetary procedures in Article III, §52 of the Constitution have a related but distinct purpose: "To place before the Legislature a complete picture of the State's financial resources and needs" and thereby prevent an "excessive expenditure over receipts." Report of the Commission on Economy and Efficiency on Budget System (Goodnow Commission), *reprinted* in 1916 S. Journal at 130. The Court of Appeals has summarized the origin and purpose of the Executive Budget Amendment as follows:

"Prior to the adoption of the budget amendment by the people of the State in 1916, there was no orderly plan or system which the General Assembly was required to follow in disbursing the State's revenues, and as a result appropriations were more or less uncorrelated and deficits in the State Treasury were not unusual. The purpose of the budget amendment was to remedy this situation by providing an intelligent and definite method of estimating and appropriating the income of the State." *Baltimore v. O'Connor*, 147 Md. 639, 644 (1925).⁸

⁷The phrase also authorizes the General Assembly "to prescribe, through the legislative process, the deposit of Treasury funds in financial institutions other than banks." 68 *Opinions of the Attorney General* at 90.

⁸The procedures under the Executive Budget Amendment were briefly summarized in the block grants opinion as follows:

"Under the Executive Budget Amendment, there are only two kinds of appropriation bills: (1) the Budget Bill, which is prepared and submitted to the General Assembly by the Governor; and (2) supplementa-

In other words, the budget process permits—indeed, requires—the Governor and General Assembly to set fiscal priorities: to trade off one worthwhile goal against another, in light of limited State resources and the constitutional requirements that the budget be balanced. *See* Article III, §52(5a) of the Constitution. If an activity is part of the State’s governmental apparatus, so that the State will be held accountable for the activity’s use of funds—“accountable” in terms of both the State’s bond rating and like measures of financial soundness and, more broadly, for the policy decisions reflected in fiscal allocations—the activity must be included within the “monies of the State” requirement. Otherwise, “an intelligent and definite method of estimating and appropriating the income of the State” would be impossible. *Baltimore v. O’Conor*, 147 Md. at 644.

III

Identification of Activities Outside State Fiscal Operations

A. *Background*

As part of its former revenue sharing program, the federal government required an audit of “all funds” of the State. Office of Revenue Sharing Audit Guide §IIA1c (December 1977). In that context, the State needed to identify which State-created activities were part of the State’s fiscal operations and which were not.

Consequently, the accounting firm responsible for the State’s financial reporting, Coopers & Lybrand, developed “a concept of the reporting entity; namely, the government as a functioning economic unit.” This approach “establishes a set of criteria by which activities and programs may be evaluated for the purpose of determining

ry appropriation bills, which are initiated by the General Assembly and must provide their own revenue. Article III, §52(2), (3) and (8). ...

And, under the Executive Budget Amendment, the General Assembly may only strike or reduce the Governor’s proposed appropriations. Article III, §52(6). This power, however, implicitly includes the power to condition or limit the way an appropriation is to be spent. ...

While the power of the General Assembly with respect to the Budget Bill itself is thus limited, the Executive Budget Amendment also authorizes the General Assembly to enact a statute that requires the Governor to include a particular level of funding in subsequent budgets for particular programs. Article III, §52(11) and (12).” 68 *Opinions of the Attorney General* at 93.

whether they should be included in the reporting entity." Coopers & Lybrand, *The Financial Reporting Entity of the State of Maryland* 1 (n.d.) ("*State Entity*").⁹ Substantially identical criteria have been adopted by the accounting profession as general standards. Governmental Accounting Standards Board and Government Accounting Research Foundation, *Governmental Accounting and Financial Reporting Standards* §2100 (1984) ("*Reporting Standards*").

B. *Applicability to "Moneys of the State" Questions*

The heart of this financial reporting concept—that the State, in its fiscal operations, is to be viewed “as a functioning economic unit”—is entirely consonant with the purpose of the constitutional provisions in question: to permit integrated, effective fiscal accountability and oversight by the Executive and Legislative branch officials charged with responsibility for the functioning of the State as a whole. In fact, the State’s financial reports must reflect the full scope of the State’s underlying financial operations. “Users interested in evaluating the performance of governmental entities need to be able to identify the operations for which their officials are responsible. Specific criteria for the reporting entity inclusion or exclusion can help fulfill that need.” *Reporting Standards* §2100.104c, at 68.

These criteria “should be broad enough to include all governmental activities, organizations, and functions necessary to achieve the desired objectives.... [A] broad definition is necessary to provide users with all necessary information.” *Reporting Standards* §2100.106, at 68.

In our view, a comparably inclusive definition of activities subject to Article VI, §3 and Article III, §52 is likewise necessary. Otherwise, the goal of accountability, discussed in Part II above, cannot be achieved. The criteria developed by the accounting profession for purposes of governmental financial reporting carry out, in this context, the Court of Appeals’ instruction that “[a]ll as-

⁹The determinations made by Coopers & Lybrand were approved by this office:

“Our specific obligation, under the Revenue Sharing Audit Requirements, is to ‘determine what constitutes all funds’ of the State. Funds of the State are determined by what constitutes the entity of the State. We are satisfied that Coopers & Lybrand has adequately determined the components of the State.” Letter from Attorney General Sachs to Chief Deputy Comptroller J. Basil Wisner (December 7, 1979).

pects of the interrelationship between the State and the statutorily-established entity must be examined in order to determine" whether it is an agency or instrumentality of the State for a particular purpose. *A.S. Abell Publishing Co. v. Mezzanotte*, 297 Md. at 35.

As Coopers & Lybrand put it, the criteria should "lead to the determination of primary fiscal accountability, responsibility, and authority for financial reporting purposes." *State Entity* at 2. The criteria work as follows:

"In determining which governmental activities to include within the [State financial reporting] Entity, it is necessary to assess the nature of each activity and its relationship to the appropriate criteria. The criteria are structured to bring out the nature of basic responsibilities and authority in the governance and accountability of the organization over its financial transactions and economic undertakings. No one of the criteria should be controlling, but rather they should be viewed collectively and a judgment made as to whether a particular activity of government should be deemed a part of the Entity." *Id.* at 3.

The criteria, in other words, are a form of detailed inquiry into the degree of linkage between the State, treated as an integrated economic unit, and the activity—which is precisely the inquiry that we believe is called for in deciding the applicability of the "moneys of the State" requirements to an activity.¹⁰

¹⁰The 1979 Cooper & Lybrand analysis included a "Table of Activities and Programs Considered for the State of Maryland's Financial Reporting Entity." As discussed in note 9 above, these determinations about then-existing activities were approved by the Attorney General. Only the following activities were determined to be excluded from the State reporting entity:

1. Washington Metropolitan Area Transit Commission;
2. Regional Planning Council;
3. Maryland School for the Blind;
4. Blind Industries;
5. private foundations related to State colleges and universities;
6. community colleges;
7. Maryland Health and Higher Education Facilities Authority;
8. Maryland Automobile Insurance Fund;
9. Maryland National Capital Park and Planning Commission;
10. Washington Suburban Sanitary Commission;
11. Washington Suburban Transit Commission;
12. Maryland Suburban Transit Commission;
13. Maryland State Employees Credit Union;
14. Medical Mutual Liability Insurance Company;

continued

IV

The Criteria and their Application to the Bay Trust

A. *Manifestations of State Oversight Responsibility*1. *Selection of governing authority*

The governing authority for an activity is the body that has final decisionmaking authority—in the case of the Chesapeake Bay Trust, the Board of Trustees. This criterion examines not only whether the Governor or another State official appoints this body but also whether the appointment is “authoritative”:

“When the governing authority is appointed by elected officials, a determination must be made as to whether the appointment is authoritative. One made by an elected official principally because he or she is in an official position, where the position the person is appointed to has little continuing linkage to the elected official (for example, appointment of a chairman for a charitable activity), is not authoritative. An authoritative appointment is one where the elected official maintains a significant continuing relationship with the appointed official with respect to carrying out important public functions.” *Reporting Standards* §2100.110a, at 69.

If the appointment is “authoritative”—that is, if the appointees, as part of “continuing linkage” with the State official who appointed them, run the activity in accordance with that official’s policies—this fact evidences inclusion within the State entity. Conversely, the absence of this kind of policy linkage evidences exclusion.

The Bay Trust statute identifies five State officials as ex officio members of the Board of Trustees. NR §8-1903(b)(1), (2), and (3).¹¹ The Governor appoints the remaining ten members of the Board, “who shall represent the interests of local government, education,

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- 15. Maryland Credit Union Insurance Corporation;
 - 16. Maryland Savings-Share Insurance Corporation;
 - 17. Maryland Potomac Water Authority; and
 - 18. sheriffs and State’s Attorneys.

¹¹These officials are the President of the Senate; the Speaker of the House; and the Secretaries of Agriculture, Health and Mental Hygiene, and Natural Resources, or their designees.

business, environmental conservation, and the general public." NR §8-1903(b)(4). Except for the ex officio members, board members serve staggered four-year terms, rather than at the pleasure of the Governor. NR §8-1903(d)(1),(2).

Although State officials serve on the board, and presumably the views of the three departmental secretaries reflect the policy perspective of the Governor, the Board appointments are essentially "non-authoritative." The ex officio members, a distinct minority, bring to the board not simply their legislative or departmental objectives but also their personal expertise and their knowledge of related governmental activities. The staggered terms of the majority reflect an intention that the board is not to be a policymaking instrument of any one Governor but is to make independent decisions. *Cf. Reporting Standards* §2100.607 (industrial development board consisting of two ex officio members and seven mayoral appointees for staggered terms does not reflect continuing relationship with city).

Evidence of exclusion.

2. *Designation of management*

If a State official chooses the people who are in charge of the day-to-day operations of the activity, this fact is evidence of inclusion within the State entity. If the activity's governing authority alone makes that decision, that designation process is evidence of exclusion. *Reporting Standards* §2100.110b, at 69-70; *State Entity* at 4.

Although the Bay Trust statute does not expressly authorize the Trust to hire those who actually carry out the Trust's functions, the Trust does have the broad power to "[t]ake any ... action necessary to carry out the purposes of the Trust." However, the General Assembly evidently anticipated that the staffing would ordinarily be provided by the State: "The State agencies represented on the Trust shall provide *staff*, supplies, and office space, utilizing existing resources." NR §8-1904(e).

Inconclusive.

3. *Ability to significantly influence operations*

"Where a constitutional officer or body possesses the ability to significantly influence the ultimate result of operations in the nor-

mal course of events, there is a strong possibility that the activity should be within the [State entity]." *State Entity* at 5. Influence over operations is manifested by matters like the signing of contracts, personnel decisions, and "determin[ing] the outcome of the services being provided." *Reporting Standards* §2100.110c, at 70.

The Trust makes its own operational decisions. It is expressly empowered, among other things, to provide grants, develop projects, and execute contracts. NR §8-1905(a)(2),(3), and (5). It is exempt from the laws on budgetary administration and public works, the State Procurement Law, the Merit System Law, and the pension laws. NR §8-1909(a).¹² Moreover, it "may carry out its corporate purposes without obtaining the consent of any department, board, or agency of the State." NR §8-1909(a).

Evidence of exclusion.

B. *Accountability for Fiscal Matters*

These criteria look to "lines of fiscal responsibility"—that is, whether the fiscal condition of an activity is a State responsibility. *Reporting Standards* §2100.110d, at 70. In the context of determining an activity's status for purposes of "moneys of the State," these criteria are no doubt somewhat circular. For example, if the activity is covered by the "moneys of the State" requirement, its authority to spend money will be subject to State budget procedures; if it is not covered, it will not be constitutionally subject to budget procedures.¹³ Nevertheless, to the extent that the statute creating an activity itself delineates lines of fiscal responsibility, these criteria are pertinent in determining legislative intent. The General Assembly's understanding of, and intent about, an activity's place in the State's overall fiscal affairs is significantly reflected in provisions that absolve the activity from—or, conversely, require its compliance with—the specific fiscal procedures applicable to most State agencies.

¹²"Except as [to State appropriations], in exercising its powers, the Trust is exempt from the provisions of Articles 15A, 21, 64A, 73B, and 78A of the Code." The pertinent provisions of Articles 15A, 21, and 78A have since been recodified in the State Finance and Procurement Article.

¹³But see note 2 above.

1. *Budgetary authority*

This criterion considers whether State officials make decisions about the preparation of, and revisions to, the activity's budget.

The Trust is expressly exempted from statutory provisions on budgetary administration, except "to the extent of State appropriations, if any." NR §8-1909. The Trust has received small, and declining, amounts of appropriated funds.¹⁴

Evidence of exclusion.

2. *Responsibility for surplus or deficit*

"Who is responsible for funding deficits and operating deficiencies? Is this responsibility a legal or a moral one? Who governs or controls the use of surplus funds? How are surplus funds disposed of?" *Reporting Standards* §2100.110d(2), at 70; *State Entity* at 6. In addition, State "guarantees or 'moral responsibility' for debt" indicates financial interdependency. *Reporting Standards* §2100.109c, at 69.

If the Trust has a surplus from State appropriations, the surplus reverts to the State General Fund.¹⁵ If the Trust has a surplus from non-State sources, the surplus does not revert, because the Trust's broad exemption from State fiscal procedures, contained in NR §8-1909(a), means that it is exempt from the general requirement for reversion in §7-302 of the State Finance and Procurement Article.¹⁶ On the other hand, "[t]he Trust shall terminate on July 1, 1989," at which time any surplus "shall be held by the State Treasurer until legislation is enacted providing for the disposition of the funds."

The grant of powers to the Trust does not authorize it to incur or insure a debt.

Inconclusive.

¹⁴In fiscal year 1986, the Trust received \$41,338 in appropriated funds; in fiscal year 1987, only \$31,338. The projected appropriation for fiscal year 1988 is \$25,000.

¹⁵See note 17 below.

¹⁶We attach more significance to the Trust's broad exemption than to the mere fact that its annual surplus from non-State sources does not revert, because many activities plainly within State government have surplus funds that do not revert. See §7-304 of the State Finance and Procurement Article.

3. *Fiscal management*

This factor deals with control of collection and disbursement of funds, title to assets, and authority to require audits.

The Trust has authority to manage its assets independently. NR 88-1908(a), (b), and (c). Its "books, records, and accounts" are expressly made "subject to audit by the State." NR 88-1908(d). However, this express provision indicates the General Assembly's view that the Trust is not a part of the State's ordinary fiscal management process, because "each unit of the State government" is already subject to regular audit. §2-1215(a) of the State Government Article.

Evidence of exclusion.

4. *Revenue characteristics*

"Where revenues are derived by means of a public levy or charge, in contrast to being grant receipts, there should be the presumption to include the [activity's] revenues or expenditures within the reporting entity." *Reporting Standards* §2100.110d(4), at 70; *State Entity* at 6. Even if an activity's source of revenue is not State taxes or fees, the revenue characteristics may nevertheless evidence inclusion—if, for example, the activity receives through appropriation federal grants that are themselves "moneys of the State." See 68 *Opinions of the Attorney General* at 88-89. The point of this criterion, we believe, is to inquire whether, as a matter of legislative intent and actual operation, the activity largely derives its revenue outside the ordinary State funding channels.

The Trust is authorized to accept "any gift, grant, legacy, or endowment of money from the federal government, State government, local government, or any private sources in furtherance of the Trust." NR 88-1905(a)(1). Although the Trust is also authorized to "[r]eceive appropriations as provided in the State budget" [NR 88-1905(a)(6)], the legislative history suggests an expectation that the Trust's resources would largely come from sources other than tax and fee revenues.¹⁷

¹⁷"The Department of Fiscal Services anticipates that grants for citizen Bay programs would total \$150,000. This would be raised from corporations, local governments, environmental group[s], foundations, and the federal government[t]." Senate Economic and Environmental Matters Committee, Report on Senate Bill 583, at 3 (1985). This expectation has been largely borne out. In fiscal year 1986, the Trust received \$41,888 from State appropriations, of which over \$36,000 was unspent and

Evidence of exclusion.

C. *Scope of Public Services*

“If the program of public service is generally available to all citizens within the geographical bounds of the governmental jurisdiction there is a strong possibility that the program should be included in the [reporting entity.]” *Reporting Entity* at 7.

The work of the Trust benefits the citizens of Maryland generally, not merely some small or discrete segment of the population. Its purpose “is declared to be of general benefit to the citizens and charitable in nature.” NR §8-1902. The Trust’s major grants to date have supported, among other things, citizen participation in the Critical Areas program, a pamphlet on reducing domestic sources of water pollution, beach improvement projects, and a training program for teachers. These examples illustrate the diverse public benefits of the Trust’s activities.

Evidence of inclusion.

D. *Special Financing Relationship*

This factor takes account of any unusual financial support given to the activity by the State, or vice versa—for example, the lease of State-owned land to an activity for a nominal charge. *See Reporting Standards* §2100.605, at 82.

The Trust has no special financing relationship of this kind, although the State does provide a direct subsidy in the form of “staff, supplies, and office space.” NR §8-1904(e).

Inconclusive.

E. *Summary*

The criteria discussed above are obviously not an exercise in arithmetic. Their application will usually lead to judgment calls instead of precise outcomes. Nevertheless, we believe that they pro-

reverted to the General Fund. The Trust received \$107,286 in donations during that fiscal year. *See also* note 14 above.

vide a useful framework for analyzing an activity's status under Article VI, §3. If an activity is intended by the General Assembly to function autonomously, most of these criteria will point to the activity's having been excluded from the forms of oversight and accountability to which State agencies are subject. Likewise, if an activity is created by the General Assembly as a component of local government, most of these criteria would point to local, rather than State, oversight and accountability procedures.¹⁸ But if neither is true, then the activity is subject to the "moneys of the State" requirement.

We conclude that the Bay Trust is not a State agency for purposes of the "moneys of the State" requirements in Article VI, §3 of the Constitution. Most of the criteria, especially those that directly address the Trust's key fiscal operations, point to the Trust's autonomy. *See* Part IV A 1 and 3; Part IV B 1, 3, and 4. They reflect an apparent legislative intent—underscored by the broad, express exemption of the Trust from the statutes governing the fiscal, procurement, and personnel functions of State agencies—that the Trust carry out its tasks with fiscal independence and not be linked to the State's integrated fiscal process.

V

Conclusion

In summary, it is our opinion that the Chesapeake Bay Trust is not subject to the "moneys of the State" requirements in Article VI, §3 of the Maryland Constitution. Therefore, it is not subject to the Executive Budget Amendment, Article III, §52 of the Constitution.¹⁹

¹⁸For example, application of the criteria to a county or multi-county sanitary commission leads to the very clear conclusion that such a commission is a component of local government not subject to the "moneys of the State" requirement. *See generally* Subtitle 6 of Title 9 of the Health-Environmental Article. *Cf. Highfield Water Co. v. Public Serv. Comm'n*, 488 F. Supp. 1176 (D.Md. 1980).

¹⁹The Trust is subject, "to the extent of State appropriations," to the statutory implementation of the Executive Budget Amendment. NR §8-1909.

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CHESAPEAKE BAY CRITICAL AREA COMMISSION—"HEARINGS"/
"MEETINGS"—ATTENDANCE REQUIREMENT—VALIDITY OF
CRITERIA.

April 2, 1986

The Honorable Larry Young
Chairman
House Environmental Matters Committee
Maryland House of Delegates

You have requested our opinion concerning certain provisions in the statute creating the Chesapeake Bay Critical Area Commission. Specifically, you inquire:

1) whether the "regional public hearings" required by §8-1808(d)(1) of the Natural Resources Article ("NR" Article) are "meetings of the Commission," for purposes of the requirement in NR §8-1804(c)(6) that Commission members "attend at least 60 percent of the meetings of the Commission" annually; and

2) whether the legality of the Commission's criteria for program development would be affected if they were adopted by a quorum composed of members of the Commission who had failed to attend at least 60 percent of Commission meetings.

For the reasons stated below, we conclude that:

1) Although the question is a very close one, public hearings held by the Commission need not be counted for purposes of the attendance requirement as "meetings of the Commission."

2) The question of Commission members' compliance with the statutory attendance requirement does not affect the legality of the Commission's criteria. That is, even if it were concluded that a majority of Commission members had failed to attend the required number of meetings, nevertheless those members continue to serve on the Commission and are legally entitled to participate fully in the Commission's actions.

I

Attendance at "Meetings"

A. *Background*

The Chesapeake Bay Critical Area Commission "consists of 25 voting members" appointed by the Governor. NR §8-1804(a). Eleven Commission members are required to be local government officials. NR §8-1804(a)(2). Five other members are State Executive Department secretaries, serving *ex officio*. NR §8-1804(a)(4).

In general, the Commission is empowered to superintend the efforts that will be made at the local level to protect the Bay and its environs. *See, e.g.*, NR §§8-1808(a), 8-1809(d)(2), 8-1811, and 8-1814. The Commission has the power, among other things, to "adopt regulations and criteria" and "conduct hearings in connection with policies, proposed programs, and proposed regulations or amendments to regulations." NR §8-1806(1) and (2).

B. *Program development criteria*

One of the Commission's principal responsibilities was the adoption of criteria for the development and approval of programs in each local jurisdiction, designed to achieve the statutory goals. NR §8-1808. Certain hearings were required to have been held prior to the adoption of the criteria:

"The Commission shall promulgate by regulation on or before December 1, 1985, criteria for program development and approval, which are necessary or appropriate to achieve the standards stated in subsection (b) of this section. Prior to developing its criteria and also prior to adopting its criteria, the Commission shall hold at least 6 regional public hearings, one in each of the following areas:

- (i) Harford, Cecil, and Kent Counties;
- (ii) Queen Anne's, Talbot, and Caroline Counties;
- (iii) Dorchester, Somerset, and Wicomico Counties;
- (iv) Baltimore City and Baltimore County;
- (v) Charles, Calvert, and St. Mary's Counties; and
- (vi) Anne Arundel and Prince George's Counties.

During the hearing process, the Commission shall consult with each affected local jurisdiction." NR §8-1808(d)(1).

As we understand it, the Commission in fact held 16 hearings, instead of the minimum of six required by the statute. The Commission, having been advised by counsel that a quorum was not essential to the convening of these public hearings, did not regard the hearings as Commission business meetings. After the hearings, the Commission—acting at meetings, with a quorum—considered and adopted the criteria. *See* 12 Md. Reg. 1953 (Sep. 27, 1985) (proposed regulations); 12 Md. Reg. 2352 (Nov. 22, 1985) (final regulations).

C. Construction of "Meetings"

The statute contains the following provision regarding attendance by Commission members:

"Any member of the Commission appointed by the Governor who shall fail to attend at least 60 percent of the meetings of the Commission during any period of 12 consecutive months shall be considered to have resigned, and the chairman shall forward the member's name to the Governor, not later than January 15 of the year following the nonattendance with the statement of the nonattendance, and the Governor shall thereupon appoint a successor for the remainder of the term. If the member has been unable to attend meetings as required by this subtitle for reasons satisfactory to the Governor, the Governor may waive the resignation if the reasons are made public." NR §8-1804(c)(6).

This provision is closely modeled after Article 41, §4 of the Maryland Code, an attendance requirement that is applicable to members of all State boards and commissions.¹ The only difference is

¹ "Any member of any State board or commission appointed by the Governor who shall fail to attend at least 50 percent of the meetings of the board or commission of which he is a member during any period of twelve consecutive months shall be considered to have resigned and the chairman of said board or commission shall forward or cause his name to be forwarded to the Governor, not later than January 15 of the year following such nonattendance with the statement of such nonattendance, and the Governor shall thereupon appoint his successor for the remainder of the term. If the member has been unable to attend meetings as required by this section for reasons satisfactory to the Governor, the Governor may waive such resignation if such reasons are made public."

that the minimum attendance requirement applicable to the Commission is 60 percent, rather than the 50 percent generally required of members of State boards and commissions.

Thus, the General Assembly clearly attached considerable importance both to the public hearing process preceding adoption of the criteria, else it would not have specified with such detail the requirements for those hearings; and to diligent attendance by Commission members at meetings, else it would not have increased the otherwise applicable 50 percent attendance requirement to 60 percent. Moreover, the General Assembly might well have understood these two provisions to be linked, so that the attendance requirement for meetings would serve to increase attendance at the hearings. This argument—that “hearings” are “meetings,” for purposes of the attendance requirement in NR §8-1804(c)(6)—is strengthened by provisions elsewhere in the statute that authorize the Commission to “appoint a panel of 3 of its members” to conduct other required public hearings. NR §§8-1809(d)(1) and 8-1810(b).

Finally, there is little doubt that, when a public hearing is convened by a quorum of the Commission, or indeed of any other public body, it is subject to the State Open Meetings Law. The term “meet” is defined, for purposes of the Open Meetings Law as follows: “‘Meet’ means to convene a quorum of a public for the consideration or transaction of public business.” §10-501(f) of the State Government Article (“SG” Article). Under SG §10-505(3), “a public body shall meet in open session whenever the public body is carrying out . . . a quasi-legislative function.”² A “quasi-legislative function” is defined as “the process or act of . . . adopting, disapproving, amending or repealing a rule, regulation, or bylaw that has the force of law.” SG §10-501(i)(1). The taking of testimony at a public hearing is surely part of “the process . . . of . . . adopting . . . a rule.” See *City of New Carrollton v. Rogers*, 287 Md. 56 (1980).³

² The phrase “shall meet in open session” in SG §10-505 does not imply that agency members are prohibited from assembling for the functions identified in SG §10-505 unless a quorum is present. The Open Meetings Law sets out certain requirements that an agency must follow once a quorum is present for the consideration or transaction of public business. If the quorum is carrying out one of the functions identified in SG §10-505, it “shall meet in open session”; if it is carrying out one of the functions identified in SG §10-508(a), it “may meet in closed session.” The Open Meetings Law does not prescribe the circumstances under which a quorum is required in the first place. See note 4 below.

³ The *Rogers* case held that even an informal, information-gathering meeting called by a citizen’s association, at which a quorum of the city council attended for the

Nevertheless, after taking into account these forceful considerations, we still conclude on balance that hearings of the Commission need not be counted for purposes of the requirement in NR §8-1804(c)(6) that Commission members "attend at least 60 percent of the meetings of the Commission."

First, we believe that the breadth of "meeting," for purposes of the Open Meetings Law, is not dispositive of the issue of construction here. *See Hills & Dales, Inc. v. City of Wooster*, 448 N.E.2d 163, 167 (Ohio App. 1982) (term "public hearings" in city charter provision regarding zoning procedure not the equivalent of term "meetings open to the public" in Sunshine Law). *Cf. 70 Opinions of the Attorney General* 30 (1985) (entity might be a State agency for purposes of the Public Information Act but not for other purposes). Obviously a "regional *public* hearing" must accord with a law intended to open agency meetings to public observation.

But we are not dealing with a question of public access. Rather, the attendance requirement in NR §8-1804(c)(6) is aimed at the Commission members themselves. It is, we think, best read as a device to ensure that Commission decisions in fact reflect the *collegial* process of a diverse membership. The Commission's membership was carefully devised to bring to its decisionmaking a range of geographic and substantive interests. NR §8-1804(a). But the intended collegial decisionmaking cannot occur if members are too often absent from sessions at which decisions are made.

However, a quasi-legislative public hearing, by its nature, does not involve the kind of group deliberation and interaction that a collegial body is required to bring to its decisionmaking. A public hearing is intended primarily as a forum for those who wish to express their views. It is also, correspondingly, a means of information for agency members. *See County of Nassau v. Metropolitan Transp. Auth.*, 293 N.Y.S.2d 1017, 1021 (Sup. Ct. 1968), *aff'd mem.* 301 N.Y.S.2d 432 (App. Div. 1969) ("a quasi-legislative hearing . . . can be primarily informational for the hearing body"). But it is not a mode of agency deliberation. To be sure, members of the body might participate in the hearing by posing questions to witnesses,

purpose of answering questions, was a "meeting" within the meaning of the Open Meetings Law:

"[T]he Act applies, not only to final decisions made by the public body exercising legislative functions at a public meeting, but as well to all deliberations which precede the actual legislative act or decision, unless authorized by [the Open Meetings Law] to be closed to the public."
287 Md. at 72.

but there is little interaction among the members themselves. Hence, the absence of members from the hearing does not impair the collegial process of decisionmaking, for that process simply does not occur at a hearing.

Indeed, it is a well-settled tenet of administrative law that members of an agency may participate in the decision of a matter, notwithstanding that they did not personally hear the presentation of evidence or argument. "Neither due process of law nor the concept of a full or fair hearing requires that the actual taking of testimony be before the same officers as are to determine the matter involved, and it is common for hearings to be conducted by less than all members of an administrative agency." 2 Am. Jur. 2d *Administrative Law* §437, at 245 (1962). Accord 3 Davis, *Administrative Law* §17:2, at 280 (2d ed. 1980). The procedural minimum necessary to ensure a reasoned judgment by decisionmakers is that decisionmakers consider and review all relevant evidence, but this requirement does not mean that they must be present at the actual hearing.⁴ *Morgan v. United States*, 298 U.S. 468, 481 (1936). As Professor Davis summarized the import of this case and its progeny: "[T]he deciding officers must understand the evidence, and that may be done by reading summaries prepared by the staff or by consultations with the staff." 3 Davis, *Administrative Law* §17:2, at 280. See also *McGraw Elec. Co. v. United States*, 120 F. Supp. 354, 357-58 (E.D. Mo.), *aff'd* 348 U.S. 804 (1954) (ICC decision on rates properly made by commissioners who had not heard oral argument but who read transcript).⁵

The statute creating the Commission itself reflects an awareness that hearings and meetings do not play the same role in the work of the agency. The two terms are used separately in different places, and the public hearings are not expressly defined as meetings. The Commission members themselves are described as "25 voting members," which suggests that the attendance requirement

⁴ As discussed in Part I B above, counsel to the Commission advised that the presence of a quorum was not a prerequisite to the holding of a public hearing. This advice was based on the principle of administrative law summarized in the text accompanying this note. Moreover, we have found no case that requires the presence of a quorum at a quasi-legislative hearing at which no agency decisionmaking occurs. Thus, we suggest that if the General Assembly desires to assure the presence of a quorum of Commission members at public hearings, it should specify that requirement in the statute. See SG §2-1606(a)(2) (quorum requirement for investigating committee hearings).

⁵ We understand that all public hearings of the Commission were transcribed and available to members who had not attended any particular hearing.

is a manifestation of the General Assembly's concern about the decisionmaking process—i.e., the “voting”—that would occur at meetings, not hearings. *See also* NR §8-1812(a) (procedure for disapproving chairman's actions regarding judicial proceedings “by vote at a meeting of the Commission”).

A distinction between hearings and meetings also has its practical side, of which the General Assembly was presumably aware. As was to be expected given the tight timetable for the development of the criteria, the regional public hearings of the Commission were bunched at the beginning and near the end of the process. And, as noted in Part I A above, most of the members of the Commission are required by the statute to be public office holders. It was certainly foreseeable that these officials would have other responsibilities that would prevent them from devoting a lengthy, consecutive block of time to a series of public hearings. If hearings had been considered to be part of the attendance requirement for meetings, the result might well have been greater attendance by Commission members at far fewer hearings. This result would have ill-served the legislative intent underlying the required regional public hearings—that the public have as much opportunity as possible to be heard.⁶

Finally, the difference between hearings and meetings is reflected in provisions governing the General Assembly's own investigating committees. “Unless there is a quorum, an investigating committee may not act at any meeting or hold a hearing.” SG §2-1606(a)(2). The express inclusion of “hearing,” as separately defined in SG §2-1601(b)(1), in this quorum requirement suggests that the term “meeting” alone would not extend the requirement to hearings. *Cf. Bouton v. Potomac Edison Co.*, 282 Md. 142, 152 (1978) (meetings of Public Service Commission personnel with interested persons were not “public hearings,” within meaning of Public Service Commission Law). *See also Eudaly v. City of Colleyville*, 642 S.W.2d 75, 77 (Tex. App. 1982) (distinguishing “public hearings” from “public meetings”).

For these reasons, we are of the view that the term “meetings” in NR §8-1804(c)(6) does not extend to the “regional public hearings” required by NR §8-1808(d)(1).

⁶ As it was, Commission members were encouraged (but not required) to attend hearings, and the Commission held more hearings than it was required to.

II

Effect of Noncompliance

A. Introduction

As we understand it, if public hearings are not counted as meetings for purposes of the 60 percent attendance requirement, all members of the Commission have met that requirement. If, however, public hearings were to be reckoned as meetings for purposes of the attendance requirement, most members of the Commission would not satisfy the requirement.

As discussed in Part I above, we have concluded that public hearings need not be counted in determining compliance with the attendance requirement. Nevertheless, because the question is a very close one, we think it useful to offer our views on your second question as well: whether the legality of the Commission's criteria for program development and approval would be impaired if they had been adopted by a quorum composed of members of the Commission who had failed to meet the attendance requirement. We conclude that noncompliance by a Commission majority with the attendance requirement in NR §8-1804(c)(6) would have no effect on the legality of the Commission's criteria.

B. The Statutory "Resignation" Procedure

NR §8-1804(c)(6) provides for the "resignation" of a Commission member who fails to meet the 60 percent attendance requirement. But the provision does not swiftly or automatically remove non-complying members from office and thus create vacancies. On the contrary, the procedure entails four separate steps, all of which must be completed before a noncomplying member ceases to hold office.

First, a "period of twelve consecutive months" must have elapsed and the member's failure to meet the 60 percent attendance requirement must be determined by the Chairman of the Commission.⁷ Second, "the Chairman shall forward the member's name to

⁷ The term "period of twelve consecutive months" is ambiguous. It might refer to the annual periods following the Commission's initial meeting, which occurred in October 1984. Alternatively, the phrase might refer to calendar years, even though the life of the Commission in the first year (1984) was much less than 12 months. The Chairman of the Commission has construed the provision to mean the latter and has informed the Governor early each year of compliance with the attendance

the Governor not later than January 15 of the year following the nonattendance with the statement of the nonattendance." Third, the Governor must decide whether to "waive the resignation," after considering the reasons for the member's nonattendance. Finally, if the Governor declines to waive the resignation, the Governor "appoints a successor for the remainder of the term." Thus, the noncomplying member's service on the Commission ceases only after the successor qualifies.

Article 41, §4, in virtually identical terms, requires the members of State boards and commissions generally to attend at least 50 percent of their meetings, while authorizing the Governor to waive the resignation otherwise implied from nonattendance. In contrast, Article 41, §4A provides that a board or commission member who is convicted of certain criminal offenses "shall be suspended without pay from participation in the board's or commission's activities during the appeals period. If the conviction becomes final, the member shall be removed from the office and the office shall be deemed vacant." In our view, the sharp contrast between the automatic suspension or removal provided for by Article 41, §4A and the waivable resignation provided for by Article 41, §4 and NR §8-1804(c)(6) reflects a clear legislative intent that "resignation" by virtue of nonattendance at meetings takes effect only if the Governor decides not to waive that resignation.⁸

Thus, in our view, the statutory resignation of a Commission member operates essentially like a voluntary resignation, which is ordinarily not effective until it has been accepted. "[A] public officer who submits his resignation is required to perform the duties of his office until his resignation is accepted." *Ulrich v. Board of County Comm'rs*, 278 Md. 432, 439 (1976).

requirement for the preceding calendar year. Under the Commission's construction of the term "meetings," discussed in Part I above, all members met the attendance requirement.

⁸This construction is confirmed by the legislative history of Article 41, §4. As originally enacted, the provision required the resignation of any board or commission member "who shall fail to attend the meetings of the Board or Commission of which he is a member for a period of twelve consecutive months." After being notified of this failure, "the Governor shall thereupon appoint his successor for the remainder of the term." There was no provision for excusing the nonattendance. Chapter 329, Laws of Maryland 1947.

In 1964, Article 41, §4 was amended to provide for the 50 percent attendance requirement now in the statute and to add the language giving the Governor the authority to "waive such resignation." The bill title described the latter as "providing for gubernatorial pardon." Chapter 114, Laws of Maryland 1964.

In the *Ulrich* case, the Court of Appeals held that a public official's resignation tendered at the request of the county governing body took effect immediately, without the necessity of any formal acceptance. The basis of that holding was "that the acceptance of the resignation was implicit in the request for the resignation." 278 Md. at 440. That is, the governing body had previously determined upon its "willingness to relieve [the official] of the performance of his duties." *Id.* Under such circumstances, further formal action was unnecessary.

By contrast, formal action on the statutory "resignation" of a Commission member is expressly required by NR 88-1804(c)(6). The Governor must determine whether the member's reasons for non-attendance were satisfactory and whether to "waive the resignation." Put another way, the Governor must determine whether he is willing to accept the member's resignation. Until he does so, that resignation is not effective.⁹

C. *The De Facto Officer Doctrine*

Even if NR 88-1804(c)(6) were to be properly read as providing for Commission members' automatic and immediate ouster from their positions, the validity of the adoption of the Commission's criteria would be unaffected. If the members who did not attend the requisite number of the Commission's hearings lacked actual authority to participate in the Commission's decisionmaking thereafter, they nonetheless properly exercised such authority as *de facto* members. "A *de facto* officer has been defined as one in actual possession of an office under some colorable or apparent authority." *Kone v. Baltimore County*, 231 Md. 466, 471 (1963). "Where there is a *de jure* office [i.e., an office is legally authorized], all that is required to make an officer *de facto* is that the individual claiming the office be in possession of it, performing its duties, and claiming to be such officer under color of right." *Grooms v. Lavale Zoning Bd.*, 27 Md. App. 266, 273-74 (1975). The Court of Appeals has held that "an elected or appointed officer may remain in office at the expiration of his term and is entitled to exercise the powers

⁹ As noted in Part I B above, the Commission had received advice of counsel, on the basis of which the regional public hearings were not regarded as meetings, for purposes of the attendance requirement. For the reasons stated in Part II C above, we agree with this reading of the statute. But even if the contrary view were taken, the Commission members' good faith belief that they were not missing a "meeting" when they failed to attend a hearing might well be regarded by the Governor as a satisfactory reason to waive the resignations.

of the office until his successor qualifies, whether or not the statute creating the office so provides." *Reed v. President and Commissioners of North East*, 226 Md. 229, 242 (1961).

During the time that the resignation procedure in NR §8-1804(c)(6) goes forward, the affected members are at least de facto members of the Commission. *See Reed*, 226 Md. at 240 ("[T]he public interest requires, in the absence of any provision to the contrary, that public offices should be filled at all times, without interruption.").

"[A]ll official actions of *de facto* officers are, upon grounds of public policy and necessity, to be considered as valid and binding as if they had been performed by *de jure* officers." 226 Md. at 246. Thus, for example, in *Kone v. Baltimore County*, a disciplinary board convened and headed by a de facto officer was held to have validly and effectively discharged a public employee. *See also Reed*, 226 Md. at 246 (powers of de facto officers extend to issuance of properly authorized bonds); *Grooms*, 27 Md. App. at 275 (powers of de facto officers extend to issuance of zoning ordinance and zoning map). By the same token, it is clear that the powers of de facto members of the Chesapeake Bay Critical Areas Commission extend to adoption of the Commission's program development and approval criteria. Therefore, whatever the membership status of the majority of the Commission at the time those criteria were adopted, the action by which they were adopted was fully effective, and the criteria are valid and binding on the public.

III

Conclusion

In summary, it is our opinion that:

1) Although the question is a very close one, public hearings held by the Commission need not be counted for purposes of the statutory attendance requirement as "meetings of the Commission."

2) The question of Commission members' compliance with the statutory attendance requirement does not affect the legality of the Commission's adopted criteria for local program development and approval. That is, even if one concluded that a majority of Commission members had failed to attend the required number of meetings, nevertheless these members continue to serve on the Commis-

sion and are legally entitled to participate fully in the Commission's actions.

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Editor's Note: After the issuance of this opinion, the General Assembly enacted legislation dealing in part with attendance by Commission members at public hearings. Chapter 601, Laws of Maryland 1986.

CONSTITUTIONAL LAW

FEDERAL CONSTITUTIONAL AMENDMENTS—PROCEDURAL ISSUES
CONCERNING NATIONAL CONSTITUTIONAL CONVENTION AND
STATE RATIFICATION METHODS.

February 7, 1986

The Honorable Anne S. Perkins
Maryland House of Delegates

You have requested our opinion on several questions about procedures for amending the United States Constitution, including the relationship between the amendment procedures in Article V of the U. S. Constitution and Maryland's petition for a national constitutional convention to propose a balanced budget amendment. Specifically, your questions are:

1. How would the selection of delegates to a national constitutional convention be determined?

2. (a) If a national constitutional convention is called, will the determination of whether state legislatures or special state constitutional conventions are to ratify proposed amendments be made by Congress or by the national convention?

(b) How would the selection of delegates to state ratifying conventions be determined?

3. (a) Is Maryland's petition for a national constitutional convention valid, inasmuch as it requests a convention for the purpose of proposing only a single amendment?

(b) If Maryland's petition is valid, will it bind all delegates to the national constitutional convention so that they may consider only proposals for a balanced budget amendment?

(c) If Maryland's petition is valid but is not binding on all convention delegates, will it bind Maryland delegates to the national constitutional convention so that they may vote only on proposals before the convention for a balanced budget amendment?

(d) If Maryland's petition is valid, would it bind Members of the Maryland General Assembly or delegates to

a state constitutional convention so that they may consider only a balanced budget amendment?

For the reasons stated below, we conclude as follows:

1. Congress would determine the method by which delegates to a national constitutional convention would be chosen.

2. (a) Congress alone is empowered to determine the mode of ratification for every proposed constitutional amendment.

(b) The limited precedent suggests that each state would determine the delegate selection method for its own ratifying convention.

3. (a) The validity of Maryland's petition for a constitutional convention is questionable.

(b) Maryland's and other states' limited petitions would not bind a national constitutional convention to the specific proposals in the petitions.

(c) Maryland's delegates to a national convention would not be bound to vote only on the single amendment that was the object of Maryland's petition for a convention.

(d) If the national convention proposed more than one amendment, the General Assembly or a State convention would not be bound to vote only on the single amendment that was the object of Maryland's petition for a convention.

I

Constitutional Provision on Amendments

Article V of the United States Constitution provides, in pertinent part, that:

"The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall

be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress."

Until now, every amendment to the Constitution has been proposed by Congress. However, nearly two-thirds of the states—including Maryland—have petitioned for a national convention to propose a balanced budget amendment. See generally 68 *Opinions of the Attorney General* 157 (1983). Your questions relate to various procedural issues that would arise should such a national convention be called.

II

National Convention Delegate Selection

Article V itself is entirely silent on the method by which delegates to a national constitutional convention are to be chosen. Further, the framers of the Constitution did not address this point during their deliberations on Article V.

For the last two decades, members of Congress have attempted to resolve this ambiguity by proposing procedural legislation that would set forth, among other things, precisely how delegates to a convention would be chosen. Although such legislation has at least once passed the United States Senate, it has never received favorable consideration in the House of Representatives. Under the proposed legislation presently before the Congress, each state would elect two at-large delegates and one delegate from each congressional district. S. 40, 99th Cong., 1st Sess. (1985).¹ Indeed, even

¹Section 7 of S. 40, which deals with the delegate selection process, provides as follows:

"(a) In each State two delegates shall be elected on an at-large basis and one delegate shall be elected from each congressional district in the manner provided by State law. No Senator or Representative, or person holding an office of trust or profit under the United States, shall be elected as delegate. Any vacancy occurring in a State delegation shall be filled by appointment of the legislature of the State.

(b) The secretary of state of each State, or, if there be no such officer, the person charged by State law to perform such function, shall certify to the President of the Senate and the Speaker of the House of Repre-

if a convention were to be called without general legislation such as S. 40 having been previously enacted, Congress nevertheless would have authority to prescribe a procedure for the selection of delegates to that convention.

However, questions might be raised if the procedure prescribed by Congress appeared to be inconsistent with established tenets of constitutional law. For example, the procedure proposed in S. 40 might be challenged on the grounds that allotting every state two delegates, regardless of population, violates the one-person-one-vote principle laid down by the U.S. Supreme Court in *Reynolds v. Sims*, 377 U.S. 533 (1964).²

III

Ratification Procedure

A. *Choice of method*

We conclude that Congress is empowered to determine whether an amendment proposed by a national constitutional convention would be ratified by state legislatures or state conventions. The pertinent language of Article V—"as the one or the other Mode of Ratification may be proposed by the Congress"—assigns this responsibility to Congress and Congress alone.

The word "may" does not suggest that any entity other than Congress is authorized to determine the "Mode of Ratification" for

sentatives the name of each delegate elected or appointed by the legislature of the State pursuant to this section.

(c) The people of the District of Columbia shall elect as many delegates as the whole number of Senators and Representatives to which said District would be entitled in the Congress if it were a State. Any vacancy occurring in the delegation of the District of Columbia shall be filled by appointment of the District of Columbia Council. The Clerk of the District of Columbia Council shall certify to the President of the Senate and the Speaker of the House of Representatives the name of each delegate elected or appointed by the Council pursuant to this section.

(d) Delegates shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at a session of the convention, and in going to and returning from the same; and for any speech or debate in the convention they shall not be questioned in any other place."

²In the absence of any precedent concerning a national constitutional convention, we cannot predict how such principles would be applied.

proposed amendments. Rather, in its grammatical context, the word "may" merely serves to emphasize Congress' discretion in determining which of the two modes is to be used. Historically, Congress has determined the mode of ratification for each of the constitutional amendments proposed to date, and no one has suggested that any other entity could do so.

B. *State convention delegate selection*

Although Article V plainly permits Congress to decide that a proposed amendment is to be ratified by state ratifying conventions, it is entirely silent on the method by which delegates to those conventions are to be chosen. Further, the framers of the Constitution did not address this point during their deliberations on Article V.

Because Congress *alone* is authorized by Article V to determine the mode of ratification for amendments, we believe that a national convention would not have authority to determine the number and method of selection of delegates to state ratifying conventions. *See* Part III A above.

In 1933, when Congress proposed an amendment to repeal Prohibition, it required that the mode of ratification be by state conventions.³ In its resolution proposing what became the 21st Amendment, Congress did not instruct the states as to how delegates to state conventions were to be chosen. Each state determined the composition of its convention pursuant to its own constitution and laws.

It is not clear whether Congress could have done otherwise. State court decisions involving the ratifying conventions for the 21st Amendment are inconsistent on this issue. The Supreme Court of Alabama, in an advisory opinion to the Governor of Alabama, determined that the U.S. Constitution left it "to the sovereign state to frame its own laws" relating to ratifying conventions. *In re Opinions of the Justices*, 148 So. 107, 110 (Ala. 1933). On the other hand, the Supreme Court of Ohio concluded that determining how a ratifying convention should be chosen is a "federal function" under the U.S. Constitution, but that "in the absence of action by the Congress," the state's legislature can perform this function.

³For every other proposed amendment, Congress has mandated ratification by state legislatures.

State ex rel. Donnelly v. Myers, 186 N.E. 918 (Ohio 1933). *See also State ex rel. Tate v. Sevier*, 62 S.W.2d 895, 898 (Mo. 1933) (adopting reasoning of *Donnelly*).⁴

In sum, we regard it as likely that each state would determine the selection method for delegates to its own ratifying convention.

IV

“Single Amendment” Petition—Validity and Effect

A. *Validity*

You ask whether a state’s petition for a constitutional convention is valid at all—that is, to be counted against the “two thirds of the several States” requirement in Article V—if, like Maryland’s petition, it explicitly seeks a convention limited to proposing one amendment.

Yale law professor Charles Black argues forcefully that, because Article V provides for a convention to propose “amendments” to the Constitution, a state’s petition is valid only if it calls for a convention that can propose whatever amendments to the constitution that it chooses. *See Hearings on S. 3, S. 520 and S. 1710, Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 96th Cong., 1st Sess.* 183-89 (1979) (“Hearings”) (testimony of Professor Black). Professor Black contends that the framers of the Constitution intended the convention procedure in Article V to be used only when comprehensive revisions to the Constitution are needed; piecemeal revisions, such the adoption of a balanced budget amendment, are to be accomplished through congressional proposal.

Professor Black’s position is, however, very controversial. Other commentators argue that the framers intended the two amending procedures set out in Article V to be co-equal, each available whether the proposed revision is piecemeal or comprehensive. *See Hearings* at 77-165 (1974) (Special Report of the American Bar Association). Hence, under this view, a petition limited to a single amendment is valid.

⁴Whatever body ultimately determines how state convention delegates are chosen, the selection procedure would presumably have to satisfy applicable principles of constitutional law. *See* note 2 above and accompanying text.

This debate between authoritative commentators over the basic purposes of an Article V convention highlights the great uncertainty that surrounds the unprecedented convention method of amending the Constitution. We can only conclude that, given this uncertainty, the validity of Maryland's petition—limited as it is to a specific proposed amendment—is questionable.

B. *Effects*

Your remaining questions deal with possible limitations on the agenda of a national constitutional convention, once it comes into existence.

First, you raise the basic issue of whether state legislatures can, in their petitions for a convention, limit it to consideration of a single proposed amendment to the Constitution. For the reasons stated in the enclosed testimony of the Attorney General, we conclude that state legislatures may not so limit a convention. Statement of Stephen H. Sachs, Attorney General, Before the Senate Constitutional and Public Law Committee in Support of SJR 17, at 49-52 (March 9, 1983).

We noted that "[t]here are three possible theories under which a convention could 'run away' from limits sought to be placed upon it by legislatures or Congress": 1) it could act as a " 'revolutionary' convention ..., free to do essentially as it pleases," regardless of existing constitutional constraints on the amendment process; 2) it could view itself as free " 'to propose any amendments it chose regardless of limitations sought to be imposed by Congress or the state legislatures'; or 3) it could view itself as limited to the subject matter of the state petitions, but not limited "to considering only the precise amendment or amendments proposed in the state petitions." *Id.* at 5-7. Given these various possibilities, we concluded that, notwithstanding Maryland's and other states' limited petitions, "there is a substantial risk that a constitutional convention called to propose a balanced budget amendment would also propose other amendments to the Constitution." *Id.* at 52.

Second, you ask whether the General Assembly's limited petition would bind the State's delegates to a national convention to vote only on a balanced budget amendment. Because the convention as a whole would be independent of the state legislatures' purported limitations, so too would each individual delegate. We find no authority for the proposition that a state may limit the participation of its delegates to a convention. Once a convention convenes, its

delegates are subject to the convention's—not their states'—rules and authority.

Finally, we also find no support for the proposition that Maryland's limited petition would effectively prevent the General Assembly or a State ratifying convention from considering whatever amendments are proposed by a national convention. It is a well-established principle of law that one General Assembly may not, by its legislative acts, bind its successor. *State v. Fisher*, 204 Md. 307, 315 (1954); *Montgomery County v. Bigelow*, 196 Md. 413, 423 (1950). Further, we have previously concluded that such a petition is merely a "formal request" to Congress, which in no way binds the legislature that issued it. 68 *Opinions of the Attorney General* 157, 160-61 (1983). Because the petition is not binding, the General Assembly may withdraw the petition. Similarly, the body that ultimately will consider whether to ratify or reject proposed amendments is free to carry out its authority fully, notwithstanding the limitations in the petition.

IV

Conclusion

In summary, it is our opinion that:

1. Congress would determine the method by which delegates to a national constitutional convention would be chosen.

2. (a) Congress alone is empowered to determine the mode of ratification for every proposed constitutional amendment.

- (b) The limited precedent suggests that each state would determine the delegate selection method for its own ratifying convention.

3. (a) The validity of Maryland's petition for a constitutional convention is questionable.

- (b) Maryland's and other states' limited petitions would not bind a national constitutional convention to the specific proposals in the petitions.

- (c) Maryland's delegates to a national convention would not be bound to vote only on the single amendment

that was the object of Maryland's petition for a convention.

(d) If the national convention proposed more than one amendment, the General Assembly or a State convention would not be bound to vote only on the single amendment that was the object of Maryland's petition for a convention.

STEPHEN H. SACHS
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STATEMENT OF
STEPHEN H. SACHS
ATTORNEY GENERAL OF MARYLAND

In Support of SJR 17
March 9, 1983

Thank you for giving me this opportunity to speak on SJR 17, a resolution to withdraw Maryland's 1975 petition to Congress to call a constitutional convention for a balanced budget amendment. I strongly support the passage of this resolution.

Maryland's 1975 petition was passed pursuant to Article V of the United States Constitution, which provides that Congress must call a constitutional convention upon the application of two-thirds of the states. Under Article V, such a convention could propose constitutional amendments which would then have to be ratified by three-fourths of the states. This procedure is an alternative to the Congressionally-initiated amendment process where amendments are proposed by a two-thirds vote of both Houses of Congress for ratification by three-fourths of the states.

Before addressing the merits of the resolution to withdraw Maryland's 1975 petition, I would like to restate my position that a withdrawal of a petition for a constitutional convention is constitutional. As you know, I concluded in a 1979 opinion that a state could *not* rescind a prior *ratification* of a proposed constitutional amendment. But I believe that there is a 'crucial difference' between a ratification of an amendment and a petition for a constitutional convention. While the former is a 'final act' of a sovereign body which cannot be undone, the latter is merely a 'formal request' to Congress which can be withdrawn. The overwhelming weight of legal authority on this issue supports my position. I have attached a copy of my letter to Senator Dorman which fully sets forth my position and the authority behind it.

I urge you to recommend passage of SJR 17 because, regardless of the merits of the balanced budget amendment itself, calling a constitutional convention to adopt it would create a substantial risk of a "runaway" convention which undermines basic constitutional protections. And, because thirty-one of the necessary thirty-four states have already petitioned for a convention, a convention may well be called—and soon—unless action is taken to withdraw petitions.

One of the most important features of our Constitution is the protection it gives through the Bill of Rights and the Fourteenth

Amendment to individuals and to groups from a tyrannical majority of the moment. As we have occasionally learned through bitter experience, no nation, including this one, is immune from the curse of the many seeking to oppress the few. That is why we must do everything we can to preserve the rights and liberties guaranteed by the Constitution—and why we must avoid unnecessary risks to those rights and liberties.

One of the most effective protections we have against attempts to curtail our constitutional rights is the fact that amending the Constitution is a relatively difficult process. I believe, however, that this protection would be greatly eroded if, instead of utilizing the traditional Congressionally-initiated amendment process, we invoked, for the first time in our history, the provision in Article V of the Constitution for a national constitutional convention. Calling such a convention is a radical and unprecedented step we should not take.

Up until now, every amendment added to the Constitution was first approved by two-thirds of both the Senate and House of Representatives and then ratified by three-fourths of the states. Representatives of not only a majority, but of a substantial super-majority of the American people agreed to the amendments before they were adopted. It is, I believe, not coincidental that *none* of these amendments permanently curtailed constitutional rights or liberties. The passing passions which may compel a temporary majority of Americans to limit basic rights or liberties are unlikely to sway the super-majority necessary to amend the Constitution by this traditional method.

The untried constitutional convention method of amending the constitution offers no similar guarantee against a temporarily “tyrannical” majority. In the first place, it is possible under this method for an amendment to be adopted by the concurrence of persons representing a bare majority or less of the American people. Further, and even more important, there is a great risk that such a convention could ignore limits sought to be placed on it and propose amendments on any subject—including individual rights.

If the states of Hawaii, Montana, and Vermont joined the thirty-one states that have petitioned for a constitutional convention on the balanced budget, such a convention would be called on petition of thirty-four states comprising just less than half of the American people. Once a convention is called, there is nothing to prevent it from proposing constitutional amendments by a simple majority of its delegates. And, because there is no established procedure for

choosing these delegates, it is not even clear that a convention majority would actually represent a majority of the American people. We in Maryland can have no guarantee that delegates in other states would be chosen in a fair and equitable manner. Finally, although Article V of the Constitution requires that amendments proposed by a convention must be ratified by three-fourths of the states, it is possible for an amendment to be ratified by the requisite thirty-eight states comprising only 42% of the total U.S. population. Thus, *nowhere* in the convention method of constitutional amendment is there a requirement similar to the requirement in the Congressional method that two-thirds of the House of Representatives approve a proposed amendment which would insure that before an amendment is adopted representatives of a substantial super-majority of the American people approve it.

This lack of a requirement of super-majority support would, of course, be especially troubling if a convention were to propose amendments in areas such as individual rights. Many of those who favor the call for a convention argue that we need not worry about this happening because the Maryland petition and petitions from many other states explicitly provide that the convention could only consider certain specific balanced budget amendments. The effectiveness of these purported limitations is, however, uncertain at best.

There are three possible theories under which a convention could “run away” from limits sought to be placed upon it by legislatures or Congress.

First, a constitutional convention could become what is known as a “revolutionary” convention. Under this theory, a constitutional convention would, once it is called, become the most sovereign entity in the nation, free to do essentially as it pleases. The highest courts in at least two states have viewed conventions in this manner. *See Sproule v. Fredericks*, 69 Miss. 898, 904 (1892); *McMullen v. Hodge*, 5 Tex. 34, 73 (1849).

There is an important precedent for this model in the 1787 Convention which framed our present Constitution. That convention was called “for the sole and express purpose of revising the Articles of Confederation.” Further, the Articles of Confederation required that any amendments proposed by the Convention had to be ratified by *all* the states to be effective. The 1787 Convention, of course, ignored both of these limitations: it scrapped the Articles entirely by proposing a whole new Constitution and it made adoption of the Constitution contingent on ratification by only three-fourths of the states.

Thus, it is possible, though I believe unlikely, for a convention called under Article V of the Constitution to follow the "revolutionary" precedent set by the Founding Fathers in 1787. If so, such a convention could totally revamp the Constitution and, in order to make adoption of its product more likely, change the ratification procedure to require assent by less than three-fourths of the states.

A second, more probable, theory for an Article V Convention would be for it to consider itself bound by Article V, including the three-fourths ratification requirement, but for it to also interpret Article V as permitting it to propose any amendments it chose regardless of limitations sought to be imposed by Congress or the state legislatures. Under this scenario a convention called by two-thirds of the states to propose a balanced budget amendment could also propose amendments affecting abortion rights, a nuclear freeze, religious freedom, sexual preference, free speech, privacy interests, the right to bear arms, or any imaginable set of similar issues. As we have seen, such proposed amendments could then become part of the Constitution after approval by representatives of a bare majority or less of the American people.

There is substantial authority that a convention could run away in this manner. First, some of the most renowned constitutional scholars in the country, including Professor Charles Black of Yale, Walter Dellinger of Duke, Gerald Gunther of Stanford and Laurence Tribe of Harvard have concluded that neither State legislatures nor Congress can limit a constitutional convention to proposing only certain specific amendments. Second, there is a long history at the state level of conventions going beyond limits sought to be imposed on them by a state legislature. As recently as 1975, the Supreme Court of Arkansas held in *Pryor v. Lowe*, 523 S.W. 2d 199, that because a constitutional convention exercises power "inherent in the people," its actions cannot be restricted by a legislature. Although it did not rule on this specific point, the Maryland Court of Appeals made the similar finding that delegates to a convention are "direct agents of the people, rather than agents of the organized government" to support its holding that such delegates are not "officers" under the pre-existing State Constitution. *Board of Supervisors of Anne Arundel County v. Attorney General*, 246 Md. 417 (1967).

Under a third possible theory, the State legislatures which petition for a convention could limit the subject matter which the convention can consider but could not constrain it to voting up or down specific amendments only. The Supreme Court of Tennessee adopt-

ed such a theory in *Snow v. Memphis*, 527 S.W. 2d 55, where the court held that a provision in the Tennessee Constitution permitting "limitations" on constitutional conventions only authorized limits on the subject matter that a convention could address. Further, one of the most forceful advocates of the position that a convention could be limited, former Senator Sam Ervin, has also maintained that the states can only limit the subject matter of a convention and could not limit the convention to specific amendments.

In our case, this third possibility would mean that the state legislatures could require the convention to deliberate only on a balanced budget amendment to the federal constitution, but could not limit the convention to considering only the precise amendment or amendments proposed in the state petitions. In terms of protecting individual liberties, I find little comfort in such a partial limitation of a convention. There are an infinite number of ways by which a convention could curtail rights and liberties through the budget process. For example, the budget could be balanced in part by denying federal aid to states that did, or did not, depending on which viewpoint commended itself to the delegates, require prayer in public schools, or permit busing, or pass gun control laws, or restrict police searches.

After reviewing these three theories and the authority behind them, the conclusion I reach is that there is no way to limit a convention once it is called and that, therefore, a runaway convention could very well occur.

The most important legal authority I found taking the view that a convention could, in fact, be limited is a 1974 Special Report issued by the American Bar Association. This Report, I understand, was influential in convincing many Maryland legislators in 1975 that a runaway convention would not occur.

Substantial doubt, however, has been cast on the Special Report's conclusion by both a committee of the ABA and one of the authors of the Report itself. The ABA's Section on Individual Rights and Responsibilities agreed without dissent to reject the Special Report because of "its infirmly supported position that the Legislatures applying for the call of a convention could limit convention jurisdiction to one or more specific subjects." In response to a question by Senator Birch Bayh at a 1979 Senate hearing on constitutional conventions as to whether he had any doubts about the conclusion of the Special Report, co-author and leading ABA spokesman John D. Feerick stated that "it is a possibility—maybe

more than a possibility under certain circumstances where there is strong emotion about a particular subject" that a convention could exceed the limits placed on it by state legislatures.

Further, even if one could make a persuasive argument that the framers of the Constitution intended to give state legislatures the right to limit conventions under Article V (and no one has), there would still be a substantial question as to whether the courts would enforce this right. Although the courts have ruled on many Article V questions, there is a judicial tradition of treating some particularly sensitive Article V issues as non-justiciable "political questions." A dispute among a "runaway" convention, the state legislatures that called it and Congress may be just the kind of issue on which the courts would decline to rule.

Thus, I believe that there is a substantial risk that a constitutional convention called to propose a balance budget amendment would also propose other amendments to the constitution. And, since under the convention method of amending the Constitution, an amendment could be adopted by representatives of a bare majority or less of the American people, the risk is heightened that amendments which curtail basic constitutional rights or liberties may result.

I urge those of you who desire a balanced budget amendment to work for its adoption through the tried and testing Congressionally-initiated process, and not to let this issue open the "Pandora's box" of a constitutional convention.

CONSTITUTIONAL LAW—PUBLIC PURPOSE—DUE PROCESS—EQUAL
PROTECTION—TAX AND LIEN REQUIREMENTS IMPOSED ON ALL
MARYLAND LAWYERS ARE CONSTITUTIONAL.

April 22, 1986

The Honorable Harry Hughes
Governor

We have reviewed and hereby approve for constitutionality and legal sufficiency Senate Bill 753, which amends various provisions of law with respect to the Legal Mutual Liability Insurance Society of Maryland. Specifically, we have examined the tax and lien provisions of the legislation and have concluded that the bill does not impose a tax for a purely private purpose in violation of Article 15 of the Maryland Declaration of Rights and is not violative of due process or equal protection.

I

Senate Bill 753

Article 48A, §570 of the Maryland Code, as amended by Senate Bill 753, provides that:

“(a) Within 30 days after the date the society is incorporated, the clerk of the Court of Appeals of Maryland shall certify to State Treasurer a list of all attorneys admitted to practice law in the State as shown in the records of the Clients’ Security Trust Fund, as provided for in Article 10, §43 of the Code on the date of the Society’s incorporation.

(b) A special one-time tax for the privilege of practicing law in the State is levied on attorneys listed by the treasurer in accordance with subsection (a) of this section in the amount of \$150 per attorney, to be levied and assessed within 30 days of receipt of the certified list of attorneys. The tax shall be collected by the treasurer within 60 days after receipt of the certified list of attorneys.

(c) If the tax imposed by this section is not paid within 60 days from the date the tax is levied and assessed, the attorney who is liable for its payment shall pay an addi-

tional tax as a penalty. The penalty may not exceed 10 percent of the tax due, plus interest at the rate determined under Article 81, §204 of the Code for each month the tax remains unpaid. Interest may not be assessed on the tax which is due as a penalty. If any attorney fails to pay the tax due under this section, on or before the date fixed for its payment, the full amount of all the tax due the State together with any interest, penalty, or addition to the tax, shall be a lien in favor of the State upon all property and all rights to property, real or personal, belonging to the person in accordance with Article 81, §322 of the Code.

(d) (1) The General Assembly of Maryland dedicates the proceeds of the tax provided by this section as the initial policyholders' surplus of the society.

(2) After retaining an amount to pay the cost of collection, the treasurer and comptroller shall pay over the proceeds of the tax to the society within 30 days.

(e) The board of directors of the Society shall establish a membership fee which shall be payable by an attorney at the time of application to the Society for a policy of insurance. The amount of the fee shall be determined by the Board of Directors. The membership fee is not refundable, nor shall it be credited against any premium payable to the Society for a policy of insurance. Any attorney who has paid the tax specified in subsection (b) of this section shall be credited with the amount of the tax paid against his liability for any membership fee.

(f) Upon payment of the membership fee, an attorney may be insured by the Society for any and all hazards customarily insured by the Society, subject to any coverage limitations specified by the Society in accordance with policy limitations, exclusions, conditions, deductibles, and loss sharing requirements."

II

Public Purpose

Under Article 25 of the Declaration of Rights, the State may tax and spend only for a public purpose, not a purely private one. In

Snowden v. Anne Arundel County, 295 Md. 429, 435 (1983), the Court of Appeals stated that:

“Our cases have consistently upheld the propriety of payment of public funds to private institutions or individuals, as long as a public purpose is served thereby . . . The legislative body is primarily entrusted with ensuring that the public purpose requirement is fulfilled, and the courts have no duty unless and until a perversion of public funds to private purposes is obvious.”

See also *Wilson v. Board of County Commissioners*, 273 Md. 30 (1974). And, in *Frostburg v. Jenkins*, 215 Md. 9, 16 (1957), the Court said that:

“What is a public purpose for which public funds may be expended is not a matter of exact definition; *it is almost entirely a matter of general acceptance* We may add that the line of demarcation is not immutable or incapable of adjustment to changing social and economic conditions that are properly of public and governmental concern.” (Emphasis added).

In this regard, we note that this office, in a bill review letter on Senate Bill 816 (1975), concluded that legislation upon which Senate Bill 753 is largely patterned served a public purpose. The 1975 legislation established a Medical Mutual Liability Insurance Society funded by a \$300 tax on licensed physicians. See Article 48A, §552. There, we said that a public purpose existed because “[t]he continued provision of essential medical services to the Maryland public is in serious jeopardy unless physicians are assured of adequate professional liability insurance coverage.” A similar public purpose can be articulated for Senate Bill 753: assuring Maryland lawyers of adequate insurance coverage so that essential and affordable legal services may be provided to the public. For this reason, we conclude that the bill does not violate Article 15 of the Declaration of Rights.

III

Due Process—Lien

In *Barry Properties v. Fick Brothers*, 277 Md. 15 (1976), the Court of Appeals struck down the State mechanic’s lien law as violative of due process, because it did not afford a property owner

notice and an opportunity for a hearing *before* the lien was established. Senate Bill 753, like Article 81, §322, which it seeks to emulate, does not expressly provide a pre-determination hearing. However, there is no need to decide whether those subject to the tax, as a practical matter, may be impliedly afforded hearing rights in the Maryland Tax Court before the lien encumbers their property. See Article 41, §318(1). This is so because the collection of "internal revenue" is recognized as an extraordinary circumstance permitting the taking of property without affording a pre-determination hearing. See *Fuentes v. Shevin*, 407 U.S. 67, 90-91 (1972). Thus, even if there were no hearing before the establishment of a lien on the lawyer's property pursuant to Senate Bill 753, the legislation would not offend due process.¹

IV

Equal Protection—Public Lawyers

Lastly, we have considered whether the bill, by imposing a tax on lawyers employed by State and local governments, denies equal protection of the laws and have concluded that it does not.

Because Senate Bill 753 does not disadvantage a "suspect" class or affect a fundamental constitutional right, it passes constitutional muster under the Equal Protection Clause of the 14th Amendment unless *wholly* arbitrary or irrational. *City of New Orleans v. Dukes*, 427 U.S. 297, 304-05 (1976). Moreover, a rational basis, and thus constitutionality for equal protection purposes, will be presumed unless a clear and convincing showing by the party assailing the legislative classification proves that it does not rest upon any reasonable basis. *Washabaugh v. Washabaugh*, 285 Md. 393, 408 (1979).

Applying this standard, it is our view that the decision to tax all attorneys admitted to practice in Maryland and not to exempt government lawyers cannot be said to lack a rational basis. First, Senate Bill 753 imposes a tax on the "privilege" of practicing law, whether one is actually practicing or not. Thus, under the bill a number of lawyers who do not practice (e.g., law professors) argu-

¹ Once again there is no need to decide the appropriate forum for a lawyer to challenge the imposition of the lien in a post-determination setting, *viz.* in the Tax Court or in the Circuit Court in response to an attachment proceeding to enforce the lien. See Article 81, §322(4).

ably do not derive a *direct* benefit from the tax proceeds. Therefore, the bill does not create a discrete class of government lawyers disadvantaged by the bill. Secondly, many government lawyers do engage in some private practice or might be in private practice in the future and could, if they chose, take advantage of the availability of insurance. Third, the bill selects a certain administratively verifiable event, admission to the bar, to trigger the tax. This enables the tax to be assessed and administered in a convenient manner. Fourth, even lawyers who do not practice will, like the citizenry at large, benefit from fulfillment of the bill's purpose in ensuring the availability of legal services. Finally, in this area, the Legislature is entitled to proceed one step at a time in determining whether exceptions to the tax are necessary.²

V

Conclusion

For all of these reasons, we conclude that Senate Bill 753 is constitutional.

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Editor's note: The preceding opinion, originally written as a bill review letter, is published here in a slightly revised format. Senate Bill 753 was enacted as Chapter 281, Laws of Maryland 1986. In *Ogrinz v. James*, 309 Md. 381 (1987), the Court of Appeals sustained the constitutionality of Senate Bill 753.

² The 1975 legislation creating a Medical Mutual Liability Insurance Society did not contain exceptions for physicians employed by the federal government, volunteers or teachers in medical school. These exceptions were added by subsequent legislation. See Chapters 563 and 568, Laws of 1976.

CONSTITUTIONAL LAW—PERSONNEL—DRUG TESTING—FOURTH AMENDMENT—INDISCRIMINATE DRUG TESTING OF STATE EMPLOYEES IS UNCONSTITUTIONAL—TESTING OF MOST EMPLOYEES REQUIRES “PROBABLE CAUSE”—TESTING OF PUBLIC SAFETY EMPLOYEES REQUIRES “REASONABLE SUSPICION.”

October 22, 1986

The Honorable John F. X. O'Brien
Secretary of Personnel

You have requested our opinion on the legality of several possible approaches to testing State employees, or applicants for State jobs, in order to detect drug abuse.¹ Specifically, you ask about the following alternatives:

1. mandatory testing of current State employees—that is, compelling employees to submit a urine specimen for laboratory analysis—leading to termination from State service of employees who are found to be abusing drugs;²
2. mandatory testing of those who presently serve as correctional officers, leading to termination from State service of officers who are found to be abusing drugs;
3. mandatory testing of all applicants for State jobs, leading to a refusal to hire applicants who are found to be abusing drugs; and
4. mandatory testing of applicants for positions as correctional officers, leading to a refusal to hire applicants who are found to be abusing drugs.

You also inquired about:

¹The term “drug abuse” refers to the unauthorized use of opiates, cocaine, marijuana, or any of the other controlled dangerous substances listed in Article 27, §279 of the Maryland Code. Your questions concern drug testing to further the State’s interest as employer, as distinct from its interest as law enforcer. *See* Part II below. State employees are of course subject to prosecution for violating criminal prohibitions related to drug abuse; however, the constitutional and other considerations directly affecting State law enforcement efforts are not the subject of this opinion.

²Your inquiry, arising as it does merely from possible alternatives rather than a concrete proposal, does not indicate whether such a program would mandate testing for each employee or would instead require all employees to submit to testing, if selected for it on a random basis. Either type of program is “mandatory,” in the sense that we use the term, and our conclusion is the same in either case.

5. the legal limitations, if any, that must govern the actual conduct of a testing program.

For the reasons stated below, we conclude as follows:

1. Mandatory testing of most categories of State employees would violate the Fourth Amendment prohibition against "unreasonable searches and seizures." The testing of such an employee is permissible only if based upon particularized probable cause, the traditional prerequisite to a search or seizure. In addition, termination of an employee *solely* because the testing indicates current drug abuse would violate the federal Rehabilitation Act of 1973.

2. Mandatory testing of employees whose work is directly related to public safety is also unconstitutional unless certain Fourth Amendment safeguards are followed. Drug testing of these employees for no reason other than the nature of their jobs is not permissible. However, there is no constitutional or other legal bar to mandatory testing of these employees where circumstances give the employing agency a reasonable, objective basis to suspect illicit drug use. Therefore, under this somewhat more relaxed standard than probable cause, testing of correctional officers and other public safety employees, and termination of those who are found to be drug abusers, would be legally permissible.

3. Each applicant for a position may be tested only if, as to that particular position, drug abuse would likely make the applicant unable to perform the duties of the job or would likely present a danger to the public or to property. Likewise, the State may refuse to hire, for such a position, an applicant who is shown by testing to be a drug abuser.³

4. Testing of all applicants for positions as correctional officers, and like public safety jobs, and refusing to hire those who test positive for drug abuse would be legally permissible.

5. Any testing program must include reasonable steps to confirm that a positive result is accurate and to assure that specimens are not tampered with or switched. Test results must be secured

³You asked whether the test results for an applicant should be obtained prior to the inclusion of the applicant on an eligible list as a certified candidate for employment. If passing the drug test were properly established as an employment qualification, the timing of the test is discretionary. Whether test results for an applicant should be obtained prior to the inclusion of the applicant on a list of eligibles or prior to the successful applicant's starting work is a question of personnel administration.

against unauthorized disclosure. In addition, the termination of a classified employee for drug abuse must be preceded by notice and an opportunity for a hearing.⁴

I

Introduction

Your questions reflect a burgeoning interest in workplace testing as a means of combatting drug abuse. The social costs of drug abuse and the difficulty of blocking channels of drug supply have led to proposals for workplace testing as a way of inhibiting the demand for drugs. So, for example, the President has ordered a widespread program of drug testing in federal agencies.⁵

The prospect of losing one's job, or of not getting a job in the first place, as a result of drug abuse might well be a formidable deterrent. Yet law and sound policy alike insist that this goal be pursued without sacrificing basic values.

The fundamental legal question is whether drug testing in the workplace is compatible with the protection of personal privacy embodied in the Fourth Amendment's prohibition of "unreasonable searches and seizures."⁶ Given the public and political reaction to

⁴If a mandatory drug test is permissible under the Fourth Amendment, an employee's refusal to submit to the test may also be made grounds for discipline.

⁵Employees "in sensitive positions" are subject to mandatory testing under criteria set by each agency head; all other employees may be tested "[w]hen there is a reasonable suspicion that any employee uses illegal drugs." Exec. Order No. 12,564, Sec. 3, 51 Fed. Reg. 32,889 (1986).

⁶"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV. The Fourth Amendment applies to the states through its incorporation in the Due Process Clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

Four years ago, we examined the constitutional and statutory issues raised by a proposal to bar known drug abusers from State service. 67 *Opinions of the Attorney General* 322 (1982). However, the focus of that opinion was on what the State may, and may not, do after it learns that an applicant is a drug abuser; that opinion did not analyze the Fourth Amendment limits on the State's acquiring the information in the first place. Nor did it discuss the far more problematic issue of testing employees, as distinct from applicants.

highly publicized drug abuse tragedies, drug testing programs are being instituted widely. And, not surprisingly, they are often challenged in court by the affected employees. The case law is still developing and is unsettled. At this point, there are few definitive legal answers, and we cannot predict with confidence what the courts, especially the Supreme Court, will do.

This opinion, therefore, proceeds with caution. While we recognize the importance of government's attempts to curb drug abuse, we are concerned that indiscriminate drug testing threatens traditional Fourth Amendment values. More perhaps than any other provision of the Bill of Rights, the Fourth Amendment expresses an essential quality of democracy—the defense of personal dignity against violation by the state. We ought not experiment with these rights. They are fragile. Once damaged they are not easily repaired. Once lost they are not easily recovered.

Adherence to tested Fourth Amendment principles is particularly important when, as now, there is widespread clamor for a simple solution to a serious social problem. The saddest episodes in American constitutional history have been those occasions, like the internment of Americans of Japanese descent during World War II, when we have bent our principles to the zealotry of the moment. What is expedient is not necessarily fair, or constitutional. A war on drugs is a good idea, but not if its first casualty is the Bill of Rights.

Those who advocate indiscriminate drug testing of State employees and applicants for employment seek a drug-free workplace as a harbinger of a drug-free society. These are laudable and desirable ends. But we must pay careful attention to the means by which we achieve those ends. The Constitution teaches us that how we proceed is as important as where we go. The old rubric “the end doesn't justify the means” is what the Bill of Rights, particularly the Fourth Amendment, is all about.

II

Statutory Authority of Secretary of Personnel

In our view, the Secretary of Personnel has statutory authority to establish, by regulation, a drug testing program for applicants and current employees alike, assuming that the Secretary finds a link between drug abuse and the requirements of particular job cat-

egories. We so concluded, as to applicants, in a prior opinion. 67 *Opinions of the Attorney General* 322, 324 (1982). We likewise conclude that the Secretary's broad authority to both "prescribe what may constitute cause for removal" [Article 64A, §33] and "to make such rules as he deems necessary or proper" in the carrying out of the Merit System law [Article 64A, §11] empowers the Secretary to adopt a drug screening program applicable to current employees.

However, the Secretary's exercise of this authority must be grounded in a finding about the link between drug abuse and job performance. Article 64A, §§16 and 18(a). See 67 *Opinions of the Attorney General* at 323-24. The Secretary does *not* have statutory authority to undertake a drug testing program in pursuit of broader social goals, however desirable, like deterring drug abuse.

Moreover, the Secretary's authority must of course be exercised in conformity with constitutional requirements and federal statutory limitations. We address these vital constraints below.

III

Fourth Amendment Requirements

A. *Applicability of Fourth Amendment to Urinalysis*

A preliminary question is whether the collection and testing of a urine specimen is a "search" or "seizure," within the meaning of the Fourth Amendment.⁷ In our view, it is no less subject to the Fourth Amendment than the taking of a blood or breath sample, both of which have been held to be within the amendment's "searches and seizures" language. *Schmerber v. California*, 384 U.S. 757, 767 (1966) (blood); *State v. Berker*, 391 A.2d 107, 111 (R.I. 1978) (breath). To be sure, the cases are somewhat at odds over whether the collection and subsequent testing of a urine specimen is a "search," a "seizure," or both.⁸ But while the precise categori-

⁷"A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interest in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

⁸*Compare, e.g., McDonell v. Hunter*, 612 F.Supp. 1122, 1127 (S.D. Iowa), *aff'd* 746 F.2d 785 (8th Cir. 1985) ("[G]overnmental taking of a urine specimen is a seizure within the meaning of the Fourth Amendment.") with *Capua v. City of Plainfield*, slip op. at 7-8, Civil Action No. 86-2992 (D.N.J. Sep. 18, 1986) ("[U]rine testing consti-

zation might vary, perhaps depending upon the details of the testing program, the cases uniformly hold that the Fourth Amendment does apply to the kind of testing about which you inquire.⁹

B. Drug Testing of Employees

Although the taking of urine specimens for drug testing purposes is a search or seizure under the Fourth Amendment, it is not a per se violation of that amendment. Only “unreasonable searches and seizures” are prohibited. *Carroll v. United States*, 267 U.S. 132, 147 (1925). Hence, an inquiry into reasonableness is essential:

“The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails.” *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

See also *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967). The greater or more demeaning the intrusion, the more substantial must be the reason for conducting the search. *United States v. Afanador*, 567 F.2d 1325, 1328 (5th Cir. 1978).

The right “to be free from unreasonable governmental intrusion” applies “wherever an individual may harbor a reasonable ‘expectation of privacy.’” *Terry v. Ohio*, 392 U.S. 1, 9 (1968). But the “specific content and incidents of this right must be shaped by the

tutes a search and seizure.”). See also *Pella v. Adams*, 638 F.Supp. 94, 96 (D. Nev. 1986); *Allen v. City of Marietta*, 601 F.Supp. 482, 489 (N.D. Ga. 1985). Cf. *People v. Williams*, 557 P.2d 399, 405 (Colo. 1976) (“It is settled that extraction or compelled production of bodily fluids is a ‘search’ within the meaning of the Fourth Amendment.”).

⁹In *United States v. Jacobsen*, the Supreme Court held that a field test of a substance, limited to whether or not the substance was cocaine, was not a “search” subject to the Fourth Amendment. “[G]overnmental conduct that can reveal whether a substance is cocaine, and no other arguably ‘private’ fact, compromises no legitimate privacy interest.” 466 U.S. at 123. But, in our view and that of the post-Jacobsen decisions cited above, governmental taking of a urine specimen to find out about a person’s past behavior, when the subsequent testing can reveal a range of private facts, is much different from, and is not controlled by, this holding in *Jacobsen*.

We note that the Supreme Court recently granted review in a case that raises questions about the applicability of the Fourth Amendment to waste of a different sort—trash placed in a communal trash bin. *People v. Rooney*, 175 Cal. App.3d 634 (1985), cert. granted 55 U.S.L.W. 3257 (U.S. Oct. 14, 1986).

context in which it is asserted." *Id.* Accordingly, we first examine the extent to which the intrusion of drug testing, in the context of State employment, compromises "reasonable" or "legitimate" expectations of privacy, because only "legitimate expectations of privacy and personal security" are reckoned on the individual's side of the Fourth Amendment balancing test. *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985). An expectation of privacy is "legitimate," in Fourth Amendment terms, if the person has "an actual (subjective) expectation of privacy and ... the expectation [is] one that society is prepared to recognize as 'reasonable.'" *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). *See, e.g., Hudson v. Palmer*, 468 U.S. 517, 525 (1984) (approving Harlan test).

In our view, State employees as a group have an actual, subjective expectation that their bodily functions will not be subject to government intrusion. Nothing about State employment gives employees reason to suppose that their urination is subject to supervisory inspection and probing. It states the obvious to say that State employees, like everybody else, expect to dispose of their wastes in private.

Nor is this expectation of privacy in any sense unreasonable—rather, it is no more than what "ordinary citizens generally enjoy as free persons in the community." *Security & Law Enforcement Employees, District Council 82 v. Carey*, 737 F.2d 187, 202 (2d Cir. 1984). "The integrity of an individual's person is a cherished value of our society." *Schmerber v. California*, 384 U.S. at 772. Thus, for example, in *Jones v. McKenzie*, 628 F.Supp. 1500 (D.D.C. 1986), the public employer had ordered all employees in the unit that provided school bus service to submit to a drug test. The plaintiff who brought the Fourth Amendment challenge to this *en masse* testing was an attendant, not a driver or a mechanic. In holding that her Fourth Amendment rights had been violated, the court observed that, whatever lessened expectations about privacy drivers and mechanics might reasonably be thought to have, "it does not follow that a school bus attendant like plaintiff should have expected to be exposed to such testing." 628 F.Supp. at 1509 (emphasis omitted).

Nor does the mere fact of State employment negate this legitimate expectation of privacy. A citizen who becomes a State employee does not—and may not be compelled to—give up his or her constitutional rights as the price of gaining that employment. *Keyishian v. Board of Regents*, 385 U.S. 589, 606 (1967). "[T]he government may not condition government employment upon com-

pliance with unconstitutional conditions." *Shuman v. City of Philadelphia*, 470 F.Supp. 449, 457 (E.D. Pa. 1979).

It has been suggested that employees' expectations of privacy at work can be rendered "unreasonable" through the simple expedient of the State's telling employees that they will henceforth be subject to searches. But such an argument surely proves too much: "The government could not avoid the restrictions of the Fourth Amendment by notifying the public that all telephone lines would be tapped, or that all homes would be searched." *United States v. Davis*, 482 F.2d 893, 905 (9th Cir. 1973). In the words of one commentator, the Fourth Amendment "guarantees some identifiable measure of privacy to us all and does not lose its potency with the ebb and flow of community opinion." Yackle, *The Burger Court and the Fourth Amendment*, 26 U. Kan. L. Rev. 335, 362 (1978).

However, some categories of State employees can reasonably be expected to have somewhat diminished expectations of privacy, given the nature of their work. "[N]ot all individuals enjoy the same expectation of privacy and, therefore, not the same degree of Fourth Amendment protection." *Turner v. Fraternal Order of Police*, 500 A.2d 1005, 1007-1008 (D.C. 1985). Someone who becomes a police officer must know what that job entails: the extraordinary authority to use deadly force if necessary and the special obligation of those who enforce the law to obey it themselves. Hence, "police officers may in certain circumstances enjoy less constitutional protection than the ordinary citizen." *Turner v. Fraternal Order of Police*, 500 A.2d at 1008. For correctional officers, as well, reasonable expectations of privacy are diminished by the very nature of their working environment—primarily, the danger to institutional security posed by trafficking in drugs and drug abuse. See *Security & Law Enforcement Employees v. Carey*, 737 F.2d at 202; *McDonell v. Hunter*, 612 F.Supp. 1122, 1128 (S.D. Iowa), aff'd 746 F.2d 785 (8th Cir. 1985). See also *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, 1267 (7th Cir. 1976); *Jones v. McKenzie*, 628 F.Supp. at 1508.

These expectations of privacy, whether of employees generally or of public safety employees, are infringed significantly by drug testing. First, the direct supervision needed to assure that a specimen is really that of the person from whom it supposedly comes is an embarrassing governmental intrusion into the privacy that ordinarily attends the discharge of bodily wastes. Cf. *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983) (discussing humiliation entailed by strip search). Whether the testing procedures entail direct observation of the employee while urinating

or a search of the employee before he or she provides the specimen, "[i]t is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment." *Terry v. Ohio*, 392 U.S. 1, 17 (1968). *Cf. United States v. Jacobsen*, 466 U.S. 109 (1984) (*de minimis* infringement of privacy is constitutionally reasonable).¹⁰

Second, and quite apart from governmental supervision of the act of excretion, "[o]ne does not reasonably expect to discharge urine under circumstances making it available to others to collect and analyze in order to discover the personal physiological secrets it holds, except as part of a medical examination.... One clearly has a reasonable and legitimate expectation of privacy in such personal information contained in his bodily fluids." *McDonell*, 612 F.Supp. at 1127.

In light of these very significant personal privacy interests (albeit reduced for public safety employees), we next examine the other side of the balance—the governmental interests that could be said to make the serious intrusion necessary. With respect to most State employees, the governmental employer's interest that could be asserted to justify the testing is genuine, but very diffuse: to promote efficiency by detecting those whose drug abuse poses a risk of diminished job performance. However, wholesale testing of employees is at best a clumsy device for achieving the goal. Poor performance resulting from current drug abuse is an observable fact and can be dealt with through the customary personnel methods of counseling or, if necessary, discipline. Learning, through urinalysis, that an employee used illegal drugs at some time in the past,

¹⁰Of course, a testing program that does not involve supervision of the act of urination is possible. But a program without that degree of intrusion lacks an important safeguard from the government's point of view. The absence of supervision means that an employee who does abuse drugs is able to substitute someone else's "clean" urine. To safeguard against this possibility, the new federal testing program calls for supervision of an employee's urination if "the agency has reason to believe that a particular employee may alter or substitute the specimen to be provided." Exec. Order No. 12,564, Sec. 4(d).

In terms of the balancing of private and governmental interests required under the Fourth Amendment, a program that allows actual abusers to escape detection obviously undercuts the governmental interest. For Fourth Amendment purposes, a less intrusive but less effective program is as problematic as a more intrusive but more effective one. "If a blanket search program has little or no effectiveness, it is in substance merely a kind of harassment, a show of power, or a 'fishing expedition,' and therefore per se unreasonable under the fourth amendment." Note, *Drag-net Drug Testing in Public Schools and the Fourth Amendment*, 86 Col. L. Rev. 852, 870 (1986) ("*Dragnet Drug Testing*").

and presumably off-duty, is a poor surrogate for direct observation of impaired condition during working hours.¹¹

State employees are no different than anybody else. They have private lives outside the workplace, and some of them no doubt engage in activities that are foolish, self-destructive—and, sometimes, illegal. When these activities result in poor job performance, the State can and should respond to that performance. But the State, as employer, simply has no business trying to ferret out private misconduct that does not affect job performance. An effort to do so through *en masse* drug testing is constitutionally unacceptable.

At the same time, public safety employees are also affected by much more concrete and substantial governmental interests, for the same reasons that their jobs entail a reduced expectation of privacy. As one court wrote of police officers:

“Without a doubt, drug abuse can have an adverse effect upon a police officer’s ability to execute his duties. Given the nature of the work and the fact that not only his life, but the lives of the public rest upon his alertness, the necessity of rational action and a clear head unbefuddled by narcotics becomes self-evident. Thus, the use of controlled substances by police officers creates a situation fraught with serious consequences to the public.” *Turner v. Fraternal Order of Police*, 500 A.2d at 1008.

Given the endemic problem of drug abuse among inmates, the governmental interest in assuring that its correctional officers are not themselves a potential source of drugs is likewise imperative.

These interests are less likely to be adequately served by the employer’s simply observing the behavioral manifestations of drug abuse and then acting on those observations. Poor performance by a police or correctional officer might well have disastrous, irrepara-

¹¹Urinalysis, it should be remembered, does *not* disclose whether an employee is under the influence of drugs while at work. The test, if accurate, instead reveals the chemical residue of drug use during the days or perhaps weeks preceding the test, even if the person tested has discontinued the use of drugs. *Dragnet Drug Testing* at 854 n. 10.

Therefore, testing is at best an indirect way of responding to poor job performance caused by drug abuse. At the same time, we recognize that drug testing may well have predictive value. An employer can reasonably expect that, as a group, employees who have recently abused drugs will have more performance problems than employees who have not abused drugs.

ble consequences. The State has a significant interest in doing everything it constitutionally can to avert this risk in the first place.

In balancing the employees' and the State's respective interests, we reach different conclusions about the two different categories of employees in question—State employees generally, on the one hand, and public safety employees, on the other.¹²

In our opinion, mandatory urine testing of State employees, without regard to the nature of their jobs and without particularized probable cause, would violate the Fourth Amendment. The governmental interest as an employer in detecting a few drug abusers among its employees, whose use of drugs might or might not affect their job performance, is simply too weak to justify the indiscriminate invasion of all employees' privacy:

"We do not permit a search of every house on a block merely because there is reason to believe that *one* contains evidence of criminal activity.... Nor can the success of massive testing justify its use. We would not condone the beatings of suspects and the admissibility of their confessions merely because a larger number of convictions resulted." *Capua v. City of Plainfield*, slip op. at 2-3, Civil Action No. 86-2992 (D.N.J. Sep. 18, 1986) (emphasis in original).

The logic of wholesale drug testing—that the government's interest in detecting the few drug abusers in its work force is inherently superior to the privacy interest of all employees and is, perforce, "reasonable"—shrinks the shield of the Fourth Amendment to insignificance. We reject this false logic, as have the courts. "The invidious effect of such mass, round-up urinalysis is that it casually sweeps up the innocent with the guilty and willingly sacrifices each individual's Fourth Amendment rights in the name of some larger public interest." *Capua v. City of Plainfield*, slip op. at 17. As another court observed, if government's desire to identify drug abusers justified wholesale drug testing of employees, "[s]o might

¹²Because the Fourth Amendment balancing test turns on the particular circumstances, we do not view our conclusions as necessarily applicable in other employment settings. And we do not address the constitutionality of drug testing outside the employment context.

Nor can we, in the abstract, attempt to delineate all types of "public safety" jobs. Again, the necessary line-drawing can be done only after consideration of the particular circumstances. For present purposes, "public safety employees" include law enforcement and correctional officers.

searches of employees' homes and taps on their telephones." *McDonell v. Hunter*, 612 F.Supp. at 1130.¹³ In our view, drug testing of State employees generally must be predicated on particularized probable cause if it is to comply with the Fourth Amendment. Mandatory testing based on any standard less than this well-established constitutional norm is not permissible.¹⁴

With respect to public safety employees, however, it is our opinion that a somewhat relaxed basis for drug testing meets the Fourth Amendment's "reasonableness" standard. As discussed above, public safety employees have a reduced expectation of privacy, given the nature of the job; conversely, the government has

¹³ "No doubt most employers consider it undesirable for employees to use drugs, and would like to be able to identify any who use drugs. Taking and testing body fluid specimens, as well as conducting searches and seizures of other kinds, would help the employer discover drug use and other useful information about employees. There is no doubt about it—searches and seizures can yield a wealth of information useful to the searcher. (That is why King George III's men so frequently searched the colonists.) That potential, however, does not make a governmental employer's search of an employee a constitutionally reasonable one." *McDonell v. Hunter*, 612 F.Supp. at 1130.

See also *Jones v. McKenzie*, 628 F.Supp. at 1509 (urine testing of school transportation employees not responsible for driving or maintenance violates Fourth Amendment).

¹⁴We are not at all suggesting that the State must ignore drug abuse by employees. Observed deficiencies in performance may, of course, be dealt with appropriately. See text accompanying note 11 above. Perhaps, for some jobs, employees might be required to demonstrate the requisite job skills at the start of the work day. If, for example, a State agency has a generalized concern that drug abuse by some of its employees is impairing the motor skills essential to the job, it is entirely free to simply require a quick test of employees' coordination or dexterity. The existence of "alternative mechanisms" to achieve the governmental interest means that a more intrusive route to the same ends is not reasonable under the Fourth Amendment. See *Delaware v. Prouse*, 440 U.S. 648, 659 (1979).

What the Fourth Amendment prohibits, in our view, is "a form of surveillance, albeit a technological one," of employees' off-duty activities without the probable cause ordinarily required by the amendment:

"We would be appalled at the spectre of the police spying on employees during their free time and then reporting their activities to their employers. ... [Drug testing] reports on a person's off-duty activities just as surely as [if] someone had been present and watching. It is George Orwell's 'Big Brother' Society come to life." *Capua v. City of Plainfield*, slip op. at 2.

See also *Shuman v. City of Philadelphia*, 470 F.Supp. 449 (E.D. Pa. 1979).

a heightened interest, given the potential consequences of drug-induced mistakes or corruption.

But even where public safety employees are concerned, most courts have required more than a bare showing of the government's obvious interest in detecting drug use among employees in these kinds of jobs. As one court wrote of prison guards, "[P]rison employees do not lose all of their Fourth Amendment rights at the prison gates." *McDonell v. Hunter*, 612 F.Supp. at 1128 (emphasis in original). We do not accept the notion that prison guards have as little Fourth Amendment protection as prison inmates;¹⁵ or that police officers, though they work in an organization characterized by a military-like command structure, have as little protection as soldiers in a barracks.¹⁶

We view the correct application of the balancing test to yield a "reasonable suspicion" prerequisite to drug testing of public safety employees. That is, testing is permissible if there is a "reasonable, objective basis to suspect that a urinalysis will produce evidence of an illegal drug use." *Turner v. Fraternal Order of Police*, 500 A.2d at 1009. See also *City of Palm Bay v. Bauman*, 475 So.2d 1322, 1325-26 (Fla. App. 1985) (police officers and firefighters may be tested for drugs only if "reasonable suspicion" standard is met). Likewise, *McDonell v. Hunter*, while enjoining a testing program that subjected every correctional officer to the possibility of testing, approved testing "only on the basis of a reasonable suspicion, based on specific objective facts and reasonable inferences drawn from those facts in light of experience," that a given employee is abusing drugs. 612 F.Supp. at 1130. In *Capua v. City of Plainfield*, an order that all fire fighters submit to a surprise urinalysis test was held to violate the Fourth Amendment; but, the court also held, testing of these employees under "the individualized reasonable suspicion standard" would meet Fourth Amendment standards. Slip op. at 20. Cf. *Security & Law Enf. Employees v. Carey*, 737 F.2d at 204 ("a reasonable suspicion standard should govern strip searches of correction officers working in cor-

¹⁵*Armstrong v. New York State Comm'r of Correction*, 545 F.Supp. 728, 730 (N.D.N.Y. 1982) ("reject[ing] the proposition ... that prison employees must suffer a diminution in fourth amendment protections equal in extent to that of prison inmates").

¹⁶*Turner v. Fraternal Order of Police*, 500 A.2d at 1008 (refusing to equate privacy expectations of police and members of military). See also *United States v. McIntyre*, 582 F.2d 1221, 1224 (9th Cir. 1978) ("A police officer is not, by virtue of his profession, deprived of the protection of the Constitution."). Cf. *Committee for GI Rights v. Callaway*, 518 F.2d 466, 477 (D.C. Cir. 1975).

rectional facilities").¹⁷ See also *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d at 1267 and *Jones v. McKenzie*, 628 F.Supp. at 1508 (testing of transportation employees).¹⁸

It is impossible to fully define either "probable cause" or "reasonable suspicion" in the abstract. As a comparative matter, "reasonable suspicion" is less stringent than "probable cause," although even "reasonable suspicion" must be founded upon objective facts and rational inferences derived from practical experience, rather than "[i]nchoate, unspecified suspicions," and must be directed toward the particular employees to be tested. *Security & Law Enf. Employees v. Carey*, 737 F.2d at 205.¹⁹ The following examples, drawn from *Carey*, illustrate the difference between the two standards:

¹⁷See also *Armstrong v. New York State Comm'r of Correction*, 545 F. Supp. at 731 (strip search of corrections officer must be justified by need "to maintain institutional security" or "articulable facts as to why [officer] might have had contraband concealed in his person").

¹⁸In addition, a "reasonable suspicion" basis underlies new drug and alcohol testing rules recently announced by the Federal Railroad Administration. See *Railway Labor Executives' Ass'n v. Dole*, 121 L.R.R.M. (BNA) 2442 (9th Cir.), vacated 474 U.S. 1099 (1986).

One recent case, *Allen v. City of Marietta*, 601 F.Supp. 482 (N.D. Ga. 1985), apparently reflects a more permissive standard than that approved by most other courts. In *Allen*, the court rejected a Fourth Amendment challenge to urinalysis testing of employees who worked around high voltage electric lines. These employees were required to submit to testing on pain of firing, after an under-cover agent observed them smoking marijuana. Notwithstanding these compelling particular circumstances, which presumably would have satisfied the normal "probable cause" standard, the court articulated a broad test for permissible government searches of this kind:

"The only facts before the court establish as a matter of law that the tests were administered in a purely employment context [as distinct from law enforcement] as part of the government's legitimate inquiry into the use of drugs by employees engaged in extremely hazardous work. The [employer] has a right to make warrantless searches of its employees for the purpose of determining whether they are using or abusing drugs which would affect their ability to perform safely their work with hazardous materials." 601 F.Supp. at 491.

Cf. Shoemaker v. Handel, 795 F.2d 1136 (3rd Cir. 1986) (Fourth Amendment permits urine testing of jockeys without particularized suspicion, given intense regulation of horse racing).

¹⁹The Superintendent of the Maryland State Police has established a drug testing program under which "all police employees will be subject to drug testing" on a random basis. General Order No. 01-86115, at 1 (July 1, 1986). This program should be reexamined in light of this opinion. See also note 26 below.

1. Prior to the search, a prison superintendent received information from two sources, one of whom was known to be reliable, that a particular guard (Roe) was bringing contraband into the prison. In addition, another guard observed Roe discarding what appeared to be a marijuana cigarette. These facts amounted to probable cause to search Roe.

2. Prior to the search, contraband had been turning up inside the prison. "General rumors" attributed this contraband to two guards. The superintendent received the same information from an inmate who had previously been an informant. These facts amount to reasonable suspicion to search the two guards.

3. Prior to the search, an inmate who had no history of providing reliable information told the authorities that a guard was bringing drugs into the prison and selling them to inmates. There were no corroborating circumstances. These facts failed to satisfy the reasonable suspicion standard.

If the "reasonable suspicion" standard is satisfied, mandatory testing of a public safety employee would comport with the Fourth Amendment.²⁰

C. Consent

The elaborate Fourth Amendment balancing test discussed above would be academic if the State could simply extract "con-

²⁰We have also considered whether mandatory testing of a public safety employee under these circumstances would violate the employee's constitutionally distinct right of privacy, grounded in the "concept of personal liberty" under the Fourteenth Amendment. *Whalen v. Roe*, 429 U.S. 589, 598 n. 23 (1977). This right of privacy protects, among other things, "the individual interest in avoiding disclosure of personal matters." 429 U.S. at 599.

However, much the same balancing process as is called for by the Fourth Amendment applies in this context as well. See *Whalen v. Roe*, 429 U.S. at 599-602 (compilation and limited intra-governmental disclosure of certain medical information not an impermissible invasion of privacy); *Plante v. Gonzalez*, 575 F.2d 1119, 1134 (5th Cir. 1978) (privacy interest not absolute and must be balanced against governmental need for information). For the reasons discussed in text, we conclude that mandatory urine testing of public safety employees, under a "reasonable suspicion" standard, would not violate the constitutional right to privacy.

In this regard, the results of drug testing, constituting medical data about an individual, are protected against unauthorized disclosure. §10-617(b) of the State Government Article ("SG" Article). The court in *Shoemaker v. Handel* emphasized comparable confidentiality protection in rejecting the claim that drug testing of jockeys violated the jockeys' right to privacy. 795 F.2d at 1144.

sent” for drug testing from its employees. Voluntary consent to a search, without more, satisfies the Fourth Amendment. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). And, indeed, the Department of Justice’s position is that a public employee who is told that drug testing is a condition of employment and who does not quit has consented to the testing.²¹ We totally reject this skewed notion of consent, which drains the concept of all genuine meaning.

A valid consent to a search must “in fact [be] voluntarily given, and not [be] the result of duress or coercion, express or implied.” *Schneckloth*, at 248-49. It flies in the face of economic reality to suppose that an employee “voluntarily” consents to a drug test when the alternative is losing his or her job, or for that matter that an applicant voluntarily consents when the alternative is denial of the job. Agreement to a search, motivated by fear that refusal will lead to loss of one’s livelihood, is not voluntary consent. *Serpas v. Schmidt*, 621 F.Supp. 734, 743 (N.D. Ill. 1985).

Nor can voluntary consent fairly be inferred from a person’s decision to accept a job with knowledge that drug testing is a condition of that job. In both *McDonell v. Hunter* and *Security & Law Enf. Employees v. Carey*, the prison employees were told, at the outset of their employment, that they would be subject to certain searches. In *McDonell*, the employees signed a consent form expressing their agreement, among other things, “to submit to a urinalysis or blood test when requested by the [prison administrator].” 612 F.Supp. at 1134. In *Carey*, they were given a rule book including a policy that “‘any employee while on duty shall be subject to search.’” 737 F.2d at 193. Nevertheless, neither circumstance was viewed as giving rise to voluntary consent. *McDonell*, 612 F.Supp. at 1131; *Carey*, 737 F.2d at 202 n. 23. Both courts evidently took account of the inherent coercion of such “consent.”

We acknowledge that the cases in this area are not always consistent with one another or altogether clear as to their doctrinal underpinnings. In *United States v. Sihler*, 562 F.2d 349 (5th Cir. 1977), a prison employee came to work daily past a large sign stating that “all persons entering upon these confines are subject to routine searches of their person, property or packages.” The court

²¹Memorandum of Points and Authorities of Amicus Curiae United States in Support of Defendants’ Motion to Dismiss at 24, *Guiney v. Roache*, Civil Action No. 86-1346-K (D. Mass. filed Sep. 18, 1986) (Police officers are allowed “the option to terminate or avoid any employment relationship with the Department and ... avoid the test. Thus, any officer who decides to take the test and remain employed necessarily will be making that decision ‘voluntarily.’”).

held that Sihler, having "voluntarily accepted and continued an employment which subjected him to search on a routine basis," had consented to the search that led to his conviction for possessing marijuana. 562 F.2d at 351.

Nevertheless, we think the better reasoned cases recognize that the exercise of choice is not the same thing as voluntary consent. That one has warning of a search and a choice of whether to submit to it or not is surely one factor in assessing the overall reasonableness of the search. *Cf. Little v. State*, 300 Md. 485, 506 (1984). But if the choice to decline the search carries with it significant adverse consequences, then the alternative—submitting to the search—does not reflect voluntary consent. *See, e.g., Blackburn v. Snow*, 771 F.2d 556, 567 (1st Cir. 1985) (agreeing to unreasonable search in order to visit brother in jail not voluntary consent); *Gaioni v. Folmar*, 460 F.Supp. 10, 14 (N.D. Ala. 1978) (entering arena past sign notifying entrants of search not voluntarily consent); 63 *Opinions of the Attorney General* 595, 601-02 (1978) (entering Port Administration property past sign notifying entrants of search not voluntary consent).²²

The point has been well summarized by a leading scholar in the field:

“‘Consent’ in any meaningful sense cannot be said to exist merely because a person (a) knows that an official intrusion into his privacy is contemplated if he does a cer-

²²We do not believe that cases involving breath-analysis testing under “implied consent” laws are pertinent to the question of consent to workplace drug testing. In Maryland, as in many other states, a person who drives “is deemed to have consented ... to take a chemical test to determine the alcohol content of his blood if he should be detained on suspicion of driving ... in violation of an alcohol restriction.” §16-205.1(a) of the Transportation Article (“TR” Article). The driver is not actually compelled to take the test. TR §16-205.1(b); §10-309(a) of the Courts Article. But if the driver refuses a request to do so, the consequence is a suspension of the driver’s license. TR §16-205.1(f)(4). Such laws are constitutional, not because the driver’s “implied consent” is truly voluntary, but because the search itself is constitutionally reasonable.

“[T]he State could legitimately compel the suspect, against his will, to accede to the test. Given, then, that the offer of taking a blood-alcohol test is clearly legitimate, the action becomes no *less* legitimate when the State offers a second option of refusing the test, with the attendant penalties for making that choice.” *South Dakota v. Neville*, 459 U.S. 553, 563 (1983) (emphasis in original).

In *Ringe v. Romaro*, 624 F.Supp. 417, 425 (W.D. La. 1984), the court rejected the argument that consent to a search of bar patrons was derived from a statute providing that those who enter a bar “shall be deemed to have consented” to a search.

tain thing, and then (b) proceeds to do that thing. Were it otherwise, the police could utilize the implied consent theory to subject everyone on the streets after 11 p.m. to a search merely by making public announcements in the press, radio and television that such searches would be undertaken." 2 LaFave, *Search and Seizure* §8.2, at 677 (1978).

The Fourth Amendment is a bulwark of personal liberty. The State cannot insist that its citizens choose between the opportunity to work for the State and their constitutional rights.²³

D. *Drug Testing of Applicants*

The Fourth Amendment balancing test yields a somewhat different result on the question of whether applicants for State employment may be subject to mandatory drug testing as part of the evaluation process itself.

Applicants presumably have, and are entitled to have, relatively little overall expectation of privacy about the hiring process. The very point of the application process is for the prospective employer to learn facts pertinent to the applicant's ability to perform the job. An application may be rejected if "the applicant is physically, mentally, or morally unfit for the performance of the duties of the position to which he seeks employment." COMAR 06.01.01.17A(3).²⁴

²³It is no answer to suggest that those who seek government jobs should simply look for work elsewhere:

"[I]f the government were to announce that hereafter all telephones would be tapped, perhaps to counter an outbreak of political kidnappings, it would not justify, even after public knowledge of the wiretapping plan, the proposition that anyone using a telephone consented to being tapped. It would not matter that other means of communication exist—carrier pigeons, two cans and a length of string; it is often a necessity of modern living to use a telephone. So also is it often a necessity to fly on a commercial airliner, and to force one to choose between that necessity and the exercise of a constitutional right is coercion in the constitutional sense." *United States v. Albarado*, 495 F.2d 799, 807, n. 14 (2d Cir. 1974) (rejecting the argument that airline passengers consent to magnetometer searches, while upholding the reasonableness of such searches).

²⁴COMAR 06.01.01.17A(4) provides that an application may be rejected if the applicant "is addicted to the habitual or excessive use of drugs, narcotics, or intoxicating beverages." However, this provision must be administered consistently with the Re-

At the same time, applicants have—and are entitled to have—an expectation that their private affairs and bodily integrity will not be probed for reasons extraneous to the needs of the job for which they have applied. The Secretary's interest in requiring a drug test turns on the link between drug abuse and job requirements. See Part II above (scope of Secretary's authority). *Cf.* Article 100, §95A(a) (employer may not ask medical questions lacking "a direct, material, and timely relationship to the applicant's fitness or capacity to properly perform the activities or responsibilities of the desired position"). Moreover, even drug abusers have a legitimate expectation, grounded in the federal Rehabilitation Act of 1973, as well as common sense, that their drug abuse will be irrelevant to at least some State jobs. See Part VI below.

Because the governmental interest is in ascertaining an applicant's fitness for a given job, wholesale drug testing of all applicants, without regard to job requirements, would violate the Fourth Amendment. However, if drug testing is in furtherance of a bona fide effort to learn whether an applicant is capable of performing the duties of a particular job, we see no Fourth Amendment barrier to the testing. *McDonell v. Hunter*, 612 F.Supp. at 1130 n.6 ("The Fourth Amendment ... does not preclude taking a body fluid specimen as part of a pre-employment physical examination."). In other words, if drug abuse would prevent the performance of the duties of the job or would present a danger to the public or to property—the standard under which the Rehabilitation Act permits denial of a job to a drug abuser—an applicant may be tested to ascertain that abuse.²⁵

This approach permits routine testing of all applicants for public safety jobs. Just as State employees who hold jobs directly related to public safety are entitled to lesser expectations of privacy than other employees, so applicants for public safety jobs should expect a more probing evaluation than other applicants. And, of course,

habilitation Act's requirement that drug abuse or alcoholism alone, without evident impairment of the applicant's ability to meet job requirements, is not a proper basis for a refusal to hire. See Part VI below.

²⁵If the physical requirements of a job are so demanding that employees are required to take either an entry physical examination or periodic physicals of which urinalysis is a routine diagnostic component, there is no Fourth Amendment barrier to testing the urine specimen for drugs. *McDonell v. Hunter*, 612 F.Supp. at 1130 n. 6. Physical examinations of this kind are patently not a mere pretext to conduct otherwise improper drug testing. The standard is whether "a job requires unusual physical effort, like performing arduous or hazardous tasks." Department of Personnel Pre-Employment Physical Examination Procedures 2 (Feb. 24, 1984).

the State's interest in avoiding the employment of drug abusers in public safety jobs is correspondingly greater. Because of the obvious link between avoidance of drug abuse and job requirements, we conclude that—as to jobs directly related to public safety—the Fourth Amendment balancing test permits the State to require drug testing of all applicants.²⁶ But, we reiterate, this conclusion does not apply across-the-board to other categories of jobs. Moreover, an applicant's agreement to submit to drug testing may not be boot-strapped into his or her blanket consent for testing during future employment.

IV

Equal Protection Requirements

In general, legislation is presumed to be valid and will be sustained against an equal protection challenge if the classification drawn by the statute is "rationally related to a legitimate governmental purpose." *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985).²⁷ In determining whether a classification is rationally related to a legitimate state purpose, the inquiry is as follows: "(1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose?" *Western & So. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 668 (1981).²⁸

²⁶We therefore see no Fourth Amendment problem with those elements of the State Police testing program that involve applicants or trainees. *Cf.* note 19 above.

²⁷The Equal Protection Clause prohibits any state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, §1. A drug testing program would be subject merely to "rational basis" review. A challenged classification is subject to strict scrutiny only when a fundamental right is impaired or a suspect class is disadvantaged. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976). Public employment is not considered a fundamental right. *Id.* Moreover, drug abusers would not constitute a suspect class, which is traditionally viewed as a classification made on the basis of race, religion, alienage, or national origin. *Racetrac Petroleum, Inc. v. Prince George's County*, 601 F.Supp. 892, 913 (D.Md. 1985). *See also City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

²⁸The same test applies to administrative regulations. *See, e.g., New York City Transit Auth. v. Beazer*, 444 U.S. 568, 587-88 (1979). Under the Merit System law, the Secretary's rules "shall have the force and effect of law." Article 64A, §11.

In our view, the testing of employees generally, and the discharge of those who are drug abusers, would not violate the Equal Protection Clause.²⁹ The “legitimate governmental purpose” is unquestionable: to maintain a competent, reliable work force. Furthermore, a legislative judgment that the barring of drug abusers, as a class, from State employment would promote that purpose cannot be said to be unreasonable.³⁰

New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979), seems to be dispositive. In that case, the Supreme Court upheld the constitutionality of a New York City Transit Authority (“Authority”) rule that barred current methadone users from all jobs in the subway system. The district court had found the rule to be unconstitutionally overbroad: “Because it is clear that substantial numbers of methadone users are capable of performing many of the jobs at [the Authority], the [district] court held that the Constitution will not tolerate a blanket exclusion of all users from all jobs.” 440 U.S. at 578.

The Supreme Court reversed, however, noting that “the special classification created by [the Authority’s] rule serves the general objectives of safety and efficiency.” The Supreme Court flatly rejected the view that the Equal Protection Clause mandated an individualized determination of the impact of drug use on job performance:

“At its simplest, the District Court’s conclusion was that [the Authority’s] rule is broader than necessary to exclude those methadone users who are not actually qualified to work for [the Authority]. We may assume not only that this conclusion is correct but also that it is probably unwise for a large employer like [the Authority] to rely on a general rule instead of individualized consideration of every job applicant. But these assumptions concern matters of personnel policy that do not implicate the principle safeguarded by the Equal Protection Clause [T]he exclusionary line challenged by [the methadone users] ‘is not one directed “against” any individual or category of persons, but rather it represents a policy choice ... made

²⁹We previously reached the same conclusion about the refusal to hire drug abusers. 67 *Opinions of the Attorney General* at 324-26.

³⁰A decision by the Secretary to adopt any such regulation must be preceded by a rulemaking process that will permit public comment and develop a record as to the link between drug use and job performance. SG §10-112.

by that branch of Government vested with the power to make such choices.'” *Id.* (quoting *Marshall v. United States*, 414 U.S. 417, 428 (1974)).

Thus, the Supreme Court concluded, “[n]o matter how unwise it may be for [the Authority] to refuse employment to individual car cleaners, track repairmen, or bus drivers simply because they are receiving methadone treatment, the Constitution does not authorize a federal court to interfere in that policy judgment.” 440 U.S. at 594.³¹

Of course, the Equal Protection Clause also permits a more selective approach—namely, adoption of a testing program for those employees whose work is most directly linked to public safety, like correctional officers. A classification thus founded on public safety concerns readily evinces its rational basis. *See Shoemaker v. Hand-del*, 608 F.Supp. 1151 (D.N.J. 1985), *aff’d*, 795 F.2d 1136 (3d Cir. 1986).³²

Whatever the scope of the testing program, the Equal Protection Clause requires that a drug user terminated from employment not be totally precluded from obtaining employment with the State at a later date, if the employee stops abusing drugs. *Compare Schanuel v. Anderson*, 708 F.2d 316, 319-20 (7th Cir. 1983) (statute prohibiting employment of felons as detectives until several years after conviction have elapsed upheld against an equal protection

³¹Although this passage speaks to the barring of job applicants, the Authority’s rule applied to current employees as well and resulted in the firing of some. *See* 440 U.S. at 576 n. 11 and accompanying text. The Supreme Court did not distinguish between current and prospective employees in its equal protection analysis.

We recognize that, in cases involving refusals to hire ex-felons, the Equal Protection Clause has been construed to require some direct correlation between the disqualifying condition and the nature of the job. E.g., *Kindem v. City of Alameda*, 502 F. Supp. 1108 (N.D. Cal. 1980); *Butts v. Nichols*, 381 F.Supp. 573 (S.D. Iowa 1974). *See* 71 *Opinions of the Attorney General* 242 (1986). *Cf. Cobb v. United States Merchant Marine Academy*, 592 F.Supp. 640, 643 (E.D.N.Y. 1984). In light of *Beazer*, however, we cannot say that a comparable correlation between current drug use and particular job requirements is mandated by the Equal Protection Clause.

Our conclusion about equal protection applies as well to the substantive aspect of due process, which is analyzed similarly. *See Beazer*, 440 U.S. at 592 n. 38. *See generally* 67 *Opinions of the Attorney General* at 328-29.

³²As discussed in Part III B above, the Fourth Amendment imposes constraints on drug testing even of public safety employees. But Fourth Amendment constraints do not affect our conclusion that the Equal Protection Clause does not prohibit a drug testing program for correctional officers.

claim, because the statute did not create a permanent bar to employment) *with Kindem v. City of Alameda*, 502 F.Supp. 1108 (N.D.Cal. 1980) (enforcement of an ordinance that permanently barred ex-felons from city employment enjoined on equal protection grounds). *See also New York City Transit Auth. v. Beazer*, 440 U.S. at 572 n.3 ("A policy excluding all former users would be harder to justify than a policy applicable only to persons currently receiving treatment.").

V

Due Process Requirements

A. *Liberty Interest*

Any testing of current State employees, and the discharge of those whose results confirm the use of illicit drugs, may not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, §1. In an employment setting, a "liberty" interest has been recognized when the dismissal "impose[s] on [the employee] a stigma or other disability that foreclose[s] his freedom to take advantage of other employment opportunities." *Board of Regents v. Roth*, 408 U.S. at 573. The Court of Special Appeals recently summarized the elements of this kind of "liberty" claim as follows:

"To invoke this liberty interest, the terminated employee must show that his former employer has published false statements about him.... He must also show that these untruths are preventing him from securing similar employment Lastly, it must appear that the false information was of such a stigmatizing nature that it virtually 'foreclosed his freedom to take advantage of other employment opportunities.' " *Leese v. Baltimore County*, 64 Md. App. 442, 460-61 (1985) (citations omitted).

In determining whether a stigmatizing dismissal has occurred, courts focus on whether the grounds for termination impute some sort of "dishonesty, immorality, pressure to drop criminal charges, intoxication and the like." *Smith v. Board of Educ.*, 708 F.2d 258, 266 n. 6 (7th Cir. 1983). The termination of an employee on charges of drug abuse might well fall into this category. *Jones v. McKenzie*, 628 F.Supp. at 1505. To be actionable, the charges must be unsupported or false; however, allegedly inaccurate results or unreliable tests would probably satisfy this element. *See Part V C 2 below.*

Moreover, although the State would certainly not "publish" its drug abuse findings in the sense of making affirmative efforts to make them known, even the prospect of disclosure to prospective future employers presents a legal risk. *Jones v. McKenzie*, 626 F.Supp. at 1505 ("unless expunged, the rationale for ... termination will remain in ... file for automatic publication to any prospective employer"). See also *Hester v. Milledgeville*, 598 F.Supp. 1456, 1473 (M.D. Ga. 1984) *aff'd in part and rev'd in part on other grounds*, 777 F.2d 1492 (11th Cir. 1986).

Accordingly, certain safeguards are necessary. First, discharge for illegal drug use should not itself serve to foreclose future employment with the State, if the terminated employee stops using drugs. Cf. *Kindem v. City of Alameda*, 502 F.Supp. at 1113 ("absolute foreclosure" of opportunity for ex-felons to work for city impairs liberty interest).³³ Second, to avoid legal risk, drug abuse findings should not be disclosed to prospective employers.³⁴

Comparable safeguards are necessary to protect the liberty interest of job applicants turned down because of drug abuse. See 67 *Opinions of the Attorney General* at 327.

B. Property

As the United States Supreme Court recently reaffirmed, "[p]roperty interests are not created by the Constitution, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

In 70 *Opinions of the Attorney General* 151 (1985), we examined whether the various categories of State employees "have a property interest in their employment." We concluded that all classified employees, including permanent part-time employees, "clearly have a property right in their employment." 70 *Opinions of the*

³³Avoiding "absolute foreclosure" does not mean that a criminal record or other evidence of past illegal drug use must be ignored. See generally 71 *Opinions of the Attorney General* 242 (1986).

³⁴The employee's personnel file, showing the reason for termination, is generally protected from disclosure, except as otherwise authorized by law. SG §10-616(h). A neutral reference (including the employee's name, dates of employment, and positions held) poses little risk, for the mere fact of nonretention "would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of 'liberty.'" *Board of Regents v. Roth*, 408 U.S. at 574 n. 13.

Attorney General at 156. However, contractual, probationary, and unclassified employees do not have sufficient property interests to invoke due process protections (although they might have certain protections flowing from contract or regulation). 70 *Opinions of the Attorney General* at 157-59.

Moreover, applicants have no property interest in a possible job. 67 *Opinions of the Attorney General* at 327.

C. Procedural Due Process Requirements

1. Notice and hearing

Because State employees within the classified service have a constitutionally protected property interest in their employment, they are entitled to certain procedural due process protections. As we recently summarized: “[D]ue process requires that, *before* termination, the employee be given oral or written notice of the charges against him, an explanation of the employer’s evidence, and an opportunity to present, in person or in writing, reasons why the proposed action should not be taken.” 70 *Opinions of the Attorney General* at 156 (emphasis in original). See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. at 546. We further concluded that the State’s current procedures for terminating classified employees satisfy these due process requirements. 70 *Opinions of the Attorney General* at 157. These procedures would be applicable to the proposed termination of a classified employee for illicit drug use.³⁵

2. Test accuracy

The elements of the basic due process balancing test are as follows:

“[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the

³⁵The termination of a probationary or unclassified employee, though not constrained by comparable due process requirements, must be undertaken in accordance with the procedures required by regulation. See 70 *Opinions of the Attorney General* at 158-59.

probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

The notice and hearing procedures available to classified employees generally satisfy due process, under this test. See Part V C 1 above. But the flexible character of due process "calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The "particular situation" here—loss of one's job because of drug use—involves a very significant private interest. Hence, the procedures surrounding drug testing must guard against an erroneous deprivation of that interest.

We cannot set out, in the abstract, what these procedures ought to be. Rather, the particular testing procedures for an agency should be embodied in detailed standards. For example, the chain of custody for each specimen must be documented. In addition, the pertinent regulations should clearly identify who has authority to order testing.³⁶

Moreover, the testing protocol must be sufficiently reliable so that there is only an insignificant risk of a "false positive"—a finding that the person has used illegal drugs when in fact he or she has not done so. To be sure, "due process is not synonymous with a requirement of scientific exactitude or error-free procedures." *Peranzo v. Coughlin*, 608 F.Supp. 1504, 1507 (S.D.N.Y. 1985) (refusing to preliminarily enjoin use of a particular drug testing device as the sole basis for disciplinary action against prison inmates).³⁷ See generally *Walters v. National Ass'n of Radiation*

³⁶"A fundamental problem with the [Department of Corrections'] policy is that it lacks any standards whatsoever for its implementation. Who can authorize or make a search or a demand for a blood or urine sample? Without any standards, it appears that any institutional officer may authorize or make a search or demand for blood or urine at his or her own unfettered discretion, and that the procedures followed will be another matter within the unfettered discretion of the officer implementing the Department's policy." *McDonell v. Hunter*, 612 F.Supp. at 1128 n. 4.

³⁷At issue in *Peranzo* was the reliability of the EMIT test, a commonly used urine testing apparatus. See *Warning of Drug Test Inaccuracies*, 122 Lab. Rel. Rep. (BNA) 179, 180 (July 14, 1986) (EMIT test "picks up chemical compounds similar to those contained in many illegal drugs and thus yields fairly frequent 'false positive' results," according to one expert). See also note 38 below.

Survivors, 473 U.S. 305, 320 (1985). But it is essential that positive initial test results be confirmed reliably. Cf. *Jones v. McKenzie*, 628 F.Supp. at 1505-07 (termination of employee on the basis of a single unconfirmed positive result was arbitrary and capricious).³⁸

VI

Federal Statutory Requirements

Section 504 of the Rehabilitation Act of 1973 generally prohibits employment and other discrimination against an "otherwise qualified handicapped individual" in "any program or activity receiving Federal financial assistance." 29 U.S.C. §794l. A handicapped individual is defined under 29 U.S.C. §706(7)(B) as "any person who: (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." A 1978 amendment added to this definition a specific reference to alcoholism and drug abuse:

"For purposes of [provisions relating to employment of the handicapped], such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others." 29 U.S.C. §706(7)(B).³⁹

³⁸There is controversy over the precise methodology to be followed in confirming an initial finding of drug use. See *Wykoff v. Resig*, 613 F.Supp. 1504, 1508-12 (N.D. Ind. 1985) (reviewing cases). Whatever the proper methodology, the need for care in the conduct of laboratory testing is obvious:

"Questions respecting the reliability of laboratory screening of urinalysis samples have been raised, resulting in an order by the Surgeon General of the Navy that six thousand samples be retested When it found that positive laboratory results were erroneous, [the] Navy corrected personnel records and reversed disciplinary actions." *Williams v. Secretary of the Navy*, 787 F.2d 552, 560 n. 12 (Fed. Cir. 1986).

³⁹A violation of this prohibition could result in termination of the federal assistance. See 29 U.S.C. §794a; 42 U.S.C. §2000 d-1. The Act also permits private actions against states for alleged discrimination in programs that receive federal aid. *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984).

This language was intended as much to protect some drug abusers as to exclude others from the Act: “[O]nly those active alcoholics or drug abusers who cannot perform the essential functions of a job in question or who present a danger to life and property are not covered by the employment provisions of sections 503 and 504.” H.R. Rep. No. 95-1780, 2d. Sess. 102 (1978), *reprinted in* 1978 U.S. Code Cong. & Adm. News 7413. *See Simpson v. Reynolds Metals Co.*, 629 F.2d 1226, 1231 n. 7 (7th Cir. 1980).⁴⁰

Our prior opinion concluded that an “across-the-board bar to the employment of drug abusers” would conflict with Section 504 of the Act. 67 *Opinions of the Attorney General* at 332. However, we stated that the Secretary “would not be precluded from determining that an applicant’s drug abuse would prevent the applicant from ‘perform[ing] the essential function of [the] job in question or [would] present a danger to life and property,’ ” and, hence, that the applicant would not be an “otherwise qualified handicapped” individual within the meaning of Section 504. We also noted that the Secretary could “make this determination either on a position-by-position basis or on an individual applicant basis.” *Id.*

Although our prior opinion addressed the effect of the Rehabilitation Act on applicants, we believe that the same conclusions apply to individuals currently employed in State government. In particular, employees whose current drug abuse presents a risk to public safety are patently not “otherwise qualified handicapped individuals” within the meaning of the Act. *See, e.g., McCleod v. City of Detroit*, 39 Fair Empl. Prac. Cas. (BNA) 225 (E.D.Mich. 1985). Thus, discharge of drug abusers from service as correctional officers would not violate the Act.

VII

Conclusion

In summary, it is our opinion that:

1. Mandatory testing of most categories of State employees would violate the Fourth Amendment prohibition against “unrea-

⁴⁰By contrast, the various statutes that specify the obligations of the State toward its handicapped employees are not applicable at all in the case of an employee who is an abuser of drugs. 68 *Opinions of the Attorney General* 322, 323 (1983); 67 *Opinions of the Attorney General* at 331 (1982); 63 *Opinions of the Attorney General* 408, 413 (1978).

sonable searches and seizures." The testing of such an employee is permissible only if based upon particularized probable cause, the traditional prerequisite to a search or seizure. In addition, termination of an employee solely because the testing indicates current drug abuse would violate the federal Rehabilitation Act of 1973.

2. Mandatory testing of employees whose work is directly related to public safety is also unconstitutional unless certain Fourth Amendment safeguards are followed. Drug testing of these employees for no reason other than the nature of their jobs is not permissible. However, there is no constitutional or other legal bar to mandatory testing of these employees where circumstances give the employing agency a reasonable, objective basis to suspect illicit drug use. Therefore, under this somewhat more relaxed standard than probable cause, testing of correctional officers and other public safety employees, and termination of those who are found to be drug abusers, would be legally permissible.

3. Each applicant for a position may be tested only if, as to that particular position, drug abuse would likely make the applicant unable to perform the duties of the job or would likely present a danger to the public or to property. Likewise, the State may refuse to hire, for such a position, an applicant who is shown by testing to be a drug abuser.

4. Testing of all applicants for positions as correctional officers, and like public safety jobs, and refusing to hire those who test positive for drug abuse would be legally permissible.

5. Any testing program must include reasonable steps to confirm that a positive result is accurate and to assure that specimens are not tampered with or switched. Test results must be secured against unauthorized disclosure. In addition, the termination of a classified employee for drug abuse must be preceded by notice and an opportunity for a hearing.

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CONSTITUTIONAL LAW—*TENNESSEE V. GARNER*—*WHITLEY V. ALBERS*—STANDARDS GOVERNING USE OF DEADLY FORCE TO EFFECT ARREST, TO PREVENT ESCAPE OF PRE-TRIAL DETAINEE, AND TO PREVENT ESCAPE OF CONVICTED PRISONER.

November 17, 1986

Colonel E. J. Zaccanelli
Chief Assistant Sheriff
Sheriff's Department
Prince George's County

You have requested our opinion on the constitutionality of the policy of the Prince George's County Sheriff's Department on the use of deadly force in the apprehension of fleeing felons.

Your question was prompted originally by the Supreme Court's decision in *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694 (1985), holding unconstitutional the use of deadly force to effect the arrest of an unarmed, nondangerous suspected felon. Subsequently, the Supreme Court decided *Whitley v. Albers*, 475 U.S. 312, 106 S.Ct. 1078 (1986), upholding the constitutionality of the use of deadly force in efforts to quell a prison disturbance. These two decisions have given rise to additional questions from other sheriffs, the Maryland Division of Correction, and local jails concerning the use of deadly force to prevent escapes by pretrial detainees or convicted prisoners.¹

For the reasons given below, we conclude as follows:

1. Your office's policy properly limits the use of deadly force in arrests to the arrest of dangerous suspects. However, the policy should be modified (i) to make explicit the requirement that there be probable cause to believe the suspect is dangerous; (ii) to permit such force only if its use is necessary to effect the arrest; and (iii) to require that a warning be given, if feasible, before deadly force is used.

2. Deadly force may be used to prevent the escape of a pre-trial detainee only if (i) the officer has probable cause to believe that the detainee poses a threat of serious harm to the officer or others;

¹Despite the varying scope of duties of sheriffs in the different jurisdictions, all of them deal with prisoners and suspects. Our conclusions, therefore, are applicable to all sheriffs' offices in Maryland.

(ii) the use of deadly force is necessary to prevent the escape; and (iii) the officer has given a warning, if feasible, before using deadly force.

3. Deadly force may be used, if necessary, to prevent the escape of an unarmed convicted prisoner if it is reasonably likely that the prisoner would present a risk of serious harm to others, considering (i) the nature of the institution; (ii) the characteristics of its inmates; (iii) the factors that lead to their placement there; and (iv) the officer's personal knowledge, if any, of the particular escaping prisoner.

I

Tennessee v. Garner

Garner arose out of the fatal shooting of a 15-year-old boy by a Memphis, Tennessee police officer. While responding to a report of a nighttime burglary, the officer saw Garner running across the backyard of the house to a six foot high chain link fence. The officer, using a flashlight, saw Garner's face and hands, but saw no sign of a weapon.² When Garner began to climb over the fence after the officer's warning to halt, the officer shot and mortally wounded him. 105 S.Ct. at 1697.³

In using deadly force, the officer acted in accordance with a Tennessee statute permitting the use of deadly force to effect the arrest of a felon fleeing from or resisting arrest.⁴ The statute thus embodied the common law rule that, while deadly force may not be used to prevent the flight from arrest of one suspected of a mis-

²At trial, the officer testified that he was reasonably certain that Garner was unarmed. However, he also testified that he was convinced Garner could not have been captured immediately if he had made it over the fence. 105 S.Ct. at 1697.

³Ten dollars and a purse taken from the house were found on Garner's body. 105 S.Ct. at 1697-98.

⁴The District Court, after a three day bench trial, found that the shooting of Garner was authorized by the statute and that the statute was constitutional. *See* 105 S.Ct. at 1698. The United States Court of Appeals for the Sixth Circuit first remanded the case for further consideration in light of the Supreme Court's decision in *Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978). *Id.* The District Court, on remand, confirmed the constitutionality of the statute and the propriety of the officer's actions. *Id.* Considering the case on appeal a second time, the Sixth Circuit reversed and remanded, finding the statute and the shooting unconstitutional.

demeanor, it may be used to prevent the flight of a suspected felon. Because that rule was in effect at the time of the adoption of the Fourth Amendment to the United States Constitution, Tennessee argued that the use of deadly force against a fleeing felon must be constitutional.⁵

In its opinion, the Supreme Court noted that “there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.” 105 S.Ct. at 1699.⁶ In determining the reasonableness of the seizure of the deceased, the Supreme Court therefore balanced the “‘nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.’” *Id.* (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)).

The factors that weigh heavily against the use of deadly force are “the suspect’s fundamental interest in his own life,” the unmatched “intrusiveness of a seizure by means of deadly force,” and “the interest of the individual, and of society, in judicial determination of guilt and punishment,” which is frustrated by the use of deadly force. 105 S.Ct. at 1700. The Supreme Court found that these factors outweigh the government’s interest in the use or the threat of use of deadly force to encourage suspects to submit peacefully to arrest. 105 S.Ct. at 1700-01. Hence, “[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable.” 105 S.Ct. at 1701.

The Supreme Court did not, however, totally invalidate the statute. It held that, “[w]here the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.” 105 S.Ct. at 1701. The Supreme Court then elucidated the conditions under which the use of deadly force against a fleeing suspect is justified:

“Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. ... [D]eadly

⁵The Fourth Amendment assures “[t]he right of the people to be secure in their persons ... against unreasonable searches and seizures.”

⁶The Fourth Amendment proscribes only *unreasonable* searches and seizures. *Carroll v. United States*, 267 U.S. 132, 147 (1925).

force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." *Id.*

II

Whitley v. Albers

Albers arose out of the shooting of a prisoner by a guard during a prison disturbance in which one guard had been assaulted and another taken hostage by prisoners.

The leader of the disturbance, who was armed with a knife, claimed that one inmate had been killed and threatened to kill the hostage.⁷ The prison officials determined that forceful intervention was necessary to protect the hostage and the inmates who were not participating in the disturbance. The prison security manager was to attempt to free the hostage from the upper-tier cell in which he was being held. Officers armed with shotguns were ordered to follow and to shoot low at any inmate climbing the stairs toward that cell. Two warning shots were fired as the security manager climbed the stairs, and shortly thereafter, Albers—an inmate who had not been participating in the disturbance—started to climb the stairs.⁸ One of the officers fired at Albers, striking him in the leg and causing serious injury. 106 S.Ct. at 1082-83.⁹

While noting that the Eighth Amendment protects convicted prisoners from the unnecessary and wanton infliction of pain, the Supreme Court pointed out that "[i]t is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause...." 106 S.Ct. at 1084.¹⁰ Moreover, what is unnecessary and wanton infliction of pain should be determined "with due regard for differ-

⁷In reality, an inmate had been beaten by others but had not been killed. 106 S.Ct. at 1082.

⁸Albers testified that he had been concerned for the safety of elderly prisoners in lower-tier cells and had sought to have them released from their cells. 106 S.Ct. at 1082. At the time of the shooting, Albers was attempting to return to his own cell, on the upper tier. 106 S.Ct. at 1087.

⁹Another inmate was also shot on the stairs, and several who remained on the lower level were injured by gunshots. 106 S.Ct. at 1083.

¹⁰The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

ences in the kind of conduct against which an Eighth Amendment objection is lodged." *Id.*

Thus, in the context of providing medical care to prisoners, "deliberate indifference to a prisoner's serious illness or injury" constitutes cruel and unusual punishment. *Estelle v. Gamble*, 429 U.S. 97, 105 (1976) (quoted in *Albers*, 106 S.Ct. at 1084). However, when prison officials are attempting to restore order in the face of a disturbance, they must take into account the threat to inmates, prison staff, and visitors, for the safety of all of whom they are responsible. "In this setting, a deliberate indifference standard does not adequately capture the importance of such competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance." *Albers*, 106 S.Ct. at 1085. Instead, the appropriate standard is "'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'" *Id.* (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.) (Friendly, J.), *cert. denied*, 414 U.S. 1033 (1973)).

Applying that standard requires consideration of "'such factors as the need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted.'" 106 S.Ct. at 1085 (quoting district court, 546 F.Supp. 726, 733 (D. Or. 1982)). "From such considerations inferences may be drawn as to whether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur." 106 S.Ct. at 1085.¹¹

¹¹The Supreme Court concluded that, under the circumstances, the prison officials had not acted wantonly. 106 S.Ct. at 1086-87. Rather, "the actual shooting was part and parcel of a good faith effort to restore prison security." 106 S.Ct. at 1087. *Albers's* right to be free from cruel and unusual punishment had not, therefore, been violated.

The Supreme Court also rejected *Albers's* claim to have been deprived of a liberty interest without due process of law. "[T]he Eighth Amendment ... serves as the primary source of substantive protection to convicted prisoners in cases such as this one, where the deliberate use of force is challenged as excessive and unjustified." 106 S.Ct. at 1088. In such a case, "the Due Process Clause affords [prisoners] no greater protection than does the Cruel and Unusual Punishments Clause." *Id.*

III

Use of Deadly Force in Arrests

A. *Sheriff's Policy Statement*

The policy of the Prince George's County Sheriff's Department on the use of firearms by deputies authorizes the use of deadly force in arrests under the following circumstances:

"To effect the arrest or prevent the escape of any felon or person whom the deputy has probable cause to believe has committed a felony, and where the felon used or threatened the use of deadly force in the commission of the crime; or when the deputy reasonably believes that the felon would use deadly force against the deputy or another person if not immediately apprehended. Deadly force must never be used based upon *mere suspicion* that a crime was committed—no matter how serious. The deputy should have either witnessed the crime, or have sufficient probable cause to believe that the subject committed, is committing or is about to commit an offense for which the use of deadly force is permissible."¹² (Emphasis in original.)

Thus, your office's policy authorizes the use of deadly force only against a felon or suspected felon and only if (i) the felon used or threatened to use deadly force in committing the crime or (ii) the deputy reasonably believes that the felon would use deadly force against the deputy or others if not immediately apprehended. Those circumstances appear to be the only prerequisites to the use of deadly force. The policy does not explicitly require that the use of deadly force be necessary to effect the arrest or that the officer give warning before resorting to deadly force.

¹²Although it does not fall within the scope of our *Garner* analysis, we feel compelled to mention our concern about the use of the phrase "is about to commit" an offense. We are aware of no authority for arresting a person who has not yet, at the least, embarked on an attempt to commit a criminal act. In order to effect a warrantless arrest, an officer must have probable cause to believe the suspect has already committed or is engaged in committing a crime or attempted crime. *Henry v. United States*, 361 U.S. 98 (1959). We believe this phrase in your policy should be amended to "is attempting to commit" an offense.

B. *Analysis*

The rule enunciated in *Garner* has three elements: (i) the arresting officer must have probable cause to believe the suspect poses a threat of serious harm; (ii) the use of deadly force must be necessary to prevent escape; and (iii) if feasible, some warning must be given. *Pruitt v. City of Montgomery*, 771 F.2d 1475, 1482-83 (11th Cir. 1985).

As to the first element, we note that in *Garner* the Supreme Court thoroughly explored, and rejected, reliance on the felony-misdemeanor distinction as a guideline for determining when deadly force may be used. Although felonies were more dangerous crimes than misdemeanors in earlier times, modern changes in the law "have ... made the assumption that a felon is more dangerous than a misdemeanant untenable. Indeed, numerous misdemeanors involve conduct more dangerous than many felonies." *Garner*, 105 S.Ct. at 1703.

The crucial consideration is the dangerousness of the suspect, not the classification of the crime that he has committed or is alleged to have committed. To the extent that your office's policy could suggest that deputies may presume fleeing felony suspects to be dangerous, it creates a danger that the standards of *Garner* may be violated. Likewise, to the extent that your office's policy permits the use of deadly force against dangerous felons, but not against equally dangerous misdemeanants, the policy is more restrictive than *Garner* requires. Hence, we think it would be advisable to omit the references to felons in favor of language that focuses solely on the threat of physical harm that the suspect represents.

We think that the limitation of the use of deadly force, under your office's policy, to cases in which "the felon used or threatened the use of deadly force" or "would use deadly force ... if not immediately apprehended" is at least as restrictive as the *Garner* decision's limitation of the use of deadly force to cases in which "the suspect poses a threat of serious physical harm, either to the officer or to others." 105 S.Ct. at 1701. Such a threat exists, under *Garner*, "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm." *Id.* It is conceivable that less than deadly force could cause serious bodily harm and thereby provide a basis for the use of deadly force by an arresting officer. You might consider adopting the Supreme

Court's formulation, which deals specifically with the nature of the threat—"serious physical harm, either to the officer or to others."¹³

The first element of the rule of *Garner* also requires that the arresting officer have "*probable cause* to believe that the suspect poses a threat of serious physical harm." 105 S.Ct. at 1701 (emphasis added). "Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing" that the suspect poses such a threat. See *Henry v. United States*, 361 U.S. 98, 102 (1959) (discussing probable cause for arrest).

Your office's policy authorizes a deputy to use deadly force only when the deputy has probable cause to believe that the suspect committed a crime involving deadly force "or when the deputy *reasonably believes* that the suspect would use deadly force." We think that the reference to "reasonable belief," in this context, advertes to the same circumstances that would constitute "probable cause" for a determination that the suspect is dangerous. Cf. *Wong Sun v. United States*, 371 U.S. 471, 478 n.6 (1963) (term "reasonable grounds" in federal Narcotic Control Act means substantially same as "probable cause"). Nevertheless, to avoid any intimation that any different and lower standard of certainty as to dangerousness is permitted, it would be advisable to explicitly require the deputy to have probable cause to believe that the suspect would use deadly force.

Although your policy thus meets the first element of the rule of *Garner*, it fails to meet the second and third elements. As noted above, *Garner* requires that, even when there is adequate evidence that the suspect is dangerous, the use of deadly force be *necessary* to prevent the suspect's escape. Under *Garner*, "the use of any significant force, up to and including deadly force, not reasonably necessary to effect an arrest ... would be constitutionally unreasonable." *Kidd v. O'Neil*, 774 F.2d 1252, 1256-57 (4th Cir. 1985). Your policy does not require this second element and should be modified to include it.

¹³We recognize that in many—if not most—cases, a suspect "poses a threat of serious physical harm" because he or she is armed and thus clearly has used or threatens to use deadly force. We think that *Garner* also permits an arresting officer to use deadly force, if necessary, against an unarmed suspect who has willfully inflicted or has threatened to inflict serious physical harm. There is no difference, in this respect, between a suspect who knifed a victim and a suspect who strangled a victim. However, we do not think that deadly force is justified to effect an arrest in a case in which an action not normally violent in character has the evidently inadvertent result of causing serious physical injury.

The third requirement of *Garner* is that a warning be given, if feasible, before deadly force is used against a fleeing suspect. Hence, the failure of an officer to give a warning, when it was feasible to do so, "alone would have established a violation of the legal standard." *Acoff v. Abston*, 762 F.2d 1543, 1548 (11th Cir. 1985). Your policy does not mandate such a warning and should be amended to include it.

Thus, your office's present policy, with easily added modifications, would comply with the rule of *Garner*. Although there are many ways of stating that rule, you might wish to follow more closely the actual wording employed by the Supreme Court, set out in Part I of this opinion. In addition, a restatement of the *Garner* rule that you might find useful appears in *Acoff v. Abston*, 762 F.2d at 154.

IV

Use of Deadly Force Against Escapees

Neither *Garner* or *Albers* addresses the use of deadly force to prevent the escape of a person legally committed to a detention facility pending trial on criminal charges or committed to a jail or prison to serve a sentence after conviction. Nonetheless, the Supreme Court's discussions of the interest to be weighed in *Garner* and *Albers* provide guidance regarding the use of deadly force to prevent escapes by prisoners.

Clearly, there are situations in which the use of deadly force against an escapee would be justified under the rule of *Garner*, as well as under *Albers*. Where an escapee threatens a correctional officer or others with a weapon, the officer certainly has probable cause to believe that the escapee poses a threat of serious physical harm. Because the use of deadly force, if necessary, is authorized in such a situation, we address in detail only the more difficult situations involving escapees who are apparently unarmed.

A. Pre-Trial Detainees

"[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). Therefore, in determining the constitutionality of the conditions of pre-trial

detention, "the proper inquiry is whether those conditions amount to punishment of the detainee." *Id.* Generally, that inquiry turns on whether the action taken against a detainee is reasonably related to a legitimate governmental objective and whether it is excessive in relation to that purpose. 441 U.S. at 538-39.

The State has a sufficient interest in ensuring the presence of a suspect at trial to warrant detention pending trial if necessary. See *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). Moreover, "[p]rison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry." *Bell*, 441 U.S. at 547 (emphasis added). At the same time, both the detainee and society undeniably have an interest "in judicial determination of guilt and punishment." See *Garner*, 105 S.Ct. at 1700. Therefore, we think that the circumstances that justify the use of deadly force to prevent the escape of a pre-trial detainee are substantially the same as those that justify the use of such force to effect an arrest.

In *Garner*, the Supreme Court pointed out that felony suspects cannot be presumed dangerous automatically. 105 S.Ct. at 1703. Similarly, we think that the determinations that lead to detention pending trial do not permit a presumption that pre-trial detainees are necessarily dangerous.

Pre-trial detention is the result of a determination of the risk that the defendant will not otherwise appear for trial. Hence, the factors that form the basis for that determination are generally those "bearing on the risk of a wilful failure to appear." Maryland Rule 4-216(f)(8). "The nature and circumstances of the offense charged" may be considered as one of those factors, but only to the extent that it is "relevant to the risk of non-appearance." Rule 4-216(f)(1). The court may also consider "[t]he danger of the defendant to himself or herself or others." Rule 4-216(f)(7). However, we think that the rule as a whole requires this factor, also, to be considered only as it bears on the likelihood of the defendant's appearance for trial.¹⁴

¹⁴The Second Circuit has expressly held that pre-trial detention solely on the ground of the defendant's danger to the community in general is a violation of due process. *United States v. Salerno*, 794 F.2d 64, 71 (2d Cir. 1986). While pre-trial detention may be imposed if necessary to prevent a defendant from intimidating witnesses or otherwise jeopardizing the trial process, "substantive due process ... prohibits the total deprivation of liberty simply as a means of preventing future crimes." 794 F.2d at 71-72.

Thus, the presence of a defendant in a pre-trial detention facility does not, as a general matter, indicate the likelihood that the defendant "poses a threat of serious physical harm." See *Garner*, 105 S.Ct. at 1701.¹⁵ To the extent that the dangerousness of a defendant may be considered in ordering pretrial detention, the role of this factor played in any particular case will not necessarily be clear. Accordingly, we think that deadly force may be used to prevent the escape of a pre-trial detainee only under circumstances of the sort that would justify the use of deadly force to effect an arrest—that is, where there is probable cause to believe that the defendant poses a threat of serious physical harm to detention facility officers or to others; where deadly force is necessary to prevent the escape; and where some warning, if feasible, has been given. See *Garner*, 105 S.Ct. at 1701.

B. *Convicted Prisoners*

We think that the use of deadly force to prevent the escape of a convicted prisoner presents a substantially different case from that of an escaping pre-trial detainee. Because the prisoner has been found guilty of a crime and sentenced to incarceration, "[t]he infliction of pain in the course of a prison security measure ... does not amount to cruel and unusual punishment simply because it may appear in retrospect that the degree of force authorized or applied for security purposes was unreasonable, and hence unnecessary in the strict sense." *Albers*, 106 S.Ct. at 1084.

Moreover, prison officials have a responsibility to keep prisoners incarcerated for the protection of society.¹⁶ In *Albers*, the Supreme Court pointed out the importance of prison administrators' responsibility to maintain order, discipline, and security in the prison. 106 S.Ct. at 1084-85. In judging actions taken in the discharge of that responsibility, courts must therefore hesitate "to critique in hind-

¹⁵The presence of an individual in a detention facility pending trial may be the result of his or her inability to make a relatively low bail on a minor charge or it may be based on a finding that he or she has previously fled the jurisdiction to avoid prosecution on other charges and thus is unlikely to appear for trial if released.

¹⁶The sentencing judge's decision to incarcerate a criminal generally reflects a determination that the criminal presents some risk of harm to society. Prison officials might, indeed, be liable to persons injured by dangerous prisoners who escape through the negligence of those officials. See *Lamb v. Hopkins*, 303 Md. 236, 245 (1985) (adopting as Maryland law *Restatement (Second) of Torts* §319 regarding duty of those in charge of persons having dangerous propensities).

sight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance." 106 S.Ct. at 1085.

In our view, the attempted escape of a prisoner presents much the same kind of emergency situation as a disturbance among prisoners in the institution. Hence, we think that the constitutionality of the use of deadly force to prevent a prisoner's escape must be determined, as in *Albers*, on the basis of such factors as the need for the application of force and the relationship between the need and the amount of force used. *See* 106 S.Ct. at 1085.

In the only case we have found that directly addresses this issue, a United States District Court upheld the constitutionality of the use of deadly force to prevent a prisoner's escape. *Newby v. Serviss*, 590 F.Supp. 591 (W.D.Mich. 1984).¹⁷ In that case, an apparently unarmed prisoner whose conviction was for a nonviolent crime was shot while attempting to escape from a medium-security prison. 590 F.Supp. at 593, 597. The trial court based its conclusion that the use of deadly force was not excessive on the following factors: (i) the guard was faced with an emergency situation; (ii) the guard had no way of knowing whether the prisoner actually was armed or had a history of violence; (iii) the guard had a duty to prevent escapes, in order to preserve order within the prison and protect the surrounding community; (iv) the guard knew that the prisoner had ignored prior warnings; and (v) there was no certainty that the prisoner's escape could be prevented by any other means. 590 F.Supp. at 597.

The court in *Newby* suggested that the mere fact of a prisoner's attempt to escape in itself gives prison officials probable cause to believe that the prisoner poses a threat of serious physical harm: "An escapee by virtue of his escape, is a desperate individual and is in the process of committing a felony." 590 F.Supp. at 596. It is certainly true that a particularized assessment of the risk of harm posed by a specific prisoner, based upon the prisoner's history of having threatened or inflicted serious harm, will generally be impracticable. Nonetheless, we think that it cannot be appropriately assumed that every escapee from any correctional institution is dangerous.

¹⁷The *Newby* case was decided before the Supreme Court issued its decisions in either *Garner* or *Albers*. However, the district court reached its decision in *Newby* largely in reliance on the lower court opinions that were subsequently affirmed in *Garner* and *Albers*. *See* 590 F. Supp. at 596-97.

For example, inmates of institutions administered by the Division of Correction are classified into four security levels. Those classified at the lower security levels have been expressly determined not to pose a significant danger to persons in the institution or the surrounding community. For inmates classified at the higher security levels, of course, the reverse is true—they have been determined to pose a significant danger to the safety of others. We think that the probable dangerousness of a particular escapee accordingly can and should be predicted from the security level of the institution, the factors that lead to inmates' placement there and that indicate the likelihood that any particular inmate poses a threat of serious harm, the characteristics of the institution's inmate population in general, and whatever personal knowledge of the escapee's dangerousness the correctional officer may have.

That prediction of probable dangerousness, in turn, bears on the determination of the need for the application of deadly force. *See Albers*, 106 S.Ct. at 1085. The use of deadly force, if necessary, to prevent the escape of prisoners reasonably believed to be dangerous is not excessive in relation to the State's interest in keeping them incarcerated and, therefore, is not wanton and unnecessary. At the same time, we think it is clear that deadly force may never be used if it does not appear to be reasonably necessary. *Cf.* 106 S.Ct. at 1086.

Moreover, we think that a warning must be given, if feasible, before resorting to force to prevent a prisoner's escape. In *Albers*, the Supreme Court held that a verbal warning was not required where a warning shot had been fired and prison officials could believe in good faith that a warning would endanger the success of the security measure. 106 S.Ct. at 1087. In our view, however, an escaping prisoner ordinarily presents a quite different situation in this regard from that created by rioting prisoners: In an escape, a warning would ordinarily promote success, by giving the prisoner an opportunity to submit to recapture.

We recognize that any escape presents an emergency situation in which there is little or no time to make a detailed analysis of the likelihood that the escaping prisoner poses a threat of serious physical harm. At the same time, we think that the factors that enter into such an analysis lend themselves to evaluation in advance of any escape. Therefore, we think it would be advisable to develop a written policy on the use of deadly force for each correctional or detention facility, whatever its size or other characteristics. Such a policy should take into account the security of the facility, the standards that determine which inmates are placed in the facili-

ty, and the composition of the inmate population. We are aware that assessing the probable dangerousness of escapees from certain institutions—in particular, those housing inmates with various histories of violence—will be a difficult matter. Nonetheless, we think a careful consideration of these factors will make possible a reasonable estimate of the dangerousness of the inmates in each institution.¹⁸

V

Conclusion

In summary, we conclude as follows:

1. Your office's policy properly limits the use of deadly force in arrests to the arrest of dangerous suspects. However, the policy should be modified (i) to make explicit the requirement that there be probable cause to believe the suspect is dangerous; (ii) to permit such force only if its use is necessary to effect the arrest; and (iii) to require that a warning be given, if feasible, before deadly force is used.

2. Deadly force may be used to prevent the escape of a pre-trial detainee only if (i) the officer has probable cause to believe that the detainee poses a threat of serious harm to the officer or others; (ii) the use of deadly force is necessary to prevent the escape; and (iii) the officer has given a warning, if feasible, before using deadly force.

3. Deadly force may be used, if necessary, to prevent the escape of an unarmed convicted prisoner if it is reasonably likely that the prisoner would present a risk of serious harm to others, considering (i) the nature of the institution; (ii) the characteristics of its inmates; (iii) the factors that lead to their placement there; and (iv) the officer's personal knowledge, if any, of the particular escaping prisoner.

¹⁸Some institutions house inmates at different security levels; we think that a separate policy should be established for each security level within such an institution. Institutions housing both convicted prisoners and pre-trial detainees present especially difficult problems. We note that some jurisdictions—principally in other states—use different colored clothing to distinguish pre-trial detainees from convicted prisoners.

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CRIMINAL LAW

CRUELTY TO ANIMALS—PEST ELIMINATION—THE USE OF GLUE-BOARDS TO KILL RODENTS DOES NOT NECESSARILY VIOLATE THE CRUELTY TO ANIMALS LAW.

January 14, 1986

The Honorable Idamae T. Garrott
Maryland House of Delegates

You have requested our opinion as to whether the use of commercially-marketed glueboards to kill rats and mice violates the Maryland Cruelty to Animals Law, Article 27, §59 of the Maryland Code.

For reasons stated below, we conclude that the use of glueboards to kill rodents does not necessarily violate the Cruelty to Animals Law. The applicability of the statute would depend upon the facts and circumstances surrounding each particular use. We recognize that, as a practical matter, law enforcement of this nature is not possible with regard to pest elimination methods used in private dwellings. Hence, the question of whether glueboards are an acceptable method of rodent control ought to be addressed directly by the General Assembly.

I

Cruelty to Animals Law

Article 27, §59 provides as follows:

“Any person who (1) overdrives, overloads, deprives of necessary sustenance, tortures, torments, cruelly beats, mutilates or cruelly kills; or (2) causes, procures or authorizes these acts; or (3) having the charge or custody of an animal, either as owner or otherwise, inflicts unnecessary suffering or pain upon the animal, or unnecessarily fails to provide the animal with nutritious food in sufficient quantity, necessary veterinary care, proper drink, air, space, shelter or protection from the weather, is guilty of a misdemeanor and shall be punishable by a fine not ex-

ceeding \$1,000 or by imprisonment not to exceed 90 days, or both. Customary and normal veterinary and agricultural husbandry practices including but not limited to dehorning, castration, docking tails, and limit feeding, are not covered by the provisions of this section. *In the case of activities in which physical pain may unavoidably be caused to animals, such as food processing, pest elimination, animal training, and hunting, cruelty shall mean a failure to employ the most humane method reasonably available. It is the intention of the General Assembly that all animals shall be protected from intentional cruelty, but that no person shall be liable for criminal prosecution for normal human activities to which the infliction of pain to an animal is purely incidental and unavoidable.*"

The legislative intent underlying this criminal statute is stated directly in it—that "all animals ... be protected from intentional cruelty," with the caveat that "no person" be prosecuted "for normal human activities to which the infliction of pain to an animal is purely incidental and unavoidable."¹

We are aware of no cases construing either the "pest elimination" provision in the Maryland statute or any analogous provision in the cruelty to animals statutes of other states. Instead, the cases tend to address mistreatment of domestic animals and exhibitions of animals, such as cockfighting. Nonetheless, pest elimination is specifically included and, therefore, must meet the statutory stan-

¹Prior to 1975, the statute read as follows:

"Any person who (1) overdrives, overloads, deprives of necessary sustenance, tortures, torments, cruelly beats, mutilates or cruelly kills; or (2) causes, procures or authorizes these acts; or (3) having the charge or custody of an animal, either as owner or otherwise, inflicts unnecessary suffering or pain upon the animal, or unnecessarily fails to provide the animal with proper food, drink, air, space, shelter or protection from the weather, is guilty of a misdemeanor and shall be punishable by a fine not exceeding \$1,000 or by imprisonment not to exceed 90 days, or both." Article 27, §59 (Cum. Supp. 1972).

The constitutionality of this statute was questioned in 1973, on the ground that it failed to give adequate notice of the prohibited conduct. *See 58 Opinions of the Attorney General* 80, 83 (1973). In 1975, the statute was amended to its present language. This version of the statute was approved as constitutional in a subsequent Opinion of the Attorney General. *See 65 Opinions of the Attorney General* 174 (1980). Thus, the General Assembly amended the statute with the obvious intent of simultaneously preventing prosecution for such "ordinary human activities" as pest elimination, while still requiring that all animals be treated humanely.

dards. *See also* Article 27, §62 ("animal" defined as "every living creature except man").

II

Applicability to Pest Elimination Methods

The killing of rats and mice in dwellings is, of course, a "normal human activity." The traditional methods of accomplishing this objective include anticoagulants, acute poisons, and springtraps.²

More recently, the repertoire of pest elimination methods has come to include glueboards. Glueboards are "rodent control devices consisting of a flat, rigid base (such as cardboard, fiberboard, or plastic) coated on one side with an extremely adhesive material." Frantz and Padula, "A Laboratory Test Method for Evaluating the Efficacy of Glueboards for Trapping House Mice," in *Vertebrate Pest Control and Management Materials: Fourth Symposium* 210 (D. E. Kaukeinen ed. 1983) ("Frantz and Padula"). The glueboard is designed, like flypaper, to trap the animal on its surface and cause death by starvation, dehydration, suffocation, or stress.

Article 27, §59 requires use of "the most humane method reasonably available." The term "humane," in the context of pest elimination, has been defined as that method which produces "rapid unconsciousness without distress." Frantz and Padula, at 224.

The use of glueboards to eliminate pests is not humane in that sense. A rodent stuck to a glueboard might take more than 24 hours to die. During that interval, the rodent's attempts to free itself from the board are likely to be quite painful.³ But even though glueboards do not eliminate rodents in a quick and relatively painless manner, neither do some of the other methods of pest control. Multiple-dose anticoagulants, for example, are so-called because the rat must ingest several dosages of the chemical before death

²Anti-coagulants are chemicals that kill rodents by causing them to bleed to death. Strychnine is an example of an acute poison. Springtraps are the familiar baited devices. Another extermination device, fumigants (poisonous chemicals applied by spraying), is not discussed in this opinion because its use is limited to outdoor settings.

³*See* affidavits of Dianne Fervis, D.V.M. (October 29, 1985), David McKeown, D.V.M. (November 5, 1985), Nedim C. Buyukmihei, D.V.M. (October 22, 1985), Florella E. Mitchell, D.V.M. (November 13, 1985), and Robert M. Lynn, D.V.M. (November 9, 1985) (supplied by Valerie Stanley, Esquire, Animal Legal Defense Fund).

occurs. The lag phase between ingestion and death may last as long as 72 hours. See Rowsell, Ritcey, & Cox, "Assessment of Humane-ness of Vertebrate Pesticides," in *Proceedings of the Canadian Association for Laboratory Animal Science* 241 (1978-1979).

Moreover, even if one were to flatly conclude that glue-boards are, comparatively, not a humane form of pest elimination, they would not necessarily be unlawful. A comparatively inhumane pest elimination method would still be in compliance with the statute if it were "the most humane method reasonably available." See also Article 27, §62 ("cruelty" defined in terms of "unnecessary or unjustifiable physical pain or suffering").

This language is not an absolutely precise guide to conduct. As we observed in an opinion discussing the constitutionality of the Cruelty to Animals Law: "There is some risk of misjudgment regarding whether the 'most humane method reasonably available' was used or whether a person's acts are 'normal human activities to which the infliction of pain to an animal is purely incidental and unavoidable'." 65 *Opinions of the Attorney General* 174, 178 (1980) (1975 amendment cured statute's failure to give fair notice of prohibited conduct). See *In re William G.*, 52 Md. App. 131 (1982). However, the underlying principle is clear: The amended Cruelty to Animals Law "eliminates the possibility of prosecution for commonplace and generally accepted human activities." 65 *Opinions of the Attorney General* at 178.

We think it unquestionable that considerations of effectiveness, safety, and cost are a "commonplace and generally accepted" aspect of pest control and that the statutory phrase "the most humane method reasonably available" allows these factors to be taken into account. See, e.g., *Buffalo Broadcasting Co., Inc. v. American Society of Composers, Authors and Publishers*, 546 F. Supp. 274, 288-90 (S.D.N.Y. 1982), *rev'd on other grounds*, 744 F.2d 917 (2d Cir. 1984) (Where different methods of licensing would be much more costly and much less efficient than that being used, such methods were not "realistically available" alternatives under the applicable statute.). See also Black's Law Dictionary 1138 (rev. 5th ed. 1979) ("reasonable" defined as "suitable under the circumstances"); *id.* at 123 ("available" defined as "obtainable; present or ready for immediate use").

Given this statutory language, it is virtually impossible for us to conclude that a method of pest control is inherently—i.e., under all circumstances—unlawful under the Cruelty to Animals Law. The conditions simply vary too much from one application to the next.

In terms of effectiveness, glueboards may work where other control methods fail. Indeed, a study critical of the inhumaneness of the device observed that "glueboard application should be limited to problems for which other management strategies are inappropriate or have failed." Frantz and Padula at 224.

A "reasonably available" pest elimination method must also be affordable and safe. Pest elimination techniques requiring the use of chemicals are likely to be significantly more costly than the glueboard method. These methods generally require employment of professional exterminators.

With respect to safety, the use of acute poisons can pose risks to family members living in a house infested with rats or mice. The use of springtraps might pose as much risk as glueboards to non-target animals—that is, animals not intended to be eliminated, like house pets. In addition, such methods might pose a risk to young children.

These examples underscore the reason why we cannot conclude flatly that glueboards violate the Cruelty to Animals Law. The point is simply this: There may be situations in which use of a pest elimination method produces a longer or more painful death than other methods, but at the same time the less humane method is significantly less costly, more effective, or safer than alternative methods. In those situations, use of the less humane method—be it a glueboard or any other pest control technique—does not violate Article 27, §59.

IV

Conclusion

In summary, it is our opinion that the use of glueboards to kill rodents does not necessarily violate the Maryland Cruelty to Animals Law. The applicability of the statute to glueboards would depend upon the facts and circumstances surrounding each particular use. Because of the practical difficulty of enforcing the Cruelty to Animals Law in this context, we recommend that the General Assembly consider directly the question of whether the use of glueboards should be specifically prohibited.⁴

⁴*Cf.* Article 27, §59A (specified methods of killing dogs and cats prohibited). See generally 67 *Opinions of the Attorney General* 110 (1982).

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ELECTIONS

PUBLIC ETHICS—FAIR ELECTION PRACTICES ACT—TESTIMONIALS—
“CONTRIBUTIONS”—“GIFT”—FUNDS PROVIDED TO AN OFFICIAL AS A RESULT OF A TESTIMONIAL ARE POLITICAL CONTRIBUTIONS REGULATED BY THE ELECTION LAWS IF THE PURPOSE OF THE EVENT IS TO RAISE FUNDS FOR AN ELECTION.

April 11, 1986

Mr. John O'Donnell
Executive Director
State Ethics Commission

You have requested our opinion on whether funds given to an official at a testimonial dinner or similar affair are regulated under the State election laws.

For the reasons stated below, we conclude that funds provided to an official as a result of a testimonial are political contributions regulated by the Fair Election Practices Act—and therefore are not a “gift,” within the meaning of the Maryland Public Ethics Law—if the testimonial is for the purpose of raising funds for a future or past election campaign. This purpose is measured by the circumstances surrounding the testimonial, including the identity of the organizers; the timing of the event; the content of solicitations, advertising, and other pertinent written materials available to those who attend; and the use of the proceeds from the event.¹

I

“Gifts” Under the Public Ethics Law

As you point out in your letter, several provisions of the Maryland Public Ethics Law turn on whether a transfer of valuables constitutes a “gift.” See, e.g., Article 40A, §§3-106, 4-103(d), and 5-105(a)(3) of the Maryland Code. The term “gift” is defined in the Ethics Law as follows:

¹This opinion confirms the portion of a previous letter of advice that dealt with this subject. Letter of Advice from Assistant Attorney General Jack Schwartz to Marie M. Garber, State Administrator of Election Laws, at 9-10 (August 27, 1985).

“‘Gift’ means the transfer of anything of economic value regardless of the form without adequate and lawful consideration. ‘Gift’ does not include the solicitation, acceptance, receipt, or regulation of political campaign contributions regulated in accordance with the provisions of Article 33, §§26-1 et seq. of this Code, or any other provision of State law regulating the conduct of elections or the receipt of political campaign contributions.” Article 40A, §1-201(p).

Thus, under the exclusion in this definition, an official subject to the Public Ethics Law who is given the proceeds of a testimonial would not receive a “gift,” if the proceeds are regulated “political campaign contributions.” Cf. 68 *Opinions of the Attorney General* 252, 261-62 (1983) (exclusion of regulated campaign contributions from Public Ethics Law disclosure requirement).²

II

Proceeds of Testimonials

The Fair Election Practices Act, Subtitle 26 of Article 33, contains no express regulation of testimonials. However, the Act broadly defines “contributions” as follows:

“‘Contributions’ means the gift, transfer or promise of gift or transfer of money or of other thing of value to any candidate, or his representative, or a representative of any political party or partisan organization to promote or assist in the promotion of the success or defeat of any candidate, political party, principle or proposition submitted to a vote at any election.” Article 33, §1-1(a)(5).

Contributions are regulated in detail by the Act. *See, e.g.*, Article 33, §§26-7, 26-9, and 26-11. In particular, contributions are subject to the limitations in Article 33, §26-9(b): not more than \$1,000 to any one candidate in an election, and not more than \$2,500 to all candidates in an election. Donations to defray past election debts are contributions allocable to the limitations for that past election; donations to accumulate a campaign fund for a future election are

²*See also* 62 *Opinions of the Attorney General* 374 (1977), discussed in note 3 below.

allocable to that election. *See, e.g., 58 Opinions of the Attorney General* 266, 267 (1978).

The mere labeling of an event as a testimonial does not affect the applicability of the Act, one way or the other. Rather, the proceeds of a testimonial are political contributions—and therefore subject to the Act's contribution limitations and other requirements—if they are given to the honoree “to promote or assist in the promotion of the success or defeat of [the honoree] at any election.” Article 33, §1-1(a)(5). Conversely, if the funds raised at a testimonial are not “to promote or assist in the promotion of” the election of the honoree, they are not political contributions.

The Act's regulation of those who organize a testimonial also turns on the link to electoral activity. Two or more persons who act together to hold a testimonial would be a “political committee” if their activities “assis[t] or attempt[t] to assist in any manner the promotion of the success or defeat of any candidate, candidates, political party, principle or proposition submitted to a vote at any election.” Article 33, §1-1(a)(14). *See also* Article 33, §1-1(a)(12) (definition of “partisan organization”).

In applying the Act to testimonials, this office has consistently attempted to draw the distinction between electoral and nonelectoral events that necessarily follows from these definitions. Thus, the office advised that “[a] testimonial dinner committee ... formed well in advance of any election and of a candidate's announcing for public office would seem to be excluded from the coverage of [the definition of ‘political committee’].” *57 Opinions of the Attorney General* 185, 186 (1972).

In *60 Opinions of the Attorney General* 232 (1975), the office held that an event called the Four Star Salute, intended to raise campaign funds for incumbent officeholders, was subject to regulation under the Act:

“While we have no doubt that the sponsors did intend for the four incumbent office holders to be honored for their years of prior service at the event, it is equally clear that they always intended that the monies raised would be devoted to the 1974 reelection or election campaigns. Under those circumstances, we do not believe it appropriate to view the event as a testimonial dinner, at least in the pure sense of that term.” *60 Opinions of the Attorney Gener-*

al at 237.³

Finally, in 61 *Opinions of the Attorney General* 407 (1976), the office summarized the difference between true testimonials and political fundraisers as follows:

"[M]oney given to a fund-raising affair held for the benefit of incumbent office holders will not be deemed to constitute a contribution chargeable to the \$2,500 per election limitation if that affair is not conducted for the purpose of raising money either to eliminate a prior election campaign deficit or to accumulate a campaign fund for use in a subsequent election effort on the part of the incumbent office holders. ... It is, for example, entirely possible that such affairs may be conducted solely for the purpose of providing the incumbent office holder with a gift or appropriate recognition of his public service or, conceivably, for the purpose of enabling him to defray the normal expenses of holding office and serving his constituents. If this is the only purpose of the affair and if this is the purpose for which the contributors to it intend to serve, then donations would not constitute political contributions chargeable to the \$2,500 limitation." 61 *Opinions of the Attorney General* at 413.

This determination inevitably depends upon the particular circumstances surrounding a given testimonial event. The following factors are pertinent:

1) *Identity of the organizers.* If a partisan organization or political committee sponsors the testimonial event, the testimonial can only be regarded as a political fundraiser. The nature of these organizations permits no other conclusion. See Article 33, §1-1(a)(12) and (15). Ticket purchases would be "contributions," as defined in Article 33, §1-1(a)(5).

2) *Timing.* The fact that a testimonial is held "well in advance of any election and of a candidate's announcing for public office"

³Another opinion concluded, without discussion, that "the cost of tickets to testimonials or campaign contributions" need not be reported as lobbying expenses under the predecessor of Article 40A, §5-105, because "[t]hese transactions will be reported pursuant to the Fair Election Practices Act." 62 *Opinions of the Attorney General* 374, 383 (1977). The "testimonials" in question were held for "announced or unannounced candidates for election to the Maryland Legislature or Executive Department." 62 *Opinions of the Attorney General* at 374-75. These events were evidently campaign fundraisers labeled as "testimonials," rather than nonelectoral fetes.

is some evidence that the event is a true testimonial, rather than a political fundraiser. See 57 *Opinions of the Attorney General* at 186. Conversely, the fact that a so-called "testimonial" is held in the midst of an election campaign is some evidence that the event is really a political fundraiser.

3) *Solicitations and advertisements.* The opinion concerning the Four Star Salute noted that the organizers of the event themselves described it explicitly as intended to raise campaign funds. 60 *Opinions of the Attorney General* at 233. Although the opinion does not so state, presumably the written materials used for the affair likewise reflected this intended use. The opinion did indicate that news coverage of the event made clear its electoral nature. As the opinion put it: "While it is possible that some individual ticket purchasers may have perceived the event as nothing more than a testimonial honoring the State's four highest elected officials, it is entirely reasonable to assume that it was correctly viewed by its organizers, the vast majority of ticket purchasers and the general public as a political fundraiser designed to raise a substantial sum of money for use in the 1974 elections." 60 *Opinions of the Attorney General* at 233.

In our view, it is evidence that an event is a political fundraiser if the solicitations, advertisements, and other written materials associated with an event refer to a future campaign, the honoree's political prospects, or a past campaign debt. By contrast, it is evidence that an event is a true testimonial if the written materials for the affair refer exclusively to the past achievements of the honoree.

4) *Use of the funds raised.* In the Four Star Salute opinion, this office noted that "virtually all of [the event's] net proceeds were expended 'to promote or assist in the promotion of the success' of the four incumbents as candidates in the 1974 primary election." 60 *Opinions of the Attorney General* at 234. Plainly, one indication of the nature of the event is the use of the proceeds. If an event is a true testimonial, the disposition of the proceeds must be consistent with its nonelectoral nature—for example, money given to the honoree for his or her unrestricted use.⁴

⁴The Act permits political contributions to be given directly to a candidate. Article 33, §26-9(a). Hence, the mere fact that the proceeds of a testimonial are presented to the honoree personally, rather than to his or her campaign treasurer, does not itself negate the possibility that the funds are meant as a political contribution. But, even if an honoree receives money from a testimonial that its organizers intend as an unrestricted gift, to be used as the honoree sees fit, the Act nevertheless does

We recognize that these criteria are far from precise. But as the Act now stands, no more definitive guidance is possible.⁵

III

Conclusion

In sum, it is our opinion that funds provided to an official as a result of a testimonial are political contributions regulated by the Fair Election Practices Act—and therefore are not a “gift,” within the meaning of the Maryland Public Ethics Law—if the testimonial is for the purpose of raising funds for a future or past election campaign. This purpose is measured by the circumstances surrounding the testimonial, including the identity of the organizers; the timing of the event; the content of solicitations, advertising, and other pertinent written materials available to those who attend; and the use of the proceeds from the event.

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Opinions and Advice

Editor's Note: The Governor's Commission to Review the Election Laws (Nilson Commission) has recommended that the interpretation in this opinion be codified. Report of the Commission 71-73 (January 15, 1987).

not prohibit that person from subsequently donating those funds to his or her campaign. A candidate may make contributions to his or her own campaign without limit. Article 33, §26-8(a). This kind of subsequent use by the honoree of a testimonial gift would not transform those proceeds into “contributions.” See 61 *Opinions of the Attorney General* at 413.

⁵The Governor has appointed a Commission to Review the Elections Laws, chaired by former Deputy Attorney General George A. Nilson. The Act's inadequate treatment of testimonials has been brought to the attention of the Commission.

ELECTIONS—RECOUNTS—PROCEDURES IN PRIMARY AND GENERAL ELECTIONS.

April 28, 1986

Mrs. Marie M. Garber
State Administrator of
Election Laws

You have requested our review of the Election Code provisions pertinent to recounts. As you point out, Chapter 625 of the Laws of Maryland 1985 gave the State Board the responsibility to adopt regulations governing the conduct of recounts. Article 33, §1A-1(e)(6) of the Maryland Code. You asked us to summarize the pertinent statutory provisions as background for these regulations.

I

Introduction

The Election Code contains two sets of provisions under which recounts may be sought.¹ Subtitle 13 of Article 33, "Contested Nominations at Primary Elections," specifies in detail a recount procedure for primaries. Subtitle 19, "Contested Elections," which was completely rewritten by Chapter 755 of the Laws of Maryland 1985, specifies the procedure for a court challenge "in any election

¹A recount is a process by which the election supervisors review the work of the judges of election and the board of canvassers. In the draft regulations, "recount" is defined as "the entire process of resolving a challenge to the vote count reported for an election." Draft COMAR 14.02.12.02D. "[T]he Election Supervisors, in making a recount of votes, are vested with discretion in determining whether a ballot should be counted or rejected." *Mahoney v. Board of Supervisors of Elections*, 205 Md. 325, 336 (1954).

By contrast, the board of canvassers has purely ministerial duties, with none of the discretionary decisionmaking that a recount may entail. *See, e.g., Bowling v. Weakly*, 181 Md. 496, 500 (1943). Thus, the mandamus procedure for correction of errors made by the board of canvassers, set forth in Article 33, §17-7, is not really a "recount" and is not further discussed in this letter. *See Dorsey v. Ennis*, 167 Md. 444, 450 (1934) (writ of mandamus to correct error of board of canvassers properly directed only to that board, not to the board of supervisors, because "the powers and functions of the two boards are different ..., although the personnel of both boards is the same").

conducted pursuant to [Article 33]." §19-1. Although Subtitle 19 does not expressly provide for recounts, its scope is broad enough to include requests for recounts.² However, we cannot predict with confidence precisely how a court would proceed if asked to order a recount under Subtitle 19. The following discussion attempts to answer the questions that are, more or less, answerable.

II

Primary Elections

A. Candidates

If a defeated candidate seeks a recount in a primary election, he or she must follow the procedures for contested nominations in Subtitle 13. Subtitle 19 applies only "[i]f no other timely and adequate remedy is provided by this article." §19-2. If a defeated candidate for nomination asserts that one of the grounds for a Subtitle 13 recount exists, the recount would be a "timely and adequate remedy"; hence, the candidate would not meet the prerequisite for a Subtitle 19 challenge.³

The grounds for seeking a Subtitle 13 recount are specified in §13-2: "acts of fraud, mistake, error or irregularity in making the count or returns by the judges, or ... ambiguity, error, fraud, or mistake or miscalculation by the judges," as reflected in the returns and tally sheets. Thus, a Subtitle 13 recount is the exclusive remedy if those responsible for the tally are alleged by a losing candidate to have failed to carry out that responsibility properly.

The procedures for a recount under Subtitle 13 are rather clearly detailed in the statute. The recount must be sought "within ten days after the day of any primary election, or within two days after

²Former Subtitle 19 did not provide a means by which a recount could be sought. Rather, it was intended only to permit an election contest on the basis of alleged "fraud or misconduct." *Mahoney v. Board of Supervisors of Elections*, 205 Md. 344, 356 (1954). A recount in a general election would arguably have been available only on the basis of provisions outside both Subtitle 13 and Subtitle 19. See *Clark v. Board of Elections*, No. 30925/38/235 (Cir. Ct. for Harford County 1982). Whatever may have been the status of general election recounts prior to the enactment of Chapter 755, we believe that Subtitle 19 should now be viewed as the vehicle for such a recount. See Part III below.

³The actions of a local board in conducting a Subtitle 13 recount "are as fully subject to [judicial] review as the decisions of any administrative agency." *Mahoney v. Board of Supervisors of Elections*, 205 Md. at 336.

the results of the canvass are declared official.” §13-1. The contest is initiated by a petition addressed to and filed with the local board of supervisors, specifying the grounds for the challenge. The local board is to recount “those precincts named in the petition.” §13-4(a). If balloting has been conducted with voting machines, the recount is to be conducted through the verification procedures specified in §17-4. In jurisdictions using other voting systems, the local board must determine how the recount is to be conducted and must conduct it promptly. §13-4(a)(2).⁴

The mechanism for the payment of the costs of a Subtitle 13 recount is specified in §13-5:

“The petitioner shall pay the cost of the recount and re-canvass in the county, municipality, legislative district or other district or political subdivision, and his bond shall be liable therefor, unless the result of the election in the unit being ordered recounted is changed or unless the petitioner has gained a number of votes over his principle opposing candidate equal to two per centum (2%) or more of the total votes cast in the unit being recounted. In either of such later events, the costs shall be awarded against the municipality or county for which the recount is held.”

B. Voters

Registered voters who are not candidates may secure a recount only if one is ordered by a court as a result of an action brought under Subtitle 19. As indicated above, the Subtitle 13 recount procedures may be invoked only by a candidate. §13-1. By contrast, a Subtitle 19 challenge is open to “any registered voter.” §19-2. Because Subtitle 19 applies to “any election” [§19-1], it applies to primaries. *See* §1-1(a)(6) (the term “election” includes “all elections, primary, general, special, local, congressional, presidential, or statewide”).

This form of challenge is initiated by a petition filed in court, alleging that:

“any act or omission relating to an election...:

⁴Although §13-4(a)(2) refers only to the punchcard ballot system used in Montgomery County, the obvious intent is to require that the recount methodology be appropriate to any electronically tabulated or similar voting system that has been approved by the State Board under Subtitle 16B.

(1) Is inconsistent with this Article or other law applicable to the elections process; and

(2) May change or have changed the outcome of the election.” §19-2.⁵

This basis for challenge includes the grounds for a recount under Subtitle 13 (fraud, mistake, error, irregularity, ambiguity, or miscalculation by election officials), if the irregularity were serious enough to have changed the outcome of the election.⁶

The timing for a Subtitle 19 challenge is specified in §19-3:

“The Petition referred to in §19-2 of this subtitle shall be filed in the appropriate circuit court within 20 days after the earliest of the following:

(1) The date of the act or omission or, if later, the date the act or omission became known to the petitioner; or

(2) The date the results of the canvass for that election are declared official.”⁷

The procedure is to be that provided by “the generally applicable rules of civil procedure.” §19-4.

The court has broad discretion in determining appropriate relief:

“Upon a finding, based upon clear and convincing evidence, that the act or omission involved materially affected the rights of interested parties or the purity of the elections process and:

(1) Might have changed the outcome of an election already held, the court shall:

⁵Although a petition under Subtitle 19 that seeks a recount obviously would be filed only after an election, the procedure under Subtitle 19 applies as well to preelection challenges. *See* §19-5(2).

⁶Subtitle 19 certainly extends to other matters (for example, a candidate’s violation of law), but a recount would ordinarily be an appropriate remedy only if the act or omission involved the tally of votes.

⁷This deadline is considerably longer than that in §13-1. Moreover, a court could order a recount only after an evidentiary hearing. Because the time between the primary and the general election in gubernatorial election years is so short, a Subtitle 19 recount of primary election results might well not be a practicable remedy unless the parties and the court moved the case with the utmost speed.

(i) Declare null and void the election for the office, offices, question, or questions involved and, order that the election be held again on a date set by the court; or

(ii) Order any other relief that will provide an adequate remedy." §19-5.

Hence, the petitioner may seek, and the court may order—if the standard of §19-5 is satisfied—a recount as the form of "other relief [that] will provide an adequate remedy." In our view, the requested recount would, in effect, be a request for an injunction against the local board. *See* Rule BB 70a.

Subtitle 19 does not specify the procedure to be followed if a court were to order a recount. Certainly, the procedures in Subtitle 13 and §17-4 could be suggested to the court as a clear expression of legislative policy in this regard. Moreover, if the State Board adopts regulations that contain even more detailed, generally applicable recount procedures, a court would very likely order that those procedures be followed.

The question of who is to bear the cost of a recount ordered by a court under Subtitle 19 is likewise not addressed in the statute. In our view, the local board would be required to bear the cost, whatever the results of the recount. Under §19-5, a recount would not be ordered unless the plaintiff proved, with "clear and convincing evidence," that an improper act or omission by election officials not only "materially affected the rights of interested parties or the purity of the elections process" but also "[m]ight have changed the outcome of [the] election." This standard is more rigorous than the showing required for a Subtitle 13 recount. If a plaintiff satisfies the standard of §19-5, and thereby secures the remedy of a recount, we see no basis for shifting the cost of that recount back to the plaintiff—even if the recount ultimately does not change the election's outcome. *See also* 26 Am. Jur. 2d Elections §363, at 177-78 (1966) (express statutory authority required for reimbursement of expenses incurred in election contest).

III

General Elections

Subtitle 13, by its terms, applies only to primary elections. Thus, any recount in a general election can only be obtained by means

of a court order under Subtitle 19.⁸ This restriction applies to candidates as well as other registered voters. The procedures discussed in Part II B above for the application of Subtitle 19 to a primary election would apply as well in a general election.⁹

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Opinions and Advice

Editor's Note: The preceding opinion was originally issued as a letter of advice. The State Election Board's recount regulations appear in COMAR 14.02.12.

⁸See note 2 above.

⁹In our view, the conduct of a recount under Subtitle 19 is not inconsistent with the General Assembly's constitutional jurisdiction over election contests for certain offices. See Article III, §19 and Article V, §12 of the Maryland Constitution. See generally *Mahoney v. Board of Supervisors of Elections*, 205 Md. at 356 ("[A] recount was not designed to permit candidates to seek out evidence of fraud or misconduct to be made the basis of an election contest."). Cf. 63 *Opinions of the Attorney General* 370 (1978) (House of Delegates is exclusive judge as to residency of successful candidate).

ELECTIONS—FAIR ELECTION PRACTICES ACT—CONTRIBUTIONS—
RECORDKEEPING—REQUIREMENT THAT A DETAILED RECORD
BE KEPT OF ALL CONTRIBUTIONS APPLIES TO THE PROCEEDS
OF RAFFLES AND GAMING WHEELS.

July 1, 1986

Mrs. Marie M. Garber
State Administrator of Election Laws

You have requested our opinion concerning the records that must be kept by recipients of political contributions. Specifically, you ask the following questions:

1. Is a treasurer required to maintain a record of every contribution—including the name and address of the contributor and the amount and date of the contribution—regardless of the size of the contribution?

2. If so, does this requirement apply to contributions in the form of purchased raffle chances or spins on a wheel used at a fundraising event?

For the reasons stated below, we conclude that a treasurer is legally required to maintain a record of every contribution, regardless of size. The record must contain the name and address of the contributor, the amount of the contribution, and the date of the contribution. There is no exception for contributions in the form of wagers on a raffle or a wheel. However, those who have already held political fundraisers at which the proceeds of wheels were simply recorded as lump sum contributions, in good faith reliance upon the General Assembly's authorization for the use of wheels, should not now be penalized for that reliance.

I

Recordkeeping Requirements

The Fair Election Practices Act, Subtitle 26 of Article 33 of the Maryland Code, is intended to "regulat[e] and control ... campaign financing and to insure a system of centralized responsibility for campaign funds and expenditures." *Parker v. Junior Press Printing Serv., Inc.*, 266 Md. 721, 726 (1972). To that end, the Act im-

poses a variety of recordkeeping and reporting requirements. This office has described the Act's structure and purpose as follows:

"[I]ts overriding thrust is to control, and require the reporting of, contributions and expenditures of money and other valuable things made in connection with elections and to require that certain records be maintained with respect to all such contributions and expenditures. Put another way, the Fair Election Practices Act is intended to enable an interested person to 'audit' all campaign activities in connection with a given election and ascertain, by an examination of both publicly filed records and records required to be maintained by various organizations, all amounts of money and valuable things expended in connection with any given election campaign ..., the purposes for which they were expended and the sources of all such expenditures." 59 *Opinions of the Attorney General* 282, 293 (1974).

One means of achieving this objective is the Act's system of control for political contributions, in which the treasurer of each candidate or political committee plays a critical role: "All contributions, money or other valuable things collected, received or disbursed by any candidate or committee for any purpose, shall be paid over to and made to pass through the hands of the treasurer and ... shall be disbursed by him." Article 33, §26-6(a). *See also* Article 33, §26-4(a). Contributors may not make a contribution except to the treasurer or to the candidate, who "shall thereupon report such contribution to his treasurer." Article 33, §26-9(a). Even the candidate's own contributions "must pass through the hands of the candidate's treasurer and be reported as required in other provisions of [the Act]." Article 33, §26-8(a).

Every contribution, having gone to the treasurer, is then required by Article 33, §26-7(a) to be recorded in the treasurer's account books:

"Every treasurer and every subtreasurer shall keep detailed, full and accurate accounts in a proper book or books, to be called 'account books,' to be provided and preserved by him, of all contributions, money or valuable things received ... and setting forth in such statement and accounts the sum or valuable thing so received ... and the date when, the name of the person and his address from whom received ... and the object and purposes which the

sum, or other valuable thing, was received.”¹

The language could not be clearer—“all contributions” are to be recorded with the name and address of the contributor and the date and the amount. No exception is stated.

The all-inclusive nature of this requirement is emphasized by the fact that in the very next subsection, which requires that campaign contribution receipts be issued by the treasurer, specific dollar amount exceptions are specified. Article 33, §26-7(b)(1).²

Thus, in general, the required record must be kept of every contribution, regardless of its amount. In Part III A below, we discuss the difficult problem of how this requirement is to be applied to the proceeds of gaming wheels.

II

Fundraising by Means of Gambling

Political entities are permitted, under certain circumstances, to engage in activities that would otherwise be illegal gambling. One such provision, Article 27, §261D, applies statewide and authorizes raffles:

“(a) Notwithstanding any other provision of this article, any bona fide political committee, as defined in Article 33, §1-1(a)(14) of the Code, or candidate for public office may conduct a raffle from which prizes in the form of cash or merchandise are awarded.

(b) (1) The cost of a raffle ticket may not exceed \$5.

(2) Any individual may not purchase more than \$50 worth of tickets.

(c) The provisions of this section may not relieve any candidate or political committee from the reporting and

¹This subsection imposes the same recordkeeping requirements for all expenditures.

²A receipt need not be given for a contribution, other than the purchase of tickets, of less than \$51. Cumulative ticket purchases of less than \$251 likewise do not require a receipt. However, “upon request, a receipt must be given for any lesser amount.”

recordkeeping requirements under Article 33 of the Code.”

A second provision, Article 27, §261C (as amended by Chapter 154, Laws of Maryland 1986), authorizes political fundraising through the use of wheels in Baltimore City:

“(a) In Baltimore City, notwithstanding any other provisions of this article, any bona fide politically partisan organization as defined in Article 33 of this Code may conduct fund raising affairs at which merchandise or cash prizes may be awarded in any one game or spin by such devices commonly known as paddle wheels or wheels of fortune.

(b) The amount of any merchandise or cash prize award may not exceed the amount otherwise permitted in Baltimore City.”

Finally, a newly enacted provision, Article 27, §261C-1, authorizes gaming wheels at political fundraisers in Baltimore County:

“(a) In Baltimore County, notwithstanding any other provisions of this article, any bona fide politically partisan organization or political committee as defined in Article 33 of the Code may conduct fund-raising affairs at which merchandise or cash prizes may be awarded in any one game or spin by such devices commonly known as paddle wheels or wheels of fortune.

(b) The amount of any merchandise or cash prize award may not exceed the amount otherwise permitted in Baltimore County.”³

³This provision, introduced as Senate Bill 622, was enacted as an emergency bill and signed into law as Chapter 154 of the Laws of Maryland 1986. A parallel measure, House Bill 425, was also enacted. Chapter 52, Laws of Maryland 1986. *See* Bill Review Letter from Attorney General Sachs to Governor Hughes (April 7, 1986).

III

Gambling Proceeds

A. *Recordkeeping*1. *Raffles*

With respect to the raffles permitted under Article 27, §261D, the recordkeeping requirements in Article 33, §26-7(a) unquestionably must be complied with. Article 27, §261D(c) expressly provides that “the reporting and recordkeeping requirements” of the Act are not excused by the authorization for raffles.

2. *Wheels*

The question is closer with regard to the wheel games permitted in Baltimore City and Baltimore County. Article 27, §§261C and 261C-1 authorize a gambling activity that would otherwise be prohibited. However, they do not say anything, one way or the other, about the previously enacted recordkeeping requirements of the Act. To read their silence as excusing compliance with the expressly all-encompassing recordkeeping requirement in Article 33, §26-7(a) would be inconsistent with the longstanding principle that repeals by implication are to be avoided. *E.g.*, *Prince George's County v. White*, 275 Md. 314, 319 (1975). “[R]epeals not expressed will not be found unless demanded by irreconcilability or repugnancy.” *Board of Educ. v. Lendo*, 295 Md. 55, 63 (1982). As the Court of Appeals has stated:

“[T]he applicable rules of statutory construction direct that when two statutes, enacted at different times, cover similar subject matter, but make no reference to each other, they should be construed, if at all feasible, so as to give as full effect to each other as possible. Moreover, if the statutes are not irreconcilable, they should be construed in harmony with their respective objects.” *Haskell v. Carey*, 294 Md. 550, 558 (1982).

This construction of the Act—that it admits of no exception for gambling proceeds—has been consistently adopted by the State Administrative Board of Election Laws, based on advice from this office. *See, e.g.*, Memorandum on Campaign Fund Reporting from State Administrative Board of Election Laws to Campaign Fund Accounts: Candidates, Chairmen, Treasurers (May, 1986). “The

consistent construction by the agency responsible for administering a statute is entitled to considerable weight.” *National Asphalt Pavement Ass’n v. Prince George’s County*, 292 Md. 75, 80 (1981).

But compliance with Article 33, §26-7(a), although not impossible, would certainly require a significant change from the “cash on the table” way in which wheels have traditionally been operated. The main recordkeeping problem is that the amount of an individual’s contribution is unknown until after the wheel is spun; if a player wins, he or she makes no contribution. The only way to keep track of individual contributions would be by replacing cash with chips, bought at the start of play and redeemed at the end, with records kept both times and then reconciled. This recordkeeping chore would undoubtedly be a strong disincentive to the conduct of the gaming authorized by Article 27, §§261C and 261C-1.

The problem can only be resolved through further legislation. House Bill 819, introduced in the 1986 Session, would have authorized political fundraising through wheels statewide. It would also have amended Article 33, §26-7 by adding the following subsection:

“(3) Notwithstanding any law or regulation that prohibits an anonymous contribution, a treasurer or subtreasurer may accept and is not required to identify in the account books each sum of money given by each individual who purchases a spin or chance on the paddle wheel or wheel of fortune at a campaign fund-raising event if:

(i) the net income to the sponsoring political committee or partisan organization from a paddle wheel or wheel of fortune does not exceed \$1,500 in a 24-hour period at a single fund-raising event; and

(ii) the account books include the total net amount received and the names and addresses of the individuals who attend the fund-raising event at which the wheel is used.”

The State Administrative Board of Election Laws advised the bill’s sponsor that the bill was necessary “to exempt such contributions from separate and specific listing in the account books,” because the Act “[n]ow requires that sum, name, address and date of every contribution be recorded.” Memorandum from Administrator Marie M. Garber to Delegate Collins (Jan. 16, 1986). Similar advice was provided to the House Judiciary Committee, which reported the bill unfavorably despite the State Board’s support for it.

Under the circumstances, we cannot conclude that the proceeds of gaming wheels are excused from the Act’s recordkeeping re-

quirements. Candidates planning future events of this kind must adhere to the requirements, notwithstanding the burden.

However, we also believe that those who have already held gaming events under the authority of Article 27, §§261C and 261C-1 and who in good faith concluded that they were thus authorized to conduct the event in the traditional way—using cash, without individual records—should not be subject to penalty. It would be utterly impossible, at this point, for them to establish a record of individual contributions. They should simply record and report the lump sum derived from the wheels.

B. *Anonymous Contributions*

A related difficulty is presented by the Act's prohibition on the use of anonymous contributions for political purposes:

“Any money or other thing of value received from any unknown person or source by any treasurer ... shall not be used for any political purpose whatsoever, but shall be paid by the treasurer ... to the Treasurer of the State of Maryland.” Article 33, §26-7(c).

If, at the end of an evening of gambling, a treasurer has an undifferentiated sum of money with no record of who contributed or in what amount, that money can only be characterized as having been “received from ... unknown person[s].”

Again, the difficulty is that the General Assembly, having amended the gambling laws to authorize a form of fundraising in which anonymous contributions naturally follow from the traditional conduct of the games, did not amend Article 33, §26-7(c) to remove *its* impediment to those games. In our view, the same approach outlined in Part III A 2 above for the problem of record-keeping is appropriate here: Those who, in good faith, have already held gaming events at which individual contributors cannot now be identified should not be penalized; however, future events must comply with Article 33, §26-7(c).

IV

Conclusion

In summary, it is our opinion that:

1. A treasurer for a candidate, political committee, or partisan organization is required to maintain in his or her account books a record of every contribution, regardless of size. This record must include the name and address of the contributor and the amount and date of the contribution.

2. This recordkeeping requirement applies to contributions in the form of purchased raffle chances or spins on a wheel, where gambling activities are legal.⁴ However, those who have already held political fundraisers at which the proceeds of wheels were simply recorded as lump sum contributions, in good faith reliance upon the General Assembly's authorization for the use of wheels, should not now be penalized for that reliance.

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Opinions and Advice

Editor's Note: The General Assembly has enacted a law substantially similar to that discussed in Part III A of this opinion. Chapter 598, Laws of Maryland 1988.

⁴We do not address the applicability of the Act's requirements to contributions in the form of *illegal* gambling proceeds (e.g., wheels used in a jurisdiction other than Baltimore City or Baltimore County), except to observe that a treasurer who has engaged in that type of illegal conduct might have a right to assert the Fifth Amendment privilege against self-incrimination if a report form called for the disclosure of incriminatory information. See, e.g., *Garner v. United States*, 424 U.S. 648, 657 (1976).

HEALTH

LOCAL HEALTH DEPARTMENTS—CENTRAL COLLECTION UNIT—
DELINQUENT DEBTS OWED TO LOCAL HEALTH DEPARTMENTS
MAY BE REFERRED TO CENTRAL COLLECTION UNIT.

June 2, 1986

Mr. Galen R. Clagett, President
Board of Commissioners of Frederick County

You have requested our opinion on the proper method of collection of certain debts owed to local health departments. Specifically, you ask whether delinquent debts for services rendered under programs financed or administered in part by the State may be referred for collection to the Central Collection Unit of the State Department of Budget and Fiscal Planning ("CCU") as debts "owed to the State or ... its units" within the meaning of §3-302 of the State Finance and Procurement Article ("SF" Article).

For the reasons given below, it is our opinion that, for purposes of collection of those debts, local health departments are units of the State.¹ Accordingly, the debts about which you inquire may be referred to the CCU for collection after they become delinquent.

I

Collection of State Debts

Under SF §3-302(a)(1), the CCU "is responsible for the collection of each delinquent account or other debt that is owed to the State or any of its officials or units." To that end, "[a]n official or unit of the State government shall refer to the Central Collection Unit

¹We caution, however, that this conclusion cannot be regarded as determinative of the status of local health departments in other contexts. "[I]t is well established that an entity may be considered an agency, unit, or instrumentality of government for one purpose, but not for another." 70 *Opinions of the Attorney General* 30, 32 (1985). Cf. 67 *Opinions of the Attorney General* 244, 247 n. 5 (1982) (conclusion that Legal Services Corporation is not State entity for purposes of Maryland Public Ethics Law has no bearing on whether Corporation is State entity for other purposes); 65 *Opinions of the Attorney General* 356, 363 n. 3 (1980) (county boards of education are State agencies for some purposes, local agencies for others).

each debt for which the Central Collection Unit has collection responsibility under this subsection." SF §3-302(a)(2). Thus, the CCU has broad statutory authority to collect delinquent debts owed to the various State government entities.² Moreover, the CCU's authority extends to units of State government whose funds are not part of the State Treasury. SF §3-305(b).

However, the CCU's authority does not extend beyond State government. Its responsibility is expressly limited to debts "owed to the State or any of its officials or units." Accordingly, the CCU may not collect debts owed to local health departments unless those departments are units of State government for the purposes of SF §3-302. See *Holy Cross Hospital v. Health Services Cost Review Commission*, 283 Md. 677, 683 (1983) (agencies of State may exercise only those powers granted expressly or by necessary implication).

The term "unit of State government" is not defined. Therefore, we turn to the principles underlying a determination of whether an entity is a component of State government.

II

Determination of Status as Unit of State Government

Determining whether a particular entity is a unit of State government for a particular purpose is not necessarily a simple matter. "[T]here is no single test for determining whether a statutorily-established entity is an agency or instrumentality of the State for a particular purpose. All aspects of the interrelationship between the State and the statutorily-established entity must be examined in order to determine its status." *A.S. Abell Publishing Co. v. Mezzanote*, 297 Md. 26, 35 (1983).³

²The breadth of the CCU's authority is underscored by the express itemization, in SF §3-302(b), of claims for which the CCU is not responsible.

³In *A.S. Abell*, the Court of Appeals held that the Maryland Insurance Guarantee Association ("MIGA") is an agency or instrumentality of the State for purposes of the Public Information Act. 297 Md. at 39. In reaching that conclusion, the Court particularly rejected the contention that MIGA could not be regarded as a State agency because it had not been so designated by the General Assembly. While the General Assembly has expressly designated some entities as State agencies, "the absence of a legislative designation is not determinative of MIGA's status." *Id.*

Moreover, the status of an entity for some purpose is not determinative of its status for other purposes. Thus, for example, the Washington Suburban Sanitary Commission ("WSSC") was held to be a State agency for the applicability of sovereign immunity in *Katz v. Washington Suburban Sanitary Comm'n*, 284 Md. 503, 512 (1979). Again, in *Donocam Associates v. Washington Suburban Sanitary Comm'n*, 302 Md. 501, 510 (1985), the WSSC was held to be a State agency for the Administrative Procedure Act's applicability. Yet, in *Washington Suburban Sanitary Comm'n v. C. I. Mitchell & Best Co.*, 303 Md. 544, 561 (1985), the WSSC was held not to be a State agency for the purpose of a statute creating an administrative remedy for persons seeking to recover excess charges mistakenly paid to State agencies.

The decisions of the Court of Appeals in *Katz* and *Mitchell & Best* demonstrate that the determination of an entity's status must be based on the relationship between it and the State. Further, that relationship must be viewed in the context of the particular law whose applicability is in question.⁴

In *Katz*, the WSSC's assertion of the defense of governmental immunity from tort liability was opposed on the ground that the WSSC is not a State agency. The Court of Appeals noted that the members of the WSSC are appointed by the county executives and the county councils of the two counties in which the Washington Suburban Sanitary District lies and that its capital and operating budgets are subject to review and approval by the county executives and county councils. Notwithstanding that degree of local control, the Court of Appeals held that the WSSC is a State agency for the purpose of determining its immunity to suit. The WSSC was created by public general law, it has "regional functions and responsibilities," and it was "created by the General Assembly as [a] State agenc[y] responsible for providing services which would otherwise be the responsibility of the counties." 284 Md. at 512.

In *Mitchell & Best*, the Court of Appeals considered the applicability to the WSSC of a statutorily created administrative procedure for claiming refunds of charges "erroneously or mistakenly paid to any State ... agency authorized to collect the same." Article

⁴This point is further illustrated by the categorizations of MIGA. As discussed in note 3 above, the Court of Appeals held that MIGA was a State agency for purposes of the Public Information Act. But we later concluded that MIGA was not a "unit of the State government," for purposes of the statutory ban against retaining private counsel. 70 *Opinions of the Attorney General* 30 (1985). See also 71 *Opinions of the Attorney General* 206, 211 (1986).

81, §215 of the Maryland Code. The Court concluded that the refund procedure did not apply to charges assessed by the WSSC:

“The budget of WSSC is not included in the State budget submitted by the Governor and approved by the General Assembly. WSSC’s budget is approved by the county councils of the two counties within which the [Washington Suburban Sanitary] District lies. The refund provisions of Article 81, §§215 and 216 contemplate a state agency which is at least subject to some role of the Comptroller in connection with disbursing funds.” *Mitchell and Best*, 303 Md. at 544.

Thus, the determination of whether county boards of health are units of State government for the purpose of CCU’s debt collection powers must be based on the relationship between the State and the county boards, considered in light of the purposes of the debt collection statute, SF §3-302.

III

Relationship of County Boards of Health to State

A. *State Policy Direction*

The county boards of health were created by public general law to implement and administer the programs of the Department of Health and Mental Hygiene (“DHMH”), in order “to provide more efficient means for promoting the public health in this State.” Chapter 22, Laws of Maryland 1886. Although county boards of health have power to “adopt and enforce rules and regulations on any nuisance or cause of disease in the county” under HG §3-202(d) of the Health-General Article (“HG” Article), their primary duties are established by public general law. HG §3-202(a). And, the authority given to the counties to regulate health matters “may not 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 law relating to the subject of health.” Article 25, §3(n). *Accord* Article 25A, §5(J).

The Secretary of Health and Mental Hygiene “shall establish general policy for, and adopt standards to promote and guide the development of, the environmental, physical, and mental hygiene services of this State *and its subdivisions*.” HG §2-105(a). Further,

the Secretary "shall supervise generally the administration of the health laws of this State and its subdivisions." HG §2-105(b). Thus, basic health policy is set and administered at the State, rather than local, level.

Indeed, the rules and regulations promulgated by the Secretary are binding on the counties. *See* 43 *Opinions of the Attorney General* 190, 191 (1958) ("The rules and regulations of the State Board of Health which have been duly promulgated are to be followed by all political subdivisions of the State, and no political subdivision may issue its own rules and regulations which conflict with the policies set forth in the regulations and rules of the State Board of Health."). The county health officers, who are the executive officers of the county boards of health, are required to enforce "the State health laws and the policies, rules, and regulations that the Secretary adopts." HG §3-306(c)(4). The local boards of health must coordinate their activities with those of DHMH and must report to DHMH on sanitary conditions whenever necessary. HG §3-202(b).

While the health officer of each county is nominated by the county governing body, the health officer is appointed by the Secretary and may be removed from office only with the concurrence of both the county governing body and the Secretary. HG §3-304. The county health officer, in turn, appoints the staff of the local health department. HG §3-306(c)(2). All employees of local health departments are "State personnel," for purposes of the statutory authorization for the State to pay certain settlements or judgments. §12-401(6) of the State Government Article. *Cf.* Article 64A, §25 (status of local health department employees under merit system). Thus, the State has considerable control over the activities of the local health departments. *Cf. A.S. Abell Publishing Co. v. Mezzanote*, 297 Md. at 37-38 (noting that State control of entity, while not dispositive, is indicative of entity's status as State agency).

B. *State Fiscal Direction*

Although we understand that local funds constitute about half of the appropriations to local health departments, nevertheless we find significant aspects of overall State fiscal control. Under HG §3-202(c), county boards of health may establish fees for the services they render, but "[a] fee or charge for a service that is provided wholly or partly with State or federal funds that [DHMH] administers is subject to approval and modification by the Secretary."

HG §3-202(c)(2). Moreover, HG §16-201(b) provides that “[t]he Secretary shall require political subdivisions and grantees to set, subject to approval and modifications of the Secretary, charges for services that are provided by the political subdivisions or grantees and that are supported wholly or partly by State or federal funds administered by [DHMH].” *See also* HG §16-208 (legislative intent that uniform payment standards and procedures be applied “to all individuals who receive services under programs that either are operated by [DHMH] or supported wholly or partly by State or federal funds administered by [DHMH]”).

In accordance with the authority granted by those statutory provisions, the Secretary has promulgated extensive regulations concerning the fiscal administration of local health services. Those regulations require the health officer of each political subdivision to submit to the Secretary an annual plan for the operation of the local health program and a budget for the program. COMAR 10.04.01.05A. The regulations describe in detail the contents of the plan and, indeed, the format to be used for the plan. COMAR 10.04.01.05 to 10.04.01.07 and Addendum 1. Moreover, the records of political subdivisions’ disbursements and revenues “relating to local health department activities” are subject to audit by DHMH. COMAR 10.04.01.08M(2).

Similarly detailed regulations govern the setting and collection of fees or charges for services rendered by local health departments. Those regulations are designed to ensure “that charges for health services reflect the full costs of rendering those services [and] that the methods for determining full costs be uniform among all units.” COMAR 10.02.01 Preface. To that end, they require the political subdivisions to provide schedules of recommended charges for approval or modification by the Secretary. COMAR 10.02.01.03B and C. In addition, the regulations require submission for the Secretary’s approval or modification of a plan for billing and collection of those charges and fees, which must set forth the subdivision’s proposed “procedure to be followed in making a reasonable effort to collect unpaid amounts due.” COMAR 10.02.01.05C(4).⁵

⁵Under the regulations of the CCU, any organization to which a debt is owed must attempt to collect the debt before referring it to CCU for enforced collection action. COMAR 17.01.01.04.

C. Summary

This degree of State control over local health administration reflects the strong public interest in maintaining a coordinated and fully effective statewide system of health services. This office has previously noted that "the preservation of the health and physical safety of the people of the State is one of the prime functions of the General Assembly in the exercise of the police power." 43 *Opinions of the Attorney General* at 191. Thus, the county boards of health serve an important public purpose under significant State control. Cf. *A.S. Abell Publishing Co.*, 297 Md. at 37-38 (noting public purpose of and State control over Maryland Insurance Guaranty Association).

Moreover, the health programs administered by the local boards, with few exceptions, are financed wholly or partly by State funds or by federal funds administered by DHMH. Hence, the State has a strong interest in the recoupment of those funds through efficient collection of debts owed for the services so financed. The CCU was created, of course, to centralize and make more efficient just such recoupment efforts. See Chapter 355, Laws of Maryland 1973 (creating CCU and removing collection functions from other State agencies).

The strength of the State's interest in recoupment of State and federal funds used to provide health services at the local level is exemplified by HG §16-202(d). Under that provision, DHMH may—but need not—"delegate to the political subdivision ... the determination and collection of the amount payable" for services provided by a political subdivision. "However, the political subdivision ... shall follow each law and each rule and regulation of [DHMH]" in making the determination. *Id.* By thus assigning to DHMH the primary responsibility for collecting payments due for services provided at the local level, that provision evidences the General Assembly's view that such payments are properly regarded as due to the State.

Hence, in view of the relationship between the State and the local boards of health, we think those boards are units of the State government for purposes of CCU's debt collection powers.⁶

⁶The definitions of the terms "county" and "health officer" in HG §3-101(b) and (c) explicitly exclude Baltimore City and the Baltimore City Commissioner of Health. Hence, the provisions of HG §§3-101 through 3-309 are not applicable to Baltimore City. See Special Revisor's Note to HG §3-101(b). The Baltimore City Commissioner of Health has the same powers, however, under the City's Charter. *Id.* State health

IV Conclusion

In summary, it is our opinion that debts owed to local boards of health are debts "owed to the State or any of its officials or units" within the meaning of SF §3-302. Accordingly, CCU has authority to collect those debts in accordance with its procedures.⁷

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programs are administered in Baltimore City in the same way as in the counties. See, e.g., HG §18-315 (antirabies clinics). Moreover, the Secretary of Health and Mental Hygiene "super-vise[s] generally the administration of the health laws of this State and its subdivisions," including Baltimore City. HG §2-105(b). Therefore, the relationship between the State and the City with regard to State-mandated health programs is essentially the same as that between the State and the counties. Cf. 67 *Opinions of the Attorney General* 356, 363 (1982) (Baltimore City Department of Social Services is in same position as other local departments of social services).

The provisions of HG §§3-101 through 3-309 clearly are applicable in the same way and to the same extent to both "home rule" and "non-home rule" counties. HG §§3-201 and 3-202(b). Accordingly, the relationship between the State and the various counties with regard to these health programs, and the authority of CCU, is not affected by the degree of autonomy particular counties have in other contexts.

⁷See note 5 above.

HEALTH OCCUPATIONS

PHYSICIANS—DELEGATION OF DUTIES—PHYSICIAN'S ASSISTANTS—THE BOARD OF MEDICAL EXAMINERS MAY REGULATE THE DUTIES DELEGATED TO PHYSICIAN'S ASSISTANTS BUT MAY NOT LICENSE OR REGISTER PHYSICIAN'S ASSISTANTS.

February 18, 1986

C. Earl Hill, M.D.

President

Board of Medical Examiners

The Board of Medical Examiners has requested our opinion regarding the scope of its authority under §14-304(c) of the Health Occupations Article ("HO" Article) to regulate physician's assistants.

For the reasons stated below, we conclude that HO §14-304 does not authorize the Board of Medical Examiners to act as an occupational licensing board for physician's assistants. Thus, the Board lacks the authority to pass upon the qualifications of physician's assistants under a procedure—whether labeled "registration" or something else—that amounts to licensure or certification. However, HO §14-304(c) does authorize the Board to specify the circumstances under which a physician may delegate duties within the scope of the practice of medicine to an assistant and to regulate the carrying out of those duties by a physician's assistant.

We recognize that the line between impermissible regulation of physician's assistants as such and permissible regulation of delegated duties by physicians is not easy to draw. Hence, we believe that more precise direction from the General Assembly is warranted.

I

Statutory Provision on Delegated Duties

HO §14-304 provides as follows:

"(a) To the extent permitted by the rules, regulations, and orders of the Board and the Commission, an individual

to whom duties are delegated by a licensed physician may perform those duties without a license as provided in this section.

(b) The individuals to whom duties may be delegated under this section include any individual authorized to practice any other health occupation regulated under this article.

(c) The Board shall adopt rules and regulations to delineate the scope of this section. Before it adopts any rule or regulation under this section, the Board shall invite and consider proposals from any individual or health group that could be affected by the rule or regulation.

(d) (1) If a duty that is to be delegated under this section is a part of the practice of a health occupation that is regulated under this article by another board, any rule or regulation concerning that duty shall be adopted jointly by the Board of Medical Examiners and the board that regulates the other health occupation.

(2) If the two boards cannot agree on a proposed rule or regulation, the proposal shall be submitted to the Secretary for a final decision."

HO §14-304 recognizes the reality that a physician cannot alone perform every act that falls within the practice of medicine. *See* HO §14-101(i) (definition of "Practice medicine"). Thus, HO §14-304 sets the basic conditions under which duties may be delegated to persons other than physicians and assures that those persons will not be subject to prosecution for practicing medicine without a license. *See* HO §14-701.

Moreover, HO §14-304 addresses the full range of potentially delegated duties. That is, it provides that if the duty "is a part of the practice of a health occupation that is regulated under this article by another board," the duty may be delegated to that practitioner and "any rule or regulation concerning that duty shall be adopted jointly by the Board of Medical Examiners and the board that regulates the other health occupation." HO §14-304(d). If the duty is within the scope of practice of medicine alone, the physician may delegate the duty to anyone, subject to the Board's regulations. HO §14-304(a) and (c).

II

Physician's Assistants

The profession of physician's assistant is not presently regulated by the Health Occupations Article. Under the Board's regulations, a physician's assistant is defined as follows:

“ ‘Physician's assistant’ means an individual other than a licensed physician who, after adequate training, registration by the Board of Medical Examiners, and having a job description approved by the Board, may perform certain duties that would otherwise be performed by a licensed and registered physician.” COMAR 10.32.03.01B(8).

In general, the Board's regulatory scheme has two basic elements: criteria governing the carrying out of delegated duties, and requirements for the registration of physician's assistants. *Compare, e.g.*, COMAR 10.32.03.06B (prohibition on delegating authority to prescribe or dispense drugs) *with* COMAR 10.32.03.04B (application and examination requirements for physician's assistants).

III

Scope of Board Authority

A. *Introduction*

In a recent opinion, we described as a “fundamental premise” of administrative law that “the actions of an administrative agency must be consistent with the statute that grants it the authority to act.” 70 *Opinions of the Attorney General* 135, 135 (1985). Hence, the authority of the Board of Medical Examiners to regulate delegated duties, and those who carry them out, depends upon HO §14-304 and the legislative intent that it reflects.

B. *Permissible regulation*

HO §14-304 protects patient welfare through regulation of the actual performance of delegated duties: “To the extent permitted by ... regulations, ... an individual to whom duties are delegated by a licensed physician may perform those duties without a license as provided in this section.” HO §14-304(a). Thus, the Board plainly acts within its authority under HO §14-304 when it adopts reason-

able regulations on such matters as the duties that may be delegated to physician's assistants and the supervision that must be provided.

Moreover, the Board is presently authorized to make determinations about the qualifications of physician's assistants, in the context of deciding whether to allow assistants to perform a given duty. For example, assuming a reasonable basis for its decision, the Board may identify duties that are not to be delegated under any circumstances, because no physician's assistant is qualified to perform those duties. Conversely, the Board may identify a given set of duties that may be delegated to any physician's assistant who is certified by a national certifying board or holds some other credential identified by the Board. In effect, the Board would be making a regulatory judgment that all persons so certified are qualified to perform the identified duties.

We believe that essentially self-enforcing standards of this kind best comport with the mandate of HO §14-304(c) that the "Board shall adopt rules and regulations to delineate the scope of this section."¹ Nevertheless, the Board is not foreclosed from consideration of delegation questions on a case-by-case basis as well. For example, the Board has the authority to refuse to permit a particular physician to delegate particular duties to a particular physician's assistant, on the grounds that the assistant is not qualified to perform those duties. But such decisionmaking often carries with it a risk that those adversely affected will perceive the process as arbitrary and unfair. Therefore, if the Board intends to continue a process of case-by-case determinations, like the review of individual job descriptions contemplated by COMAR 10.32.03.05, it should take care to do so on the basis of reasonable, consistently applied factors.²

¹We do not mean to impliedly endorse all of the specific provisions of the Board's substantive regulation of delegated duties. The Antitrust Division will shortly be undertaking a review of those regulations as part of its counseling function.

²We note that the Board's current regulations provide for notice and a hearing if the Board disapproves an application for registration. COMAR 10.32.03.04.F. However, no comparable provision provides for notice and a hearing if the Board disapproves a job description. *See* COMAR 10.32.03.05B and C.

If the Board determines to continue case-by-case determinations about proposed delegated duties, it may well be required to grant a hearing before denying a proposal that a physician's assistant perform such duties. *See* §§10-201(c) and 10-205 of the State Government Article.

C. Impermissible regulation

In our view, HO §14-304(c) does not authorize the Board to create, in effect, an across-the-board licensing requirement for physician's assistants. The "registration" scheme under COMAR 10.32.03.04 imposes eligibility and examination requirements akin to the prerequisites for licensure required by statute for the various health occupations.

If such direct regulation of entry into the profession is to be imposed, action by the General Assembly is required. Indeed, the General Assembly has acted in precisely this fashion in requiring a certification procedure for cardiac rescue technicians [HO §14-303], aviation trauma technicians [HO §14-303.1] and emergency medical technician-paramedics [HO §14-303.2]. In light of the wording and apparent purpose of HO §14-304, and the General Assembly's enactment of certification criteria for specific categories of otherwise unregulated persons who perform delegated duties, we conclude that the Board lacks the authority to regulate physician's assistants as a group, through the analogue to licensure in COMAR 10.32.03.04.³

IV

Conclusion

In summary, it is our opinion that HO §14-304 authorizes the Board of Medical Examiners to specify the duties that may be delegated to a physician's assistant and to regulate the conditions under which those duties are to be performed. It does not authorize the Board to license or register physician's assistants.

STEPHEN H. SACHS
Attorney General

JACK SCHWARTZ
Chief Counsel
Opinions and Advice

³As discussed in Part III B above, the Board is not precluded from determining that all physician's assistants who hold a particular credential are qualified to perform specified duties.

Editor's Note: The Board of Medical Examiners has been redesignated as the Board of Physician Quality Assurance, with new responsibilities for physician discipline. Chapter 109, Laws of Maryland 1988.

HEALTH OCCUPATIONS—NURSE PRACTITIONERS—PHARMACISTS—
PHARMACISTS ARE NOT PROHIBITED FROM FILLING PRESCRIPTIONS
PROPERLY ISSUED BY NURSE PRACTITIONERS.

March 25, 1986

The Honorable Marilyn Goldwater
Maryland House Of Delegates

You have requested our opinion whether, under current law, pharmacists are prohibited from filling prescriptions issued by nurse practitioners.

For the reasons stated below, we conclude that pharmacists are not prohibited from filling prescriptions properly issued by nurse practitioners.

I

Nurse Practitioners
and the Issuance of Prescriptions

In 61 *Opinions of the Attorney General* 619, 620 (1976), this office described the role of nurse practitioners as follows:

“Historically, nursing has been an adjunct to the practice of medicine. Although the nurse certainly did many things independently, nurses were largely thought of as persons trained to follow the directions of physicians regarding the care and treatment of the physicians’ patients. The development of the modern health care delivery system has, however, created a need to expand the functions of physicians’ auxiliaries. A person capable of making independent, albeit limited, medical judgments and of performing medical functions which may transcend traditional functions of nurses, is required. Such persons might be stratified somewhere between the traditional nurse and the physician. ... The General Assembly has acted both to encourage the expanded role of the nurse and to allow delegation by physicians of certain medical functions to other qualified persons.”

The speciality of nurse practitioner is authorized in the statute and governed in detail by regulation. Under §7-302(b) of the Health Occupations Article ("HO" Article):

"An applicant for certification as a certified nurse practitioner shall:

- (1) Be a registered nurse;
- (2) Complete a nurse practitioner program approved by the Board [of Examiners of Nurses]; and
- (3) Meet the other requirements that the Board sets."

In addition, HO §7-305 provides that "[a]n applicant qualifies for certification as a certified nurse practitioner only if the applicant passes a Board approved examination." The special status of nurse practitioners is further recognized by the statute's creation of a separate peer review committee for certified nurse practitioners. HO §7-504(c)(3).

Under the pertinent regulations, a nurse practitioner is "a registered nurse who by reason of certification under these regulations may engage in the activities authorized by these regulations." COMAR 10.27.07.01B(4). *See also* COMAR 10.27.07.03A (requirements for certification, including examination). These regulations were issued jointly by the Board of Examiners of Nurses ("Nursing Board") and the Board of Medical Examiners ("Medical Board"). 8 Md. Reg. 473 (March 6, 1981).

The actual practice of a nurse practitioner is controlled by a "written agreement with the physician." COMAR 10.27.07.02B(2). A nurse practitioner may, "under the terms and conditions set forth in the written agreement ... [p]rescrib[e] drugs." COMAR 10.27.07.02A(4). Correspondingly, the physician is to "[e]stablish and review drug and other medical guidelines with the nurse practitioner [and] [p]articipate with the nurse practitioner in periodically reviewing and discussing medical diagnoses and the therapeutic or corrective measures employed in the practice setting." COMAR 10.27.07.02B(2)(b) and (c).

The nurse practitioner regulations are authorized by the statute governing the delegation of duties by licensed physicians.¹ Under HO §14-304(a), "to the extent permitted by the rules, regulations,

¹The statute in effect at the time that the nurse practitioner regulations were adopted likewise authorized the delegation of duties by physicians, if permitted by regulation. *See* former Article 43, §122(b)(6).

and orders of the [Medical] Board and the Commission [on Medical Discipline], an individual to whom duties are delegated by a licensed physician may perform those duties without a license as provided in this section.”² If “a duty that is to be delegated ... is a part of the practice of a health occupation that is regulated ... by another board, any rule or regulation concerning that duty shall be adopted jointly by the Board of Medical Examiners and the board that regulates the other health occupation.” HO §14-304(d)(1).³

In an opinion reviewing the legality of these regulations, we observed that the Medical Board and the Nursing Board had “broad administrative discretion” to decide what duties nurse practitioners would be permitted to perform. Opinion No. 80-087, at 7 (November 24, 1980) (unpublished).

In short, nurse practitioners unquestionably have authority to issue prescriptions, in accordance with the written agreement with a physician required by the regulation. Thus, the sole question is whether the statute regulating the practice of pharmacy prevents these prescriptions from being filled.

II

The Filling of Nurse Practitioner Prescriptions

A. *The Former Pharmacy Act*

When nurse practitioners were first authorized to issue prescriptions in 1981, pharmacists had clear legal authority to fill those prescriptions under the statute regulating the practice of pharmacy (the “Pharmacy Act”).⁴ Several provisions then in the statute re-

²The prescribing of drugs is, of course, part of the practice of medicine. See HO §14-101(i) and former Article 43, §119(f)(1). See also 61 *Opinions of the Attorney General* at 625 n. 4.

³The scope of practice of registered nursing includes both “[d]elegated medical functions” and “any additional acts authorized by” the Board of Examiners of Nurses under its authority. HO §7-101(h)(2)(iv)2 and (v). The Nursing Board has the authority “to adopt rules and regulations for the performance of additional acts that ... are recognized jointly by the medical and nursing professions as proper to be performed by registered nurses.” HO §7-205(a)(3)(ii). See also former Article 43, §294(a)(2).

⁴The “practice of pharmacy” was generally defined in pertinent part as the “selec-

flected the obvious fact that the vast majority of prescriptions are written by physicians and dentists. *See, e.g.*, former Article 43, §§249 (“physicians and dentists [may] personally compound and dispense their own prescriptions”) and 254B (“prescription presented more than 120 days from the date it was issued by a physician or dentist” not to be filled). However, no provision of the former Pharmacy Act purported to catalog exhaustively or to define all those who had authority to issue prescriptions.

Under the former Pharmacy Act, a pharmacist was subject to discipline for the “[d]ispensing or sale of any drug for which a prescription is required without first having received from an authorized prescriber a written or oral prescription for the drug.” Former Article 43, §266A(c)(1)(vii). The term “authorized prescriber” was undefined. Hence, because nurse practitioners were authorized by regulation to issue prescriptions under certain circumstances, they were “authorized prescribers” within the meaning of former Article 43, §266A(c)(1)(vii). And, in fact, the prescriptions of nurse practitioners were filled without incident.

B. *The Recodified Pharmacy Act*

In 1981 the Pharmacy Act was recodified as Title 12 of the Health Occupations Article. The prohibition on unauthorized prescriptions contained in former Article 43, §266A(c)(1)(vii) was carried forward without significant change to HO §12-311(b)(14):

“[T]he [State] Board [of Pharmacy] ... may deny a license to any applicant, reprimand any licensee, place any licensee on probation, or suspend or revoke a license if the applicant or licensee ...

Without first having received a written or oral prescription for the drug from an authorized prescriber, dispenses any drug for which a prescription is required.”

However, for the first time the term “authorized prescriber” was defined. Under HO §12-101(b), “‘authorized prescriber’ means any licensed dentist, licensed physician, licensed podiatrist, or licensed veterinarian.” The Revisor’s Note describes this definition as “new language added to replace the various, unnecessarily diverse references throughout the former law to those who may issue prescriptions.”

tion, preparation, and dispensing of drugs, medicines, and devices used in the diagnosis, treatment, and prevention of disease.” Former Article 43, §250(a)(1).

Thus, if the listing in the definition of “authorized prescriber” is construed to be an exclusive and exhaustive listing of those who are authorized to issue prescriptions, then the prohibition in HO §12-311(b)(14) would preclude a pharmacist from filling a prescription issued by a nurse practitioner. However, such a reading would, in our view, be inconsistent with other provisions in the Pharmacy Act and contrary to the manifest legislative intent.

C. Construction of “Authorized Prescriber”

The Pharmacy Act “does not limit the right of an individual to practice a health occupation that the individual is authorized to practice under this article.” HO §12-102(a). As discussed in Part I above, a nurse practitioner is authorized to issue prescriptions as part of his or her “practice [of] a health occupation.” If the definition of “authorized prescriber,” for purposes of the Pharmacy Act, were read so as to effectively prevent nurse practitioners from issuing prescriptions, just such a limitation of practice would occur.

That reading would yield the absurd situation in which nurse practitioners had full authority to issue worthless prescriptions. We are unwilling to ascribe to the General Assembly an intention to use the backhanded device of a definition to do precisely what HO §12-102(a) says is not to be done by the Pharmacy Act. *See Maguire v. State*, 192 Md. 615, 623-24 (definitions must be given a “reasonable construction” in the entire context of the statute, to avoid “absurdity”).⁵

The grounds for discipline set out in HO §12-311(b)—including the prohibition in HO §12-311(b)(14) against filling a prescription from someone other than “an authorized prescriber,” as newly defined in HO §12-101(b)—is described in the Revisor’s Note as “new language derived without substantive change” from several provisions of former Article 43. (Emphasis added.) But because pharmacists were not prohibited by the predecessor provision from filling the prescriptions of nurse practitioners, a literal reading of “authorized prescriber” in this context would effect a substantive change, contrary to the express intent.

⁵“In order to avoid repugnance with other parts of the act and conflict with legislative intent, the words [of a definition] may be restricted or expanded by the subject matter. The propriety of construing the words is obvious for all parts of an act should be in harmony with the intent of the act.” 2A Singer, *Sutherland Statutory Construction* §47.07 at 133 (Sands 4th ed. 1984 rev.).

As the Court of Appeals has repeatedly held, "a change in a statute as part of a general recodification will ordinarily not be deemed to modify the law unless the change is such that the intention of the Legislature to modify the law is unmistakable." *Duffy v. Conway*, 295 Md. 242, 257 (1983). See also *In re Special Investigation No. 236*, 295 Md. 573, 576 (1983); *Office and Professional Employees International Union, Local 2 v. MTA*, 295 Md. 88, 100 (1982); *Hoffman v. Key Federal Savings & Loan Association*, 286 Md. 28, 37 (1979); *Bureau of Mines v. George's Creek Coal & Land Co.*, 272 Md. 143, 155 (1974). Here, in light of HO §12-102(a) and the Revisor's Note, there is no indication of a legislative intent to effect a substantive change concerning nurse practitioners through the adoption of a definition of "authorized prescriber" in the Pharmacy Act. To the contrary, the intent to make no substantive change is clear.

Moreover, quite apart from the situation of nurse practitioners, the term "authorized prescriber," as defined in HO §12-101(b), cannot be read as if it alone identified those whose prescriptions may be filled. For example, the subheading of Article 27 that deals with controlled dangerous substances contains definitions and restrictions that must be read in conjunction with the Pharmacy Act. Under Article 27, §285(a), certain controlled dangerous substances may not be "dispensed without the written prescription of a practitioner." A "practitioner" is defined as "a physician, dentist, veterinarian, scientific investigator, or other person licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to or administer a controlled dangerous substance in the course of professional practice or research in this State." Article 27, §277(t)(1). See also Article 27, §277(a) (definition of "dispense").

The definition of "authorized prescriber" in HO §12-101(b) cannot and should not be read as an implied repeal of any of the authorizations or restrictions in the controlled dangerous substances subheading of Article 27. That is, a pharmacist is not authorized to fill a prescription for a controlled dangerous substance, even if the prescription is written by an "authorized prescriber" under HO §12-101(b), unless all of the requirements pertaining to controlled dangerous substances are satisfied; and conversely, a pharmacist is not prohibited from filling a prescription for controlled dangerous substances lawfully issued by a "practitioner" under Article 27, §285, even if the practitioner does not come within the definition

of "authorized prescriber" in HO §12-101(b).⁶

This reasoning, we think, is pertinent to your question: Just as a pharmacist cannot rely solely on the provisions within the four corners of the Pharmacy Act in prescribing controlled dangerous substances, so the pharmacist must look to other law in filling prescriptions written by nurse practitioners.

In sum, the definition of "authorized prescriber" in HO §12-101(b) does not supplant other law bearing on the issuance and filling of prescriptions.

III

Conclusion

It is our opinion that pharmacists are not prohibited from filling prescriptions properly issued by nurse practitioners.

STEPHEN H. SACHS
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BARBARA H. FOSTER
Assistant Attorney General

⁶The pharmacist must also take account of various requirements specified in regulation. *See, e.g.*, COMAR 10.19.03.07C.

HEALTH OCCUPATIONS—CHIROPRACTORS—BLOOD TESTING AND
URINALYSIS ARE WITHIN SCOPE OF PRACTICE OF CHIROPRACTIC.

August 1, 1986

Arthur T. Keefe, Jr., M.D.
Secretary, Board of Medical
Examiners of Maryland

The Board of Medical Examiners has requested our opinion on whether the use of certain laboratory diagnostic techniques—specifically, blood tests and urinalysis—is within the scope of the practice of chiropractic, as defined by §3-101(f) of the Health Occupations Article (“HO” Article).

While the question is a close one, for the reasons given below, we conclude that the use of those laboratory procedures is within the scope of the practice of chiropractic.¹

I

Statutory Definition of Practice of Chiropractic

The starting point of our analysis is, of course, the language of the statutory “scope of practice” provision applicable to chiropractors. See *Public Service Comm’n v. Baltimore Gas & Electric Co.*, 60 Md. App. 495, 508 (1984). HO §3-101(f) defines the practice of chiropractic as follows:

“(1) ‘Practice chiropractic’ means to use a drugless system of health care based on the principle that interference with the transmission of nerve impulses may cause disease.

(2) ‘Practice chiropractic’ includes the diagnosing and locating of misaligned or displaced vertebrae and, through the manual manipulation and adjustment of the spine and

¹This opinion should not be understood to address the statutory authority for any laboratory procedure other than blood tests and urinalysis, the subject of your inquiry and the procedures traditionally used by chiropractors. See Part II A below.

other skeletal structures, treating disorders of the human body.

(3) Except as otherwise provided in this title, 'practice chiropractic' does not include the use of drugs or surgery, or the practice of osteopathy, obstetrics, or any other branch of medicine.

(4) The definition of 'practice chiropractic' does not prohibit a chiropractor from selecting diet and hygiene measures for an individual."

Thus, chiropractic is a limited form of health care. *Cf.* HO §14-101(k) (broadly defining practice of medicine). Accordingly, chiropractors are restricted in their practice to only those actions encompassed by the statutory definition. *See* 15 *Opinions of the Attorney General* 63, 65 (1930) (in absence of authorization under prior law, chiropractors could not prescribe diets). If chiropractors are not statutorily authorized to make use of laboratory procedures in "diagnosing ... misaligned or displaced vertebrae," a chiropractor's attempt to do so would constitute unlawful practice of medicine.

It has been suggested that the definitional reference to "diagnos[is] of misaligned or displaced vertebrae" restricts chiropractors to using only those diagnostic techniques that will affirmatively and directly show the existence of such misalignments or displacements. X-rays and purely physical diagnostic techniques such as palpation will affirmatively show the existence and location of any misalignment or displacement. Laboratory analyses of blood and urine samples, however, will not. Rather, they are used by chiropractors to eliminate the possibility that a patient's symptoms are caused by an organic disorder not treatable by chiropractic. Accordingly, it has been suggested that the use of those laboratory procedures falls outside the scope of "diagnosing ... misaligned or displaced vertebrae."

However, in our view, HO §3-101(f)(2) need not and should not be read so restrictively. One legitimate way of determining whether a patient suffers from misaligned or displaced vertebrae is to eliminate other potential causes of the patient's symptoms.² Ac-

²Back pain—the complaint chiropractors most commonly see—may be caused by various organic disorders, as well as by misaligned vertebrae. Letter from D. Brent Owens, D.C., Vice-President, Board of Chiropractic Examiners, to Arthur T. Keefe, Jr., M.D., Secretary, Board of Medical Examiners, at 2 (December 17, 1982). Chiropractic treatment is inefficacious to remedy those disorders and, in some cases, may be contraindicated. *Id.*

cordingly, we think that “diagnosing ... misaligned or displaced vertebrae” may be accomplished both by the use of diagnostic procedures that will affirmatively show the presence or absence of misalignment and by the use of less direct, process-of-elimination methods of diagnosis.

Of course, chiropractors are prohibited by HO §3-101(f)(3) from making use of any diagnostic procedure that involves the use of drugs or surgery.³ It has been suggested that HO §3-101(f)(3) also prohibits chiropractors from using the procedures at issue here, by prohibiting “the practice of osteopathy, obstetrics, or any other branch of medicine.” We do not think that provision has such an effect, however.

Diagnosis certainly is a part of the practice of medicine in general. HO §14-101(k). See *Aitchison v. State*, 204 Md. 538, 546 (1954). However, the general phrase “any other branch of medicine” in HO §3-101(f)(3) follows a specific enumeration of particular medical specialties. In such a case, “the general words in the statute will usually be construed to include only those things of the same class or general nature as those specifically antecedently mentioned.” *State v. Sinclair & Sinwellan Corp.*, 274 Md. 646, 658 (1975). See also *State v. One Hundred and Fifty-Eight Gaming Devices*, 304 Md. 404, 429 n. 12 (1985). Diagnostic techniques do not in themselves constitute a comparable “branch of medicine”—that is, diagnosis is not itself a medical treatment specialty similar to osteopathy or obstetrics.

Thus, HO §3-101(f)(3) as a whole should be read as prohibiting chiropractors from (i) using drugs or surgery for either diagnostic or treatment purposes and (ii) treating their patients by any of the methods used in any medical specialty, except those clearly permitted. *E.g.*, HO §3-101(f)(4). It does not prohibit chiropractors from employing a diagnostic technique involving laboratory tests but not the use of drugs or surgery.

³A Michigan appellate court has held that taking a blood sample, because it involves piercing the skin with a needle, is prohibited by a statute prohibiting chiropractors from performing “incisive surgical procedures [or] an invasive procedure requiring instrumentation.” *People v. Bovee*, 285 N.W.2d 53, 59 (Mich. App. 1979). That statutory language broadly prohibits all procedures involving intrusion into the body, whether or not those procedures constitute surgery. HO §3-101(f)(3), in contrast, prohibits “the use of ... surgery,” but does not clearly prohibit all intrusive procedures. Taking blood samples is an intrusive procedure. See *Robinson v. State*, 18 Md. App. 678, 692 (1973). It is by no means, however, “surgery” as that term is generally understood.

II

Background and Legislative
History of Scope of Practice ProvisionsA. *Background of Enactment*

In construing a statute, the background of its adoption—the circumstances existing at the time—may properly be considered in resolving any uncertainty as to its meaning. *Northland Insurance Co. v. Walls*, 291 Md. 604, 611 (1981).

The Chiropractic Practice Act, now codified as Title 3 of the Health Occupations Article, was originally enacted as Chapter 666 of the Laws of Maryland 1920. That Act did not expressly define the practice of chiropractic. Instead, it limited the scope of chiropractic by providing that chiropractors “may adjust by hand any articulations of the spinal column, but shall not prescribe [medication], practice major or minor surgery, obstetrics, nor any other branch of medicine, nor practice osteopathy.” Chapter 666, Laws of Maryland 1920, sec. 6(c).

At that time, there was disagreement within the profession itself as to the proper scope of the practice of chiropractic. One school of thought held, on the ground that all diseases and disorders are caused by misalignment or displacement of vertebrae, that diagnosis is neither a necessary nor a proper part of the practice of chiropractic. Beideman, “Seeking the Rational Alternative: The National College of Chiropractic from 1906 to 1982,” 3 *Chiropractic History* 17, 17-18 (1983). The other school held that diagnosis is fully as necessary and as proper in the practice of chiropractic as in the practice of medicine. *Id.* Accordingly, adherents of the second school of thought made use of appropriate diagnostic procedures except those involving the use of drugs or surgery.

Chiropractors in Maryland were predominantly adherents of that second school of chiropractic thought. Memorandum from D. Brent Owens, D.C., President, Board of Chiropractic Examiners, to Harry J. Matz, Assistant Attorney General (March 10, 1985). If the General Assembly had disapproved chiropractors’ use of diagnostic procedures, the Chiropractic Practice Act—enacted “to authorize and regulate the practice of Chiropractic”—would likely have included a clear prohibition against the practice. Instead, however, the Act reflected Maryland chiropractors’ orientation toward diagnostic techniques—for example, in the Act’s requirement that applicants for licensure as chiropractors demonstrate competence in subjects related to general diagnosis. Chapter 666, Laws of Maryland 1920

sec. 6(b). Hence, the General Assembly, in adopting the Act, apparently contemplated and approved the use by chiropractors in Maryland of commonly practiced drugless and nonsurgical diagnostic techniques.

B. *Legislative History*

The legislative history of HO §3-101(f) likewise, in our view, reflects an intention to authorize chiropractors to employ appropriate techniques in diagnosing vertebral misalignments.

Chapter 534 of the Laws of Maryland 1929 “substitut[ed] a definition of Chiropractic in place of the limitations imposed on persons practicing Chiropractic” by the 1920 Act. Under the 1929 Act, the practice of chiropractic was defined in part as “diagnosis, the location of misaligned or displaced vertebrae of the human spinal column, the procedure preparatory to and the adjustment by hand of such misaligned or displaced vertebrae.” Chapter 534, Laws of Maryland 1929 (amending then Article 43, §384(c)).

Thus, in that original definition, diagnosis was identified as an element of the practice of chiropractic separate from the locating of a diagnosed misalignment or displacement, thereby reflecting the theory and practice of chiropractors in Maryland. Therefore, that definition should be read—in accordance with the ordinary signification of its terms—as authorizing chiropractors to perform appropriate nonsurgical and drugless diagnosis, in order to determine whether their patients suffer from conditions treatable by chiropractic. See *Woodmont Country Club v. Montgomery County*, 61 Md. App. 229, 236 (1985) (statutory language should be given its ordinary meaning, considered in light of statute’s objectives).

That aspect of the original definition remained unchanged until its recodification, as part of a general revision and recodification of State law concerning the various health occupations, by Chapter 8 of the Laws of Maryland 1981.⁴ The Revisor’s Note to HO §3-101(f) stated that “[t]he revised definition is not intended to expand, limit, or prohibit practices authorized under the former definition of ‘practice of chiropractic.’” That definition was enacted as

⁴Other aspects of the definition were amended in the interim. For example, Chapter 704 of the Laws of Maryland 1949 enacted a provision clarifying the right of chiropractors to “select food materials necessary for the nourishment of the body and measures of cleanliness incident to the care of the human body.” That provision is now codified at HO §3-101(f)(4).

proposed by the revisor. Chapter 8, Laws of Maryland 1981, sec. 2 at 96-97. Thus, the present definition is unquestionably intended to be construed in the same way as the original definition.⁵

III

Other Relevant Statutory Provisions

A. *Introduction*

The language of any particular statutory provision must be construed in context and in relation to all other provisions of the statute. *Department of State Planning v. Mayor & Council of Hagerstown*, 288 Md. 9, 14 (1980). The relevant provisions of Title 3 of the Health Occupations Article bolster our view that the General Assembly did not intend to entirely prohibit chiropractors from using laboratory diagnostic tests.

B. *Licensing Examination Requirements*

HO §3-304 requires all applicants for licensure as chiropractors to pass a qualifying examination and sets minimum requirements for the content of that examination. The preclinical subjects covered on the examination must include at least bacteriology, histology, and pathology. HO §3-304(d)(4)(i). Those studies teach material that is necessary to an understanding of the results of laboratory tests, but is by no means necessary to the competent use of physical diagnostic techniques.⁶

In addition, the clinical studies that must be tested on the licensing examination include symptomatology, as well as physical diagnosis and roentgenology. HO §3-304(d)(4)(ii). That is, prospective

⁵Even were that not so, we think that the change in phrasing is not so material as to evidence a legislative intent to modify the law. See *In re Special Investigation No. 236*, 295 Md. 573, 576-77 (1983).

⁶We recognize that the statutory list of required examination subjects does not include certain other subjects relevant to laboratory analysis—for example, nephrology and urology. In our view, however, that omission merely reflects the fact that chiropractic is a more limited form of health care practice than medicine. The diagnosis that a chiropractor performs is not, therefore, a general medical diagnosis, but a diagnosis designed to ascertain whether a patient's symptoms are caused by misaligned or displaced vertebrae or by some organic disorder.

chiropractors must demonstrate competence not only in their performance and evaluation of physical diagnosis and x-rays but also in their evaluation of symptoms in general. Were chiropractors restricted to ascertaining whether their patients suffer from misaligned or displaced vertebrae through x-rays and physical examinations alone, there would surely be no need for such a requirement. Indeed, in that case, HO §3-304(d)(4)(ii) would require chiropractors to demonstrate competence in a skill that they were prohibited from using. We think that the General Assembly could not have intended such a result. See *Woodmont Country Club v. Montgomery County*, 61 Md. App. 229, 236 (1985) (statutory construction that leads to unreasonable or illogical results is to be avoided).

C. History of Examination Requirements

Nor are these examination requirements by any means recent innovations. From its original enactment, the Chiropractic Practice Act required a licensing examination that included at least the subjects of symptomatology and bacteriology. Chapter 666, Laws of Maryland 1920, sec. 6(b). In 1941, histology and pathology were added to the list of subjects that must be included in the preclinical portion of the licensing examination, and roentgenology was added to the clinical portion. Chapter 501, Laws of Maryland 1941 (amending then Article 43, §446(b)).

The 1941 enactment also substituted the more standard terms "neurology" and "physical diagnosis" for "nerve tracing" and "physical examination" in the designations of the clinical subjects of the examination. By those additions and amendments to the minimum licensing requirements, the General Assembly clearly recognized that chiropractic had moved away from a "one cause, one cure" theory of disease and toward the mainstream of health care. R.C. Schafer, D.C., *Chiropractic Health Care* 62, 69-70 (3d ed. 1978). Moreover, in thus upgrading the licensing requirements to reflect that progress in the profession, the General Assembly acknowledged that chiropractors appropriately make use of certain of the same diagnostic techniques used by physicians—i.e., blood and urine analyses.

IV

Administrative Interpretations
and Policy ConsiderationsA. *Introduction*

The interpretation given to a statute by those affected by it, and relied on by the public generally, is entitled to considerable weight in construing the statute. *Board of Examiners in Optometry v. Spitz*, 300 Md. 466, 480 (1984). On the present issue, it is apparent that chiropractors, their patients, and the public at large have long taken the view that laboratory analyses are an appropriate part of chiropractic diagnosis.

B. *Educational Requirements*

As already noted, chiropractic practice in Maryland has from its beginnings included the use of diagnostic techniques. *See* Part II A above. Accordingly, the Board of Chiropractic Examiners has long required that chiropractors licensed in Maryland be trained in the use of such techniques, including blood and urine analyses.

Since at least the early 1950's, the Board has required schools of chiropractic to train their students in laboratory diagnostic techniques. Board of Chiropractic Examiners, "Essentials for the Approval of Chiropractic Schools" at 12, 17 (December 17, 1953).⁷ The uniform standards for accreditation of chiropractic schools promulgated by the national Council on Chiropractic Education likewise require the schools to provide training in the use of laboratory diagnostic tests. Council on Chiropractic Education, "Educational Standards for Chiropractic Colleges" at III-7, III-23 (February, 1984). The Board now relies largely on those standards in determining whether to approve particular schools. *See* Revisor's Note, HO §3-402.

Further, the Board's criteria for evaluating performance on the licensing examination require prospective chiropractors to "demonstrate the ability to use standard methods of diagnostic procedures common to all healing arts," including blood and urine tests. Board

⁷The Board was first granted authority to "recognize" schools that provided the statutorily required minimum chiropractic training by Chapter 501 of the Laws of Maryland 1941. Graduation from a Board-approved school was explicitly made a statutory prerequisite to licensure by Chapter 268 of the Laws of Maryland 1953. That requirement is now codified at HO §3-302(c)(2), and the minimum standards for Board approval of chiropractic schools are codified at HO §3-402.

of Chiropractic Examiners, Evaluation Criteria for Clinical Portion of Examination, Part VI (December 17, 1981). Notably, those criteria were promulgated in accordance with a statutory mandate. See Chapter 378, Laws of Maryland 1981 (enacting HO §3-304(d)(1)). In the years since the Board's adoption of those criteria, the General Assembly has taken no action to nullify the requirement of proficiency in laboratory diagnosis. Such legislative inaction is indicative that the requirement carries out the legislative intent regarding chiropractors' qualifications. *Jackson Marine Sales, Inc. v. State Dep't of Assessments & Taxation*, 32 Md. App. 213, 217, cert. denied, 278 Md. 725 (1976).

C. Practice Requirements

The General Assembly has likewise acquiesced in regulations that identify laboratory diagnostic techniques as appropriate subjects of required continuing education for chiropractors. In 1973, the Board was granted statutory authority to establish continuing education requirements for the annual renewal of chiropractors' licenses. Chapter 105, Laws of Maryland 1973. Those requirements "shall reflect current educational methods and chiropractic techniques." HO §3-308(d)(2). The regulations adopted under that authority include clinical laboratory diagnosis among the course subjects that satisfy the requirement, thereby clearly identifying such diagnostic techniques as part of "current ... chiropractic techniques." See Board of Chiropractic Examiners, "Policy and Procedures: Continuing Chiropractic Education." That identification, never repudiated by the General Assembly, evidences the legislative view of laboratory diagnosis as an appropriate part of the practice of chiropractic.⁸

Further, the Board has indicated that it will discipline chiropractors for failure to use laboratory diagnosis when laboratory tests are indicated. See Board of Chiropractic Examiners, "Position/Policy Paper on Diagnosis, Treatment and Referral." See also American Chiropractic Association, *Chiropractic: State of the Art 1984* at 6-7 (1984) (quoting Council on Chiropractic Education statements adopted January 1978 and June 1979). In the Board's view,

⁸This is so, in our view, notwithstanding that the Board does not specifically require chiropractors to take continuing education courses in laboratory diagnosis. While any particular chiropractor may choose other courses, the regular inclusion of laboratory diagnosis among the Board's course offerings is nonetheless indicative that such diagnostic techniques are regarded as an appropriate part of chiropractic.

such tests are necessary to the complete fulfillment of a chiropractor's duty to refer patients to medical practitioners whenever a patient's condition is not amenable to treatment by chiropractic. Memorandum from Board of Chiropractic Examiners to Thomas J. Kwiatkowski, Jr., at 4 (June 23, 1983). *See also Salazar v. Ehmann*, 505 P.2d 387, 389 (Colo. App. 1972) (chiropractor has duty to refer patient to physician when chiropractor knows or reasonably should know that medical, rather than chiropractic, care is indicated).

D. Other Administrative Interpretation

The evidence regarding the scope of chiropractic that is provided by the administrative practices of the Board is bolstered by another administrative interpretation, in a different context.

Specifically, the Secretary of Health and Mental Hygiene, in regulations governing medical laboratories, has authorized laboratories to provide examination results to "a licensed practitioner of medicine, dentistry, podiatry, or other person authorized to engage in the practice of healing." COMAR 10.10.01.07D. Thus, medical laboratories are authorized to, and do, provide services to chiropractors. Such a practice is additional evidence that the use of laboratory tests is within the scope of the practice of chiropractic. *Cf. Board of Examiners in Optometry v. Spitz*, 300 Md. 466, 481 (1984) (ophthalmologists' practice of referring patients to opticians for contact lens fitting indicates opticians are authorized to perform such fittings).

E. Policy Considerations

For many patients, a chiropractor is the "portal of entry" health care provider—that is, the health care provider to whom the patient turns first. Those patients certainly expect the chiropractor to determine, by appropriate means of diagnosis, whether referral to a physician is needed.

If such a patient suffers from an organic disorder, the chiropractor's inability to perform or order laboratory tests may seriously delay a needed referral to a physician. In the case of a life-threatening disorder discoverable only by means of those tests, the consequences of such a delay could be grave. The alternative, presumably, would be for a chiropractor to refer patients to a physician for laboratory tests whenever the chiropractor has any reason

to suspect the patient might suffer from such an organic disorder. In that case, the cost of health care would be significantly—and, perhaps, needlessly—increased. It is reasonable to conclude that the General Assembly, because of these possible effects, chose to define the scope of chiropractic practice to include the use of laboratory procedures.

V

Conclusion

In summary, it is our opinion that chiropractors may use blood tests and urinalysis as part of their diagnoses to determine whether their patients suffer from conditions amenable to chiropractic treatment. While the question is a close one, we believe that the statutory provisions governing chiropractors, read as a whole and in light of the long-standing practice of chiropractors, evidence a legislative intent to authorize chiropractors to use those diagnostic techniques.

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INSURANCE

COMMERCIAL CASUALTY UNDERWRITING ASSOCIATION—
MALPRACTICE INSURANCE FOR NURSE MIDWIVES—
CALCULATION OF ASSESSMENTS—NATURE OF JUDICIAL RE-
VIEW.

August 6, 1986

The Honorable Edward J. Muhl
Insurance Commissioner

You have requested our opinion concerning the construction of certain provisions of Chapter 663 (Senate Bill 379), Laws of Maryland 1986. Chapter 663 adds a new Subtitle 43, the Commercial Casualty Underwriting Association Act, to the Insurance Code, Article 48A of the Maryland Code.¹ The Act provides for the creation of a Commercial Casualty Underwriting Association ("CCUA" or "Association").

Specifically, you have posed the following questions:

1. If the CCUA is directed to activate a subpool for nurse-midwives, pursuant to §602(b)(2), may the Association issue malpractice insurance to nurse-midwives, in light of the provision in §607 that the Act does not apply to medical malpractice insurance?
2. In determining the assessment to be levied against member insurers to support the CCUA, should the Association base its calculations on (i) premiums attributable to all commercial casualty insurance policies issued in this State or (ii) only those premiums attributable to commercial casualty policies other than property and homeowner's, medical malpractice, motor vehicle, and workers' compensation insurance?
3. Which judicial review provisions, those in §40 or in §242B, apply to decisions of the Insurance Commissioner ("Commissioner") under §§602(a), 604(a)(2) and 606(b)(1)?

For the reasons set forth below, we conclude as follows:

1. The CCUA may issue malpractice insurance to nurse-midwives upon the activation of that subpool.

¹All statutory references in this opinion, unless otherwise explicitly stated, are to Article 48A.

2. The premium base upon which assessments are calculated should exclude premiums attributable to policies of property and homeowner's, medical malpractice, motor vehicle, and workers' compensation insurance.

3. Appeals from the quasi-legislative decisions of the Commissioner under §§602(a) and 604(a)(2) are subject to judicial review in accordance with §242B, while appeals from the quasi-judicial decisions of the Commissioner under §606(b)(1) are subject to judicial review in accordance with §40.

I

Overview of Chapter 663

Chapter 663 of the Laws of Maryland 1986 provides for the creation of the CCUA, consisting of all insurers licensed to write commercial casualty policies in the State of Maryland. §601(a)(1). The Association is designed to act as a residual market mechanism to "make certain commercial casualty insurance available to all qualified applicants." §599(1). The Act provides the following criteria for coverage by the Association:

"The Association shall issue policies of insurance only if, after a hearing, the Commissioner finds that commercial casualty insurance is unavailable for a particular subpool and that:

- (1) A substantial number of commercial entities within any subpool are or within 6 months will be unable to obtain commercial casualty insurance from an insurer authorized to do business in this State or an approved surplus line insurer;
- (2) The lack of commercial casualty insurance severely hampers the operation of the commercial entities in this subpool;
- (3) The lack of commercial casualty insurance will cause a substantial number of commercial entities in the subpool to cease operations in this State; and
- (4) The cessation of operation of a substantial number of commercial entities in a subpool will be detrimental to the general welfare of the citizens of this State." §602(a).

The Commissioner has broad authority to designate subpools. §602(b)(7). The Act also expressly identifies certain subpools that "the Commissioner may require the association to activate," including licensed nurse-midwives. §602(b)(1) through (6).

However, several specified lines of casualty insurance are excluded from the Act by §607:

"This subtitle does not apply to:

- (1) Property and homeowner's insurance;
- (2) Medical malpractice insurance;
- (3) Motor vehicle insurance; and
- (4) Workers' compensation insurance."

II

Malpractice Insurance for Nurse-Midwives

As noted in Part I above, the Insurance Commissioner has specific authority to require the CCUA to activate a subpool composed of "[n]urse-midwives licensed under Title 7, Subtitle 6 of the Health-Occupations Article." §602(b)(2). However, §607(2) provides that the Act does not apply to "[m]edical malpractice insurance." In order to reconcile these apparently conflicting provisions in a manner that effectuates the General Assembly's intent, we examine the Act in its entirety, consider the circumstances surrounding its enactment, and apply established rules of statutory construction.

Property and homeowner's, medical malpractice, motor vehicle, and workers' compensation insurance are each excluded from the Act by §607. It is reasonable to conclude that these lines of insurance were excluded because a residual market mechanism has already been created for them—namely, the Maryland Joint Insurance Association, for essential property insurance (Subtitle 27A); the Medical Mutual Liability Insurance Society of Maryland ("Medical Mutual"), for medical malpractice insurance (Subtitle 36); the Maryland Automobile Insurance Fund, for motor vehicle insurance (Subtitle 16A); and the State Accident Fund, for workers' compensation insurance (Article 101, §§70-84).

Until July 1, 1985, Medical Mutual was authorized to provide medical malpractice insurance to physicians only. Chapter 129 of

the Laws of Maryland 1985 extended its reach to "other health care providers," defined as persons "licensed or authorized to practice a health occupation." See §§549(e) and 554. Nurse-midwives are licensed pursuant to Title 7 of the Health Occupations Article and, therefore, come within the definition of "other health care providers." Accordingly, Medical Mutual provides an alternative to the private medical malpractice insurance market for nurse-midwives in Maryland. Under these circumstances, it is initially puzzling as to why the General Assembly specifically provided, in §602(b)(2), that the Insurance Commissioner may activate a subpool of insurance for nurse-midwives.²

When a statute is ambiguous, "the circumstances existing and events occurring at the time of the statute's enactment may be considered." *Vournas v. Montgomery County*, 300 Md. 123, 128 (1984). Therefore, we turn to what the General Assembly considered when it enacted Chapter 663.

Written testimony by the Maryland Chapter of the American College of Nurse-Midwives to the Senate Finance Committee recounts the insurance crisis that hit nurse-midwives in the summer of 1985. Letter from Kathleen Slone, CNM, to Chairman Dennis Rasmussen (February 6, 1986). At that time, the insurer that had provided their medical malpractice insurance pulled out of the market altogether. Unable to obtain coverage from some twenty other carriers, nurse-midwives urgently asked the General Assembly to include them in the provisions of the CCUA legislation. They explained that, since nurse-midwives' salaries are only one-fourth the average for obstetricians and gynecologists nationally, they are not able to afford the level of insurance offered to their physician colleagues. With these circumstances as backdrop, the General Assembly enacted Chapter 663 and specifically included nurse-midwives within its scope.

It is clear that the General Assembly meant to provide a market specifically for nurse-midwives in the CCUA. Regardless of the fact that the Act generally does not apply to medical malpractice insurance and that Medical Mutual already covers nurse-midwives, the General Assembly specifically addresses nurse-midwives in

²The Court of Appeals has stated on numerous occasions that the General Assembly is presumed to have had, and to have acted with respect to, full knowledge and information about prior and existing law. *E.g.*, *City of Baltimore v. Hackley*, 300 Md. 277, 283 (1984). Therefore, one must presume that the General Assembly was aware of the 1985 amendment, which broadened the scope of Medical Mutual to include nurse-midwives.

§602(b)(2). The Court of Appeals has consistently held that a specific enactment prevails over an incompatible general enactment in the same or another statute. *See, e.g., Lumberman's Mut. Casualty Co. v. Insurance Comm'r*, 302 Md. 248, 268 (1985); *A.S. Abell Pub. Co. v. Mezzanote*, 297 Md. 26, 40 (1983); *Maguire v. State*, 192 Md. 615, 623 (1949). Therefore, we conclude that the CCUA is legally permitted to issue medical malpractice insurance to nurse-midwives.

III

Assessment Base

Section 601(d) provides that "[e]ach member insurer [of the CCUA] shall participate in the expenses and losses of the Association in the proportion that the member insurer's premiums written bear to the aggregate premiums written by all members of the Association." "Premiums written" is broadly defined in §600(k) to mean "gross direct premiums charged during the second preceding calendar year with respect to commercial casualty insurance policies in this State and the general casualty components of commercial multiperil policies," less certain amounts returned or paid out to policyholders.

Neither §600(k) nor §601(d) expressly excludes from this calculation premiums collected as a result of the issuance of property and homeowner's, medical malpractice, motor vehicle, and workers' compensation insurance. However, when member insurers are permitted to recoup the expenses for the support of the CCUA, premiums written by CCUA members for insurance *other than* property and homeowner's, medical malpractice, motor vehicle and workers' compensation are calculated for the purposes of recoupment. §601(k)(2)(i).

In light of these discordant provisions, you have asked whether the CCUA should assess member insurers based upon "premiums written" excluding, or including, premiums for property and homeowner's, medical malpractice, motor vehicle and workers' compensation insurance.

On their face, §§601(d) and 600(k) appear to give the CCUA authority to assess member insurers based upon premiums written for all commercial casualty policies, notwithstanding the limita-

tions on recoupment embodied in §601(k)(2)(i). However, such a construction would produce an illogical and inequitable result and appears to conflict with the legislative intent.³

As evidenced by the exclusion in §607, the General Assembly intended to take the four listed kinds of insurance out of the commercial casualty assessment mechanism. In our view, the provisions of §§600(k) and 601(d) should be read in conjunction with the exemption language in §607. This reading would harmonize those sections with the recoupment provision, because premiums written on property and homeowner's, medical malpractice, motor vehicle, and workers' compensation policies would then be exempt from the CCUA's assessment base as well as from its recoupment mechanism. The intention as to any one part of a statute may be found by reading all the parts together. *See Bridges v. Nicely*, 304 Md. 1, 10 (1985); *Schweitzer v. Brewer*, 280 Md. 430, 438 (1977); *Supervisor of Assessments v. Sloan*, 57 Md. App. 286, 293 (1984).

Material in the legislative history supports this construction. *See Bledsoe v. Bledsoe*, 294 Md. 183, 189 (1982) (approving the use of committee reports and other extrinsic aids to determine legislative intent). The Floor Statement to Senate Bill 379 comments that Amendment No. 11, which added §601 to the bill, provides for the assessment of losses to all commercial casualty insurers "with certain exceptions." What those exceptions are is made clear by the legislative notes on Senate Amendment No. 3. Those notes explicitly state that the purpose of Amendment No. 3 is to exempt workers' compensation from the CCUA's assessment base. In explaining this legislative action, the note explains that workers' compensation already has a residual market (the State Accident Fund) and that this is the same justification for exempting personal lines and medical malpractice from assessments under the bill. These notes from the legislative files support the proposition that the General Assembly intended to exempt the lines of insurance itemized in §607 from the CCUA's assessment base.

Further insight into the legislative intent underlying the Act can be gleaned from an examination of the structure of the Maryland Joint Insurance Association ("JIA"), established pursuant to Subtitle 27A, and the Professional and Executive Liability Fund ("PELF"), established pursuant to Subtitle 37. These residual market mechanisms have purposes similar to those of the CCUA and

³Statutes must be read in such a way as to avoid unjust, illogical, absurd, or unreasonable consequences. *See, e.g., McClurkin v. Maldonado*, 304 Md. 225, 233 (1985); *Kindley v. Governor of Maryland*, 289 Md. 620, 625 (1981).

are strikingly alike in structure, so it is logical to assume that the CCUA legislation was modeled after the JIA and the PELF and that the General Assembly's intent with regard to all three was similar.

Both the JIA and the PELF have equivalent assessment and recoupment bases. Section 478C(3) provides that, with respect to the JIA, each member insurer shall participate in the expenses and losses of the JIA in the proportion that its premiums written bear to the aggregate premiums written by all JIA members. "Premiums written" is defined in §478B(5) to include only premiums charged with respect to essential property insurance and the essential property insurance components of multiperil policies. Thus, the assessment calculation is based upon only those premiums attributable to essential property insurance policies that the JIA is authorized to issue.

The JIA's recoupment base is similarly restricted. Section 478C(9) provides in pertinent part that, to recoup loss and expense assessments, the JIA's plan of operation shall provide for the addition of surcharge or rating factors to be added to premiums for essential property insurance and homeowner's insurance covering property located in this State.

The PELF likewise operates with symmetrical bases for assessment of losses and expenses and recoupment. As with the CCUA and the JIA, member insurers participate in PELF's expenses and losses in the proportion that their premiums written on certain lines of insurance bear to the aggregate premiums written on those lines of insurance by all PELF members. §560(c). "Premiums written" is defined in §559(h) to include only premiums charged with respect to general liability insurance policies in this State and the general liability components of multiperil policies. Section 561(d) provides for the direct recoupment of any assessments from the policyholders of any subpool which the Insurance Commissioner has activated.

In essence, the assessment and recoupment provisions of the JIA and the PELF are aimed at producing a wash: Policyholders who benefit from the issuance of policies by either group bear the cost of expenses and losses, which are passed through to them by each member insurer. Accordingly, one can reasonably assume that the General Assembly intended to create the same parity between the assessment base and the recoupment base when it established the CCUA.

IV

Judicial Review of
Commissioner Decisions Under Chapter 663

A. *Introduction*

Orders, decisions, and findings of the Commissioner pertaining to the operation of the CCUA are subject to judicial review. You have inquired specifically about the nature of judicial review of the following kinds of decisions under the Act:

- (1) a finding, under §602(a), that commercial casualty insurance is unavailable for a particular subpool;
- (2) a requirement, in an order issued under §602(a), that one or more of the subpools specified in §602(b) be activated;
- (3) an order, under §604(a)(2), upholding or reversing a decision of the Board of Governors of the Association; and
- (4) a decision, under §606(b)(1), to uphold or reverse Association's denial of insurance to a commercial entity.

Section 604(b) provides that "[a]ll orders, decisions, and findings of the Commissioner made under this subtitle are subject to judicial review in accordance with §242B of this Article." Section 242B, in turn, sets forth the scope of judicial review of decisions of the Commissioner made under Subtitle 16, titled Rates and Rating Organizations.

However, §606(b) provides that a commercial entity denied insurance by the Association may appeal that decision to the Commissioner and may request a hearing "under §§35 through 40" of the Insurance Code. Section 40 prescribes the procedures for judicial review of the Commissioner's decisions made after a quasi-judicial hearing.

B. *Judicial Review of Quasi-Legislative and Quasi-Judicial Decisions*

The difference in judicial review turns on the nature of the underlying decision:

"The 1963 revision [of the Insurance Code] provided two types of judicial review from actions of the Insurance Commissioner. One under §40 of Art. 48A was from actions in which the Commissioner acted in 'a quasi-judicial capacity,' as §39 put it, the other, under [§242B(2)], then

§245] for judicial review of the legislative orders and decisions as to rates and rating organizations. On an appeal from a judicial or quasi-judicial action under §40(4), the court is directed to 'hear the matter de novo' on the record and any additional evidence offered in court, and decide whether the action appealed from was unconstitutional, unlawful or unsupported by competent, material and substantial evidence or by the weight of such evidence, as shown by the whole record and the de novo evidence taken in court." *State Ins. Comm'r v. National Bureau of Casualty Underwriters*, 248 Md. 292, 303-04 (1967).

Conversely, the Court of Appeals noted, §242B(2) [then §245] "shows in its terms that a different standard was intended in an appeal from a legislative action." 248 Md. at 304. When reviewing a quasi-legislative action of an administrative agency, a court must affirm the decision if it is supported by a preponderance of the evidence and if the agency's findings are supported by competent, material, and substantial evidence on the whole record and are not against the weight of the evidence. *Id.* See also, e.g., *Baltimore Gas and Elec. Co. v. McQuaid*, 220 Md. 373, 382 (1959).

The scope of judicial review of the Commissioner's legislative actions under the rating organization subtitle was also addressed in *Maryland Fire Underwriters Rating Bureau v. Insurance Comm'r*, 260 Md. 258, 263-64 (1971), in which the Court of Appeals described the scope of judicial review as "narrow." As the Court of Special Appeals later put it, "a reviewing court 'should be loathe to substitute its judgment for the result reached by an administrative agency'" in the exercise of legislative functions. *Katz v. Insurance Comm'r*, 53 Md. App. 420, 425 (1983) (quoting *Maryland Fire*, 260 Md. at 266).

The establishment of two separate standards of judicial review for appeals from decisions of the Commissioner has its roots in the separation of powers doctrine, embodied in Article 8 of the Maryland Declaration of Rights. *Department of Natural Resources v. Linchester Sand & Gravel Corp.*, 274 Md. 211 (1975). As explained in *Linchester*, the General Assembly has delegated some of its legislative authority to administrative agencies and, in order to preserve the separation of powers and the judiciary's proper role, the scope of judicial review is narrowly circumscribed. 274 Md. at 221-25. When an administrative agency acts in a quasi-legislative capacity, judicial review of that particular action "is limited to assessing whether the agency is within its legal boundaries"; when an agency acts in a quasi-judicial, or factfinding capacity, the reviewing court

has authority to review the appealed conclusions to determine "whether the contested decision was rendered in an illegal, arbitrary, capricious, oppressive or fraudulent manner." 274 Md. at 224.

Legislative or quasi-legislative decisions involve legislative facts, as opposed to adjudicative facts. *Montgomery County v. Woodward & Lothrop, Inc.*, 280 Md. 686, 711-12 (1977); *Hyson v. Montgomery County Council*, 242 Md. 55, 64-65 (1966). Adjudicative facts are facts about the parties and their activities, businesses, and properties. They usually answer the questions of who did what, where, when, how, why and with what motive or intent. Legislative facts, in contrast, do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law, policy, and discretion. *Montgomery County v. Woodward & Lothrop, Inc.*, 280 Md. at 712. See also 2 Davis, *Administrative Law Treatise* §12:3, at 413 (2d ed. 1979). The difference between the two, broadly speaking, is whether the decision is to be made on individual or general grounds.⁴ Where a single or discrete number of entities are involved and a factual determination is made based upon evidence of record in an adversary or trial-type proceeding, the process is judicial in nature. *Montgomery County v. Woodward and Lothrop, Inc.*, 280 Md. at 713.

C. Applicability to Chapter 663 Decisions

Section 604(b) provides generally that "[a]ll orders, decisions, and findings of the Commissioner made under the [Act] are subject to judicial review in accordance with §242B." In contrast, §606(b) specifically authorizes a commercial entity that has been denied coverage by the Association under §606(a) to appeal the decision to the Commissioner and "request a hearing under §§35 through 40" of the Insurance Code. As previously discussed in Part II above, a specific enactment prevails over an incompatible general

⁴"Facts pertaining to the parties and their businesses and activities, that is, adjudicative facts, are intrinsically the kind of facts that ordinarily ought not to be determined without giving the parties a chance to know and to meet any evidence that may be unfavorable to them The reason is that the parties know more about the facts concerning themselves and their activities than anyone else is likely to know, and the parties are therefore in an especially good position to rebut or explain evidence that bears upon adjudicative facts. Because the parties may often have little or nothing to contribute to the development of legislative facts, the method of trial often is not required for the determination of disputed issues about legislative facts." 2 Davis, *Administrative Law Treatise* §12:3, at 413.

enactment in the same or another statute. Accordingly, the specific provision of §606(b)(2) prevails over the general language contained in §604(b), as to §606(b) decisions.

This result is entirely compatible with the overall scheme of judicial review under the Insurance Code, as discussed in Part IVB above. A hearing held pursuant to §606(b) would be inherently quasi-judicial in nature. The Association would be placed in an adversarial position vis-a-vis the commercial entity that was denied coverage, and the Commissioner would be required to decide factual issues concerning that particular commercial entity. The Commissioner's decision would affect only a single commercial entity and would not have a general and far-reaching effect. Accordingly, the Commissioner would be exercising a quasi-judicial function and the judicial review provisions set forth in §40 would be appropriate.

On the other hand, appeals from decisions of the Commissioner under §§602(a) and 604(a)(2) are unlike those under §606(b) and should proceed in accordance with the judicial review provisions of §242B. Unlike §606(b), neither §602(a) nor §604(a)(2) contains any specific language in conflict with the general pronouncement in §604(b). Therefore, there is no internal conflict to resolve. Furthermore, the judicial review provisions of §242B are appropriate to the quasi-legislative nature of the functions performed by the Commissioner under §§602(a) and 604(a)(2).

Section 602(a) provides that the Association shall issue policies of insurance only if, after a hearing, the Commissioner finds that commercial casualty insurance is unavailable for a particular subpool and that certain other conditions, as set forth in Part I above, exist. Section 602(b) provides that, upon making the requisite findings, the Commissioner may include in an order under §602(a) the requirement that the Association activate certain subpools.

The Commissioner's determinations under §602(a) and (b) are quasi-legislative determinations based upon legislative facts. The decision whether certain commercial casualty insurance is unavailable and whether or not a subpool should be activated involves broad public policy issues and the exercise of considerable discretion. The decision is based on general facts and its impact is wideranging. Accordingly, the narrowly circumscribed scope of judicial review of legislative functions is appropriate to a finding made pursuant to §602(a) and the resultant activation of a subpool pursuant to §602(b).

Likewise, any hearing held pursuant to §604(a)(2) would also be quasi-legislative in nature and judicial review in accordance with

§242B would be appropriate. Section 604(a)(2) provides for an appeal to the Commissioner from a decision of the Board of Governors. The Board of Governors is empowered to administer the Association (§601(e)(1)), to submit a program of operation to the Commissioner (§601(f)), to determine the premiums to be charged on policies issued by the Association (§601(i)(1)), and to contract with a licensed insurer or the JIA to administer the affairs of the Association (§601(j)(1)). These decisions have a general, far-reaching effect and are directed toward the public generally, not a discrete or limited number of member insurers or commercial entities. The Commissioner must consider legislative facts when he determines whether to uphold or reverse a generally applicable decision of the Board of Governors. The Commissioner's role in resolving this kind of issue is most accurately characterized as quasi-legislative, not quasi-judicial, in nature and, therefore, the judicial review provisions of §242B are applicable.

V

Conclusion

In summary, it is our opinion that:

1. The CCUA may issue malpractice insurance to nurse-midwives upon the activation of that subpool.
2. The premium base upon which assessments are calculated should exclude premiums attributable to policies of property and homeowner's, medical malpractice, motor vehicle, and workers' compensation insurance.
3. Appeals from the quasi-legislative decisions of the Commissioner under §§602(a) and 604(a)(2) are subject to judicial review in accordance with §242B, while appeals from the quasi-judicial decisions of the Commissioner under §606(b)(1) are subject to judicial review in accordance with §40.

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INSURANCE—RECISSION—VEHICLE LIABILITY INSURANCE—
INSURER SEEKING TO TERMINATE POLICY BASED ON IN-
SURED'S MISREPRESENTATIONS MAY CANCEL OR REFUSE TO
RENEW THE POLICY UNDER INSURANCE CODE PROVISIONS OR
MAY SEEK JUDICIAL RECISSION BUT MAY NOT RESCIND THE
POLICY UNILATERLY.

December 1, 1986

The Honorable Edward J. Muhl
Insurance Commissioner

You have requested our opinion concerning the applicability of certain provisions of the Insurance Code to rescission of an automobile liability insurance contract. Specifically, you have asked whether an insurer may unilaterally rescind such an insurance contract, and treat it as void *ab initio*, based on alleged material misrepresentations in the application for insurance; or whether an insurer that desires either to cancel or to refuse to renew the insurance policy may do so only in accordance with the substantive and procedural requirements imposed by the Insurance Code.

For the reasons given below, we conclude that, in order to terminate an automobile liability insurance contract based on alleged material misrepresentations by the insured, an insurer may (i) cancel or refuse to renew the policy in accordance with Article 48A, §§234A and 240AA of the Maryland Code or (ii) seek judicial rescission and a declaration that the policy is void *ab initio*. However, the insurer may not rescind the policy unilaterally.

I

Cancellation and Nonrenewal of Motor Vehicle Liability Insurance Policies in Maryland

Cancellations and nonrenewals of motor vehicle liability insurance policies in Maryland are governed by Article 48A, §§234A and 240AA.¹ Section 240AA “was adopted solely as a repository for the

¹All statutory references in this opinion, unless otherwise stated, are to Article 48A, the Insurance Code.

comprehensive procedures governing cancellations and non-renewals; ... the major substantive criteria for such proposed actions [are] to be found in §234A." *Government Employees Ins. Co. v. Insurance Comm'r*, 273 Md. 467, 483 (1975).

An insurer that intends to "cancel or fail to renew a policy of motor vehicle liability insurance ... for any reason other than non-payment of premium" must send written notice by certified mail to the insured at least forty-five days in advance of the proposed effective date of the action. §240AA(a) and (b). The notice must be in triplicate and state in clear and specific terms, on a form approved by the Commissioner, the following information:

- "(i) The proposed action to be taken;
- (ii) The proposed effective date of the action;
- (iii) The insurer's actual reasons for proposing to take such action;
- (iv) An offer to exclude a named driver from the policy, if applicable;
- (v) The right of the insured to replace the insurance through the Maryland Automobile Insurance Fund and the current address and telephone number of the fund;
- (vi) The right of the insured to protest the proposed action and to request a hearing thereon before the Commissioner by signing two copies of the notice and sending them to the Commissioner within ten days;
- (vii) That if a protest is filed by the insured, the current insurance will remain in effect pending a determination by the Commissioner; and
- (viii) The authority of the Commissioner to award reasonable counsel fees to the insured for services rendered in connection with any such hearing if he finds the proposed action of the insurer to be unjustified." §240AA(b).

Section 240AA further provides that an insured shall have the right to protest the proposed action within 30 days after receipt of the notice and that a protest duly filed shall stay the proposed action of the insurer pending a final determination by the Commissioner. §§240AA(d) and (e). At any hearing conducted by the Commissioner within the scope of §240AA, the insurer "has the burden of proving its proposed action to be justified and, in doing so, may rely only upon the reasons set forth in its notice to the insured." §240AA(f).

The panoply of procedural protections provided to an insured by §240AA go hand in hand with the substantive limitations imposed upon insurer action by §234A. This latter section, originally enacted in 1970, prohibits discrimination in underwriting and provides, in part, that:

“No insurer ... shall cancel or refuse to underwrite or renew a particular insurance risk or class of risk for any reason based in whole or in part upon race, color, creed, sex, or blindness of an applicant or policyholder or for any arbitrary, capricious, or unfairly discriminatory reason.” §234A(a).

An insurer that intends to cancel, refuse to underwrite, or refuse to renew a risk must do so by the application of standards that are reasonably related to the insurer's economic and business purposes. At any hearing to determine whether §234A has been violated, the burden of persuasion is upon the insurer to demonstrate that the cancellation, or refusal to underwrite or renew, is justified by the application of those standards. §234A(a). The Court of Appeals has held that the major substantive criteria for cancellations and nonrenewals are to be found in §234A and that this section prohibits an insurer, when it cancels or refuses to underwrite or renew an insurance policy, from relying upon any irrelevant considerations similar to, and “within the frame of reference of,” those specifically enumerated. *Insurance Comm'r v. Allstate Ins. Co.*, 268 Md. 428, 442 (1973).

These safeguards not only protect the insured against arbitrary cancellation or nonrenewal but also further the public policy objectives of compulsory liability insurance. In Chapter 73, Laws of Maryland 1972, the General Assembly enacted a compulsory motor vehicle insurance law. This law requires the owner of any motor vehicle registered in Maryland to maintain a vehicle liability insurance policy in certain amounts. §17-103 of the Transportation Article (“TR” Article).² A vehicle owner “shall maintain the required security for the vehicle during the registration period.” TR §17-104(b). If the required security for any vehicle terminates or other-

²The minimum levels of required coverage are set out in TR §17-103(b). Under TR §17-103(a)(2), the Motor Vehicle Administration “may accept another form of security in place of a vehicle liability insurance policy if it finds that the other form of insurance adequately provides the benefits required by [TR §17-103(b)].”

Chapter 73 also created the Maryland Automobile Insurance Fund, to provide insurance coverage for poor risks. See *First Nat'l Bank v. Fidelity & Deposit Co.*, 283 Md. 228, 242 (1978).

wise lapses at any time, the registration of that vehicle is automatically suspended. TR §17-106(a). These requirements have "the overall remedial purpose of protecting the public by assuring that operators and owners of motor vehicles are financially able to pay compensation for damages resulting from motor vehicle accidents." *Pennsylvania Nat. Mut. Cas. Ins. Co. v. Gartelman*, 288 Md. 151, 154 (1980).

Continuous insurance coverage is essential to the effectiveness of a law mandating automobile insurance in fixed amounts. An insured must receive adequate notice of a proposed cancellation or nonrenewal so that replacement insurance coverage can be obtained, unnecessary gaps in coverage avoided, and the protection available to innocent third party accident victims preserved. See *Government Employees Ins. Co. v. Taylor*, 270 Md. 11, 17 (1973). In addition, the statutory termination provisions allow the insured to avoid the consequences flowing from a lapse in coverage, such as suspension of vehicle registration. See *Reserve Ins. Co. v. Duckett*, 240 Md. 591 (1965). For these reasons, the very same bill that enacted mandatory vehicle liability insurance—Chapter 73, Laws of Maryland 1972—also amended the Insurance Code to add the procedural protections of §240AA.

II

Rescission of Automobile Liability Insurance

A. Common Law Background

At common law, a contract could be rescinded by mutual consent, by an action in equity, or as a defense to an action at law. See, e.g., *Glen Alden Corp. v. Duwall*, 240 Md. 405 (1965); *Vincent v. Palmer*, 179 Md. 365 (1941); *Ryan v. Brady*, 34 Md. App. 41 (1976). Although some authority suggests that rescission of a contract may be accomplished merely by giving adequate notice to the other party, the cases generally evince a decided preference for judicial intervention. Compare *Stiegler v. Eureka Life Ins. Co.*, 146 Md. 629 (1928) with, e.g., *Suburban Garden Farm Homes Corp. v. Adams*, 171 Md. 213 (1937). Rescission of a contract without mutual consent is viewed as an extraordinary equitable remedy, to be granted by a court of competent jurisdiction only upon proof of fraud, duress, or other wrongdoing. *Great United Realty Co. v. Lewis*, 203 Md. 442, 450 (1954); *Suburban Garden Farm Homes Corp. v. Adams*, 171 Md. at 218; *Bartlett v. Department of Transportation*, 40 Md. App. 47, 50 (1978).

In order to rescind a contract void *ab initio* based on misrepresentation in the inducement, the party seeking rescission must establish that the misrepresentation is material to the risk. *Erie Ins. Exchange v. Lane*, 246 Md. 55 (1967). Whether a misrepresentation has been made, and whether it is material to the risk, are questions for the trier of fact. *Erie Ins. Exchange v. Lane*, 246 Md. at 63; *Baker v. Continental Casualty Co.*, 201 Md. 464 (1952).

Generally, in cases dealing with automobile liability insurance rescission, the rescission is effected by, or enforced through, judicial action. However, it is unsettled whether judicial rescission is the exclusive method available to an insurer or whether an insurer may rescind a contract unilaterally, without going to court.

B. Effect of Compulsory Insurance Laws

The Insurance Code makes no mention of rescission as a method by which an insurer may terminate a policy of motor vehicle liability insurance. Nor does any recent Maryland case address the question.³

However, a New York court has addressed the effect of New York's compulsory insurance law—comparable to Maryland's—on rescission of an automobile liability insurance contract. In *Teeter v. Allstate Ins. Co.*, 192 N.Y.S.2d 610 (App. Div. 1959), *aff'd*, 212 N.Y.S.2d 71 (N.Y. 1961), the court held that the remedy of rescission *ab initio* of an automobile insurance policy for fraud did not survive the adoption of the compulsory automobile insurance law. The statutorily prescribed methods for cancelling or refusing to renew such a policy were held to have supplanted the common law right to rescission. *Teeter* rests largely on the nature of New York's procedural scheme for terminating coverage, which the court described as "all embracing." 192 N.Y.S.2d at 617. The court also observed that the compulsory automobile insurance law

³All of the Maryland cases dealing with rescission of automobile liability insurance policies arose prior to the enactment of Maryland's compulsory automobile insurance law and of §§234A and 240AA. See, e.g., *Southern Gen. Ins. Co. v. O'Keefe*, 275 F. Supp. (D. Md. 1967); *State Farm Mut. Auto. Ins. Co. v. West*, 149 F. Supp. 269 (D. Md. 1957); *Strumpf v. State Farm Mut. Auto. Ins. Co.*, 252 Md. 696 (1969). Other Maryland cases that have addressed the issue of rescission of insurance contracts dealt primarily with life insurance policies containing provisions for rescission within a specified time period. See *Silberstein v. Massachusetts Mut. Life Ins. Co.*, 189 Md. 182 (1947); *Penn Mutual Ins. Co. v. Hartle*, 165 Md. 120 (1933); *Stiegler v. Eureka Life Ins. Co.*, 146 Md. 629 (1928).

"relies, to a large extent, upon penal sanctions which are wholly incompatible with the recognition of a right of rescission *ab initio* as between the insurer and the insured. The Legislature plainly intended to give the insured a reasonable opportunity to obtain other insurance or to surrender his license plates, without suffering any penalty, in the event of the termination of coverage for any reason." *Id.*

Finally, the court noted, had the New York legislature intended to allow rescission to be an available remedy, it could have so provided in the statute. 192 N.Y.S. 2d at 615-16.

One commentator has concluded that, in general, compulsory automobile liability statutes "destroy an insurance company's former common law remedy to retroactive rescission of the contract for fraud and ... substitute therefor a statutory right to cancel prospectively but not retrospectively." 7 *Williston on Contracts* §920, at 631 (Jaeger ed. 1963).⁴

III

Statutory Limits on Right to Rescission in Maryland

As discussed in Part I above, the Insurance Code provides two methods by which an insurer may terminate coverage under a policy of automobile liability insurance—cancellation and nonrenewal. The procedural requirements imposed by §240AA are delineated in great detail and are designed to ensure that no policyholder will be denied an adequate opportunity to contest the insurer's proposed action or to obtain replacement coverage, if necessary. Section 234A establishes substantive criteria for the cancellation or

⁴See also *Barrera v. State Farm Mut. Auto. Ins. Co.*, 456 P.2d 674 (Cal. 1969), in which the California Supreme Court held that an insurer's actions under a statute expressly *permitting* unilateral rescission of automobile liability insurance policies nevertheless were limited by the public policy underlying mandatory insurance laws:

"We ... cannot accept a construction of the statute governing rescission of insurance policies, insofar as it applies to automobile liability insurers, which would serve only the financial interest of the insurer and directly thwart that public policy." 456 P.2d at 684.

nonrenewal of any insurance policy and places the burden squarely upon the insurer to justify its proposed action.

Given this comprehensive statutory scheme, and observant of the fact that Maryland is a compulsory automobile insurance state, we believe that the General Assembly did not intend to allow an insurer to terminate coverage under a policy of motor vehicle liability insurance merely by declaring that the insured made a material misrepresentation on the insurance application. To view the legislative intent otherwise would leave a gaping hole in the statutory scheme through which an insurer could walk at will merely by alleging material misrepresentation.⁵ If unilateral rescission were permissible, the insured would be stripped of all of the Insurance Code's procedural and substantive protections applicable to cancellations and nonrenewals and would be faced with the unenviable choice of accepting the rescission or applying to a court for an injunction to halt it.

At the same time, we do not believe that we need to go as far as did the New York court in *Teeter* and conclude that the common law right to rescission has been entirely supplanted by the statutory scheme. It is doubtful that the General Assembly, by enacting §§234A and 240AA as well as a compulsory automobile insurance law, intended to deprive an insurer of the right to seek *judicial* rescission of an automobile liability insurance contract as an alternative to cancellation or nonrenewal.⁶ Absent a clear expression of legislative intent to the contrary, we believe that the right to seek judicial rescission of an automobile liability insurance policy remains intact.

As noted in Part II B above, the Insurance Code does not address the issue of rescission of a motor vehicle liability insurance policy. The Insurance Commissioner does have the authority, under §§234A and 240AA, to determine whether an insurer has acted in accordance with the law in cancelling, or refusing to underwrite or renew, an insurance risk or class of risk. However, the Commissioner's jurisdiction does not extend to determining whether an in-

⁵Statutes must be read in such a way as to avoid unjust, illogical, absurd, or unreasonable consequences. *See, e.g., McClurkin v. Maldonado*, 304 Md. 225, 233 (1985); *Kindley v. Governor of Maryland*, 289 Md. 620, 625 (1981).

⁶Statutes in derogation of common law rights should be strictly construed. *E.g., Bradshaw v. Prince George's County*, 284 Md. 294, 303 (1979); *Stoll v. Mayor and City Council of Baltimore*, 163 Md. 282, 293 (1932); *In re Special Investigation No. 202*, 53 Md. App. 96, 103 (1982); *Dillon v. Great Atlantic and Pacific Tea Co.*, 43 Md. App. 161, 166 (1979).

surer has established grounds for rescission of an insurance contract. Only a court can declare that the contract is void *ab initio*.

IV

Conclusion

In summary, it is our opinion that, in order to terminate an automobile liability insurance contract based on alleged material misrepresentations by the insured, an insurer may (i) cancel or refuse to renew the policy in accordance with Article 48A, §§234A and 240AA or (ii) seek judicial rescission and a declaration that the policy is void *ab initio*. However, the insurer may not rescind the policy unilaterally.

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Editor's Note: Article 48A, §240AA has been amended to require additional detail in a cancellation notice. Chapter 455, Laws of Maryland 1987.

JUDGES

RETIREMENT—AGE DISCRIMINATION—UNDER RECENTLY AMENDED FEDERAL LAW, DISTRICT COURT JUDGES ARE NO LONGER SUBJECT TO MANDATORY RETIREMENT AT AGE 70, BUT CIRCUIT COURT AND APPELLATE JUDGES REMAIN SUBJECT TO MANDATORY RETIREMENT.

December 29, 1986

Mr. James H. Norris, Jr.
State Court Administrator

You have requested our opinion concerning the effect on Maryland's judiciary of a recent amendment to the federal Age Discrimination in Employment Act ("Act" or "ADEA"). The amendment extends the Act's protections to persons 70 years of age and older. Specifically, you have asked whether, in light of the newly amended Act, the judges of the District Court, the circuit courts, and the appellate courts remain subject to mandatory retirement at age 70, as provided in the Maryland Constitution.

For the reasons stated below, we conclude as follows:

1. District Court judges are covered by the Act and may no longer be required to retire at age 70.
2. Circuit court judges and appellate court judges fall within an exception to the Act and, therefore, remain subject to the constitutional requirement that they retire at age 70.

I

Mandatory Retirement of Judges

The Maryland Constitution provides that a judge of the Court of Appeals or Court of Special Appeals "shall retire when he attains his seventieth birthday." Article IV, §5A(f). A circuit court judge holds office "until he shall have attained the age of seventy years." Article IV, §3. Likewise, a District Court judge holds office "until he shall have attained the age of seventy years." Article IV, §41D.

Under the Supremacy Clause of the United States Constitution, these provisions may no longer be given effect if they conflict with the federal Act. U.S. Const. art. VI, cl. 2. See *Michael v. Majority of Board of Trustees of New York City Emp. Retirement System*, 437 N.Y.S.2d 977, 980 (App. Div. 1981), *appeal dismissed* 434 N.E.2d 1082 (N.Y. 1982). Hence, we turn to the provisions of the ADEA.

II

Age Discrimination in Employment Act

A. *Purpose and Scope*

As we observed in a prior opinion, the ADEA “is designed both to promote the employment of older persons, based on ability rather than age, and to prohibit arbitrary age discrimination in employment.” 69 *Opinions of the Attorney General* 150, 150 (1984). See 29 U.S.C. §621(b). The key substantive provision of the Act declares it to be unlawful for an employer to “discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual’s age”; or “to limit ... his employees in any way which would 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).

When originally enacted in 1967, the Act covered employees at least 40 years of age but less than 65. In 1978, Congress raised the maximum age to 70 for state, local, and private employees and eliminated the maximum entirely for federal workers. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, §3(a), 92 Stat. 189 (1978).

Thus, prior to its recent amendment, the ADEA prohibited virtually all employers from discriminating on the basis of age against employees who were at least 40 years of age but less than 70—for example, by requiring them to retire before attaining the age of 70. See 29 U.S.C. §§623(a) and 631(a).

B. *1986 Amendment*

The newly enacted amendment to the ADEA, effective on January 1, 1987, removes the maximum age cap entirely. Age Discrimi-

nation in Employment Amendments of 1986, Pub. L. No. 99-592, §2(c)(1)(2), 100 Stat. _____ (1986). The purpose of the amendment is straightforward—"to eliminate mandatory retirement by striking all references to upper age limitations." H.R. Rep. No. 99-756, 99th Cong., 2d Sess. 8 (1986), *reprinted in* 1986 U.S. Code Cong. & Adm. News 5634. As amended, 29 U.S.C. § 631(a) will read: "The prohibitions of this chapter shall be limited to individuals who are at least 40 years of age." Hereafter, protected employees will be assured of the right to continue employment past age 70 until voluntary departure or termination for cause.¹

C. *Exceptions*

The definitional section of the ADEA, 29 U.S.C. §630, which was not changed by the 1986 amendment, defines "employer" to include state and local governments [§630(b)] and "employee" to include an individual employed by an employer [§630(f)].² Thus, every state employee is protected by the provisions of the Act unless that employee falls within one of the enumerated exceptions to the definition of "employee". In relevant part, "employee" is defined as follows:

"The term 'employee' means an individual employed by any employer *except that the term employee shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.*" (Emphasis added.)

Every judge of the District Court, the circuit courts, the Court of Special Appeals, and the Court of Appeals is "an individual em-

¹Special temporary exceptions have been made for public safety officers (police, firefighters, and prison guards) and tenured academic faculty, providing for a seven year study period to evaluate the consequences of the elimination of mandatory retirement for these groups. See Public Law 99-592, §§3, 5, and 6.

²The ADEA's application to the states is a valid exercise of Congress' powers under the Commerce Clause and does not violate the Tenth Amendment. *EEOC v. Wyoming*, 460 U.S. 226, 243 (1983).

ployed by [an] employer"—i.e., the State of Maryland.³ Therefore, as an "employee," a judge is protected by the Act, and not subject to mandatory retirement at age 70, unless he or she is "elected to public office ... by the ... voters."⁴

III

Application of Amended ADEA to Judges

A. District Court Judges

Under Article IV, § 41D of the Constitution, District Court judg-

³A judge is, of course, a public officer. But the ADEA's definition of "employee" generally includes public officers; were it otherwise, the exception for *elected* public officers would be unnecessary.

⁴We are constrained to conclude that judges are not "appointee[s] on the policymaking level," within the meaning of that additional exception to the Act's definition of "employee."

The term "policymaking level" is not expressly defined in the ADEA or its legislative history. However, the definition of "employee" in Title VII, 42 U.S.C. §2000e(f), is identical to the ADEA definition. Because the Supreme Court has observed that the "prohibitions of the ADEA were derived in haec verba from Title VII," *Lorillard v. Pons*, 434 U.S. 575, 584 (1978), constructions of the "policymaking level" exception in Title VII are highly relevant to a determination of the scope of the identical exception in the ADEA.

The legislative history of Title VII demonstrates that Congress intended the "policymaking level" exception to apply only to cabinet officers and similar political appointees in the Executive Branch. H. Conf. Rep. No. 92-899, 92d Cong., 2d Sess. (1972); S. Conf. Rep. No. 92-681, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S. Code Cong. & Adm. News 2179, 2180. This exception "shall be construed narrowly." *Id.* The EEOC, the agency principally responsible for the enforcement of Title VII, has characterized Congress' intent as follows:

"In exempting policymaking appointees, Congress realized the necessity of allowing elected officials complete freedom in appointing those who would direct state and local departments and agencies. These individuals must work closely with elected officials and their advisors in developing policies that will implement the overall goals of the elected officials. In order to achieve these goals, an elected official is likely to prefer individuals with similar political and ideological outlooks. Congress intended to allow elected officials the freedom to appoint those with whom they feel they can work best." EEOC Decision No. 78-42, Empl. Prac. EEOC Dec. (CCH) ¶6725 (Sept. 29, 1978).

See also EEOC Decision No. 79-08, Empl. Prac. EEOC Dec. (CCH) ¶6739 (Oct. 20, 1978).

es are appointed by the Governor and confirmed by the Senate.⁵ At no time does a District Court judge stand for any form of election.

Because District Court judges are not elected public officials, they are not exempted from the definition of "employee" in 29 U.S.C. §630(f). Accordingly, District Court judges are protected by the Act and may no longer be required to retire at age 70.

B. *Circuit Court Judges*

Circuit court judges initially gain office in one of two ways, direct election or gubernatorial appointment. Under Article IV, §3 of the Constitution, circuit court judges are elected by the voters of their respective jurisdictions to 15-year terms.⁶ Any qualified person may run for an open seat on a circuit court bench.

More commonly, circuit court judges first take office when appointed by the Governor to fill a vacancy pursuant to Article IV, §5. But these appointees are themselves required to stand for election promptly after their appointment—generally, at the first elec-

⁵Article IV, §41D provides as follows:

"The Governor, by and with the advice and consent of the Senate, shall appoint each judge of the District Court whenever for any reason a vacancy shall exist in the office.... Each judge appointed by the Governor and confirmed by the Senate shall hold the office for a term of ten years or until he shall have attained the age of seventy years whichever may first occur. If the ten year term of a judge shall expire before that judge shall have attained the age of seventy years, that judge shall be reappointed by the Governor, with the Senate's consent, for another ten year term or until he shall have attained the age of seventy years, whichever may first occur."

⁶Article IV, §3 provides that:

"[T]he Judges of the several [circuit] Courts ... shall, subject to the provisions of Section 5 of this Article of the Constitution, be elected in Baltimore City and in each county, by the qualified voters of the city and of each county, respectively, all of the said Judges to be elected at the general election to be held on the Tuesday after the first Monday in November, as now provided for in the Constitution. Each of the said Judges shall hold his office for the term of fifteen years from the time of his election, and until his successor is elected and qualified, or until he shall have attained the age of seventy years, whichever may first happen, and be reeligible thereto until he shall have attained the age of seventy years, and not after."

tion occurring more than a year after the vacancy.⁷ All circuit court judges, therefore, are “elected to public office,” within the meaning of that phrase in 29 U.S.C. §630(f). Accordingly, circuit court judges fall within the exception to the Act’s coverage and must continue to retire at age 70, pursuant to Article IV, §3.

C. Appellate Judges

Article IV, § 5A provides for the appointment, term of office, election for continuance, and retirement of judges of the Court of Appeals and Court of Special Appeals. Appellate judges are initially appointed by the Governor and are subject to an election for continuance—that is, “approval or rejection” by the voters—after a year in office and at the end of each successive term.⁸ While appel-

⁷The exact timing of the election is specified in Article IV, §5:

“Upon every occurrence or recurrence of a vacancy through death, resignation, removal, disqualification by reason of age or otherwise, or expiration of the term of fifteen years of any judge of a circuit court, or creation of the office of any such judge, or in any other way, the Governor shall appoint a person duly qualified to fill said office, who shall hold the same until the election and qualification of his successor. His successor shall be elected at the first biennial general election for Representatives in Congress after the expiration of the term of fifteen years (if the vacancy occurred in that way) or the first such general election after one year after the occurrence of the vacancy in any other way than through expiration of such term. Except in case of reappointment of a judge upon expiration of his term of fifteen years, no person shall be appointed who will become disqualified by reason of age and thereby unable to continue to hold office until the prescribed time when his successor would have been elected.”

⁸Article IV, §5A provides that:

“(b) Upon the occurrence of a vacancy the Governor shall appoint, by and with the advice and consent of the Senate, a person duly qualified to fill said office who shall hold the same until the election for continuance in office as provided in subsections (c) and (d).

(c) The continuance in office of a judge of the Court of Appeals is subject to approval or rejection by the registered voters of the appellate judicial circuit from which he was appointed at the next general election following the expiration of one year from the date of the occurrence of the vacancy which he was appointed to fill, and at the general election next occurring every ten years thereafter.

(d) The continuance in office of a judge of the Court of Special Appeals is subject to approval or rejection by the registered voters of the geographical area prescribed by law at the next general election following the expiration of one year from the date of the occurrence of

late judges are not subject to competitive elections, as are circuit court judges, we are of the opinion that the noncompetitive election for continuance is, nevertheless, an election. Thus, appellate judges fall within the ADEA's exception for elected public officials and must continue to retire pursuant to the constitutional mandate at age 70.⁹

The pertinent constitutional provisions expressly term the process an "election." When a vacancy occurs, the Governor appoints someone to hold office "until the election for continuance." Article IV, §5A(b). The election for continuance, after the expiration of a year in office, subjects the appellate judge to the approval or rejection of "the registered voters," who "vote for the judge's retention in office ... or his removal." Article IV, §5A(e). If the voters "reject the retention" of the judge, the office is deemed vacant 10 days "after the certification of the election returns." *Id.* Likewise, Article IV, §11, applicable to appellate and circuit court judges alike, provides that "[t]he election for Judges ... shall be certified ... to the Governor, who shall issue commissions to the different persons for the office to which they shall have been respectively elected...."

We acknowledge that the selection process of an appellate court judge—appointment followed by an election for continuance—is a hybrid between the competitive election of a circuit court judge and the direct appointment of a District Court judge. Nonetheless, the process does entail an election. The crux of the matter is that the electorate has the ultimate power, through the election for continuance, to decide if an appellate judge will remain in office.¹⁰

the vacancy which he was appointed to fill, and at the general election next occurring every ten years thereafter.

(e) The approval or rejection by the registered voters of a judge as provided for in subsections (c) and (d) shall be a vote for the judge's retention in office for a term of ten years or his removal. The judge's name shall be on the appropriate ballot, without opposition, and the voters shall vote yes or no for his retention in office. If the voters reject the retention in office of a judge, or if the vote is tied, the office becomes vacant ten days after certification of the election returns."

⁹The applicability of the exception is ultimately a question of federal, not State, law. However, in the absence of pertinent legislative history for the ADEA or Title VII, Maryland law provides the only guidance available in determining whether appellate judges are "elected." *Cf. EEOC v. Reno*, 758 F.2d 581, 584-85 (11th Cir. 1985).

¹⁰The recent history of the election process for appellate judges supports our conclusion that appellate judges are properly viewed as elected officials.

The current provision for filling an appellate court vacancy, Article IV, §5A, was ratified by the voters on November 2, 1976. Prior to that time, appellate judges were

IV

Conclusion

In summary, we conclude as follows:

1. District Court judges are covered by the Act and may no longer be required to retire at age 70.
2. Circuit court judges and appellate court judges fall within an exception to the Act and, therefore, remain subject to the constitutional requirement that they retire at age 70.¹¹

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elected by the qualified voters of their respective appellate judicial circuits. *See* former Article IV, §14. However, in 1974, two years before the enactment of the present "election for continuance" provision, the General Assembly was presented with, and rejected, a bill that would have made appellate judges purely appointed officials, entirely eliminating the need for any election after the initial appointment. *See* House Bill 893 and Senate Bill 585 (1974 Session). *See also* Final Report of the Commission on Judicial Reform to the Governor and General Assembly of Maryland (December 31, 1974). In rejecting the concept of appointed appellate judges, the General Assembly evidently concluded that Maryland voters would be unwilling to relinquish their ultimate electoral power to retain an appellate judge or to remove one in whom, for one reason or another, they no longer had confidence.

¹¹The distinction between elected and appointed judges, for purposes of mandatory retirement, arguably gives rise to equal protection concerns. Nevertheless, we certainly cannot conclude, in the abstract, that this distinction—compelled by the interaction of federal and State law—lacks any rational basis.

LICENSING AND REGULATION

ELEVATORS—ANSI CODE—REGULATIONS MAY SUPPLEMENT, BUT NOT RELAX ANSI CODE STANDARDS.

December 12, 1986

Mr. Dominic N. Fornaro
Commissioner of Labor and Industry
Department of Licensing and Regulation

You have requested our opinion on whether you have the authority to adopt regulations that would depart from the standards of the American National Safety Code for elevators, dumbwaiters, escalators, and moving walks ("ANSI Code") if, based on the rule-making record, you determined that such modifications were appropriate in light of the economic impact or compliance burden of the ANSI Code.

For the reasons given below, we conclude that the Commissioner of Labor and Industry may supplement the standards in the ANSI Code but may not amend the Code so as to relax or weaken its standards. If application of the ANSI Code results in undue economic burden or makes compliance impracticable in specific situations, the Commissioner may grant case-by-case exceptions, provided that reasonable safety measures are preserved.

I

Article 89, §49B

Article 89, §49B(d) reads in relevant part as follows:

"All new and existing elevators, dumbwaiters, escalators and moving walks shall be inspected, tested and maintained in a safe operating condition as prescribed by the American National Standards Safety Code for elevators, dumbwaiters, escalators and moving walks and known as ANSI A17.1-1971, and all subsequent amendments and revisions to it, and any rules and regulations as may be adopted by the Commissioner of Labor and Industry.

All alterations and relocations of elevators, dumb-waiters, escalators and moving walks, installed subsequent to January 1, 1975, shall meet the requirements of the ANSI Code A17.1-1971 and all subsequent amendments and revisions to it."

Thus, the statute incorporates by reference, or legislatively adopts, the safety code and amendments promulgated by a private group, the American National Standards Institute.¹

II

Delegation Doctrine

A. Adoption of Privately Developed Standards

As you point out, the adoption by the General Assembly of the ANSI Code raises a constitutional question: Has the General Assembly impermissibly delegated its legislative authority to a private group? We think not.²

¹"Two private organizations are the major sources of consensus standards: the American National Standards Institute, Inc., and the National Fire Protection Association." S.Rep. No. 1282, [Occupational Health and Safety Act of 1970], 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Ad. News 5182. A "national consensus standard" is any "safety and health standard or modification which (1) has been adopted and promulgated by a nationally recognized standards-producing organization under procedures whereby it can be determined ... that persons affected have reached substantial agreement on its adoption (2) and formulated after an opportunity for consideration of diverse views...." *Id.* at 5202-03.

²As noted in a recent letter of advice, "[i]t is not uncommon for the General Assembly to make references to a private organization or corporation in a statute The Court of Appeals has frequently rejected constitutional attacks on statutes delegating a measure of governmental power to private organizations." Letter from Assistant Attorney General Robert A. Zarnoch to Senator Frank J. Komenda (October 28, 1986) (citing *Commission on Medical Discipline v. Stillman* 291 Md. 390 (1981) and *Scholle v. State*, 90 Md. 729 (1900), and discussing reference in §4-509.1(a) of the Estates and Trusts Article to the Medical Eye Bank of Maryland, Inc.).

Other examples of Maryland statutes that incorporate privately formulated codes may be found in Article 25, §§10D and 10E, which authorize the County Commissioners of St. Mary's and Charles Counties, respectively, to adopt building codes promulgated by the Building Officials Conference of America; Article 41, §257N, which requires the Department of Economic and Community Development to "develop statewide energy utilization guidelines" utilizing the most recent ASHRAE (American Society of Heating, Refrigerating, and Air Conditioning Engineers) standard;

Historically, the courts have rejected overly expansive transfers of legislative authority to non-governmental organizations. Thus, in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), the Supreme Court held that sections of the Bituminous Conservation Act of 1935 were unconstitutional because they permitted groups of private producers and miners to fix maximum hours and minimum wages: "This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business." 298 U.S. at 311.

In the same year, the Court of Appeals held unconstitutional an attempt by the General Assembly to abdicate its lawmaking function by making a statute regulating milk production effective only upon the request of various private groups. *Maryland Co-op Milk Producers, Inc. v. Miller*, 170 Md. 81 (1936). This "power-conferring" was held to be an invalid delegation: "The statutory powers here complained of are not made effective in the exercise of the General Assembly's own judgment, and are inoperative because of an invalid transfer of that responsibility." 170 Md. at 90. And, at least one case in the early part of this century held that this constitutional limitation prohibited legislative adoption of a privately formulated code. *Kansas v. Crawford*, 177 P. 360 (Kan. 1919) (striking down statute requiring that all electrical wiring conform to National Electrical Code, given lack of legislative participation in Code's adoption).

However, the clear trend in the case law embodies the modern view that, particularly in highly technical areas, a legislature may constitutionally rely on institutionalized, albeit nongovernmental, means for the detailing of legal requirements. Thus, in *Independent Electricians and Electrical Contractors' Ass'n v. New Jersey Board of Examiners of Electrical Contractors*, 256 A.2d 33, 42 (N.J. 1969), the court approved a statute quite similar to that involved in *Crawford*. The court noted that the Electrical Code adopted by the statute had been formulated by two standards-setting organizations "through 17 panels of recognized electrical and safety experts throughout the country, who revise it every three years." 256 A.2d at 42. As is true of the ANSI Code as well, these procedures "reflect a national consensus of manufacturers, consumers, scientific, technical and professional organizations, and

and Article 38A, §§58 and 60, adopting the National Fire Protection Association and National Electrical Codes, respectively.

governmental agencies." As one commentator observed, "The fact that a legislature adopts, by name, a private code rather than enacting a detailed bill drawn up by the same interest group is scarcely of constitutional significance." Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 Ind. L.J. 650, 680 (1975).

B. *Incorporation of Prospective Amendments
to Privately Developed Codes*

A somewhat closer question is whether the General Assembly may constitutionally require compliance with all future changes in the ANSI Code, not simply with the ANSI Code as it existed in 1955, when Article 89, §49B was enacted. There is support for the view that incorporation by reference of prospective amendments to private codes is unconstitutional. See *Agnew v. City of Culver City*, 304 P.2d 788, 797 (Cal. Dist. Ct. App. 1957), *aff'd*, 334 P.2d 571 (Cal. 1959); *Hillman v. Northern Wasco County People's Utility Dist.*, 323 P.2d 664, 671 (Oregon 1957). Cf. *Kingery v. Chapple*, 504 P.2d 831, 836-37 n. 13 (Alaska 1972). In general, the courts have had some difficulty in sustaining the constitutionality of a delegation "when the legislature adopts not only the existing standards of some technical or professional group, but any which it may prescribe in the future." Jaffe, *Law Making by Private Groups*, 51 Harv. L. Rev. 201, 229 (1937).

However, better reasoned precedent supports the view that delegating the future formulation of technical details to a disinterested, expert body is constitutional. For example, in *State v. Wakeen*, 57 N.W.2d 364 (Wis. 1953), the statute in question regulated the dispensing of "drugs," as " 'recognized in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia, or official National Formulary, or any supplement to any of them' " 57 N.W.2d at 365 (emphasis added). Rejecting the argument that this adoption of privately formulated listings was an unconstitutional delegation, the Wisconsin Supreme Court wrote that the legislature had merely "provided for the inclusion [in its definition of "drugs"] of articles discovered in the future with the advancement of science. It should not be held void because it provides for the inclusion of new discoveries, if approved by persons most eminent in the profession who are most interested in maintaining the highest standards known or to be known to science." 57 N.W.2d at 369. As the same court later observed in a related context:

"By delegating the task of determining what [a standard of pollution control technology] is to a federal agency, [the legislature] has not delegated its law-making powers. Rather, it has simply delegated the complicated fact determinations upon which the legislative policy is contingent." *Niagara of Wis. Paper Corp. v. Wisconsin Dep't. of Natural Resources*, 268 N.W.2d 153, 162 (Wis. 1978).

Cf. New Jersey v. Hotel Bar Foods, Inc., 112 A.2d 726 (N.J. 1955).

We think that the reasoning adopted by the Wisconsin court is applicable as well to the General Assembly's adoption of the ANSI Code and its "subsequent amendments." The incorporation by reference in Article 89, §49B(d) is a recognition on the part of the General Assembly that elevator safety is a highly technical area in which detailed standards are best determined by the well-recognized, expert body that has in place the mechanism for updating the standards. The General Assembly has not delegated its essential lawmaking power; instead, as the Wisconsin Supreme Court put it, "it has simply delegated the complicated"—and, we would add, inherently changeable—"fact determinations upon which the legislative policy is contingent." *Niagara of Wis. Paper Corp.*, 268 N.W.2d at 162. Given that the legislative goal of protecting public safety might well depend on a prompt response to new technology, in our view the General Assembly is not constitutionally required to approve separately each and every ANSI Code amendment as it is developed.

C. Conclusion

In sum, "where the legislature adopts the rules and regulations of private associations in the fields of health and safety there has been little challenge on the basis of an illegal delegation." 1 *Sutherland Statutory Construction* §4.11, at 142 (Sands 4th ed. 1985). See also Freedman, *Delegation of Power and Institutional Competence*, 43 U. Chi. L. Rev. 307, 333 (1976). We conclude that the General Assembly's decision to adopt the ANSI Code for elevators, as amended, is not unconstitutional.³

³Maryland is certainly not alone in its reliance on evolving private standards in technical areas:

"There has been widespread State adoption of the National Formulary and the United States Pharmacopoeia as standards for pure food and drug legislation and the Uniform Classification of Accounts of the Na-

III

Rulemaking Authority of the
Commissioner of Labor and Industry

Article 89, §49B(d) expressly provides for the Commissioner's rulemaking authority with respect to elevators: "All new and existing elevators ... shall be inspected, tested and maintained ... as prescribed by the American National Standards Safety Code ... and all subsequent amendments and revisions to it, *and rules and regulations which may be adopted by the Commissioner of Labor and Industry.*" (Emphasis added.)

However, the exercise of this rulemaking authority "must be reasonable and consistent with the letter and policy of the statute under which the agency acts." *Comptroller v. M. E. Rockhill, Inc.*, 205 Md. 226, 233 (1954). Both the "letter and policy" of Article 89, §49B(d) mandate compliance with the ANSI Code. In essence, the ANSI Code and its amendments establish the minimum elevator safety standards to be met in Maryland.

In our view, the grant of rulemaking authority to the Commissioner does not extend to a rule that would modify an ANSI Code requirement, just as it does not authorize a rule modifying a requirement directly stated in the statute. Thus, the Commissioner lacks authority to prescribe by rule a testing procedure that is more relaxed than the procedure called for in the ANSI Code—for example, by allowing mere visual inspection instead of actual testing of a component. *See, e.g.*, ANSI Code §1005.3a (hydraulic pressure testing).⁴

However, the issue of inspection frequency is more complicated, because both the ANSI Code and the statute itself contain perti-

tional Association of Railway and Utility Commissioners, the National Electrical Safety Code, the regulations of the National Board of Fire Underwriters, etc." 1 *Sutherland Statutory Construction*, §4.11 at 148 n.5.

See also note 2 above.

⁴The grant of rulemaking authority in Article 89, §49B(d), though it does not authorize relaxation of the ANSI Code, would be meaningless if it did not allow the Commissioner to supplement the ANSI Code. For example, the Commissioner may regulate in areas not covered by the Code, such as by requiring additional safeguards for handicapped persons on elevators. *Cf. City of Baltimore v. Sitnick*, 254 Md. 303 (1969) and *Rosburg v. State*, 111 Md. 394 (1909) (discussing "concurrent powers" doctrine with regard to local subdivisions and State).

nent provisions. The ANSI Code provides for varying inspection procedures at six month, one year, three year, and five year intervals. *See, e.g.*, ANSI Code §§1001 and 1002 (electric elevators) and §§1004 and 1005 (hydraulic elevators). The statute, in contrast, specifically provides for one year inspection intervals:

“If an inspection discloses that an elevator ... complies with the applicable safety code and the rules and regulations of the Commissioner ..., the Commissioner shall issue ... a certificate of registration and inspection. The certificate shall be valid for not more than one year from date of issuance.” Article 89, §49B(i).

Reading §49B(i) and the ANSI Code together, we conclude as follows:

1. The Commissioner has authority, derived from §49B(i), to prescribe annual inspections, conducted in accordance with the ANSI Code requirements for such inspections. Given the maximum one year validity period specified in §49B(i), the Commissioner has the discretion not to require the ANSI Code’s six month inspections.

2. The Commissioner lacks authority to prescribe inspections less frequently than annually. To do so would be inconsistent with §49B(i). However, the annual inspection required by §49B(i) need not be more extensive than required under the ANSI Code. In other words, if the ANSI Code calls for a particular inspection procedure once every three years, that procedure need not be performed annually merely because §49B(i) requires annual inspections; rather, the procedure is required every third inspection.

IV

Hardship Exceptions

With regard to your question about the authority of the Commissioner to take economic factors into account and modify the ANSI Code accordingly, we reiterate that a rule dealing with a matter addressed by the ANSI Code must be consistent with the Code. *See* Part III above.

At the same time, the Commissioner does have express authority to consider economic factors. Article 89, §49B(g) provides that:

“The Commissioner, upon written request, may grant exceptions from the literal requirements or permit the use

of other devices or methods than those specified under ANSI Code A.17.1-1971 and all subsequent amendments and revisions to it and rules and regulations adopted where it is evident that action is necessary to prevent undue hardship or where existing conditions prevent practical compliance and reasonable safety can in the opinion of the Commissioner be secured."

As we read it, this provision's reference to "exceptions" permits the grant of exceptions on a particularized, case-by-case basis only. If the person making the "written request" can satisfy the Commissioner that, under the particular circumstances, compliance with the ANSI Code would cause "undue hardship" or would be impracticable *and* that "reasonable safety can ... be secured," the Commissioner may permit noncompliance with the Code.

V

Conclusion

In summary, it is our opinion that the Commissioner of Labor and Industry may supplement the standards in the ANSI Code but may not amend the Code so as to relax or weaken its standards. If application of the ANSI Code results in undue economic burden or makes compliance impracticable in specific situations, the Commissioner may grant case-by-case exceptions, provided that reasonable safety measures are preserved.

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LOCAL GOVERNMENT

CHARTER COUNTIES—PREEMPTION/CONFLICT—TALBOT COUNTY
MAY CONTRACT WITH PRIVATE ENTITY FOR CUSTODY OF IN-
MATES IN COUNTY DETENTION FACILITY.

March 20, 1986

David R. Thompson, Esquire
County Attorney for Talbot County

You have asked for our views on whether Talbot County, a charter county, has the legal authority to contract with a private entity for the custody of inmates committed to the county detention facility.

For the reasons given below, it is our opinion that the county does have the authority to contract for the custody of its inmates, pursuant to the enactment of appropriate ordinances.

I

Background

At common law, it was the obligation of the sheriff to provide custody of and medical care for prisoners. 58 *Opinions of the Attorney General* 647 (1973). These common law duties have been codified in Article 87, §§45 and 46 of the Maryland Code. Also in Article 87, however, is a provision for an alternate custodian. Article 87, §48, provides:

“Where a county has adopted a charter under Article XI-A of the Constitution of Maryland, the county council of the county by resolution, ordinance or local law may provide for the appointment of a qualified person as jailor or warden of the county jail, together with qualified assistants necessary to perform the duties of the office. A jailor or warden appointed shall be responsible for the safekeeping, care and feeding of all prisoners in the jail from the time they are committed (and while working on the public highways and going to and from that work) until they are discharged, released or withdrawn from jail by

the sheriff, or under court order, or other authority. These provisions do not affect the powers and duties of the sheriff of the county in respect to the safekeeping and custody of all prisoners, except when the prisoners are in jail, or working on the public highways or going to and from work."

Talbot County, as a charter county, may, under §48, vest the responsibility for the housing of prisoners in an administrative official of the county. The further question, of course, is whether this official may use a private contractor to provide for the operation of the jail. The statute is silent on this point, but its general language regarding the county council's authority to provide for a warden and assistants indicates that the county has broad authority to decide how the jail will be administered. Determining whether that authority extends to the use of a contractor requires an examination of the powers granted to charter counties.

II

General Powers of Charter Counties

Article 25A of the Code (the "Express Powers Act" or the "Act") enumerates the powers of charter counties. Subsection 5(C) empowers charter counties "to establish, maintain, regulate and control county jails, and county houses of correction or detention and reformatories, and to regulate all persons confined therein."

The language of §5(C) clearly confers on charter counties, in very broad terms, full authority to provide for the operation of county jails and the treatment of prisoners. We are unaware of any limitations on the grant of this authority, except the statutory authority under Article 87, §45 and 46 of the sheriff to keep custody of and to care for prisoners and the authority of the courts regarding pre-trial detainees. *See Epps v. Levine*, 457 F.Supp. 561, 565-66 (D.Md. 1978).

The scope of §5(C) of the Act is amplified by §5(S), which provides in part:

"The foregoing or other enumeration of powers in the article shall not be held to limit the power of the county council, in addition thereto, to pass all ordinances, resolutions or bylaw, not inconsistent with the provisions of this article or the laws of the State, *as may be proper in exe-*

cuting and enforcing any of the powers enumerated in this section or elsewhere in this article, as well as such ordinances as may be deemed expedient in maintaining the peace, good government, health and welfare of the county.

Provided, that the power herein granted shall only be exercised to the extent that the same are not provided for by public general law; provided, however, that no power to legislate shall be given with reference to licensing, regulating, prohibiting or submitting to local option, the manufacture or sale of malt or spirituous liquors." (Emphasis added.)

Court decisions and Opinions of the Attorney General have construed §5(S) as a very broad grant of authority to legislate within and beyond the scope of the express powers set out elsewhere in §5. In *Montgomery Citizens League v. Greenhalgh*, 253 Md. 151 (1969), the Court of Appeals considered the authority of Montgomery County, a charter county, to enact a fair housing law prohibiting discrimination on the basis of race, religion, or national origin in the sale or rental of housing. The court concluded that the law was "a logical extension or supplementation of the specifically granted powers to legislate as to the use to be made of real property [§5(T)] and full power to zone [§5(X)]." 253 Md. at 160. The court, in reaching this conclusion, particularly considered §5(S) and noted: "The Council, having been given 'full' legislative power as specified by Art. XI-A, is also given the statutory power to pass 'all' ordinances it deems expedient under the police power." *Id.* See also 60 *Opinions of the Attorney General* 569, 571-72 (1975) (charter county may enact historic preservation legislation pursuant to Maryland Constitution, Article XI-A and Express Powers Act).

Fifteen years after its decision in *Montgomery Citizens League*, the Court of Appeals upheld a county ordinance that provided for the reimbursement of legal expenses incurred by certain county employees charged with criminal offenses or departmental violations in the performance of their duties. *Snowden v. Anne Arundel County*, 295 Md. 429 (1983). The court, in reaching its decision, relied heavily on *Montgomery Citizens League*. It noted with regard to §5(S) that "[t]his 'general welfare' or 'general grant of power' clause has been broadly construed to permit charter counties to legislate beyond the Powers expressly enumerated in the Express Powers Act." *Snowden*, 295 Md. at 432. See also *Bradshaw v. Prince Georges County*, 284 Md. 294 (1979) (charter county may waive sovereign immunity); *Prince George's County v.*

Chillum-Adelphi, 275 Md. 374 (1975) (charter county may direct activities of volunteer fire departments that accept county funds); *County Council v. Investors Funding*, 270 Md. 403 (1973) (§5(S) authorizes charter county to regulate landlord-tenant relations).

III

Limits on Powers of Charter Counties

The authority flowing from the Express Powers Act is not unlimited. Under §5(S), a county's ordinances must not be "inconsistent with the provisions of this article or the laws of the State," and the powers granted "shall only be exercised to the extent that the same are not provided for by public general law." These principles have been embodied in the concepts of "concurrent powers" and "preemption." "The doctrine of 'concurrent powers' enables the State and the local jurisdictions to legislate concurrently on a subject matter covered by the Express Powers Act, if there is no conflict between the local law and the Public General Law." 63 *Opinions of the Attorney General* 377, 388 (1978). The converse of concurrent power is the concept of preemption:

"In general, preemption occurs either when the General Assembly has expressly stated its intent to occupy exclusively a specific field of legislation or when a court is able to infer from a patterned approach to the subject, an implied intent on the part of the legislature to occupy exclusively the field." 65 *Opinions of the Attorney General* 136, 141 (1980).

In 63 *Opinions of the Attorney General* 377, the Attorney General concluded that a Prince George's County ordinance providing for county standards and licenses for group residential facilities was invalid. After carefully examining the ordinance and the various State statutes covering the facilities, the opinion concluded:

"It is permissible for both the county and the State to impose licensing requirements unless the county requirements present an irreconcilable conflict with the State requirements or unless the State has so forcefully entered the field as to prevent local regulations 'by occupation.' Here we have what appear to be irreconcilable conflicts as well as a broad State regulatory scheme, and we thus conclude that the State licensing and regulations must

take precedence to the exclusion of local regulation.” 63
Opinions of the Attorney General at 399.

In 65 *Opinions of the Attorney General* 136, the Attorney General concluded that a proposed ordinance requiring or permitting the County Executive to enter into binding collective bargaining agreements covering county employees would be legal. In that opinion, we noted that the General Assembly had not provided an express statement of its intent to preempt the field of public sector collective bargaining. The General Assembly had enacted a statute to enhance the authority of Baltimore City to implement a collective bargaining scheme and statewide collective bargaining statutes reflective of an intent to occupy exclusively the field of education. However, this office concluded that such limited State legislative activities in the area were not part of a “patterned approach” to collective bargaining indicating an intent to occupy exclusively and thereby preempt the field.

IV

Talbot County’s Authority to Contract for Operation of Jail

Applying these principles to your question, we conclude that §5(C) and (S) of the Express Powers Act permit the county to provide by ordinance for a contract with a private entity for the incarceration of county prisoners. As noted above, the grant of authority in §5(C) of the Act is stated in very broad terms: It is authority “to establish, maintain, regulate and control” county jails and “to regulate all persons confined therein.” The authority vested by this language necessarily includes choosing whether to operate the institution with county employees or through the use of a contractor. This authority, of course, is further supported by §5(S) in that such an action not only would be an appropriate means of executing the express power granted by §5(C), but otherwise may be characterized as maintaining the “good government” of the county. See *Montgomery Citizens League*, 253 Md. 151 (1969); *Prince George’s County v. Silverman*, 58 Md. App. 41 (1984); 65 *Opinions of the Attorney General* 136 (1980).

We are unaware of any enactments of the General Assembly that express a legislative purpose to reserve to the General Assembly the enactment of laws concerning contracts for custody of prisoners. Accordingly, we conclude that there is no preemption by di-

rect, express legislative statement. The further question is whether the General Assembly has acted so forcefully, and in such a patterned manner, as to allow an inference of preemption by exclusive occupation.

The legislature has addressed the contracting of prison services in other contexts. For example, Article 27, §690(e) authorizes the Commissioner of Correction to enter into agreements for the housing of State inmates in county detention facilities and §690(g) authorizes the Commissioner to contract with the federal government for the housing of State inmates. Under Article 27, §700A(c), the Commissioner may contract with "the proper authorities of political subdivisions of this State" for the housing of work release program participants in "local confinement facilities."

Article 27, §705(b) provides for written agreements between counties that choose to establish and maintain a regional detention center. Article 27, §705(f) authorizes the Commissioner of Correction to enter into an agreement that provides for the housing of State inmates in a regional detention center. A county seeking to establish a Community Adult Rehabilitation Center is authorized, under Article 27, §710(b) to lease a facility to serve as a center. Additionally, under Article 27, §710A(a), the State or a county establishing a Community Adult Rehabilitation Center "may, by contract, provide for the operation of [the] center by a nonpublic person, group, or agency."

In addition to those provisions, the Commissioner of Correction is authorized to contract with certain other states for the housing of this State's inmates in facilities in those states. Article 41, §§4-1201 to 4-1211 (the "Interstate Corrections Compact"). Finally, under Article 27, §678(d), the Commissioner of Correction may contract with "any private persons, firms, or organizations, to provide food, housing, transportation, and programs to inmates in a pre-release unit for women."

A review of these statutes indicates a legislative intention to control the authority of the Commissioner of Correction to provide by contract for the custody of inmates. However, the statutes do not represent such a patterned approach to similar contracting by counties as to lead to the conclusion that the legislature has preempted such contract authority. Instead, as noted in 65 *Opinions of the Attorney General* at 143, "these legislative actions simply stem from disparate needs brought to the attention of the General Assembly" within the context of very specific types of institutions.

In sum, it is our advice that Talbot County, by enacting ordinances to vest authority over county inmates in a warden or jailor and to authorize custody and care of inmates to be provided by a private contractor, would be exercising its concurrent power to legislate in the area of local jail operation. Such ordinances would "supplement the Public General Law without contravening it." 63 *Opinions of the Attorney General* at 388, citing *Roszburg v. State*, 111 Md. 394 (1909).

V

Related Issues

A. County's Police Power

While the county has authority to contract for prison services, it cannot wholly abdicate its responsibility for the operation of a county jail. The operation of a jail is clearly an exercise of the police power, and the police power cannot be delegated to a private entity. "Although local governments are normally bound by their contracts, ... it has long been recognized that questions of invalidity and enforceability arise when governmental bodies attempt by ordinance or contract to surrender or bargain away their discretionary legislative functions." *Maryland Classified Employees Ass'n v. Anderson*, 281 Md. 496, 508 (1977) (citation omitted).

Hence, such a contract should not purport to prevent the county from controlling the operation of the jail. See *City of Belleview v. Belleview Fire Fighters, Inc.*, 367 S.2d 1086, 1088 (Fla. App. 1979) (contract giving private corporation exclusive right to determine manner and method of providing fire protection, including selection of fire fighters and setting of policy, held invalid). We recommend that such a contract include provisions regarding the degree of control retained by county officials, the respective liabilities of the parties and their employees, standards for the operation of the facility, and the training and qualification of correctional officers.

With regard to the last two items, we direct your attention to relevant provisions of State law. Standards for local correctional facilities are established and enforced by the Maryland Commission on Correction Standards, under Article 41, §4-401. The term "local correctional facilities" includes "all places of correctional confinement or correctional institutions within the State of Maryland, primarily operated by local governments." Article 41, §4-401(b)(6). Thus, it appears that the State standards would apply,

as a matter of law, to a facility operated under a contract with a private entity. Similarly, qualification and training requirements for certain correctional employees are established and enforced by the Correctional Training Commission, under Article 41, §4-301. Although the matter is not entirely free from doubt, it appears that these requirements may apply to the employees of a contractor. See Article 41, §4-301(b)(4).

B. Conformance to County Charter

Although the county has the authority to contract for prison services, the ordinances by which the county exercises its authority must be consistent with the provisions of the county charter. The ordinances may not permit the county to enter into a contract in a manner inconsistent with requirements set out in the charter. For example, if, under the charter, all county contracts must be approved by the County Council, the ordinances to be enacted may not delegate that approval authority. A thorough discussion of this principle, in the context of collective bargaining, is set out in 65 *Opinions of the Attorney General* 136, 144-52.

C. Private Ownership of Jail

You asked that we specifically address not only the county's authority to contract for the operation of a jail constructed and owned by the county, but also the county's authority to contract for the housing of county inmates in a privately owned and operated facility. Insofar as the authority of the county is concerned, we see no difference between the two means of contracting for inmate housing. So long as ordinances consistent with the county charter authorize the particular means of contracting, the county may undertake either method. We note, however, that there may be significant differences in the legal and practical issues presented by each scheme. For example, it is our understanding that State co-funding of the construction of county jails would not be available for the construction of a privately owned facility.

Furthermore, the county's reliance on a privately owned facility would have serious implications, in that the county would have great difficulty, on short notice, providing for custody of its inmates elsewhere. This would tend to place the county at a disadvantage in dealing with a contractor's poor performance or default. One acceptable solution might be the county's retention of an option to purchase the facility for a clearly established price in the

event the county terminates the contract. In any event, the potential problems presented by termination of such a contract should be carefully addressed in the agreement between the county and the contractor.

VI

Conclusion

In summary, it is our opinion that Talbot County, as a charter county, may, through the enactment of ordinances consistent with the county charter, provide for custody of its inmates by a private contractor. These ordinances would both vest authority for the custody of county inmates in a warden or jailor under Article 87, §48, and authorize contracting with a private entity for the care of the inmates, either in a county owned facility or in a facility owned by the contractor.

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Editor's Note: The preceding opinion was originally issued as a letter of advice. The references in it to Article 41 have been changed to reflect subsequent recodification. Other recent opinions on problems of preemption and conflict include 72 *Opinions of the Attorney General* 188 (1987) and 69 *Opinions of the Attorney General* 183 (1984).

MARYLAND INSURANCE GUARANTY ASSOCIATION

STATE FUNDS—STATE AGENCIES—THE STATE HAS NO FINANCIAL LIABILITY FOR CLAIMS RAISED AGAINST MIGA, WHICH IS CONSIDERED A STATE AGENCY FOR SOME PURPOSES BUT NOT OTHERS.

March 3, 1986

The Honorable Howard A. Denis
Senate of Maryland

You have requested our opinion on three issues pertaining to the Maryland Insurance Guaranty Association ("MIGA"):

1. whether the State of Maryland is financially liable for claims against MIGA;
2. whether MIGA is a State agency or entity; and
3. whether appointment of the MIGA board of directors by the State Insurance Commissioner is an important factor in the above two determinations.

For the reasons given below, we conclude that:

1. The State has no financial liability for claims raised against MIGA.
2. MIGA is properly considered a State agency for some purposes but not for others.
3. The appointment of MIGA's board of directors by the Insurance Commissioner may well be a factor in determining MIGA's status as a State agency but has no bearing whatsoever on the issue of State liability.¹

¹In a letter of advice to Senate President Melvin A. Steinberg and Senate Finance Committee Chairman Dennis F. Rasmussen (February 17, 1986), Assistant Attorney General Robert A. Zarnoch reached essentially the same conclusions as are set forth here. That letter also set out various possible changes to MIGA's statute to further clarify MIGA's relationship to the State.

I

Background

The Maryland Insurance Guaranty Association was established by Chapter 703, Laws of Maryland 1971. The law governing MIGA is codified in Article 48A, §§504 through 519 of the Maryland Code.

As you have noted, the purpose of MIGA is to protect the public by (i) providing a mechanism to avoid financial loss to policyholders and claimants resulting from the insolvency of insurers and (ii) assisting in the detection and prevention of insurer insolvencies. Article 48A, §504(a). To that end, all insurers providing insurance (other than life and health insurance and annuities) must be members of MIGA as a condition of their authorization to transact business in Maryland. Article 48A, §§504(b) and 506.²

MIGA is designated as a "non-profit unincorporated legal entity." Article 48A, §506. Members of its board of directors are appointed by the Insurance Commissioner. Article 48A, §507.

MIGA uses no public funds. On the contrary, the Association is statutorily required to "[a]llocate claims paid and expenses incurred among the six accounts separately, and assess member insurers separately for each account in amounts necessary to pay the obligation of the Association ... subsequent to an insolvency, the cost of examinations ... and other expenses authorized by this subtitle." Article 48A, §508(a)(3). Even if MIGA's own funds prove insufficient in any given year, no provision is made for resort to State funds. Rather, the statute specifically requires that if the maximum assessment against members, taken together with other MIGA assets, does not comprise a sufficient amount in any account to make all necessary payments from that account, "the funds available shall be prorated and the unpaid portion shall be paid as soon thereafter as funds become available." Article 48A, §508(a)(3).

²For purposes of administration and assessment against member insurers, MIGA is divided into six separate accounts: title insurance, surety insurance, wet marine and transportation insurance, motor vehicle insurance, workmen's compensation, and all other insurance to which the statute applies. Article 48A, §506.

II

State Liability for Claims Against MIGA

In general terms, any assumption of financial liability by the State must be expressly stated. This may occur by authorization in the Constitution, by statute, or by express contract with the State. *See, e.g.*, §§13-120 and 13-152(a)(1) of the Financial Institutions Article. In the absence of such express authorization, the State cannot be held liable, as all rights "asserted against the State must be clearly defined, and cannot be raised by inference or presumption." *Rogan v. B & O R.R. Co.*, 188 Md. 44, 55 (1946). *See also* 81A C.J.S. *States* §194 (1977); 72 Am.Jur.2d. *States, Territories, and Dependencies* §88 (1974).

Even where express statutory or other authorization does exist, an enactment does not amount to a pledge of the faith and credit of the State unless it provides for wholly unconditional governmental liability for the payment of a debt. Thus, in *Maryland Industrial Development Financing Auth. v. Meadow-Croft*, 243 Md. 515, 523 (1966), the Court of Appeals held that a statute purporting to pledge the State's faith and credit was "of no legal force or effect" because limitations on the pledge pre-vented it from being binding in and of itself.

Finally, any financial obligation of the State must accord with Article III, §34 of the Constitution. This section provides in pertinent part that "[t]he credit of the State shall not in any manner be given, or loaned to, or in aid of any individual association or corporation."³ The Court of Appeals has interpreted this prohibition as "directed against the guaranty by a state of the debt of another and is not a limitation on the creation of an indebtedness for which a state is primarily liable." *Development Credit Corp. v. McKean*, 248 Md. 572, 576-77 (1968). Thus, the State may make grants or loans to private entities from the proceeds of the State's own borrowing, if the purpose of such grant or loan is public or semipublic; it may not, however, directly pledge its own faith and credit to guaranty the debt of another entity. *Johns Hopkins University v. Williams*, 199 Md. 382, 401 (1952); *Maryland Industrial Devel-*

³A comma after the word "individual" was omitted, apparently without substantive intent, in the 1867 Constitution. The language of Article III, §34 has been construed to bar gifts or loans of the State's credit to individuals as well as to associations and corporations. *See* 70 *Opinions of the Attorney General* 180 (1985) at 199 n. 18.

opment Financing Auth. v. Helfrich, 250 Md. 602, 614-15 (1968); *McKean*, 248 Md. at 576.

Applying these general principles to your question about MIGA, we conclude that the State has absolutely no financial liability for claims against MIGA. Article 48A makes no provision for financial liability of the State to MIGA. The statute neither appropriates State funds nor pledges the credit of the State for that or any other purpose. Instead, as discussed in Part I above, the statute specifically allocates MIGA claims and expenses among the separate MIGA accounts, all of which are funded by assessments on member insurers. Article 48A, §508(a)(3). Furthermore, in the event that MIGA funds do not meet its obligations in any given year, the statute provides for a procedure of prorating and delayed payment from those same accounts. Article 48A, §508(a)(3).⁴

In short, the State has never expressly assumed liability for claims against MIGA. On the contrary, the pertinent provisions of Article 48A makes clear that the obligation rests solely on the member insurers from whose assessments MIGA is funded. See *National Grange Mut. Ins. v. Pinkney*, 284 Md. 694, 703-04 (1979) (MIGA is not "maintained by the State," but instead allocates claims and expenses among its authorized accounts).⁵

Given the clear language of Article 48A, there is no question that the statute fails to provide for wholly unconditional governmental liability for payment of MIGA's debts. This is not, as in *Meadow-Croft*, due to limitations in a statutory pledge of faith and credit. In this case, there is no pledge whatsoever—the requirement of unconditional liability obviously has not been met where no liability

⁴The origins of MIGA are described in 57 *Opinions of the Attorney General* 306 (1972). As this opinion observed, a main purpose of MIGA is to spread the costs resulting from an insurer's insolvency "throughout a large segment of the industry since assessments are made against all insurers in the appropriate category under [Article 48A, §506]." 57 *Opinions of the Attorney General* at 316. Nothing in the legislative history, as recounted in this opinion, suggests that any part of the costs were to be borne by the State.

⁵We note that Senate Bill 813, currently before the General Assembly, proposes to amend Article 48A to clarify the relationship between MIGA and the State. Among other changes, the bill would add a provision that payment of covered MIGA claims "is neither guaranteed nor insured by the State of Maryland." Proposed Article 48A, §504(a)(2). It is our opinion that this express denial of any State guaranty only confirms existing law.

at all is undertaken.⁶

Finally, even if the State had expressly and unconditionally assumed liability for MIGA's obligations, which it has not, such action would probably violate Article III, §34 of the Constitution. As we have already discussed, the State could make a grant or loan to MIGA from the proceeds of its own borrowing, but it could not explicitly pledge its faith and credit to guaranty claims against MIGA. *See generally 70 Opinions of the Attorney General* at 198-201. Thus, to hold the State financially liable for claims covered by MIGA would not only extend the meaning of the statute beyond its stated terms, but would construe it in such a way as to make it potentially unconstitutional. *Cf. In re James D.*, 295 Md. 314, 327 (1983) (statutes are to be construed to avoid constitutional questions whenever "reasonably possible").

III

MIGA's Status As A State Agency

As the Court of Appeals observed in *A.S. Abell Pub. Co. v. Mezzanotte*, 297 Md. 26, 35 (1983), "there is no single test for determining whether a statutorily-established entity is an agency or instrumentality of the State for a particular purpose. All aspects of the interrelationship between the State and the statutorily-established entity must be examined in order to determine its status." In examining MIGA's status for the purpose of the State's Public Information Act, the Court of Appeals found in *A.S. Abell* that MIGA's existence depends upon the General Assembly; it serves a public purpose; its management is selected by the Insurance Commissioner, and is not self-perpetuating; it does not independently manage its affairs or enforce its regulations; its decisions may be reversed by the Insurance Commissioner; and it enjoys a special tax and liability status. The Court of Appeals accordingly held that while the State does not exercise control over all aspects of MIGA's operation, the total relationship between the State and the Association is such as to make MIGA an instrumentality of the State within the scope of the Public Information Act. 297 Md. at 38-39.

⁶Moreover, the State's underlying sovereign immunity has not been "expressly waived" by the MIGA statute or "by a necessary inference from such legislative enactment." *Board of Trustees v. John K. Ruff, Inc.*, 278 Md. 580, 588 (1976). In addition, no State funds have been appropriated for the payment of judgments arising out of claims against MIGA. 278 Md. at 591.

Taking full account of the holding in *A.S. Abell*, this office subsequently considered MIGA's status as a "unit of the State government" for purposes of the statutory ban against retaining private counsel. 70 *Opinions of the Attorney General* 30 (1985). In making our determination, we noted that: MIGA is a "non-profit unincorporated legal entity" whose primary duties require it to operate much as a private insurance pool; the General Assembly intended it to operate in most respects as a private entity in the day-to-day handling of its claims and cases; its needs for legal counsel are the same as those of any private insurance pool and could best be met by privately-retained attorneys who specialize in insurance practice; and the long-standing practice, accepted by MIGA, the Insurance Commissioner, and the Attorney General, was for MIGA to be represented by privately-retained counsel. Considering all these factors, we found that MIGA was not a unit of State government for the purpose of the statutory ban and could therefore continue to retain private counsel. 70 *Opinions of the Attorney General* at 32.

There is no discrepancy between the Court of Appeals' holding in *A.S. Abell* and the determination made in 70 *Opinions of the Attorney General* 30. It is well-established that an entity may be considered an agency, unit, or instrumentality of government for one purpose, but not for another. 70 *Opinions of the Attorney General* at 32 (citing examples of the Maryland Legal Services Corporation, county boards of education, and the American Red Cross). The factors to be considered in making this inquiry, as well as its ultimate outcome, are to a great extent determined by the purpose for which the inquiry is made. Thus, some or all of the factors mentioned above, and potentially other factors as well, might be pertinent, depending upon the particular inquiry. It is not possible to make an across-the-board determination of MIGA's status as a State agency.⁷

⁷Among the amendments to Article 48A proposed in Senate Bill 813 (see note 5 above) is a provision that expressly denies that MIGA is an instrumentality of the State of Maryland.

IV

Appointment of MIGA's Board of Directors

The State Insurance Commissioner appoints the members of the MIGA board of directors from member insurers. You have asked whether this fact is an important consideration in answering your previous two questions.

The power of appointment by a state official has no bearing whatsoever on the State's financial liability for claims against MIGA. As we have discussed in Part II above, that question depends on the language and construction of MIGA's statute, which clearly puts no obligation on the State to guaranty the association. The manner in which MIGA's board is appointed is wholly irrelevant to the issue.

On the other hand, State control over the board of directors would likely be one pertinent factor in determining MIGA's status as a State agency for some specified purpose. Indeed, as we have noted, appointment by the Commissioner was one of the factors considered by the Court of Appeals in determining that MIGA was a State instrumentality for the purposes of the Public Information Act. *A.S. Abell*, 297 Md. at 38.

V

Conclusion

In summary, it is our conclusion that the State bears no financial liability for claims against MIGA. MIGA is properly considered a State agency for some purposes but not for others. While the appointment of its board of directors may have some bearing on MIGA's status in this regard, it is wholly irrelevant to the issue of the State's financial obligation.

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Editor's Note: The legislation referred to in notes 5 and 7 of this opinion was enacted. Chapter 161, Laws of Maryland 1986. MIGA is now known as the Property and Casualty Guaranty Corporation.

MUNICIPALITIES

IMPACT FEES—CONSTITUTIONAL LAW—EQUAL PROTECTION—
OCEAN CITY HAS STATUTORY AUTHORITY TO IMPOSE IMPACT
FEES TO DEFRAY COST OF BEACH RESTORATION AND WOULD
MORE LIKELY THAN NOT PREVAIL AGAINST EQUAL PROTEC-
TION CHALLENGE.

March 24, 1986

Guy R. Ayres, III, Esquire

On behalf of the Town of Ocean City, you have asked for our opinion concerning several issues associated with the funding of the beach restoration project at Ocean City. Specifically, you pose the following questions:

1. Does Ocean City have statutory authority to charge impact fees to fund beach restoration?

2. If impact fees are authorized, does their imposition on new development only—and not on existing properties—violate the Equal Protection Clause of the United States Constitution?

3. Would any equal protection problem be alleviated if the impact fees were placed in a capital improvement fund that would be used to fund not only the beach restoration project, but also any major public improvements necessitated by new development?

For the reasons given below, we conclude as follows:

1. Ocean City has statutory authority to impose impact fees in order to provide revenue for beach restoration.

2. While the matter is not free from doubt, the charging of impact fees solely on new development only to fund the beach restoration project would more likely than not be sustained against an Equal Protection Clause challenge.

3. The creation of a capital improvement fund financed by new development impact fees, to be used for numerous capital improvements rather than exclusively for beach restoration, would strengthen the argument that the charging of impact fees does not violate the Equal Protection Clause.

I

Background

"Ocean City is a coastal resort community which exists on a naturally eroding barrier island." Department of Natural Resources, *Maryland's Atlantic Coastal Beach: Options for the Future*, at 1 (September 23, 1985). In recent years, the natural erosion of the beach has been hastened by "extensive development in Ocean City." *Id.*

Because the beach at Ocean City provides both significant revenue and important recreational opportunities for the State, it has come to be regarded as a public resource. For this reason, the Governor has concluded that it is in the State's best interests to undertake a beach restoration project.

Companion bills, House Bill 472/Senate Bill 272, that would accomplish this objective are currently pending in the General Assembly. This legislation would create an "Ocean Beach Replenishment Fund," out of which projects like bulkhead construction and dune restoration would be funded. Proposed §8-1105.2(a) and (b) of the Natural Resources Article ("NR" Article). Although the Fund would be created with State appropriations, State financial assistance for projects other than land acquisition "shall not exceed 50 percent of nonfederal costs." Proposed NR §8-1105.2(e). Conversely, Worcester County and Ocean City would be required to submit a "financing plan" under which they would pay the other half. Proposed NR §8-1105.2(h)(2) and (i)(1). The financing plan is to specify "the revenue sources to be relied upon to provide the local costs, which without limitation may include," as to the city:

"1. ordinary taxes authorized by the Tax-Property Article;

2. fees and charges authorized by Article 23A, Section 2(b)(33) or its charter; and

3. the admissions tax authorized by Article 81, Section 402 or designated portions thereof." Proposed NR §8-1105.2(i)(2)(ii).

Your letter states that one potential revenue source under consideration by Ocean City is "an Impact Fee on all new development." By "impact fee," we understand you to mean a fee that would be tied in to the set of approvals required for a new development and that would be payable in addition to current fees for required permits.

II

Authority to Impose Impact Fees

Article XI-E, §5 of the Maryland Constitution provides in pertinent part as follows:

“No ... municipal corporation shall levy any type of tax, license fee, franchise tax or fee which was not in effect in such municipal corporation on January 1st, 1954, unless it shall receive the express authorization of the General Assembly for such purpose, by a general law which in its terms and its effect applies alike to all municipal corporations in one or more of the classes provided for in Section 2 of this Article.”¹

The only potential “express authorization” for the imposition of impact fees is Article 23A, §2(b)(33) of the Maryland Code:

“Subject to the limitations imposed by the provisions of Article 81 and the Tax-Property Article, [a municipal legislative body has the power] to establish and collect reasonable fees and charges:

(i) For the franchises, licenses, or permits authorized by the law to be granted by a municipal corporation; or

(ii) Associated with the exercise of any governmental or proprietary function authorized by law to be exercised by a municipal corporation.”

We conclude that Article 23A, §2(b)(33)(ii) does constitute sufficiently express authorization.²

As we discussed in 67 *Opinions of the Attorney General* 307 (1982), Article 23A, §2(b)(33) was part of a legislative response to a Court of Appeals decision that sharply curtailed the power of municipalities to license and impose fees upon various activities. See *Campbell v. City of Annapolis*, 289 Md. 300 (1981). This legislative

¹Article XI-E, §2 authorizes the General Assembly to classify municipalities “into not more than four classes based on population.” In Article 23A, §10 of the Maryland Code, the General Assembly determined that all Maryland municipalities are members of a single class.

²In our view, Article 23A, §2(b)(33)(i) does not authorize the proposed impact fee. See 67 *Opinions of the Attorney General* 307, 311 (1982) (municipality does not have authority under Article 23A, §2(b)(32) and (33)(i) “to impose a license tax or fee to raise revenue that bears no reasonable relation to the expense of regulation”).

correction, Chapters 565 and 684 of the Laws of Maryland 1981, was intended "to restore to municipal corporations the broad authority 'heretofore thought to exist' to levy fees and charges in connection with the exercise of their lawful powers." 67 *Opinions of the Attorney General* at 310.

In Part I above, we summarized the obligations that would be placed on Ocean City if House Bill 472/Senate Bill 272 were enacted. The protection and replenishment of the barrier island on which Ocean City is built is plainly an appropriate governmental function. See McQuillin, *Municipal Corporations* §9.05 at 631-32 (3rd ed. 1979). Although the State will design and manage the beach restoration project, the legislation requires that Ocean City bear a portion of the project costs. As the preamble to the legislation states, "The beaches should be rebuilt and maintained through a cooperative effort between the federal, State, and local governments."

In short, we believe that Ocean City's financing of its share of the project costs is "[a]ssociated with the exercise of [a] governmental or proprietary function authorized by law," within the meaning of Article 23A, §2(b)(33)(ii). Indeed, the express reference in House Bill 472/Senate Bill 272 to "fees and charges authorized by Article 23A, Section 2(b)(33)" would be pointless if it did not contemplate that fees to defray project costs might be charged under that provision.³

III

Equal Protection Requirements

A. *Introduction*

Your second question is whether imposition of an impact fee on new development only, and not on existing properties, would "deny to any person ... the equal protection of the laws." U.S. Const. amend. XIV, §1. Under this financing alternative, the purchasers or lessees of new development would ultimately pay all of Ocean City's share of the beach restoration project costs, even though many others would also benefit from the project.

³The statutory underpinning for impact fees discussed above also satisfies the requirement of Article 14 of the Maryland Declaration of Rights that no tax or fee be charged "without the consent of the Legislature."

It is axiomatic that if—as here—no fundamental right or suspect class is involved, a governmental decision to treat groups of its citizens differently will be sustained under the Equal Protection Clause unless the challenger can show that there is no rational basis for the classification. *See* Nowak, Rotunda, and Young, *Constitutional Law* 591 (2d ed. 1983). Thus, Ocean City may impose an impact fee on new development only and not on existing property if it has a rational basis for doing so.

As a general matter, the rationality of imposing the costs associated with new development on the developer is readily apparent:

“The development and subdividing of land produces an increased demand for community services that would necessitate the expenditure of government funds. Thus, it is reasoned, ‘the subdivider who creates the demand ought to pay the price and pass it along to the owners of the subdivided and improved land.’” *Maryland-National Capital Park & Planning Comm’n v. Washington Business Park Associates*, 294 Md. 302, 317 (1982) (quoting 7 P. Rohan, *Zoning and Land Use Controls* §45.04[1], at 45-92 (1982)).

Cf. Board of County Comm’rs v. Gaster, 285 Md. 233, 248-49 (1979) (subdivision plat may be disapproved because of adverse impact on schools and roads).

This rational basis would likewise undergird the imposition of impact fees on new development, although we are aware of no Maryland cases that deal with such fees. The real issue is how closely linked the increased demand caused by new development and the government expenditure must be in order for the developer “‘to pay the price.’” In examining this issue, we turn to the analogous issue of special assessments.

B. *Special Assessments*

1. *Definition*

“Assessments[,] as distinguished from other kinds of taxation, are the special and local impositions upon the property in the immediate vicinity of local improvements, which are necessary to pay for the improvement, and are laid with reference to the special benefit which the property is supposed to have derived therefrom.” McQuillin, *Municipal Corporations* §38.01 at 10. *See also* Leonar-

do v. Board of County Commissioners, 214 Md. 287, 307 (1957) (“[T]he whole theory of a special assessment is based on the doctrine that the property against which it is levied derives some special benefit from the improvement.”)⁴

2. Requirement of proportionality

In the law of special assessments, equal protection problems are raised if the assessment is not levied against landowners in proportion to the benefit they receive through the public improvement.

More than 50 years ago, the United States Supreme Court summarized as follows the applicability of equal protection doctrine to special assessments:

“By a long line of decisions in this court it has been settled that ... the Legislature of a state may require that the cost of local public improvement, such as the construction or reconstruction of a public road, be distributed over the lands particularly benefited and charged against them according to their value, their area, or the benefits which they will receive; may itself determine what lands will be benefited, and in what proportions they will share in the benefits; and may avail itself, for the purposes of that determination, of any information which it deems appropriate and sufficient [O]nly where there is manifest and unreasonable discrimination in fixing the benefits which the several parcels will receive can the legislative determination be said to contravene the equal protection clause of [the Fourteenth] amendment.” *Kansas City S. Ry. v. Road Improvement Dist. No. 3*, 266 U.S. 379, 386-87 (1924).

See also 58 *Opinions of the Attorney General* 18 (1973) (municipalities required to levy benefit charges according to benefit received by each property).

⁴A number of provisions in the Maryland Code impose special assessments. *See, e.g.*, Article 25, §§58, 59 (assessments for ditch and drainage projects, imposed “against each owner” in “sum proportional to the entire benefits accruing to each owner from the ... improvements”); Article 25, §10B1/2 (special assessment levied against any land developer “subdividing and/or developing” in Carroll County, to reflect cost of “additional educational facilities, water and sewerage, sanitation or other such facilities”); Article 25, §165 (“benefit charge” assessed against “all real property ... benefited by” erosion prevention works set up by statute).

The results in any particular case reflect the court's judgment whether this flexible proportionality requirement has been violated. Compare, e.g., *Beauchamp v. Somerset County Sanitary Comm'n*, 243 Md. 98 (1966) (decision to apportion special assessment according to location of residence—rural or urban—held constitutional on ground that different groups would benefit in different amounts from proposed improvements) with *Montgomery County v. Schultze*, 57 Md. App. 781 (1984), *aff'd*, 302 Md. 481 (1985) (enhanced benefit to land from improvement based on proximity alone not sufficient to require more proximate landowners to shoulder entire cost of project, when project will be of benefit to and be primarily used by public at large; to justify special assessment, there must be special benefit to those assessed).

However, beyond the basic requirement that special assessments be proportionate to benefits conferred, such assessments are generally presumed valid and constitutional, and municipalities are accorded broad discretion in their classifications of groups to be charged, and in their imposition of such fees. Classifications by municipalities are generally assumed to be rationally related to the purpose behind a given special assessment. *Northampton Corp. v. Washington Suburban Sanitary Comm'n*, 278 Md. 677, 684 (1976). ("Our cases made it abundantly clear that so long as similarly situated properties are similarly treated under a definite and just plan adopted by governmental authorities in the exercise of their discretion, the action will not be disturbed by the courts where neither fraud nor mistake appears.") See also *Leonardo v. Board of County Commissioners*, 214 Md. at 307-08.

Indeed, these principles have been applied to the funding of one of the principal amenities of Ocean City, its boardwalk. See *Bassett v. Mayor and City Council of Ocean City*, 118 Md. 114, 119-120 (1912) (General Assembly has broad discretion in judging what properties should be assessed to pay for boardwalk).

3. *Imposition of special assessments on new development*

In spite of the general requirement in special assessment law that costs be proportionate to benefits received, some cases have upheld special assessments even though a disproportionate charge was imposed on new development. These cases generally draw on the broad discretion afforded municipal authorities in the imposition of special assessments or impact fees. In addition, they accept the argument that disproportionate charges to new development are justified when new development necessitates public improve-

ment that previously was merely desirable. Otherwise put, courts have sometimes viewed new development as the final “straw that broke the camel’s back,” forcing the municipality to undertake public improvements it previously thought of as potentially beneficial but not immediately imperative.

The cases in this area do not represent a fully developed, coherent body of law. Rather, they reflect disparate views as to the showing that will sustain the imposition of disproportionate charges on new development. But in general, their overall import is that strict equality between the benefit received through public improvement and the burden of a fee is not a constitutional requirement.

Perhaps the most relaxed view of the benefit-burden relationship is reflected in *Deerfield Estates, Inc. v. Township of East Brunswick*, 286 A.2d 498, 507-08 (N.J. 1972). That case involved a city’s refusal to install a water main to service subdivision development pending the payment of a sewer extension fee by the developer. The court suggested that municipalities had broad discretion in allocating the costs of a water main extension project:

“First, it may be undertaken entirely at municipal cost and expense.... In the second place the municipality may undertake the project as a local improvement and assess the costs against the owners of the properties benefited....

The third course is to require that the work be done at the expense of the developer either with or without a formula providing for partial or total reimbursement.” 286 A.2d at 507.

The restraint on the municipality’s discretion is simply that the results be “equitable”: “What [the municipality] may not do is to extend mains throughout one development at general municipal expense and then turn about and impose upon another developer the full cost.” *Id.* But apart from this obvious form of discrimination, “[t]he demands of equality do not ... preclude reasonable differentiation.” The rule of equitable treatment “must be given a pragmatic application”:

“Complete equality of treatment may sometimes be impossible Equality of treatment may upon occasion be forced to give way before some supervening public interest.” 286 A.2d at 507-08.

Other cases have required that the municipality establish a reasonable—but not absolute—relationship between the need for a

public improvement and the occurrence of new development. For example, in *Call v. West Jordan*, 614 P.2d 1257, 1258 (Ut. 1980), the court held that "in lieu" fees imposed on new developers must be used so as to demonstrably benefit a new subdivision, but need not benefit that development only.⁵ In that case, subdividers brought an action challenging a city ordinance requiring them either to dedicate part of their land for parks or pay an equivalent value to the city for flood control or park and recreational facilities. The court held that the fee must "be used in such a way as to benefit demonstrably the subdivision in question. This is not to say that the benefit must be solely to the particular subdivision, but only that there be some demonstrable benefit to it." 614 P.2d at 1259 (emphasis in original).

The *Jordan* court quoted from another special assessment case, *Home Builders Association of Kansas City v. City of Kansas City*, 555 S.W.2d 832 (Mo. 1977), in which the Missouri Supreme Court held that special assessments are constitutionally valid where "the burden cast upon the subdivider is *reasonably* attributable to his activity." (Emphasis in original.) The test imposed by that court was summarized by it as follows: "Insofar as the establishment of a subdivision within a city increases the recreational needs of the city, then to that extent the cost of meeting that increase may reasonably be required of the subdivider." 555 S.W.2d at 835 (emphasis omitted). In other words, those who bring about an increase in demand may properly be required to bear the full cost of such a recreational improvement even though they are not the sole beneficiaries of it; conversely, the other beneficiaries need not be required to pay a share of the cost.

Even cases requiring a very strong showing of connection between the imposition of a fee and the onset of new development do not require a showing of exclusive benefit. In *Ivy Steel and Wire Co. v. City of Jacksonville*, 401 F. Supp. 701 (M.D. Fla. 1975), the imposition of a water pollution control charge solely on new development was upheld, in spite of the obvious fact that existing landowners would benefit from pollution control as much as new developers. The court reasoned that it was constitutional to impose the fee on new development only because new development created the "immediate need" for the pollution control measure. The court supported its conclusion by pointing out that "[o]ur system of government frequently imposes certain burdens on some groups while

⁵"In lieu" fees are fees imposed in lieu of the dedication of land by a new developer for park or recreational facilities.

exempting others ... despite the [result] that, while all benefit, only some bear the burden." 401 F. Supp. at 705. *See also Jordan v. Village of Menomonee Falls*, 137 N.W.2d 442 (Wis. 1966) (although not holding that this level of connection was always required to make municipal fee constitutional, court found additional schools, parks, and recreational facilities would not have been necessary in this case *but for* new development; therefore, new properties could constitutionally bear full burden of funding public improvement).

C. Conclusion

As the discussion above suggests, we cannot predict with confidence the outcome of an equal protection challenge to the proposed impact fee. If the impact fee were to be the sole revenue source for Ocean City's share of the project costs, a court might view the burden on new development as fatally disproportionate and therefore a violation of the Equal Protection Clause. However, this result is far from inevitable, especially given the broad discretion afforded taxing authorities under the rational basis test. If, for example, the impact fee were part of a mix of revenue measures, so as to assure greater proportionality, or if new development can fairly be said to be the catalyst that transforms a merely desirable project into an essential one, Ocean City would likely prevail in defending against an equal protection challenge.⁶

IV

Capital Improvement Fund

Your final question posits the creation of a capital improvement fund, funded by impact fees on new development only but used to fund not only the beach restoration project but also many other types of major public improvements. As we understand it, the capital improvement fund would support additional sidewalks, park and recreational facilities, and sanitation facilities, all of which would be necessary because of the additional drain on public re-

⁶The pending legislation, House Bill 472/Senate Bill 272, authorizes a number of revenue-raising devices apart from the impact fees. *See* Part I above. If Ocean City concludes that the possibility of an equal protection challenge to the impact fee makes use of that revenue measure too problematic, it will nevertheless have a number of alternative methods at its disposal if the legislation is enacted.

sources that occurs when an area's population increases. You ask whether the equal protection problem that might otherwise exist would be lessened by the use of such a capital improvement fund.

We believe that creation of a capital improvement fund would strengthen the arguments that Ocean City would be able to make in support of the constitutionality of the impact fee. As discussed in Part II B 3 above, the imposition on new development of the full cost of an improvement can be justified if new development has occasioned the need for the improvement, even if other property owners benefit as well. The proposed capital improvement fund would, in effect, identify the beach restoration project as one such improvement along with many others. Because a categorization of this kind is to be sustained unless there is "manifest and unreasonable discrimination," the capital improvement fund's spreading of impact fee revenues among several projects of benefit to new development would improve the case for constitutionality. *Kansas City S. Ry. v. Road Improvement Dist. No. 3*, 266 U.S. at 386.

V

Conclusion

In summary, it is our opinion that:

1. Ocean City has statutory authority to impose impact fees in order to provide revenue for beach restoration.
2. While the matter is not free from doubt, the charging of impact fees solely on new development to fund the beach restoration project would more likely than not be sustained against an Equal Protection Clause challenge.
3. The creation of a capital improvement fund financed by new development impact fees, to be used for numerous capital improvements rather than exclusively for beach restoration, would strengthen the argument that the charging of impact fees does not violate the Equal Protection Clause.

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Opinions and Advice

Editor's Note: The ocean beach replenishment legislation referred to in Part I of this opinion was enacted as Chapter 606, Laws of Maryland 1986, codified at §§8-1105.2 and 8-1105.3 of the Natural Resources Article.

OIL OVERCHARGE RESTITUTION

EXXON REFUND—RESTRICTIONS ON THE USE OF THE REFUND—
SUPPLANTING OF STATE FUNDS PROHIBITED.

March 5, 1986

The Honorable Louis L. Goldstein
Chairman, Board of Trustees
Maryland Energy Overcharge Restitution Trust Fund

You have requested our opinion concerning the restrictions that will apply to the State's use of certain oil overcharge refunds. These funds are being made available to Maryland and the other states, subject to the requirements that were established by United States District Court for the District of Columbia to govern the use of the funds. *United States v. Exxon*, 561 F. Supp. 816 (D.D.C. 1983), *aff'd*, 773 F.2d 1240 (Temp. Emer. Ct. App. 1985), *cert. denied*, 54 U.S.L.W. 3499 (U.S. Jan. 28, 1986) (No. 85-429).

Accordingly, this opinion sets forth our interpretation of the court's decision and other applicable law. For the reasons stated below, we conclude that:

1. The refund may be used only for one or more of five designated energy conservation programs.
2. Both the refund principal and the interest earned on it must be spent as soon as possible, consistently with their efficient and effective use.
3. The refund may not be spent on administrative expenses but may be spent on services directly related to the recipient programs.
4. The refund may not be used to supplant State funds otherwise available for the recipient programs.

In its use of the *Exxon* refund, the State must be cognizant not only of its present obligation to comply with the *Exxon* order but also of the prospect of additional, large refunds in other cases. Careful adherence to the letter and the underlying intent of the *Exxon* order may well yield significant future benefits for the consumers of Maryland.

I

United States v. Exxon

This action was filed by the United States Department of Energy ("DOE") pursuant to the provisions of Sections 208B and 209 of the Economic Stabilization Act of 1970, 12 U.S.C. §1904. DOE sought civil penalties and restitution from Exxon Corporation for overcharges on domestic crude oil produced from January 1975 until the end of federal oil price controls in January 1981. On March 25, 1983, the United States District Court for the District of Columbia entered partial summary judgment in favor of DOE and directed Exxon to refund \$895,501,163.85 in overcharges, together with interest from the dates of the overcharges. 561 F. Supp. at 818 and 857-58.¹

Exxon appealed to the Temporary Emergency Court of Appeals, which affirmed, without modification, the district court's decision. 733 F.2d 1240 (Temp. Emer. Ct. App. 1985). Thereafter, Exxon sought review by the United States Supreme Court. On January 27, 1986, the Supreme Court denied Exxon's petition for certiorari, thereby concluding this protracted litigation. 54 U.S.L.W. 3499 (U.S. Jan. 28, 1986) (No. 85-429). Therefore, the decision of the district court, undisturbed on appeal, will govern the use of the *Exxon* refund and is the focus of our analysis.

After holding Exxon liable for the total overcharges alleged by DOE, the district court found that, through the operation of the federal oil price regulations in effect at the time of the overcharges, Exxon's unlawfully inflated prices were passed through the nationwide distribution system in the form of increased costs from producer to refiner to jobber to retailer, and, finally, to the ultimate consumers. 561 F. Supp. at 853. The court concluded that the overcharges "were borne by ultimate consumers of petroleum products throughout the entire country" and that "the broad scattering of the ill effects of Exxon's wrongdoing render[ed] impossible the tracing of the overcharges to their ultimate victims and the calculation of the precise damages suffered by each." *Id.*

Section 209 of the Economic Stabilization Act prescribes restitution as the remedy for violations of the oil price regulations. 12 U.S.C. §1904. Exercising its broad equitable powers to fashion a

¹The district court declined to assess civil penalties against Exxon. 561 F.Supp. at 858. The accumulated interest currently exceeds \$1.2 billion, raising the total judgment against Exxon to approximately \$2.1 billion.

restitutive remedy in the case, the district court chose as the remedial framework a provision, known as the Warner Amendment, that had been incorporated into the continuing appropriations resolution for fiscal year 1983.² The Warner Amendment sets forth a formula for the disbursement of certain escrowed oil overcharge refunds under the control of the Secretary of Energy. The court directed Exxon to pay the full amount of the overcharges, together with accrued interest, into an escrow account in the United States Treasury. The funds are to be held in trust by DOE and disbursed within 10 days to the states and territories, in accordance with the procedures set forth in the Warner Amendment.

With some minor modifications, the district court ordered that the Warner Amendment "apply in its entirety under this court's order as the set of terms and conditions governing DOE's handling of the escrow account established to receive restitution payments from Exxon." 561 F. Supp. at 856 n.59.³ The judgment of the court further provides that "the States and other eligible jurisdictions shall use all funds [disbursed pursuant to the judgment in this case] in a manner consistent with this Court's Memorandum Opinion of March 25, 1983, and shall report annually to this Court and to DOE the manner in which said funds have been used until all such funds shall have been expended." *United States v. Exxon*, No. 78-1035 (D.D.C. June 7, 1983). This latter requirement, which does not appear in the Warner Amendment, imposes a continuing reporting obligation on the states and jurisdictions receiving the Exxon refunds.

In accordance with the district court's decision, DOE will imminently disburse approximately \$36,000,000 to the State of Maryland. A letter signed by the Governor, which was requested by DOE as a prerequisite to disbursement, confirms the State's intention to adhere to the requirements concerning the use of the funds.

²Pub. L. No. 97-377, 96 Stat. 1830, 1919, § 155 (1982). Pertinent aspects of the Warner Amendment are examined in detail in Part III of this opinion.

³In its order, the court struck as irrelevant those provisions of the Warner Amendment that limit the monies that the Secretary of Energy may disburse to: (1) a total of \$200,000,000, (2) funds that "are not likely to be required for satisfying claims of potential claimants . . ." and (3) funds "the use [of which] would be consistent with orders covering such funds." 561 F. Supp. at 856 n.59.

II

Maryland Energy Overcharge Restitution Trust Fund

In 1984, the General Assembly established an Energy Overcharge Restitution Trust Fund and created a Board of Trustees to manage and make disbursements from the Trust Fund. Chapter 759, Laws of Maryland 1984, codified as Title 13 of the Natural Resources Article ("NR" Article). This enabling statute directs the Board of Trustees to "assess and determine the respective needs of the citizens of the State, develop plans for the allocation and disbursement of trust funds in accordance with those needs ... and ... to disburse funds accordingly." NR §13-105(f)(2).

Although the statute permits the Board to exercise discretion in determining the energy needs of the citizens of Maryland and devising means for addressing those needs, NR §13-106 sets forth guidelines that the Board must observe in developing plans for the allocation and disbursement of trust funds. The Board is directed to give priority in funding to low-income residential weatherization programs, "to the extent practicable and permitted by law." NR §13-106(c). However, the statute provides that the allocation guidelines set forth in NR §13-106 are subject to any restrictions on the use or allocation of overcharge refunds "expressly provided by statute or required as a condition of acceptance" of a particular overcharge refund. NR §13-106(a). Moreover, the Board may disburse funds "solely to supplement, and not to supplant, the existing and planned funding for the recipient programs." NR §13-106(d).

The statute further provides that if overcharge refunds totaling in excess of \$500,000 are received by the Board, the refunds are to be held in the Trust Fund and the principal is not to be expended. NR §13-106(b)(1). However, the principal of the Trust Fund may be expended even if it exceeds \$500,000 if that expenditure "is required as a condition of acceptance of oil overcharge refunds." NR §13-106(b)(3)

III

Use of the *Exxon* RefundA. *The Warner Amendment—Introduction*

As discussed in Part I above, the district court in *Exxon* adopted, without substantive modification, the provisions of the Warner

Amendment as the terms governing the disbursement of monies that Exxon was directed to disgorge. The clear intent of the court, expressed in its opinion, is that the *Exxon* monies are to be treated in most respects by the states as though they were disbursed pursuant to the Amendment. 581 F. Supp. at 856. Therefore, we must examine the provisions of the Amendment and its legislative history for guidance regarding the use of the *Exxon* refund.

The Warner Amendment was enacted on December 21, 1982, as part of the continuing appropriations resolution for fiscal year 1983. The Warner Amendment directed the Secretary of Energy to disburse from escrowed oil overcharge refunds under DOE control amounts not to exceed \$200,000,000 for use by the states in one or more of five energy conservation programs identified in the law.⁴

Section (a) of the Amendment states the law's purpose: "[T]o provide the Secretary of Energy the exclusive authority for the disbursement of the designated petroleum violation escrow funds for limited restitutional purposes ... which are reasonably expected to benefit the class of persons injured by such violations." The Amendment further provides that the states shall use these funds as if such funds were received under one or more of five designated energy programs. Section (c). The five programs designated in the Amendment for receipt of overcharge monies are ongoing, primarily federally-funded, energy conservation programs operated by state governments. In addition, section (f) of the Amendment prohibits the use of funds received under the Amendment for any administrative expenses of DOE, any state, or any energy conservation program. Finally, funds received pursuant to the Amendment must be used as a supplement to, and not a substitute for, otherwise available funding for the programs. Section (c).

B. Programs Eligible for Funding

Section (c) of the Warner Amendment provides that the states shall use the refunds "as if such funds were received under one or more energy conservation programs." Subsection (e)(2) defines "energy conservation programs" as:

⁴In January 1983, the Secretary of Energy disbursed \$200,000,000 to the states and territories.

- “(A) the program under Part A of the Energy Conservation and Existing Buildings Act of 1976 (42 U.S.C. 6861 and following);
- (B) the program under Part D of Title III of the Energy Policy and Conservation Act (relating to primary and supplemental State agency conservation programs; 42 U.S.C. 6321 and following);
- (C) the program under Part G of Title III of the Energy Policy and Conservation Act (relating to energy conservation for schools and hospitals; 42 U.S.C. 6371 and following);
- (D) the program under the National Energy Extension Service Act (42 U.S.C. 7001 and following); and
- (E) the program under the Low-Income Home Energy Assistance Act of 1981 (42 U.S.C. 8621 and following).”

In Maryland, the counterparts of these programs are administered by the State Departments of Human Resources and Natural Resources. The State programs are:

- (1) the Maryland Weatherization Program (COMAR 07.06.05) (administered by the Department of Human Resources through the Community Services Administration);
- (2) the Maryland Energy Conservation Program (administered by the Department of Natural Resources through the Maryland Energy Office of the Maryland Energy Administration);
- (3) the Maryland Institutional Conservation Program (administered by the Department of Natural Resources through the Maryland Energy Office of the Maryland Energy Administration);
- (4) the Maryland Energy Extension Services (administered by the Department of Natural Resources through the Maryland Energy Office of the Maryland Energy Administration); and
- (5) the Maryland Energy Assistance Program (COMAR 07.06.06) (administered by the Department of Human Resources through the Community Services Administration).

The requirement that the funds are to be used as if they were received "under one or more energy conservation programs" suggests that the states have broad discretion in deciding whether to apply the *Exxon* refund to all or any number of the designated programs. Section (c) (emphasis added). Legislative history confirms that Congress intended that the States would assess the energy needs of their citizens and respond accordingly by allocating the refund to those programs that would most swiftly and efficiently meet the most critical needs.⁵ It follows that the Board may, in its discretion, allocate the entire refund to a single program or to more than one.⁶

The terms of the court order and the Amendment make clear that the *Exxon* monies may not be allocated for programs other than those identified in the Amendment. For example, funds may not be awarded to other governmental or private weatherization or energy assistance programs, even though such programs might service the same or comparable areas of need. This restriction does not, however, preclude such programs from applying for funding from the *Exxon* distribution, under the State Energy Conservation Program or through the State Energy Extension Services.

C. *Timing of Expenditures*

The Amendment does not prescribe a specific time period within which the funds must be expended. However, the states are required to identify to the Secretary of Energy, within one year from the date on which the funds are received, the specific program or programs to which funds will be allocated. Section (c). Although the Amendment does not specify a time period for the expenditure of the funds, the legislative history clearly indicates the intention

⁵In debate on the floor of the Senate, Senator Warner stated that the amendment "would allocate monies to [the states], giving them the discretion to direct the funds to the highest priority energy-related projects in their particular States." 128 Cong. Rec. S15115 (daily ed. Dec. 16, 1982) (statement of Sen. Warner). Similarly, Senator Percy noted that "the States under this Amendment are provided a great deal of flexibility in order to design programs which will meet the special needs of consumers in the States in the quickest manner possible." 128 Cong. Rec. S15116 (daily ed. Dec. 16, 1982) (statement of Sen. Percy). Senator Hatfield stated that the Amendment requires "the States[to] choose from five federally authorized State and local energy programs." 128 Cong. Rec. S15702 (daily ed. Dec. 20, 1982) (statement of Sen. Hatfield).

⁶But see NR §13-106(c) (priority to be given to low-income residential weatherization programs).

of the Amendment's sponsors that the funds be allocated and disbursed by the states at the earliest date compatible with the most efficient and effective use.⁷

In its judgment, the district court ordered the states to "use *all* funds [disbursed pursuant to the *Exxon* case] in a manner consistent with [the] court's Memorandum Opinion of March 25, 1983, and [to] report annually to [the] court and to DOE the manner in which said funds have been used until *all* such funds shall have been expended." *United States v. Exxon*, No. 78-1035 (D.D.C. June 7, 1983) (judgment) (emphasis added). Read together with the legislative history, the court's statement reflects an expectation that the states will allocate and disburse the refund to one or more of the identified programs on a schedule that strikes a balance between the swiftest possible distribution and the most efficient use of these monies to achieve the purpose to which they are dedicated.

D. *Use of the Principal*

The Maryland Trust Fund statute provides, in pertinent part, that:

"The principal of the Trust Fund may be expended if:

(1) the principal of the Trust Fund does not exceed \$500,000;

(2) An energy emergency is declared by the Governor, as provided in Article 41, § 15B (c-1) of the Code, and then only for the purposes of subsection (a)(1) of this section; or

(3) It is required as a condition of acceptance of oil over-charge refunds." NR §13-106(b).

⁷Speaking on the floor of the Senate, Senator Warner stated, "the Amendment would direct States to send out these funds *now*." 128 Cong. Rec. S15115 (daily ed. Dec. 16, 1982) (statement of Sen. Warner) (emphasis added). Senator Percy, also speaking on the floor of the Senate, stated that "the Amendment provides the States substantial flexibility in order to design programs which will meet the special needs of consumers in the States in the *quickest* manner possible." 128 Cong. Rec. S15116 (daily ed. Dec. 16, 1982) (statement of Sen. Percy) (emphasis added). Senator Hatfield, submitting the Report of the Conference Committee on the continuing resolution, stated that the "distribution of these funds is for the purpose of having limited by *expeditious* restitution to claimants who have been injured by petroleum pricing and allocation violations." 128 Cong. Rec. S15702 (daily ed. Dec. 20, 1982) (statement of Sen. Hatfield) (emphasis added).

The plain effect of this provision would be to maintain, in trust, the principal amounts of oil overcharge refunds totaling in excess of \$500,000 and permitting the expenditure only of the interest earned on the trust principal. Two exceptions stated in the subsection are a declaration by the Governor of an energy emergency or the presence of a conflicting condition imposed on the use of a given refund. We conclude that the latter exception is applicable to the *Exxon* funds.

The court's requirement that "all funds" derived from the *Exxon* refund be disbursed and expended efficiently and expeditiously prohibits the deposit of those monies into a trust that generally permits expenditure of interest only. Such an arrangement, based upon arbitrary spending limitations that are not directly related to the ability of the designated program or programs to efficiently use the available principal, would violate the restitutive purpose of the remedy chosen by the court. The equitable doctrine of restitution underlying the *Exxon* decision—that Exxon be forced to disgorge its wrongful gains and that the overcharges be remitted to the states for the benefit of the injured parties—requires in part that the consumers be restored to the position that they would have occupied but for the wrongful conduct in question. Restatement (Second) of Restitution §1 (Tent. Draft No. 1, 1983). Any plan that would arbitrarily withhold all or a portion of the principal would violate this concept and, in turn, the order of the court.

Similar considerations govern the maintenance by the Board of whatever portion of the *Exxon* refund is not expended within the first year after its receipt. We reiterate that the Board, in effect, acts as a fiduciary for the citizens of the State with respect to the *Exxon* refund. Accordingly, it is our opinion that, in dealing with the *Exxon* refund (and, indeed, with any other oil overcharge refunds received under comparable conditions), the Board and the State should be guided by the same considerations that apply to fiduciary relationships in other, more traditional circumstances. This, of course, includes exercising reasonable care to conserve the trust funds and avoid any use that may jeopardize the trust principal.

For example, to the extent that any portion of the *Exxon* refund must be held over for future distribution, the Board may not lend or otherwise shift all or a portion of the remaining *Exxon* refunds to another fund or trust that is not under the Board's direct management and supervision. Cf. 66 *Opinions of the Attorney General* 56 (1981) (State, as trustee of Fair Campaign Financing Fund, may use the Fund only in accordance with its purpose).

This intent to preserve and maintain separately the monies in the Trust Fund is reflected in the Board's enabling statute, as well. NR §13-406(e) provides: "Any portion of the appropriated funds that are not obligated at the end of the fiscal year shall not revert to the General Fund and shall be carried over in the Trust Fund for use in the next fiscal year." This statutory language underscores the Board's duty under the court order to maintain all undisbursed refunds in the Trust Fund until their distribution.

In sum, any action that would conflict with the judicial mandate of expeditious disbursement or would place the refund monies beyond the Board's control would violate both the court's order and the enabling statute and would jeopardize future oil overcharge refund recoveries.

E. Use of Interest Earned on the Principal

There is no clear guidance in either the district court's opinion or the Amendment regarding the use of the interest that will be earned on the principal of the *Exxon* funds after the monies have been disbursed to the states. The legislative history of the Amendment also provides no pertinent direction.

Despite the lack of any express statement by the court about interest, the legal principles underlying the remedy implemented by the court provide guidance as to the State's use of interest collected on the *Exxon* funds. After holding Exxon liable for the overcharges, the district court determined that the oil-consuming public bore the brunt of Exxon's overcharges. The court found that, "As a result of the pervasive system of price control which then existed ... Exxon's overcharges were not ... borne by Exxon itself, but instead were borne by ultimate consumers of petroleum products throughout the entire country." 561 F. Supp. at 853 (footnote omitted). The district court held, in effect, that the injured parties were the citizens of the states, and not the states themselves.

The equitable principles of restitution require that the wrongdoer be forced to disgorge his wrongful gains and that the lost benefits be restored to the injured parties. Restatement (Second) of Restitution §1 (Tent. Draft No. 1, 1983). Responding to this mandate, the district court ordered Exxon to refund not only the actual amount of the overcharges (calculated by DOE to be \$895,501,163.85) but also to pay interest on those overcharges from the date of the overcharges. In so holding, the court cited the decision of another federal district court that: "[T]he requirement that

sellers who violate regulations and orders promulgated under the [federal petroleum price control statute] also pay interest on the amount of the overcharge is a rational method to "make whole" those who have been overcharged.' " 561 F. Supp. at 858 (quoting *Bonray Oil Co. v. DOE*, 472 F. Supp. 899, 904 (W.D. Okla. 1978), *aff'd per curiam*, 601 F.2d 1191 (Temp. Emer. Ct. App. 1979)).

This reasoning is reflected in the court's judgment as well, which ordered "that the monies deposited by Exxon into the escrow account shall be held in trust by the Treasury and *shall earn interest*." *United States v. Exxon Corp.*, No. 78-1035 (D.D.C. June 7, 1983) (emphasis added). The court further ordered that, upon the conclusion of the appellate process, the Treasury "shall disburse the monies deposited by Exxon *together with the interest earned thereon*, to each of the States." *Id.* (emphasis added). In this way, the court ensured that the interest earned on the principal amount, after it had been disgorged by the wrongdoer, would be distributed, together with the principal, to the injured parties—the consumers of petroleum products throughout the United States, including the State of Maryland. The court thereby confirmed its view that the principles of restitution, in the context of oil overcharge cases, require that the injured parties receive not only the actual amount of the overcharges, but also all interest that accrues on the overcharges until the time that the principal amount is actually disbursed.

As we have emphasized throughout this opinion, the role of the State in the distribution process is not that of an ultimate recipient. Rather, the State acts as a fiduciary for Maryland citizens who were injured by Exxon's overcharges. Accordingly, we conclude that all interest earned on *Exxon* funds while they are held in trust by the State must be disbursed through one or more of the eligible programs, together with the principal, for the benefit of the oil-consuming public.

F. Administrative Expenses

Section (f) of the Warner Amendment states that: "No funds disbursed under this section may be used for any administrative expenses of the Department of Energy or of any State, whether incurred in connection with any energy conservation program or otherwise." This prohibition is unambiguous and bars the use of *Exxon* funds for administrative expenses, even though federally-

appropriated funds may normally be used for such expenses under the regulations of a particular program. The legislative history of the Amendment supports a strict reading of section (f).⁸

The legislative history, however, also reflects a congressional intent that section (f) should not be interpreted to limit the use of refunds for direct services that comprise the substance of the programs, such as the purchase of materials or the payment of salaries for installers, trainers, and other personnel essential to and directly involved in the delivery of conservation services.⁹

In our view, then, section (f) prohibits the use of refund monies from the Trust Fund to pay salaries of State or program officials or to pay other costs of administration but does not bar expenditures directly related to the energy conservation objectives of the programs.

G. Supplementation of State Funding

Section (c) of the Amendment provides that: "Funds disbursed under this section shall be used to supplement, and not supplant, funds otherwise available for such programs under Federal or State law." As with the matter of interest earned on the refund, neither the district court's opinion nor the legislative history of the Amendment provides any express guidance with regard to the interpretation of this provision.

This requirement, containing no definition or elaboration of the contrasting terms "supplement" and "supplant," imposes a standard that does not lend itself to a "bright line" rule regarding its

⁸For example, Congressman Dingell stated on the floor of the House of Representatives: "We provided that *none* of the funds should be used for administrative expenses." 128 Cong. Rec. H10435 (daily ed. Dec. 20, 1982) (statement of Rep. Dingell) (emphasis added).

⁹Senator Hatfield stated on the floor of the Senate that: "Subsection (f) of the [Amendment] prohibits the use of these funds for administrative expenses, but shall not be constrained to limit the use of funds for those direct services, such as, labor costs associated with low-income weatherization and retrofit activities." 128 Cong. Rec. S15703 (daily ed. Dec. 20, 1982) (statement of Sen. Hatfield). Similarly, Congressman Dingell, speaking on the floor of the House, stated: "We would not want to see these funds used to pay salaries or other expenses of those administering those programs, although we recognize that direct labor costs for installing weatherization or the other materials would, of course, not be precluded." 128 Cong. Rec. H10435 (daily ed. Dec. 20, 1982) (statement of Rep. Dingell).

applicability.¹⁰ However, the underlying principle is reasonably clear: Because the State is a fiduciary, it may not use the Exxon funds, directly or indirectly, for anything other than an extra component of aid to the beneficiaries of the trust arrangement. The refund is not to serve other State purposes, either through direct application or by displacing resources that would otherwise go to the beneficiaries.

In practical terms, the inquiry that is required by the section (c) prohibition on supplantation of otherwise available funding is whether a decision to reduce funding for an eligible program would have been made even if the program were not eligible to receive Exxon funds. In short, with respect to State budgetary and appropriation decisions, a case by case analysis will have to be undertaken in each instance when a reduction or reallocation of funding is contemplated for any of the programs that have been, or likely will be, designated to receive Exxon funds, to determine whether the change would constitute a prohibited supplantation of otherwise available funding.¹¹

At least until additional guidance is provided by the court or DOE about the meaning of the Amendment's section (c), we strongly advise that State funds allocated for an eligible program—either already appropriated by the General Assembly or included by the Governor in an as yet unapproved budget bill—not be reduced or reallocated unless the reason for doing so can be shown to be inde-

¹⁰In this respect, the Warner Amendment differs markedly from other provisions in federal law designed to assure certain minimum levels of state funding. *See, e.g.*, 42 U.S.C. §623(d) (federal payments for child welfare services contingent upon state funding not "less than the total of the State's expenditures ... for fiscal year 1979"); 33 U.S.C. §1256(c) (federal grants for water pollution control programs contingent upon state funding not "less than the expenditure by such State ... for such recurrent program expenses during the fiscal year ending June 30, 1971"). While a particular level of past funding might well be relevant to application of the Warner Amendment's "supplement, and not supplant" formulation, it cannot be viewed as itself determinative under the Amendment's language.

¹¹We recognize that the phrase "funds otherwise available for such programs under ... State law" arguably might be read to apply only to already appropriated funds, which under Maryland law are the only funds presently "available." *See* Article III, §32 of the Maryland Constitution. However, we doubt that the court, in adopting this aspect of the Warner Amendment, intended to incorporate the varying procedural characteristics of each state's budgeting process. Moreover, if the bar to supplantation were wholly inapplicable to potential reductions in the budget bill, much of the purpose of the *Exxon* refund mechanism—to provide additional help to the victims of overcharges—would be defeated. In any event, we believe that prudence dictates an avoidance of actions that risk a finding of noncompliance with the court order. *See also* note 12 below and accompanying text.

pendent of the *Exxon* distribution. Conversely, a decision to reduce or reallocate funds expressly based on anticipated *Exxon* funds would not only pose a serious risk of noncompliance with the court order but would also risk the loss of funds from overcharges at issue in other cases.

The court order applies, of course, to the State generally. In addition, the Board of Trustees must comply with a comparable restriction in its enabling statute:

“Disbursements from the Trust Fund to programs funded by the State or with federal funds administered by the State shall be used solely to supplement, and not to supplant, the existing and planned funding for the recipient programs.” NR §13-106(d).¹²

If, in light of the particular circumstances at the time, the Board concludes that “existing” or “planned” levels of funding for a program have in fact been reduced because of the availability of the *Exxon* refund, it would be prohibited by this statute from disbursing funds for that program, lest a “supplant[ing]” occur. Such a result—*reduced* funding for that conservation program—would be wholly at odds with the purpose of the *Exxon* restitution and the Trust Fund itself. Thus, we emphasize the importance of an independent basis for any decision to reduce either already appropriated or budgeted funds for a recipient program.

IV

Potential Future Refunds

Scrupulously careful adherence by the State to the order of the district court in *Exxon* is supported by a significant monetary incentive. Specifically, the conduct of the states, individually and collectively, with respect to the *Exxon* monies will be closely monitored by Congress, the federal government (in particular, the Office of Management and Budget), the oil industry, and other parties who object to the disbursement of overcharge refunds through

¹²NR §13-106(d) was enacted later than, and with knowledge of, the Warner Amendment. Chapter 759, Laws of Maryland 1984. The reference to “existing and planned funding” in NR §13-106(d) therefore presumably reflects the General Assembly’s understanding of the scope of the phrase “funds otherwise available” in the Amendment. See note 11 above.

the states to the public. Any misuse of the *Exxon* monies or failure to adhere to the requirements of the court's order would lend support to an argument that has been and undoubtedly will again be raised before judicial and administrative tribunals: that the states are not an efficient or dependable vehicle for achieving restitution through oil overcharge refunds.

Although the *Exxon* litigation was certainly the largest single overcharge case, dozens of oil overcharge proceedings are now pending that, collectively, hold the potential for recoveries equal to and possibly greater than the recovery in *Exxon*. For example, in *In re Kansas Stripper Well Litigation*, MDL No. 378 (D. Kan.), an escrow fund containing in excess of \$1.2 billion is held under the control of the United States District Court for the District of Kansas. The court currently is in the process of selecting a remedial structure for the distribution of these funds. If the court chooses a distribution plan similar to that ordered by the court in *Exxon*, Maryland's share of this disbursement would be approximately \$23 million. However, any failure by this or the other states to adhere to the guidelines established for the use of the *Exxon* monies would provide factual support for the inevitable argument on behalf of the oil industry and other claimants that refund money should not be returned to the states for distribution to their citizens.

V

Conclusion

In sum, it is our opinion that the district court decision in *United States v. Exxon* directs the State to allocate the refund among one or more of five energy conservation programs. Although the funds need not be expended within a prescribed period of time, both the principal and interest must be spent by the programs within the minimum amount of time necessary for the most efficient achievement of the energy conservation objectives that the programs are designed to meet. The refund principal may not be held indefinitely in trust but must be disbursed together with the interest. The Board of Trustees must, within one year from the date on which the funds are received, select and identify to the Secretary of Energy the program or programs that will receive the *Exxon* refund and must thereafter report annually to the court and DOE on the expenditure of *Exxon* funds until the exhaustion of both interest and principal. Although no part of the refund may be spent by the

State or any of the programs for administrative expenses, portions of the refunds may be spent, as necessary, to purchase necessary materials and to pay the salaries of personnel essential to and directly involved in the delivery to the consumers of the programs' services. Any reductions in appropriations or budgetary allocations for the designated programs may be made only upon grounds independent of the availability of monies derived from the *Exxon* disbursement.

We recognize that issues may well arise in the future that are not addressed in this opinion. Our overall recommendation is that the Board of Trustees and other State officials, in dealing with the *Exxon* refund, be mindful of the principles of restitution and adhere to the district court's mandate that the funds be distributed promptly and efficiently to the petroleum product consumers in the State who are in greatest need of energy conservation assistance.

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Editor's Note: Chapter 782 of the Laws of Maryland 1986 amended the Trust Fund statute in several respects, none inconsistent with the conclusions of this opinion.

PERSONNEL

CONSTITUTIONAL LAW—EMPLOYMENT APPLICATIONS—CRIMINAL RECORD—EQUAL PROTECTION—DUE PROCESS—STATE AGENCIES MAY INQUIRE INTO PROSPECTIVE EMPLOYEES' CRIMINAL CONVICTIONS, BUT ONLY IF RELEVANT TO PARTICULAR POSITION FOR WHICH APPLICATION IS MADE.

May 16, 1986

The Honorable John F. X. O'Brien
Secretary of Personnel

You have requested our opinion on the propriety of asking applicants for State employment whether they have "ever been fined, placed on probation or committed to a jail or prison." That question appears on an addendum to the State's standard employment application form used by the Division of Correction ("DOC") of the Department of Public Safety and Correctional Services.¹

For the reasons given below, we conclude that State agencies may inquire into prospective employees' criminal convictions and may consider convictions in making hiring decisions. However, the particular question about which you inquire is phrased somewhat overbroadly and should be rewritten. We caution further that inquiries as to applicants' possible criminal records are proper only if past criminal behavior would have a bearing on the applicants' fitness for a particular position.²

¹The addendum pertains to a form used in the hiring of officers and employees in the classified service. See Article 27, §684(b) of the Maryland Code. However, our analysis would apply as well to the hiring of persons outside the classified service.

²You have also asked for general advice on the kinds of questions that may be asked of applicants for State employment. As a general rule, employers may ask only for information that is related to the particular position for which application is being made. Thus, the principles that govern determination of the propriety of asking about applicants' criminal history are equally applicable to other questions. The propriety of any particular question, accordingly, will in most cases turn on the nature of the position as to which it is asked. While, in consequence, we cannot provide you definitive advice as to every possible question, we would be happy to review particular questions and advise you as to their legality.

I

Authority to Inquire Concerning Criminal Records

Article 64A, §19 of the Maryland Code prescribes the general effect to be given to criminal convictions incurred by applicants for State employment. That section provides:

“No person who has been convicted of any crime and who has served his sentence or has obtained his release by virtue of any pardon, full or conditional, on probation or release by conditional commutation of sentence, or by parole, shall be rendered ineligible, if otherwise qualified, by reason of the conviction, to take the [personnel] examination.... No person who has received an honorable discharge from the military or naval services or who has received a certificate of satisfactory completion of service and who is thereafter convicted of a crime may be entitled to the preference given to veterans. However, if any such person is, after the taking of any such examinations, certified by the Secretary of Personnel as eligible for appointment to any position, the appointing authority may consider the conviction in determining whether such person shall be given the appointment for which an eligible list has been requested.”

Thus, a criminal conviction does not normally render an applicant wholly ineligible for State employment. Nonetheless, appointing authorities are authorized to take criminal convictions into account in making their hiring decisions. That authorization necessarily carries with it the authority to ask applicants whether they have been convicted of crimes. Indeed, the standard application for State employment issued by the Department of Personnel presently requests just such information for the purpose of determining applicants' eligibility for military veterans' preference.

In addition, the DOC has specific authorization for inquiry into criminal convictions. Under Article 41, §70B(g), “no person shall ... be given or accept a probationary or permanent appointment as a correctional officer, a correctional supervisor, or a correctional administrator, ... unless such person satisfactorily meets minimum qualifications as may be determined by the [Correctional Training] Commission.” The Commission's regulations concerning selection standards for those classifications require the hiring agency to conduct “a comprehensive background investigation which includes fingerprinting of the applicant and a search made

of local, State, and national criminal record files." COMAR 12.10.01.02B(4)(a).³ Those regulations also provide that "[a] conviction of any State or federal felony which would adversely affect the applicant's performance of correctional duties is grounds for rejection by the Commission." *Id.*⁴

Accordingly, there is no question that State personnel law authorizes agencies in general, and the DOC in particular, to ask applicants about their possible criminal records. Moreover, for positions in which an employee would be required to carry firearms, other State and federal statutory provisions make such questions necessary.

Article 27, §445(c) prohibits the possession of a pistol or revolver by "any person who has been convicted of a crime of violence, or of any of the [handgun] provisions of [Article 27] or who is a fugitive from justice." Similarly, federal law prohibits the receipt or possession of firearms by a person who is under indictment for or has been convicted of a crime punishable by imprisonment for more than one year. 18 U.S.C. §922(h) and 18 U.S.C. App. §1202(a).

Under 18 U.S.C. §925(a)(1), the prohibition does not apply to the receipt of a firearm issued for the use of a government agency; however, under 18 U.S.C. App. §1203(2), that exception applies only if the recipient of the weapon has been pardoned and expressly authorized by the President or the Governor to receive and possess a firearm. *Hyland v. Fukuda*, 580 F.2d 977, 979 (9th Cir. 1978). Hence, a person who has a criminal record may be subject to prosecution for unlawful possession of a firearm even if the weapon was issued by a governmental agency as part of the necessary equip-

³Regulations of the Police Training Commission likewise authorize a background investigation of applicants for the position of police or security officer. If the investigation reveals that an applicant "has been convicted of any felony or misdemeanor for which a sentence of more than 1 year may have been imposed[,], ... [t]he Commission may reject the employment of the applicant after it has reviewed the facts." COMAR 12.04.01.01A(5)(a).

⁴The Correctional Training Commission has proposed amendments to increase the specificity of these provisions. Under the proposed regulations, conviction of "any State or federal offense which would adversely affect the performance of an applicant" is a ground for the applicant's rejection for the position of non-uniformed institutional support staff, classification counselor, or parole or probation agent. 13 Md. Reg. 556 (February 28, 1986) (to be codified at COMAR 12.10.01.02B(4)(a)). Applicants for positions as uniformed correctional officers would be disqualified by recent or repeated convictions of described types of crimes—for the most part, crimes involving violence, breach of trust, or drug or alcohol abuse. *Id.* (to be codified at COMAR 12.10.01.02B(4)(b)).

ment for a particular job. Clearly, applicants for such positions must be asked for information concerning their criminal histories.

Nevertheless, the authority of State agencies to make such inquiries is not without limits. The scope of information that may be requested from most applicants is expressly limited by various provisions of State law. Further, constitutional provisions and federal statutes may prevent employers from asking about job applicants' criminal records at all, in some cases. We discuss each of these limitations below.

II

State Statutory Restrictions

Article 27, §737 provides for expungement of criminal records under certain circumstances, and Article 27, §740(a) prohibits employers—including the State—from questioning job applicants concerning criminal charges that have been expunged.⁵ Nor, under that provision, may refusal to disclose expunged charges ordinarily be the basis for rejecting a job applicant:

“An employer or educational institution may not, in any application, interview, or otherwise, require an applicant for employment or admission to disclose information concerning criminal charges against him that have been expunged. An applicant need not in answering any question concerning criminal charges that have not resulted in a conviction, or in answering any questions concerning convictions pardoned by the Governor, include a reference to or information concerning charges that have been expunged. An employer may not discharge or refuse to hire

⁵The term “employer” in Article 27, §740(a) is not defined. Ordinarily, the State is not included in general terms of this kind unless the statute so provides expressly: “[I]t is a basic and long-standing principle of statutory construction that the State is not deemed to be bound by an enactment of the General Assembly unless the enactment specifically names the State or manifests a clear and indisputable intention that the State is to be bound.” *Mayor & City Council v. State*, 281 Md. 217, 223 (1977). See also *Town of New Roads v. Dukes*, 312 So.2d 890 (La. App. 1975) (state not an “employer” under statute regulating labor relations). Cf. Article 49B, §15(b) (term “employer” expressly includes the State). However, the penalty in Article 27, §740(c) for violations of “this section” refers to State officers and employees, and from this we infer an intent to apply the substantive prohibition in Article 27, §740(a) to the State.

a person solely because of his refusal to disclose information concerning criminal charges against him that have been expunged.”

Article 27, §292(b) provides for probation before the entry of judgment against a first-time offender under the controlled dangerous substances laws. Upon the offender's satisfactory completion of that probation, the records of the arrest and conviction are to be expunged and “shall not thereafter be regarded as an arrest or conviction for purposes of employment, civil rights, or any statute or regulation or license or questionnaire or any other public or private purpose.” Article 27, §292(b)(5). In addition, Article 27, §641 authorizes probation before judgment for a defendant who has been convicted or has pled guilty or nolo contendere to any other charge. Upon the defendant's fulfillment of the probation, he or she is discharged without a judgment of conviction. That discharge “is not a conviction for purposes of any disqualification or disability imposed by law because of conviction of crime.” Article 27, §641(c).

In light of these provisions, we believe that the particular question the DOC is using sweeps too broadly. Neither DOC nor any other State agency has authority to routinely ask every prospective employee for information concerning criminal records that have been expunged. We suggest that the question asked of most job applicants be altered to ask simply and directly whether the applicant has ever been convicted of a crime as to which the records have not been expunged.⁶

At the same time, applicants for positions that require the carrying of firearms should be asked for additional information concerning their possible criminal histories. Expungement of criminal records does not relieve a person of the disabilities as to possession of firearms imposed by federal law. *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 115 (1983). In *Dickerson*, an applicant for licensure as a firearms dealer had previously received probation before judgment under a state statute substantially identical to Article 27, §641. Notwithstanding the absence of an entry of judgment, the Supreme Court concluded that the applicant had

⁶It would also be advisable to include a statement making clear to applicants that a criminal record is not an absolute bar to eligibility for State employment. We suggest the following: “A conviction record will not necessarily bar you from employment. Each application will be individually considered on its own merits, taking into account such factors as the nature and seriousness of the violation, how long ago it occurred, and rehabilitation.”

been “convicted” within the meaning of the federal firearms statutes. 460 U.S. at 113. Subsequent expungement of the records of that conviction did not nullify it; hence, the applicant was disqualified by the conviction from possessing or dealing in firearms. 460 U.S. at 115.

In sum, State agencies generally have authority to ask job applicants for information concerning criminal convictions as to which the records have not been expunged. For positions that require carrying firearms, however, the hiring agency should also ask whether the applicant has ever been convicted of a crime constituting a felony for purposes of the federal firearms statute, even if the records have been expunged.

III

Equal Protection Restrictions

A hiring practice that takes account of applicants’ criminal records obviously is not directed at all applicants equally. Rather, a particular group—those individuals who have been convicted of crimes—is singled out for special treatment, and its members might be barred from employment. Such a classification must not “deny to any person ... the equal protection of the laws” within the meaning of the Fourteenth Amendment to the United States Constitution. In our view, this State’s present hiring practice would be sustained against a challenge under the Equal Protection Clause.⁷

Public employment is not a fundamental right. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976). Nor is the class of persons with criminal records a “suspect” class. *Miller v. Carter*, 547 F.2d 1314, 1321 (7th Cir.) (Campbell, J., concurring), *aff’d by equally divided court*, 434 U.S. 356 (1977). Accordingly, federal courts reviewing State laws that restrict the availability of employment opportunities on the basis of applicants’ criminal re-

⁷Such a practice must also comply with the Equal Protection principle of Article 24 of the Maryland Declaration of Rights. We believe, however, that the Court of Appeals would reach the same result in applying Article 24 as it would in applying the Equal Protection Clause. See *Hornbeck v. Somerset County Board of Education*, 295 Md. 597, 640 (1983) (Article 24 and Equal Protection Clause are in *pari materia* and generally apply in a like manner and to same extent). *Accord State v. Good Samaritan Hospital*, 299 Md. 310, 326 n. 7, appeal dismissed, 469 U.S. 802 (1984).

cords have consistently concluded that such a qualification need only have a rational connection with the applicant's fitness or capacity to perform the job. *Upshaw v. McNamara*, 435 F.2d 1188, 1190 (1st Cir. 1970); *Dixon v. McMullen*, 527 F.Supp. 711, 720 (N.D. Tex. 1981); *Kindem v. City of Alameda*, 502 F.Supp. 1108, 1111 (N.D. Calif. 1980); *Butts v. Nichols*, 381 F.Supp. 573, 579 (S.D. Iowa 1974).

Statutes barring former felons from employment as peace officers have, under that test, generally been held to be constitutional. For example, in *Dixon v. McMullen*, the court found such a statute to be narrowly tailored to address the legitimate state concern that "persons publicly employed in emergency or dangerous situations are sober and alert, and possess qualities such as honesty, integrity, reliability and obedience to the law." 527 F.Supp. at 721. Similarly, in *Upshaw v. McNamara*, the First Circuit noted that "a person who has committed a felony may be thought to lack the qualities of self control or honesty that this sensitive job [as a police officer] requires." 435 F.2d at 1190. *See also Schanuel v. Anderson*, 708 F.2d 316, 320 (7th Cir. 1983) (no equal protection violation in barring ex-felons for ten years from armed guard or investigator positions).

Such employment practices have also been upheld as applied to positions other than those of police officer or prison guard. For example, the Eighth Circuit has concluded that "conviction records, at least in cases of aggravated offenses and multiple convictions, may have a bearing on the suitability of an applicant for a fire department position." *Carter v. Gallagher*, 452 F.2d 315, 326 (8th Cir. 1971). *See also Hetherington v. State Personnel Board*, 147 Cal. Rptr. 300, 306 (Cal. App. 1978) (upholding constitutionality of statute prohibiting employment of ex-felons as police and law enforcement personnel, parole agents, probation officers, prison guards, or youth counselors). *Cf. DeVeau v. Braisted*, 363 U.S. 144, 158-59 (1960) ("Barring convicted felons from certain employment is a familiar legislative device to insure against corruption in specified, vital areas.").

Absolute and across-the-board prohibitions against the hiring of former criminals have been held to violate equal protection, however, on the ground that they are over-inclusive. For example, in *Kindem v. City of Alameda*, 502 F. Supp. 1108, 1112 (N.D. Cal. 1980), such a provision in the city's charter was invalidated on the ground that it was "not tailored along any lines to conform to what might be considered legitimate government interest." At the same time, the court carefully delineated the scope of its holding:

“This is not to say that a prior felony conviction can never be a factor in public employment decisions. It is reasonable to assume, for example, that the prior conviction might be highly relevant or properly determinative with respect to hiring decisions involving certain sensitive jobs. It may also be reasonable to assume that convictions for certain crimes may indicate that an individual is unfit for any future municipal employment.” *Id.*

Similarly, in *Butts v. Nichols*, 381 F. Supp. 573, 580 (S.D. Iowa 1974), a three-judge federal district court invalidated on equal protection grounds a prohibition against hiring ex-felons for any state civil service position.⁸ Nonetheless, the court affirmed the appropriateness of a more narrowly drawn prohibition: “There is no doubt that the State could logically prohibit and refuse employment in certain positions where the felony conviction would directly reflect on the felon’s qualifications for the job (e.g., conviction of embezzlement and a job requiring the handling of large sums of money).”⁹

These cases make it clear that State agencies may refuse employment to persons who have been convicted of crimes if—but only if—the nature or frequency of the individual applicant’s convictions has a bearing on his or her fitness for a particular position.

⁸The court also found that statute impermissibly arbitrary because it, by its terms, did not apply to positions exempted from the civil service—including such responsible positions as city solicitor, treasurer, auditor, assessor, and city manager. 381 F.Supp. at 581.

⁹The Seventh Circuit has suggested that statutes restricting the employment of former criminals must afford prospective employees equality of treatment with current employees. That court invalidated a statute that prohibited the issuance of a taxicab driver’s license to any person convicted of designated crimes but did not automatically revoke a previously issued license upon conviction of those crimes. *Miller v. Carter*, 547 F.2d 1314, 1316 (7th Cir.), *aff’d by equally divided court*, 434 U.S. 356 (1977). In that court’s view, such a distinction among former criminals convicted of the same crimes is irrational. *Id.*

Even assuming that the Seventh Circuit was correct in concluding that there is no rational basis for a distinction between current and prospective employees as to the effect of a conviction, we do not think the administration of personnel matters in this State creates such a distinction. Under Article 64A, §19, convictions are taken into account in hiring but may not ordinarily be made an absolute bar to the hiring of a prospective employee. As to current employees, conviction of a crime “involving moral turpitude” is a ground for discharge, but does not automatically lead to discharge. COMAR 06.01.01.47I. Thus, convictions have essentially the same effect for both present and prospective employees of the State.

IV

Due Process Restrictions

A law, regulation, or policy restricting the hiring of convicted criminals must not "deprive any person of life, liberty, of property, without due process of law." U.S. Const. amend. XIV, §1. "The substantive aspect of due process protects individuals from arbitrary or irrational action on the part of the state." *Kindem v. City of Alameda*, 502 F.Supp. at 1113. Due process is violated when such action deprives the individual of an interest in property or liberty.

Applicants for State employment have no property interest in that employment, for they have no claim of entitlement to it. *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Therefore, the State's refusal to hire persons with criminal records would not deprive those persons of any protected property interest. *See 67 Opinions of the Attorney General* 322, 327 (1982) (rule prohibiting hiring of drug abusers would not impair any protected property interest).

Nor, in our view, does the State's present practice of taking convictions into account in making its hiring decisions impair any liberty interest of prospective employees. A deprivation of liberty occurs when the State imposes on the individual a stigma that alters or extinguishes a right or status previously recognized by State law. *Paul v. Davis*, 424 U.S. 693, 711-12 (1976). Thus, a violation of due process would arise if the State, in refusing to hire a job applicant, imposed on the applicant a stigma that foreclosed opportunities for future employment. *Board of Regents v. Roth*, 408 U.S. at 573-74.

In merely declining to hire a particular person, without publication of the reason, the State imposes no stigma at all. Nor does the State's refusal to hire former criminals for particular positions prevent those persons from obtaining employment in other positions or with other employers. Hence, such a refusal does not violate due process.

In reviewing a proposed absolute ban on hiring drug abusers, we noted that the validity of such a ban would be subject to "some small doubt," in that a "skeptical" court might view the ban as inadequately correlated to job performance requirements. *67 Opinions of the Attorney General* at 328. Even so, we concluded that the proposed hiring ban would likely be upheld. *Id.*

We think that the State's current practices with regard to hiring former criminals are not subject to even that small doubt. Persons

with criminal records are not subject to any absolute ban on their hiring in all State employment positions. Moreover, the DOC regulations under which some former criminals are precluded from some positions are expressly tailored to limit such preclusion to crimes that would "adversely affect the applicant's performance of correctional duties." COMAR 12.10.01.02B(4)(a).¹⁰ Courts that have found due process violations in prohibitions against hiring former criminals have done so where the prohibition was applicable to all governmental positions, regardless of their job performance requirements, and did not take account of the nature of the crime for which the applicant had been convicted. *See, e.g., Larry v. Lawler*, 605 F.2d 954, 958-59 (7th Cir. 1978); *Kindem v. City of Alameda*, 502 F.Supp. 1108, 1113-14 (N.D. Calif. 1980). *Cf. Thompson v. Gallagher*, 489 F.2d 443, 447 (5th Cir. 1974) (flat ban on city's hiring of persons with less than honorable military discharges violated due process).

Thus, the refusal of State agencies to hire former criminals does not violate due process if—but only if—that refusal does not foreclose other employment opportunities and is based on a reasonable relationship between convictions of particular types of crimes and the requirements of particular jobs.

V

Federal Statutory Restrictions

Federal administrative agencies and courts enforcing equal employment opportunity laws presume, with reason, that information requested on an employment application is likely to be used as the basis for hiring decisions. The Equal Employment Opportunity Commission ("EEOC") further reasons that, even if the information requested is not used in employment decisions, the mere request may discourage those who would be required to disclose potentially unfavorable information from completing the application.

Therefore, questions asking for information that, if made a factor in employment decisions, would tend to disqualify members of a protected minority in significantly greater percentages than the

¹⁰See also note 4 above. The more specific regulations that have been proposed by the Correctional Training Commission would, in our view, be even less vulnerable to attack because they clearly are closely correlated to the requirements of the positions to which they would apply.

rest of the population are generally held to be discriminatory. *Costa v. Markey*, 706 F.2d 1, 5 (1st Cir. 1982). Such questions are justified only if the employer can demonstrate the "business necessity" for the requested information—that is, its job-relatedness. See 42 U.S.C. §2000e-2(e)(1). In essence, an employer must prove that it needs the information in order to conduct business safely and efficiently.

In general, employment applications should solicit only information that is actually relevant to hiring decisions. The EEOC guide on preemployment inquiries states:

"In devising or reviewing application forms or in seeking information from job applicants, employers should ask themselves: (1) Will the answers to this question, if used in making a selection, have a disparate effect in screening out minorities and/or members of one sex (i.e., disqualify a significantly larger percentage of members of a particular group than others)? (2) Is this information really needed to judge an applicant's competence or qualification for the job in question?" EEOC Guide to Pre-Employment Inquiries, Fair Employment Practices Manual, 443:65 (1982).

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e through 2000e-17, prohibits an employment practice—even one that is neutral on its face—if it has a disproportionate adverse impact on persons of a certain race, color, religion, sex, or national origin unless the practice can be shown to be directly related to job performance. 42 U.S.C. §2000e-2; *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971). On that basis, an absolute ban on employment, in any position, of any person convicted of a crime other than a minor traffic offense has been held to be unlawful: The ban had a disparate impact on blacks, and there was no evidence that the policy was related to job performance or justified in terms of "business necessity." *Green v. Missouri Pacific R.R. Co.*, 523 F.2d 1290, 1295, 1298 (8th Cir. 1975).

Nevertheless, a refusal to hire former criminals does not violate Title VII when the employer can show that past criminal conduct has a bearing on fitness for a particular position. For example, "a prior conviction of a serious offense would be a valid ground to disqualify a person from police work. And this would be so regardless of the disproportionate racial impact such a standard might have." *United States v. City of Chicago*, 411 F.Supp. 218, 235 (N.D. Ill. 1976).

Similarly, it has been held that a private employer may reject applicants for employment in "security sensitive" positions if they have been convicted of serious crimes. *Richardson v. Hotel Corp. of America*, 332 F.Supp. 519, 521 (E.D. La. 1971), *aff'd mem.*, 468 F.2d 951 (5th Cir. 1972). In that court's view, "[i]t is reasonable for management of a hotel to require that persons employed in positions where they have access to valuable property of others have a record reasonably free from convictions for serious property related crimes." *Id.* See also *Washam v. J.C. Penney Co.*, 519 F. Supp. 554, 561 (D.Del. 1981) (in trial of Title VII claim, defendant may prove convicted felon is unqualified to serve as security manager because holder of position must testify as witness). Cf. *Lane v. Inman*, 509 F.2d 184, 186 (5th Cir. 1975) (prohibition against issuing taxi driver's permit to person convicted of smuggling drugs is "obviously job-related in determining who is to be entrusted to operate taxicabs").¹¹

Hence, State agencies do not violate Title VII by refusing to hire job applicants with criminal convictions in particular positions, if those convictions have a bearing on fitness for those positions. Cases decided under Title VII also make it clear that State agencies should request information about convictions only if a conviction is relevant to the particular position for which application is being made. As the EEOC has summarized: "Federal courts have held that a conviction for a felony or misdemeanor may not by itself lawfully constitute an absolute bar to employment, but that an employer may give fair consideration to the relationship between a conviction and the applicant's fitness for a particular job." EEOC Guide to Pre-Employment Inquiries at 443:67.¹²

¹¹Indeed, in certain circumstances employers may be obligated to make inquiries into an applicant's criminal background. The Maryland Court of Appeals has held that, under the "negligent hiring" doctrine, an employer has a duty to "use reasonable care to select employees competent and fit for the work assigned to them" in order to protect other individuals who might reasonably be expected to come into contact with the employee in the performance of his duties. *Henly v. Prince George's County*, 305 Md. 320, 336 (1986). See *Cramer v. Housing Opportunities Comm'n*, 304 Md. 705 (1985). Whether a particular hiring decision may be considered "negligent" depends upon a number of factors, including the nature of the applicant's crime, the job, and the level of risk to others. For example, entrusting building security functions to an individual convicted of a serious and violent crime might well be considered negligent. See *Henley*, 305 Md. at 3323.

¹²The EEOC advises that questions about criminal convictions should be accompanied by a statement such as we suggest in note 6 above.

VI

Conclusion

In summary, it is our opinion that State agencies may inquire into prospective employees' criminal convictions, but only if past criminal activity has a bearing on fitness for the particular position for which application is being made.¹³ Applicants for positions that require the carrying of firearms—but only applicants for those positions—should also be asked for information about past criminal activity as to which the court and police records have been expunged.

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¹³A like conclusion was reached in 57 *Opinions of the Attorney General* 335 (1972), regarding the extent to which the Department of Licensing and Regulation may take an applicant's criminal record into account in evaluating an application for a license: "[W]hen any of the [licensing] agencies ... relies upon the conviction of a crime as a basis for disqualification that crime must bear a reasonable relation to the type of license under consideration." 57 *Opinions of the Attorney General* at 339.

PREVAILING WAGE LAW

“CONSTRUCTION MANAGER” PROJECTS—APPLICABILITY OF LAW TO CERTAIN CONTRACTS UNDER \$500,000.

March 18, 1986

*Mr. Charles H. Rush, President
Baltimore Building and Construction
Trades Council*

As a member of the Advisory Council on Prevailing Wage Rates, you inquired about the application of Maryland's Prevailing Wage Law, Title 18, Subtitle 5 of the State Finance and Procurement Article (“SF” Article), to publicly funded construction projects that are carried out through a series of separate contracts, arranged on behalf of the contracting public body by a “construction manager.” Specifically, you ask how the exclusion from the Prevailing Wage Law of “contracts of less than \$500,000,” as set forth in SF §18-501(c), is to be treated in this situation.

For the reasons given below, we conclude that the Prevailing Wage Law applies to a contract of less than \$500,000, arranged on behalf of a public body by a construction manager, if (1) the contract embodies an aspect or stage of construction of a single public works project, (2) the total construction cost of the project is \$500,000 or more, and (3) the project is otherwise within the scope of the law. Under these circumstances, the exclusion in SF §18-501(c) may not be given effect. The contracting public body, and the construction manager as its agent, must exercise oversight responsibility so that the provisions of the Prevailing Wage Law are in fact adhered to throughout the various stages of the public works construction. However, because this construction of the Prevailing Wage Law is a question of first impression, we do not intend to suggest any fault if a contracting public body, construction manager, or contractor has in good faith failed previously to recognize the applicability of the law in the circumstances discussed in this opinion.

I

Construction Manager's Role

Your inquiry involves the implications of an agency's use of a "construction manager" to oversee a construction project. As we understand it, a construction manager performs many of the tasks traditionally handled by a general contractor. These responsibilities might include the acquisition of materials and labor, regulation of construction costs, the pacing of the construction itself, and the procurement of specialty contractors to perform various stages of the construction work.

The difference in methodology can be illustrated by the following example: Suppose that the General Assembly allocates \$1 million of bond proceeds for the construction of a building at a State facility. Under traditional procedures, the State agency would enter a contract with the low bidder for the entire cost of the project, somewhat under the \$1 million appropriated for it. The general contractor, in turn, would enter into contracts with subcontractors for work on various aspects of the project. State procurement law generally reflects this traditional mode of public works construction. *See, e.g.*, SF §13-501 (payment and performance bonds).

Under the "construction manager" approach, the manager, acting as agent for the State agency, would enter into separate contracts for the necessary components of the entire project. There would be no general contractor; hence, no single contract would reflect the entire project cost. In this simplified example, the construction manager would enter a series of separate contracts, all of which together would approximate the amount of the overall contract under the traditional method, but none of which individually would exceed \$500,000.

II

Prevailing Wage Law

A. *History and Purpose*

Maryland's Prevailing Wage Law is to a great extent modeled on the federal Davis-Bacon Act, 40 U.S.C. §§276a through 276a-5. Originally enacted in 1931, the Davis-Bacon Act requires that minimum wages be paid on all federal and federally assisted construction works, in order "to protect local contractors and workmen

against what was deemed to be unfair and predatory competition from outsiders who, by importing cheap migratory labor, could obtain important public works projects by underbidding contractors in the community where the project was to be built." *Barnes v. Commissioner of Labor and Industry*, 45 Md. App. 396, 403 (1980), *aff'd* 290 Md. 9 (1981). That kind of competition also had the effect of "destabiliz[ing] wage rates generally prevailing in the locally based construction industry." *Id.* See generally S. Rep. No. 963, 88th Cong., 2nd Sess. *reprinted in* [1964] U.S. Code Cong. & Ad. News 2339, 2340-41. See also *United States v. Binghamton Constr. Co.*, 347 U.S. 171, 178 (1954).

Maryland's Prevailing Wage Law was enacted in 1969. Chapter 558, Laws of Maryland 1969. By that time, the concept of minimum wage rates, or "prevailing wages," was viewed as a basic labor stabilization mechanism:

"By requiring contractors engaged in public construction to pay at least the same wage rates they would be expected to pay if engaged in non-public construction in the same community, the Legislature has endeavored to avoid unnecessary labor unrest that might especially affect public projects and delay their efficient completion. Viewpoints differ, of course, as to the efficacy and fairness of these laws, but that does seem to be their asserted purpose and function." *Barnes*, 45 Md. App. at 404.

As introduced, the bill that became the Prevailing Wage Law would have applied to "public works" generally, without any dollar amount exclusion. House Bill 376, 1969 Session. The exclusion of "contracts of less than \$500,000" was added to the original bill by amendment. See Chapter 558, Laws of Maryland 1969. An effort the following year to delete the exclusion, in order "to broaden the law's application to all contracts without regard to dollar amount," was defeated. See Chapter 293, Laws of Maryland 1970 (indicating amendments to Senate Bill 570).¹

Presumably, the purpose of the exclusion for comparatively small contracts is two-fold: to relieve both public agencies and contractors of the paperwork and other procedural burdens imposed by the Prevailing Wage Law, which on a small job might be regarded as disproportionate; and to open competitive opportunities for small, minority-owned, or newly formed companies that might not have the capacity to pay prevailing wages. Our interpretive task

¹ The Davis-Bacon Act excludes contracts of \$2,000 or less. 40 U.S.C. §276a.

is to give full effect to the exclusion while preventing its use as a device to erode the underlying requirements of the law itself.

B. *Obligations of Public Bodies*

In general terms, the Prevailing Wage Law requires the establishment of a minimum wage rate for each trade classification on a given public works construction project (power equipment operators, laborers, ironworkers, masons, electricians, roofers, and so on) and the payment of those rates throughout all stages of the construction. "Construction" is broadly defined to include "all construction, reconstruction, improvement, enlargement, painting and decorating, alteration, maintenance or repair." SF §18-501(b).

As defined by SF §18-501(c), the term "Public works" includes buildings, bridges, roads, and a variety of other "structures or works, constructed for public use or benefit or paid for wholly or in part out of public funds." However, "for the purposes of [the Prevailing Wage Law], contracts of less than \$500,000 shall be excluded."

The Prevailing Wage Law applies to the actions of a "public body"—those entities authorized to contract for the construction of a public works project once the General Assembly allocates the necessary funds. The term includes "the State or any department, officer, board, commission, agency or instrumentality of the State, and shall include any other agency, political subdivision, corporation, person or 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." SF §18-501(d)(1).²

The Prevailing Wage Law places several significant obligations on the public body authorized to contract for the construction of public works. First, the contracting public body must determine whether the project is subject to the Prevailing Wage Law. If so, the public body must then request the Commissioner of Labor and Industry ("Commissioner") to issue wage rate determinations, specific to each classification of trade or craft necessary to execute

² The intricate wording of the definition of "Public body" effectively excludes from the operation of the Prevailing Wage Law (i) State construction projects funded wholly from non-State sources and (ii) county and municipal construction projects, "when less than 50 percent of the funds used for the construction of a particular public works are State funds." SF §18-501(d)(1). The law is also inapplicable when a political subdivision contributes 25 percent or more of the cost of public school construction. SF §18-501(d)(3). See 69 *Opinions of the Attorney General* 220 (1984).

the project, before advertising for bids or proposals. SF §§18-504(a) and 18-510(a).

SF §18-504(a) provides for incorporation of the rates in the contract specifications:

“[The Commissioner’s] determination or schedule of the prevailing hourly rate of wages shall be attached to and made a part of the specifications and the contract for the work The public body shall specify in the call for bids or proposals for the contract what is the prevailing hourly rate of wages, including the prevailing rate of wages for overtime work, in the locality for the various classifications of workmen and apprentices needed to execute the contract.”

As a result, all contractors bidding on the public works project are competing on equal footing, in terms of projected labor costs.

Prevailing wage rates must be paid throughout all stages of the public works construction, regardless of the amount of the various construction subcontracts: “It shall be mandatory upon the contractor to whom the contract is awarded, and upon *any* subcontractor under him, to pay not less than the specified rates in the execution of the contract.” SF §18-504(b) (emphasis added). SF §18-504(b) imposes on the public body awarding the contract the duty to embody this obligation in the contract:

“The public body awarding the contract shall cause to be inserted in the contract a stipulation to the effect that not less than the prevailing hourly rate of wages shall be paid to all workmen and apprentices performing work under the contract. [The public body] shall also require in all the contractor’s bonds that the contractor include such provisions as will guarantee the faithful performance of the prevailing hourly wage clause as provided by contract.”

In recognition of the lack of privity between the contracting public body and the various construction subcontractors engaged to work on the typical public works project, the Prevailing Wage Law is also peppered with clauses placing responsibility on the general contractor to ensure that each subcontractor observes its legal and contractual obligations under the Prevailing Wage Law, when engaged on public works. *See, e.g.*, SF §§18-506(d) and 18-507(e).

Enforcement of the Prevailing Wage Law is primarily entrusted to the Commissioner. On receipt of a complaint of noncompliance, or as a result of an investigation, the Commissioner is authorized

“to cause investigations to be made as may be necessary to determine whether there has been compliance” with the Prevailing Wage Law and regulations [SF §18-507(a)]; to hold hearings [SF §§18-505(a) and 18-507(c)]; and, if necessary, to issue orders requiring the contracting public body to withhold sums to cover unpaid wages and liquidated damage penalties from the monies due the contractor [SF §18-507(b)].

But the General Assembly has also vested the contracting public body with the responsibility to monitor and control the activities of its contractors. As a general matter, the contracting public body is obligated to “take cognizance of all complaints of all violations of the provisions of this law committed in the course of the execution of the contract.” SF §18-504(b).

In addition, every contractor engaged on a public works project is required to submit a copy of its payroll records, and those of its subcontractors, to the contracting public body. §18-506(d). This statutory requirement provides a means of reinforcing the contractor’s obligation to ensure that all wage rates set forth “are not less than those established by the Commissioner”; that employees are not working out of classification; and that all provisions of the Prevailing Wage Law are followed. SF §18-506(d). Accordingly, the contracting public body has the obligation to review these payroll records, if only to ascertain that the work performed by and payments made to employees of the various contractors and subcontractors engaged on the project in fact conform to the wage determinations incorporated into the original contract specifications.

Finally, the Prevailing Wage Law imposes penalties on contractors for their, or their subcontractors’, failure to pay the required rates or to work employees only in the proper classification, including “liquidated damages at the rate of \$10 per day” for each underpaid employee. SF §18-502(b) and (d). A general contractor may recoup from the subcontractor penalties attributable to that subcontractor’s noncompliance. SF §18-507(e).

III

Application of Prevailing Wage Law to “Construction Manager” Projects

A. *Introduction*

As the discussion in Part II above indicates, the Prevailing Wage Law seeks to achieve its policy goal through a detailed and compre-

hensive regulatory scheme. Though the law is phrased with the traditional public body-general contractor-subcontractors methodology in mind, nevertheless we believe that its plain intention is to assure the application of prevailing wages to projects valued at \$500,000 or more, even if a different methodology is used. Because the bedrock principle of statutory construction is to effectuate the intent of the General Assembly, the exclusion of “contracts of less than \$500,000” in SF §18-501(c) cannot be read so as to potentially undermine the entire law.

B. *Statutory language and legislative history*

The Prevailing Wage Law itself reflects the General Assembly’s understanding not only that large projects have component parts but also that prevailing wages are to apply to the entire project. Under SF §18-504(c), federally funded public works construction is exempt from the Prevailing Wage Law if the public works are covered by the federal Davis-Bacon Act. However: “If only *a portion* of a particular public work or public works [is subject to Davis-Bacon], the provisions of [the Prevailing Wage Law] shall apply to *the remainder* of said public work or public works.” (Emphasis added.) See also Chapter 4, Laws of Maryland 1971 (bill title).³

In addition, when the General Assembly amended the Prevailing Wage Law in 1983, the title of the bill described its purpose as “providing that the State Prevailing Wage Law applies to wages paid to workmen and apprentices employed in certain *public works construction projects* when the State provides at least a certain amount of the funds for the *project*.” Chapter 70, Laws of Maryland 1983 (emphasis added). The Governor’s Chief Legislative Officer, testifying in support of this legislation, observed that: “Maryland Prevailing Wage Law now applies to *projects which cost \$500,000 or more* and which are totally funded by the State.” Testimony of Carl E. Eastwick Before the Senate Budget and Taxation and the House Economic Matters Committees on Senate Bill 304/House Bill 439, at 1 (1983) (emphasis added). He continued:

“The purpose of these bills is to correct an anomaly in the coverage of those laws so that the State policy can be given full effect. The bills require that *major projects* principally funded with State money must be bid and con-

³ The Commissioner’s regulations also reflect the understanding that a “project” is the proper referent for Prevailing Wage Law obligations. See, e.g., COMAR 21.11.11.01C(2).

structed on the basis of the Prevailing Wage Laws. The current law . . . does not apply to *projects* which should be covered by the Prevailing Wage Laws. . . . [T]he law must apply to *projects* made possible by and carried out to a major extent with State funds." *Id.* at 3-4 (emphasis added).

C. *Legislative intent*

The Prevailing Wage Law is a remedial measure, intended by the General Assembly to respond to a perceived harm. *See* Part II A above. As such, it "should be liberally construed in the public interest to carry out its purpose." *Smith v. Higinbotham*, 187 Md. 115, 130 (1946). In turn, exceptions from its coverage should be "strictly and narrowly construed." *See Radio Communications, Inc. v. Public Serv. Comm'n*, 50 Md. App. 422, 432 (1982).

If the exception were read with a literalism that disregards the statutory purpose, many subcontracts even on a very large, traditionally organized project would be excluded as "contracts of less than \$500,000." But, as discussed in Part II B above, *all* subcontracts are covered if the general contract is for \$500,000 or more. Similarly, specialty contracts that would be covered as subcontracts in a traditionally organized project are not to be excluded simply because they are labeled "contracts," rather than "subcontracts," in a project run by a construction manager. *Cf. North Ga. Bldg. & Constr. Trades Council v. Goldschmidt*, 621 F.2d 697, 708-09 (5th Cir. 1980) (federal Davis-Bacon Act applicable to municipal project when, "[a]s a practical matter, everyone knew that federal funds would be required").

It is axiomatic that public bodies authorized to enter into contracts for public works also may fix the terms of those contracts, as long as those terms do not contravene law or public policy. When a statute sets certain conditions on the use of public funds, an agency may not evade the law by indirectly authorizing what it is prohibited from doing directly. *See Hanna v. Board of Educ.*, 200 Md. 49, 55 (1951). Where the work is of a public character, is funded by the State, and is carried out by agents acting under the State's authority, "it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf." *Atkin v. Kansas*, 191 U.S. 207, 222-23 (1903). *See also Ruark v. Engineers Union*, 157 Md. 576, 581-82 (1929). If the expenditure of State funds by a public body for a public works project is condi-

tioned on the application of the Prevailing Wage Law, a construction manager acting on behalf of the contracting public body is obligated to enforce that law.

In our view, the intent underlying the Prevailing Wage Law is best served by construing the exclusion in SF §18-501(c) as inapplicable to contracts that are integral to a public works project with total construction costs of \$500,000 or more, even if some or all of those contracts do not exceed \$500,000.⁴ As a practical matter, a construction manager must know what the total costs will likely be, even as he or she negotiates individual contracts. *See* SF §13-602(b) (contract modification to be assessed for its effect “on the project budget or the total construction cost”).

D. *Budgetary requirements*

Our view that total project costs are the proper criterion for Prevailing Wage Law application is reinforced by the State’s constitutionally required budgetary procedures. The Constitution authorizes appropriations only in accordance with “a Budget Bill, or a Supplementary Appropriation Bill.” Article III, §52(2). One of the key aspects of the budget system is that the intended objects of expenditure be clearly identified: “Each Budget shall contain a complete plan of proposed expenditures,” and each supplementary appropriation “shall be embodied in a separate bill limited to some single work, object or purpose therein stated.” Article III, §52(3) and (8). *See Dorsey v. Petrott*, 178 Md. 230 (1940).

The statutory framework carries forward the requirement that expenditures be clearly identified, so that coherent fiscal decisions can be made. The draft budget is to “be comprehensive” and to include “capital improvements.” SF §7-104(a)(2)(i) and (b). *See also* SF §7-105 (budget to contain “the detail that the Governor or law requires”). The budget books, which contain detail beyond that in the budget itself, are themselves submitted to the General Assembly. SF §7-115.

In compliance with these requirements, appropriations for construction are stated in terms of total project costs. To cite but a

⁴ We recognize that questions will arise as to whether a particular contract is properly viewed as part of a larger project, or is instead a separate project in and of itself. This opinion does not purport to resolve such case-by-case questions. Rather, our conclusion is simply that contract size alone—i.e., the isolated fact that a contract is under \$500,000—does not automatically bring into play the exclusion.

few examples, Chapter 125 of the Laws of Maryland 1985, the General Construction Loan of 1985, sets aside \$780,000 to correct building deficiencies in the Annapolis State Government Center, including construction of an electrical duct bank and replacement of outmoded equipment; \$950,000 for the construction of a wastewater treatment plant at Bowie State College; and \$635,000 for development of Sandy Point State Park, including construction of office and chemical storage buildings, an underground fuel system, roads, and parking.⁵

The actual flow of funds from the State fisc for the various construction projects, detailed in Section 1(3) of Chapter 125, also reflects the budgetary focus on specific project costs: "The actual cash proceeds of the sale of [State general obligation] bonds shall be paid to the Treasurer . . . and thereafter shall be credited on the books of the State Comptroller and expended, upon approval by the Board of Public Works, for the following [enumerated] public purposes." *See also* Article VI, §3 of the Maryland Constitution. In addition, Section 1(5) of Chapter 125 cautions: "Before a State agency or institution named in this Act as responsible for an individual item may begin work with funds secured under this Act, the agency or institution shall provide satisfactory assurances to the Board of Public works that *the work described in the individual item can be completed with the funds specified for that item.*" (Emphasis added.)

When a construction project is budgeted at \$500,000 or more, the fiscal assessment necessarily takes into account the impact of the labor costs that result from the application of the Prevailing Wage Law.⁶ In this way, the public officials responsible for the budget give effect to the Prevailing Wage Law in precisely the way that we believe the law itself contemplates—by reference to total construction costs on a public works project.

⁵ A bill of this kind, providing for the use of debt proceeds, is a "Supplementary Appropriations Bill," within the meaning of Article III, §52(2) and (8). *Panitz v. Comptroller*, 247 Md. 501, 513-15 (1967).

⁶ To be sure, an appropriations line item might include costs that are not properly regarded as part of the costs of construction. *See Demory Bros. v. Board of Public Works*, 273 Md. 320, 330 (1974) (cost of land acquisition not a cost of construction). However, even if a budget line item does not itself differentiate between construction and other costs of a project, the schedules supporting the budget do. *See* SF §7-101(b).

III

Conclusion

In summary, it is our opinion that the Prevailing Wage Law applies to a contract of less than \$500,000, arranged on behalf of a public body by a construction manager, if (1) the contract embodies an aspect or stage of construction of a single public works project, (2) the total construction cost of the project is \$500,000 or more, and (3) the project is otherwise within the scope of the law.

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Editor's Note: The Procurement Law has been recodified twice since the issuance of this opinion. Chapter 840, Laws of Maryland 1986; Chapter 48, Laws of Maryland 1988. The Prevailing Wage Law is now codified as Title 17, Subtitle 2 of the State Finance and Procurement Article.

PROCUREMENT

DEBARMENT—CONSTITUTIONAL LAW—FEDERAL PREEMPTION—
CURRENT STATUTE PROHIBITING AWARD OF STATE CONTRACTS
TO LABOR LAW VIOLATORS IS UNCONSTITUTIONAL, BUT
AMENDMENT TO CORRECT DEFECTS MAY BE POSSIBLE.

August 14, 1986

Mr. Warren K. Wright
Procurement Advisor
Board of Public Works

You have requested our opinion about the constitutionality of §13-404 of the State Finance and Procurement Article ("SF" Article), which prohibits the award of State contracts to persons "found in contempt of court by a federal court of appeals for failure to correct an unfair labor practice prohibited by the National Labor Relations Act." This question arises from the recent decision of the United States Supreme Court in *Wisconsin Dep't of Indus., Labor and Human Relations v. Gould*, _____ U.S. _____ [106 S.Ct. 1057] (1986). In *Gould*, the Supreme Court ruled that a Wisconsin statute forbidding that state from purchasing any product manufactured or sold by recidivist labor law violators is constitutionally invalid under the Supremacy Clause of the United States Constitution.

For the reasons given below, we conclude that SF §13-404, as presently formulated, is likewise an unconstitutional interference with federal labor policy. However, an amended debarment statute—enacted for purposes unrelated to labor law compliance and limited in its effect to the period of time when a company was in contempt of court—would not be clearly unconstitutional.

I

Preemption Under Federal Labor Law

The National Labor Relations Act ("NLRA") was enacted by Congress to regulate labor relations comprehensively and to consolidate enforcement responsibility in the National Labor Relations Board ("NLRB"). *Nash v. Florida Industrial Comm'n*, 389 U.S.

235 (1967). Therefore, state laws that interfere with the NLRA are invalid under the Supremacy Clause of the U.S. Constitution, Article IV, cl. 2:¹

“When it is clear or may fairly be assumed that the activities which a State purports to regulate are [protected or prohibited by the NLRA], due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.” *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959).²

II

Preemption of State Debarment Laws

In *Wisconsin Department of Industry, Labor and Human Relations v. Gould, Inc.*, the Supreme Court unanimously held that the NLRA preempts the Wisconsin debarment statute. Under that statute, persons or firms that have been found to have violated the NLRA three times within a five year period are prohibited from competing for state business for three years.³

¹“This Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . , shall be the supreme law of the Land . . . , anything in the Constitution or laws of any State to the Contrary notwithstanding.”

²The NLRA does not preempt all state legislation in the labor relations field. If there is something in or arising from allegedly wrongful conduct that would be of merely peripheral concern to the NLRB, but of significant interest to the state, the matter will not be preempted. *Farmer v. United Bth. of Carpenters Local 25*, 430 U.S. 290, 295-97 (1977). See also *Pemberton v. Bethlehem Steel Corp.*, 66 Md. App. 133, 156 (1986) (NLRA does not preempt State tort claims for intentional infliction of emotional distress and invasion of privacy arising in labor relations context).

³The scope of debarment is set out in the Wisconsin statute as follows:

“The department [of industry, labor and human relations] shall maintain a list of persons or firms that have been found by the national labor relations board, and by 3 different final decisions of a federal court . . . if the 3 final decisions involved a cumulative finding of at least 3 separate violations, to have violated the national labor relations act, 29 U.S.C. 151 et seq., and of persons or firms that have been found to be in contempt of court for failure to act on 3 or more occasions

Wisconsin argued that the debarment statute did not interfere with federal regulation of labor relations because "Wisconsin is acting as a market participant, not a market regulator." Brief for Appellants at 19.⁴ However, the Supreme Court concluded, "Wisconsin's debarment law functions unambiguously as a supplemental sanction for violations of the NLRA" by flatly prohibiting state purchases from repeat law violators. 106 S.Ct. at 1062.

Citing *Garmon*, the Supreme Court held that states are prohibited "not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act." 106 S.Ct. at 1061. The Court continued:

"[I]f Wisconsin's debarment law is valid, nothing prevents other States from taking similar action against labor law violators. Indeed, at least four other States already have passed legislation disqualifying repeat or continuing offenders of the NLRA from competing for state contracts. Each additional statute incrementally diminishes the [NLRB's] control over enforcement of the NLRA and thus further detracts from the 'integrated scheme of regulation' created by Congress." 106 S.Ct. at 1062 (quoting *Garmon*, 359 U.S. at 247).⁵

This problem of conflict, the Supreme Court observed, is especially acute as to a remedy—debarment—that has been denied the NLRB, "because 'the range and nature of those remedies that are and are not available is a fundamental part' of the comprehensive system established by Congress". 106 S.Ct. at 1061 (quoting *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 287 (1971)).

by a court within a 5 year period ... if the 3 contempt findings involved a cumulative total of at least 3 different violations." Wisconsin Statutes §101.245 (Supp. 1985).

⁴Wisconsin simply asserted its sovereign right to do business with whom it pleased; it did not proffer an argument that contracting with recidivist labor law violators might cause Wisconsin economic injury. See Part IV below.

⁵In a footnote to this passage, the Supreme Court specifically mentioned SF §13-404, discussed in Part III below, and comparable laws in Connecticut, Michigan, and Ohio. 106 S. Ct. at 1062 n.6.

III

Preemption of the Maryland Debarment Statute

SF §13-404 debars from State business any person who, within the preceding two years, has been found in contempt of a federal court of appeals for failure to correct an unfair labor practice under the NLRA.⁶

The statute is as follows:

“(a) The Attorney General shall establish and maintain a monthly list of all persons found in contempt of court by a federal court of appeals for failure to correct an unfair labor practice prohibited by the National Labor Relations Act (29 U.S.C. §158, 49 Stat. 452). This list shall contain the names of those persons found to have engaged in these practices during the 2-year period before the date of the list.[⁷]

(b) A contract or subcontract may not be awarded to any person or for any supplies manufactured by a company whose name appears on the most recent list of the Attorney General.

(c) This restriction does not prohibit the awarding of a contract to a company whose name does not appear on such a list but whose supplies manufactured include component parts manufactured by a company whose name does appear on the list.

(d) This restriction does not apply during an emergency situation when the listed person is the sole source of supplies or services.”⁸

SF §13-404 is in one respect less sweeping than the Wisconsin statute struck down in *Gould*, which required debarment not only for contempt of court but also on the basis of cumulative violations

⁶A finding of contempt is issued when a person continues to commit an unfair labor practice after both the NLRB and a federal court of appeals have ordered that person to desist. See Comment, *State Debarment of Federal Labor Law Violators*, 79 Col. L. Rev. 198 (1979) (“*Debarment Comment*”).

⁷A recent example of the listing required by SF §13-404(a) appears at 12:21 Md. Reg. 2051 (Oct. 10, 1985). That list contained the names of 25 companies.

⁸Chapter 840, Laws of Maryland 1986 (effective July 1, 1987), makes nonsubstantive changes in the wording of the debarment statute. It also redesignates the statute as SF §11-212.

alone.⁹ Nevertheless, although SF §13-404 might be seen as a lesser infringement on the federal scheme, the distinction does not lead to a different result. Like the Wisconsin law, SF §13-404 assesses a penalty for noncompliance with the NLRA "in order to encourage compliance with the law." Chapter 507, Laws of Maryland 1978 (preamble). Therefore, SF §13-404 interferes with the intended federal exclusivity in enforcing the NLRA and is preempted by that law, under the analysis in *Gould*.

Indeed, in a different respect SF §13-404 results in an even greater interference with federal law than the Wisconsin law. The enforcement scheme established by the NLRA is "essentially remedial" in nature; NLRB orders are directed toward granting relief to the injured parties rather than toward punishing violators. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10 (1940). Under the NLRA, once an employer rectifies its unlawful conduct, federal sanctions cease. Debarment for a specified period, the Supreme Court wrote in *Gould*, regardless of whether the violations have been rectified, clearly interferes with the federal scheme by imposing a sanction harsher than that intended by Congress. 106 S.Ct. at 1062 n. 5. SF §13-404 not only debars for a specified period but also provides for automatic debarment on the basis of a *single* finding of contempt, in contrast to the Wisconsin law's requirement of three or more violations. In its obvious effort to punish labor law violators without regard to recidivism, SF §13-404 is more punitive and thus more clearly in conflict with the NLRA than the Wisconsin provision.

IV

Potential Amendment of SF §13-404

As discussed in Part III above, SF §13-404 in its present form is unconstitutional and unenforceable. However, it is arguably possible to amend the statute so as to correct the constitutional defect—although, we must add, some of the language in *Gould* suggests that no state debarment legislation linked to labor law violations would survive scrutiny.

Potential reform of SF §13-404 would involve both its substance and its underlying rationale. First, the statute has no chance of being upheld if it continues to impose a sanction that continues for

⁹See note 3 above.

a fixed period, even after the violator corrects the violation and is no longer in contempt. An amendment to make the period of debarment coextensive with the period of contempt would remove a major flaw in the present statute.¹⁰

But this modification, in and of itself, would not be sufficient. Even this modified statute would be found unconstitutional, we believe, if the debarment were for punitive purposes.

In *Gould*, Wisconsin conceded "that the point of the statute is to deter labor law violations and to reward 'fidelity to the law.'" 106 S.Ct. at 1062 (quoting transcript of oral argument). The Wisconsin law could not "even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs." *Id.* at 1064. *Cf.* Appellants' Brief at 30 (recognizing "economic inefficiency" of its policy choice).

SF §13-404 was enacted in 1978 for the same deterrent purpose, now found by the Supreme Court to be constitutionally impermissible. The preamble to the bill states as follows:

"The State of Maryland should not tolerate injustice. Further, the State has the responsibility to act, if possible, against such injustice. Therefore, it is necessary and proper for the State, in order to encourage compliance with the law, to prohibit awards to any company which violates labor law". Chapter 507, Laws of Maryland 1978.

However, debarment can serve purposes unrelated to labor law compliance. Under SF §13-401, "the procurement officer shall determine that a bidder or offeror is responsible and responsive." A "responsible bidder or offeror" is one "who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance." SF §13-101(h). Hence, a bidder or offeror who is not "responsible" is to be disqualified for that particular contract. Beyond this case-by-case assessment, the Board of Public Works has proposed regulations for the suspension or debarment of persons for "unsatisfac-

¹⁰"A State statute that geared both the imposition and duration of debarment to a violator's refusal in the face of a contempt order to comply with NLRB-directed remedial action might survive preemption attack [R]emoval of the debarment once the required remedial action is undertaken by the violator would minimize the statute's interference with the NLRA's remedial scheme. Rather than penalizing the violator, a statute so structured merely reinforces NLRB and judicial efforts to enforce compliance with an unfair labor practice remedy already formulated by the [NLRB]." *Debarment Comment* at 209.

tory performance" or "improper conduct." 13:9 Md. Reg. 1055 (April 25, 1986).

In our view, the General Assembly is not precluded by *Gould* from reaching the conclusive legislative judgment that a company that has not only violated the NLRA but also refuses to rectify its misconduct in the face of a contempt citation is an unreliable contractor. Corporate management so heedless of those legal obligations might be comparably careless of its legal obligations under a contract. The company would also likely be prone to labor unrest, putting at risk its contract fulfillment.¹¹

Wisconsin proffered no such economic justification for debarment; indeed, it conceded that it had none. Hence, the Supreme Court has *not* ruled on the constitutionality of a debarment statute grounded in this objective. *See* 106 S.Ct. at 1064.

To be sure, the effect of debarment is the same, whatever its purpose, and the Supreme Court might well conclude that a state's interest in contract performance does not save any debarment statute linked to labor law violations. But if the General Assembly enacted a debarment statute amended and justified as discussed above, we could not say that such a law would be clearly unconstitutional.¹²

V

Conclusion

In summary, it is our opinion that:

1. SF §13-404 is unconstitutional and unenforceable.

¹¹"By denying state contracts to employers that, in failing to comply with judicial enforcement orders, have demonstrated a willingness to engage in continued NLRA violations, the state protects itself against the possibility that the employer's ability to meet its contractual obligations to the state may be undermined by labor unrest." *Debarment Comment* at 205.

¹²A "not clearly unconstitutional" standard is ordinarily applied by this office in its review of bills after each session of the General Assembly. *E.g.*, 68 *Opinions of Attorney General* 136, 147 (1983). The future General Assembly that might choose to enact the debarment law outlined above would, of course, be free to act for its own purposes and would not be bound by the purpose set out in the preamble to the 1978 legislation.

2. If a debarment statute were enacted for reasons unrelated to labor law compliance and were limited so that companies would be subject to debarment only while in contempt, the statute would not be clearly unconstitutional.

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Editor's Note: Former SF §13-404 has been repealed. See General Revisor's Note to Title 16, Subtitle 1, in Chapter 48 of the Laws of Maryland 1988.

PUBLIC CONTRACTS

INDEMNITY CLAUSES—AGREEMENT UNDER WHICH DEPARTMENT OF AGRICULTURE WOULD UNCONDITIONALLY INDEMNIFY ANOTHER STATE FOR LIABILITY ARISING FROM MANUFACTURE OF A VACCINE IS NOT AUTHORIZED UNDER CURRENT LAW.

December 1, 1986

The Honorable Wayne A. Cawley, Jr.
Secretary, Department of Agriculture

You have requested our opinion concerning your authority, or that of any other State official, to enter a contract under which the Department of Agriculture would unconditionally "indemnify, defend, and save harmless" another state and its employees in connection with the manufacture and use of a vaccine. The particular indemnity clause in question is contained in a proposed agreement under which the Department of Agriculture would purchase a certain veterinary vaccine from the Michigan Department of Public Health.

For the reasons given below, we conclude that no State official has authority to agree to this indemnity clause.

I

Background

The Michigan Department of Public Health sells a vaccine that is useful in preventing a serious disease in horses.¹ The Department of Agriculture would like to purchase the vaccine for distribution to Maryland veterinarians.

¹As you describe it, the disease is "a type of botulism 'staggers' that affects young foals and which is usually fatal." Letter from Secretary of Agriculture Cawley to Attorney General Sachs, at 1 (September 23, 1986). The Michigan Department of Public Health sells *Clostridium Botulinum* Type B Toxoid, which protects horses against botulism caused by that particular organism.

As a condition of sale, the Michigan Department of Public Health requires that the sales contract contain the following indemnity clause:

"The Contractee assumes full liability for the use, administration and manufacture of the Toxoid and agrees to indemnify, defend, and save harmless the State of Michigan, Michigan Department of Public Health, and any other subdivision, officer, agent or employee of the State of Michigan from any and all claims and losses which may arise from the use, administration or manufacture of the Toxoid, including any action or omission by the Contractee, or other persons receiving this Toxoid from the Contractee."²

II

Scope of Statutory Waiver of Immunity

A. *Introduction*

"The law is well established that the State or one of its agencies may not by affirmative action or by failure to plead the defense, waive the defense of governmental immunity in the absence of express statutory authorization, or by necessary implication from a statute." *Austin v. City of Baltimore*, 286 Md. 51, 56 n. 3 (1979). When the General Assembly has waived immunity, the scope of the waiver is no greater than that delineated in the statute. *MTA v. Granite Constr. Co.*, 57 Md. App. 766, 780-81 (1984). In general, "the standard of liability is strictly construed even under statutes which expressly impose liability on the sovereign." 3 *Sutherland Statutory Construction* §62.01, at 65 (Sands ed. 1974).

B. *Torts*

The Maryland Tort Claims Act effects a limited waiver of sovereign immunity in tort actions. §12-101(a) of the State Government Article ("SG" Article). The principal limitations on this waiver are:

²Agreeing to an identical indemnity clause is apparently a prerequisite to the purchase of other products from the Michigan Department of Public Health—for example, pertussis vaccine.

1. the tort must have been committed by a person within the scope of the term "State personnel," SG §12-101;
2. the tortious act or omission must be "within the scope of the public duties of the State personnel" and must be free of "malice or gross negligence," SG §12-104(b)(4); and
3. the tort must be within the State's "insurance coverage under Title 9 of the State Finance and Procurement Article," SG §12-104(a).

Under the proposed indemnity clause, the Department would assume the risk of exposure to potential damages originating in tortious conduct beyond that contemplated by the Tort Claims Act. First, the clause would require the Department to indemnify the State of Michigan and its employees, who obviously are not "State personnel" under the Tort Claims Act. Second, the indemnity clause, phrased in terms of "any and all claims and losses arising from the ... manufacture" of the vaccine, apparently extends even to grossly negligent acts or omissions in Michigan's manufacture of the product. Finally, the clause would impose on the Department a risk that is covered neither by purchased insurance nor by the State's self-insurance program. *See* §9-105 of the State Finance and Procurement Article ("SF" Article).³

C. *Contracts*

Nevertheless, the Tort Claims Act is not directly applicable to the proposed indemnity clause. The Department's liability under the clause, though directly traceable to tortious acts by Michigan employees, would arise as a matter of contractual obligation. The victim of the tortious act or omission would sue Michigan in tort, but Michigan, in turn, would sue the Department in contract.

The State has generally waived sovereign immunity in contract actions:

"Except as otherwise expressly provided by a law of the State, the State, its officers, and its units may not raise the defense of sovereign immunity in a contract action, in a court of this State, based on a written contract that

³Although the Treasurer "may provide any other purchased insurance that the Treasurer considers appropriate to the interest of the State" [SF §9-105(b)(2)], in fact the liability insurance purchased by the Treasurer does not cover the risks associated with the production of vaccine by an out-of-state entity.

an official or employee executed for the State or 1 of its units while the official or employee was acting within the scope of the authority of the official or employee." SG §12-201(a).

Hence, the determinative question, we think, is whether an official or employee would be acting "within the scope of [his or her] authority" in agreeing to the indemnity clause in the vaccine sales agreement. If so, the waiver of immunity in contract would apply. If not, the clause would be unenforceable, because neither the contract nor tort waivers would apply.

III

Contracting Authority

An official authorized to enter a contract on behalf of the State or a State agency necessarily has broad authority to agree to terms that are reasonably related to the bargain. See *Arizona v. California*, 373 U.S. 546, 580 (1963). Although some contract terms are standard, others might be a product of bargaining over the specifics of a contract, and—as here—still others might be insisted upon by the seller. The State contracting officer negotiates a contractual arrangement "just as a private citizen or corporation might do" and must have "similar flexibility to prescribe"—or, we think, accept—"contract specifications that fulfill [the agency's] own perceived needs." 68 *Opinions of the Attorney General* 242, 246 (1983). This essential discretion in the contracting process has been recognized by the courts. *E.g.*, *Board of Educ. v. Allender*, 206 Md. 466, 475 (1955); *Hanna v. Board of Educ.*, 200 Md. 49, 51 (1952).⁴

⁴The Procurement Law, in its definition of "contract modification," reflects the potential breadth of contract terms:

"'Contract modification' means any written alteration in the specifications, delivery point, date of delivery, contract period, price, quantity, or other provision of any existing contract, whether accomplished by unilateral action in accordance with a contract provision, or by mutual action of the parties to the contract. It includes bilateral actions such as supplemental agreements, and unilateral actions such as change orders, administrative changes, notices of termination, and notices of the exercise of a contract option." SF §11-101(g).

We recognize that the proposed contract between the Department and the Michi-

An indemnity clause might well be reasonably incident to the contractual purpose. If the seller of a product is required to bear the risk of a given liability, that risk will be reflected in the price of the product. It might be to the State's advantage to negotiate a lower price by shifting risk to the State through the device of an indemnity clause.

Hence, we are not suggesting that indemnity clauses are per se improper. For example, agreeing to indemnify a vendor against losses associated with the State's use of a product might reflect routine commercial practice and fall within the discretion of a contracting officer.

Yet the discretion of a contracting officer, in this and other respects, is not unlimited. The Procurement Law, for example, specifies various mandatory procedures and clauses.⁵ Legal limitations on the officer's authority to contract—whether grounded in the Maryland Constitution, pertinent statutes, or public policy—are necessarily a component of any agreement with the State. "The rule is firmly established that one who makes a contract with a municipal corporation or administrative agency is bound to take notice of the limitations of its powers to contract." *Hanna v. Board of Educ.*, 200 Md. at 57.

In our view, this State's public policy precludes the entering of a contract that purports to impose upon the State unlimited liability arising from the manufacture of a product. Both the Constitution and the statutes require a link between contractual commitments and appropriations. Thus, Article III, §32 of the Constitution, which prohibits the withdrawal of money from the Treasury "except in accordance with appropriation by Law," applies to any binding commitment for the payment of State funds and requires that multi-year contracts be made contingent upon future appropriations. See 57 *Opinions of the Attorney General* 88 (1972). Cf. SF §13-705(b), (c), and (d). Moreover, SF §7-237 provides for civil liability and criminal penalties if "any officer or agent of the State" responsible for certain categories of contracts:

gan Department of Health would not be subject to the Procurement Law. SF §11-202(b)(1). Nevertheless, the Procurement Law, in this and other respects, reflects general legal principles that are applicable to the intergovernmental contract in question.

⁵See, e.g., SF §§13-406, 13-602, 13-705, and 18-501 through 18-515; COMAR 21.07.01 through 21.07.04.

“(1) Makes or participates in making for any purpose a contract that purports to bind the State to pay any amount unless money has been appropriated for that purpose and remains unspent;

(2) Creates a deficiency; or

(3) Incurs a liability or spends money in excess of the applicable appropriation.” SF §7-237(b) (emphasis added).⁶

The indemnity clause in the proposed Michigan contract is flatly inconsistent with the public policy that these particular provisions express. The effect of the clause is to expose the Department to potentially unlimited liability under circumstances in which no funds are appropriated to fund that potential liability, the risk is uninsured, and the indemnity clause itself does not condition the Department’s obligation on future appropriations having been made available.

To be sure, under the statute waiving sovereign immunity in contract, this indemnity clause would not result in any actual outlay of money from the Treasury unless a budget bill were enacted with appropriations sufficient to satisfy a final judgment arising out of the indemnity clause. SG §12-201(a). The General Assembly would retain its ultimate authority to decide whether to provide funds for this purpose. *See* 68 *Opinions of the Attorney General* 382 (1983).

But this possibility does not cure the legal difficulty created by contracting for such a potential liability. If a judgment were rendered under the indemnity clause, the Governor then would be obliged to include in the budget bill an amount sufficient to fund the judgment. SG §12-204. To this extent, the Governor’s discretion over the formulation of the budget bill would be impaired—and, given that the potential liability under the indemnity clause might be huge, this impairment of the Governor’s discretion over the allocation of State resources might well be significant. A contract having that restrictive effect on the Governor’s discretion is contrary to public policy: “Obviously ... any contract which controls or restricts the discretion vested in a public officer or public body is contrary to public policy and void.” *Smith v. Ouzts*, 103 S.E.2d 567, 569 (Ga. 1958). *See also Modjeski & Masters v. Pack*, 388 S.W.2d

⁶This section, with its civil and criminal sanctions, applies to contracts concerning the “construction, improvement, or maintenance of a building or work” or the “management of or provision for a State institution.” SF §7-237(a). But the essential principle applies to other types of contracts as well, albeit without the sanctions.

144, 148 (Tenn. 1965). *See generally* 63 Am.Jur.2d *Public Officers and Employees* §336, at 913 (1984).

The exposure in the proposed indemnity clause is extraordinary. It far exceeds that arising from ordinary indemnity clauses, where the risk is met either by insurance or by the availability of appropriations.⁷

In our view, if a State official is to be authorized to incur a risk of liability of this kind, the General Assembly should grant that authority expressly. Absent such legislative authorization, we do not believe that a contracting officer has authority to agree to this indemnity clause.⁸

IV

Conclusion

In summary, it is our opinion that, in the absence of appropriate insurance, a contract provision purporting to require the State to indemnify without limit the State of Michigan and its employees for any damages arising from their acts or omissions in the manufacture of a vaccine cannot be given legal effect. Assent to such a provision would be outside the authority of any State officer or employee.

We recognize the difficulty presented when the sole source of an important product conditions its availability on agreement to an indemnity clause like this. Nevertheless, the authority to assent to such an indemnity provision must come from the General Assembly.

⁷The Treasurer is responsible for the State Insurance Program. SF §9-104(a). Proposed indemnification agreements that would impose a casualty risk on the State should be discussed with the Treasurer so that the insurance consequences can be ascertained.

Absent insurance or already available appropriations to fund an indemnity agreement, the agreement itself should indicate expressly that any indemnity payment is conditioned upon available appropriations at the time of the loss. *See* 34 Comp. Gen. 824 (1975). Language of this kind would preserve the discretion of both the Governor and the General Assembly.

⁸This conclusion applies as well to the Board of Public Works, notwithstanding its broad authority over contract matters. Letter from Assistant Attorney General Margaret Lee Quinn to Board of Public Works (April 29, 1986).

STEPHEN H. SACHS
Attorney General

JACK SCHWARTZ
Chief Counsel
Opinions and Advice

PUBLIC ETHICS

PUBLIC INFORMATION ACT—LOCAL GOVERNMENTS—ALL INFORMATION ON CALVERT COUNTY FINANCIAL DISCLOSURE FORM IS TO BE AVAILABLE TO THE PUBLIC.

December 22, 1986

*Ms. Shirley McCarthy, Chairman
Calvert County Ethics Commission*

You have requested our opinion on whether certain information on disclosure statements filed with the Calvert County Ethics Commission must be withheld from public disclosure. For the reasons given below, we conclude that all of the information on those statements must be made available to the public.

I

Conflict of Interests
and Financial Disclosure Provisions

The Calvert County Ethics Code prohibits County officials and employees from participating in matters that “would, to their knowledge, have a direct financial impact, as distinguished from the public generally, on them, their spouse or dependent child, or a business entity with which they are affiliated.” Calvert County Code §X.C.1.¹ The County’s ethics ordinance also requires officials, employees, and candidates for elective office to file statements “disclosing any interest or employment the holding of which would require disqualification from participation [in matters involving the

¹Calvert County, like all other local governments in the State, was required to enact “conflict of interest provisions applicable to [its] local officials....” Article 40A, §6-101(a) of the Maryland Code.

The ordinance’s terms prohibit officials and employees from participating “on behalf of Calvert County in any *manner*” that would have such a personal financial impact. The ordinance tracks a model local ethics law adopted by the State Ethics Commission whose comparable provision prohibits participation “in any *matter*” that would involve such a conflict of interest. COMAR 19A.04 Apx. B. We assume, therefore, that the word “manner” in the Calvert County provision should be read as “matter.”

County], sufficiently in advance of any anticipated action to allow disclosure to the public." Calvert County Code §X.D.4.² Officials and employees must also file annual statements disclosing the receipt of any gift exceeding \$25 in value from any person who has a contract with Calvert County or who is regulated by the agency of which the declarant is a member. Calvert County Code §X.D.1.

The County Ethics Commission has devised a standard form for the disclosure statements, which it requires be submitted annually. The form identifies the declarant by name, address, and office. It requires disclosure of any gift having a value greater than \$25 received from a person doing business with or regulated by the County or from a lobbyist, and it asks whether the declarant has participated in a County matter that had a direct financial impact on the declarant, the declarant's spouse or dependent children, or affiliated business entities. In addition, the form requires the declarant to disclose certain specified interests or employments: (i) the employment of a family member with the County, (ii) interests in real property in the County other than the declarant's residence, (iii) any representation of a party before a County body for a contingent fee, and (iv) any interest or employment of the declarant or a family member in a business entity doing business with the County.

II

Confidentiality and Public Disclosure Provisions

Section 10-617 of the State Government Article ("SG" Article) provides that, "[u]nless otherwise provided by law," certain information in public records must be withheld from public inspection. SG §10-617(a). Home addresses and telephone numbers of State and local employees are made ordinarily nondisclosable by SG §10-617(e). "[I]nformation about the finances of an individual, including assets, income, liabilities, net worth, bank balances, financial history or activities, or credit worthiness," is made ordinarily nondisclosable by SG §10-617(f). You have suggested that those provi-

²The filing requirement applies to the Board of County Commissioners, the County Attorney, the Administrative Director, Merit System and contractual employees, and the members of the Planning Commission, the Industrial Park Authority, the Marine Museum Board of Governors, the Housing Authority, the Board of Zoning Appeals, the Building Board, the Plumbing Board, the Electrical Board, and the Liquor Board. Calvert County Code §X.D.3.

sions require you to redact the home address and financial information from a disclosure statement before releasing it to the public.

However, §X.D.5. of the County ordinance unambiguously requires that “[d]isclosure statements filed pursuant to this section [§X.D] shall be maintained by the Commission as public records available for public inspection and copying.”³ That provision, in accordance with SG §10-617(a), thus supersedes the usual confidentiality of information that is filed “pursuant to” the financial disclosure provisions of the ordinance. Hence, if the information required by the Calvert County disclosure form is within the ambit of §X.D, all information on the form must be disclosed.⁴

III

Scope of Financial Disclosure Requirement

The Calvert County financial disclosure requirement, like all such requirements of both State and local law, is designed to guard against improper influence on the conduct of public business by requiring governmental officials and employees to make public disclosure of their financial affairs. Article 40A, §1-102(c) of the Maryland Code. Such laws, accordingly, “are concerned not just with actual conflicts of financial interest, but also with appearances.” *Montgomery County v. Walsh*, 274 Md. 502, 514 (1975). To effectuate the legislative intent to assure the public of the impartiality and independent judgment of governmental officials, such a provision must be liberally construed. Article 40A, §1-102(d); 66 *Opinions of the Attorney General* 197, 203 (1981).

The statement required by Calvert County Code §X.D.4 is one “disclosing any interest or employment the holding of which would

³Moreover, the State Ethics Commission—which is charged with ensuring that local ethic laws comport with the requirements of the State Public Ethics Law—has expressly stated that “[t]he local law, to be consistent with the Public Ethics Law should provide that financial disclosure statements be held by the [local agency administering the ordinance] as public records available for public inspection and copying.” COMAR 19A.04.02.05.

⁴In any case, the current practice is unacceptable. If any information on the disclosure form is not within the ambit of §X.D and therefore is not disclosable to the public, the County Ethics Commission has no authority to require the information’s inclusion on the financial disclosure statement. If, however, the required information is within the ambit of §X.D, it is disclosable in its entirety.

require disqualification from participation" in County actions. Thus, by the terms of that provision, a declarant must disclose *any* interest or employment by reason of which County actions would directly affect the declarant's personal finances. The specific interests and employments designated on the County's disclosure form all are clearly of that sort, for all of them pertain to assets or sources of income whose value may be wholly or partially determined by particular County actions. Therefore, in our view, the ordinance's language on its face is broad enough to encompass all of the inquiries on the form.

Moreover, we think that the very content of the disclosure statement indicates that the County Ethics Commission itself regards all of the required information as being within the contemplation of the ethics ordinance's disclosure requirements. The Commission is charged by §X.B with administering and interpreting the ordinance. Hence, the inclusion of this information on the form, which was devised by the Commission for the very purpose of administering the disclosure requirement, is strongly persuasive evidence that disclosure of the information is within the ambit of §X.D.4. *See National Asphalt Pavement Ass'n. v. Prince George's County*, 292 Md. 75, 80 (1981).

The disclosure required by the County's disclosure statement form is undeniably more detailed than the minimum that State law requires. *See* Article 40A, §6-201(c). However, State law by no means prevents counties from adopting broader or more detailed disclosure requirements. *Montgomery County v. Walsh*, 274 Md. at 510. In fact, the State Ethics Commission's regulations, in addition to setting forth the minimum disclosure required, also discuss more detailed disclosure approaches that would be consistent with the principles of the State Public Ethics Law.

Calvert County's requirements, as embodied in the local Commission's form, are patterned on the disclosure approaches discussed in those regulations and reflect the State disclosure approach. COMAR 19A.04.02.05.B. As such, they represent a permissible determination by the agency charged with administering the County's ethics ordinance as to the level of detail necessary to meet the ordinance's requirement that County officials and employees disclose "any interest or employment the holding of which would require disqualification" from acting on behalf of the County. Such an administrative construction of the ordinance "'should not be disregarded except for the strongest and most cogent reasons.'" *Demory Brothers, Inc. v. Bd. of Public Works*, 273 Md. 320, 327

(1974) (quoting *Comptroller v. Rockhill, Inc.*, 205 Md. 226, 233 (1954)).

Further, that construction of the ordinance's filing requirement comports well with the requirement's purpose. Financial disclosure requirements in general "see[k] to foster a climate of honesty perceptible by the public at large." *Montgomery County v. Walsh*, 274 Md. at 514. Disclosure is designed to ensure that "public officials and employees act with honesty, integrity, and impartiality in all their dealings, and that their private financial holdings and transactions present no conflict of interest between the public trust and private interests." 274 Md. at 515. Accordingly, disclosure may certainly go beyond merely asking declarants whether they or their families have financial interests that would require disqualification. "[T]o limit disclosure requirements to financial information that on its face relates to County activities or to the functions and duties of a particular official or employee would not guarantee the absence of financial conflicts of interests." 274 Md. at 517.⁵ Because the purpose of the ordinance's disclosure requirement is to assure the public that no such conflicts exist, we think that the requirement does encompass disclosure of all of the interests and transactions identified on the form.

IV

Conclusion

In summary, it is our opinion that all of the information on the Calvert County financial disclosure form is within the ambit of the County Ethics Ordinance's disclosure provision. Accordingly, disclosure statements filed with the County Ethics Commission are filed "pursuant to" the financial disclosure section of the ordinance and must be "maintained by the Commission as public records available for public inspection and copying" in their entirety, as required by Calvert County Code §X.D.5.

⁵Indeed, courts in other jurisdictions have pointed out that "[i]t would be an anomaly to enact a statute, designed to eliminate conflicts of interest between public trust and private gain, in such manner that the person affected is permitted to decide when a financial interest relates to his public employment." *Stein v. Howlett*, 289 N.E.2d 409, 413 (Ill. 1972), *appeal dismissed*, 412 U.S. 925 (1973). *Accord, Fritz v. Gorton*, 517 P.2d 911, 926 (Wash.), *appeal dismissed*, 417 U.S. 902 (1974).

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PUBLIC INFORMATION

911 SYSTEM—RECORDINGS OF ALL 911 CALLS ARE “PUBLIC RECORDS” GENERALLY SUBJECT TO DISCLOSURE, BUT PORTIONS OF THE RECORDINGS ARE WITHIN CERTAIN EXCEPTIONS TO DISCLOSURE.

April 4, 1986

Mr. John G. Rouse, III

Chairman, Emergency Number Systems Board

You have requested our opinion on whether tape recordings of calls to 911 Emergency Telephone System centers are subject to the disclosure requirements of the Maryland Public Information Act (the “PIA”) and, if so, whether there are any circumstances under which disclosure may or must be denied.

For the reasons stated below, we conclude that:

1. Recordings of calls to 911 Emergency Telephone System centers are “public records” under the PIA.
2. The portion of any recording that contains medical or psychological information about an individual may not be disclosed.¹
3. Recordings of calls for police assistance may be withheld from disclosure, but only if disclosure would be contrary to the public interest.
4. All other recordings must be disclosed upon request, except in the extraordinary situation in which a court is asked to withhold otherwise available information.²

¹See also Part III D 2 below, which discusses the possible nondisclosure of “sociological information.”

²This opinion confirms the substance of a prior advice letter on this issue. Letter from Dennis M. Sweeney, Deputy Attorney General, to Russell E. Wroten, Chief of Police of Cambridge, Maryland (June 26, 1984).

I

911 Emergency Telephone System

The 911 Emergency Telephone System was established in Maryland by Chapter 730 of the Laws of Maryland of 1979. That statute, now codified at Article 41, §§204H-1 through 204H-8 of the Maryland Code, was enacted in response to the General Assembly's finding of a need "to eliminate delays [in citizens' summoning appropriate emergency aid] caused by lack of familiarity with emergency numbers and by understandable confusion in circumstances of crisis." Article 41, §204H-1(d).³ To that end, the General Assembly established the number 911 as "the primary emergency telephone number for the State of Maryland." Article 41, §204H-1(e).

As of July 1, 1985, a 911 system was in operation in Baltimore City and in each of Maryland's counties. Maryland thus became the second state to have a 911 system in effect state-wide.⁴

The 911 system in each jurisdiction provides citizens with easy emergency access to police, fire fighting, and emergency ambulance services. When the 911 number is dialed, the caller automatically reaches a public safety answering point operated around the clock in the county where the call is made. Personnel at that answering point determine the nature of the emergency and route the call to the appropriate agency for response or directly dispatch the needed assistance.

The county systems are overseen by the Emergency Number Systems Board, which must approve all local plans for the installation or expansion of 911 systems and review and coordinate their operation. The minimum requirements for 911 systems established by the Board include electronic recording, with playback capability, of all incoming calls. COMAR 12.11.03.05E and F.⁵ The tapes themselves are physically maintained in the local 911 emergency communication centers.

³The General Assembly "recognize[d] that [emergency] assistance is almost always summoned by telephone and that a multiplicity of emergency telephone numbers exist[ed] throughout the State and within any one county" and expressed its "concer[n] that avoidable delays in reaching appropriate emergency aid [were] occurring to the jeopardy of life and property." Article 41, §204H-1(b) and (c).

⁴As it happens, Maryland was preceded by our good neighbor Delaware—which has, of course, historically prided itself on being the "first state."

⁵The taping of such emergency telephone calls is lawful, notwithstanding the general prohibition against wiretapping, under §10-402(c)(4) of the Courts Article.

II

Public Information Act Disclosure Requirements

The PIA, codified at §§10-611 through 10-628 of the State Government Article ("SG" Article), is designed to afford the public a general right of "access to information about the affairs of government and the official acts of public officials and employees." SG §10-612(a). To that end, the PIA requires that, "[e]xcept as otherwise provided by law, a custodian shall permit a person or governmental unit to inspect any public record at any reasonable time." SG §10-613(a).⁶

A "public record" is any documentary material—expressly including a tape recording—that "is made by a unit or instrumentality of the State government or of a political subdivision or received by the unit or instrumentality in connection with the transaction of public business." SG §10-611(f). Thus, the PIA applies to all the records of every agency that carries out governmental functions, whether on the State or local level. *See A.S. Abell Publishing Co. v. Mezzanote*, 297 Md. 26 (1983).

In light of the PIA's broad scope, there is no question that the 911 emergency centers operated by the counties are governmental agencies subject to the PIA and that the tape recordings of telephone calls to those centers are public records within the meaning of the PIA. Thus, unless the recordings are specifically exempted from the PIA's disclosure requirements, they must be made available to anyone who requests them. *Superintendent, Maryland State Police v. Henschen*, 279 Md. 468 (1977). *See also* 61 *Opinions of the Attorney General* 702, 705 (1976) (clerk of court may not deny access to marriage records, regardless of their intended use by person seeking inspection).

⁶The "custodian" of a public record is the governmental officer or employee who is responsible for keeping the public record or who actually has physical custody and control of the record. SG §10-611(c). Because the Emergency Number Systems Board does not itself operate any 911 system nor receive physical custody of any of the local systems' tapes, it is not the custodian of those tapes. Therefore, any request for access to those tapes must be directed to the local government officials or employees who operate the 911 systems in the various political subdivisions.

III

Exceptions to Disclosure

A. *Introduction*

Despite the PIA's general purpose to permit broad public access to public records, the Act contains a number of provisions that require or permit a custodian to deny requests for inspection of records. Those exceptions should, as a general matter, be construed narrowly, to promote public access to information about governmental activities.

At the same time, the PIA recognizes that the public's right to information is counterbalanced by the right to privacy of individuals who are subjects of governmental records. SG §10-612(b) accordingly provides that, "*unless an unwarranted invasion of the privacy of a person in interest would result*, [the PIA] shall be construed in favor of permitting inspection of a public record."⁷ Particular calls for emergency assistance might well reveal intimate personal information about the caller or others. In those circumstances, we think that releasing the record to anyone other than the person in interest would be "an unwarranted invasion of [that person's] privacy." Consequently, when the applicant seeking disclosure of such a call is not the person in interest, the PIA's exceptions can and should be construed somewhat more liberally than would otherwise be the case.

B. *Privileged or Confidential Records*

Public records must be withheld from disclosure to the extent that (i) the information they contain is made "privileged or confidential" by law or (ii) inspection of a particular record would be contrary to State or federal law, the rules adopted by the Court of Appeals, or a court order. SG §10-615. However, none of those exceptions applies to the recordings of calls made to 911 centers. While callers might prefer that their calls be kept confidential, the requirement that "privileged or confidential" records be withheld from public inspection, by its terms, applies only to records protected by common-law or statutory privileges, such as the attorney-client or psychiatrist-patient privilege, or by other confidentiality requirements. *See, e.g., 66 Opinions of the Attorney General 98,*

⁷The "person in interest" with regard to a public record is any person who is the subject of the records, or that person's designee or legal representative. SG §10-611(e).

103 (1981); 64 *Opinions of the Attorney General* 236, 239 (1979). Nor does any federal or State law or court rule generally prevent inspection of calls to 911 centers. Cf. 7 U.S.C. §2020(e) (limiting disclosure of information concerning food stamp recipients).⁸

C. *Other Personal Records*

The PIA itself requires that certain enumerated records not otherwise made confidential be withheld from public inspection. SG §10-616. However, records of calls for emergency assistance are not included in that list of protected records. Records of calls to 911 centers are therefore not automatically and wholly exempt from disclosure under that section.

D. *Personal Information*

1. *Medical and psychological information*

The PIA requires that certain specific types of information be withheld from public disclosure. SG §10-617(b) requires a custodian to “deny inspection of the part of a public record that contains medical or psychological information about an individual.” In our view, statements concerning an injured or ill person’s symptoms or condition, provided to a 911 center operator for the purpose of obtaining appropriate emergency medical care, are “medical or psychological information” that must be withheld.

The inclusion of such information in a public record does not preclude public access to the entire record, however—it is only the part that contains the protected information that must be withheld. Therefore, if access to a tape is requested, the tape must be reviewed to determine whether portions of it contain information that must be deleted before the tape’s release.⁹

⁸Article 27, §739 prohibits disclosure or review of expunged police records pertaining to a criminal proceeding. However, those records by definition do not include “investigatory files [or] police work-product records used solely for police investigation purposes.” Article 27, §735(e). That exclusion clearly encompasses records of calls for police assistance.

⁹We direct your attention also to SG §10-614(b)(3), under which an applicant must be given prompt written notice of the reasons and authority for any denial of a disclosure request and of the procedures for review of the denial that are available to the applicant.

2. *Sociological information*

SG §10-617(c) requires that “sociological information” be withheld, if—but only if—“the official custodian has adopted rules or regulations that define sociological information for purposes of this subsection.” Although the PIA does not provide further guidance, the apparent intent is to permit the protection of the kind of personal information that a person would disclose only under the conditions of confidentiality that customarily attend sociological studies. Thus, for example, the Department of Public Safety and Correctional Services has defined “sociological data,” with respect to parole and probation authorities, as including “[p]ersonal relationships, beliefs, values, etc.,” and “[r]eligious preference and attendance.” COMAR 12.11.02.02M(2) (a) and (g). The Emergency Number Systems Board might wish to consider the preparation of a model regulation along these lines.

E. *Discretionary Nondisclosure*

In addition to requiring that certain records or information be withheld from public inspection, the PIA also grants custodians discretion to deny inspection of particular parts of specified records if inspection by the applicant “would be contrary to the public interest.” SG §10-618(a). That section, like SG §10-616, applies only to the records specifically there designated. Those include “records of investigations conducted by ... a State’s attorney, ... a police department, or a sheriff” and “an investigatory file compiled for any other law enforcement ... purpose.” SG §10-618(f)(1)(i) and (ii). In our view, recordings of calls to 911 centers for police assistance generally are not “records of an investigation conducted by” a law enforcement agency, but they are part of “an investigatory file compiled for any other law enforcement ... purpose.”

1. *Records of investigations*

In 63 *Opinions of the Attorney General* 543, 547 (1978), this office concluded that arrest logs are not “records of investigations” because they “merely reflect the end result of a police investigation. They contain no information whatever concerning the actual investigation.” At the same time, the Attorney General noted that “should such records contain such investigatory material, they may very well be subject to the [SG §10-618(f)(1)(i)] exception.” *Id.* The same is true, in our opinion, of records of calls to 911 centers for police assistance.

A call to a 911 center does not directly convey any information to law enforcement officials. The centers are not themselves part of any of the agencies enumerated in SG §10-618(f)(1)(i), and the 911 operator who takes a call simply dispatches needed police assistance to the location indicated. Only on rare occasions do law enforcement officials review the recording of such a call as part of an investigation. Thus, like arrest logs, records of calls to 911 centers ordinarily "contain no information whatever concerning the actual investigation" conducted by a law enforcement agency. Should the record of a call actually be used in an investigation, however, it would be a record of the investigation.

2. *Investigatory files*

However, we think that records of calls for police assistance are part of "an investigatory file compiled for any other law enforcement ... purpose," within the meaning of SG §10-618(f)(1)(ii). Those calls trigger an investigation, at least to the extent of a police response to ascertain whether further law enforcement action is needed. In our view, the recorded complaint that triggers such an investigation is part of an "investigatory file." And the records of calls to 911 centers are compiled for the law enforcement purpose of ensuring that police assistance is promptly dispatched in an emergency.

Federal courts construing the analogous exception in the Freedom of Information Act (the "FOIA") have held that letters triggering agency investigations are covered by that exception.¹⁰ *E.g.*, *Evans v. Department of Transportation*, 446 F.2d 821, 824 (5th Cir. 1971) (letter inquiring how to bring pilot's abnormal behavior to attention of proper authorities was part of investigatory file); *Luzaich v. United States*, 435 F. Supp. 31, 34, *aff'd per curiam*, 564 F.2d 101 (8th Cir. 1977) (unsolicited anonymous tip advising Internal Revenue Service to audit taxpayer was investigatory record).

¹⁰As originally enacted, the FOIA exception authorized nondisclosure of "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party." See *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 221-22 (1978). It now authorizes nondisclosure of "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would" harm specified governmental interests. 5 U.S.C. §552 (b)(7). Under the FOIA, the term "investigatory records" is narrower than "investigatory files." See 437 U.S. at 229-30.

The Court of Appeals has held that FOIA decisions are persuasive as to the interpretation of the PIA. *Faulk v. State's Attorney*, 299 Md. 493, 506 (1984). Hence, Maryland courts would, we think, likewise conclude that the records of complaints that trigger investigations constitute "an investigatory file," whether they are embodied in tape recordings or written communications.

However, the conclusion that 911 calls for police assistance are an "investigatory file compiled for [a] law enforcement purpose" does not by itself mean that the recordings may be withheld. First, if the applicant is a person in interest, nondisclosure is authorized only to the extent that disclosure would cause one of the harms specified in SG §10-618(f)(2). *See generally* 64 *Opinions of the Attorney General* 236, 241-43 (1979) (discussing grounds for nondisclosure of investigatory records). Moreover, any other person is entitled to access unless the custodian has reason to conclude that inspection of the record "would be contrary to the public interest." SG §10-618(a). In considering "the public interest," the custodian should also take account of the harms specified in SG §10-618(f)(2). *See* Attorney General's Office, *Public Information Act Manual* 28 (4th ed. 1985). In particular, the custodian should consider whether the information on the recording is such that disclosure would "constitute an unwarranted invasion of personal privacy."

F. Court-Ordered Nondisclosure

Finally, the PIA provides for temporary denial of inspection of any public record when "the official custodian believes that inspection would cause substantial injury to the public interest." SG §10-619(a). The official custodian must petition the circuit court for an order permitting continued nondisclosure within 10 days of the original denial under this section. The person who sought access to the record must be notified of that action and has the right to appear and be heard in the court's proceeding on the petition.

The governmental entity in such a proceeding bears the burden of proving that disclosure would do *substantial* injury to the *public* interest. *Cranford v. Montgomery County*, 300 Md. 759, 780 (1984). Moreover, meeting that burden of proof may be difficult, for the PIA generally "shall be construed in favor of permitting inspection of a public record." SG §10-612(b). This "extraordinary" procedure is very rarely invoked. *See Public Information Manual* at 35.

IV

Conclusion

In summary, it is our opinion that:

1. Recordings of calls to 911 Emergency Telephone System centers are "public records" under the PIA.
2. The portion of any recording that contains medical or psychological information about an individual may not be disclosed.
3. Recordings of calls for police assistance may be withheld from disclosure, but only if disclosure would be contrary to the public interest.
4. All other recordings must be disclosed upon request, except in the extraordinary situation in which a court is asked to withhold otherwise available information.

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PUBLIC INFORMATION—"MEDICAL OR PSYCHOLOGICAL INFORMATION"—"PERSON OF INTEREST"—TAPE RECORDING OF INVOLUNTARY ADMISSION HEARING MAY BE DISCLOSED ONLY TO PATIENT OR AUTHORIZED REPRESENTATIVE.

May 12, 1986

Arthur Cohen, J.D., M.P.H.
Acting Chief Hearing Examiner
Office of Hearings
Department of Health and Mental Hygiene

You have requested our opinion concerning access to a tape recording of a hearing for the involuntary admission of a patient to a mental health facility. Specifically, you ask whether a hospital whose professional staff had participated at the hearing may be granted access to the taped record of that hearing.

For the reasons stated below, we conclude that the tape recording of an involuntary admission hearing may be disclosed only to the patient or his or her representative. It may not be disclosed to any other requester, including participants in the hearing, without the consent of the patient.¹

I

Involuntary Admission Hearings

A. *Purpose*

The Mental Hygiene Law affords to "any individual proposed for involuntary admission" to a public or private mental health facility a right to "a hearing to determine whether the individual is to be admitted to a facility as an involuntary patient or released without being admitted." §10-632(a) of the Health-General Article ("HG" Article).² The hearing, conducted by an impartial hearing officer, is intended to develop a record upon which the hearing officer may make the required determination:

¹A narrow exception to this general conclusion is discussed in note 9 below.

²"Except as otherwise provided in [the Mental Hygiene Law], 'facility' means any public or private clinic, hospital, or other institution that provides or purports to

"The hearing officer shall:

(1) Consider all the evidence and testimony of record;
and

(2) Order the release of the individual from the facility unless the record demonstrates by clear and convincing evidence that at the time of the hearing each of the following elements exist as to the individual whose involuntary admission is sought:

(i) The individual has a mental disorder;

(ii) The individual needs in-patient care or treatment;

(iii) The individual presents a danger to the life or safety of the individual or of others;

(iv) The individual is unable or unwilling to be voluntarily admitted to the facility;

(v) There is no available less restrictive form of intervention that is consistent with the welfare and safety of the individual; and

(vi) If the individual is 65 years old or older and is to be admitted to a State facility, the individual has been evaluated by a geriatric evaluation team and no less restrictive form of care or treatment was determined by the team to be appropriate." HG §10-632(e).

Thus, the focus of the hearing is on the mental condition of the patient whose involuntary admission is sought. Much of the testimony would normally be presented by psychiatrists or other mental health professionals. Any lay testimony about the patient can be viewed in this context as a report of the patient's behavioral symptoms. In short, the hearing consists largely of a presentation of medically relevant information about the mental condition of the patient.

B. Record of Hearing

Under the pertinent regulations of the Department of Health and Mental Hygiene, hearing testimony is taped:

provide treatment or other services for individuals who have mental disorders." HG §10-101(e)(1).

“The hearing officer shall maintain a record of the hearing which shall include all the physical evidence submitted by the parties and the mechanical recording of the oral proceedings before the hearing officer. The mechanical recording need not be transcribed unless an appropriate appeal is taken by the patient or upon payment of costs for the transcription by the involuntary patient or other person entitled to access to the transcript. The Department shall pay the costs of transcription if the patient is indigent. Upon request, a patient, his counsel, or other authorized representative of the patient shall be allowed to listen to any mechanical recording of the original proceeding in which the patient is a party.” COMAR 10.21.01.07E.

This regulation expressly grants access to the recording only to “a patient, his counsel, or other authorized representative of the patient.” This limited grant of access would be meaningless if it were not predicated upon the assumption that the taped record is otherwise confidential. Hence, if the regulation may be given effect, no participant in a hearing other than the patient or the patient’s representative would be able to gain access to the tape, unless the patient consented.³

However, the validity of the implied restriction in the regulation turns on the status of the record under the Maryland Public Information Act (“PIA”) and other statutes governing access to records. If the PIA or other law were to mandate disclosure to persons other than the patient, the tighter restriction in the regulation could not be given effect.

“Can a state agency regulation or county ordinance having the force and effect of law make a class of records confidential? The probable answer is no. Such an interpretation would allow state agencies and local entities at their election to totally undermine the overall purposes of the

³As we read it, the regulation applies the same restriction to transcripts of recordings. A hearing transcript is made only if an appeal “is taken by the patient or upon payment of costs for the transcript by the involuntary patient or other person entitled to access to the transcript.” COMAR 10.21.01.07E. In context, “other person entitled to access” means the patient’s “counsel or other authorized representative”—i.e., the same persons who are entitled to access to the tape recording. It would be anomalous if the regulation were read to grant broader access to sensitive medical information merely because the information is transcribed. In any event, as discussed in Part II C below, the Public Information Act restricts disclosure of medical information, whatever its format.

[PIA].” Attorney General’s Office, *Public Information Act Manual* 14 (4th ed. 1985).

Thus, we turn to the requirements of the PIA.

II

Statutory Restrictions on Access

A. *Nature of Record*

The tape recording of an involuntary admission hearing is unquestionably a “public record,” for purposes of the PIA. §10-611(f) of the State Government Article (“SG” Article). *See* 71 *Opinions of the Attorney General* 288, 290 (1986). Therefore, it would be subject to disclosure upon request unless the PIA requires or permits withholding. SG §10-613(a).⁴

B. *Effect of Other Law*

The PIA generally requires the denial of a request for access to a public record if that record, or any part of it, is “privileged or confidential” by law or if “inspection would be contrary to ... a State statute.” SG §10-615(1) and (2)(i).⁵ Hence, we must first look to provisions of law outside the PIA to determine if any of them directly precludes access to the hearing record. In our view, none does.

Under §9-109(b) of the Courts Article (“CJ” Article), “communications [to a psychiatrist or psychologist] relating to diagnosis or treatment of the patient’s mental or emotional disorder” are generally privileged. However, “[t]here is no privilege if ... [a] disclosure is necessary for the purposes of placing the patient in a facility for mental illness.” CJ §9-109(d)(1). Accordingly, the disclosures made by psychiatrists or psychologists at an involuntary admission hear-

⁴Ordinarily, the PIA “shall be construed in favor of permitting inspection of a public record.” SG §10-612(b). However, this general construction is inapplicable if, as here, “an unwarranted invasion of privacy of a person in interest would result” from disclosure. *Id.* *See* 71 *Opinions of the Attorney General* at 291.

⁵SG §10-615 also requires withholding if inspection would be contrary to “a federal statute or regulation ... [.] the rules adopted by the Court of Appeals ... [or] an order of a court of record.”

ing are not “privileged ... by law,” within the meaning of SG §10-615(1).

Moreover, although the Health-General Article is replete with provisions intended to assure the confidentiality of records containing medical information, none of these applies to the recording of an involuntary admission hearing. *See* HG §§4-301 (medical records in the custody of a provider of medical care);⁶ 4-302 (medical records of hospitals or related institutions); 7-612 (records kept by facilities for the treatment of mentally retarded individuals); 10-701(d) (records of individuals in a mental health facility); and 10-713(c) (records kept by a mental health facility on individuals admitted to the facility). Thus, any restriction on the disclosure of the recording is to be found only in the PIA.

C. *Required Denial Under the PIA*

The PIA generally requires the custodian of a record to “deny inspection of the part of a public record that contains medical or psychological information about an individual, other than an autopsy report of a medical examiner.” SG §10-617(b)(1).⁷ The tape recording of an involuntary admission hearing consists largely, if not exclusively, of such “medical or psychological information.” *See* Part I A above.⁸

The only exception to this requirement is that the custodian “shall permit the person in interest to inspect the public record to the extent permitted under §4-302(b) of the Health-General Arti-

⁶In 63 *Opinions of the Attorney General* 453 (1978), this office concluded that the Legislative Auditor was authorized to examine the medical records of the Department of Health and Mental Hygiene, so long as the Legislative Auditor maintained the confidentiality of the records. The opinion assumed, for purposes of the specific question addressed by it, that the term “providers of medical care” in the predecessor of HG §4-301 “includes the Department of Health and Mental Hygiene.” 63 *Opinions of the Attorney General* at 459. While we do not disagree with this assumption, nevertheless we think that HG §4-301 does not apply to medical records held by the Department in a capacity other than as a “provider of medical care”—here, in its capacity as adjudicator.

⁷The “custodian” of a record is the person who has “physical custody and control” of it. SG §10-611(c)(2).

⁸To the extent that a recording contains material other than “medical or psychological information,” those portions—if “reasonably severable”—must be made available upon request (unless exempt from disclosure for some other reason). SG §10-614(b)(3)(iii).

cle." SG §10-617(b)(2). The term "person in interest" is defined, for purposes of the PIA, as follows:

" 'Person in interest' means:

(1) A person or governmental unit that is the subject of a public record or a designee of the person or governmental unit; or

(2) If the person has a legal disability, the parent or legal representative of the person." SG §10-611(e).

In our view, only the patient is "the subject of" a hearing, the sole purpose of which is to determine whether that patient's condition requires involuntary admission to a mental health facility. Correspondingly, only the patient is "the subject of" the recording of that hearing. Although persons other than the patient certainly contribute to the record through their testimony, none of them can fairly be regarded as "the subject of" that record.

This construction is reinforced by the separate definition of "person in interest" for purposes of HG §4-302(b), which governs disclosure of hospital records to the patient and which SG §10-617(b)(2) expressly incorporates as the basis of disclosure to the "person in interest":

" 'Person in interest' means:

(i) As to a minor on whom a medical record is kept, a parent of the minor; and

(ii) As to an adult on whom a medical record is kept:

1. The adult;

2. A designee of the adult; or

3. If the adult has been adjudicated a disabled person, the spouse or a legal representative of the adult." HG §4-302(a)(4).

Thus, only the patient (or, as appropriate, the patient's representative), and no one else, is to be regarded as "the person in interest" of a public record that contains medical and psychological information about that patient.

Accordingly, we conclude that SG §10-617(b) prohibits the disclosure of the tape recording of an involuntary commitment hearing to anyone other than the patient, those authorized by law to represent the patient's interests, and those who seek access with the patient's or authorized representative's consent. The Department's

regulation, which permits only "a patient, his counsel, or other authorized representative of the patient" to listen to the recording, correctly implements the statutory requirement. Thus, a hospital whose staff members have testified at a hearing may generally not be permitted access to the recording of the hearing.⁹

III

Conclusion

In summary, it is our opinion that the tape recording of an involuntary admission hearing may be disclosed only to the patient or his or her representative, unless the patient consents to other disclosure. It may not be disclosed without consent to any other requester, including participants in the hearing.¹⁰ We recognize that this restriction might, for example, prevent the treating facility from gaining access to a record that would be useful in its treatment of the patient. However, such a basis for disclosure would require a statutory amendment, perhaps along the lines of HG §4-301(c)(8) (A provider of medical care who has custody of medical records may provide information "requested by another provider of medical care for the sole purpose of treating the individual on whom the record is kept").¹¹

STEPHEN H. SACHS
Attorney General

⁹An exception would potentially arise if an involuntarily admitted patient sought access to the record. Under SG §10-617(b)(2), that access is to be granted "to the extent permitted under [HG] §4-302(b)." Under HG §4-302(b)(2), disclosure in full of a medical record relating to a "psychiatric or psychological problem" may be denied if "the attending physician believes disclosure of the medical record to be medically contraindicated." In order to make that judgment in some cases, the attending physician would have to have access to the record—i.e., the tape recording. SG §10-617(b) necessarily permits disclosure in that situation.

¹⁰*But see* note 9 above.

¹¹*See also* COMAR 10.21.01.04B (records of persons in observation period status).

In a recent report to the Governor, we recommended an effort to reform the current welter of overlapping and confusing provisions concerning access to mental health records. Attorney General's Office, Report to the Governor on the Confidentiality of Mental Health Records 9-10 (Jan. 1986). The issues raised by your inquiry should be examined as part of this effort.

JACK SCHWARTZ
Chief Counsel
Opinions and Advice

PUBLIC INFORMATION ACT—DISCLOSURE PRINCIPLES—LICENSING
RECORDS—INVESTIGATORY RECORDS—COMPLAINTS ABOUT
MORTGAGE BANKERS AND MORTGAGE BROKERS ARE AVAIL-
ABLE TO THE PUBLIC.

September 9, 1986

Margie H. Muller
Bank Commissioner

You have requested advice concerning the status of complaints under the Maryland Public Information Act ("PIA" or "Act"), codified at §§10-611 through 10-628 of the State Government Article ("SG" Article). Specifically, you have asked if the number of complaints filed with your office against a company licensed as a mortgage banker and mortgage broker (under Title 12, Subtitle 5 of the Financial Institutions Article ("FI" Article)) may be disclosed under the PIA.

For the reasons stated below, we conclude that such information is available to the public under the Act. We have attached to our advice a sample format for releasing this information to insure that any disclosure is accomplished in a meaningful and fair manner.

I

Factual Background

On August 8, 1986, the Baltimore *Sun* published an article concerning the large number of complaints lodged against mortgage licensees for failing to meet the terms of lending commitments given to borrowers in purchase money and refinancing mortgage transactions.¹ This article prompted a real estate brokerage firm to file a written request for the following information:

"Therefore, we request that your office provide us, by name and number of complaints, those mortgage companies referenced in the enclosed article, plus any other banking consumer oriented information available to you

¹ The headline stated that "Md. bank regulator says lenders " 'drag their feet' " on mortgages."

related to these mortgage companies." Letter dated August 12, 1986, from Merrill Lynch Realty to Bank Commissioner.

The requester concluded by asserting that realtors "have an obligation to disclose to our consumers any mortgage banking information which might adversely affect them and our clients." *Id.*

A review of the procedures established by your office and the Department of Licensing and Regulation reveals two separate sources that contain the information requested.

Chapter 302 of the Acts of 1984 legislated a complaint procedure for the Mortgage Bankers and Mortgage Brokers Subtitle. Codified at FI §12-507.1, this enactment imposes the following duty on the Bank Commissioner:

"Any person aggrieved by the conduct of a licensee under [the Mortgage Bankers and Mortgage Brokers] Subtitle in connection with a consumer loan may file a written complaint with the Bank Commissioner who shall investigate the complaint." FI §12-507.1(a).

Under this section, the Bank Commissioner is given specific authority to investigate for violations of the Mortgage Bankers and Mortgage Brokers Subtitle and its Code of Conduct (COMAR 09.03.05). FI §12-507.1(b). Incidental powers of enforcement, including the authority to subpoena witnesses and compel the production of documents, are also provided. FI §12-507.1(e).

You have advised that upon receipt of a written complaint a file is opened and a copy of the complaint is forwarded to the licensee for a response. Complaints that cannot be resolved are placed under active investigation, a process that routinely results in obtaining a copy of the complainant's complete loan file from the licensee. The file may also contain the results of an independent investigation or analysis by examiners. If appropriate, this file becomes the basis for preparing a formal administrative proceeding against the licensee.

Departmental procedures could also provide another source of this information. Chapter 6 of the Acts of 1980 required all units of the Executive Branch to adopt procedures for handling complaints from members of the public.² The Department received ap-

²Units were required to file a Citizen Response Plan with the Administrative, Executive and Legislative Review Committee for approval. The General Revisor's Note

proval of its Citizen Response Plan as required by Chapter 6 on December 18, 1980. The portion of the Plan dealing with written complaints provides as follows:

“All written communications requiring a response should be recorded in a log or record indicating the date of receipt, the name of the correspondent, and the date of completion, unless, in the opinion of the unit head, the maintenance of such a log or record would impose an extraordinary burden.”

Past experience with these logs has demonstrated that the identity of the particular licensee subject to the complaint is routinely recorded because this licensee status often provides the basis for retrieving these complaints.

II

PIA—Right to Disclosure

A. *General Principles*

Our office has recently reiterated the philosophy embodied by the PIA. In addressing the disclosure of recorded calls to 911 Emergency Telephone System centers, we advised that in light of the Act’s “broad scope”, documents subject to the PIA “must be made available to anyone who requests them” unless the documents “are specifically exempted from the PIA’s disclosure requirements”. 71 *Opinions of the Attorney General* 288, 290 (1986) We further noted in this Opinion that “[t]hose exceptions should, as a general matter, be construed narrowly, to promote public access to information about governmental activities”. *Id.* Required disclosure is not, under the PIA, inhibited by the intended use of the information by the applicant. See 61 *Opinions of the Attorney General* 702, 705 (1976), concluding that a clerk of court may not deny access to marriage records, regardless of their intended use by the person seeking inspection.

These principles favoring public disclosure are mandated by the plain language of the statute. SG §10-612(a) specifies that the purpose of the Act is to afford the public a general right of “access

to Title 2 of the SG Article explains that this Act, formerly codified in Article 41, §14-1, was “deleted as obsolete since the units that were subject to the section have complied.”

to information about the affairs of government and the official acts of public officials and employees." To that end, the PIA requires that, "[e]xcept as otherwise provided by law, a custodian shall permit a person or governmental unit to inspect any public record at any reasonable time." SG §10-613(a).³

At the same time, the PIA recognizes that the public's right to information is counterbalanced by the right to privacy of a person who is the subject of governmental records. While SG §10-612(b) provides that the PIA "shall be construed in favor of permitting inspection of a public record, with the least cost and least delay to the person or governmental unit that requests the inspection," this rule of construction is qualified by a determination that the inspection would not result in "an unwarranted invasion of the privacy of a person in interest."⁴

B. *Unwarranted Invasion of Privacy*

We have concluded as a threshold inquiry that the disclosure sought in this request does not subject the licensee to the unwarranted invasion of privacy sought to be prevented by the PIA. Separate considerations—statutory and practical—support this conclusion.

In distinct instances, the General Assembly has made known its firm determination that agencies of State government respond to complaints from members of the public. Chapter 6, enacted in 1980 by overriding the Governor's 1979 veto, required all executive units to formulate and submit for approval by a joint legislative committee a Citizen Response Plan. In 1984, the General Assembly specifically directed the Bank Commissioner to investigate all written complaints concerning Mortgage Bankers and Mortgage Brokers by enacting Chapter 302. These requirements for the creation and maintenance of public records were imposed by the General Assembly within an existing, well-established legal framework that favored public disclosure.

³There can be little debate that the sources of information used in responding to this request constitute "public records." SG §10-611(f)(1)(i) defines "public record" as any documentary material that "is made by a unit or instrumentality of the State government or of a political subdivision or received by the unit or instrumentality in connection with the transaction of public business."

⁴"Person in interest" is defined as "a person or governmental unit that is the subject of a public record" SG §10-611(e)(1). "'Person' means an individual ... and any partnership, firm, association, corporation, or other entity." SG §1-101(d).

The philosophical underpinnings for public access to information on an agency's response to consumer complaints were recently stated in the context of public disclosure of governmental response in a case of alleged child abuse:

"Thus, we believe that the pertinent statutes and regulations can and should be construed to permit the fullest possible disclosure regarding agency performance, consistent with the legally mandated preservation of personal privacy. 71 *Opinions of the Attorney General* 368 (1986)

The alternative to this approach "would accomplish nothing more than to deny public access to information concerning the quality of agency performance". *Id.*, p.375.

We find these considerations equally applicable to your inquiry. The public has a right to evaluate the performance of the Bank Commissioner in responding to systemic problems within the mortgage lending industry. Overall statistics do not provide sufficient information to make an informed evaluation. By disclosing the identity of the licensee and the complaint history of that licensee, the public is able to assess the effectiveness of your office within a specific context. If this assessment demonstrates a failure in a specific instance or an uneven treatment among licensees, such a result provides the legitimate basis for further public inquiry into the performance of its government. This type of inquiry can be easily thwarted by simply releasing cumulative numbers.

Our conclusion on the invasion-of-privacy issue is equally compelled by the current Departmental practice of disclosing pending complaints against licensees holding individual license from boards and commissions within Licensing and Regulation.⁵ Under COMAR 09.01.04.13, a person who has entered or contemplates entering a contract with an individual licensee may contact the licensing agency and discover the total number of complaints filed against the licensee, the number of complaints (closed as well as pending), and the nature of any formal disciplinary action taken against the licensee. When proposing this regulation, the Department explained the balancing process between the right to access

⁵The current practice of licensure under the Mortgage Bankers and Mortgage Brokers Subtitle permits the issuance of a license to a corporation or other business entity. We understand that all pending complaints are against such license holders. The legal effect under the PIA of this kind of licensure—as opposed to the licensing of individuals—is discussed in Part II D of this opinion.

of information by the public and the privacy rights of individual licensees as follows:

"These proposed amendments grow out of extenuating circumstances identified by the Department after nearly 2 years of administering requests under [the PIA]. In each instance, the proposed change allows disclosure of information concerning one of the basic responsibilities of the Department to the public. As amended, Regulation .13 insures that the public will be better informed in selecting the services of a licensee" 11 *Md.R.* 1748 (September 28, 1984).

In our view, there is no principle—either within the PIA or the realm of common sense—that would provide a corporate or company licensee with greater privacy rights than the rights afforded an individual licensee.⁶

C. Privileged or Confidential Records

Public records must be withheld from disclosure to the extent that (i) the information they contain is made "privileged or confidential" by law, or (ii) inspection of a particular record would be contrary to State or federal law. SG §10-615. Information concerning "banking institutions" obtained by the Bank Commissioner is generally deemed to be confidential under FI §5-209. "Banking institution" is defined, however, as "an institution that is incorporated under the laws of this State as a State bank, trust company, or savings bank." Accordingly, this section imposes no privilege or confidentiality on the records of mortgage licensees sought to be disclosed.

D. Licensing Records—SG §10-617(h)

Licensing records constitute the great majority of records maintained by the Department, and disclosure of information contained in these records is generally governed under SG §10-617(h). Stated

⁶We caution, however, that our resolution of this issue should not be expanded beyond the context of the relatively narrow pending request. Complete disclosure of all documents generated by the complaint process would be governed by other considerations. For example, complaints may contain personal financial information that would be protected from disclosure under SG §10-617(f). Responses from licensees could likewise contain confidential commercial or financial information under SG §10-617(d)(2) and (3).

in terms of a general prohibition against public inspection, SG §10-617(h)(2) contains a laundry list of exceptions to the otherwise mandatory duty not to disclose. Pertinent to this inquiry is the permitted disclosure in SG §10-617(h)(2)(vi) of “any orders and findings that result from formal disciplinary actions.” By implication, any form of disciplinary action that has not culminated in a formal order or finding by the agency cannot be disclosed unless authorized by regulation after the custodian has found a compelling public purpose. SG §10-617(h)(3). As we have previously discussed, COMAR 09.01.04.13 permits expanded discovery under SG §10-617(h) if the requester has entered or contemplates entering into a contract with a licensee.

The request considered in this advice does not on its face meet the standards set forth in Regulation .13. Accordingly, if SG §10-617(h) and its implementing regulations control the resolution of your request, the applicant must further allege a present or future contractual relationship. For the reasons stated below, we conclude that this section does not apply to requests for information from Departmental records unless the records are for individual licensees. The applicant need not, therefore, proffer any existing or contemplated contractual relationship to receive complaint information on licensed mortgage companies.

The predecessor section to SG §10-617(h) was enacted by Chapter 431 of the Acts of 1982. It governed the disclosure of “occupational and professional licensing records on *individual persons*” (emphasis added) Former Article 76A, §3(c)(xii). This section was revised in 1984 to its present formulation in SG §10-617(h)(1) as follows: “A custodian shall deny inspection of the part of a public record that contains information about the *licensing of an individual* in an occupation or profession.” (Emphasis added.) In either format, we consider the inclusion of the term “individual” to express a deliberate legislative determination that the privacy rights granted to licensees under this section were only intended to be enjoyed by individuals—not business entities.

The enumerated exceptions to the general prohibition stated in SG §10-617(h)(1) support this reading of legislative intent. Almost all the categories listed in SG §10-617(h)(2) describe circumstances that are peculiar to individual licensees. Some examples are as follows: the permitted disclosure of a home address if the business address is not available (SG §10-617(h)(2)(ii)); the educational and occupational background of the licensee (SG §10-617(h)(2)(iv)); and the professional qualifications of the licensee (SG §10-617(h)(2)(v)).

Further support for limiting the purview of SG §10-617(h) to individual licensees is contained in its legislative history. This section was proposed as part of an overall legislative reform of the PIA by the Governor's Information Practices Commission. Appointed in 1980 by Executive Order 01.01.1980.11, this Commission surveyed the record-keeping functions and procedures of the major units of State government, specifically including the divisions within the Department of Licensing and Regulation. *See* Final Report of the Commission 201—46 (1982). Although the Commission was well aware that different entities were subject to licensing by agencies within the Department, it nevertheless chose to propose legislation—enacted by Chapter 431 with some amendment—that limited the scope of former Article 76A, §3(c)(xii) (presently codified at SG §10-617(h)) to an individual licensee.⁷ The nature of this limitation as a deliberate policy consideration is reflected in the Commission's explanation of the privacy interest to be protected by its proposal:

"The Commission does not believe that the release of other personally identifiable information pertinent to licensees would serve the public interest. Instead, disclosure of other information would constitute an unreasonable invasion of the privacy rights of licensees. In order to assess the competency of licensees, the public does not need to know licensee's race, social security number, place of birth, and so forth." Final Report of the Commission, p. 537.

We recognize as a conceptual matter that, in the area of disciplinary action, the policy considerations for complementary treatment of individual licensees and licensed business entities may be equally applicable.⁸ The present structure of the PIA—and particularly SG §10-617(h)—does not permit this result through the office of statutory interpretation. Legislative amendment would, therefore, be appropriate and necessary to accomplish this goal.

⁷Amendments to this section evidenced an intent to provide greater protections for subject licenses against disclosure. As originally proposed, "nonpending complaints" constituted a category of exceptions to the general prohibition against disclosure. This category was stricken by amendment, and the current "orders and findings that result from formal disciplinary actions" was substituted. *See* Chapter 431 of the Laws of Maryland 1982.

⁸As we have previously discussed in this opinion the only inequity presented by our advice is the release of the requested information without the necessity of alleging an existing or contemplated contractual relationship.

E. *Records of Investigation—SG §10-618*1. *Introduction*

In addition to the provisions of SG §10-617(h) that prevent disclosure of individual licensing records except under specified circumstances, the PIA also permits a custodian discretion in denying inspection of particular parts of certain designated records if inspection by the applicant “would be contrary to the public interest.” SG §10-618(a). Included within the records specified in the discretionary provisions of SG §10-618(a) is “an investigatory file compiled for any other law enforcement ... purpose.” SG §10-618(f)(1)(ii). Where files are prepared in connection with government litigation and adjudicative proceedings are currently underway or contemplated, they are compiled for a “law enforcement purpose.” *Equitable Trust Co. v. State Human Relations Comm’n*, 42 Md. App. 53, *rev’d on other grounds* 287 Md. 80 (1980); Attorney General’s Office, *Public Information Act Manual* 27 (4th ed. 1985).

As detailed below, we conclude that a log maintained in compliance with the Citizen Response Plan is not an “investigatory file” under the provisions of SG §10-618(f)(1)(ii). Files containing the details of an investigation into a complaint would, of course, fall squarely within this provision.

2. *Citizen Response Plan Log*

Ideally, a log maintained under the Citizen Response Plan for written complaints would contain the following information: the date the complaint was received, the name of the complainant, the licensee subject to the complaint, the date of the agency response, and the status of the complaint (under consideration or closed). Such a log would not, in our view, constitute an investigatory file under SG §10-618(f)(1)(ii).

In 63 *Opinions of the Attorney General* 543 (1978), this office concluded that “arrest logs” (containing the date, suspect’s name, address, age, race, arresting officer, desk officer, charge and case number) were not “investigatory files” within the meaning of the PIA. The opinion noted at 547:

“These ‘arrest logs’ merely reflect the end result of a po-

lice investigation. They contain no information whatever concerning the actual investigation.”⁹

In addition to lacking fruits of an investigation, a response log is not prepared for a “law enforcement purpose”. Indeed, its entire function is to comply with a departmentally-imposed plan of tracking agency responses to citizen complaints.

3. *Investigatory Files*

The files that contain the details of an investigated complaint for the purpose of determining the appropriateness of administrative charges are clearly governed by SG §10-618(f)(1)(ii). The rules for applying these provisions to “investigatory files” were recently stated in the opinion on the 911 Emergency Telephone System as follows:

“However, the conclusion that 911 calls for police assistance are an ‘investigatory file compiled for [a] law enforcement purpose’ does not by itself mean that the recordings may be withheld ... Moreover, any other person is entitled to access unless the custodian has reason to conclude that inspection of the record ‘would be contrary to the public interest.’ SG §10-618(a). In considering ‘the public interest,’ the custodian should also take account of the harms specified in SG §10-618(f)(2). [citation omitted]. In particular, the custodian should consider whether the information on the recording is such that disclosure would ‘constitute an unwarranted invasion of personal privacy.’” 71 *Opinions of the Attorney General* at 295 (1986).

We have previously analyzed the issue of an unwarranted invasion of privacy raised by this PIA request in Part II B. Furthermore, a consideration of the factors enumerated in SG §10-618(f)(2), as suggested in our opinion and the *Public Information Act Manual*, does not produce a conflict with the principles of the PIA favoring public disclosure.¹⁰ Accordingly, we cannot identify

⁹The conclusion was not, however, categorical. The opinion further stated: “[w]e caution, however, that should such records contain such investigatory material, they may very well be subject to” the PIA. *Id.* We likewise add the same qualifier concerning the response log.

¹⁰Under SG §10-618(a), a custodian may conclude that disclosure was contrary to the “public interest” if it produced one of the enumerated harms in SG §10-618(f)(2). These harms include: interference with a law enforcement proceeding; deprivation

a governing principle under the PIA that would preclude disclosure of the information sought in this request.¹¹

III

Conclusion

In summary, we conclude that the PIA authorizes the disclosure of the number of complaints against specific companies licensed as Mortgage Bankers and Mortgage Brokers, the number of complaints that are still open, the number of complaints that have been closed, and the nature of any formal administrative action. We have included a proposed format to convey this information in a balanced manner.

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Opinions and Advice

Editor's Note: The preceding opinion was originally issued as a letter of advice. The *Public Information Act Manual* referred to in the opinion was reissued in 1987 in a revised edition.

of an impractical adjudication; disclosure of a confidential source or investigative technique; prejudice to an investigation; and endangering the life or physical safety of an individual. We find none of these results would inure if the proposed disclosure were made.

¹¹A custodian is not *required* to find one of the harms specified in SG §10-618(f)(2) before the custodian can conclude that disclosure is contrary to the "public interest". 64 *Opinions of the Attorney General* 236 (1979). However, having concluded that disclosure would not constitute an unwarranted invasion of privacy, we are unable to identify any additional "public interest" considerations in the mortgage lending field that would result in a denial of this request.

COMPLAINT INFORMATION FOR CALENDAR YEAR 1988

TO: [name of requester]
RE: [name of licensee]
DATE: [date of response]

You have requested complaint information on the above-referenced company currently licensed as a [type of license] by this office. Under the Maryland Public Information Act, you are entitled to receive the information contained in this response.

When considering this information, you should recognize that raw statistics may not provide definitive information and, at times, may distort the public's experience with a particular licensee. For example, licensees engaging in extensive business activities run a higher risk of accumulating a greater number of complaints than a licensee with modest business activities. As with any business decision, you should thoroughly consider all aspects of a transaction before engaging the services of a licensee.

To assist you in evaluating the numbers below, the following is an explanation of the various categories:

(1) "Total complaints" include the total number of written complaints received that comment adversely on the performance of the licensee. This category does not mean the number of complaints where it has been determined that the licensee has violated the law.

(2) "Open complaints" include complaints that have not been resolved by the licensee or dismissed by this agency as failing to allege a violation of the law. Complaints in this category are under investigation by this agency.

(3) "Closed complaints" include complaints that have been resolved by the licensee or complaints that this agency has determined do not constitute a violation of the law.

(4) "Pending charges" include formal administrative charges that have been instituted by this agency for *alleged* violations of the law. Any licensee so charged has the right to a hearing before an impartial decision-maker with the State having the burden of proving its charges.

(5) "Disciplinary action" includes the result of any order or findings that result from formal disciplinary action.

Total complaints.....[number]

Open complaints.....[number]
Closed complaints.....[number]
Pending charges.....[charges filed and brief de-
scription]
Disciplinary action....[whether licensee has been subject
to a reprimand, suspension, revocation, or fine]

PREPARER

PUBLIC INFORMATION ACT—TAXATION—TAX-RELATED INFORMATION—RESTRICTIONS ON DISCLOSURE OF INFORMATION IN CENTRAL REGISTRATION SYSTEM—RECOVERY OF COSTS—TAXPAYER'S RIGHT TO CHALLENGE DISCLOSURE.

October 15, 1986

*Stephen M. Cordi, Director
Retail Sales Tax Division
Comptroller of the Treasury*

You have requested our opinion concerning public disclosure of information contained in the automated Central Registration System maintained by the Retail Sales Tax Division ("Division") of the Office of the Comptroller. Specifically, you ask:

- (1) What, if any, information contained in the system must be disclosed to the general public upon request?
- (2) How may the State recover costs incurred in complying with a request for information that must be disclosed?
- (3) Do taxpayers have a right to restrict dissemination of any information in the system?

As more fully explained below, we conclude as follows:

- (1) With the exception of the particular kinds of information described in Part V below, which is not confidential, the information in the system may not be disclosed to the public in a form that will identify particular taxpayers.
- (2) Current State law and regulations authorize the Division to charge requesters the actual cost incurred in providing requested information.
- (3) Although taxpayers may seek judicial relief to prevent disclosure, in the absence of a court order all information in the system that is subject to mandatory disclosure under the Maryland Public Information Act ("PIA") must be made available to the public upon request.

I

Central Registration System

Persons who wish to do business in Maryland must first register with the State for various tax and related purposes. Such persons may be obligated to pay one or more of a number of taxes in addition to income taxes—admissions, retail sales, alcohol, tobacco, or motor vehicle fuel taxes. A business operator may also be obligated to pay unemployment insurance or to make income tax withholding reports. The Division has developed a Central Registration System for new businesses that allows the operator to submit a “Combined Registration Application” containing the information required by each of the State agencies concerned, thereby greatly simplifying the process of starting a business in Maryland.

The Application contains the full identity of the taxpayer, including the taxpayer’s federal identification number or social security number and the name, address, and telephone number of the business entity and of each individual who controls it. Additionally, the Application contains detailed information on the nature and scope of the business, including the form of its ownership, the size of its payroll, the number of its employees, the name and location of all of its places of business, and the specific business activities in which it engages.

The original of the Application is kept on file with the Division’s Central Registration Unit, and copies are sent to the various State tax agencies as appropriate. Ultimately, pertinent parts of the information on the Application are entered into an automated data processing network. The information is thus readily available for use by the different agencies “to determine if the Applicant is liable for certain taxes, to register the applicant and, where appropriate, to issue a required license.” Form No. CRU-1 at 2 (rev. June, 1984).

The information in these automated files may also be useful to entities other than State tax agencies for a variety of purposes. Governmental entities, for example, might seek information concerning particular taxpayers for tax administration or related official purposes.¹ Government or private entities might wish to obtain categorized information for research. And, commercial enterprises

¹As noted in Part III below, both State and federal laws expressly authorize disclosure to governmental entities for these purposes. Therefore, this opinion addresses only disclosure to members of the public.

might seek the names and addresses of particular groups of taxpayers in order to target sales activities to those taxpayers.

II

The Maryland Public Information Act

"The Maryland Public Information Act ... was broadly conceived. Its purpose was to provide the public the right to inspect the records of the State government or of a political subdivision.... Its basic policy was in favor of disclosure." *Faulk v. State's Attorney for Harford County*, 299 Md. 493, 506 (1984). *See also Cranford v. Montgomery County*, 300 Md. 759, 771 (1984).

The PIA's basic rule of disclosure is contained in §10-613(a) of the State Government Article ("SG" Article): "Except as otherwise provided by law, a custodian shall permit a person or governmental unit to inspect any public record at any reasonable time." Moreover, the General Assembly has specifically provided that the PIA ordinarily "shall be construed in favor of permitting inspection of a public record, with the least cost and least delay to the person or governmental unit that requests the inspection." SG §10-612(b). Thus, the PIA "reflect[s] the legislative intent that citizens of the State of Maryland be accorded wide-ranging access to public information concerning the operation of their government." *A.S. Abell Publishing Co. v. Mezzanote*, 297 Md. 26, 32 (1983).

The PIA defines "public record" as documentary material in any form that "is made by a unit or instrumentality of the State government or of a political subdivision or received by the unit or instrumentality in connection with the transaction of public business." SG §10-611(f)(1). Since all of the information about which you have inquired certainly is documentary material that either was made or—more accurately—was received by a unit of State government in connection with public business, the records of that information are clearly "public records." *See 65 Opinions of the Attorney General* 365, 366 (1980) (personnel file of public employee is "public record" within meaning of PIA).

The determination that a record is a "public record" does not end the inquiry, however. The PIA itself requires a custodian of records to deny inspection of all or part of certain public records. *See* SG §§10-615 through 10-617. SG §10-615 provides:

“A custodian shall deny inspection of a public record or any part of a public record if:

(1) by law, the public record is privileged or confidential;
or

(2) the inspection would be contrary to:

(i) a State statute; [or]

(ii) a federal statute or a regulation that is issued under the statute and has the force of law.”

Additionally, SG §10-617(f)(2) requires a custodian to deny inspection of any part of a public record “that contains information about the finances of an individual, including assets, income, liabilities, net worth, bank balances, financial history or activities, or credit worthiness.”²

Some of the information on any particular Application clearly is information about the finances of the individual filing the Application. In addition, both State and federal tax laws contain confidentiality provisions that may apply to some of the information on the Application.

III

Confidentiality Statutes

A. State Statutes

The Maryland statutes pertaining to income taxes, retail sales taxes, admissions and amusement taxes, and unemployment insur-

²SG §10-617(d) requires a custodian to deny inspection of any part of a public record that contains confidential commercial or financial information. However, information is “confidential” for purposes of that exemption only if its disclosure would impair the government’s ability to obtain needed information in the future or would cause substantial harm to the competitive position of the person from whom the information is obtained. 69 *Opinions of the Attorney General* 231, 234 (1984). Because the information on the Central Registration Application must be submitted as a prerequisite to doing business in Maryland, its disclosure would not harm the State’s ability to obtain needed information. *Id.* Nor would the information on the Application reveal details of innovative business techniques that would give competitors an advantage over the taxpayer who submitted the application. *Cf.* 69 *Opinions of the Attorney General* at 235-36 (architects’ construction drawings may reveal innovative design details). Therefore, in our view, SG §10-617(d) does not apply to the information on the combined registration application.

ance all include provisions that make the information on required reports or returns confidential. Thus, Article 81, §300(a) provides:

“Except in accordance with proper judicial or legislative order and except to an officer of the State having a right thereto in his official capacity, it shall be unlawful for any officer or employee or former officer or employee of the State or any political subdivision to divulge or make known in any manner:

(1) The amount of income or any particulars set forth or disclosed in any return under this [income tax] subtitle; or

(2) Any federal return, federal return information, or copies of a federal return or return information required by State law to be attached to or included in the State return.”

It is also unlawful, “[e]xcept in accordance with proper judicial order, or as otherwise provided by law,” for public employees “to divulge or make known in any manner the amount of sales, the amount of tax paid or any other particulars set forth or disclosed in any return required by [the Retail Sales Tax] subtitle.” Article 81, §366. Similarly, “[e]xcept in accordance with a proper judicial order and except by request of an officer of [a] county or municipality having a right to make the request in an official capacity, an official or employee of the State or any of its subdivisions may not make known in any manner any information contained in any [admissions and amusement tax] report.” Article 81, §404(f)(1).

The unemployment insurance law also provides for the confidentiality of information collected pursuant to the authority of the Department of Employment and Training (“DET”) to require employers to make records and reports concerning employment. Article 95A, §12(g)(1). “Information thus obtained shall not be published or open to public inspection (other than to public employees in the performance of their public duties) in any manner revealing the employing unit’s identity.” Article 95A, §12(g)(1).³

³“Employing unit” is defined by Article 95A, §20(e) as any individual or any type of organization that has one or more individuals in its employ performing services for it in Maryland.

B. *Federal Tax Law*

The Internal Revenue Code also provides that “[r]eturns and return information shall be confidential.” 26 U.S.C. §6103. More particularly, that section provides that, except as specifically authorized:

“[N]o officer or employee of any State ... who has or had access to returns or return information under this section ... shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section.” 26 U.S.C. §6103(a).

“Return information” means all information concerning a taxpayer’s finances or taxes, official actions taken or contemplated regarding the taxpayer’s return, “or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Treasury] with respect to a return or with respect to the determination of the existence, or possible existence, of liability” for taxes. 26 U.S.C. §6103(b)(2). Return information includes the taxpayer’s name, address, and identifying number. 26 U.S.C. §6103(b)(2) and (6). However, return information “does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.” 26 U.S.C. §6103(b)(2).

Under 26 U.S.C. §6103(d)(1), returns and return information “shall be open to inspection by, or disclosure to, any State agency, body, or commission, or its legal representative, which is charged under the laws of such State with responsibility for the administration of State tax laws.” The information thus obtained is further open to disclosure to a State agency charged with auditing State revenues and programs, for the purpose of auditing the State tax agency. 26 U.S.C. §6103(d)(2).

IV

Non-Disclosable Information

Clearly, the various tax confidentiality provisions are designed to protect from public exposure information concerning the personal and business affairs of individuals that the State requires those individuals to reveal to it in the exercise of its taxing authority. Confidentiality provisions thereby protect “the right of an individ-

ual not to have his private affairs made public by the government.' " *Whalen v. Roe*, 429 U.S. 589, 599 n. 24 (1977) (quoting Kurland, *The Private I*, *University of Chicago Magazine* 7, 8 (Autumn 1976)). Such protection of the individual's interests in privacy has been identified as critical to any tax collection system based on voluntary compliance because it encourages voluntary reporting of complete and accurate information to the tax authorities. Tully, *State Tax Secrecy Laws and Federal Grand Jury Subpoenas in Non-Tax Investigations*, 46 Alb. L. Rev. 78, 80-81 (1981).

It has also been recognized that protection of such privacy interests requires that personal tax-related information be kept confidential even if it is collected by the government in a form other than the actual tax returns to which the confidentiality statutes refer. Thus, in *In re Hampers*, 651 F.2d 19, 21 (1st Cir. 1981), the First Circuit held that State tax returns are not automatically obtainable by a federal grand jury because their disclosure would circumvent the safeguards of the federal tax confidentiality statute.⁴

Likewise, in 44 *Opinions of the Attorney General* 350, 352 (1959), this office concluded that particulars of admissions and amusement tax returns were not subject to public disclosure, notwithstanding the lack of any express statutory provision for their confidentiality. The Attorney General reasoned that protection of those returns was necessary to effectuate the legislative intent to safeguard personal information on income and sales tax returns:

"The Legislature has evidenced a general intention to make the statement of gross income and other particulars of tax returns confidential. It has expressly so stated with respect to income tax and sales and use tax returns. We cannot ascribe to the Legislature an intention to render these provisions futile insofar as amusement operators are concerned. Yet if amusement tax returns are not kept confidential any curious member of the public or interest-

⁴In *Hampers*, a federal grand jury investigating a non-tax matter subpoenaed state tax documents that were confidential under state law. The First Circuit, balancing the state's interest in preserving the documents' confidentiality against the weaker federal interest in obtaining the documents for a non-tax investigation, concluded that the documents were covered by a qualified privilege. 651 F.2d at 22-23. Therefore, the court held that "to enforce a subpoena in [a] federal criminal investigation, a federal grand jury must proffer reasonable cause to believe that a federal crime has been committed, that the information sought will be probative of a matter at issue in the prosecution of the crime, and that the same information or equally probative information can not be obtained elsewhere through reasonable efforts." 651 F.2d at 23.

ed competitor of any person engaged in the amusement business could obtain the very information as to gross income that the Legislature has painstakingly made confidential under the income and sales tax sections of the Code.” *Id.*⁵

By the same token, information contained on the Combined Registration Application must be kept confidential to the extent that its disclosure would reveal confidential tax return information.

Section D of the Application contains significant information concerning the size of a business’s payroll and the number of its employees. That information is contained in such items as: the business’s estimated gross payroll, its taxable payroll, whether its income tax withholding will exceed \$300 per quarter, and the number of its employees in Maryland. For particular kinds of businesses, that section of the Application also discloses the size of the business’s operations in the past, as reflected in such items as whether the business had a total payroll of \$1,000 or more during any calendar year, whether an agricultural business had a total payroll of \$20,000 or more during any calendar quarter, and the number of weeks during any calendar year in which ten or more workers performed agricultural services. All of these items contain information that both the income tax and unemployment compensation laws require be maintained and reported to the tax authorities. That is, they reflect the “particulars” of those reports. Accordingly, the information contained in these items is confidential and must not be disclosed in a form that would identify it with any particular taxpayer or employer.

Indeed, the very identity of a taxpayer as such must be kept confidential. The taxpayer’s federal identification number, social security number, and name and address are federal return information as defined in 26 U.S.C. §6103(b)(2)(A). Such information is confidential in the hands of an officer or employee of a state who obtained it “in *any* manner in connection with his service as such an officer or an employee *or otherwise*.” 26 U.S.C. §6103(a). It is also “federal return information ... required by State law to be ... included in the state [income tax] return,” and it is therefore confidential by State law. Article 81, §300(a)(2).⁶

⁵The information on admission and amusement tax reports is now covered by an express confidentiality provision, Article 81, §405(f).

⁶We point out however, that it is the name and address “of a person with respect to whom a [federal] return is filed” that may not be disclosed. That is, it is the fact

V

Disclosure of Information

Notwithstanding the various confidentiality provisions, much information derived from the Combined Registration Application is subject to public disclosure. Information regarding alcoholic beverages licensing is expressly made disclosable by other law. In addition, certain other items of information are outside the ambit of any confidentiality provision.

A. Alcoholic Beverages Licensure

Article 2B, §147(a) requires the Comptroller and other officials to keep records of all alcoholic beverages licenses that they issue or approve and of every license revocation, suspension, cancellation, or restriction imposed, together with a note of the cause for each such action. Those records “shall be open to inspection ... during regular business hours, by any person.” *Id.*⁷ Thus, the legislative intent to make public all official actions regarding the licensing of alcoholic beverages businesses is especially clear. In line with that intent and the general disclosure requirements of the PIA, we believe that the names and addresses of license applicants and the additional information shown in Section E of the Application must be disclosed to anyone on request.⁸

Such information is not, in our view, “return information” within the meaning of 26 U.S.C. §6103(b)(2). The State’s licensure of alcoholic beverages businesses is independent of, and thus irrelevant to, federal excise taxation of the same businesses. 26 U.S.C. §5145. Likewise, the fact that a taxpayer has applied for a Maryland alcoholic beverages license is irrelevant to the taxpayer’s liability for federal income tax. Accordingly, that fact is not information received, collected, or prepared by the Secretary of the Treasury with

of a person’s taxpayer status that is confidential. The name and address of a business or an individual clearly is disclosable in contexts that do not reveal taxpayer status, notwithstanding that the business or individual may also be a taxpayer. *See e.g.*, SG §10-617(h)(2) (names, business addresses, and business telephone numbers of licensees must be disclosed upon request).

⁷Under SG §10-617(a), that express statutory requirement of disclosure overrides the PIA’s usual exemption of personal financial information from disclosure.

⁸Section E asks seven questions directly related to the “manufacture, sale, distribution or storage of alcoholic beverages.”

respect to any federal tax or tax return, but solely concerns State licensing matters.

Neither is the mere fact that one has applied for a license to operate an alcoholic beverages business the equivalent of confidential information—such as the amount of a taxpayer's income or sales—that must be set forth on any State tax return. Because disclosure of the fact of the application would not disclose tax return “particulars,” the fact is not protected by Article 81, §§300(a) or 366.

B. *Cigarette Sales*

Section F of the Application asks whether the applicant “desire[s] to sell cigarettes at the wholesale level in the State of Maryland.” In our view, this information is not covered by any confidentiality provision.

The only federal tax imposed with specific regard to cigarettes is the federal excise tax on the manufacture or importation of cigarettes and related products imposed by 26 U.S.C. §5701. As with State alcoholic beverages licensing, the State requirement that wholesalers of cigarettes register and purchase tax stamps is irrelevant to any aspect of federal taxation or tax returns. Hence, disclosure of the fact that a particular applicant does, or does not, desire to sell cigarettes at wholesale would not disclose any information concerning that person's taxes or tax returns under the federal system.

Nor would disclosure of that information disclose any particulars of any State tax return that State law requires to be kept confidential. The Maryland tax on cigarettes is paid by purchasing from the Comptroller stamps to be affixed to the containers of the cigarettes. Article 81, §434. Thus, the fact that a particular business is required to purchase the stamps in no way reflects the business's taxpayer status, income, sales, or other confidential affairs.

Finally, the information in Section F reveals nothing about the applicant's “assets, income, liabilities, net worth, bank balances, financial history or activities, or credit worthiness.” Hence, it is not protected from disclosure by SG §10-617(f)(2). Accordingly, this information must be disclosed to the public.

C. *Other Specific Information*

Other items of information contained on the combined registration application, while they are related to the determination of

the applicant's liability for certain taxes, nonetheless may be disclosed without breaching confidentiality requirements. For example, the questions in Section G of the application pertain exclusively to the applicant's potential liability for the Motor Vehicle Fuel Tax imposed by Article 56, §§135 through 157. One's status as a taxpayer under those provisions is not confidential, however. To the contrary, Article 56, §140(k) requires every dealer in motor vehicle fuels, special fuel user, and special fuel seller to display "conspicuously in each place of business" a license to engage in the business or a certificate of exemption from licensing. That information must, therefore, be disclosed to the public.

For much the same reason, we believe that the names and addresses of persons licensed to collect retail sales tax must also be disclosed. Article 81, §362 provides that the license "shall be displayed in the applicant's place of business." This requirement is an aspect of the uniquely public nature of sales tax collection. The licensee patently does not have the sort of privacy interest regarding sales tax liability that confidentiality statutes are designed to protect. Hence, we think that the General Assembly did not intend to include the bare fact of licensure among the "particulars set forth or disclosed in the [retail sales tax] return" that must be kept confidential under Article 81, §366. Opinion No. 79-032 at 2-3 (April 26, 1979) (unpublished).

In sum, it is our view that information pertaining to particular businesses must be disclosed when its disclosure will not reveal either (i) confidential information concerning the affairs of the business or any individual or (ii) the identity of the person or entity liable for those taxes as to which the taxpayer's identity is itself confidential.⁹ While it is not practicable to formulate an all-

⁹We point out, in addition, that each of the tax confidentiality statutes at issue here expressly permits disclosure of statistical information. 26 U.S.C. §6103(b)(2) (return information "does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer"); Article 81, §300(e) ("Nothing herein shall be construed to prohibit the publication of statistics so classified as to prevent the identification of particular [income tax] reports and the items thereof."), §366 ("publication of [retail sales tax] statistics so classified as to prevent the identity of particular reports or returns and the items thereof" not prohibited), and §404(f)(2) "publication of [admissions and amusement tax] statistics so classified as to prevent identification of individual accounts" not prohibited); Article 95A, §12(g)(1) (employment information not to be disclosed "in any manner revealing the employing unit's identity"). Hence, the disclosure of such generalized information is governed by the basic requirement of the PIA that it be made available to anyone upon request. SG §10-613(a).

inclusive listing of the particular items of information that must be disclosed, we will be happy to review specific requests for disclosure and advise you regarding the appropriate response.

VI

Recovery of Costs

Your second question concerns the mechanism by which you may recover the expenses incurred in providing information from the Central Registration System to a requester. In our view, that mechanism already exists in regulations adopted under SG §10-621(a), which authorizes the custodian of a public record to “charge an applicant a reasonable fee for the search for, preparation of, and reproduction of a public record.” *See* COMAR 03.07.01.01G (establishing charges for preparing and copying public records for inspection).

In particular, COMAR 03.07.01.01G(3) provides that when information must be retrieved from a data processing system in the form of a computer print-out, the Comptroller “shall determine a reasonable charge for the print-out on a case-by-case basis, taking into account computer time, programming, and material costs.” We think that the most appropriate method for arriving at the “reasonable charge” is to charge the actual costs incurred by the Division. The goal in this regard should be for the State neither to make a profit nor to bear a loss on the cost of providing information to the public.

SG §10-621(b) provides that a custodian of records “may not charge a fee for the first 2 hours that are needed to search for a public record and prepare it for inspection.” In providing information that must be retrieved from the data processing system, one of the costs the Division incurs is a charge for the computer time used. That charge is high—approximately \$1,400 per hour—although the amount of computer time used in complying with any particular request may be rather small, depending upon the nature of the request. Therefore, you have specifically asked whether SG §10-621(b) prohibits you from charging for the first two hours of computer time used.

In our view, SG §10-621(b) is applicable only to *employee* time, and not to computer time. We are confident that the General Assembly did not intend to require any State agency to bear what

could be as much as a \$2,800 charge for complying with a single request under the PIA. Indeed, this office has previously espoused this view, in the *Public Information Act Manual* prepared for the guidance of custodians of public records: "[T]he official custodian may not charge a fee for the first 2 hours of the official's or employee's time that are needed to search for a public record and prepare it for inspection." Office of the Maryland Attorney General, *Public Information Act Manual* 10 (4th ed. 1985) (emphasis added).

VII

Taxpayer's Right to Prevent Disclosure

A substantial number of those who request information from the Central Registration System wish to use the information for commercial purposes. Some of the subjects of the information might well desire to prevent such use. In addition, some taxpayers may wish to prevent any dissemination of information derived from their Combined Registration Applications. Accordingly, you ask whether a taxpayer has the right to prevent dissemination of information that the PIA requires to be disclosed.

The reason for a particular request for information is irrelevant to the question of whether the information must be disclosed—even an improper motive for a request does not excuse from disclosure "information otherwise revealable under the Act." *Moberly v. Herboldsheimer*, 276 Md. 211, 227 (1975). In 61 *Opinions of the Attorney General* 702, 710 (1976), this office concluded that the PIA does not permit a clerk of court to deny public inspection of marriage records, regardless of the intended use of those records. On that basis, the Attorney General concluded that the clerk must comply with a request made by a person who wished to use the information for commercial solicitations, notwithstanding the clerk's desire to protect the privacy of the individuals named in the records. 61 *Opinions of the Attorney General* at 710-11.

Further, the determination of whether the PIA requires disclosure of particular information must be based on the PIA and the confidentiality statutes discussed above. The wishes of the subject of the information do not affect that determination—information that the PIA clearly requires to be disclosed does not become non-disclosable simply because the subject of the information would prefer it so. In 63 *Opinions of the Attorney General* 355, 359 (1978), this office concluded that the determination of what infor-

mation is confidential under the PIA requires an objective, rather than a subjective, inquiry: "To allow a person submitting information or that person and a custodian to definitively characterize information as 'confidential' would allow the liberal disclosure policy of the [PIA] to be defeated merely by an assertion of one party or the agreement of both."

It is a closer question, however, whether a taxpayer has a right to challenge the Division's determination that particular information is not confidential. In *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979), the Supreme Court held that the federal Freedom of Information Act ("FOIA") does not afford a private right of action to prevent disclosure of information that is exempt from the FOIA's general requirement of disclosure.¹⁰ Nonetheless, we think that the PIA does create a private right to prevent disclosure of information protected by SG §§10-615 or 10-617.

The FOIA's exemptions merely permit agencies to withhold the described information; they do not limit agencies' discretion to disclose that information. *Chrysler Corp.*, 441 U.S. at 294. In contrast, the PIA absolutely prohibits disclosure of certain information. Thus, unlike the FOIA, the PIA is not "exclusively a disclosure statute." *See* 441 U.S. at 292. This office has previously suggested that individuals may have a right to institute "reverse PIA" actions to prevent disclosure of confidential information. Office of the Maryland Attorney General, *Public Information Act Manual* 33-34 (4th ed. 1985).¹¹ In addition, a person claiming that information is required by law to be kept confidential presumably may seek a writ of mandamus to prevent disclosure. *See generally, e.g., Criminal Injuries Comp. Bd. v. Gould*, 273 Md. 486 (1975).

Hence, whether under the PIA itself or through common law process, a taxpayer may challenge a determination that particular information about the taxpayer in the Central Registration System is not confidential. *See Chrysler Corp.*, 441 U.S. at 318 (submitter of information may seek review under the Administrative Procedure Act of agency's decision to disclose information).

¹⁰Because the purpose and language of the FOIA and the PIA are substantially the same, the Supreme Court's interpretation of the FOIA is ordinarily persuasive as to the PIA. *Faulk v. State's Attorney for Harford County*, 299 Md. 493, 506 (1984).

¹¹Moreover, SG §10-626 expressly creates a private right of action for damages against any person who "willfully and knowingly permits inspection or use of" protected personal information. We do not mean to suggest, of course, that a good-faith determination that particular information must be disclosed would expose a custodian to liability under SG §10-626.

That is not to say that the Division must notify the taxpayer of any requests for information, however. No provision of the PIA expressly imposes such an obligation on custodians of public records. And, in the case of information from the Central Registration System, the number of taxpayers affected by a single request could easily run into the hundreds. We believe that, if the General Assembly had intended to impose such an obligation, it would have done so expressly.

At the same time, the PIA certainly does not prohibit the giving of such notice. Thus, you may notify taxpayers—directly or through the publication of a general notice—that certain information has been requested, if you choose to do so.

VIII

Conclusion

In summary, it is our opinion that federal and State statutes regarding the confidentiality of tax-related information prohibit disclosure of information concerning the personal and business affairs of identifiable taxpayers. However, (i) nonconfidential information about the taxpayer's plans to engage in certain regulated business activities or the taxpayer's authority to collect the retail sales tax and (ii) information that cannot be associated with any particular taxpayer must be disclosed to the public upon request. In complying with any request for disclosable information, the Division may impose a reasonable charge for the costs incurred, including the cost of all computer time actually used. Finally, we conclude that taxpayers have no right to prevent dissemination of information that the PIA requires to be disclosed to the public, although they may challenge the Division's determination as to the disclosability of particular information.

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PUBLIC OFFICERS

STATE'S ATTORNEY—OATH OF OFFICE—GOVERNOR, CIRCUIT COURT JUDGE, OR CIRCUIT COURT CLERK MAY ADMINISTER OATH TO STATE'S ATTORNEY—RECORD TO BE MAINTAINED IN CLERK'S TESTAMENTARY BOOK OR OTHER PERMANENT FORM.

November 13, 1986

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

You have requested our opinion concerning the administration of the oath of office to a State's Attorney. Specifically, you ask whether the circuit court clerk or a circuit court judge is the proper public official to administer the oath. If a circuit court judge may administer the oath, you further inquire whether a record of the administration of the oath may be entered in the testamentary book maintained by your office.

For the reasons given below, it is our opinion that the Governor, a circuit court judge, or a circuit court clerk may administer the oath of office to the State's Attorney. Although the Governor may decline to administer the oath, a judge or clerk may not. In addition, it is our opinion that, should a judge administer the oath of office to the State's Attorney, record of the administration of the oath may be made in the clerk's testamentary book or in any other suitable permanent form.

I

Background

After the 1982 election, the re-elected State's Attorney for Baltimore County took her oath of office before a judge of the Circuit Court for Baltimore County. Thereafter, the judge signed his name, attesting to the administration of the oath of office to the State's Attorney, in the "test book" maintained in your office. In previous years, you had administered the oath to the State's Attorney in your capacity as the Clerk of the Circuit Court for Baltimore County in accordance with your understanding of the mandate of

§2-104 of the Courts Article ("CJ" Article), and you had recorded that act in your "test book" as required by CJ §2-502.

An informal survey by you of your fellow circuit court clerks revealed that, in some counties, the clerk administered the oath of office to the State's Attorney; in others, a judge administered the oath. Although we provided you with oral advice soon after the 1982 election, we recently agreed that, because of the variety of practices among the counties and the possibility of lingering questions about the proper official to administer the oath to the State's Attorney, we would commit our previous advice to writing and disseminate it at this time.¹

II

Constitutional and Statutory Framework

A. *Constitutional Provisions*

The two constitutional provisions that pertain to the administration of the oath of office to State's Attorneys are Article V, §8 and Article I, §10.

Article V, §8 first appeared in the 1851 Constitution as Article V, §2 and was reenacted as part of the 1864 and 1867 Constitutions. Article V, §8 provides as follows:

"All elections for the State's Attorney shall be certified to, and Returns made thereof, by the Clerks of the said Counties and City, to the Judges thereof, having criminal jurisdiction, respectively, whose duty it shall be to decide upon the elections and qualifications of the Persons returned; and, in case of a tie between two or more Persons, to designate which of said Persons shall qualify as State's Attorney, and to administer the oaths of office to the Person elected.

The other pertinent constitutional provision, Article I, §10, provides as follows:

¹The general election was held on Tuesday, November 4, 1986. Under Article V, §7 of the Maryland Constitution, the State's Attorney shall serve from the first Monday in January after his or her election but first must take the oath of office required by Article I, §9 of the Constitution.

“Any officer elected or appointed in pursuance of the provisions of this Constitution, may qualify, either according to the existing provisions of law, in relation to officers under the present Constitution, or before the Governor of the State, or before any Clerk of any Court of Record in any part of the State; but in case an officer shall qualify out of the County in which he resides, an official copy of his oath shall be filed and recorded in the Clerk’s office of the Circuit Court of the County in which he may reside....”

This provision first appeared in the 1867 Constitution.²

With one narrow exception, the Constitution is silent as to “test books” and to the recording generally of the act of either taking or giving the oath of office. The exception is in Article I, §10, which provides that in case an officer should qualify out of the county in which the officer resides, “an official copy of his oath shall be filed and recorded” in the clerk’s office of the circuit court of the county in which the officer resides.

B. *Statutory Provisions*

An extensive statutory framework relating to official oaths appears in Article 70 of the Maryland Code. However, no specific reference is made to the State’s Attorney. Article 70, §1 provides that the Governor and Lieutenant Governor shall take their oaths before the Chief Judge of the Court of Appeals. Section 2 provides that the Secretary of State, the judges and clerks of the appellate courts, the Attorney General, the State Reporter, the Adjutant General, the Treasurer, and the Comptroller shall take their oaths before the Governor. Section 3 provides that Senate members shall take their oaths before the Senate President and that House of Delegate members shall take their oaths before the Speaker of the House.³ Section 4 formerly provided that the circuit court clerks take their oaths before a judge of their respective courts; however, that section was repealed in 1973 and now appears, without substantive change, as CJ §2-104(c)(2). Section 5 provides that all mu-

²When first enacted, it was §10 of Article XV—“Miscellaneous Provisions.” In 1978, it was transferred to its present section—“Elective Franchise.” Chapter 681, Laws of Maryland 1977 (ratified November 4, 1978).

³The Senate President and the Speaker of the House take their oaths before a member of their respective bodies. Article 70, §3.

nicipal officers, except the mayors or chief magistrates, shall take the oath before the mayor or chief magistrate. Finally, §7 provides that all “other officers,” presumably those not specified in the prior sections of Article 70, who are “elected or appointed ... under the Constitution and laws of this State,” including “mayors or other chief magistrates,” shall take their oaths before the circuit court clerk or one of the clerk’s deputies.⁴

Another section pertaining to official oaths is CJ §2-104(c)(1), which provides that, “[e]xcept as authorized by Article I, §10 of the Constitution, every officer, except the clerk of the circuit court of a county or an appellate court, shall take the oath before the clerk of the circuit court.” Relying upon this section’s authority, you previously had administered the oath of office to State’s Attorneys elected in your county.⁵

The Code provisions relating to the maintenance of a permanent record of each officer’s oath-taking are varied and are found in Article 70 and the Courts Article. The oaths of the Governor and Lieutenant Governor are to be recorded “in the test book of the Court of Appeals.” Article 70, §1. The oaths of the Secretary of State, the judges and clerks of the appellate courts, the Attorney General, the State Reporter, the Adjutant General, the Treasurer, and the Comptroller “shall be preserved in a book to be kept by the Secretary of State.” Article 70, §2. The oaths of the members of the General Assembly shall be “subscribed accordingly.” Article 70, §3. The clerks of the circuit court shall maintain “[a] test book containing the oaths of office and signatures of every person who takes the oath before the clerk.” CJ §2-502. Finally, the clerks shall report monthly the names and offices of all officers who have taken and subscribed the oath of office before them, which is to be “carefully preserved” by the Secretary of State. Article 17, §71; Article 70, §12; and §7-105(b) of the State Government Article (“SG” Article).

⁴As discussed in Part III below, two years after this provision was first enacted, the General Assembly indicated that it was not to be construed as covering State’s Attorneys.

⁵The Code provisions relating to State’s Attorneys include no reference to the official before whom a State’s Attorney should take the oath of office. *See* Article 10, §§34-41.

III

Construction of Article V, §8 and Article I, §10

Our analysis begins with an examination of the pertinent constitutional provisions, because statutory enactments cannot override the Constitution. In our view, Article V, §8 provides that the clerk shall certify the election of the State's Attorney to the judges of his or her court and that the judges shall have three duties: (i) to decide upon the elections and qualifications of the persons "returned"; (ii) to designate, in the case of a tie vote, the person who shall qualify as State's Attorney; and (iii) to administer the oath of office to the person elected.

You have pointed out that the semicolon after the word "returned" in Article V, §8 suggests that only the first of these three duties is reposed with the judges and that the remainder of that sentence modifies "Clerks," thereby reposing the duty to administer the oath of office with the clerks. Alternatively, you have suggested that all three duties, which are listed after the phrase "whose duty it shall be," are those of the clerk, because "whose duty" modifies "Clerks."

While these possible interpretations cannot be disregarded lightly, we believe that a better reading is that the phrase "whose duty" modifies "Judges" and not "Clerks," and that the final clause—"to administer the oaths of office to Persons elected"—is among the judges' "duties."⁶

First, with respect to the suggestion that the semicolon is intended to bifurcate the allocation of duties, the history of Article V, §8 indicates that in 1867 the semicolon was substituted for a comma for purely stylistic reasons. There was no semicolon in the 1851 version of this section.⁷ Neither was there a semicolon in the version of this provision enacted in the 1864 Constitution. In fact, there was no semicolon in this provision when it was presented initially to the 1867 Constitutional Convention as part of the report of the Committee upon the Attorney General and State's Attorney. *Proceedings*

⁶For the reasons that follow, we also reject yet another, grammatically conceivable construction of the "administration of oaths" clause in Article V, §8—that it authorizes judges to administer the oath to a State's Attorney only in case of a tie.

⁷A review of the debates of the 1850 Constitutional Convention reveals that there also was no semicolon in the proposed versions of this section. See *Debates and Proceedings of the Maryland Reform Convention to Revise the State Constitution* (1851).

of the State Convention, of Maryland, To Frame a New Constitution 136-38 (1867) ("1867 Proceedings").

However, when the committee's report was later amended to provide for an elected Attorney General, a semicolon was placed after the word "returned" in the nearly identical provision of Article V, §2, pertaining to the Attorney General.⁸ *1867 Proceedings* at 580. No formal action of the convention amended Article V, §8, pertaining to the State's Attorney, to conform its punctuation to that of §2, pertaining to the Attorney General. Nonetheless, the final version of the 1867 Constitution included the conforming punctuation. *1867 Proceedings* at 748-750. There is no reported discussion whatsoever suggesting that a change was intended as to the administration of the oath of office to the State's Attorney.

We conclude, therefore, that the addition of the semicolon did not substantively change §8. Rather, it was merely an editor's stylistic decision to conform the punctuation of §8 to that of §2. *Cf.* 65 *Opinions of the Attorney General* 285, 288-90 (1980).⁹

Second, with respect to the suggestion that "whose duty" modifies "Clerks," the Court of Appeals has stated unequivocally (although in dicta) that "Article V, §8, of the Constitution makes it the duty of the judge of a county to administer the oath of office to the person elected as that county's State's attorney." *White v. State*, 244 Md. 188, 191 (1965). This reading reflects customary grammatical usage, under which "whose duty" modifies the closest, preceding noun—here, "Judges." Indeed, the Court of Appeals has interpreted the nearly identical language of Article V, §2, which is punctuated identically, to require the Governor to administer the oath of office to the Attorney General. *Groome v. Gwinn*, 43 Md. 572, 625 (1875).

⁸Article V, §2 provides as follows:

"All elections for Attorney-General shall be certified to, and returns made thereof by the Clerks of the Circuit Courts of the several counties, and the Clerk of the Superior Court of Baltimore City, to the Governor of the State, whose duty it shall be to decide on the election and qualification of the person returned; and in case of a tie between two or more persons, to designate which of said persons shall qualify as Attorney General, and to administer the oath of office to the person elected."

⁹To express the framers' intent accurately, the editor should have inserted additional semicolons after the phrases "shall qualify as State's Attorney" in Article V, §8 and "shall qualify as Attorney General" in Article V, §2.

Further support for this construction is found in the statutes enacted contemporaneously with, or soon after, the first enactment of Article V, §8 in the 1851 Constitution. In May of 1852, the General Assembly passed the first comprehensive statute pertaining to official oaths. Chapter 172, Laws of Maryland 1852. The provisions of Chapter 172 remain largely unchanged in present Article 70. Chapter 172 provided, in §1, that "the oath required to be taken and subscribed by every person, elected or appointed to any office of profit or trust, under the Constitution or laws of this State" shall be taken before the clerk.¹⁰ Section 3 provided that certain named officials, including the Secretary of State, the Treasurer, and the Comptroller, take the oath before the Governor. State's Attorneys were not among those persons enumerated. Section 7 provided for the oath taking for members of the General Assembly.

Chapter 17, Laws of Maryland 1854, made a number of additions and clarifications to this statute. Chapter 17 provided for the oath taking of the clerks themselves (to be taken before the judges of their respective courts), municipal officers, and the Adjutant General. Of particular interest to this inquiry is section 8 of Chapter 17, which makes clear that section 1 of the prior law, providing that persons elected to offices of profit take their oaths of office before clerks, does not apply to State's Attorneys. Specifically, section 8 of Chapter 17 provided that the earlier act "shall not be construed to include State's Attorney's administering of oaths to which officers is provided for in the second section of the fifth article of the constitution." Such contemporaneous or nearly contemporaneous construction is highly probative of the meaning of Article V, §8. *See Wells v. Price*, 183 Md. 443 (1944).

Having concluded that Article V, §8 provides for the administration of the oath of office to a State's Attorney by a judge, we turn to Article I, §10 (formerly Article XV, §10). That section was added to the 1867 Constitution upon the recommendation of the Committee on Revision and Compilation on August 14, 1867, three days before the entire Constitution was adopted. Judging from its placement in Article XV, "Miscellaneous Provisions," and its proximity to provisions providing for the orderly transition of power from the officers then serving to those to be elected after the 1867 Constitution was ratified, §10 is clearly a transitional and catch-all provision. It provides that all officers elected or appointed pursuant to "this [1867] Constitution" may qualify *either* "according to the ex-

¹⁰State's Attorneys hold offices of profit. *White v. State*, 244 Md. 188, 191 (1965); 48 *Opinions of the Attorney General* 323 (1963).

isting provisions of law"—that is, Article V, §8 of the 1864 Constitution; Chapter 172, Laws of Maryland 1852; and Chapter 17, Laws of Maryland 1854—"in relation to officers under the present [1864] Constitution" or "before the Governor" or "before any Clerk of any Court of Record."¹¹

Thus, this catch-all and transitional section provides three different persons before whom the State's Attorney may take the oath of office—a judge, the Governor, or a clerk—and allows for a reading that avoids conflict with Article V, §8. This interpretation is consistent with the principle that constitutional provisions shall be interpreted harmoniously, if at all possible, to give effect to every word. *Boyer v. Thurston*, 247 Md. 279, 293 (1967); *Groome v. Gwinn*, 43 Md. 572, 624 (1876).¹²

IV

Discretionary Duty of Governor

Although Article V, §8 and Article I, §10, read together, permit State's Attorneys to take their oaths of office before the Governor, or a judge, or a clerk of a court of record, we note a significant difference as to the duty of the Governor, judge, or clerk to administer the oath. We conclude that, although the Governor may decline to administer the oath of office to a State's Attorney, a judge or clerk may not.

No constitutional or statutory provision specifically directs the Governor to administer the oath to a State's Attorney. By contrast, Article V, §2 of the Constitution specifically directs the Governor to administer the oath of office to the Attorney General. In 1876, the Court of Appeals upheld the issuance of a writ of mandamus to the Governor to require him to perform the ministerial duty of

¹¹At the time the 1867 Constitution was drafted, Chapters 172 and 17 had been codified as Article LXVIII of the 1860 Code.

¹²CJ §2-104(c)(1), which begins "[e]xcept as authorized by Article I, §10 of the Constitution," also is in conformity with this interpretation. By contrast, it is more difficult to harmonize Article 70, §7 with these constitutional provisions. To the extent a literal reading of that section would demand a different conclusion, the Constitutional provisions—Article I, §10 and Article V, §8—take precedence over that Code provision. We note, however, that the legislative history of Article 70, §7 suggests that that provision was not intended to apply to State's Attorneys. See Chapter 17, Laws of Maryland 1854, §8.

administering the oath of office to the Attorney General. *Groome v. Gwinn*, 43 Md. 572, 624 (1876). Thus, the Governor may not decline to administer the oath to the Attorney General.¹³

Applying the reasoning of the *Groome* case to the administration of the oath of office to State's Attorneys, we conclude that a judge may not decline to administer the oath to a State's Attorney, in light of the mandatory wording of Article V, §8 of the Constitution.¹⁴ And, by virtue of Article I, §10 of the Constitution and CJ §2-104, a clerk may not decline to administer the oath of office to any official, including the State's Attorney.¹⁵

V

Signature in Testamentary Book

The second aspect of your inquiry is whether a judge may sign the clerk's testamentary book should he or she administer the oath to the State's Attorney. You point out that CJ §2-502 provides that circuit court clerks "shall record, index, and maintain ... [a] test book containing the oaths of office and signatures of every person *who takes the oath before the clerk*." (Emphasis added.) We understand that it is your practice to have each officer to whom you administer the oath subscribe his or her name after the oath, and then you sign the book. This practice clearly complies with the mandate of CJ §2-502. However, that section does not prohibit a judge from signing the book should he or she administer the oath.

Moreover, we discern a clear legislative intention that a permanent record of those taking oaths of office be maintained. *See, e.g.*, Article 17, §71; Article 70, §§ 1, 2, 3 and 12; CJ §2-502; and SG §7-105.¹⁶ Although there is no statutory delineation of the recordkeep-

¹³Similarly, the Governor may not decline to administer the oath of office to the Secretary of State, the Treasurer, the Comptroller, or the other officers enumerated in Article 70, §2.

¹⁴Likewise, a judge may not decline to administer the oath to the clerk. *See* CJ §2-104(c)(2).

¹⁵We note in passing that an oath taken in open court is administered by the judge regardless of who actually recites the words. *See Quynn v. Carroll's Administrator*, 22 Md. 288, 294 (1864); 20 *Opinions of the Attorney General* 226 (1935).

¹⁶*See also* Article I, §10 of the Constitution, providing that officers qualifying outside of the county in which they reside shall have an "official copy" of their oath filed with the clerk in the county in which they reside.

ing ancillary to the oaths taken before judges (by clerks pursuant to CJ §2-104(c)(2) and by State's Attorneys pursuant to Article V, §8 of the Constitution), it does not follow that no record whatever should be kept of those oaths.

Given the clear legislative intent that a record of those persons taking the oath of office be preserved, a permanent record should be kept and may be made in any suitable manner. For example, the recordkeeping used by judges for the oaths given to clerks can be used for the oaths given to State's Attorneys as well. In addition, as stated above, we see no prohibition to a judge's signing the clerk's "test book" as one way to maintain a permanent record.

VI

Conclusion

In summary, it is our opinion that the Governor, a circuit court judge, or a circuit court clerk may administer the oath of office to the State's Attorney. Although the Governor may decline to administer the oath, a judge or clerk may not. In addition, it is our opinion that, should a judge administer the oath of office to the State's Attorney, record of the administration of the oath may be made in the clerk's testamentary book or in any other suitable permanent form.

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PUBLIC PROPERTY

HIGHWAYS—"TRANSPORTATION PURPOSE"—LAND ACQUIRED FOR A NOW-ABANDONED HIGHWAY PROJECT MAY BE USED FOR CONSTRUCTION OF MOTOR VEHICLE ADMINISTRATION FIELD OFFICE.

September 25, 1986

The Honorable Judith C. Toth
Maryland House of Delegates

You have requested our opinion as to whether land originally acquired for a highway project that has since been abandoned by the State may be used instead for the construction of a Motor Vehicle Administration field office.¹

For the reasons given below, we conclude that such a substituted use of the land is permitted.

I

Governing Statutes

Section 8-302 of the Transportation Article ("TR" Article) authorizes the State Highway Administration ("SHA") to acquire private property "for any public purpose that it considers necessary or desirable to perform the duties imposed by this title ['Highways'] or for any other purpose authorized under this title." TR §8-302(a).

Understandably, it sometimes happens that land so acquired is later found to be unneeded: Highway construction plans may change, leading to the abandonment of a project; or, after completion of a project, it may be found that somewhat more land had been acquired than was used. TR §8-309(b)(1) provides that "if land acquired [by SHA] is not needed for present or future State, county, or municipal transportation purpose[s] or other public purposes, [SHA] shall dispose of the land as soon as practicable after the com-

¹Your question arose after land of this kind in Montgomery County was considered as a site for a new Motor Vehicle Administration office. Although that particular site has since been ruled out, you have asked that we address the general question.

pletion or abandonment of the project for which the land was acquired.”

TR §8-309(b)(2) establishes the procedure for disposition of land from an abandoned project. That procedure requires that if “the Secretary [of Transportation] determines that the property is no longer needed for any State transportation purpose,” the land must be offered for sale first to a county or municipality and thereafter to the person from whom the land was originally acquired or that person’s successor in interest.

II

Legislative History

Before the enactment of the Transportation Article in 1977, the provisions of what is now TR §8-309 were codified as §§6 and 208 of former Article 89B. As originally enacted, by Chapter 539 of the Laws of Maryland of 1931, §6 vested the State Roads Commission with “full power and authority to dispose of” any land or bridge that it determined to be unneeded for the maintenance of the State’s highway system or that ceased to be used in the highway system “by reason [of] the relocation of any road or bridge by the State Roads Commission.” Former Article 89B, §208—originally enacted as §162D(1-C) by Chapter 542 of the Laws of Maryland of 1957—gave the previous owner a right to reacquire any abandoned road or right-of-way.

In Chapter 134 of the Laws of Maryland of 1969, the General Assembly for the first time not merely authorized, but required the State Roads Commission to dispose of unneeded land in its possession. The preamble to that Act noted that a substantial number of the unneeded parcels of land in the Commission’s ownership at that time “are susceptible of private development, and ... many of these parcels of excess land have been owned by the Commission for many years.” Accordingly, the Act declared the legislative intent to make those parcels available for development:

“[T]he State Roads Commission should divest itself from ownership of land not needed for current or future highway purposes or other public purposes in order that such land can be placed back on the tax records of the several counties and be used for residential development or be otherwise developed by private enterprise thus benefit-

ing the economy of the counties and the State." Chapter 134, Laws of Maryland 1969 (enacting former Article 89B, §6(1)).

The provisions of former Article 89B, §86 and 208 remained unchanged until their recodification in a combined form as TR §8-309. See Chapter 13, Laws of Maryland 1977, sec. 2 at 381 (Revisor's Note). TR §8-309, as originally enacted, thus had as its purpose "to return unneeded land to the tax rolls of the counties and to make this land available for use by private enterprise." Chapter 13, Laws of Maryland 1977, sec. 2 at 378. To that end, TR §8-309(b)(1) generally required prompt disposition of land "not needed for present or future highway or other public purposes." *Id.* TR §8-309(b)(2) provided more particularly that, "[i]f the land is from a project that was abandoned, the person from whom the land was acquired ... has the first right to reacquire the land." *Id.*

However, that provision of TR §8-309(b)(2) was amended, before Chapter 13 took effect, to limit the previous owner's right of reacquisition to cases in which the project was abandoned "*and the Secretary [of Transportation] determines that the property is no longer needed for any transportation purpose.*" Chapter 924, Laws of Maryland 1977. That amendment was enacted for the express purpose of "providing that the Secretary of the Department of Transportation may allow the use, disposal or transferral of certain property from an abandoned highway project for a transportation purpose prior to the disposal of such property." *Id.*

Finally, the previous owner's right to reacquire land from an abandoned project was further limited by the enactment of Chapter 547 of the Laws of Maryland of 1983. That act amended TR §8-309 to its present form. The stated legislative purpose of the amended section now is "to return unneeded land to the tax rolls of the counties and to make this land available for use by *a county or municipality for any transportation purpose.*" TR §8-309(a). To that end, the Secretary of Transportation is now required to offer unneeded land from an abandoned project to a county or municipality for its transportation purposes before the previous owner may be permitted to reacquire the land. TR §8-309(b)(2). However, any such disposition is required only if "the Secretary determines that the property is no longer needed for any State transportation purpose." TR §8-309(b)(2)(i).

III

Intent of Statute

In our view, the primary legislative intent underlying TR §8-309 is to make land from abandoned highway projects available for other State transportation-related public projects. That intent—expressed clearly in the terms of the statute—is further exemplified in the history of the statute outlined in Part II above.

Before the enactment of Chapter 924 of the Laws of Maryland of 1977, the fact of the State's abandonment of a highway project was itself sufficient to trigger the prior owner's right of reacquisition. That is, if the State abandoned the project for which the land had been acquired, the State Roads Commission was statutorily required to offer the land to the previous owner—no matter how desirable, useful, or even necessary the land might be to another project. Chapter 924 was enacted for the explicit purpose of rectifying that situation.

Moreover, it is clear that TR §8-309(b) does not reflect a legislative intent to give local governments a prior claim to such land as against the State. Indeed, local governments were not given priority even as to the previous owner of the land until 1983—six years after enactment of the State's priority. Chapter 547, Laws of Maryland 1983. Therefore, we think it is unquestionable that the General Assembly did not intend to require the Department of Transportation to divest itself of land that is desirable or useful for transportation-related State projects merely because the land is not needed for the particular project for which it was originally acquired. *See Schweitzer v. Brewer*, 280 Md. 430, 438-39 (1977) (In construing statutes, "results that are unreasonable, illogical, and inconsistent with common sense should be avoided.").

We point out, in addition, that this power of the State to retain land from an abandoned highway project is by no means without precedent. To the contrary, governmental bodies ordinarily have full authority to divert land acquired for one purpose to another public purpose when that is appropriate:

"[W]hen property is condemned in good faith for the named public purpose, the necessary quantum (or quantity), or duration of the estate taken is ordinarily left to the sound business discretion of the condemnor, and if ... the land is no longer needed or desired for use for that particular purpose, the condemnor is at liberty to deal with the real estate in any legitimate manner that he sees fit, and

neither the condemnee nor those claiming under him may object." *Shreve v. Mayor and City Council of Baltimore*, 243 Md. 613, 622 (1966).

See also 3 Nichols, *Eminent Domain* §9.22 ("property acquired in fee simple by a public body for a particular purpose may be diverted to another use"). Thus, in the absence of the statutory provisions, neither the local government nor the previous owner of land from an abandoned highway project would have any right to acquire or reacquire ownership of the land.

IV

Permitted Uses of Land

The rights of local governments and previous owners to acquire land from abandoned projects pertain to land that "is no longer needed for any State transportation purpose." TR §8-309(b)(2)(i). Thus, you ask whether the construction of a field office for the Motor Vehicle Administration ("MVA") may be deemed a "transportation purpose" for retaining the land. In our view, the construction of such an office is a "transportation purpose."

The MVA, like the SHA, is an integral part of the Department of Transportation. TR §2-107(a). Its purpose is to administer and enforce the Maryland Vehicle Law. TR §12-104(a) and (b). Therefore, it has significant dealings with the public regarding licensing, registration, and enforcement—dealings that include hearings and other actions requiring the attendance of the affected individual. For the convenience of the public, the MVA is required to "maintain as many offices in this State as the Administrator considers necessary to carry out the powers and duties" given to it. TR §12-104(c). Thus, the construction and maintenance of the MVA's field offices directly serves the transportation functions that the MVA was created to perform.

In short, the statutory requirement of MVA field offices—which is clearly intended to facilitate the public's use of motor vehicles—makes the construction of those offices a "transportation purpose" within the meaning of TR §8-309. We believe that such a construction most fully effectuates the intent of that section. *See Management Personnel Service v. Sandefur*, 300 Md. 332, 341 (1984) ("[T]he cardinal rule of statutory construction is to ascertain and

carry out the real legislative intent.”).²

V

Conclusion

In summary, it is our opinion that land originally acquired for a State highway project may be used by the State for the construction of an MVA field office after the abandonment of the project. In our view, such a use is a use for a “transportation purpose” and, thus, authorized by TR §8-309(b)(2).

STEPHEN H. SACHS
Attorney General

NOLAN H. ROGERS
Assistant Attorney General

JACK SCHWARTZ
Chief Counsel
Opinions and Advice

²We need not and do not address the question of whether any other offices or similar uses of land by the MVA or other units of the Department of Transportation would be so directly related to transportation that their construction could be deemed a use of land for a transportation purpose.

SAVINGS AND LOAN ASSOCIATIONS

INSURANCE—THE MARYLAND SAVINGS-SHARE CORP. LACKED STATUTORY AUTHORITY TO INSURE ON A PER ACCOUNT BASIS—THE GENERAL ASSEMBLY MAY CHANGE THE LEGISLATION UNDER WHICH CERTAIN DEPOSITS ARE NOW INSURED ON A PER ACCOUNT BASIS.

February 27, 1986

The Honorable Howard A. Denis
Senate of Maryland

Mr. William S. Ratchford, II, Director
Department of Fiscal Services

You have each raised questions about the insurance of savings and loan accounts by the Maryland Savings-Share Insurance Corporation ("MSSIC"). Specifically, you inquire (1) whether MSSIC had the legal authority to alter its insurance coverage in 1976 from a maximum amount per depositor to a maximum amount per account; (2) whether legislation enacted at the 1985 First Special Session of the General Assembly compels the State of Maryland Deposit Insurance Fund Corporation (the "Fund") to insure accounts established on or before May 18, 1985 on a per account basis; and (3) whether insurance previously provided as a maximum amount per account may now be limited, by the Fund or by the General Assembly, to a maximum amount per depositor.

For the reasons stated below, it is our opinion that:

(1) MSSIC acted contrary to law when it changed, through a bylaw amendment, the basis of its insurance of savings and loan accounts from per depositor—which was at all times the basis of insurance provided by the Federal Savings and Loan Insurance Corporation ("FSLIC")—to per account.

(2) In Chapter 6 of the Laws of Maryland 1985 (First Special Session), the General Assembly unambiguously provided that accounts established on or before May 18, 1985 were to be insured by the Fund on the basis of MSSIC's per account rule, even though accounts opened after that date were to be insured on a per depositor basis parallel to that of FSLIC.

(3) Although the effect of Chapter 6 cannot be undone by administrative action or a rule change, it is constitutionally permissible for the General Assembly to enact a law providing that pre-May 19, 1985 accounts are to be insured on a per depositor basis only.

I

Special Counsel's Finding

Your requests stem in part from the conclusion of the Office of Special Counsel that MSSIC's 1976 change to insurance on a per account basis was "contrary to the intention of the legislature in enacting MSSIC's charter." *Report of the Special Counsel on the Savings and Loan Crisis* 143 (January 8, 1986) ("Preston Report"). The Special Counsel noted that, as a result of this change, "in effect, MSSIC provided unlimited insurance. Merely by opening separate accounts, a single depositor could exceed the maximum coverage at will." *Id.* In addition, the Special Counsel stated:

"The rapid growth of member associations was stimulated by the new coverage provided by MSSIC, especially through brokered deposits. The impact on the liability assumed by the State of Maryland, through the creation of [the Fund] and its assumption of MSSIC's liabilities, is substantial. At Old Court [Savings and Loan Association], for instance, the Office of Special Counsel has estimated that approximately \$87,000,000 was deposited in multiple accounts of single depositors. Over fifty percent of the deposits were from out of state. Approximately \$76,000,000 of these accounts would have been uninsured under the old MSSIC bylaw." *Id.*

See also Preston Report at 12-13, 20, and 407.

In light of these findings, we examine in some detail the history of the MSSIC statute, the stated legal rationale for the expansion of MSSIC insurance liability, and the impact of legislation enacted at the 1985 First Special Session.

II

Changes in MSSIC Insurance

A. *Enactment of MSSIC Statute*

In *MSSIC v. United States*, 308 F.Supp. 761 (D. Md.), *rev'd on other grounds* 400 U.S. 4 (1970), U. S. District Court Judge Edward Northrup recounted the history of the creation of MSSIC:

"Maryland Savings-Share Insurance Corporation (MSSIC) is a non-profit corporation created by the Maryland legislature under a special statutory charter. The primary purpose of the corporation is to insure the free-share accounts of member savings and loan associations, but it also serves to promote the elasticity and flexibility of the resources of member associations and to aid the liquidity of member associations by providing a central reserve fund. In the late 1950's and early 1960's a number of savings and loan associations collapsed. The lack of state control over these institutions made the citizens of Maryland fair game for shady operators. The public was bilked out of millions. Many persons lost their life savings. There was a scandal of considerable magnitude. The governor responded to the situation by creating two commissions which studied the savings and loan industry and proposed legislation regulating it. The commissions' study of the industry also showed that there was no existing private corporation which could adequately insure the deposits of the associations, so the commissions also proposed that the state create an insurer for those savings and loans which did not qualify for federal insurance programs. MSSIC was created by a special act of the Maryland General Assembly." 308 F. Supp. at 763.

The gubernatorial commission ("Shriver Commission") that proposed the MSSIC legislation in 1962 recommended a scheme of insurance financed by the member associations themselves, without State backing.¹ The Shriver Commission expressly proposed that

¹The report of the Shriver Commission consists of a one-page letter to the Governor and a proposed bill. The Commission stated its conclusions as follows:

"1. That a system for insuring the free-share accounts of State chartered savings and loan associations is desirable and in the public interest.

2. That such insurance should be provided through a central fund

the State's faith and credit not be pledged in support of depositor insurance. *See Preston Report* at 44. Hence, some limit on risk was plainly necessary, given MSSIC's limited resources.²

The bill proposed by the Shriver Commission, House Bill 36, was amended both in the House and the Senate. Among the changes made by the House Banking, Insurance and Social Security Committee and approved by the House of Delegates was the addition of the following language to provisions governing the power of the MSSIC Board of Directors to promulgate bylaws, rules, and regulations:

"As one of such rules and regulations the board of directors from time to time shall establish a limit on the amount of insurance which may be provided for each separate account of an association; and this limit may not exceed by more than the sum of \$10,000.00 the amount of prevailing insurance available from the Federal Savings and Loan Insurance Corporation or its successor instrumentality from time to time." 1962 House Journal at 185.³

financed by the insured associations as is done in Massachusetts and Ohio and that the faith and credit of the State should not be pledged.

3. That all of the sound and well managed Maryland savings and loan associations should be eligible for membership in the fund, but that their participation therein should be voluntary.

4. That the supervision of the participating savings and loan associations by a State regulatory agency is essential.

5. That exemption from Federal income taxation will be essential to the success of any fund for the purpose of insuring free share accounts."

Contrary to its founders' hopes, MSSIC did not obtain tax exempt status under the Federal income tax laws. *See United States v. MSSIC*, 400 U.S. 4 (1970).

²At that time, the savings and loan associations to be insured by MSSIC could not borrow from the Federal Reserve. It was not until nearly two decades later that MSSIC-insured institutions were able to borrow from the Federal Reserve. *See Evaluation Report—The Division of Building, Savings and Loan Associations*, Department of Fiscal Services, (1980) at 12.

³When this amendment was added, language in the title of the bill relating to the insuring of accounts was not altered. ("[T]o insure the free share accounts of ... associations ... and relating generally to the insuring of free share accounts in certain savings and loan associations in this State and to the corporation herein created for that purpose.") *See* Chapter 131, Laws of Maryland 1962. Nor were provisions governing the general powers of MSSIC changed. *Id.* (codified at former Article 23, §161NN) ("to insure the free share accounts of member associations through the creation of a central insurance fund").

At the time this change was adopted, the federal statute governing the insurance of accounts by FSLIC provided that "no member ... shall be insured for an aggregate amount in excess of \$10,000." 12 U.S.C. §§1724(b) and 1728(a). See *Mahoney v. FSLIC*, 393 F.2d 156 (7th Cir. 1968).

This change to the Shriver Commission bill was approved by the Senate, but with the insertion of the word "share" between "separate" and "account." 1962 Senate Journal at 361. Eventually both houses agreed on the amendment and the provision became law as former Article 23, §161SS.⁴

B. MSSIC Implementation of Insurance Coverage

The first MSSIC Board implemented former Article 23, §161SS by promulgating the following bylaw in 1962:

"The limit of insurance liability for which the Corporation may be required to pay for any one free share account may not exceed by more than the sum of \$10,000 the amount of prevailing insurance available from the Federal Savings and Loan Insurance Corporation or its successor instrumentality from time to time for such free share account." *Bylaws and Rules and Regulations*, MSSIC, Article VII, §2, at 13 (1963).

According to the Special Counsel, at that time "[e]ach depositor's account in a member association was insured to \$20,000"—\$10,000 above the FSLIC limit. *Preston Report* at 45. However, MSSIC did not depart from the FSLIC rule that accounts were generally insured on a per depositor rather than a per account basis.⁵

⁴When this portion of Article 23 was later incorporated into the Financial Institutions Article ("FI" Article), the language of the revision "derived without substantive change" from §161SS was FI §10-105(b):

"The amount of loss to be protected against for each separate savings account may not exceed the limit established from time to time in the Corporation's bylaws, rules, and regulations. This limit may not exceed by more than \$10,000 the amount of prevailing insurance available from the Federal Savings and Loan Insurance Corporation."

This provision was repealed by Chapter 6, Laws of Maryland 1985 (First Special Session). See Part II C below.

⁵"Savers in [a FSLIC] insured institution generally are insured in an amount not exceeding \$100,000. A person may have various accounts in different capacities at the same association and have separate insurance coverage of funds. For example, a

Over the ensuing years, Congress raised the limit on FSLIC insurance coverage on a number of occasions. Coverage was raised from \$10,000 to \$15,000 in 1966; from \$15,000 to \$20,000 in 1969; from \$20,000 to \$40,000 in 1974; and from \$40,000 to its present \$100,000 level in 1980. *See* Historical Notes to 12 U.S.C. §§1724 and 1728. Invariably, in light of the federal change, MSSIC would follow suit by increasing its insurance coverage. *See, e.g.*, MSSIC Minutes of March 26, 1980 (vote to increase insurance of accounts from \$40,000 to \$100,000).⁶ However, the per depositor rule remained unchanged and in effect for nearly 12 years.

In 1976, MSSIC amended Article VII, §2 of its bylaws to delete from its insurance liability limitation the words "any one free share account" and to substitute the words "each separate share account of any association." According to an opinion issued by MSSIC's counsel:

"[T]he purpose of this amendment was to clarify MSSIC's intent to provide insurance for each share account *as those accounts appear on a member's records*. Thus, supposing that an individual were to open several accounts with a MSSIC member, using the same name for each account, and that the MSSIC member permitted this duplication, the individual would be insured for the full amount of insurance on each of the accounts." Letter from Jacques T. Schlenger, Esquire, Venable, Baetjer and Howard to Harry B. Wolf, Jr., MSSIC Executive Vice-President at 2 (August 17, 1976) ("VB & H letter") (emphasis in original).⁷

This opinion letter explicitly recognized that this bylaw amendment was a departure from MSSIC's consistent prior practice: "MSSIC

person may have insured in the same association an individual account or joint account and an interest in an irrevocable trust account. His insurance protection under each grouping would be separate and apart from the insurance he would receive under the other groups." *Preston Report* at 94-95, n. 101 (emphasis in original). For purposes of this opinion, we need not examine in detail every permutation of FSLIC insurance coverage.

⁶It would appear that these increases in insurance coverage were accomplished by a majority vote of MSSIC Board members on a motion or resolution rather than by formal amendment to the entity's bylaws. Under former FI §10-111(b), amendments were to be "submitted to and approved by" the Director of the Savings and Loan Division, who had 30 days to register his disapproval. It is our understanding that the Division Director did not object to these changes in coverage, although such approvals were not given in writing.

⁷The VB & H letter, in its entirety, is appended to this opinion.

in the past has issued to its members a general set of criteria, to be used by members in determining insurance coverage, which combined separate accounts having a single ownership into a single account for insurance purposes." *Id.* MSSIC's counsel concluded that the amendment was a "reasonable interpretation" of MSSIC's powers under former Article 23, §161SS.

This bylaw change helped bring about a vast expansion in deposits at MSSIC-insured institutions. As of May 1985, MSSIC insured more than \$7 billion in deposits. *Preston Report* at 16. However, its Insurance Fund contained only some \$206 million. State of Maryland Deposit Insurance Fund Corporation, *Report on Examination of Balance Sheets—May 18, 1985*.

C. 1985 Legislation

After the onset of Maryland's savings and loan crisis, the statute creating MSSIC was repealed and MSSIC was merged into the Fund, a State agency. Chapter 6, Laws of 1985 (First Special Session). *See generally* 70 *Opinions of the Attorney General* 180 (1985). One of the purposes of the Fund is "[i]nsuring the savings accounts of member associations." FI §10-110(a)(2). The limit of insurance is set forth in FI §10-110(b):

"The amount of loss to be protected against *for each depositor* may not exceed the limit established from time to time by the rules and regulations of the Fund. This limit may not exceed the amount of federal insurance." (Emphasis added.)

However, uncodified Section 6 of Chapter 6 provided as follows:

"That any limit established by the Fund Director under §10-110(b) of this Act shall only apply to accounts established after the effective date of this Act. Notwithstanding §10-110(b) of this Act, any account established on or before the effective date of this Act shall be subject to the same terms and conditions of insurance under the Maryland Deposit Insurance Fund Corporation as that account was subject under the Maryland Savings-Share Insurance Corporation."

The contemporaneous understanding of the effect of this uncodified section is reflected in a May 29, 1985 "Session Review" of the First Special Session prepared by the Department of Legislative Reference. There, Section 6 was described as providing that:

“[A]ny new insurance levels adopted by the Fund Director shall only apply to accounts established after May 18, 1985 (the current MSSIC insurance level is \$100,000 per account; FSLIC only insures up to \$100,000 per *person* holding accounts in an association).” (Emphasis in original).⁸

Against this background, we now turn to the questions you have raised.

III

MSSIC's Authority to Provide Unlimited Insurance

As noted in Part I above, the Special Counsel concluded that MSSIC's expansion of insurance coverage in 1976 “was contrary to the provisions in MSSIC's charter” and that MSSIC's counsel was wrong in advising otherwise. *Preston Report* at 12. We agree with the Special Counsel's conclusion.

MSSIC's counsel identified four justifications for the expansion of insurance to a maximum amount per account instead of per depositor:

- (1) The “plain meaning” of the words “each separate share account” in former Article 23, §161SS.
- (2) The intent of the reference to FSLIC limits in former Article 23, §161SS as creating “some kind of competitive parity” between MSSIC and FSLIC institutions.
- (3) The absence of any single standard definition of “account”.
- (4) The complexity of FSLIC account regulations, which could not have been intended to be “automatically force[d]” upon MSSIC. VB & H letter at 2-4.

We do not believe that these points take adequately into consideration the language, history, and purpose of the MSSIC statute.

⁸Even before the 1985 enactment, the extent of insurance coverage provided by MSSIC under its per account rule was not unknown at various levels of government. *Preston Report* at 403 and 407. See also Special Savings and Loan Committee files on Senate Bill 576 (1984) (proposed amendment to the MSSIC statute that would have set a limit on total loss coverage for each depositor, opposed by the Division of Savings and Loan Associations and MSSIC, was defeated).

First, the words "each separate account" in former Article 23, §161SS did not stand in isolation. They were part of a sentence instructing MSSIC to "establish a limit" on its insurance of accounts. Insurance that in actual effect was unlimited was patently inconsistent with the legislative intent underlying this choice of language.

Second, the MSSIC statute implemented the Shriver Commission's recommendation of a system of private insurance with limited funds to insure accounts.⁹ In adopting that recommendation, the 1962 General Assembly could not have intended to sanction a device that jeopardized the solvency of MSSIC and the goal of depositor insurance. As the Special Counsel put it, "MSSIC, an insurer, took the extraordinary step in 1976 of voluntarily and vastly increasing its own liability." *Preston Report* at 144. Such an increase in risk cannot be viewed as compatible with the actions of a General Assembly that, in 1962, enacted reform legislation to correct a system under which "[m]any persons had lost their life savings." *MSSIC v. United States*, 308 F. Supp. at 763.

Third, an expansive reading of the words "each separate account" would fly in the face of the additional limit set in former Article 23, §161SS—that coverage may not exceed by more than \$10,000 "the amount of prevailing insurance available" from FSLIC. Again, in practical terms, the effect of MSSIC's bylaw amendment was to exceed FSLIC insurance limits, not by \$10,000, but by an open-ended amount.¹⁰

Fourth, the General Assembly elsewhere in the MSSIC statute referred to insurance of "all free share accounts," while plainly recognizing that such insurance was on a per depositor, not a per account, basis. Former Article 23, §150A provided as follows: "On or after July 1, 1973, all free share accounts of associations in this State shall be insured by the Federal Savings and Loan Insurance Corporation or the Maryland Savings-Share Insurance Corporation to the maximum limit prescribed by law." This provision was enacted in 1968, when MSSIC insured on the same per depositor basis

⁹See note 1 above and accompanying text.

¹⁰We also disagree with the VB & H letter's suggestion that the General Assembly could not have intended to "force on" MSSIC "the complexity" of FSLIC account rules. Whatever its nuances, the general principle of per depositor insurance has always been clearly set forth in federal law, at 12 U.S.C. §§1724 and 1728—provisions of which the General Assembly was presumably aware. See Sutherland, *Statutory Construction* at 51.06 ("[I]t may be presumed that the legislature had existing federal statutes relating to the same subject matter in mind when enacting the statute being construed.").

as FSLIC. *See* Chapter 479, Laws of Maryland 1968. Thus, the General Assembly's use of the phrase "each separate account" in former Article 23, §161SS was no more a warrant for per account insurance than was the phrase "all free share accounts ... shall be insured" in former Article 23, §150A.

Fifth, MSSIC's construction of former Article 23, §161SS cannot be justified as furthering some statutory goal of affording privately-insured savings and loans a competitive advantage over FSLIC institutions. The "primary purpose" of MSSIC was to insure savings and loan accounts, not to promote the business of such associations. *See MSSIC v. United States*, 308 F.Supp. at 763.¹¹

Finally, for nearly 12 years, MSSIC officials charged with the initial implementation of the 1962 statute insured accounts only on a per depositor basis. This consistent practice should have been given considerable weight. *See, e.g., State Farm Mut. Auto Ins. Co. v. MAIF*, 277 Md. 602, 605-06 (1976) (construction placed upon a statute by an administrative official soon after its enactment should not be disregarded except for the strongest and most cogent reasons).

In our view, the initial construction of the MSSIC statute—that it authorized only per depositor insurance, paralleling the terms of federal insurance—comports with the legislative intent. MSSIC acted in excess of its statutory powers when it adopted the per account rule in 1976.

IV

Effect of 1985 Legislation

In our opinion, Chapter 6, Laws of Maryland 1985 (First Special Session), requires the Fund to insure accounts established on or before May 18, 1985 on the same per account basis as MSSIC had insured them, even though all accounts established after that date are insured on a per depositor basis. There is simply no other way to read the uncodified Section 6 of Chapter 6. Insurance per ac-

¹¹The overall statement of State policy in FI §8-102(1)(ii) speaks of the public interest in promoting the "business and financial stability of savings and loan associations." MSSIC was an instrument intended to assure the latter; it was given no business promotion role.

count is unquestionably part of "the same terms and conditions of insurance" as under MSSIC. *See* Part II C above.

This legislative decision is not open to challenge on the speculative ground that the General Assembly acted on the basis of an incomplete or erroneous view of MSSIC's authority to have adopted per account insurance.¹² Nor is there any constitutional bar to the General Assembly's having implicitly ratified an *ultra vires* act of MSSIC.¹³

¹²The General Assembly is presumed to have had and acted with full knowledge of prior and existing law and legislation on the subject and the policy of the prior law. *Board of Education of Garrett County v. Lendo*, 295 Md. 55, 63 (1982). This presumption is rebuttable, and has been described by a leading commentator as "to put it charitably, ridiculous." Sykes, *A Modest Proposal for a Change in Maryland's Statutes Quo*, 43 Md.L.Rev. 647, 654 (1984). Nevertheless, it is regularly adhered to by the courts. Moreover, as noted in 16 Am.Jur.2d *Constitutional Law* §248 (1979):

"The validity of legislation which would be necessary or proper under a given state of facts does not depend on the actual existence of the supposed facts. It is enough if the lawmaking body may rationally believe such facts to be established. Under the American system of government by the people through their chosen representatives, practical legislation admits of no other standard of action. The fact that the finding of the legislature is in favor of the truth of one side of a matter as to which there is still room for difference of opinion is not material. What the people believe is for the common welfare, must be accepted as tending to promote the common welfare, whether it does in fact or not. It has been said that any other basis would conflict with the spirit of the Constitution and would sanction measures opposed to a republican form of government."

¹³Courts have regularly upheld subsequent legislative ratification of the *ultra vires* acts of public bodies. *Leonardo v. County Commissioners*, 214 Md. 287, 301-02 (1957); *Washington Suburban Sanitary Comm'n v. Noel*, 155 Md. 427, 432 (1928); 56 Am.Jur.2d *Municipal Corporations* §512; Sutherland, *Statutory Construction* §§41.15 *See also* *City of Baltimore v. State*, 281 Md. 217, 230 (1977) ("The mere fact that officials of the Executive Branch of the government may have failed to comply with a previously enacted statute furnishes no basis for invalidating a subsequent enactment by the Legislative Branch of the government. The contention that the General Assembly might have been misled ... is of no avail."). And there is authority upholding the legislative ratification of *ultra vires* acts of private corporations. *See* *Butler v. United States Savings and Loan Co.*, 37 S.W. 385 (Tenn. 1896); Sutherland, *Statutory Construction* §41.19.

V

Power to Change Basis of
Insurance from Per Account to Per Depositor

A. *Authority of the Fund*

To be valid, agency rules—and, indeed, any administrative action—must be “consistent with the letter and policy of the statute under which the agency acts.” *Comptroller v. Rockhill, Inc.*, 205 Md. 226, 233 (1954). See also 70 *Opinions of the Attorney General* 135, 136 (1985). 64 *Opinions of the Attorney General* 180, 184 (1979). Because Chapter 6 of the Laws of Maryland 1985 (First Special Session) expressly provides that “any account established on or before the effective date of this Act shall be subject to the same terms and conditions of insurance” under the Fund “as that account was subject” under MSSIC, the Fund may not impose a per deposit rule on those accounts. To do so would simply ignore the command of the statute.¹⁴

B. *Authority of the General Assembly*

In our opinion, the General Assembly may amend Chapter 6 so as to limit Fund insurance on pre-May 19, 1985 savings and loan accounts to coverage on a per depositor basis without offending the Contract Clause of Article I, §10 of the United States Constitution or other constitutional requirements. The provision in Chapter 6 that pre-May 19, 1985 accounts are “subject to the same terms and conditions of insurance under the [Fund] as ... under [MSSIC]” is simply not a constitutionally protected contract right.

First, the MSSIC insurance bylaw was not itself an absolute contract. In 70 *Opinions of the Attorney General* 180 (1985), we concluded that a provision of MSSIC’s bylaws that gave member associations a right to the return of their capital deposits under some circumstances “created no absolute contractual right” that would bind the Fund. 70 *Opinions of the Attorney General* at 196. Because the bylaw was subject to change at any time, the Fund had “the same right that MSSIC had to determine whether to continue to permit withdrawal of MSSIC member associations’ capital deposits.” *Id.*

¹⁴Although an agency might not act impermissibly when it retroactively changes unsettled law, see Davis, *Administrative Law Treatise*, §5.09 (1958), its action would be invalid if it contravened a statute.

We think that this reasoning applies as well to the MSSIC bylaw establishing the terms of its insurance. MSSIC changed it once, from per depositor to per account; presumably it could have changed it back at any time, at least before any insured losses had been quantified; and the General Assembly now has no less a right to change it from per account to per depositor.

Moreover, the MSSIC per account rule was beyond MSSIC's statutory authority, for the reasons set forth in Part III above. We are aware of nothing in Contract Clause jurisprudence that prevents the General Assembly from reforming an *ultra vires* contract. To the contrary, it is well-settled that the Contract Clause applies only "if the contract, when made, was valid by the Constitution and laws of the State." *Havemeyer v. Board of Supervisors*, 70 U.S. 294, — [18 L.Ed. 38, 42] (1866). See also *Local Division 589, Amalgamated Transit Union v. Commonwealth of Mass.*, 666 F.2d 618, 640 (1st Cir. 1981) ("uncertainty" as to a contract's legality under state law "would make reliance upon its lasting unreasonable").

Most importantly, whatever the nature of MSSIC's insurance obligation, the Fund's assumption of that obligation did not create an immutable contract between the State and the depositors. Chapter 6 did not direct the execution of a written contract, expressly guarantee any contract, or otherwise employ the language of contract. See *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway*, 470 U.S. 451, 466 (1985). Rather, Chapter 6 reflected a traditional exercise of the "police power". See *Veix v. Sixth Ward Building and Loan Ass'n*, 310 U.S. 32, 38-39 (1938).¹⁵ The General Assembly merely "declare[d] a State policy and direct[ed] a subordinate body to carry it into effect." *Dodge v. Board of Education*, 302 U.S. 74, 78 (1937). See also 70 *Opinions of the Attorney General* at 201.¹⁶

In sum, given the absence of a contractual or other property

¹⁵In *Veix*, the Supreme Court rejected a Contract Clause attack on a statute restricting depositor withdrawals from a building and loan association, stating that "[c]ertainly the protection of building and loan associations against the catastrophe of excessive withdrawal is, today, within legislative power." 310 U.S. at 41.

¹⁶No theory of estoppel would have obliged the State to incur MSSIC's insurance coverage. In *Mahoney v. FSLIC*, 393 F.2d 156 (7th Cir. 1968), the U. S. Court of Appeals for the Seventh Circuit rejected a depositor's claim that faulty advertising by a FSLIC-insured savings and loan and the federal agency's failure to adequately regulate obligated FSLIC to insure each of his three accounts to the legal maximum. See also *Michaels v. FSLIC*, 413 F.2d 144 (7th Cir. 1969).

right that could be impaired or divested by legislation mandating per depositor insurance coverage, the General Assembly is not precluded from adopting such a limitation.¹⁷

Although we find no constitutional objection to legislation that would apply per depositor coverage to all accounts insured by the Fund, we do suggest that any legislation of this kind take into account the special circumstances of Maryland savings and loan associations that themselves hold accounts in what were previously MSSIC-insured institutions. Before May 1985, some MSSIC member institutions engaged in the practice of issuing certificates of deposit ("CDs") to other MSSIC-insured institutions, and, of course, those CDs were insured on a per account basis. During negotiations between the Fund and FSLIC over federal qualification for former MSSIC members, FSLIC refused to recognize these CDs for the purpose of calculating net worth unless the Fund undertook to insure them on a per account basis and, if required, to redeem them within one year. Because we cannot predict what FSLIC's reaction would be if enactment of across-the-board per depositor coverage were to reduce the net worth of these now federally-insured institutions below FSLIC requirements, we recommend the following amendment to any such legislation:

"Notwithstanding any other provision of law, the State of Maryland Deposit Insurance Fund Corporation shall continue to provide insurance coverage for an account issued to or held by an association on or before May 18, 1985, insured by the Maryland Savings-Share Insurance Corporation, that has been or will be accepted, in whole or in part, by the Federal Savings and Loan Insurance Corporation for purposes of determining net worth in issuing insurance to such association on or after May 18, 1985."

¹⁷Because of our conclusion that no constitutionally protected contract right exists as a result of the MSSIC per account rule, there is no need to decide whether such a right has been "impaired." See *MSTA v. Hughes*, 594 F.Supp. 1353 (D. Md. 1984), *aff'd* — F.2d — (4th Cir. 1985). Nor need we consider whether State assumption of some but not all MSSIC liabilities "justly compensated" for an impairment, on the theory that depositor losses were reduced by government action. However, we do note that depositors of institutions in conservatorship on May 18, 1985 and whose accounts are still frozen cannot be said to have detrimentally relied on the State's present adherence to the per account rule.

In addition, because a modification of the insurance of pre-May 19, 1985 accounts would not violate the Contract Clause, it would likewise not violate the Due Process Clause. See *Pension Benefit Guaranty Corp. v. R. A. Gray Co.*, 467 U.S. 717 (1984). See also *MSTA v. Hughes*, 594 F.Supp. at 1372.

VI

Conclusion

In summary, it is our opinion that:

(1) MSSIC acted contrary to law when it changed, through a bylaw amendment, the basis of its insurance of savings and loan accounts from per depositor to per account.

(2) In Chapter 6 of the Laws of Maryland 1985 (First Special Session), the General Assembly unambiguously provided that accounts established on or before May 18, 1985 were to be insured by the Fund on the basis of MSSIC's per account rule, even though accounts opened after that date were to be insured on a per depositor basis parallel to that of FSLIC.

(3) Although the effect of Chapter 6 cannot be undone by administrative action or a rule change, it is constitutionally permissible for the General Assembly to enact a law providing that pre-May 19, 1985 accounts are to be insured on a per depositor basis only.

STEPHEN H. SACHS

Attorney General

ROBERT A. ZARNOCH

Assistant Attorney General

JACK SCHWARTZ

Chief Counsel

Opinions and Advice

August 17, 1976

Mr. Harry B. Wolf, Jr.

Executive Vice President

*Maryland Savings-Share Insurance
Corporation*

Baltimore Life Building

901 North Howard Street

Baltimore, Maryland 21201

Dear Mr. Wolf:

You have requested our opinion concerning the meaning of one section of the Charter of the Maryland Savings-Share Insurance Corporation ("MSSIC") which establishes a limit on the amount of insurance which may be provided to the holders of accounts in member associations. The section, which appears in Article 23 of the Annotated Code of Maryland as §161SS, reads in part as follows:

As one of such rules and regulations the board of directors from time to time shall establish a limit on the amount of insurance which may be provided for each separate share account of any association; and this limit may not exceed by more than the sum of \$10,000.00 the amount of prevailing insurance available from the Federal Savings and Loan Insurance Corporation or its successor instrumentality from time to time.

Pursuant to this enabling statute, MSSIC has recently adopted a provision in Article VII, §2 of its By-Laws which states that:

The limit of insurance liability for which the Corporation may be required to pay for each separate share account of any association may not exceed by more than the sum of \$10,000 the amount of prevailing insurance available from the Federal Savings and Loan Insurance Corporation or its successor instrumentality from time to time.

This provision amended the previous Article VII, §2 by replacing the words "any one free share account" with the words "each separate share account of any association". As we understand the situation, the purpose of this amendment was to clarify MSSIC's intent to provide insurance for each share account *as those accounts appear on a member's records*. Thus, supposing that an individual were to open several accounts with a MSSIC member, using the same name for each account, and that the MSSIC member permitted this duplication, the individual would be insured for the full amount of insurance on each of the accounts.

We also understand that MSSIC in the past has issued to its members a general set of criteria, to be used by members in determining insurance coverage, which combined separate accounts having a single ownership into a single account for insurance purposes. Presently, MSSIC is sending out a new circular which states that each account appearing on a member's books shall receive full insurance coverage.

In adopting this new practice of providing full insurance coverage for each separate account appearing in a member's records,

MSSIC is relying upon the plain meaning of the words "each separate share account of any association", which tends to indicate that each account recorded in a member's records may receive insurance up to the full limit permitted in MSSIC's Charter. As for the meaning of "account", MSSIC adopts the position that reference to a member's records provides the most obvious determination of how many "accounts" a member has at any one time.

We believe, with the qualifications stated below, that MSSIC's interpretation of its power to insure, granted by §161SS of its Charter, is a reasonable interpretation, and has the added advantage of setting forth a simple, definable means of determining the insurance coverage of any one individual or business.

The major problem which we believe MSSIC faces in interpreting its Charter in this manner stems from the fact that MSSIC's Charter, by making reference to the insurance limits of the Federal Savings and Loan Insurance Corporation ("FSLIC") as a limit on MSSIC's *own* insurance coverage, is obviously designed to achieve some sort of parity between MSSIC's insurance limits, on the one hand, and those of FSLIC on the other. We do not have a detailed knowledge of why this reference to FSLIC was inserted in MSSIC's own Charter, but it stands to reason the reference reflects a realization by the Maryland legislature that MSSIC members could secure a competitive advantage over federally-insured savings and loan associations by providing insurance far in excess of that which is available from FSLIC. As you know, FSLIC has promulgated a very complex set of regulations, which appear in Title 12, Part 564 of the Code of Federal Regulations, which treat various types of ownership interests and combinations of accounts as single accounts for insurance purposes. These regulations in their present form date back to 1967, and have been substantially amended since that time. The regulations, in turn, have been promulgated pursuant to §§401 and 404 of the National Housing Act, which require the combination of certain accounts for purposes of determining insurance coverage. The Federal Deposit Insurance Act also requires that certain accounts be treated as single accounts for insurance purposes, and regulations have been adopted by the Federal Deposit Insurance Corporation which closely parallel the regulations adopted by FSLIC.

MSSIC's authority to insure accounts as they appear on member's records could be challenged in a variety of ways. An institution insured by FSLIC, for instance, might complain to the Division of Building, Savings and Loan Associations ("Division") regarding

the practice, or commence a declaratory judgment action to interpret MSSIC's Charter in the State courts.

If any such proceeding was commenced, MSSIC, as noted before, could initially defend its position by pointing to the plain meaning of the words "each separate share account" in its Charter. Other points which MSSIC could use in favor of its being able to take such action are (1) the absence of any single standard definition of an "account", which applies to all state and federal banks and/or savings associations and (2) the complexity of the federal regulations published by FSLIC which define "account" for purposes of federal insurance coverage. On this latter point, you could stress the fact that it was FSLIC's decision—not MSSIC's—to adopt such a set of complicated regulations, and that to automatically force the application of those regulations upon MSSIC by reference would substantially interfere with the authority and discretion of your group.

In conclusion, we would state that you have strong arguments favoring your ability to define "accounts" in a manner which differs somewhat from the definition of "accounts" in the FSLIC regulations, so long as you adopt some rational means of determining what is an "account". Reference to member's records appears to provide such a means. We would further stress, however, that your Charter does indicate a general intent to create some kind of competitive parity between those associations insured by MSSIC and those associations insured by FSLIC. If MSSIC's recent action in amending its By-Laws was perceived as a competitive maneuver by the Division or a court, or if MSSIC members, for instance, were to encourage a proliferation of accounts for the purpose of providing additional insurance coverage, or were to advertise the distinction between federally and state-insured associations, we believe that a court, or the Division, might well focus on this policy statement in MSSIC's Charter and determine that the words "each separate share account" must be interpreted by MSSIC in a manner which fulfills that policy as well as providing you with an easily-determinable measure of your potential liability. For the time being, however, we suggest that you defend your recent amendment as being consistent with your Charter authority.

Very truly yours,

VENABLE, BAETJER AND HOWARD

JACQUES T. SCHLENGER

SOCIAL SERVICES

CHILD ABUSE—PERSONAL INFORMATION CONCERNING INDIVIDUALS INVOLVED IN A CHILD ABUSE CASE IS CONFIDENTIAL, BUT INFORMATION ABOUT THE HANDLING OF THE CASE BY THE LOCAL DEPARTMENT OF SOCIAL SERVICES MAY BE DISCLOSED UNDER CERTAIN CONDITIONS.

July 25, 1986

Mr. Frank Farrow
Executive Director
Social Services Administration

You have requested our opinion on whether any information relating to a case of alleged child abuse may be disclosed to the public.

As we discuss in detail below, information about a case of alleged child abuse generally may not be disclosed, because Article 88A, §6(b) of the Maryland Code mandates that "all records and reports concerning child abuse or neglect" be kept "confidential." This law, which conforms to federal requirements, prohibits disclosure in order to assure the privacy of those involved in an alleged incident.

Yet the public has a vital interest in seeing to it that those responsible for child protective services are doing their job properly and are provided with adequate resources. The agencies involved have no privacy interest to be protected; on the contrary, the public interest requires that they be held accountable for their performance, like any other part of government. And true accountability depends, in turn, on some degree of public scrutiny of their performance. Thus, we believe that the pertinent statutes and regulations can and should be construed to permit the fullest possible disclosure regarding agency performance, consistent with the legally mandated preservation of personal privacy.

For these reasons, as elaborated below, we conclude as follows regarding the scope of permissible disclosure: If abuse has resulted in the death of a child and if the parent or other caretaker has been arrested on charges related to that abuse, the custodian of pertinent records may disclose the following information: (i) whether the child had ever been the subject of a report of suspected abuse, (ii) the date on which any such report was received, (iii) the dates

on which the local department of social services initiated and completed its investigation into the validity of the report, and (iv) the general nature of the department's investigation.¹

I

Reports and Records of Child Abuse

Anyone who has reason to believe that a child has been abused must report that belief to the local department of social services or to the police. §§5-903 and 5-904 of the Family Law Article ("FL" Article).² Health practitioners, police officers, educators, and social workers are required by FL §5-903(b) to make both oral and written reports, which are to include, to the extent possible, the following information:

¹However, if disclosure would be contrary to the public interest for some specific reason, the information may be withheld. *See* note 11 below.

We also point out that, although we refer below to disclosure by the Social Services Administration, the restrictions on disclosure discussed in this opinion are broadly phrased and apply not only to social services agencies but also to any agency that has received records or reports of child abuse. Thus, for example, a local State's Attorney who has received a copy of a report is subject to the restrictions in Article 88A, §6(b) of the Maryland Code when responding to press inquiries. However, disclosure to a defendant in a subsequent criminal action would be governed by applicable constitutional principles and procedural rules regarding criminal discovery. *See* Rule 4-263.

²Child abuse is defined as follows:

" 'Abuse' means:

(1) the sustaining of injury by a child as a result of cruel or inhumane treatment or as a result of a malicious act by any parent or other person who has permanent or temporary care or custody or responsibility for supervision for a child under circumstances that indicate that the child's health or welfare is harmed or threatened thereby; or

(2) sexual abuse of a child, whether physical injuries are sustained or not." FL §5-901(b).

Sexual abuse is further defined as any act that involves "sexual molestation or exploitation of a child by a parent or other person who has permanent or temporary care or custody or responsibility for supervision of a child." FL §5-901(j)(1). Thus, an assault against a child by a person who is not a custodian or caretaker of the child, while it is certainly a criminal act, is not "child abuse." Put another way, every report of suspected child abuse necessarily implicates a parent, guardian, custodian, or other caretaker of the child.

- “(1) the name, age, and home address of the child;
- (2) the name and home address of the child’s parent or other person who is responsible for the child’s care;
- (3) the whereabouts of the child;
- (4) the nature and extent of the abuse of the child, including any evidence or information available to the reporter concerning previous injury possibly resulting from abuse; and
- (5) any other information that would help to determine:
 - (i) the cause of the suspected abuse; and
 - (ii) the identity of any individual responsible for the abuse.” FL §5-903(c).

All other persons who have reason to believe that a child has been abused are likewise required to “report the belief,” either orally or in writing. FL §5-904.³

Regardless of the form or source of the report, the local department of social services or the appropriate law enforcement agency must initiate an investigation. The immediate duty—“[w]ithin 24 hours after receiving the report of suspected abuse”—is to see the child, attempt to interview the child’s caretaker, and decide on the safety of the child and other children in the home. FL §5-905(a)(2). Thereafter, the investigation is to include:

- “(1) a determination of the nature, extent, and cause of the abuse, if any; and
- (2) if the suspected abuse is verified:
 - (i) a determination of the identity of the person or persons responsible for the abuse;
 - (ii) a determination of the name, age, and condition of any other child in the same household;
 - (iii) an evaluation of the parents and the home environment; and

³The reports required by FL §§5-903 and 5-904 are to be made either to the local department of social services or to the State or local police. The agency that receives the report is required to notify the other agency. FL §§5-903(b)(2) and 5-904(b). *See also* FL §5-903(b)(1)(ii) (copy of report to local State’s Attorney).

(iv) a determination of any other pertinent facts or matters." FL §5-905(b).

Those findings must be embodied in a written report to the local State's Attorney and to the Social Services Administration ("SSA"). FL §5-905(f)(2)(ii) and (g); COMAR 07.02.07.07I.

Thus, social services agencies have information of a highly personal nature about the individuals involved in a child abuse case. Both federal and State laws and regulations pertaining to child abuse contain provisions designed to protect the privacy of those individuals.

II

Statutory and Regulatory Confidentiality Provisions

A. Federal Statute and Regulations

The federal Child Abuse Prevention and Treatment Act authorizes the Secretary of Health and Human Services to make grants to the states to assist "in developing, strengthening, and carrying out child abuse and neglect prevention and treatment programs." 42 U.S.C. §5103(b)(1). To qualify for such a grant, a state must, among other things, "provide for methods to preserve the confidentiality of all records in order to protect the rights of the child, and the child's parents or guardians." 42 U.S.C. §5103(b)(2)(E).

Regulations adopted by the Department of Health and Human Services ("HHS") under that provision of the federal Act require states to "provide by statute that all records concerning reports and reports of child abuse and neglect are confidential and that their unauthorized disclosure is a criminal offense." 45 C.F.R. §1340.14(i)(1). However, the regulations also provide that state statutes may permit release of such reports to various persons and entities who may need the information to investigate the report of suspected abuse or to provide services to the child or the child's family; to the child named in the report or a person responsible for the child's welfare; or to a state or local official responsible for administration or oversight of child protective services. 45 C.F.R.

§1340.14(i)(2)(i) through (xi).⁴

B. *State Statutes and Regulations*

Maryland is a grant recipient and has, accordingly, taken the necessary steps to comply with federal confidentiality requirements. Article 88A, 6(b) of the Maryland Code provides that, with limited exceptions, "all records and reports concerning child abuse or neglect are confidential." The exemptions to that prohibition against disclosure parallel the types of disclosure permitted under the HHS regulations. *Compare, e.g.*, 45 C.F.R. §1340.14(i)(2)(i) and (iv) with Article 88A, §6(b)(2) (disclosure permitted to those investigating a report of a child abuse or providing services to the child or family).⁵

This concern for the protection of personal privacy is also reflected in the more general provisions of the Maryland Public Informa-

⁴The authorization for disclosure to a person responsible for the child's welfare requires protection of the identity of the person who reported the alleged abuse and of others who would be endangered by disclosure. 45 C.F.R. §1340.14(i)(2)(viii). HHS also permits disclosure to researchers, "but without information identifying individuals named in a report or record." 45 C.F.R. §1340.14(i)(2)(xi).

⁵As amended by Chapter 234, Laws of Maryland 1986 (House Bill 882), Article 88A, §6(b) authorizes the following disclosures:

"(1) Under a court order;

(2) To personnel of local or State departments of social services, law enforcement personnel, and members of multidisciplinary case consultation teams, who are investigating a report of known or suspected child abuse or neglect or who are providing services to a child or family that is the subject of the report;

(3) To local or State officials responsible for the administration of the child protective service as necessary to carry out their official functions;

(4) To a person who is the alleged child abuser or the person who is suspected of child neglect if that person is responsible for the child's welfare and provisions are made for the protection of the identity of the reporter or any other person whose life or safety is likely to be endangered by disclosing the information;

(5) To a licensed practitioner who, or an agency, institution or program which is providing treatment or care to a child who is the subject of a report of child abuse or neglect; or

(6) To a parent or other person who has permanent or temporary care and custody of a child, if provisions are made for the protection of the identity of the reporter or any other person whose life or safety is likely to be endangered by disclosing the information."

tion Act ("PIA"). *See* §10-612(b) of the State Government Article ("SG" Article). Under SG §10-616(b), "[a] custodian shall deny inspection of public records that relate to welfare for an individual." Further, SG §§10-626 and 10-627 subject to civil and criminal liability anyone who willfully and knowingly permits inspection of a public record that names or otherwise identifies an individual and that is prohibited by the PIA.

Regulations adopted by the Department of Human Resources ("DHR") likewise require SSA to protect the confidentiality of "[a]ny information relating to individuals, whether recorded or not, which is acquired in the course of performance of official duties." COMAR 07.01.02.01. The focus of those confidentiality regulations generally is on protecting the privacy of individuals who receive services from SSA. *See* COMAR 07.01.02.04 (restricting disclosure of information for purposes other than its use by SSA or Income Maintenance Administration).

In particular, the regulations that apply to SSA focus on ensuring that reports of suspected child abuse are made to the local departments in complete confidentiality and on protecting the privacy of the subjects of such a report. For example, the Central Registry of child abuse cases, maintained by SSA, generally includes data concerning each reported case of suspected child abuse but eliminates identifying information about the child or the child's caretakers if investigation of a particular case has ruled out the possibility of child abuse. COMAR 07.02.07.08B(1). Information from the Central Registry may be made available (other than to protective services staff and law enforcement personnel) only in the form of demographic and statistical data that "do not identify particular persons or cases." COMAR 07.02.07.08C(2).

III

Scope of Permissible Disclosure

A. Background

Tragic events sometimes bring particular cases of child abuse to the public's attention. Of late, several children have died from maltreatment for which adults have been arrested on child abuse

or related charges.⁶ In such cases, there is strong and understandable public demand for information regarding the case and its handling by the local department of social services.

Certainly, SSA may—and, we understand, routinely does—explain the procedure by which any report of suspected child abuse is investigated. The press and public, however, seek more particularized and detailed information—for example, whether the child or the alleged abuser was the subject of any report; if so, the precise nature of the local department's investigation; and the determinations made or actions taken by the department.

B. Disclosure Prohibited Under All Circumstances

The various confidentiality statutes and regulations discussed in Part II above make it very clear that SSA is prohibited from publicly disclosing the identity of the person who made a report of suspected abuse, the nature and extent of the child's injuries that prompted the report; the identity of the alleged abuser; information obtained in the local department's investigation or the sources of that information; or the evaluations of the child's family and home made in the course of the investigation.

Nor, under most circumstances, may SSA disclose even the bare fact that a report had been received concerning the child or the alleged abuser. In most cases, disclosure of that fact in itself would necessarily invade the privacy of the child and of those who would be suspected, rightly or wrongly, of having abused the child. The broadly worded confidentiality provisions clearly are designed to prevent that result. *Cf.* 65 *Opinions of the Attorney General* 365, 367 (1980) (obvious purpose of PIA's exemption of personnel files from disclosure "is to preserve the privacy of personal information").

C. Disclosure Permitted Under Limited Circumstances

Nonetheless, the statutory confidentiality provisions are *not* intended to shield from public scrutiny the functioning of child pro-

⁶"Recent child abuse deaths spur state to seek better protection," *Baltimore Sun*, June 30, 1986 at D1, col. 2. Under Article 27, §35A, child abuse is a felony separate from and in addition to any other criminal charge that may stem from a child's injury or death. *Anderson v. State*, 61 Md. App. 436, 448-49, 459 (1985). Child abuse is punishable by up to 15 years' imprisonment.

tective services. Whether a local department carried out its responsibilities properly in a particularly tragic case of child abuse is a matter of vital public concern, and we believe that the statutory restrictions should be construed to permit disclosure of facts about local department performance—if, but only if, disclosure does not compromise the privacy interests that the restrictions require be protected.

A rigid insistence on complete confidentiality with regard to every aspect of the agency's handling of the case would accomplish nothing more than to deny public access to information concerning the quality of agency performance. In our view, a reading of Article 88A, §6(b) that would apply the provision to matters beyond the privacy interests underlying the restrictions would derogate both the public interest and the "cardinal rule in the construction of statutes [which] is to effectuate the real and actual intention of the Legislature." *State v. Fabritz*, 276 Md. 416, 421 (1975). "[S]tatutes are to be construed reasonably with reference to the purpose to be accomplished, ... and in light of the evils or mischief sought to be remedied." *Id.* (citations omitted). The "purpose to be accomplished" by Article 88A, §6(b) is the protection of the privacy of persons involved in a report of child abuse, as required by federal law. Our construction of §6(b) follows from this purpose. *See Holy Cross Hospital v. Health Services Cost Review Comm'n*, 283 Md. 677, 686 (1978).

The law permits limited disclosure of particular information only if two events have already taken place: the abused child has died of his or her injuries; and a parent, guardian, or other caretaker of the child has been arrested on charges of inflicting the abuse. In such a case, complete confidentiality is obviously no longer justified by the need to protect the privacy of that child. *Cf.* Restatement (Second) of Torts §652I (1977). Nor would a complete refusal to disclose any information protect the pertinent privacy interest of the arrested person, whose arrest is itself a matter of public record subject to disclosure in the absence of a court order to the contrary. 63 *Opinions of the Attorney General* 543, 548 (1978).

Accordingly, if these two events have occurred, SSA may disclose whether that child had ever been the subject of a report of a suspected abuse, the date on which any such report was received, and the dates on which the local department of social services initi-

ated and completed the investigation required by FL §5-905.⁷ Public disclosure of the general nature of the department's investigation—for example, that a representative of the department visited the child's home—would be permissible. However, the specific details of that investigation, the information obtained, and the sources of the information may not be disclosed.

In our view, disclosure of this kind, under this set of circumstances, would not constitute disclosure of a record or report “concerning child abuse” within the meaning of Article 88A, §6(b). Rather, such limited disclosure would essentially concern only the functioning of the local department of social services.⁸

Neither Article 88A, §6(b) nor DHR's regulations anywhere define the records that “concer[n] child abuse.” Notably, however, the regulations governing child abuse cases consistently use the term “report” to mean a statement that the person making the report has reason to believe that a particular child has been abused. *See* COMAR 07.02.07.04 to .07.⁹ Those regulations use the term “record” to mean the written documentation of the report and of the information obtained and determinations made in the course of the investigation into that report. *See* COMAR 07.02.07.10-1 and .11. That is, SSA's own regulations appear to regard a “record” or “report” as the detailed, personal information about the child and the child's family in which those individuals clearly have a privacy interest. Those terms do not logically extend to information concerning social services agencies' performance that does not implicate such privacy interests.

For like reasons, we believe that public disclosure of limited information concerning agency performance in cases of this type would not contravene federal law and regulations. The federal Child Abuse Prevention and Treatment Act requires states to maintain confidentiality “in order to protect the rights of the child, and

⁷In a particular case, the alleged abuser may have previously been the subject of a report of abuse of a different child. Disclosure of that fact would be permissible only if the identity of the other child could be concealed. As noted above, we think it is clear that each child has a right to privacy concerning whether he or she has ever been the subject of such a report.

⁸We caution, however, that this conclusion cannot be extended by analogy to any other situations. In every case except one of the type we have described, at a minimum one or the other of the allegedly abused child or the suspected abuser has a right to privacy that must be respected.

⁹The one exception to this consistent usage is COMAR 07.02.07.07I, which uses “report” to describe the local department's duty to provide certain information.

the child's parents or guardians." 42 U.S.C. §5103(b)(2)(E). Where those rights are not at stake, the purpose of the confidentiality provision does not require refusal to disclose information.

Similarly, the federal regulations relating to state child abuse programs require protection of both "records concerning reports and reports of child abuse." 45 C.F.R. §1340.14(i)(1). These records are to be kept confidential because they concern the persons involved in an incident of alleged child abuse. *See also* C.F.R. §1340.20 (programs other than those of state agencies must hold in confidence information "related to personal facts or circumstances about individuals").

Indeed, the HHS regulations expressly do not prevent "summarizing the outcome of an investigation to the person or official who reported the known or suspected instances of child abuse." 45 C.F.R. §1340.14(3). That is, the agency charged with administering the federal statute has interpreted its confidentiality provision as permitting limited disclosure of information that would impair, to some degree, the privacy interests of those involved in the alleged abuse. In light of this construction, we think that the federal regulations can properly be read as permitting disclosure, in the public interest, of information that would *not* impair personal privacy.

Further, we think the disclosure of such information would comport with the general purpose of the federal Act and regulations—to promote the establishment and conduct of effective state programs to prevent and treat child abuse. *See* H.R. Rep. No. 5, 93d Cong., 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Ad. News 2763, 2765-66 (explaining need for enactment of legislation). Public disclosure of information concerning the quality of performance by social services agencies in handling child abuse cases would certainly promote the effectiveness of those agencies. Such disclosure would enable the public to clearly identify any improvements in the organization, administration, staffing, or funding of those agencies that may be needed to improve their ability to serve children who are in need of protection.¹⁰

HHS itself takes the view that its regulations should be construed to permit disclosure in the interest of preventing child

¹⁰The Governor's Task Force on Child Abuse and Neglect has stated that efforts to prevent child abuse are presently adversely affected by insufficient staff to handle the agencies' large caseloads and inadequate funding for programs to prevent, detect, and treat child abuse. Governor's Task Force on Child Abuse and Neglect, Final Report at 108-11 (December, 1985).

abuse. In 1985, HHS proposed regulatory amendments specifically authorizing disclosure of full information to directors of child day care centers, agencies that license or regulate such centers, and foster care or adoption agencies. 50 Fed. Reg. 16,105 (1985). Those amendments were proposed "to prevent known abusers from being placed in settings where they would have first hand contact with children or from being approved as a foster parent or an adoptive parent." 50 Fed. Reg. at 16,107. At the same time, HHS announced that it would interpret its already adopted regulations to permit such disclosure, "in view of our efforts to assist States to protect children. We believe that such a limited expansion of access to child abuse reports and records could serve to prevent some significant number of child abuse incidents in the future." 50 Fed. Reg. at 16,108.

In our opinion, the very limited public disclosure we have described, by assisting in identifying needed improvements in this State's child protective services, also "could serve to prevent some significant number of child abuse incidents in the future." Therefore, we believe that HHS would not construe its regulations to prohibit such disclosure.

Finally, we think this disclosure would not violate SG §10-616(c). That provision prohibits disclosure of "public records that relate to welfare for an individual"—that is, personal information concerning applicants for or recipients of the various forms of assistance and services provided by social services agencies. However, SG §10-612, in furtherance of the public's right to "information about the affairs of government and the official acts of public officials and employees," requires that the provisions of the PIA be construed in favor of disclosure "unless an unwarranted invasion of the privacy of a person in interest would result." We reiterate that disclosure of information concerning the response of a local department of social services to a report of suspected child abuse would not, in the circumstances we have outlined, invade the privacy of a person in interest with regard to that report. Hence, in accordance with SG §10-612(b), we think that SG §10-616(c) should not be construed to prohibit disclosure of that information.¹¹

¹¹At the same time, we wish to make it clear that disclosure is not, in our opinion, necessarily always required. In a particular case, disclosure of any information regarding whether the child or the alleged abuser had previously been the subject of a report might be prejudicial to a civil or criminal investigation or otherwise adversely affect the public interest in a specific way:

"In determining whether, in an individual case, disclosure would result

Thus, in our view, the relevant provisions of both State and federal law can and should be read to permit limited disclosure of information concerning the performance of social services agencies, in cases in which a child has died as a result of abuse and an adult responsible for the care of that child has been arrested on charges stemming from the abuse. Disclosure of that information would serve the public interest in access to information concerning the functioning of governmental agencies without infringing the legally protected privacy rights of the individuals involved in a child abuse case.

IV

Conclusion

In summary, it is our opinion that, although public disclosure of information related to alleged child abuse is prohibited by law if personal privacy interests would be impaired, information related to agency performance may be disclosed to the public under some circumstances. Specifically, limited disclosure is permissible in a case in which a child has died as a result of abuse and a parent or other person who had permanent or temporary care or custody of that child has been arrested on charges related to that abuse. In such a case, SSA may disclose (i) whether the child had ever been the subject of a report of suspected abuse, (ii) the date on which any such report was received, (iii) the dates on which the local department of social services initiated and completed its investigation into the validity of the report, and (iv) the general nature of the department's investigation. All other disclosure of information contained in reports of suspected child abuse or in the local departments' records relating to such reports—including whether any re-

in one of the consequences listed in [SG §10-618(f)(2)]—or some other consequence that would make a disclosure contrary to the public interest—the custodian cannot simply state that this is so. Rather, he must carefully consider whether that consequence is likely or possible and, then, objectively balance that possibility (and the conclusion that the disclosure would be contrary to the public interest) against the asserted public interest in favor of disclosure.” 64 *Opinions of the Attorney General* 236, 242 (1979).

In such a case, SSA has authority to refuse to disclose the information. See SG §10-618(f) (investigatory records and files not otherwise confidential may be withheld if disclosure would be contrary to public interest).

port was ever received with respect to a particular person—must be kept confidential in accordance with Article 88A, §6(b).

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Editor's Note: The reporting and investigation requirements set out in Part I of this opinion have been recodified and substantively amended. They appear at FL §§5-704, 5-705, and 5-706.

UTILITIES

FRANCHISES—MUNICIPAL CORPORATIONS—SCOPE OF MUNICIPAL
AUTHORITY OVER UTILITY WITH STATEWIDE FRANCHISE.

August 8, 1986

Robert E. Watson, Esquire
Counsel for Mountain Lake Park

You have requested our opinion on whether the Town of Mountain Lake Park may require the Potomac Edison Company to have a town franchise; may regulate the company's operations within the town; and may levy on the company a franchise, pole rental, or right-of-way agreement fee.

For the reasons stated below, we conclude that the Potomac Edison Company has a State franchise conferred by Article 23, §340. The State retains the power to impose reasonable regulations and to seek reasonable compensation for the exercise of this franchise and may delegate this power to the subdivisions. In the absence of such a delegation to the State's municipal corporations, the Town of Mountain Lake Park may not regulate and seek compensation for the exercise of this franchise. However, the Town may require the utility to move company equipment located on public property at company expense to further a governmental purpose.

I

Background

In your letter requesting this opinion, you indicated that the town desires to widen some of its 16-foot streets within the established 50-foot right-of-way. This work would require moving some of the utility poles of the Potomac Edison Company and the company has demanded that it be paid \$1,000 for each pole that it relocates. You also mentioned that, in the course of operating and maintaining its power plant in the town, the company has damaged some of the town's streets but the company has declined to pay for the necessary repairs.

Moreover, the company has taken the position that it would not be subject to any franchise ordinance the town might enact, on the

ground that the company enjoys a Statewide franchise. Although the company does not directly contest the authority of the town to levy a pole rental fee, it has requested that it be provided with the basis for any such authority. In light of the company's position, the town is interested in ascertaining what authority it might have to adopt a franchise ordinance to regulate the company within its jurisdiction and to levy reasonable franchise, pole rental, or right-of-way agreement fees.

II

Grant of Franchises Generally

The general rule is that "[t]he streets of a city or town are held by a municipal corporation in trust for the public, to be used for the purposes of travel and such other uses as customarily pertain thereto." *Adams v. Comm'rs of Trappe*, 204 Md. 165, 171 (1954). The use of public property by a limited number of persons for some special purpose is a franchise that can only be granted by the State. Hence, the use of the streets by a company for the purpose of distributing electric power requires the granting of a franchise. *Johnson v. Consolidated Gas, Elec. Light & Power Co.*, 187 Md. 454, 459 (1947), or a duly authorized municipal corporation. *Purnell v. McLane*, 98 Md. 589, 592 (1904).

The granting of a franchise is regarded as a legislative function. *Charles County Sanitary Dist., Inc. v. Charles Util., Inc.*, 267 Md. 590, 598 (1973). Although a franchise may be granted in perpetuity [*Crisfield v. Public Serv. Comm'n*, 183 Md. 179, 193 (1944)] and without compensation [*Purnell v. Ocean City*, 162 Md. 169, 174 (1932)], the right to a franchise is not to be presumed. *McLane*, 98 Md. at 594. The claim of a franchise must be supported by a clear and unambiguous legislative enactment and to doubt the claim is to deny it. *Id.*

Once a franchise is accepted, it is regarded as a contract. *Crisfield*, 183 Md. at 199. Both public and private contracts are, of course, subject to the protection of the Federal Constitution against the states "impairing the Obligation of Contracts." Art. I, Sec. 10, cl. 1. However, this prohibition is not absolute and contracts may be substantially modified for a "significant and legitimate public purpose." *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 411 (1983).

Moreover, the mere granting of a franchise does not preclude regulation of its use, because this power is impliedly reserved by the contract. *Crisfield*, 183 Md. at 199-200. *See also Kahl v. Consolidated Gas, Elec. Light and Power Co.*, 191 Md. 249, 261 (1948). Thus, in the absence of applicable law to the contrary, a public utility may be required to move its facilities in or under public streets at its own expense in furtherance of projects of a governmental nature. *Mayor and Council of Baltimore v. Baltimore Gas and Elec. Co.*, 232 Md. 123, 131 (1963). Likewise, the mere granting of a franchise does not preclude the levying of fees for the use of public property that the franchise permits. *See Johnson v. Consolidated Gas, Elec. Light & Power Co.*, 187 Md. at 460 (citing cases). Although a franchise undoubtedly could by express terms confer the power to use the streets without compensation, it is not to be supposed that a franchise confers such power. *Postal Tel. Cable Co. v. Baltimore*, 79 Md. 502, 509-510 (1894), *aff'd* 156 U.S. 210 (1895). Thus, in *Chesapeake & Potomac Telephone Co. v. State Roads Comm'n*, 134 Md. 1, 4-6 (1919), the Court of Appeals held that a statute allowing telephone and telegraph companies to use the State's highways for their poles, wires, and other fixtures did not preclude the State from seeking compensation for that use when it acquired a road along which telegraph poles and wires had been erected.

III

Article 23, §340 Franchises

Article 23, §340 of the Maryland Code, the statute under which the Potomac Edison Company claims to have a Statewide franchise, provides as follows, in relevant part:

"Any of the corporations formed under class thirteen, §28 of this article, as codified by the Code of 1904, shall have the power which is conferred upon telegraph companies incorporated under this article by §318, and may construct and lay any part of its line or lines underground or any route for which it is authorized to construct such lines in whole or in part, above ground, and the corporation may acquire by condemnation any property or right whatsoever necessary for its purposes in its discretion, either in fee simple or the use thereof in fee simple, or for a less estate, in the manner set forth in Title 12 of the Real Property Article of the Code."

Section 340, which was originally enacted as Chapter 16l of the Laws of Maryland 1886, also requires local approval for use of the streets in Baltimore City.

The "class thirteen" corporations having the power conferred by §340 are those that construct, own, or operate telegraph or telephone wires in this State and maintain their principal office here, and those that transact "any business in which electricity over or through wires may be applied to any useful purpose." Article 23, §28 of the Maryland Code of 1904. The "power which is conferred upon telegraph companies ... by §318," and which §340 also confers on telegraph, telephone, and electric companies by reference, is defined in §318 as follows:

"It may construct a line or lines of telegraph through this State, from or to any point or points within this State, or upon the boundaries thereof, and along and upon any postal roads and postal routes, roads, streets and highways, or across any of the bridges or waters within the limits of this State, by the erection of the necessary fixtures, including posts, piers or abutments for sustaining the cords or wires of such lines, without their being deemed a public nuisance, or subject to be abated by any private party; provided, the same shall not be so constructed as to incommode injuriously the public use of said postal roads or postal routes, roads, highways and bridges or injuriously interrupt the navigation of said waters, or interfere with the convenience of any landowner more than is unavoidable."

Section 318 also provides that such corporations are liable for the damages that they cause in erecting or using such fixtures.

In an opinion interpreting what is now §340, this office said in 1925 that "no approval of any municipality of the State except the City of Baltimore is required for the construction and operation of a telegraph, telephone or electric light system in the State." 10 *Opinions of the Attorney General* 226, 228 (1925). However, in a court case two years later, the Court of Appeals concluded that what was claimed as a Statewide franchise under §340 (then §337) was subject to a local law requiring municipal consent if the utility had not yet exercised its franchise in that locale. *Kelly v. Consolidated Gas Elec. Light and Power Co.*, 153 Md. 523, 530-532, and 537 (1927). Although the Court of Appeals has recognized that what is now §340 confers a franchise to construct lines along streets, highways, and the like "within the State," it has noted that

the exercise of the franchise is subject to the limitations of what is now §318, including not "incommod[ing] injuriously the public use of" those ways. *See Johnson v. Consolidated Gas, Elec. Light & Power Co.*, 187 Md. at 459. The Court of Appeals also noted in *Johnson* that these utilities "are liable for proper compensation for these franchise rights." 187 Md. at 460.

IV

Potomac Edison's Franchise

Although we are advised by Potomac Edison that electric service was established in Mountain Lake Park by West Maryland Power Co. in 1923, it is not clear that there was then a valid franchise for doing so. On May 23 of that year, the annual meeting of the Community of Mountain Lake Park passed an ordinance that granted to the West Maryland Power Co. the right to supply electric service in and through the community for a period of 50 years. Although Mountain Lake Park did not become a municipal corporation until 1931 [Chapter 507, Laws of Maryland 1931], the Community of Mountain Lake Park was incorporated by Chapter 430, Laws of Maryland 1888. Chapter 430 expressly declared that the community did not have the powers ordinarily associated with municipal corporations and this law, as amended by Chapter 315 of the Laws of Maryland 1896 and again by Chapter 688 of the Laws of Maryland 1914, granted only limited powers to the community. Because these powers did not include the power to grant the kind of franchise that was the subject of the 1923 ordinance, there is substantial question of whether the franchise was ever valid.

It is also doubtful that the West Maryland Power Co. enjoyed the franchise conferred by what is now §340. A certificate of incorporation for the West Maryland Power Co. was approved by the State Tax Commission on July 27, 1922. This certificate declares that one of the purposes of the corporation is to "transact any business in which electricity over or through wires may be applied to any useful purpose." Although this language closely follows the relevant language of Article 23, §28 of the 1904 Code, there is no reference in the certificate to the company being a "class 13" corporation. Moreover, §28, which established this class, was repealed in 1908. *See* Section 1 of Chapter 240, Laws of Maryland 1908. In 1965, the West Maryland Power Co. and the Monongahela Power Co., a West Virginia corporation, were merged into the Marietta

Electric Co., an Ohio corporation, which changed its name to Monongahela Power Co. We are advised by Potomac Edison that on May 31, 1974, it purchased the Maryland utility property and franchises of its affiliate, Monongahela Power Co., including the electric facilities located in the Town of Mountain Lake Park.

The Potomac Edison Co. also claims to be a class 13 corporation as a successor by consolidation to West End Gas and Electric Co. of Frederick County. The articles of incorporation for West End Gas, dated June 20, 1904, declare that among the purposes of the company is the "transaction of any business in which electricity over or through wires may be applied to any useful purpose." This, of course, duplicates the relevant language of Article 23, §28 of the 1904 Code. Accordingly, there can be no doubt that West End Gas was incorporated as a class 13 corporation. Moreover, we are satisfied that the Potomac Edison Co. is properly regarded as a successor to West End Gas and its status as a class 13 corporation. Therefore, whatever questions there may be about the right of the West Maryland Power Co. to have established electric service in Mountain Lake Park, Potomac Edison provides electric service to the town under the franchise conferred by Article 23, §340.

V

Effect of Potomac Edison's §340 Franchise

As noted, the exercise of this franchise is subject to the State's reserve power of reasonable regulation and compensation. Such power may, of course, be delegated to the subdivisions.

Since 1954, all municipal corporations have enjoyed home rule under Article XI-E of the Constitution. Municipal corporations generally have the power to govern themselves in matters of local concern under this article. *Birge v. Town of Easton*, 274 Md. 635, 644 (1975). However, Article XI-E, §5 provides that they may not levy "any type of tax, license fee, or franchise tax or fee" that was not in effect on January 1, 1954 unless authorized by express, uniform general legislation enacted by the General Assembly. *See Campbell v. City of Annapolis*, 289 Md. 300, 305 and 308 (1981).

Under the general laws of the State, municipal corporations have the express authority to grant franchises under the existing general and public local laws. Article 23A, §2(b)(13). They also have the express authority to levy reasonable fees and charges for those

franchises. Article 23A, §2(b)(33). However, they do not have express authority to levy fees on franchises conferred by the State, and Mountain Lake Park was not granted this power prior to January 1, 1954. Moreover, the regulation of a franchise granted by the State could hardly be said to be a matter of purely local concern subject to the general home rule powers of the municipal corporations.

VI

Conclusion

In summary, it is our opinion that the Potomac Edison Company has a State franchise conferred by Article 23, §340. The State retains the power to impose reasonable regulations and to seek reasonable compensation for the exercise of this franchise and may delegate this power to the subdivisions. In the absence of such a delegation to the State's municipal corporations, the Town of Mountain Lake Park may not regulate and seek compensation for the exercise of this franchise. However, the Town may require the utility to move company equipment located on public property at company expense to further a governmental purpose.

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VEHICLE LAWS

LICENSING OF DEALERS AND SALESMEN—APPLICABILITY OF LICENSING REQUIREMENTS TO VEHICLE LESSORS AND VEHICLE LEASE BROKERS.

January 23, 1986

*Mr. W. Marshall Rickert, Administrator
Motor Vehicle Administration*

You have asked whether a vehicle lessor must obtain a vehicle dealer's license, assuming that the lessor's business involves lease agreements under which the lessee has the option to purchase the vehicle at the end of the lease period.¹ You have also asked whether a "vehicle lease broker" must obtain a vehicle salesman's license.

For the reasons given below, we conclude as follows:

1. If a vehicle lessor uses leases intended as security, and meets the other requirements of the Vehicle Laws, the lessor must obtain a vehicle dealer's license from the Motor Vehicle Administration.
2. If a vehicle lease broker is compensated by (i) a dealer, under any form of agreement or arrangement; (ii) a financial institution that buys a vehicle from the dealer; or (iii) a lessee under a lease intended as security, the broker must obtain a vehicle salesman's license from the Administration.

¹Such a lease is often termed an open-end lease, as contrasted with a closed-end lease. One court has described the difference as follows:

"Under the closed-end lease, the lessee returns the vehicle to the lessor at the end of the lease term and the obligations of both come to an end. Under the open-end lease, however, the relationship between the lessor and lessee does not end. Rather, it involves the sale of the vehicle and an adjustment between the lessor and lessee based on the sales price." *In re Tulsa Port Warehouse Co.*, 690 F.2d 809, 810 n. 1 (10th Cir. 1982).

I

Licensing of Vehicle Lessors

A. *Dealer Licensing*

The Vehicle Laws do not impose licensing requirements on vehicle lessors as such. Only if a lessor "conduct[s] the business of a dealer" must he or she be licensed by the Motor Vehicle Administration. §15-302 of the Transportation Article ("TR" Article). TR §11-111 generally defines "dealer" as follows:

" 'Dealer' means a person who is in the business of buying, selling, or exchanging vehicles including a person who during any 12 month period offers to sell five or more vehicles, the ownership of which was acquired for resale purposes."

For purposes of the licensing title of the Vehicle Laws, TR §15-101(b) further defines "dealer" as follows:

"(1) 'Dealer' means ... a dealer in vehicles of a type required to be registered under Title 13 of this Article.^[2]

(2) 'Dealer' includes:

(i) A person who is in the business of buying, selling, or exchanging vehicles, including a person who during any 12-month period offers to sell five or more of these vehicles, the ownership of which was acquired for resale purposes; and

(ii) For the purposes of §§15-301 through 15-315, inclusive, of this title, any person who sells vehicles, whether or not that person acquired the vehicles for personal or business use, if the vehicles are displayed at a fixed location used principally for the purpose of selling vehicles on a regular basis."

Hence, the sale or resale of vehicles is an essential component of the licensing requirement.

B. *Sale and Ownership of a Vehicle*

The Vehicle Laws do not themselves define "sale." However, the Uniform Commercial Code does: "A 'sale' consists in the passing

²TR §13-402 itemizes the "vehicles of a type required to be registered under Title 13 of this Article."

of title from the seller to the buyer for a price." §2-106(1) of the Commercial Law Article ("CL" Article). The definition of "owner" in the Vehicle Laws, TR §11-143, similarly focuses on the passing of title or property interest:

" 'Owner', as used in reference to a vehicle:

(1) Means a person who has the property in or title to the vehicle;

(2) Includes a person who, subject to a security interest in another person, is entitled to the use and possession of the vehicle; and

(3) Does not include a lessee under a lease not intended as security."

If a lessee is a vehicle's "owner" as defined in TR §11-143, he or she could only have become so as a result of a "sale" by the lessor, regardless of how the lessor would wish to characterize the transaction.

A lessee is unquestionably "entitled to the use and possession" of the leased vehicle. Therefore, under TR §11-143(2) and (3), the lessee is the "owner" of the vehicle if the use and possession by the lessee is subject to a security interest, and if the lease itself is intended as that security.

C. *Lease Intended as Security*

A "security interest" is defined in TR §11-157 as "an interest in a vehicle that is reserved or created by agreement and that secures payment or performance of an obligation ... and ... includes the *interest of a lessor under a lease intended as security.*"

For guidance as to the circumstances under which "a lease [is] intended as security," we turn to the Uniform Commercial Code. "Security interest" is broadly defined as "an interest in personal property or fixtures which secures payment or performance of an obligation." CL §1-201(37). "Unless a lease ... is intended as security," the definition continues, "reservation of title thereunder is not a 'security interest.'" The definition of "security interest" then outlines certain criteria for determining the required intent:

"Whether a lease is intended as security is to be determined by the facts of each case; however (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) *an agreement that upon*

compliance with the terms of the lease *the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security.*"

The Maryland Court of Appeals has examined the applicability of CL §1-201(37) to leases in two leading cases. *United Rental Equipment Co. v. Potts and Callahan Contracting Co.*, 231 Md. 552 (1963), involved a contest over title to an air compressor. The compressor was leased for a monthly payment of \$800. The lease provided for a term of at least one month, with monthly payments to continue until the equipment was returned to the lessor. But the lease also specified that 85% of the rental was to be applied against the purchase price of the compressor, and the lessee agreed to pay all sales and use taxes.

The Court of Appeals found that the parties to the original lease agreement "contemplated the purchase of the compressor by [the lessee] if he continued to pay the specified monthly rental and otherwise complied with the lease." 231 Md. at 559. Therefore, the lease "was a security interest created by contract." 231 Md. at 558. In the terms of CL §1-201(37), the lease was "intended as security," because "upon compliance with the terms of the lease the lessee ... has the option to become the owner of the property for no additional consideration or for a nominal consideration."³

Under CL §1-201(37), if no additional consideration beyond the lease payments is needed for the lessee to exercise a purchase option, the lease is unequivocally intended for security and the lessee is the "owner" of the vehicle under TR §11-143. When *some* additional consideration is required, an important question is whether the consideration is "nominal." If so, the lease is intended for security; if not, the lease might or might not be intended as security, depending upon the totality of circumstances reflecting the intent of the parties.⁴

³Although *United Rental* was an application and interpretation of Pennsylvania law, the provision construed by the Court of Appeals was identical to CL §1-201(37). See *Waldron v. Best T.V. and Stereo Rentals*, 485 F. Supp. 718, 720 (D. Md. 1979).

⁴Recitals in the lease itself, like a statement that the lease "is intended to be a true lease (and not a lease intended as a security or a lease in the nature of a security interest)," may be taken into account in considering the parties' intent, but they are not conclusive, and "the practical effect of other provisions in the lease [might be] to refute such recitals." *American Standard Credit v. National Cement Co.*, 643 F.2d 248, 266 (5th Cir. 1981).

In *Crest Investment Trust v. Atlantic Mobile Corp.*, 252 Md. 286 (1969), the Court of Appeals included a yardstick for "nominal consideration" among its "considerations and factors" for determining "whether a lease in form is a lease in fact or a security instrument." 252 Md. at 289. These "considerations and factors" are:

"1. The facts in each case control to show intention of the parties to create a security interest.

2. Reservation of title in a lease or option to purchase appurtenant to or included in the lease does not in and of itself make the lease a security agreement.

3. Lease agreement which permits the lessee to become the owner for nominal or for no additional consideration is deemed intended as a security agreement as a matter of law.

4. *The percentage that option purchase price bears to the list price, especially if it is less than 25%, is to be considered as showing the intent of the parties to make a lease as security.*

5. Where the terms of the lease and option to purchase are such that the only sensible course for the lessee at the end of the lease term is to exercise the option and become the owner of the goods, the lease was intended to create a security interest.

6. The character of a transaction as a true lease is indicated by:

(a) Provision specifying purchase option price which is approximately the market value at the time of the exercise of the option.

(b) Rental charges indicating an intention to compensate lessor for loss of value over the term of the lease due to aging, wear and obsolescence.

(c) Rentals which are not excessive and option purchase price which is not too low.

(d) Facts showing that the lessee is acquiring no equity in leased article during the term of lease.' " 252 Md. at 289-90 (quoting *In re Alpha Creamery Co.*, 4 U.C.C.

Rptg. Serv. 794, 795 (W.D. Mich. 1967)) (emphasis added).⁵

As one federal appellate court summarized, when it adopted the Crest Investment test in applying Oklahoma's equivalent of CL §1-201(37):

"The critical elements of that test involve the consideration necessary for lessee to exercise the option to purchase and the percentage that consideration bears to the list price of the items leased. Under [*Crest Investment*], if that percentage is less than twenty-five per cent, it is considered as showing the intent of the parties to make the lease a security." *Percival Const. Co. v. Miller & Miller Auctioneers*, 532 F.2d 166, 171 (10th Cir. 1976).

Under the *Crest Investment* test, consideration is generally to be treated as "nominal" if the option purchase price at the end of the lease period is less than 25% of either the list or purchase price of the vehicle. In *Crest Investment* itself, the option purchase price was nearly 58% of the list price and therefore could not "in any way be regarded as nominal." 252 Md. at 292.⁶

Other examples of the application of the "nominal consideration" criterion may be found in out-of-state cases. *E.g.*, *Percival Const. Co. v. Miller & Miller Auctioneers*, 532 F.2d at 171 (option price of 10.6% of "list price" nominal); *In re Wheatland Elec. Products Co.*, 237 F.Supp. 820, 822 (W.D. Pa. 1964) (option price of 25% of "list price" not nominal); *Crowder v. Allied Investment Co.*, 209 N.W.2d 141, 143 (Neb. 1973) (option price of "4% of the total consideration payable under the agreement" nominal); *Rebhum v. Execu-*

⁵We do not read *Crest Investment* as intimating that no other factors may be considered. On the contrary, because "[t]he facts in each case control to show intention of the parties," other factors might be pertinent. For example, one court has summarized as follows "a number of significant factors tending to suggest that a sale has occurred: (1) whether the lease creates an equity in the lessee; (2) whether the lessee is obligated to provide comprehensive insurance in favor of the lessor; (3) whether the lessee pays sales tax; (4) whether the lessee pays all taxes, maintenance, and repairs; and (5) whether the lessee holds the lessor harmless or assumes the risk of loss." *In re Tulsa Port Warehouse Co.*, 690 F.2d 809, 811 (10th Cir. 1982) (citations omitted).

⁶In *Crest Investment*, a trailer was leased for a minimum of two months at a rental of \$160.00 per month. At the end of a 12 month period, the lessee could exercise an option to purchase the trailer "when the amount required to meet the full purchase price of \$3,400 was \$1,960, or slightly less than 58% of that full purchase price." The lessee could not automatically extend the option. Using its articulated criteria, the Court of Appeals found "little, if any, doubt that the intention of the parties was to execute a lease and not a security instrument." 252 Md. at 292.

tive Equipment Corp., 394 N.Y.S.2d 792, 794 (N.Y. Sup. Ct. 1977) (option price of 20% of "capital cost of vehicle" not nominal); *FMA Financial Corp. v. Pro-Printers*, 590 P.2d 803, 806 (Utah 1979) (option price of 10% of lessor's "original cost" and "only 6 percent of the total lease payments" nominal). See generally Annot., 76 A.L.R.3d 11, 85 §19 (1977) (compiling cases on the relationship between consideration and purchase price or total rental, as part of the determination of whether an equipment lease is intended as security). Cf. *Tom Benson Chevway Rental & Leasing v. Allen*, 571 S.W.2d 346, 348 (Tex. Civ. App. 1978) (lease with total payments equalling or exceeding value of vehicle and with option price of \$1 was "credit sale" for purposes of Truth in Lending Act).

D. *Title to a Vehicle Acquired Under a Lease Intended as Security*

If a lease is in fact a security agreement, then the lessee is the "owner" of the vehicle under TR §11-143. If the lessee is the owner of the vehicle, the lessee "shall apply to the Administration for a certificate of title of the vehicle." TR §13-101.1. The Administration is required to issue a certificate of title if it "finds that the applicant is entitled to a certificate of title" and "has received the required fees." TR §13-106(a)(2).

Indeed, the lessee becomes the title owner prior to the issuance of a certificate of title by the Administration. The Uniform Commercial Code provision on the passing of title, CL §2-401, provides in pertinent part as follows:

"Each provision of this title with regard to the rights, obligations and remedies of the seller, the buyer, purchaser or other third parties applies irrespective of title to the goods except where the provision refers to such title. Insofar as situations are not covered by the other provisions of this title and matters concerning title become material the following rules apply:

(1) Title to goods cannot pass under a contract for sale prior to their identification to the contract (§2-501) and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by Titles 1 through 10 of this article. Any retention or reservation by the seller to the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to

the provisions of the title on secured transactions (Title 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.

(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of security interest by the bill of lading:

(a) If the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but

(b) If the contract requires delivery at destination, title passes on tender there.”

If a lessee is considered the “owner” under TR §11-143(2) and (3), in that the lessee has the use and possession of the automobile under a lease intended as security, title would have passed after the automobile was identified in the security agreement and upon delivery of the vehicle. CL §2-401(2). At that point, the “sale” has occurred. CL §2-106(1). *Cf. Tatum v. Richter*, 280 Md. 332 (1977) (title in an automobile passed to buyer once the goods had been identified in the bill of sale, although the seller retained possession).

Even if a lease intended as security explicitly states that title does not pass until sometime after delivery of the vehicle, the Vehicle Laws do not permit that delay to be given effect. As discussed above, TR §13-101.1 requires the “owner of each vehicle” to apply for a certificate of title, and TR §13-106 requires the Administration to issue a certificate of title to the owner. *See also* TR §13-104(a) (“The application for a certificate of title of a vehicle shall be made by the owner of the vehicle on the form that the Administration requires.”). *Cf. Annot.*, 74 A.L.R.3d 739, 766 §10 (1976) (compiling cases holding that long-term lessees of vehicles are “owners” under statutes making vehicle owner liable for the negligent operation of the vehicle by another). Moreover, a vehicle may not be driven unless it is registered (TR §13-401), and a vehicle may not be registered “unless the Administration has issued to the owner a certificate of title of the vehicle or has received an application for the certificate of title.” TR §13-402(b). Thus, if the lessee

is the owner of a vehicle, only the lessee may obtain the necessary certificate of title. Therefore, title passes under a lease intended as security when the person possesses and uses the vehicle.⁷

E. Summary

If a lessor is in the business of leasing, or leases five or more vehicles within a 12 month period, *and* the leases are intended as security, the lessor is acting as a dealer and must be licensed pursuant to TR §15-302. Failure to obtain the license is a misdemeanor. TR §27-102. On the other hand, if the leases are not intended as security, the lessor need not be licensed.

II

Licensing of Vehicle Lease Brokers

Your second question is whether individuals whom you identify as "vehicle lease brokers" must be licensed as salesmen. You describe the activities of these brokers as follows:

"These businesses (or persons) open shop, and solicit individuals interested in leasing. Once contacted, the lease broker shops dealerships for the specified car, and locates a bank or other financial institution interested in buying the car and leasing it to the lease broker's client."

Ultimately, a lease is executed between the financial institution and the lessee.

A person who "act[s] as a vehicle salesman" must be licensed. TR §15-402. The term "vehicle salesman" is defined in TR §15-101(e)(1) as follows:

"'Vehicle salesman' means ... any individual who:

(i) For a commission or other compensation, under any form of agreement or arrangement with a dealer, buys,

⁷Pursuant to TR §13-808, the excise tax must be paid prior to the Administration's issuing title to the owner. The lessee must therefore pay the tax on the fair market value of the vehicle at the time the lease is executed and title is transferred, rather than at the time the purchase option is exercised. Nevertheless, the lessee, as owner, then possesses a title which may be transferred, or used as evidence of collateral—subject, of course, to the security interest of the lessor.

sells, or exchanges or negotiates or attempts to negotiate a sale or exchange of an interest in a vehicle of a type required to be registered under Title 13 of this article; or

(ii) Induces or attempts to induce any other person to buy or exchange an interest in a vehicle or a type required to be registered under Title 13 of this article and receives or expects to receive a commission or other compensation from either the seller or the buyer of the vehicle."

Thus, a broker would be a "vehicle salesman" under TR §15-101(e)(1)(i) if there is "any form of agreement or arrangement" with a dealer "[f]or a commission or other compensation." Alternatively, a broker would come within the definition in TR §15-101(e)(1)(ii) if there is inducement coupled with compensation "from either the buyer or the seller."

You state that the lease broker "shops dealerships for the specified car." After locating the car, the broker then finds a financial institution, typically a bank, interested in purchasing the car in order to lease it to the broker's customer. If the broker is paid by the dealer pursuant to "any form of agreement or arrangement as a result of this sale, the broker is a "vehicle salesman" under TR §15-101(e)(1)(i).

Regardless of whether such an agreement or arrangement exists, the broker certainly "[i]nduces or attempts to induce" the lessor-bank to purchase the vehicle. "Induce" has been defined by the Court of Appeals, in the context of a vehicle sales broker, as "the act of referring a customer to a specific vehicle dealer or dealers." *Automobile Trade Ass'n v. Harold Folk Enterprises*, 301 Md. 642, 655 (1984) (referral agents for a consumer buying service were "vehicle salesmen"). In vehicle lease brokerage, the broker's inducement to the lessor-bank is the speed with which the vehicle can be purchased and the profit realized once the vehicle is leased. *Cf. Harold Folk Enterprises*, 301 Md. at 655 ("The customer expects to receive a lower purchase price and a faster transaction as the result of the referral made by the [buying service] agent."). Hence, the broker is acting as a "vehicle salesman" under TR §15-101(e)(1)(ii) if, having induced the lessor-bank to purchase the vehicle, the broker receives compensation from either the dealer or the lessor-bank.

Moreover, if the broker does not receive compensation from the dealer or lessor-bank, he or she logically must receive it from the ultimate user of the vehicle, the lessee. For the reasons stated in Part I, under a lease intended as a security interest, the lessee is

actually a buyer and the broker has induced a sale. Accordingly, if the lease is one intended for security and either the lessor-bank or the lessee compensates the broker, the broker is acting as a "vehicle salesman" under TR §15-101(e)(1)(ii). However, if the lease is not one intended as security, and if neither the dealer nor the lessor-bank compensates the broker, he or she is not acting as a salesman.

A person who acts as a "vehicle salesman" in performing the brokerage services that you describe must satisfy the requirements for licensure in TR §15-404(a):

"A person may not be licensed [as a vehicle salesman] unless the person:

- (1) Is a licensed dealer; or
- (2) Is employed as a vehicle salesman by a licensed dealer."

Whether a broker who is a "vehicle salesman" is employed by a dealer is obviously a factual question; however, the broker may not be employed by more than one dealer. In reviewing the issue of whether a salesman can be employed by more than one dealer, the Court of Appeals stated as follows:

"These cases demonstrate that the hierarchial structure found in today's automobile industry—from manufacturer to dealer to salesman—is an integral part of Maryland's statutory enforcement mechanism. This mechanism places a premium on the control exercised by one party over another in the process. In our view, Section 15-404's 'employed by' requirement should be read in light of this concept. Obviously, dual employment affords a licensed dealer less control over a vehicle salesman than exclusive employment. A qualitative difference exists between the degree of control exercised by the dealer and the degree of control it exercises over [the buying service's] referral agents. This qualitative difference reinforces our view that *Section 15-404 prohibits dual employment.*" *Harold Folk Enterprises*, 301 Md. at 664-65 (emphasis added).

III

Conclusion

In summary, it is our opinion that:

1. If a vehicle lessor uses leases intended as security, and meets the other requirements of the Vehicle Laws, the lessor must obtain a vehicle dealer's license from the Motor Vehicle Administration.

2. If a vehicle lease broker is compensated by (i) a dealer, under any form of agreement or arrangement; (ii) a financial institution that buys a vehicle from the dealer; or (iii) a lessee under a lease intended as security, the broker must obtain a vehicle salesman's license from the Administration.

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Editor's Note: Since the issuance of this opinion, the General Assembly has enacted a comprehensive Motor Vehicle Leasing Regulatory Act, including provisions on dealer and salesman licensing. Chapter 577, Laws of Maryland 1987.

VEHICLE LAWS—MUNICIPALITIES—"SPEED BUMPS"—MUNICIPALITIES HAVE AUTHORITY TO PLACE SPEED BUMPS ON MUNICIPAL STREETS, BUT NOT ON STATE HIGHWAYS—RISK OF LIABILITY REQUIRES CAREFUL ATTENTION TO LOCATION, DESIGN, AND WARNING SIGNS.

April 2, 1986

The Honorable Dennis C. Donaldson
Maryland House Of Delegates

You have requested our opinion on the authority of a municipality to install speed bumps on a public thoroughfare in the municipality and on the municipality's risk of liability for damage to vehicles if it does so. A "speed bump," we understand you to mean, is a raised area of asphalt intended to force motorists to slow down in order to avoid a potentially damaging jolt.

For the reasons given below, we conclude as follows:

- (1) A municipality has no authority to install speed bumps on State highways in the municipality.
- (2) A municipality may exercise its police powers by installing speed bumps on its own streets and highways.
- (3) Because of the risk of liability, a municipality that installs speed bumps must exercise caution in choosing the location and design of the bumps and in placing appropriate warnings.

I

Powers of the State and Municipalities

A. State Highway Administration Authority

The State Highway Administration ("SHA") "shall determine and may change from time to time the location, construction, geometrics, design, and maintenance of the State highway system." §8-204(c) of the Transportation Article ("TR" Article). Furthermore, SHA "shall plan, select, construct, improve, and maintain the State highway system." TR §8-204(i). The "State highway system" is defined as "the system of state-owned primary and secondary highways throughout this State" [TR §8-101(q)], and "State high-

way" is defined as "any public highway owned by this State" [TR §8-101(p)].

Under these provisions, SHA has jurisdiction over, and the right to improve and maintain, all public highways that are part of the State highway system. This jurisdiction extends to "any" State-owned highway, including those that pass through municipalities.

This grant of authority is plainly intended to vest in SHA sole decisionmaking authority concerning State highways. "[The predecessor of SHA] was created in 1908 and by statutes then and subsequently passed it was granted *plenary* power to select, construct, improve and maintain a system of improved highways for the state within the limits of the funds provided therefor." *Contino v. Baltimore & Annap. R. Co.*, 178 F.2d 521, 523 (4th Cir. 1949) (emphasis added). See also *State Roads Comm'n v. Postal Tel. Cable Co.*, 123 Md. 73, 76 (1914) (predecessor of SHA "vested with powers of control and regulation over the public highways").

Thus, as to State highways, a municipality does not have authority to install speed bumps without SHA's approval, because SHA retains overall responsibility for maintenance and improvement. See Article 23A, §2 (municipality may not pass ordinances "contrary to ... public general law"). See also Article 23B, §75 (model municipal corporation charter excludes from town control public ways "that are under the jurisdiction of [SHA]").

As a matter of policy, SHA does not install speed bumps on any of the highways under its control, based on its assessment of the potential hazards of speed bumps even in the best design situations.¹ Hence, speed bumps may not be installed on any State highway, regardless of its location.

B. Municipal Authority

1. Introduction

The Maryland Vehicle Law, Titles 11 through 27 of the Transportation Article, generally covers the registration and titling of vehi-

¹See, e.g., Department of Transportation, Federal Highway Administration, *State of the Art Report: Residential Traffic Management*, Report No. FHWA/RD-80/092, at 25 (1980) ("There are several reasons [why the use of speed bumps] on public streets has been limited. The major one is a real and perceived question as to their safety.").

cles; the licensing of dealers; the licensing of drivers; rules of the road; and restrictions on the size, weight, and permissible loads of various vehicles. TR §25-101.1(a) describes the Vehicle Law's preemptive scope: "Except as otherwise expressly provided, the provisions of the Maryland Vehicle Law are statewide in their effect." Local authorities and political subdivisions are prohibited from "mak[ing] or enforc[ing] any local law, ordinance, or regulation on any subject covered by the Maryland Vehicle Law." TR §25-101.1(b)(3). Furthermore, its provisions prevail over all local ordinances and regulations on "any subject covered by the Maryland Vehicle Law." TR §25-101.1(c)(1).²

2. *Exception to preemption—"traffic control devices"*

The preemption of the Maryland Vehicle Law over municipal ordinances is not complete, however. Local authorities, including municipalities, do retain certain specified powers over highways under their jurisdiction, including the "regulating [of] traffic by means of police officers or traffic control devices." TR §25-102(a)(2).³ In addition, pursuant to TR §25-106, a local authority is required "to place and maintain" on highways under its jurisdiction "those traffic control devices that it considers necessary to carry out the provisions of the Maryland Vehicle Law or local traffic ordinances or to regulate, warn, or guide traffic." However, these traffic control devices must "conform to the manual and specifications" of SHA,

²See generally 10 McQuillan, *Municipal Corporations* §30.40 at 685-86 (3d ed. 1981) ("Municipal control and regulation of streets must harmonize with the laws and policy of the state. This is so because all public highways are under the paramount control of the state, and municipal powers related thereto are mere delegations of state authority.").

³A "local authority" is "a political subdivision or a local board or other body that, under the laws of this State, has authority to enact laws and adopt local police regulations relating to traffic." TR §11-130. Under TR §25-102(a), a local authority may, among other things:

"(2) Regulat[e] traffic by means of police officers or traffic control devices;

...

(10) Alte[r] speed limits as provided in Title 21, Subtitle 8 of the [Vehicle Law]; and]

...

(12) Adop[t] any other traffic regulations as specifically authorized in the Maryland Vehicle Law."

which in turn is to adopt "a manual and specifications for a uniform system of traffic control devices." TR §25-104(a). Accordingly, if speed bumps are a "traffic control device" under SHA's manual and specifications, then a municipality would be authorized to place speed bumps on public thoroughfares.

The term "traffic control device" is defined in TR §11-167 as follows:

" 'Traffic control device' means any sign, signal, marking, or device that:

- (1) Is not inconsistent with the Maryland Vehicle Law; and
- (2) Is placed by authority of an authorized public body or official to regulate, warn, or guide traffic."

At first glance, a speed bump would appear to fall within this definition. However, traffic control devices installed by municipalities must conform to SHA's manual and specifications, and that manual is to conform, as far as possible, to the most recent edition of the Manual on Uniform Traffic Control Devices for Streets and Highways ("Uniform Manual"). TR §25-104(a). The Uniform Manual, which is published by the Federal Highway Administration, includes specifications for signs, signals, markings, and traffic islands, but makes no mention of speed bumps. SHA's manual adopts the Uniform Manual in toto, and similarly does not include speed bumps. In fact, manuals on traffic control devices throughout the country exclude speed bumps.⁴

Furthermore, in contrast to the definition of "traffic control device," a speed bump is not intended to "regulate, warn, or guide traffic," as a sign, signal, or marking would. Rather, in engineering terms, a speed bump is a pavement design feature intended to reduce speed on a street or highway. SHA administratively has never considered speed bumps to be traffic control devices, and that kind of consistent construction by the agency responsible for administering a statute is entitled to considerable weight. *E.g.*, *National Asphalt Pavement Ass'n v. Prince George's County*, 292 Md. 75, 80 (1981).

For these reasons, speed bumps do not fall within the definition of "traffic control devices" in TR §11-167.

⁴"[Speed bumps] are not included in the Manual of Uniform Traffic Control Devices and parallel state traffic control and design guides." Federal Highway Administration, *State of the Art Report: Residential Traffic Management* at 25.

3. *Residual police power*

Because speed bumps are not traffic control devices, there is no specific authorization under TR §§25-102 or 25-106 for municipalities to place speed bumps on public streets under their jurisdiction. Indeed, we conclude that the matter of speed bumps is altogether beyond the purview of the Vehicle Law. It is simply not a "subject covered by the Maryland Vehicle Law." TR §25-101.1(b)(3). Therefore, while the Vehicle Law does not itself authorize speed bumps on municipal streets, it does not preempt whatever authority a municipality otherwise has to place speed bumps.

A municipality generally has the power to control and supervise its streets and highways. This power is part of the grant of police power to municipalities. *See Lee v. Leitch*, 131 Md. 30 (1917). Broad police powers have been expressly granted to incorporated municipalities by Article 23A, §2 of the Maryland Code. A municipal corporation can exercise powers "'granted in express words'"; "'necessarily or fairly implied in or incident to'" the express powers; or "'essential to the accomplishment of the declared objects and purposes'" of the municipality. *McRobie v. Mayor and Commissioners*, 260 Md. 464, 466 (1971) (quoting 1 Dillon, *Municipal Corporations* §237 (5th ed.)) (emphasis omitted).

These powers include the power "to preserve peace and good order [and] to secure persons and property from danger and destruction." Article 23A, §2. In our view, a municipality would be acting well within this grant of authority if it determined that a speed bump were necessary to achieve this objective on a public thoroughfare under its jurisdiction—that is, to protect the residents of a residential street against the danger of speeding vehicles. *See also* Article 23B, §§75 and 76 (model municipal corporation charter provisions concerning municipal public ways).

II

Municipality's Risk of Liability

Under Maryland law, a municipal corporation owes a duty to persons lawfully using the public streets under its control to make those streets "reasonably safe for passage." *Weisner v. Mayor and Council*, 245 Md. 225, 228 (1967). *See generally* 10 McQuillan, *Municipal Corporations* §30.41 at 695 ("It is elementary that it is the duty of municipalities to exercise ordinary care to keep and

maintain its streets, sidewalks and alleys in repair and safe for public use.”). However, this is not an absolute duty; the municipality is not an insurer of safe passage.

A municipality’s “duty to maintain streets and highways in a reasonably safe condition is a major exception to the immunity from suit” otherwise enjoyed by Maryland counties and municipalities. *Tadger v. Montgomery County*, 300 Md. 539, 548 (1984). As stated by the Court of Appeals:

“[A municipality] may ... be liable for injuries caused by an obstruction in a public highway of which it had sufficient notice, even though the obstruction is authorized by proper municipal and legislative authority, where it is reasonably foreseeable that it will endanger persons using the highway while in the exercise of reasonable care, unless it takes the precaution of warning such persons of the danger by some reasonably adequate means.” *Mayor and City Council v. Thompson*, 171 Md. 460, 467 (1937).

The legal duty to post warning signs or take other precautionary methods to guard the safety of the travelling public arises if the hazardous condition is “unusual and extraordinary in nature.” *Gordon v. Howard County*, 13 Md. App. 42, 48 (1971).

In light of these principles of law, we are of the opinion that a municipality could be exposing itself to possible liability for failing to keep its streets safe and failing to warn the public of hazardous conditions if it were to construct speed bumps without special consideration as to their construction and location and without providing proper signs warning of upcoming bumps. While intended as a safety measure to reduce the speed of vehicles, speed bumps can be a hazard of a kind that is not ordinarily expected on a public thoroughfare. There are no Maryland cases regarding the liability issues raised by speed bumps, but one engineering study has flatly concluded that “[they] present an immediate and specific hazard to some vehicles, (the bicycle, the motorcycles, and the fire truck) and a potential hazard to all vehicles.”⁵

Therefore, we caution any municipality considering the installation of speed bumps to be aware of the potential risks involved. Speed bumps should be installed only after careful engineering study and should be used only where the potential safety hazard

⁵City of San Jose, California, *A Study of Speed Bumps* (1975). The study also concluded that speed bumps are not effective in reducing vehicle speeds.

from their use is low—on lightly travelled, low speed thoroughfares, such as those in residential neighborhoods.

III

Conclusion

In summary, it is our opinion that:

(1) A municipality has no authority to install speed bumps on State highways in the municipality.

(2) A municipality may exercise its police powers by installing speed bumps on its own streets and highways.

(3) Because of the risk of liability, a municipality that installs speed bumps must exercise caution in choosing the location and design of the bumps and in placing appropriate warnings.

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VEHICLE LAWS—DRIVING PRIVILEGE—DISCLOSURE OF MEDICAL DISORDERS—PHYSICIANS ARE AUTHORIZED TO REPORT CERTAIN DISORDERS TO THE MEDICAL ADVISORY BOARD, BUT A DEFINITION OF REPORTABLE DISORDERS SHOULD BE ADOPTED.

May 6, 1986

*W. Marshall Rickert, Administrator
Motor Vehicle Administration*

You have requested our opinion on the extent to which a physician may disclose to the Motor Vehicle Administration (“MVA”) information derived from diagnosing and treating a patient, if the physician believes that the patient has a physical or mental condition that would impair the patient’s ability to drive safely.

For the reasons stated below, we conclude that physicians are generally authorized by §16-119 of the Transportation Article (“TR” Article) to report certain disorders characterized by lapses of consciousness or loss of visual acuity to the MVA’s Medical Advisory Board. The only exception is that a psychiatrist (or licensed psychologist) may not disclose information relating to a patient’s mental or emotional disorder without the patient’s consent.

However, the statute authorizes a physician to disclose only those specific disorders that have been “defined” by the Department of Health and Mental Hygiene, in consultation with the Medical and Chirurgical Faculty of Maryland and the Board of Examiners in Optometry. No such definition has yet been issued. In order to make the reporting mechanism effective, this definition should be properly adopted. MVA should give serious consideration to adoption of an interim regulation on an emergency basis.

I

Vehicle Law’s Authorization for Disclosure

The Maryland Vehicle Law broadly disqualifies from licensure any individual “[w]hose driving of a motor vehicle on the highways the [MVA] has good cause to believe would be inimical to public safety or welfare.” TR 16-103.1(5). The MVA “may suspend, revoke, or refuse to issue or renew the license” of anyone who is “an

unfit [or] unsafe ... driver of a motor vehicle." TR §16-206(a)(1)(ii). *See also* TR §16-208(a)(2) (MVA authorized to suspend license of "any individual who cannot drive safely because of his physical or mental condition"). Certainly, some medical problems are inconsistent with safe driving. *See, e.g.*, TR §16-110.1(e) (driver's license may not be issued to individual who does not meet specified vision requirement).

TR §16-119 is intended to help the MVA identify those persons whose medical condition might preclude licensure. In general terms, it authorizes—but does not require—physicians and other persons who are authorized to diagnose and treat certain disorders to report the name, address, and birthdate of a patient "who has any such disorder." TR §16-119(b)(1).¹ The MVA then "arrange[s] for an examination of each reported individual who holds a driver's license" to determine whether cancellation of his or her driver's license is required. The MVA's Medical Advisory Board both receives the reports from physicians and advises whether a person's driving "would be contrary to public safety and welfare because of an existing or suspected mental or physical disability." TR §16-118(c)(1).

A prerequisite to the effective functioning of this reporting and investigation procedure is a clear identification of reportable disorders. The statute requires that these be "define[d]":

"The Department of Health and Mental Hygiene, together with the Medical and Chirurgical Faculty and the State Board of Examiners in Optometry, *shall define*:

(1) Disorders characterized by lapses of consciousness; and

(2) Disorders that result in a corrected visual acuity that fails to comply with the vision requirements of this subtitle." TR §16-119(a) (emphasis added).

As far as we are aware, the required definition has not been adopted.²

¹The statute makes clear that a physician or other person who decides to make such a report is protected against civil or criminal liability, unless a privilege is violated. TR §16-119(e). With regard to the only applicable privilege, see Part II B below.

²The definition of these disorders would unquestionably be a "regulation," within the meaning of the Administrative Procedure Act. *See* §10-101(e)(1) of the State Government Article. Although DHMH, the Medical and Chirurgical Faculty, and the Optometry Board are collectively responsible for defining the pertinent disorders,

This regulatory vacuum has, in practice, been filled by a related listing of disorders, adopted by MVA as a “list of reportable physical or mental conditions” to be disclosed by the applicant for a driver’s license. COMAR 11.17.03.02. The Medical Advisory Board apparently receives a small number of reports about these conditions from physicians.

The difficulty, however, is that the list of conditions in COMAR 11.17.03.02 does not—and, indeed, since it has not been “define[d]” by DHMH and the other two entities, cannot—comport with the requirements of TR §16-119(a). The list is at once over- and underinclusive. It includes at least one condition that has nothing to do with either lapses of consciousness or loss of vision. COMAR 11.17.03.02J (“[l]oss of limb or limbs”). Conversely, the list does not include any reference to vision problems.³

The absence of the required definition of reportable disorders undercuts the reporting mechanism in TR §16-119(b):

“(1) Except as provided in paragraph (2) of this subsection, any physician and any other person authorized to diagnose, detect, or treat *disorders defined under subsection (a) of this section* may report to the Medical Advisory Board and to the subject of the report, in writing, the full name, date of birth, and address of each individual 15 years old or older who has any such disorder.

(2) Unless authorized by the individual in writing, a report may not be made from information derived from the diagnosis or treatment of any individual on whom a confidential or privileged relationship is conferred by law.” (Emphasis added.)

Because *no* disorders have been “defined under subsection (a) of this section,” the authorization to report in TR §16-119(b)(1) has a totally inadequate foundation.

This is not a minor technical problem that could perhaps be ameliorated over time through administrative practice. The reporting of information from medical records that, as discussed in Part IIA below, are otherwise protected from disclosure is a serious matter.

MVA has the ultimate authority to embody the definition in a regulation necessary “to carry out ... the Maryland Vehicle Law.” TR §12-104(b).

³In context, this omission is readily understandable. An applicant for a license need not disclose vision problems, for he or she cannot in any event be licensed without having first passed a vision test. See TR §§16-110(c)(1)(i) and 16-110.1(e).

The General Assembly intended that the basis for such reporting to MVA be defined by specified, expert entities—DHMH, the Medical and Chirurgical Faculty, and the Optometry Board. In our view, no alternative basis complies with the plain direction of the statute.

Thus, we strongly recommend that TR §16-119 be implemented through a proper definition of reportable disorders.

II

State Law Restrictions on Disclosure of Physicians' Records

A. *Medical Records*

Under §4-301(b) of the Health General Article ("HG" Article), a "provider of medical care who has custody of medical records may not reveal specific information contained in those records to any person unless authorized by the individual on whom the record is kept." However, this limitation is not imposed on a provider of medical care who is "[p]roviding information to a government agency performing its lawful duties as authorized by an act of the Maryland General Assembly or the United States Congress." HG §4-301(c)(4).

The Medical Advisory Board plays a key role, defined by statute, in the MVA's process of assessing the physical and mental condition of individuals who seek to drive on highways in Maryland. TR §16-118. The reports that the Medical Advisory Board receives from physicians are an integral part of the MVA's "perform[ance of] its lawful duties." Therefore, the general prohibition in HG §4-301(b) does not prohibit physicians from reporting under TR §16-119.⁴

⁴Likewise, the American Medical Association's Principles of Medical Ethics do not prevent a physician from reporting a patient's condition pursuant to TR §16-119. Section 4 of these principles states:

"A physician shall respect the rights of patients, colleagues and of other health professionals and shall safeguard patient confidences within the constraints of the law."

One of the "constraints of the law" is TR §16-119. *Cf.* 62 *Opinions of the Attorney General* 157, 160 (1977) (application of principles of medical ethics to disclosure of suspected child abuse).

B. *Psychiatrist-Patient Privilege*

TR §16-119(b)(2) prohibits the reporting, without the patient's consent, of "information derived from the diagnosis or treatment of any individual on whom a confidential or privileged relationship is conferred by law." The law confers "a confidential or privileged relationship" only on the patient of a psychiatrist or licensed psychologist:

"Unless otherwise provided, in all judicial, legislative, or administrative proceedings, a patient ... has a privilege to refuse to disclose, and to prevent a witness from disclosing, communications relating to diagnosis or treatment of the patient's mental or emotional disorder." §9-109(b) of the Courts Article.⁵

Accordingly, even if a "mental or emotional disorder" were defined as a disorder subject to reporting under TR §16-119(b)(1), the treating psychiatrist or psychologist is prohibited by TR §16-119(b)(2) from reporting that disorder.

III

Constitutional Considerations

The reporting by physicians of disorders related to driving ability is not an impermissible invasion of a patient's constitutional right to privacy. In *Whalen v. Roe*, 429 U.S. 589 (1977), the Supreme Court held that the impact of comparable reporting requirements is insufficient to constitute an invasion of any right or liberty protected by the Fourteenth Amendment.

The New York statute at issue in *Whalen* requires that physicians report the name, address, and age of all persons who have obtained certain prescription drugs for which there is both a lawful and an unlawful market. This information is submitted to the health department by means of a copy of the prescription form, which itself also discloses the prescribed drug, the dosage, and the dispensing pharmacy. Confidential treatment of this information is required by statute and regulation.

⁵Apart from the limited privilege in §9-109 of the Courts Article, there is no physician-patient privilege in Maryland. *E.g.*, *Robinson v. State*, 249 Md. 200, 221 (1968); *Franklin v. State*, 8 Md. App. 134, 141 (1969).

In upholding this “aid in the enforcement of law designed to minimize the misuse of dangerous drugs,” the Supreme Court emphasized the breadth of state police powers in protecting public health and safety. 429 U.S. at 598. The Court cited as “[f]amiliar examples” of constitutionally permissible infringements on medical privacy “statutory reporting requirements relating to venereal disease, child abuse, injuries caused by deadly weapons, and certifications of fetal death.” 429 U.S. at 602 n. 29. The reporting mechanism in TR §16-119 is grounded in similar public safety concerns.

Moreover, TR §16-119(d)—like the New York reporting requirement at issue in *Whalen*—provides for the confidentiality of reported information:

“(1) The reports made to the Administration under this section:

- (i) Are confidential;
- (ii) May be disclosed only on court order; and
- (iii) May be used only to determine the qualifications of an individual to drive.

(2) A person may not use these reports for any other purpose.”

See also §10-617(b) of the State Government Article (custodian shall deny inspection of “medical or psychological information about an individual”). We are aware of no instance in which the confidentiality of a report has been compromised in any way.⁶ As with New York’s prescription reporting law, the “statutory scheme, and its implementing administrative procedures, evidence a proper concern with, and protection of, the individual’s interest in privacy.” 429 U.S. at 605.

⁶Once a physician reports that a patient has one of the defined disorders, the Medical Advisory Board then requests that the individual consent to the release of complete medical information so that the Board can decide whether the driving of a vehicle by the individual is contrary to public safety and welfare.

IV

Conclusion

In summary, it is our opinion that physicians are generally authorized by §16-119 of the Transportation Article ("TR" Article) to report certain disorders characterized by lapses of consciousness or loss of visual acuity to the MVA's Medical Advisory Board. The only exception is that a psychiatrist (or licensed psychologist) may not disclose information relating to a patient's mental or emotional disorder without the patient's consent.

However, the statute authorizes a physician to disclose only those specific disorders that have been "defined" by the Department of Health and Mental Hygiene, in consultation with the Medical and Chirurgical Faculty of Maryland and the Board of Examiners in Optometry. No such definition has yet been issued. In order to make the reporting mechanism effective, this definition should be properly adopted. MVA should give serious consideration to adoption of an interim regulation on an emergency basis.

STEPHEN H. SACHS

Attorney General

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JACK SCHWARTZ

Chief Counsel

Opinions and Advice

**SYNOPSIS OF OPINIONS
NOT PUBLISHED
IN THIS VOLUME**

SYNOPSSES OF UNPUBLISHED OPINIONS

ALCOHOLIC BEVERAGES

LICENSES—BALTIMORE COUNTY.

Although situated on property owned entirely by Baltimore City, Pine Ridge Golf Course is located entirely within the corporate boundaries of Baltimore County. Therefore, the Baltimore County Board of Liquor License Commissioners has licensing authority over Pine Ridge Golf Course.

Opinion No. 86-048	To: <i>Mr. Philip R. Leyhe, Jr.,</i>
	<i>Chairman, Board of Liquor</i>
September 16, 1986	<i>License Commissioners for</i>
	<i>Baltimore County</i>

BUDGETARY ADMINISTRATION

“MONEYS OF THE STATE”—DEPARTMENT OF EMPLOYMENT AND TRAINING SPECIAL ADMINISTRATIVE EXPENSE FUND.

The Special Administrative Expense Fund of the Department of the Department of Employment and Training constitutes “moneys of the State” and is therefore subject to State budgetary and appropriations procedures.

Opinion No. 86-014	To: <i>Dr. H. Louis Stettler, III</i>
	<i>Secretary, Department of Budget</i>
March 10, 1986	<i>and Fiscal Planning</i>

CHESAPEAKE BAY CRITICAL AREA COMMISSION

CRITICAL AREA CRITERIA—"SHALL"/"SHOULD".

The provision in the regulations (COMAR 14.15.02.06B) of the Chesapeake Bay Critical Area Commission using the word "shall" is mandatory. Provisions using the word "should" are directory.

Opinion No. 86-053

To: *The Hon. Solomon Liss*
Chairman, Chesapeake Bay
Critical Area Commission

October 6, 1986

CONSTITUTIONAL LAW

SAVINGS AND LOAN ASSOCIATIONS—TAX CREDIT PLAN—DEPOSITOR'S RESIDENCE.

A proposal to provide a credit of up to \$1,500 against tax liability to depositors with accounts frozen at savings and loan associations would be constitutional, if it were offered to every account holder with tax liability, regardless of the taxpayer's residency.

Opinion No. 86-009

To: *The Hon. Gene W. Counihan*
Maryland House of Delegates

February 25, 1986

CREDIT REGULATION

SECONDARY MORTGAGE LOAN LAW—HOME IMPROVEMENT CONTRACTS.

The opinion reviews the application of State credit and licensing laws to a secured home improvement contract.

Opinion No. 86-017

To: *The Hon. Alan T. Fell*
Commissioner of Consumer
Credit

March 20, 1986

EDUCATION

SCHOOL BOARDS—EMPLOYEES—LEGAL EXPENSES.

The common law rule allowing reimbursement of counsel fees to a public employee charged with a crime is applicable to county school board employees. In order to justify reimbursement from public funds, the employee seeking reimbursement must have acted in good faith and within the scope of employment.

Opinion No. 86-007

To: *Mr. Jerry L. Kunkle*
Acting Superintendent of
Schools
Cecil County Public Schools

February 14, 1986

ELECTIONS

REGISTRATION RECORDS.

Article 33, §3-22(c)(1) of the Maryland Code does not prohibit the acquisition of a voter list by a vendor of political services, if the list is intended to be used in the provision of political services to a candidate in a Maryland election.

Opinion No. 86-036

To: *Mrs. Marie M. Garber,*
State Administrator of Election
Laws

June 17, 1986

ENVIRONMENTAL HEALTH

SOLID WASTE MANAGEMENT—NORTHEAST MARYLAND WASTE DISPOSAL AUTHORITY.

A solid waste disposal facility may not be constructed and operated in a political subdivision that participates in the Northeast Maryland Waste Disposal Authority unless it conforms to the comprehensive solid waste management plan of the subdivision in which the facility is located.

Opinion No. 86-042

To: *Mr. Michael A. Gagliardo*
Executive Director,
Northeast Maryland Waste
Disposal Authority

July 28, 1986

GAMBLING ACTIVITIES

CRIMINAL LAW—OFF-TRACK TELEPHONE BETTING.

1) The use of interstate telephone lines for betting by Maryland residents with off-track betting offices in New Jersey would violate both Maryland and federal law. 2) Maryland residents' use of credit cards to place bets at Maryland tracks is prohibited by regulation, and all betting other than at those race tracks is prohibited by statute, whatever the method of payment.

Opinion No. 86-020

To: *The Hon. Melvin C. Steinberg*
President, Senate of Maryland

March 28, 1986

HEALTH OCCUPATIONS

DIETITIANS AND NUTRITIONISTS—LICENSING.

1) "[T]he right . . . to provide services and information related to nonmedical nutrition" means that an unlicensed nutritionist may offer nutritional counseling or information if the consumer seeks the service or information to achieve overall fitness, medically unsupervised weight loss, or a generally healthier diet. By contrast, only a licensed dietitian or licensed nutritionist may offer nutritional services or information in response to a consumer's specific physiological complaint or in relation to any medical diagnosis.

2) An unlicensed nutritionist may practice under the identification "nutritionist," provided that the person (i) limits his or her practice to the provision of nonmedical nutritional services and information, as authorized in HO §4.5-103; and (ii) does not use the term "licensed nutritionist" or any other term specified in HO §4.5-402.

Opinion No. 86-051

To: *The Hon. B.W. Mike Donovan*
Senate of Maryland

September 17, 1986

PROFESSIONAL COUNSELORS—SCOPE OF STATUTE.

Enactment of proposed legislation on the certification of professional counselors would not, as a legal matter, delay the process by which they are to be certified.

Opinion No. 86-063

To: *The Hon. John C. Astle*
Maryland House of Delegates

December 1, 1986

LICENSING AND REGULATION**AMUSEMENT RIDES—INSPECTION AND INSURANCE REQUIREMENTS.**

The determination by the Commissioner of Labor and Industry that a ski lift is an "amusement ride" for purposes of the Amusement Park Safety subtitle of Article 89 is legally defensible.

Opinion No. 86-010

To: *The Hon. John N. Bambacus*
Senate of Maryland

February 26, 1986

NATURAL RESOURCES**YOUGHIOGHENY RIVER—SCENIC CORRIDOR.**

Under §8-408(b) of the Natural Resources Article, the scenic corridor of the Youghiogheny River is limited to the area along the main watercourse of the river itself.

Opinion No. 86-004

To: *The Hon. John N. Bambacus*
Senate of Maryland

February 6, 1986

OCCUPATIONS AND PROFESSIONS**DENTISTS—DENTAL REVIEW COMMITTEES—
ATTORNEY GENERAL.**

1) The Maryland State Dental Association Dental Review Committee has the statutory authority to assist in investigations of the

qualifications, competence, and performance of providers of dental care. 2) The individual members of the MSDA Dental Review Committee who act in good faith and within the scope of the committee's jurisdiction have immunity from civil liability for their participation in the work of the committee. 3) The Attorney General's Office will provide representation for a committee member if the member's acts were within the scope of the committee's jurisdiction and were neither malicious nor grossly negligent.

Opinion No. 86-038

To: *Dennis M. Sullivan, D.D.S.*

Secretary-Treasurer

July 3, 1986

*Maryland State Board of Dental
Examiners*

PERSONNEL

GENERAL ASSEMBLY—CONSTITUTIONAL LAW— REVIEW OF PERSONNEL GUIDELINES.

The opinion reviews the "Personnel Guidelines for the Department of Legislative Reference/Department of Fiscal Services" both for constitutionality under the Maryland and United States Constitutions and for consistency with statutory law.

Opinion No. 86-006

To: *The Hon. Howard A. Denis*

Senate of Maryland

February 10, 1986

PROPERTY CASUALTY INSURANCE GUARANTY CORPORATION

SUBSEQUENT INJURY FUND—UNINSURED EMPLOYERS FUND—ASSESSMENTS.

The Property Casualty Insurance Guaranty Corporation is obligated to pay the assessments due the Subsequent Injury Fund and the Uninsured Employers Fund on behalf of an insolvent member insurer.

Opinion No. 86-050

September 17, 1986

To: *Mr. John H. Newby*
Secretary-Director of
Administration
Workmen's Compensation
Commission

PUBLIC EMPLOYMENT

VEHICLE LAWS—INSURANCE—STATE EMPLOYEES.

1) State law requires that a vehicle owner maintain certain minimum levels of liability insurance coverage applicable to all use of the vehicle, including use of the vehicle for State business. 2) The State has no legal obligation to reimburse its employees for any increased insurance premiums attributable to use of their vehicles for State business. Reimbursement to these employees is reflected in the mileage reimbursement that employees now receive and may not be separately reimbursed.

Opinion No. 86-039

July 21, 1986

To: *The Hon. Ruth Massinga*
Secretary, Department of
Human Resources

PUBLIC OFFICERS

HOUSING AUTHORITY—REMOVAL PROCEDURE—CITY OF ANNAPOLIS.

When charges are brought under Article 44A, §7 of the Maryland Code against a member of the board of commissioners of a housing authority, the mayor must preside at the hearing and may not delegate that responsibility.

Opinion No. 86-029

April 30, 1986

To: *The Hon. Dennis M. Callahan*
Mayor, City of Annapolis

HOWARD COUNTY EXECUTIVE—VACANCY.

Under §302(f) of the Howard County Charter, a vacancy in the Office of County Executive is to be filled with a person who belongs to the same political party with which the predecessor County Executive was affiliated at the time of election.

Opinion No. 86-041

To: *The Hon. C. Vernon Gray,*
Chairperson, County Council of
Howard County

July 25, 1986

ORPHANS' COURT JUDGES—SALARY OVERPAYMENT.

The judge of the Orphans' Court for Frederick County who has retained an overpayment in salary paid in error is required to return it to the County.

Opinion No. 86-035

To: *Lawrence E. Speelman, Esq.*
County Attorney for Frederick
County

June 5, 1986

STATE PLANNING COMMISSION—"SALARIED STATE OFFICE".

Section 5-803(a)(2) of the State Finance and Procurement Article does not bar the appointment of a State college or university faculty member to the State Planning Commission.

Opinion No. 86-065

To: *Mrs. Constance R. Beims*
Executive Department
State House

December 1, 1986

RETIREMENT SYSTEMS**MILITARY SERVICE CREDIT—"VETERANS".**

The right of certain employees to receive military service credit toward their pension and retirement benefits extends only to those who performed the types of service specified in Article 65, §88, and not to all "veterans," as defined in Article 1, §29.

Opinion No. 86-023

To: *Mr. Bennett H. Shaver*
Secretary to the Board of
Trustees
Maryland State Retirement and
Pension Systems

April 2, 1986

SHERIFFS

SHERIFF'S FEES—DUTY TO SERVE PAPERS.

Section 7-402(c) of the Courts Article does not require advance payment of fees and does not affect a sheriff's duty to serve all papers directed to the sheriff.

Opinion No. 86-043

To: *The Hon. C. Meritt Pumphrey*
Clerk, Circuit Court for Howard
County

July 29, 1986

SOVEREIGN IMMUNITY

SCHOOL BOARDS.

Under §4-105(d) of the Education Article, if a county board of education has elected to purchase insurance, it may raise the defense of sovereign immunity to a claim above the policy limit. If the county board has elected to self-insure, it may raise the defense of sovereign immunity to a claim above \$100,000, even if the amount of its self-insurance exceeds \$100,000.

Opinion No. 86-057

To: *Mr. H. Orville Berwick*
Superintendent of Schools for
Cecil County

November 12, 1986

STATE LOTTERY

UNCLAIMED PRIZE—UNIFORM DISPOSITION OF ABANDONED PROPERTY ACT.

1) The prize money for this particular unclaimed prize is not subject to the Uniform Disposition of Abandoned Property Act, but should be handled as the Maryland State Lottery handles other unclaimed prizes under §9-112(e)(ii) of the State government Article. 2) The State Lottery Agency should divest the portion of the zero coupon Treasury Bonds that is attributable to this unclaimed prize and direct the proceeds of the sale in accordance with SG §122(e)(ii).

Opinion No. 86-026

April 9, 1986

To: *The Hon. Louis L. Goldstein*
Comptroller of the Treasury
The Hon. Leo E. Green,
Chairman
Joint Committee on the
Management of Public Funds
Mr. John P. Mannion, Director
Miscellaneous Revenue Division

TAXATION

HOUSING AUTHORITY—EXEMPTION.

Property owned by the Wicomico County Housing Authority is exempt from taxation by the City of Fruitland, whether or not the Authority and the City have entered into an agreement for payments in lieu of taxes.

Opinion No. 86-059

November 17, 1986

To: *Mr. Richard S. Adkins,*
Chairman, Wicomico County
Housing Authority

PROPERTY TAX—MUNICIPAL TAX DIFFERENTIAL.

The opinion reviews the application of §6-305 of the Tax-Property Article of the Maryland Code, which provides for the setting of the county property tax rate in the municipal corporations of eight specified counties, including Garrett County.

Opinion No. 86-015

March 14, 1986

To: *The Hon. George C. Edwards*
Maryland House of Delegates

RETAIL SALES TAX—EXEMPTIONS—REAL PROPERTY—AMERICAN RED CROSS.

The American Red Cross is a federal instrumentality, not a charitable organization, for sales tax purposes. Accordingly, contractors' purchases of materials to be incorporated into the real property of the Red Cross are subject to sales tax.

Opinion No. 86-061

To: *Mr. Stephen M. Cordi*
Director, Comptroller of the
Treasury
Retail Sales Tax Division

November 19, 1986

RETAIL SALES TAX—GARMENT ALTERATIONS.

Alterations performed on a new article of clothing are properly considered part of the fabrication of the article and, therefore, are taxable. Alterations on clothing already worn are considered repairs and, therefore, are not taxable.

Opinion No. 86-049

To: *The Hon. Paula C. Hollinger*
Maryland House of Delegates

September 16, 1986

VEHICLE LAWS

DRIVING RECORD—EXPUNGEMENT.

A driver whose license is suspended for refusal to take a chemical test but who is acquitted of the alcohol-related criminal offense and has no other convictions or suspensions has a statutory entitlement to expungement.

Opinion No. 86-033

To: *W. Marshall Rickert*
Administrator

May 19, 1986

Motor Vehicle Administration

WORKER'S COMPENSATION

SUBSEQUENT INJURY FUND—UNINSURED EMPLOYERS FUND—ASSESSMENTS.

The assessments required to be paid from the City of Baltimore Accounting Department to support the Subsequent Injury Fund and the Uninsured Employers Fund are properly calculated on the amount of the total worker's compensation award, notwithstanding any setoff attributable to the payment of government benefits.

Opinion No. 86-022

To: *Ms. Joan N. Parker*
Workmen's Compensation
Commission

April 2, 1986

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