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ANNUAL REPORT
AND
OFFICIAL OPINIONS
OF THE
ATTORNEY GENERAL
OF
MARYLAND

1987

J. JOSEPH CURRAN, JR.
ATTORNEY GENERAL

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ATTORNEYS GENERAL OF MARYLAND

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

- Lt. Richard Smith, Sr., of Calvert County (Prot.), appointed by the Provincial Court, 28 Sept. 1657.
- Capt. Thomas Manning of Calvert County (Prot.), com. by the Lt. Gen., 20 Feb. 1660/1.
- Col. William Calvert of St. Mary's City (Cath.), sworn 12 June 1666.
- Col. Vincent Lowe of Talbot County (Cath.), sworn 13 Dec. 1670. Resigned after appointed Sheriff of Talbot County.
- Kenelm Cheseldyne of St. Mary's City (Prot.), sworn 6 April 1676.
- Thomas Burford of Charles County (Prot.), appointed by His Lordship and sworn 4 Oct. 1681; died in office in March, 1686/7.
- Robert Carville of St. Mary's City (Cath.), com. by Chancellor Henry Darnall, pursuant to Lord Baltimore's instructions, 3 April 1688. Superseded by Carroll.
- Charles Carroll of St. Mary's City and 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. 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, succeed-

- ing Dent, 4 Dec. 1704; sworn His Lordship's Attorney General, succeeding Carroll, 1 May 1716; died in office 1 Aug. 1718. He was Naval Officer of Annapolis, and in Aug., 1708, he became sole Commissary General.
- Thomas Bordley of Annapolis (Prot.), sworn 6 Sept. 1718; dismissed in September, 1721. He was sole Commissary General. He died 11 Oct. 1726.
- Daniel Dulany, Sr., of Annapolis (Prot. protege and former clerk of George Plater above), succeeded Bordley, 10 Oct. 1721. Until July, 1724, he was joint Commissary General. He resigned in 1725.
- Michael Howard of Talbot County (Prot.), sworn 19 Oct. 1725. He was appointed Surveyor General of the Eastern Shore in June, 1726, and Naval Officer of Oxford about 1727. He resigned in 1734.
- Daniel Dulany, Sr., succeeded Howard in Oct. 1734, and was also sole Commissary General; resigned in 1744.
- Henry Darnall III of Prince George's County (Prot., convert, wife and children Cath.), com. and sworn 19 April 1744; appointed Naval Officer of Patuxent, 24 May 1755; persuaded to resign early in 1756.
- Stephen Bordley of Annapolis (Prot., son of Thomas Bordley above), com. 26 March and sworn 26 May 1756; suffered a paralytic stroke and resigned in Dec. 1763; died 6 Dec. 1764. He was Naval Officer of Annapolis until March, 1762, when he became sole Commissary General.
- Edmund Key of Annapolis (Prot., mother Cath.), com. 26 Dec. 1763 and sworn 10 April 1764; resigned shortly before his death on 4 May 1766.
- Robert Goldsborough II of Dorchester County (Prot.), sworn 8 April and com. 4 June 1766. Resigned in 1768; died 30 April 1777.
- Thomas Jennings of Annapolis (Prot.), sworn 18 Oct. and com. 27 Oct. 1768; recom. 29 April 1773. He was appointed State Attorney General in April 1777, but was succeeded, on 6 Jan. 1778, by Benjamin Galloway. He was a relative of former Deputy Secretary Edmund Jennings.

Luther Martin	1778
William Pinkney	1805
John Thomas Mason	1806
John Johnson	1806
John Montgomery	1811
Luther Martin	1818
¹ Nathanial Williams, Assistant Attorney General	1820
Thomas B. Dorsey	1822
Thomas Kell	1824
Roger B. Taney	1827
Josiah Bayley	1831
George R. Richardson	1845
Robert J. Brent	1851
² Alexander Randall	1864
Issac D. Jones	1867
Andrew K. Syester	1871
Charles J. M. Gwynn	1875
Charles B. Roberts	1883
William 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
J. Joseph Curran, Jr.	1987

¹During the physical incapacity of Luther Martin, 1820–1822, the Governor appointed Nathanial 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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JUDSON P. GARRETT, JR. . . .	Deputy Attorney General
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*Edward R. K. Hargadon

Lawrence W. Shavers

Port Administration —

Tracy V. Drake

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 Sidney S. Campen, Jr.
 James K. Eagan, III
 Donald C. Fry
 Robert L. Grey
 Lloyd J. Hammond

Henry F. Leonnig
 Daniel F. McMullen, Jr.
 Nancy L. Miller
 Peyton Paul Phillips
 George H. White
 Frank W. Wilson

Uninsured Employers Fund —
 Charles R. Goldsborough, Jr., *Supervising Attorney*

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 Transportation
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
Catherine M. Shultz
Ralph S. Tyler

Department of Natural Resources
Civil Division
Department of Human Resources

1985

Jane F. Barrett

Hazardous Waste Unit, Dept. of Health and
Mental Hygiene

Ben C. Clyburn
Louisa H. Goldstein

Department of Transportation
State Highway Administration, Dept. of
Transportation

Illona Sheffey Rawlings
Richard B. Rosenblatt

Department of Personnel
Criminal Appeals and Correctional
Litigation Division

David M. Sheehan
Marlene Trestman
Susan Zimmerman Whitman

Civil Division
Civil Division
Maryland Industrial Development
Financing Authority, Dept. of Economic
and Community Development

1986

Peter V. Berns
Edward S. Harris

Consumer Protection Division
Contract Litigation Unit, Departments of
Transportation and General Services

Peter Keith
Norman E. Parker, Jr

Civil Division
Department of Economic and Community
Development

Christine Steiner

Educational Affairs Division

1987

Ann Marie DeBiase
Susan J. Mathias
Delia Anne Burke
Anthony K. Waters
Ellen S. Cooper

Department of the Environment
Educational Affairs Division
Securities Division
Department of Licensing and Regulation
Antitrust Division

Jennifer Lauterbach Robbins Award

In 1987, the Attorney General established an award in honor and memory of former Assistant Attorney General, Jennifer Lauterbach Robbins. Annually, the Attorney General will select one Assistant Attorney General to receive this award in recognition of special achievement in the field of health, human services or education. The award will recognize a special achievement that demonstrates the same high level of commitment to public service and law as that demonstrated by Jennifer Robbins throughout her professional career and particularly her service with the Office of the Attorney General.

The first Jennifer Lauterbach Robbins Award is presented to Susan Sugar Nathan, of the Department of Health and Mental Hygiene.

ANNUAL REPORT FOR 1987

December 31, 1987

*The Honorable William Donald Schaefer
Governor
State House
Annapolis, Maryland 21401*

Dear Governor Schaefer:

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 1987. A detailed financial statement of the Office, as well as case-load statistics and the official Opinions of the Attorney General, follow this report.

General Assembly

On June 2, the Attorney General's Office's seven-week pre-signing review of 1987 legislation for constitutionality and legal sufficiency came to an end with the signing into law of the remainder of 778 bills which were approved by the General Assembly this year. Another 95 bills were vetoed.

In the 90-day legislative session that concluded April 13, the General Assembly enacted nearly 900 pieces of legislation, tackling such questions as Blue Law repeal, election campaign reform, a gas tax increase, tort reform, reorganization of some departments of State government, smoking in public places, and the siting and financing of new stadium facilities.

The legal questions addressed by the Attorney General's Office were as varied as the subject matter of the enacted bills. Among the advice rendered during the session was the following: Shortening the statute of limitations for certain medical malpractice claims does not deny equal protection of the law; a statute prohibiting State's Attorneys from engaging in private practice does not violate the provisions of Article III, §35 of the Maryland Constitution; a prohibition on the use of radar detectors in motor vehicles in Maryland is not precluded by federal law, and a statute requiring campaign literature to indicate the political party of a

candidate does not violate the First Amendment, nor is it so overbroad as to sweep within its purview constitutionally protected speech.

In addition, it was determined that a requirement for those convicted of drunk driving to carry a minimum of \$300,000–\$500,000 insurance would not deny equal protection of the laws; a ban on incineration of out-of-State trash in Maryland would violate the Commerce Clause of the U.S. Constitution, Art. I, §8, cl. 3; the authorization of the use of slot machines by nonprofit organizations does not permit the sale of these machines in Maryland, and denying an offender contract proceeds from the reenactment of crimes in order to ensure that victims are compensated withstands constitutional scrutiny.

Legal research also showed that the State may rescind its approval of the Potomac River Basin Compact; modification of medical malpractice damage awards (malpractice remittur bill) does not infringe the right to a jury trial, does not deny equal protection, and does not impair a contract; an arbitrator's order to a State employer to grant fiscal relief in employee grievance cases is constitutional; a tax exemption of equipment to produce bituminous concrete does not deny equal protection in violation of the Fourteenth Amendment to the U.S. Constitution; the imposition of a U.S. citizenship requirement on persons seeking to qualify for a surety bond guaranty under the Small Business Surety Bond Guaranty Program would unconstitutionally discriminate against resident aliens in violation of the Fourteenth Amendment to the U.S. Constitution, and a bill providing for the deduction of collateral source payments from a damage award received by a plaintiff for personal injury or wrongful death would not unconstitutionally abridge the right to a jury trial or deny equal protection.

The staff of the office of Counsel to the General Assembly also wrote more than one hundred special review letters on bills with various constitutional and interpretative problems. Included among the bills which were reviewed and found to be constitutionally sound were: The package of Stadium Authority bills increasing the powers of the Authority, and authorizing the stadium site and its financing; the reorganization of the State Departments of Health and Mental Hygiene and Juvenile Services; a public school construction bill giving the Legislative Policy Committee legislative veto over certain Board of Public Works regulations; a multi-state lottery bill requiring Legislative Policy Committee approval of the Lottery Director's decision to enter into an agree-

ment to operate a multi-state lottery; altering contracts of insurance agents and brokers; a bill prohibiting gasoline distributors from requiring dealers to stay open 24 hours a day unless certain security devices are constructed; legislation imposing a tax on gas inventories; and a bill requiring applicants who practice certain health occupations to demonstrate "oral competence" in the English language.

The office also participated in litigation this year involving enactments of the General Assembly. These cases are: *Ogrinz v. James*, 309 Md. 381, 524 A.2d 77 (1987) (constitutionality of a tax on lawyers to fund Legal Mutual Liability Insurance Society); *State v. Burning Tree Club*, cert. granted, 310 Md. 695 (1987 (constitutionality of law removing tax break from an all-male country club), and *Kelly v. Marylanders for Sports Sanity*, 310 Md. 437, 530 A.2d 245 (1987) (whether stadium legislation can be petitioned to referendum).

Consumer Protection

Keeping Maryland's marketplace free of conflict and chicanery has been the aim—and achievement—of the Consumer Protection Division this year. Initiating cooperative efforts with Maryland businesses to accomplish that goal also was among the office's endeavors this year, and we believe it is paying off.

In March, I announced a plan for establishing liaisons between Maryland's business community and my office as a way of helping to make us partners in Maryland's economic development. I want to establish trust and communication between the business community and this office while retaining the effective law enforcement programs that Marylanders have come to expect—and which they deserve. As part of our liaison program, I have had panel discussions and meetings with various business leaders and introduced them to the chiefs of the office's Consumer Protection and Securities Divisions, among others. I was particularly pleased by the willingness of nine top Maryland securities dealers to become members of the 1988 Attorney General's Securities Roundtable.

It has also been gratifying to see the positive response we have gotten from many automobile dealers to a five-page letter I sent in September to all 425 licensed new car dealers in the State, urging them to join with us to make Maryland a model of fair and informative dealer advertising and sales practices.

False advertising injures businesses as well as consumers. After personally reviewing complaints filed with our office about auto ads; meeting with members of the automobile dealers' industry, and discussing the growing concern about car advertising with representatives of the Motor Vehicle Administration, I felt a detailed letter to the auto dealers—listing the unfair or deceptive advertising practices prohibited by Maryland's Consumer Protection Act and citing 17 common violations of the law and MVA regulations—was the best way to emphasize our awareness of the problem and seek advice on how to solve it.

In addition, the Division has hired a full-time monitor to review and analyze newspaper, TV and radio ads for cars; alert dealerships to questionable aspects of their advertising, and serve as a resource for advertising agencies, supplying advice on how to be sure that the ads they write comply with the Consumer Protection Act.

The automobile industry is by no means the only one in which questionable advertising and sales practices occur. In May, the Division reached agreements with two major retailers to alter the content of their advertisements for appliances and bedding.

Levenson & Klein, a Baltimore-area appliance dealer, has agreed not to engage in illegal bait-and-switch sales tactics and pay \$15,000 to the State for consumer education projects; and Woodward & Lothrop's department store chain has agreed to stop making comparisons with purported "regular" prices in its ads for bedding unless it can show that in the past it actually sold the same or similar goods at the claimed "regular" price. Woodward & Lothrop also agreed to pay the State \$75,000, of which \$52,000 is being targeted for consumer education and \$22,500 of which will cover the costs of the Division's investigation of the firm's advertising and sales procedures.

It is important to note that Woodward & Lothrop exhibited considerable good faith during its negotiations with the Division. In fact, once we began our inquiry, Woodie's unilaterally stopped the questionable bedding ads and sales practices.

False advertising is not the only potential problem consumers encounter. They can also be victimized by con artists offering phony services, bogus bargains and pitches for nonexistent charities. The Division dealt with fraudulent activities in all these areas this year.

In February, we obtained an order in Frederick County Circuit Court requiring the operator of a phony charitable group to pay

\$56,114 in restitution to Frederick-area residents who were bilked by the so-called Maryland Police Journal, which telephoned them to seek supposedly charitable "contributions," implying that it was affiliated with police groups—which it wasn't. In April, the former owner of a now-bankrupt invention-marketing firm agreed to pay Maryland consumers nearly a half-million dollars in restitution—the largest single refund ever made under the Consumer Protection Act. The Division had accused the firm, Design & Funding, of failing to fully comply with Maryland's invention-marketing law and deceiving consumers by grossly exaggerating its achievements in marketing invention ideas for clients. In fact, virtually none of the company's customers actually obtained a cash profit as a result of its services. And in June, we issued an alert to warn Marylanders to beware of travel-package promoters who telephone consumers, ask for their credit card numbers, and try to sell them low-cost "dream" vacations at U.S. resorts or overseas. We have received many complaints about these promoters, who are difficult to track down and are engaged in activities which are among the fastest-growing consumer frauds in the country.

When 1987 was barely a week old, we released a 36-page booklet, *Health Care Shopper's Guide*, and the nation's first statewide list of physician fees. These were the result of a two-year project designed to provide Marylanders with the most comprehensive medical costs and services information available in order to help them comparison shop and trim their medical care bills. The public response to these materials has been phenomenal. So far, more than 100,000 requests have been received for the health care fee lists and shopper's guides.

In another health-related area of continuing concern, health spas, the Division sought and obtained a unique order in September from the Prince George's County Circuit Court, granting us the power to act as a receiver and briefly take over operation of the Grecian Nautilus Spa in Laurel. The owner of the facility had repeatedly violated the State's health spa law in the operation of this club and still had not complied with a Baltimore County Circuit Court order to pay \$10,821 in restitution to the customers of a now-defunct spa he had operated in Cockeysville. The Division sought authority to assume control of the Laurel club in order to prevent a recurrence of the owner's actions in 1979, when he abruptly closed the Cockeysville facility, leaving customers without services for which they had paid.

We didn't stay in the health spa business for long. By the end of the month we had arranged for the sale of the Prince George's

County club and in the process obtained the long-overdue restitution for the Cockeysville club's former members. Of even greater long-term significance, however, was a ruling we obtained from the Court of Special Appeals on an issue raised in the course of our legal proceedings on behalf of the one-time members of the Cockeysville spa. The circuit court had granted restitution only to the 34 former club members who had testified in court, but as we urged, the appellate court held that "the testimony of consumer claimants at trial is not a prerequisite to recovery in a consumer protection action involving numerous similarly situated victims. . . ." The Court of Special Appeals ruled that a procedure should be established for responding to the refund claims of at least 150 former club members who didn't or couldn't come to court.

This year has come to a close with an important agreement between the Division and the trustees handling the financial affairs of Albert S. Blank, a now-bankrupt former mortgage broker, providing restitution totalling \$300,651 to 68 low-income families who were tricked by Blank into paying exorbitant fees and interest rates for mortgage loans.

This restitution to consumers is a fitting capstone for the 20th anniversary of the Consumer Protection Division, which we marked this year. Twenty years ago, I was privileged to chair the State Senate committee that wrote our consumer protection law, and the restitution checks we were able to deliver to these homeowners just before Christmas really represent what the Consumer Protection Division is all about: helping Marylanders who have been deceived or defrauded by unscrupulous people. (Blank, I might add, was sent to federal prison after being convicted of income tax evasion and bankruptcy fraud.)

During 1987, I also was pleased to appoint William Leibovici as Chief of the Consumer Protection Division. He succeeds Steven J. Cole, who resigned to become assistant vice president of the Council of Better Business Bureaus in Virginia. Bill, who had been Deputy Chief of the Division for nine years, is as responsible as anyone for making Maryland a leader in consumer protection, and I'm confident that he will see to it that we remain so.

Maryland Stadium Authority

The Maryland Stadium Authority had a big year in 1987. Legislation was passed authorizing the financing and construction of

two stadia at the Camden Yards site in Baltimore; a group of Marylanders attempted to have these laws reviewed by the voters via the referendum process, which would have delayed the project for 17 months; this office opined that the legislation was not referable; the Circuit Court for Anne Arundel County disagreed; and the Court of Appeals, in *Kelly v. Marylanders for Sports Sanity*, reversed the lower court and found that the stadium laws were “an appropriation for the maintenance of State government” and, therefore, not subject to voter review by referendum within the meaning of the Maryland Constitution.

The Court’s ruling in *Kelly* in September freed the Authority to actively pursue its mission to build two stadia and fill them with the Orioles and an NFL franchise. The Authority contracted with consultants, began the major effort needed to appraise and acquire the Camden Yards site, continued to negotiate a lease with the Orioles and unsuccessfully attempted to bring the St. Louis football Cardinals to Baltimore. This Office was not involved in the Authority’s negotiations with the professional sports teams, but the Assistant Attorneys General assigned to it ably represented the Authority in all its other efforts.

Also in September, I appointed Assistant Attorney General Norman E. Parker, Jr. as Counsel to the Authority. He previously served as counsel to the Small Business Development Financing Authority; counsel to the Industrial Financing Authority; deputy counsel to the Department of Economic and Employment Development, and as an attorney in private practice representing municipalities that issued industrial revenue bonds, among other business-related clients. He brings to the challenging task of representing the Stadium Authority a unique blend of commercial lawyering experience in both the private and public sectors.

Antitrust

In 1987, the Antitrust Division obtained a settlement in the State’s case against the national Blue Cross and Blue Shield Association and its Maryland and Washington D.C. Plans. The State’s complaint, filed in October 1984, alleged that an agreement among the defendants prevented the Baltimore and Washington D.C.-based Plans from competing with each other for insureds. The settlement, filed in the United States District Court in Baltimore, eliminated the restrictions on where each Plan may sell its insurance products in Maryland.

According to the lawsuit, the Washington D.C. Plan was restricted to offering its traditional Blue Cross and Blue Shield insurance only in certain areas of Maryland in the Washington metropolitan area. The Maryland Blue Cross and Blue Shield Plan was able to market its Blue Cross and Blue Shield products only in the remainder of the State and could not offer them in the restricted Washington suburban areas. This alleged agreement between the two Blue Cross and Blue Shield Plans was implemented by the trademark licensing agreements between the national Blue Cross and Blue Shield Association and the local plans.

According to the settlement, the trademark licensing agreements remain in full force and effect, but each of the Blue Cross and Blue Shield Plans may now, exercising independent business judgment, market its traditional Blue Cross and Blue Shield health insurance, health maintenance organizations, preferred-provider plans, third party administration services, and other insurance products throughout the State. Consistent with the antitrust laws, the settlement agreement provides that each plan will use its independent business judgment in deciding where it will sell its health insurance.

The settlement is effective until late January, 1991, or the completion of an Assembly of the Blue Cross and Blue Shield Plans. The Assembly of Blue Cross and Blue Shield Plans is expected to review the present structure of the Blue Cross and Blue Shield system and recommend changes to the existing nationwide system. Following the expiration of the settlement agreement, should the Plans re-establish exclusive marketing areas, the State could challenge the Plans' conduct and could reassert the allegations in the present complaint, which by the terms of the settlement was dismissed without prejudice.

In another major case this year, Antitrust Division attorneys obtained \$180,000 for the State in the settlement of its lawsuit involving a racketeering scheme involving the quality-assurance inspections of the Fort McHenry Tunnel project. In its complaint, the Antitrust Division employed a new weapon in its arsenal against wrongdoing businesses, the federal Racketeer Influenced the Corrupt Organizations (RICO) Act.

The State alleged that Trans Eastern Inspection Services, Inc., of Boca Raton, Florida, its president, a former vice-president, and a former State engineer conspired to bill the State for about 13,000 hours in fraudulent overtime. Under the terms of the Set-

tlement Agreement, filed with the federal court in Baltimore, the State will receive the \$180,000 in monthly installments paid by the defendants.

Criminal Investigations

During 1987, the Criminal Investigations Division achieved an enviable conviction rate of 100% in its prosecution of more than 20 defendants for crimes such as bribery, perjury, theft, forgery and criminal tax offenses. Except for two defendants against whom charges were abated due to their deaths, all of those tried were convicted—with substantial jail sentences being imposed in more than half of the cases. In addition, the Division has recovered for the State more than \$2 million in fines, restitution and tax penalties.

Earlier this month, the office was fortunate to have Lynne A. Battaglia, a senior attorney with the tax division of the U.S. Justice Department, join our staff as the new Chief of the Criminal Investigations Division. She is an experienced prosecutor, having handled more than 30 felony cases while she was an Assistant U.S. Attorney between 1978 and 1982. She also was head of civil litigation for the U.S. Attorney's Office in Baltimore before leaving it to teach at the University of Maryland.

At the time Ms. Battaglia was appointed Chief of the Division, I appointed Assistant Attorney General Christopher J. Romano as its Deputy Chief. He has been a member of the Division since 1984 and has handled numerous important prosecutions.

Medicaid Fraud

In 1987, the Unit managed to equal its 1986 record for convictions and more than tripled the amount of criminal restitution ordered by the courts as part of criminal sentences. This year the courts ordered \$709,530 in criminal restitution and \$41,500 in fines. The Unit identified civil Medicaid overpayments in the amount of \$229,991, which exceeded the 1986 figures by approximately \$25,000.

The major criminal prosecution in 1987 involved Kenson Nursing Home, a Baltimore City facility. As a result of the prosecution of the nursing home, its owner, administrator, activities director, and director of nursing, the Medicaid Fraud Control Unit obtained an agreement to pay the State \$319,000 in restitution, the

largest recovery ever obtained in a Maryland Medicaid Fraud case.

The Medicaid Fraud Control Unit also continued its remarkable record for obtaining the convictions on Medicaid Fraud charges of individual medical providers. In 1987, through a negotiated guilty plea, the Unit obtained the conviction of a Baltimore psychiatrist and a restitution order of more than \$146,000. This Medicaid provider was billing the Medicaid Program for psycho-therapy sessions that were never actually held. The Unit also successfully prosecuted a Prince George's County pediatrician for both Medicaid fraud and obstruction of justice. She was ordered to repay more than \$65,000 in restitution. In this case, the Unit was able to detect, by analysis of records, that the pediatrician had submitted altered and fabricated medical records in response to a grand jury subpoena. Detection of such obstruction of justice continues to be a focus of our Medicaid fraud investigations.

Other 1987 cases include the conviction of a Montgomery County general practitioner who also altered records submitted to the Medicaid Fraud Control Unit. Most recently, a Harford County pediatrician was convicted of Medicaid fraud based on his billing for medically unnecessary throat cultures. We compared his rate of performance of throat cultures on Medicaid patients with his rate of such treatments with third party and private pay insurance patients and were able to determine that he was performing unnecessary procedures for the Medicaid patients. In 1987 the Unit also prosecuted a dental case which resulted in restitution of approximately \$62,000, including a \$10,000 fine and a \$10,000 contribution to the University of Maryland Dental School.

One of the more interesting 1987 cases handled by the Medicaid Fraud Control Unit was the prosecution of the Executive Director of an entity which used a grant of Medicaid funds to operate group homes for developmentally disabled people. The director abused the grant by using money from it to buy real estate in her own name. She also diverted grant funds for other personal uses. The most egregious aspect of the case was that the defendant received Social Security disability checks on behalf of the retarded adults, and rather than putting the money in individual escrow bank accounts, she deposited the funds in a corporate bank account. As the result of this case, the defendant was ordered to pay approximately \$65,000 in restitution to the State.

The Medicaid Fraud Control Unit has accomplished much over the last year. It continues to aggressively ferret out fraud among

health care providers. It seeks to deal effectively with abusers of the Maryland Medical Assistance Program and deter those who might otherwise abuse it.

Criminal Appeals Division

In 1987, the Criminal Appeals Division continued to represent the State in all appeals in criminal cases before the Court of Special Appeals, the Court of Appeals, and the United States Supreme Court. In addition, Assistant Attorneys General in the Division represented the State in habeas corpus actions in the United States District Court, the Fourth Circuit Court of Appeals, and the U.S. Supreme Court.

One criminal appeal case, *Booth v. Maryland*, was accepted for full briefing and argument by the Supreme Court in 1987. The issue in *Booth* was the constitutionality of victim impact statements in capital sentencing proceedings, and the high court ruled 5-4 that such statements could not be used in capital cases.

Attorneys from this Division also continued to work closely with prosecutors in the 24 State's Attorney's offices around Maryland; participated in training programs; reviewed proposed legislation; responded to citizen inquiries, and generally shared their expertise in the area of criminal law and procedure.

In March, I was pleased to appoint Assistant Attorney General Gary E. Bair as Chief of the Division. He succeeds former Assistant Attorney General Deborah K. Chasanow, who was appointed a Federal court magistrate. Gary had been Chief of the Attorney General's Medicaid Fraud Control Unit since October, 1984. Under his leadership there, the State obtained more than \$1.4 million in fines and restitution. His skills and prosecutorial experience in the Medicaid Fraud Unit enhance his ability to anticipate and appreciate the needs and interests of the State's Attorneys throughout Maryland.

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 1987, the Division handled scores of Federal and State court cases, encompassing a wide range of constitutional, statutory, contractual, and tort claims initiated by employees, students, patients, and contractors. Thirty-one court cases were closed during the year; as in past years the "favorable resolution rate" exceeded 90%.

In addition, Division attorneys represented clients in more than a hundred 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 (including, most notably, the plan to reorganize higher education); 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, and copy-right and trademark matters.

Also dealt with were questions involving the licensing of 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 matters, and public information and open meetings laws.

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 worked closely with client administrators on formulating early retirement incentive programs, revising the standard faculty contract, fashioning suitable affirmative action plans, and implementing the State-wide desegregation plan. Moreover, the Division presented special seminars briefing administrators on affiliated foundation problems, wrongful termination precautions, and institutional liability issues.

Housing and Community Development

The reorganization of State government in 1987 led to the creation of the new Department of Housing and Community Development. It was formed from a portion of the former Department of Economic and Community Development, as well as the Offices of Weatherization Assistance and Community Services, which were transferred from the Department of Human Resources, and the Maryland Energy Office, transferred from the Department of Natural Resources. Concurrently with the reorganization, I approved a structure for the Department's contingent of Assistant Attorneys General, consisting of a Counsel, Deputy Counsel, six Assistant Attorneys General and three Staff Attorneys.

In 1987, the largest area of activity involving the Assistant Attorneys General assigned to housing and community development related to the issuance of \$411 million in housing revenue bonds to finance various types of housing projects in Maryland sponsored by the Department. Attorneys in this Department worked extensively on fifteen housing bond issues, the largest number of issues ever undertaken by the Department in one year. The Assistant Attorneys General also represented Departmental programs in the closings of many mortgage loans financed by tax-exempt bond proceeds, as well as State-appropriated funds. These included 16 loans totalling about \$34 million for 2,261 units of rental housing under several programs. The Office also provided counsel to the Department's Homeownership Programs and Special Loan Programs in preparing program and loan documentation for approximately 2,940 loans. These will enable limited income Marylanders to purchase or modify homes for special needs.

Additionally, attorneys in the Office provided counsel to eight of the Department's community assistance programs in the draft-

ing and review of approximately 260 grant agreements and contracts totalling some \$19.3 million in financial assistance. The funds will go primarily to local governments and nonprofit organizations for purposes ranging from community development block grants to energy assistance grants. Legal work for the Department's Division of Historical and Cultural Programs also actively involved our attorneys in the drafting and review of closing documents for approximately 12 grants and loans for historic preservation and survey purposes, as well as in the negotiation of numerous historic preservation easements.

The Department's Counsel and Deputy Counsel also prepared 16 pieces of proposed legislation for consideration by the 1988 General Assembly. While some of the proposed legislation was designed to amend existing laws, including extensive revisions to the Maryland Homeowners Association Act, several pieces constituted new program initiatives for the Department. These included a new State Action for Targeted Areas Loan Program, a Closing Costs Assistance Loan Program, an Indian Recognition Program, a Submerged Archaeology Program, and a reauthorization of State general obligation bonds for a new Partnership Rental Housing Program.

While 1987 proved to be an extremely busy year for the Office, it is anticipated that 1988 will be an even more active year as we assist the new Department in striving to improve and increase housing and community assistance in Maryland.

Economic and Employment Development

This has been an excellent year of achievement for the Assistant Attorneys General assigned to the Department of Economic and Employment Development. The greatest challenge for the office was the division of economic and community development and the amalgamation of employment training and economic development. Everything has gone smoothly and the Assistant Attorneys General have adapted well to the changes.

Among the more important, specific accomplishments of the Office during 1987 were the negotiating and drafting of the documents needed by DEED to consummate the first Equity Participation Investment Program (EPIP) transaction in the State. EPIP is a new and innovative program, approved by the General Assembly in 1986, which is administered by the Maryland Small Business Development Financing Authority, a division of DEED.

Under EPIP, the State can invest in and become equity participants in franchises which are minority-owned.

The Office also participated in the structuring and closing of two bond issues which provided significant job opportunities to Marylanders. In both transactions, the Maryland Industrial Financing Authority, MIDFA, a division of DEED, sold revenue bonds on the public market to finance facilities for businesses. In one, MIDFA issued taxable bonds, the first such issue in the State, to help finance the construction of a new corporate headquarters for Kelly-Springfield Tire Company in Cumberland. In the other financing, MIDFA issued tax-exempt bonds for the renovation of a building in Cecil County to be occupied by Majestic Industries, Inc., a New Jersey manufacturer of school supplies which has moved to Maryland and become the County's second largest employer.

Some of the highlights of the Maryland Industrial and Commercial Redevelopment financing (MICRF) responsibility of the Department include the \$1.5 million loan to MEDCO for the benefit of Bethlehem Steel, enabling it to convert a dry dock into a ship repair facility; a \$2 million grant to Baltimore City for the benefit of a nonprofit foundation at the University of Maryland, which will use the funds to launch a marine biotechnology research facility that is expected to enhance Maryland's fishing industry; a \$2 million grant to the City of Bowie for the benefit of a nonprofit high technology research institute, and a \$2.7 million loan to Carroll County for the benefit of Black & Decker, which will use the money to renovate and expand an existing facility there.

In November, I was pleased to be able to appoint former Delegate Arthur S. Drea, Jr. from Montgomery County as the Principal Counsel to DEED. Art is an excellent lawyer who earned the respect and admiration of his legislative colleagues as a hard-working, facts-and-figures-oriented Delegate. They were sorry he decided not to seek re-election in 1978, and I know they are as pleased as I am that he has agreed to serve all Marylanders as Counsel to DEED.

Health Services Cost Review Commission

The Office was closely involved with the successful merger of Lutheran and Provident Hospitals, now known as the Liberty Medical Center, Inc. We were a partner in the process from its inception to its completion—and even beyond.

Specifically, our counsel assigned to the HSCRC, Jay E. Levy and Stanley Lustman, were able to provide adequate assurances of a viable rate structure for the newly merged hospital. In addition, once the merger was completed, our Office was instrumental in working out an arrangement that would enable Provident Hospital to obtain approximately \$800,000 in funds to apply toward unemployment insurance claims by workers who lost their jobs because of the merger. The rate increase to Liberty, which provided the funds for Provident, was structured in such a way so as not to adversely affect Liberty's positioning on the Commission's "screens"—a ranking of each hospital in the State, published once a year by the Commission, establishing each facility's adjusted average cost per admission.

General Services

The attorneys representing the Department of General Services continue to pursue compensation for the State from designers and construction contractors for building defects caused by their negligence or breach of contract. Several such cases were resolved in the past year. *The State of Maryland v. Leblond and Associates*, was settled in July of 1987 for \$40,000. The case involved a designer's failure to specify smoke dampers in the ventilation systems of several buildings being renovated at the Rosewood Center. *State of Maryland v. VVKR* was settled for \$400,000 on the first day of trial in December 1987. Attorneys for the University of Maryland assisted in this case. It concerned the underground parking garage at UMAB. The designer failed to design the structure with enough strength to support the weight of the landscaping that was placed on top of the garage.

The attorneys representing the Department helped the Baltimore County Office of Law pursue a construction related affirmative claim involving the Dundalk Community College's Physical Building. The wooden roof trusses of that building structurally failed and the Board of Trustees for Baltimore County Community Colleges sued the designer, the contractor, and the manufacturer of the roof trusses. A \$95,000 settlement was entered into with several of the defendants, and a judgment was obtained against the designer for an additional \$183,810.

During 1987, the Department's attorneys continued to investigate new construction problems brought to their attention to determine if these were situations in which the Department should

pursue the responsible entities for any damages suffered by the State. The attorneys also continued to pursue pending cases the Department has filed against designers and contractors. The largest of these is *State of Maryland v. Hennison Durham and Richardson/Kidde Consultants, Inc.* That case concerns design and workmanship defects in the roofs and other areas of the Maryland Correctional Institution in Jessup. This case is scheduled for trial in November 1988.

Filing suit is not always necessary to obtain restitution. The involvement of the Department's attorneys in a dispute concerning leaks at the new Bel Air Multi-Service Center resulted in the contractor performing \$200,000 worth of repairs for \$95,000. During the course of the repairs, additional studies can still be made to determine if the Department should pursue any claim for the \$95,000.

Savings and Loan Criminal Division

During 1987, the Savings and Loan Criminal Division continued its painstaking review of the affairs of Old Court Savings and Loan and other State-insured thrifts placed into conservatorship following the collapse of the Maryland savings and loan industry in May of 1985. The Old Court investigation, the largest and most successful white-collar criminal probe in Maryland history, has thus far resulted in the recovery of approximately \$25 million in stolen funds and the conviction of seven bank officials for crimes ranging from theft to forgery.

The Division in 1987 brought to a close three major prosecutions of Old Court insiders. Jerome S. Cardin, a prominent Baltimore attorney and Old Court owner convicted of stealing \$385,000, was sentenced to fifteen years imprisonment in January. Allan Pearlstein, a Pennsylvania businessman and Old Court owner, was found guilty of the theft of \$640,000 in April and sentenced to eight years in prison. James Gay, an Old Court vice-president and real estate broker, pled guilty to the theft of \$560,000 in October 1987. Each of these felons was directed to repay the stolen funds as part of his sentence.

The success of these and other cases brought by the Division in 1987 was a testament to the diligence and talent of the specialized team of investigators assembled to handle the highly-publicized and vital task of uncovering fraud within the State's savings and loans.

Department of Personnel

During 1987, the Legal Division representing the Department of Personnel handled seven court cases, all of them pre-existing law suits. Three of the cases were concluded either by dismissal or settlement, all favorable to the Department. The remaining four cases will be going to trial on their merits.

In the area of preventive counseling, our Division has participated in various seminars to discuss the possibilities of eliminating unnecessary litigation. In addition to litigation and the day-to-day counseling of our clients in the Department, the Division also engaged in numerous administrative proceedings in 1987, representing our clients before the Equal Employment Opportunity Commission, the Maryland Commission on Human Relations, the U.S. Department of Labor, and other agencies and groups.

Department of the Environment

With the creation of the new Department of the Environment last July came the creation, quite naturally, of a new branch of the Attorney General's Office, comprising the attorneys assigned to represent the new agency.

The new Division is made up of the lawyers who represented the old Office of Environmental Programs within the Department of Health and Mental Hygiene, as well as an Assistant Attorney General and Staff Attorney representing the oil control and sediment control programs that were transferred from the Department of Natural Resources to the Department of the Environment as part of the reorganization. The Environmental Crimes Unit (formerly the Hazardous Waste Strike Force) is part of the new branch, although it is supervised from the Criminal Investigations Unit. Throughout 1987, even before the creation of this new branch, the Attorney General's Office worked to plan for and implement the reorganization that created the Department of the Environment.

In 1987, the Court of Special Appeals sustained the lawfulness of the State water discharge permit to the Little Patuxent Wastewater Treatment Plant, which was the subject of the case *Howard County and Maryland Department of Health and Mental Hygiene v. Davidsonville Area Civic Association*. In doing so, the appellate court upheld the joint State and Federal strategy for re-

moval of nutrients from sewage treatment plants in order to preserve the Chesapeake Bay.

In addition, during 1987, the Attorney General's Office assisted the Department of the Environment in negotiating an administrative consent order with Bethlehem Steel for the installation of approximately \$15 million worth of air pollution control equipment at the Sparrows Point plant over the next three years and for the payment of \$750,000, the largest civil penalty ever imposed in a Maryland anti-pollution case.

Environmental Crimes Unit

In the Environmental Crimes Unit (ECU), the new position of supervising attorney was created and filled in April with the appointment of Assistant Attorney General Elizabeth Beebe Volz to the post. The Unit now has three attorneys, four Maryland State Police Officers, one technician and two support personnel assigned to it.

This year the ECU opened 21 investigations (compared to nine probes in 1986) and obtained eight separate indictments for environmental crimes in Baltimore City, Howard County and Prince George's County. Six of these cases resulted in guilty pleas, with a total of \$74,500 in fines obtained from both the individuals and corporations found guilty of violating the State's anti-pollution laws.

As the public becomes more aware of our work in this field, referrals for investigations into environmental crimes continue to grow. We plan to maintain our high standards of investigation and preparation and thereby serve as a strong deterrent to criminal acts against our environment.

Comptroller's Office

During 1987, the Assistant Attorneys General assigned to the Comptroller's Office dealt with many important matters, but perhaps two cases which prompted rulings by the Court of Appeals were the most significant.

In July, the Court held for the Comptroller in reversing the decision of the Baltimore County Circuit Court in *World Inn, Inc., t/a Best Western Motels v. Comptroller of the Treasury*. A sales tax assessment had been levied against Best Western for

failing to collect sales taxes on rooms rented to Federal government employees who engaged the rooms in their own names and paid the bills by personal check, personal credit card, or cash. The Court of Appeals held that the tax in such cases was owed by the employees and not by the Federal government, and therefore the rentals of hotel rooms by Federal employees were not immune from the State sales tax.

In *Random House, Inc., v. Comptroller of the Treasury*, the Court of Appeals rejected the attempt by Random House, a multi-state corporation, to modify the three-factor apportionment formula by which most large businesses determine how much of their income is taxable by Maryland. It works by comparing the average relative values of Maryland and non-Maryland property, payroll and sales. Random House claimed that if its royalty income was going to be taxed by Maryland, the property factor must include the value of intangible rights, such as copyrights, that it owned. While these rights have no value on the books of Random House, the publishing firm insisted that an estimated value could and should be used. The Court of Appeals rejected this claim, noting that the estimated values suggested were speculative in nature, that the Comptroller has discretionary authority in the overall structure of the formula, and that the result produced was not in fact disproportionate to Random House's income.

Department of Human Resources

This has been a very active year for the Assistant Attorneys General assigned to the Department of Human Resources. Our staff at DHR has grown to nine Assistant Attorneys General, one Staff Attorney, one Legal Officer, four secretaries and three law clerks. Continued reduction in, and scrutiny of, Federal grants to DHR, as well as mercurial shifts in public sentiment about appropriate uses of DHR's finite resources, have combined to present our staff with some of our most significant challenges ever.

Consistent with DHR's new initiative to move low-income persons from dependence upon government benefits to independence whenever possible, we have given advice and reviewed regulations and other policies to help DHR achieve this worthy goal. Contemporaneously, DHR has strengthened its prior commitment to prevent risks to children whenever possible, as well as protect those children who are already at risk of being abused, abandoned or neglected. Consequently, our division has intensified its involvement in this area. For instance, we have worked

closely with counsel for local departments of social services in litigation concerning the termination of parental rights and the assistance rendered abused, abandoned and neglected children. Similarly, we have cooperated closely with local State's Attorneys in appealing cases which involve issues of paternity and child support.

These efforts have begun to produce consistent State appellate court results favorable to DHR, as well as an increased appreciation in the community for DHR's presence and for the extremely difficult tasks the agency has undertaken in the face of tremendous obstacles.

At the same time, we have continued our aggressive representation of DHR in its fiscal disputes with Federal agencies which seek to impose penalties on DHR for operation of its cash benefit and social service programs. This aspect of our work involves us in administrative and judicial proceedings which typically raise novel and complex issues never before adjudicated.

Lastly, we continue to represent DHR vigorously in employment matters and have assisted the agency in implementing its deep commitment to equal employment opportunity.

Juvenile Services

During 1987, the legislature responded to an Administrative initiative by removing the Juvenile Services Administration from the organization of the Department of Health and Mental Hygiene and creating an independent entity now known as the Juvenile Services Agency (JSA), which came to life on July 1.

The Juvenile Services Agency field office worked in conjunction with other divisions of the Attorney General's Office to settle *Earl P. v. Hornbeck*, a special education case filed in the U.S. District Court in Baltimore, alleging that educationally-handicapped children committed to JSA training schools were not being provided with appropriate special education services as required by law. The case was settled by the signing of a consent decree in which JSA agreed to provide these services. The JSA's counsel, along with other Assistant Attorneys General, have since provided staff training to JSA employees regarding implementation of the consent decree.

In *R.L. v. State of Maryland*, it was alleged that the conditions at the Montrose School violated constitutional standards of care.

During 1987, it was agreed in principle to settle this case because the JSA had decided to close Montrose and remove all students from the school and place them in more appropriate settings or facilities by the end of March, 1988. Lawyers from the Attorney General's Office worked toward settling the case and on preparing the human services contracts which were required to provide placements for those children returned to the community as a result of the closing of Montrose.

At the time the Juvenile Services Agency was founded, I appointed Assistant Attorney General Ellen A. Callegary as Principal Counsel to it. For the past six years, Ellen has supervised and coordinated the State's legal actions on issues involving handicapped and institutionalized persons, including those in the juvenile justice system. I know that the improvement and support of Maryland's juvenile services operations is a top priority of the Administration, and I was delighted to have someone with Ellen's abilities and experience to handle this important assignment. In that task, she has been joined by Assistant Attorney General Robert T. Fontaine.

Public Safety and Correctional Services

Counsel assigned to the Department of Public Safety and Correctional Services were involved in a number of significant matters during 1987 which resolved some longstanding lawsuits for the benefit of the State, inmates and employees of the Department.

After eleven years of litigation, a successful resolution was finally reached on the major overcrowding litigation against three of the State's older major prison facilities. Agreements were signed in cases involving the Maryland House of Correction, the Maryland Correctional Institution, and the Maryland Correctional Training Center. These agreements provide that the population at these institutions will be gradually reduced to the levels originally ordered by the Federal courts in the late 1970's and, additionally, the agreements provide for improved maintenance, programs, and classification procedures. Most important, the agreements say that after a period of three years of monitoring, the State may apply to the Federal courts to terminate any further supervision by the courts of the population, conditions, and operations of these older institutions.

Resolution also was reached in another significant case, a longstanding lawsuit challenging the failure of the State to admit fe-

male inmates to the Patuxent Institution for evaluation and participation in the unique programs offered there. The settlement was accomplished by instituting an interim program for the evaluation and treatment of female prisoners, who will be transported from the Maryland Correctional Institute for Women to the Patuxent Institution on a daily basis. The State is also going to construct a new permanent facility for female prisoners at the Patuxent Institution at a cost of approximately \$1 million. This will give female inmates access to the specialized programs available to prisoners evaluated by and committed to Patuxent.

With the approval of the U.S. District Court in Baltimore, the Correctional Litigation Unit, the Department of Public Safety and Correctional Services, and the Legal Aid Bureau designed and implemented an administrative grievance procedure for inmates. This procedure will enable the State to take advantage of a provision of Federal law which provides that if a correctional institution has a grievance procedure that meets Federal standards, the Federal court may refer many lawsuits filed by inmates to the administrative remedy procedure for resolution without the time and expense involved in protracted litigation.

Finally, counsel assigned to the Department of Public Safety and Correctional Services participated in the design and implementation of a new promotional system for troopers of the Maryland State Police. This new promotional system should go a long way towards correcting problems with the promotional system of the Maryland State Police which previously had been identified by the Attorney General's Office in a special report.

Asbestos Unit

We are anticipating approval within the next few weeks of a trial management plan in the State's asbestos property damage litigation against 28 manufacturers, miners and installers of interior building construction products containing asbestos. This will be the first comprehensive trial management plan adopted nationwide in multi-building, multi-defendant property damage cases.

The plan provides for resolution by three special masters of the factual issues of product identification and abatement costs with respect to the State buildings which are the subject of the lawsuit. A schedule incorporated in the plan calls for the hearings before the masters to begin in January, 1989, and continue through September or October of that year. The jury trial on the

issues not submitted to the masters will be scheduled to begin on June 1, 1990.

I am pleased to report these accomplishments of this, my first year as Attorney General. The people of this State have honored me with the stewardship of an office committed to the ideals of public service—evenhanded application of the law, maintenance of the highest professional standards, and dedication to the public interest. I am grateful to the lawyers and support staff who compose the largest and, in my view, the finest law firm in Maryland. I also want to thank you and your staff for the many courtesies extended to us.

J. Joseph Curran, Jr.

Attorney General

**CASES IN WHICH THE
OFFICE OF THE ATTORNEY GENERAL HAS
PARTICIPATED
FOR CALENDAR YEAR 1987**

Supreme Court of the United States (Includes Petitions for Certiorari)	37
United States Court of Appeals for the Fourth Circuit ..	176
Other United States Courts of Appeal	14
Total	227
United States District Court for the District of Maryland	1113
Other United States District Courts	60
Total	1,173
Court of Appeals of Maryland (Includes Petitions for Certiorari and Answers to Petitions)	
Civil Appeals	100
Criminal Appeals	136
Total	236
Court of Special Appeals of Maryland	
Civil Appeals	220
Criminal Appeals	1040
Total	1,260
Circuit Court of Maryland	4145
District Court of Maryland	2241
Maryland Tax Court	1125
Workmen's Compensation Hearings	10895
Miscellaneous Administrative Hearings	2320

FINANCIAL STATEMENT
OFFICE OF THE ATTORNEY GENERAL
FOR THE FISCAL YEAR BEGINNING JULY 1, 1986
AND ENDING JUNE 30, 1987

Appropriations and Budget Amendments	
Program 001	\$ 2,684,209
Program 002	489,066
Program 003	1,905,192
Program 004	472,036
Program 005	1,727,886
Program 006	644,182
Program 008	134,424
Program 009	1,072,609
Program 014	978,172
Program 015	786,710
Program 016	507,003
Program 017	534,778
Program 018	<u>411,186</u>
Total	<u>\$ 12,347,453</u>
 Total Appropriation	 12,347,453
Less Reversions	<u>- 87,173</u>
Total Expenditures	<u>\$ 12,602,280</u>

Program 001

Legal Counsel & Advice

Appropriation	\$ 2,642,589
Budget Amendments	41,620
 Less Reversion	 <u>- 44,162</u>
Total Funds Available	<u>\$ 2,640,047</u>
 Salaries	
Attorney General (1)	\$ 66,730
Deputy Attorney General (3)	174,982
Senior Exec. Associate Attorney General (3)	171,665
Division Director II (3)	152,901
Principal Counsel (2)	72,268
Asst. Atty. General VII, General Counsel (6)	301,321

Asst. Atty. General VI, General Counsel (16)	723,520
Administrator IV	8,123
Executive Associate Attorney General (1)	53,220
Asst. Atty. General V, General Counsel (12)	364,501
Asst. Atty. General IV, General Counsel (5)	132,924
Fiscal Administrator I (1)	37,046
Fiscal Specialist II (1)	31,834
Administrative Officer II (1)	43,392
Associate Librarian II (1)	29,563
Personnel Officer I (1)	29,557
Accountant Auditor IV (1)	23,464
Administrative Officer I (2)	54,341
Administrative Specialist III (1)	26,371
Legal Assistant II (3)	67,427
Fiscal Associate I	3,758
First Administrative Assistant (1)	32,063
Management Associate (3)	70,952
Administrative Aide I (8)	164,191
Services Specialist (1)	18,993
Office Secretary III (2)	38,046
Stenographer, Law and Legislative (13)	200,475
Fiscal Clerk III (1)	11,607
Office Secretary II (3)	65,727
Office Clerk I (1)	12,970
Office Assistant III (1)	11,824
Total Salaries	<u>\$ 3,195,756</u>
Additional Salary Related Expenses	
Overtime	490
Miscellaneous Adjustments	7,721
Fringe Benefits	252,791
Other Adjustments/Turnover	<u>- 2,242,271</u>
Total Additional Expenses	<u>- 1,981,269</u>
Total Salaries & Related Expenses	<u>1,214,487</u>
Other Expenses	
Technical and Special Fees	117,066
Communication	279,656
Travel	13,382
Motor Vehicle Operation and Maintenance	46,012
Contractual Services	96,991
Supplies and Materials	43,358
Equipment—Additional	207,225

Grants, Subsidies & Contributions	- 1,731
Fixed Charges	<u>623,601</u>
Total Other Expenses	<u>\$ 1,425,560</u>
Total Expenditures—001	<u>\$ 2,640,047</u>

Program 002—Division of Asbestos

Appropriation	485,060
Budget Amendments	<u>4,006</u>
Total Funds Available	<u>\$ 489,066</u>

Salaries

Asst. Atty. General VII, General Counsel (1)	22,371
Asst. Atty. General V, General Counsel (1)	114
Stenographer, Law and Legislative (1)	<u>18,993</u>
Total Salaries	<u>\$ 41,478</u>

Additional Salary Related Expenses

Overtime	4,569
Fringe Benefits	9,734
Other Adjustments/Turnover	<u>- 16</u>
Total Additional Expenses	<u>\$ 14,287</u>
Total Salaries & Related Expenses	<u>\$ 55,765</u>

Other Expenses

Technical and Special Fees	198,455
Communication	46
Travel	5,800
Contractual Services	185,786
Supplies and Materials	336
Equipment—Additional	5,183
Fixed Charges	<u>37,695</u>
Total Other Expenses	<u>\$ 433,301</u>
Total Expenditures—002	<u>\$ 489,066</u>

Program 003—Division of Savings and Loan

Appropriation	1,474,331
Budget Amendments	<u>430,861</u>
Total Funds Available	<u>\$ 1,905,192</u>

Salaries

Asst. Atty. General VI. Special Counsel (1)	43,219
Administrator II (1)	34,597
Fiscal Specialist III (3)	31,055
Legal Assistant I (1)	4,148
Total Salaries	<u>\$ 113,019</u>

Additional Salary Related Expenses

Miscellaneous Adjustments	378
Fringe Benefits	28,264
Other Adjustments/Turnover	116,107
Total Additional Expenses	<u>\$ 144,749</u>
Total Salaries & Related Expenses	<u>\$ 257,768</u>

Other Expenses

Technical and Special Fees	67,912
Communication	1,030
Travel	4,183
Motor Vehicle Operation and Maintenance	704
Contractual Services	1,510,137
Supplies and Materials	510
Equipment—Additional	20,002
Fixed Charges	42,946
Total Other Expenses	<u>\$ 1,647,424</u>
Total Expenditures—003	<u>\$ 1,905,192</u>

Program 004—Division of Securities

Appropriation	457,825
Budget Amendments	14,211
Less Reversion	- 43,011
Total Funds Available	<u>\$ 429,025</u>

Salaries

Division Director II (1)	51,820
Asst. Atty. General VI, General Counsel	44,627
Asst. Atty. General V, General Counsel (2)	53,924
Administrator II	14,270
Administrative Specialist III (2)	38,629
Administrative Aide I (1)	20,400
Office Secretary III (1)	17,735
Stenographer, Law and Legislative	16,244

Typist Clerk IV (1)	15,226
Total Salaries	<u>272,875</u>

Additional Salary Related Expenses

Overtime	814
Fringe Benefits	62,023
Other Adjustments/Turnover	<u>43,451</u>
Total Additional Expenses	<u>\$ 106,288</u>
Total Salaries & Related Expenses	<u>\$ 379,163</u>

Other Expenses

Technical and Special Fees	27,118
Travel	424
Motor Vehicle Operation and Maintenance	643
Contractual Services	14,674
Supplies and Materials	299
Equipment—Additional	3,052
Grants, Subsidies and Contributions	125
Fixed Charges	<u>3,527</u>
Total Other Expenses	<u>\$ 49,862</u>
Total Expenditures—004	<u>\$ 429,025</u>

Program 005—Division of Consumer Protection

Appropriation	1,614,972
Budget Amendments	71,128
Special Fund Expenditure	<u>41,786</u>
Total Funds Available	<u>\$ 1,727,886</u>

Salaries

Asst. Atty. General VII, General Counsel (1)	46,677
Asst. Atty General VI, General Counsel (3)	100,606
Executive Associate Attorney General (1)	53,220
Asst. Atty. General V, General Counsel (3)	79,371
Administrator II (1)	19,324
Administrator I (2)	28,270
Chief Investigator Consumer Fraud (1)	33,298
Administrative Officer III (2)	49,723
Public Affairs Officer II (1)	31,840
Administrative Officer II (1)	44,873
Administrative Officer I	17,749
Consumer Affairs Supervisor (3)	75,953
Administrative Specialist II (2)	47,302

Consumer Affairs Specialist III (7)	123,142
Publications Specialist II (1)	18,244
Services Supervisor III (1)	6,422
Consumer Affairs Specialist II (3)	65,638
Data Processing Operations Technician II (1)	18,990
Administrative Aide I (1)	20,400
Office Secretary III, Stenographic (1)	18,993
Stenographer, Law and Legislative (4)	79,353
Office Secretary II (1)	13,521
Office Clerk II (1)	14,234
Total Salaries	<u>\$ 1,007,143</u>
Additional Salary Related Expenses	
Overtime	4,262
Miscellaneous Adjustments	1,441
Fringe Benefits	252,011
Other Adjustments/Turnover	— 581
Total Additional Expenses	<u>257,133</u>
Total Salaries & Related Expenses	<u>\$ 1,264,276</u>
Other Expenses	
Technical and Special Fees	141,178
Communication	10,651
Travel	11,724
Motor Vehicle Operation and Maintenance	11,144
Contractual Services	262,938
Supplies and Materials	1,907
Equipment—Additional	4,864
Grants, Subsidies and Contributions	5,979
Fixed Charges	13,225
Total Other Expenses	<u>\$ 463,610</u>
Total Expenditures—005	<u>\$ 1,727,886</u>

Program 006—Antitrust Division

Appropriation	623,437
Budget Amendments	<u>20,745</u>
Total Funds Available	<u>\$ 644,182</u>

Salaries	
Division Director II (1)	51,820
Asst. Atty. General VI, General Counsel (3)	127,412
Asst. Atty. General V, General Counsel (3)	100,145

Administrative Officer I (1)	22,139
Accountant/Auditor III (1)	16,496
Legal Assistant I (1)	16,457
Administrative Aide I (1)	19,672
Stenographer, Law and Legislative (2)	31,194
Total Salaries	<u>\$ 385,335</u>
Additional Salary Related Expenses	
Overtime	54
Miscellaneous Adjustments	1,706
Fringe Benefits	95,281
Other Adjustments/Turnover	— 604
Total Additional Expenses	<u>\$ 96,437</u>
Total Salaries & Related Expenses	<u>\$ 481,772</u>
Other Expenses	
Technical and Special Fees	22,836
Travel	16,693
Motor Vehicle Operation and Maintenance	651
Contractual Services	115,278
Supplies and Materials	330
Equipment—Additional	2,123
Fixed Charges	4,499
Total Other Expenses	<u>\$ 162,410</u>
Total Expenditures—006	<u>\$ 644,182</u>

Program 008—State's Attorneys' Coordinator

Appropriation	131,347
Budget Amendments	3,077
Total Funds Available	<u>\$ 134,424</u>
Salaries	
State's Attorneys' Coordinator (1)	46,818
Administrative Aide I	3,992
Stenographer, Law and Legislative (1)	15,164
Total Salaries	<u>\$ 65,974</u>
Additional Salary Related Expenses	
Overtime	110
Fringe Benefits	16,088
Other Adjustments/Turnover	— 26
Total Additional Expenses	<u>\$ 16,172</u>

Total Salaries & Related Expenses	\$ <u>82,146</u>
Other Expenses	
Technical and Special Fees	7,311
Communication	2,621
Travel	3,581
Contractual Services	31,577
Supplies and Materials	628
Equipment—Additional	5,342
Fixed Charges	<u>1,218</u>
Total Other Expenses	\$ <u>52,278</u>
Total Expenditures—008	\$ <u>134,424</u>

Program 009—Medicaid Fraud Control Unit

Appropriation	271,275
Budget Amendments	11,594
Federal Fund Expenditure	<u>789,290</u>
Total Funds Available	\$ <u>1,072,609</u>

Salaries

Principal Counsel (1)	39,051
Division Director I (1)	29,401
Asst. Atty. General VII, General Counsel (1)	26,343
Asst. Atty. General VI, General Counsel (2)	86,351
Chief Investigator, Medicaid Fraud (1)	36,814
Asst. Atty. General V, General Counsel (1)	30,809
Fiscal Administrator II (1)	39,222
Fiscal Administrator I (1)	37,046
Fiscal Specialist III (3)	100,564
Medicaid Fraud Investigator III (1)	27,727
Administrative Specialist III	1,056
Medicaid Fraud Investigator II (4)	93,213
Administrative Aide I (1)	20,400
Stenographer, Law and Legislative (3)	49,972
Office Assistant III (1)	<u>7,206</u>
Total Salaries	\$ <u>625,175</u>

Additional Salary Related Expenses

Overtime	31
Miscellaneous Adjustments	12,354
Fringe Benefits	154,168
Other Adjustments/Turnovers	<u>-282</u>

Total Additional Expenses	\$ 166,271
Total Salaries & Related Expenses	\$ 791,446

Other Expenses

Technical and Special Fees	22,040
Communication	10,950
Travel	5,250
Motor Vehicle Operation and Maintenance	5,587
Contractual Services	57,319
Supplies and Materials	3
Equipment—Additional	15,336
Grants, Subsidies and Contributions	87,173
Fixed Charges	77,505
Total Other Expenses	\$ 281,163
Total Expenditures—009	\$ 1,072,609

Program 014—Civil Litigation Division

Appropriation	942,955
Budget Amendments	35,217
Total Funds Available	\$ 978,172

Salaries

Senior Executive Associate Attorney General	
Principal Counsel	
Asst. Atty. General VII, General Counsel	
Asst. Atty. General VI, General Counsel	
Administrative Officer I	
Legal Assistant II	
Administrative Aide I	
Stenographer, Law and Legislative	
Total Salaries	\$ 610,727

Additional Salary Related Expenses

Overtime	306
Fringe Benefits	155,163
Total Additional Expenses	\$ 155,469
Total Salaries & Related Expenses	\$ 766,196

Other Expenses

Technical and Special Fees	64,620
Communication	420

Travel	7,055
Motor Vehicle Operations and Maintenance	3,834
Contractual Services	61,945
Supplies and Materials	13,350
Equipment—Additional	11,115
Fixed Charges	49,637
Total Other Expenses	<u>\$ 211,796</u>
Total Expenditures—014	<u>\$ 978,172</u>

Program 015—Criminal Appeals Division

Appropriation	754,695
Budget Amendments	32,015
Total Funds Available	<u>\$ 786,710</u>

Salaries

Division Director II	
Asst. Atty. General VII, General Counsel	
Asst. Atty. General VI, General Counsel	
Asst. Atty. General V, General Counsel	
Asst. Atty. General IV, General Counsel	
Administrative Aide I	
Stenographer, Law and Legislative	
Office Secretary II	
Total Salaries	<u>\$ 525,350</u>

Additional Salary Related Expenses

Miscellaneous Adjustments	8,483
Fringe Benefits	138,912
Total Additional Expenses	<u>\$ 147,395</u>
Total Salaries & Related Expenses	<u>672,745</u>

Other Expenses

Technical and Special Fees	26,597
Travel	2,956
Motor Vehicle Operation and Maintenance	1,000
Contractual Services	30,628
Supplies and Materials	4,040
Equipment—Additional	816
Fixed Charges	47,928
Total Other Expenses	<u>\$ 113,965</u>
Total Expenditures—015	<u>\$ 786,710</u>

Program 016—Criminal Investigations Division

Appropriation	489,395
Budget Amendments	<u>17,608</u>
Total Funds Available	<u>\$ 507,003</u>

Salaries

Division Director II	
Asst. Atty. General VII, General Counsel	
Asst. Atty. General VI, General Counsel	
Fiscal Administrator I	
Accountant/Auditor IV	
Accountant/Auditor III	
Legal Assistant I	
Administrative Aide I	
Stenographer, Law and Legislative	
Total Salaries	<u>\$ 310,628</u>

Additional Salary Related Expenses

Overtime	368
Fringe Benefits	<u>77,418</u>
Total Additional Expenses	<u>\$ 77,786</u>
Total Salaries & Related Expenses	<u>\$ 388,414</u>

Other Expenses

Technical and Special Fees	58,395
Travel	1,873
Motor Vehicle Operation and Maintenance	667
Contractual Services	11,060
Supplies and Materials	2,513
Equipment—Additional	4,547
Fixed Charges	<u>39,534</u>
Total Other Expenses	<u>\$ 118,589</u>
Total Expenditures—016	<u>\$ 507,003</u>

Program 017—Educational Affairs Division

Appropriation	515,569
Budget Amendments	<u>19,209</u>
Total Expenditures	<u>\$ 534,778</u>

Salaries

Division Director II	
Asst. Atty. General VII, General Counsel	
Asst. Atty. General VI, General Counsel	
Asst. Atty. General V, General Counsel	
Administrative Officer I	
Administrative Aide I	
Office Secretary III	
Stenographer, Law and Legislative	
Total Salaries	<u>\$ 324,141</u>

Additional Salary Related Expenses

Miscellaneous Adjustments	5,628
Fringe Benefits	82,844
Total Additional Expenses	<u>\$ 88,472</u>
Total Salaries & Related Expenses	<u>\$ 412,613</u>

Other Expenses

Technical and Special Fees	49,560
Travel	2,901
Motor Vehicle Operations and Maintenance	833
Contractual Services	22,678
Supplies and Materials	4,000
Equipment—Additional	1,492
Fixed Charges	40,701
Total Other Expenses	<u>\$ 122,165</u>
Total Expenditures—017	<u>\$ 534,778</u>

Program 018—Correctional Litigation Division

Appropriation	396,779
Budget Amendments	14,407
Total Funds Available	<u>\$ 411,186</u>

Salaries

Asst. Atty. General VII, General Counsel	
Asst. Atty. General VI, General Counsel	
Asst. Atty. General V, General Counsel	
Legal Assistant II	
Administrative Aide I	
Stenographer, Law and Legislative	
Total Salaries	<u>\$ 268,864</u>

Additional Salary Related Expenses	
Fringe Benefits	<u>71,713</u>
Total Salaries & Related Expenses	<u>\$ 340,577</u>
Other Expenses	
Technical and Special Fees	27,080
Travel	942
Motor Vehicle Operation and Maintenance	767
Contractual Services	14,316
Supplies and Materials	2,662
Equipment—Additional	1,080
Fixed Charges	<u>23,762</u>
Total Other Expenses	<u>\$ 70,609</u>
Total Expenditures—018	<u>\$ 411,186</u>
Total Expenditures	
Program 001	2,640,047
Program 002	489,066
Program 003	1,905,192
Program 004	429,025
Program 005	1,727,886
Program 006	644,182
Program 008	134,424
Program 009	1,072,609
Program 014	978,172
Program 015	786,710
Program 016	507,003
Program 017	534,778
Program 018	<u>411,186</u>
Total FY 87 Expenditures	<u>\$12,260,280</u>

OFFICIAL OPINIONS
of the
ATTORNEY GENERAL
of
MARYLAND

**OPINIONS PUBLISHED
IN FULL**

See also page 373 for synopses of additional Opinions.

BUDGETARY ADMINISTRATION

REGIONAL PLANNING COUNCIL—SPECIAL FUNDS—REVERSION— COUNCIL MAY NOT SUPPLEMENT ANNUAL APPROPRIATION WITH PRIOR YEAR'S UNEXPENDED LOCAL CONTRIBUTIONS.

March 3, 1987

Mr. Alfred P. Gwynn
Executive Director
Regional Planning Council

You have requested our opinion concerning the disposition, at the end of a fiscal year, of certain unexpended special fund balances of the Regional Planning Council. Specifically, you ask whether the Council may carry over from one fiscal year to the next a pool of unexpended contributions from the member subdivisions. This reserve fund would be available to supplement the next fiscal year's appropriation of State and local funds in order to meet unanticipated funding requirements.

For the reasons given below, we conclude that the Council does not have the authority to carry over a reserve fund of unexpended appropriations from year to year and with it to supplement the next year's appropriations. Rather, in our view, such sums are to be carried over and credited to the subdivisions so as to reduce their contribution for the next fiscal year.

I

Council Funding

The Regional Planning Council, established by Chapter 753, Laws of Maryland 1963, serves an important role in coordinating the planning and development process in the region comprising Baltimore City and Anne Arundel, Baltimore, Carroll, Harford, and Howard Counties. See Article 78D, §§1, 12, 16, and 17 of the Maryland Code. The Council affords a means by which the member jurisdictions may work together with State and private agencies in dealing with common problems and planning for the future development of the Baltimore metropolitan area.

The Council receives general, federal, and special fund appropriations. The Council derives its special fund income from two sources. Article 78D, §18 of the Maryland Code requires the participating political subdivisions to pay annual budgeted contributions to the Council. The statute specifies the required level of local funding:

“(c) On or before April 15 of each year, the Council shall certify to each of the several budget officers or governing bodies of the city and the several counties comprising the area, the portion of the budget of the Council, as enacted by the General Assembly, payable respectively by each, which portion shall be in the same ratio to two thirds ($2/3$) of the budget that the assessed value of all real property in the respective city or county, as the case may be, for the preceding taxable year, bears to the assessed value of all such real property in the area; . . . and provided further . . . that this contribution of the city and several counties comprising the area shall not exceed twice the amount of the State’s contribution.”¹

These funds are deposited in the State Treasury and are expended in accordance with an appropriation contained in the State Budget.

The Council receives additional special funding pursuant to Article 78D, §20. This provision authorizes the Council to contract with local units “to provide specialized planning services for appropriate reimbursement. . . .” Reimbursements received by the Council for these specialized services are recorded as special funds and may be used for operating expenses. *See* Chapter 109, Laws of Maryland 1986 (Budget Bill for Fiscal Year 1987, item 27.02.00.024). This special fund reimbursement revenue is separate and distinct from local government contributions for general planning services and is not the subject of your opinion request.

The Council has taken the position that unspent contributions may be carried over to the ensuing fiscal year to meet unanticipated fund requirements, such as unbudgeted demands made by

¹ Article 78D, §18(c) also sets a ceiling on local contributions of the dollar amount equivalent of “an ad valorem tax of one half of one cent ($1/2$ c) per \$100” of assessed value in the jurisdiction.

changes in State law or regulation. The Legislative Auditor, however, maintains that budget law requires excess special funds derived from units of local government to be returned or credited to those units at the close of the fiscal year.

II

Reversion of Unspent Balances

The disposition of unspent appropriations is governed by Title 7, Subtitle 3, of the State Finance and Procurement Article ("SF" Article). SF §7-302 sets forth the general requirement for reversion:

"Except as otherwise provided by law, at the end of a fiscal year, the unspent balance of each appropriation that was made for that fiscal year to an officer or unit of the State government or to an institution reverts to the General Fund of the State."

This reversion requirement has broad application, encompassing all units of the State government that receive an appropriation for operating expenses or have expenses paid out of fees collected by the unit. SF §7-301(a)(2).² Furthermore, SF §7-302 includes "not only the General Funds appropriated and included in the budget, but also all Special and Federal Funds the State anticipates receiving from other sources which are included in the budget." 52 *Opinions of the Attorney General* 481, 482 (1967).³

² The Council is described in its statute as "an independent unit [that] may not be placed by the Governor in any principal department." Article 78D, §3A. Moreover, given that Article 78D, §18 expressly subjects the Council to the ordinary budgeting process, we have no doubt that the Council is properly viewed as a "unit of State government" for purposes of statutory budget procedures. Cf. 71 *Opinions of the Attorney General* 10, at notes 2 and 10 and text accompanying note 18 (1986).

³ All State expenditures are made pursuant to the appropriations in the annual budget, as amended from time to time by budget amendment. The various units of State government may, with the Governor's approval, amend the appropriations for particular programs in their individual budgets funded from the General Fund, provided they do not exceed their total General Fund appropriations as contained in the annual budget. See SF §§7-202, 7-205, and 7-209.

However, if a procedure for handling unexpended funds is "otherwise provided by law," the general reversion requirement in SF §7-302 does not apply. The various statutory provisions establishing specific exceptions to the reversion requirement exempt either certain appropriations or certain units. SF Title 7 itself exempts several categories of unspent balances from reversion to the General Fund:

1. unspent appropriations "needed to meet unpaid obligations incurred during that fiscal year," SF §7-303;

2. unspent special funds "dedicate[d]" by State or federal law "to a specific purpose," SF §7-304;

3. with the approval of the Board of Public Works, unspent appropriations for capital expenditures, SF §7-305;

4. certain unencumbered appropriations to institutions for higher education, SF §7-306; and

5. unspent appropriations to the Dedicated Purpose Account, which revert to the Revenue Stabilization Account instead of to the General Fund. SF §7-310(e) and (f).⁴

Exceptions outside SF Title 7 include §3-216 of the Transportation Article, which provides that "[n]o part of the Transportation Trust Fund may revert or be credited to the general funds of this State";⁵ Article 48A, §243A, which specifies that funds of the Maryland Automobile Insurance Fund are not part of the State Treasury; and restrictive language of similar import included in the annual Budget Bill.

There are, of course, various ways in which the General Assembly might "otherwise provide" for the disposition or use of

⁴ The Dedicated Purpose Account and the Revenue Stabilization Account constitute the "State Reserve Fund," established by Chapter 655, Laws of Maryland 1986. SF §7-310. The Dedicated Purpose Account retains appropriations for certain major, multi-year expenditures. The Revenue Stabilization Account was established "to retain State revenues for future needs and reduce the need for future tax increases by moderating revenue growth." SF §7-311.

⁵ See generally 71 *Opinions of the Attorney General* 3 (1986) (amenability of Transportation Trust Fund to transfer through statutory budget amendment).

unexpended "special fund" appropriations.⁶ In 45 *Opinions of the Attorney General* 27 (1960), the Attorney General advised that a specific statutory provision that funds be retained as special funds constitutes a dedication of moneys, exempting these funds from reversion. However, 55 *Opinions of the Attorney General* 260 (1970) pointed out that a statutory provision *permitting*, but not requiring, that funds be used exclusively for a certain purpose does not constitute a dedication of funds so as to permit retention of unexpended amounts in a reserve fund. Other opinions have found an exemption from the reversion requirement on the basis of language in the annual Budget Bill relating to the specific special fund in question. See, e.g., 40 *Opinions of the Attorney General* 288, 291 (1955); 34 *Opinions of the Attorney General* 105, 108 (1949); 8 *Opinions of the Attorney General* 197 (1923).⁷

III

Application to the Council

The relevant statutory provisions and the prior interpretations of them indicate that the Regional Planning Council is not authorized to retain unspent special fund balances to establish a reserve fund from funds contributed by local governments under Article 78D, §18. Neither the Budget Bill nor any other provision of law provides for the carrying forward of these balances.⁸ Nor, in our

⁶ Special fund appropriations are distinguished from general fund appropriations chiefly by revenue source. General funds are raised through general State taxation for use in meeting general State expenses. By contrast, special funds are usually generated through the imposition of special taxes or fees, or through the rendition of special services, "for the exclusive support of particular State activities." 46 *Opinions of the Attorney General* 185 (1961).

⁷ In addition, 58 *Opinions of the Attorney General* 41 (1973) recognized a narrow exception to the general requirement for reversion if an agency, the Comptroller, the Department of Budget and Fiscal Planning, and the General Assembly have consistently, over a course of years, treated a specific item of appropriations to a special fund as authorizing an exception to the general reversion requirement. 58 *Opinions of the Attorney General* at 45-46.

⁸ Nor are we aware of any consistent, long-standing, and universally accepted practice of the Council's carrying forward these balances. Cf. note 7 above.

view, are these local contributions “dedicated” by law “to a specific purpose,” within the meaning of SF §7-304. We do not think that this language was intended to reach funds that merely support the Council’s ordinary operational funding requirements.⁹

Indeed, the retention of these funds by the Council for unanticipated operating expenses is inconsistent with the policy underpinnings of the Council’s funding provision, Article 78D, §18. Article 78D, §18(c) specifies that the contribution of the local jurisdictions “shall not exceed twice the amount of the State’s contribution.” The “State’s contribution” is the amount of state General Fund appropriations determined under the formula (and ceiling) in Article 78D, §18(a). Presumably, the General Assembly anticipates that its appropriations will be expended. The Council’s funding scheme contemplates that no more than two local dollars actually will be spent for every State dollar spent. But because unspent portions of the Council’s General Fund appropriation revert to the General Fund at the close of the fiscal year pursuant to SF §7-302, the ratio of local to State expenditures in fact would be greater than two-to-one if unspent local contributions from one year are simply carried forward to the next.

The intent underlying Article 78D, §18(c) requires that, at the end of each fiscal year, actual costs be determined and appropriate adjustments made. If there are unspent contributions from local governments, such sums should be forwarded to and credited to amounts payable in the succeeding fiscal year by the subdivisions.¹⁰

⁹ By contrast, we believe that the local funds received by the Council under Article 78D, §20 for “specialized planning services” are dedicated to that purpose and are consequently within the exception to reversion in SF §7-304.

¹⁰ In our view, the ratio of State to local funds set in Article 78D, §18(c) “otherwise provide[s] by law” that the unexpended local contributions do not themselves revert to the General Fund, but instead are to be credited against the ensuing local contributions. Otherwise, the two-to-one ratio would be breached as much as if the Council were able to retain the contributions as a pool of reserve funds. the General Fund, but instead are to be credited against the ensuing local contributions. Otherwise, the two-to-one ratio would be breached as much as if the Council were able to retain the contributions as a pool of reserve funds.

IV
Conclusion

In summary, it is our opinion that the Regional Planning Council does not have the authority to maintain a reserve fund of unexpended local appropriations.

J. JOSEPH CURRAN, JR., *Attorney General*

GAIL COHN, *Assistant Attorney General*

JACK SCHWARTZ

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Opinions and Advice

BUDGETARY ADMINISTRATION—TRAVEL EXPENSES—AGENCY—
STATE WILL HAVE NO LIABILITY FOR EMPLOYEE'S CREDIT
CARD CHARGES.

June 23, 1987

*Dr. H. Louis Stettler, III, Secretary
Department of Budget and Fiscal Planning*

You have requested our opinion concerning potential State financial liability arising out of a contract between the State and a credit card provider, under which the provider would issue credit cards to State employees to be used for charging travel expenses.

For the reasons given below, we conclude that the State will have no liability for charges incurred by employees through the use of credit cards issued under a contract of this kind.

I

Background

In July, 1986, the Division of Management Analysis and Audits of the Department of Budget and Fiscal Planning completed a report entitled "Analysis of State Travel Management." According to this report, the trend in travel management in larger companies since federal deregulation of airline travel has been centralization of travel services. Employers accomplish centralization primarily by two means—by contracting with travel agencies for travel services, and by contracting with credit card issuers for payment arrangements. The result, reportedly, has been better travel services at lower costs. The State is planning to establish a similar centralized travel management program, which will be within the Executive Branch and will be administered by the Department of Budget and Fiscal Planning.¹

Pursuant to this program, the State intends to contract with a credit card provider that will offer fee-free credit cards to em-

¹ State central travel management programs are already in effect in Colorado, New Jersey, West Virginia, North Carolina, and Indiana.

ployees who travel frequently on State business (three or more times a year). The employee will apply for the credit directly. If the application is approved, the credit card will be issued in the employee's name, bills will be sent to the employee's home address, and the employee will be responsible for paying the credit grantor directly. After a trip, the employee will submit receipts to the State for reimbursement.

The advantage to the State of this arrangement is that it will decrease the need for travel advances, giving the State the benefit of a cash float. In addition, the credit card provider will send regular reports to the State on card usage. These reports will reflect travel patterns, indicating, for example, areas visited and hotels frequented. Data of this nature will assist the State in monitoring business travel and will allow for increased efficiency in travel management. At the same time, State employees will enjoy the convenience of payment by credit without an annual fee obligation. Moreover, the monthly statements will provide the employee with a record of expenses for the employee's own accounting purposes.

Your concern is whether the State risks assuming any liability for the use of cards issued under such an arrangement, as a consequence of either the State's agreement with the provider or the cardholder's status as a State employee. At this time, no specific contract has been framed. Hence, our response must be somewhat general. However, we think it clear that the State will not incur any liability.

II

Agency

A State employee who applies for credit under the proposed plan, like any other credit card applicant, will enter into a contractual agreement with the issuer establishing the cardholder's liability. If in so contracting the employee were acting on behalf of the State as its agent, the State, by implication, also might become liable as a consequence of the agency relationship.

Agency is a fiduciary relation that results when one person, the agent, agrees to act on behalf of another, the principal, with the latter's consent. Ordinarily, an agency relation is created as result of an oral or written agreement. See *Schear v. Motel Management Corp. of America*, 61 Md. App. 670 (1985). However, even in the

absence of any express agreement creating an agency relation, the doctrine of apparent authority might result in liability: "Succinctly stated, apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him." *Parker v. Junior Press Printing Serv., Inc.*, 266 Md. 721, 727-28 (1972). See also, e.g., *Klein v. Weiss*, 284 Md. 36 (1978); *B.P. Oil Corp. v. Mabe*, 279 Md. 632 (1977). A principal can be held liable under the theory of apparent authority only if (1) the principal manifested a representation of the agent's authority or knowingly allowed the agent to assume such authority; (2) the third person in good faith relied upon that representation; and (3) the third person, relying upon that representation, changed position to his or her detriment. See *Medical Mut. Liability Ins. Soc. of Maryland v. Mutual Fire, Marine & Inland Ins. Co.*, 37 Md. App. 706 (1977).

III

Application of Agency Criteria to the Relation between the State and the Cardholder

In our view, an agreement between the State and a credit card company to issue cards to State employees with which they may charge travel expenses does not support a reasonable inference of agency. As planned, the agreement will provide that the employee alone will apply for credit and will contract with the provider, that the cards will be issued in the name of the employee, and that the statements will be mailed to the employee's home address. These conditions would make manifest that the employee cardholder would not be acting in the stead of the State, but rather on the employee's own behalf.

Moreover, to avoid any possible doubt on this score, a clause in the agreement specifically disclaiming State liability, and comparable written notice to the employee, would make the question of implied liability a nullity. Under these circumstances, clearly, the State will not have given anyone a basis to conclude that the employee has authority to incur an obligation on behalf of the State.²

² We think it immaterial whether the employee is permitted to use the card for personal charges in addition to business expenses.

To be sure, an employee in some instances may act as an agent of the State, but the employer-employee relation does not inevitably result in the creation of an agency relation. "[T]he doctrine of apparent authority is applicable only where the relation of employer and employee is that of principal and agent." *East Coast Freight Lines v. Mayor and City Council*, 190 Md. 256, 284 (1948) (emphasis added). The difference between the two relationships is that "[a] conventional agent is employed to represent a principal in relation to some contractual obligation with a third party, whereas the [employee] is employed to render service to rather than for the [employer], even though it may happen that the service will involve relations with third persons." *Id.* The State employees who use credit cards under the program will not represent the State in its contractual relation with the credit card issuer; on the contrary, they will act solely pursuant to their separate contractual relation with the issuer. Thus, the status of the cardholder as a State employee and the restriction that the card be used only for State travel expenses will not establish an agency relation.³

IV

Conclusion

In summary, it is our opinion that the State's contract with a credit card provider for the issuance of cards to State employees will not establish an agency relationship and, therefore, will not give rise to State liability.

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Opinions and Advice

³ See also *Oxweld Acetylene v. Hughes*, 126 Md. 437 (1915) (inference of authority on the part of the agent to pledge the principal's credit for travelling expenses cannot be drawn from the fact that the expenses were incidental to the work for which agent was employed).

CHESAPEAKE BAY CRITICAL AREA COMMISSION

PROGRAM DEVELOPMENT CRITERIA—AMENDMENT—COMMISSION
MAY AMEND ONLY IF NO SIGNIFICANT CHANGE IN SUB-
STANCE OF CRITERIA—GENERAL ASSEMBLY MAY AMEND BY
STATUTE.

March 10, 1987

The Honorable Daniel M. Long
Maryland House Of Delegates

You have requested our opinion concerning amendment of the program development criteria of the Chesapeake Bay Critical Area Commission. Specifically, you pose two questions:

1. Does the Commission have authority to amend the criteria?
2. By what means may the General Assembly amend the criteria?

For the reasons stated below, we conclude as follows:

1. The Commission does not have authority to adopt amendments to the criteria that would change their substance significantly. However, it does have authority to adopt amendments that would not effect a significant substantive change.
2. The General Assembly may amend the criteria, or direct that the Commission amend them, only by means of a statute.

I

Program Development Criteria

Part of the General Assembly's purpose in enacting Chapter 794, Laws of Maryland 1984, was to "implement the [Chesapeake Bay] Resource Protection Program on a cooperative basis between the State and affected local governments, with local governments establishing and implementing their programs in a consistent and uniform manner subject to State criteria." §8-1801(b)(2) of the Natural Resources Article ("NR" Article). These "State criteria" were adopted as a regulation by the Chesa-

peake Bay Critical Area Commission pursuant to the following express statutory direction:

“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 six regional public hearings During the hearing process the Commission shall consult with each affected local jurisdiction.” NR §8-1808(d)(1).

The Commission also acted under its power “[t]o adopt regulations and criteria in accordance with Title 2, Subtitle 5 (Joint Committee on Administrative, Executive and Legislative Review) and Title 10, Subtitle 1 (Administrative Procedure Act) of the State Government Article.” NR §8-1806(1).¹

Chapter 794 also provided for two elements not ordinarily a part of an agency’s rulemaking process. First, the statute created a joint legislative committee, the Joint Committee on Chesapeake Bay Critical Areas, and directed the Commission to “meet with the Joint Committee . . . periodically as the Committee requests to review development and implementation of the criteria for program development.” NR §8-1808(d)(2). Moreover, uncodified Section 3 of Chapter 794 prescribed a specific oversight role for the General Assembly between the Commission’s adoption of the criteria and their implementation:

“[T]he criteria promulgated by the Commission . . . may not be implemented unless the General Assembly at the 1986 Session affirms by joint resolution that the criteria are reasonable and acceptable to accomplish the goals of this subtitle. If a joint resolution of affirmation is not enacted by the General Assembly at the 1986 Session, the criteria shall be revised by the Commission and resubmitted to the General Assembly on the first day of the 1987 Session and the effective date of the criteria shall be delayed until June 1, 1987.”

¹ The criteria are codified at COMAR 14.15.01 through 14.15.11. See 12 *Md. Reg.* 1953 (September 27, 1985) (proposed regulation); 12 *Md. Reg.* 2352 (November 22, 1985) (final regulation).

At the 1986 Session, the General Assembly resolved that "the criteria for local area program development adopted by the Chesapeake Bay Critical Area Commission are hereby affirmed as being reasonable and acceptable to accomplish the goals of the Chesapeake Bay Critical Area Protection Program." House Joint Resolution No. 17 and Senate Joint Resolution No. 9, *reprinted in* Laws of Maryland 1986 at 3578-80. Thus, the criteria have been implemented and local programs are under development pursuant to them.

II

Commission's Amendment Authority

A. *Introduction*

Ordinarily, an agency empowered to adopt rules has the correlative power to amend them. *Department of Transportation v. Armacost*, 299 Md. 392, 423-24 (1984). However, if the particular statutory framework within which the Commission adopted the criteria evinces a legislative intent to the contrary, this general principle must give way.

In our view, Chapter 794 manifests a clear intention to restrict the Commission's amendment authority, albeit that this intention is implicit in the statutory scheme rather than expressed in so many words. "That which necessarily is implicit in a statute is as much a part of it as that which is expressed." *Guardian Life Ins. Co. v. Insurance Comm'r*, d. 629, 643 (1982).

B. *Legislative Approval*

As discussed in Part I above, Chapter 794 imposed two conditions on the adoption of the criteria that are not part of the normal rulemaking process. First, the criteria were made subject to consultative review by a specially created joint committee. NR §8-1808(d)(2). More importantly, Section 3 of Chapter 794 reserved to the 1986 Session of the General Assembly a veto power over the criteria. This office's bill review letter on Chapter 794 (then Senate Bill 664) described the Section 3 oversight mechanism as follows:

"The particular reservation of power in Senate Bill 664 presents a classic case of conducting legislative oversight through a legislative veto. Manifestly, the General Assembly could have prescribed the criteria for the development of environmental programs for the local jurisdictions. As the General Assembly evidently felt that the development of appropriate criteria for these programs would involve a number of technical considerations, it delegated the power to develop the criteria to the Critical Area Commission which can call upon various experts in the Executive Branch for advice. By reserving to itself the power to disapprove the criteria and to delay the implementation of revised criteria, the Legislature is merely conducting oversight over the exercise of legislative power delegated to the Executive." Bill Review Letter (Senate Bill 664) from Attorney General Sachs to Governor Hughes, at 2 (May 14, 1984).

In light of this review requirement, we believe that the General Assembly did not intend to authorize the Commission to amend the criteria at will. One essential purpose of the legislative veto mechanism was to place the General Assembly's imprimatur on the criteria if—as, in fact, happened—the General Assembly concluded "that the criteria are reasonable and acceptable to accomplish the goals of" the legislation. This mechanism for seeking legislative consensus about the criteria would be largely defeated if the Commission were empowered to make wholesale changes in the newly approved criteria.

To be sure, Section 3 also provided for the situation in which that legislative sanction was not obtained. Had the General Assembly failed to pass its resolution of approval in the 1986 Session, the criteria, after revision to take account of legislative criticism and resubmission in the 1987 Session, could have taken effect even if there were no legislative action.² In this circumstance, subsequent amendment of the criteria by the Commission would not do violence to the legislative approval of a specific set of criteria, for there would have been no approval.

Nevertheless, provision for this fallback procedure, evidently designed to prevent an indefinite delay in the implementation of

² Language in Section 3 that would have required "affirmation by joint resolution" during the 1987 Session was deleted by amendment.

the criteria, does not vitiate the essential point: Chapter 794 gave the General Assembly an unusual role in the development of the criteria, in the expectation that the criteria would be ratified by the General Assembly. This purpose would be defeated if the Commission could simply amend significantly the criteria that had indeed achieved this legislative consensus.

C. Effect on Local Programs

The power of the Commission to make significant changes in the substance of the criteria after their implementation would also upset the cooperative endeavor between the State and local governments that is at the heart of the legislation. See NR §8-1801(b)(2). The criteria establish the ground rules for the development of local programs. Local governments must know what the criteria are, because they must develop programs that meet the criteria. NR §8-1809(i)(2). And, they must do so within fixed time limits. NR §8-1809(a), (c), and (f). In our view, this process reflects the General Assembly's intent that the criteria, once implemented, are not to be changed in ways that would vitiate the efforts of local governments to develop complying programs.³

D. Permissible Amendments

For all of these reasons, we conclude that the Commission is without authority to effect significant changes in the substance of the criteria. At the same time, absurd results can readily be envisioned if the Commission were without authority to amend the criteria in any way. Were that so, the Commission could not then correct evident errors or make the kind of minor changes that experience under the criteria might suggest are necessary.

If, on the other hand, the Commission's rulemaking authority were construed to permit limited amendments to the criteria—that is, amendments that would not significantly change the substance of the criteria—the Commission would be able to exercise the grant of authority to it without compromising the overall leg-

³ In this regard, it is noteworthy that the statute expressly provides a means by which a local program may be amended. NR §8-1809(g) and (h). The statute contains no reference to amendments of the criteria.

islative intent that the criteria remain essentially fixed. Accordingly, we conclude that the Commission, acting under the grant of rulemaking authority in NR §8-1806(1) and proceeding in accordance with the Administrative Procedure Act, may adopt amendments to the criteria that would not effect significant changes in their substance.

III

General Assembly's Amendment Authority

In an earlier letter, Assistant Attorney General Linda H. Lamone advised that, "pursuant to its plenary powers, the General Assembly may amend the substantive law or enact new legislation to effectively modify the criteria or other aspects of the Chesapeake Bay Critical Area protection program. This would be the only way in which it [may] amend the criteria adopted by the Commission." Advice Letter to Senator Simpson, at 4 (August 21, 1985). Ms. Lamone, with the concurrence of the Attorney General, concluded that the legislative review mechanism in Section 3 of Chapter 794 authorized, for the 1986 Session only, complete acceptance or complete rejection of the criteria by joint resolution. Nothing in Chapter 794 authorized amendment of the criteria by means of a joint resolution, then or later:

"[The Attorney General's Office] approved the bill for constitutionality assuming that the power of the 1986 General Assembly was limited to accepting or rejecting the proposed criteria in their entirety as presented in the form of a joint resolution. This assumption was premised on the well established principle that so-called legislative rules and regulations, such as those which will embody the criteria, have the force and effect of law and any amendment of them by the General Assembly constitutes the exercise of its lawmaking authority. Moreover, it is well established that the General Assembly cannot amend or repeal a law by joint resolution, as such resolutions do not have the force and effect of law . . . Thus, the only constitutionally permissible method by which the General Assembly may amend legislative rules is through the enactment of a statute that is subject to the veto of the Governor." Advice Letter at 3-4 (citations omitted).

We agree with this conclusion. The General Assembly has authority to amend the criteria of the Chesapeake Bay Critical Area Commission, just as it may amend the regulations of any agency. However, to do so, it must enact a statute.⁴

IV

Conclusion

In summary, it is our opinion that:

1. The Commission does not have authority to adopt amendments to its program development criteria that would change their substance significantly. However, it does have authority to adopt amendments that would not effect a significant substantive change.
2. The General Assembly may amend the criteria, or direct that the Commission amend them, only by means of a statute.

J. JOSEPH CURRAN, JR., *Attorney General*

JACK SCHWARTZ
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Opinions and Advice

⁴ The General Assembly did precisely that in Chapters 602, 603, and 604, Laws of Maryland 1986. See NR §§8-1808.1, 8-1808.2, and 8-1808.3.

CLERKS OF CIRCUIT COURT

BUDGETARY ADMINISTRATION—COMPTROLLER—CENTRAL PAY-ROLL BUREAU—JUDICIARY—EFFECT OF CONSTITUTIONAL AMENDMENT CHANGING CLERKS' OFFICES FROM FEE OFFICES TO OFFICES FUNDED BY GENERAL FUND APPROPRIATIONS.

May 11, 1987

*The Honorable Howard M. Smith,
Clerk, Circuit Court for Montgomery County*

You have requested our opinion concerning the ramifications of the recent constitutional amendment changing the offices of the Clerks of the Circuit Courts from fee offices to offices funded by General Fund appropriations. You have specifically asked whether, as a result of the constitutional amendment, the payment of salaries and wages for employees of each clerk's office now must be handled by the Central Payroll Bureau. More generally, you also have asked (i) what authority the Comptroller has over the clerks' offices by reason of the constitutional amendment, and (ii) whether the judges of the circuit courts retain their visitorial power over the clerks' offices.

For the reasons given below, we conclude that:

1. Payment of the salaries and wages for employees of the clerks' offices must be handled by the Central Payroll Bureau, subject to the Governor's authority to permit a delay in the conversion to the Bureau's payroll system.

2. The fiscal affairs of the clerks' offices are now subject to greater oversight by the Comptroller than before the ratification of the amendment. The Comptroller not only retains his previous authority to review the clerks' annual budgets, but also now has additional authority to superintend the expenditures and accounting procedures of the clerks' offices.

3. The judges of the circuit courts retain their visitorial power over the clerks' offices.

I

1986 Amendment of Article IV, §10

In 1986 the General Assembly determined that Article IV, §10 of the Maryland Constitution should be amended so as to provide

for the funding of the offices of the Clerks of the Circuit Courts through the State budget, rather than by means of their respective revenues. Chapter 722, Laws of Maryland 1986. Pursuant to the requirements of Article XIV of the Constitution, the proposed amendment to Article IV, §10 was placed on the ballot for the November 6, 1986 general election for adoption or rejection by the qualified voters of this State. The amendment was adopted.

Prior to the 1986 amendment, Article IV, §10 provided that the clerks "shall . . . be allowed the fees" generated by their offices.¹ The amendment deleted that phrase and added the following new language:

"(b) The offices of the Clerks shall be funded through the State budget. All fees, commissions, or other revenues established by law for these offices shall be State revenues, unless provided otherwise by the General Assembly."

The historical background of this constitutional amendment clearly indicates that one of the purposes of the amendment was to provide for State-level budgetary oversight of the clerks' offices. In the 1982 Report of the Chairmen of the Senate Budget and Taxation Committee and House Appropriations Committee, the Committee Narrative accompanying item 24.06.00.01, dealing with the budget supplement for the clerks of the court, stated:

"The Committees are concerned that the numerous provisions contained in the State Constitution and Code complicate the uniformity of administration and sound fiscal control that should exist in the offices of the Clerks of the Court. The Committees recommend that the Legislative Policy Committee appoint an appropriate committee or task force during the 1982 interim to study the various legal provisions pertaining to the Clerks, the variation in functions performed by the individual offices, and the variation in costs charged to the individual offices of the Clerks and to their respective jurisdictions. The purpose of this study would be to propose corrective legislation to obtain uniformity in services

¹ Former Article IV, §10 provided that: "The Clerks of the several Courts, created, or continued by this Constitution, . . . shall perform all the duties, and be allowed the fees, which appertain to their several offices, as the same now are, or may hereafter be regulated by law."

provided and the associated costs paid by each office of the Clerks of the Court.”

Two years later, the General Assembly added to the budget bill for fiscal year 1985 language restricting expenditure of the appropriation to the clerks’ offices “unless the Budget Committees shall receive and approve the report of the Task Force on Clerks of the Court. . .” Chapter 81, Laws of Maryland 1984 (item 24.06.00.01). The Task Force, which was established by the Legislative Policy Committee at the request of the Budget Committee Chairmen, examined three topics: “the funding basis of the clerks’ offices, *state level budgetary oversight of clerks’ offices* and functions of clerks’ offices” Report of the Clerks of Court Task Force 1 (November 1984) (“Task Force Report”) (emphasis added).²

After reviewing the issues and hearing testimony from the Office of the Attorney General, the Deputy Comptroller, the Clerks’ Association, the Chief Judge of the Court of Appeals, the Secretary of Budget and Fiscal Planning, the Clerk of the Circuit

² The Task Force highlighted some of the background of, and reasons for, State control over the clerks’ budgets:

“Related to the basis of funding is the matter of budgetary control. Under the Constitution, the clerks are Constitutional officers elected at the county level. In operation of their offices, they are subject to the ‘visitorial’ powers of local Circuit Court judges. Clerks may appoint as many employees as their judges deem necessary. The Comptroller, by statute, sets salaries for clerks’ offices and must approve operating expenditures. The General Assembly has attempted to further supervise clerks’ operations by requiring by general statute that clerks submit budgets for legislative approval and by budget language attempting, first, to empower the Comptroller (for fiscal years 1983 and 1984) and then the Budget Committees (for fiscal year 1985) to withhold approval of additional positions not budgeted.

The Attorney General has determined that the legislature can require budgets to be submitted, but has no approval power over them. This is because the Constitution provides that clerks’ offices are funded in the first instance by fees and commissions, which are not subject to state appropriation. Likewise, the Comptroller and the Budget Committees lack the power, despite the budget language, to prevent establishment of positions not in submitted budgets, at least where the clerks’ office has sufficient revenues to support its operations. This issue recently came to a head when the Comptroller refused to set a salary for two additional employees a judge ordered the Clerk of Worcester County to appoint. The Attorney General has advised that the Comptroller must set salaries for those positions.” Task Force Report at 2.

Court for Baltimore City, the Clerk of the Circuit Court for Howard County, the Maryland Association of Counties, and the City of Baltimore, the Task Force recommended:

"That the State Constitution be amended to provide that clerks' offices shall no longer be funded from the fees of their office. Instead, revenues of the clerks should be revenues of the State and clerks' operations should be provided for through the State budget. This change would eliminate concentration on revenues of clerks' offices in evaluating their budgetary requirements, while providing state level oversight of the expenditure of public funds. It is anticipated that this mechanism will provide for stable funding of clerks' offices in accordance with their requirements." Task Force Report at 7 (emphasis in original).

Thus, the constitutional amendment eliminated the funding of clerks' offices from the fees collected by each office, as supplemented from the State budget pursuant to §2-504.1(c) of the Courts Article ("CJ" Article) when needed to augment revenues. Under Article IV, §10 of the Constitution, as amended, the clerks' offices "shall be funded through the State budget" with all revenues being turned over to the Treasurer.

II

State Fiscal Procedures

When the clerks' offices were fee offices, many of the laws governing the ordinary budget and appropriations process did not apply to them. CJ §2-205.1(a) required the clerks to deposit their receipts "in a State depository"; but these funds, to be "available to each . . . clerk as needed," were "not placed in the State treasury, or subject to appropriation by the General Assembly." CJ §2-205.1(b).

On the other hand, the clerks' offices were not free from regulation. Article XV, §1 of the Constitution imposed recordkeeping requirements on fee offices like the clerks' and required remission of any annual surplus to the State Treasury. Moreover, CJ §2-205 required each clerk to file annually with the Comptroller "an accurate account" of receipts and expenditures.

The General Assembly also provided a special statutory budgeting procedure for the clerks. Under CJ §2-504.1(b), each clerk's annual budget is required to provide certain data, is "submitted to the Comptroller in a uniform format as prescribed by the Secretary of Budget and Fiscal Planning," and is "subject to review by the Comptroller and the State Court Administrator" The clerks' budgets are "included in the State budget as part of the budget for the executive branch of State government." CJ §2-504.1(b)(4). The statute also authorizes the Governor to include in the budget funds to supplement the clerks' fee revenues. CJ §2-504.1(c).

As a consequence of the constitutional amendment, some of these requirements no longer are applicable. The revenues of the clerks' offices are expressly termed "State revenues." Article IV, §10(b). As such, the revenues are to be deposited in the State Treasury. Article VI, §3 of the Constitution.

Article III, §32 of the Constitution provides that "[n]o money shall be drawn from the Treasury of the State . . . except in accordance with an appropriation by Law."³ See also §7-202 of the State Finance and Procurement Article ("SF" Article). See generally 68 *Opinions of the Attorney General* 86 (1983).

Article III, §52 sets forth, in detail, the procedures by which an appropriation is to be made. In light of the amendment to Article IV, §10, the annual budget bill henceforth will include as State revenues the estimated fees and receipts of the clerks' offices for the fiscal year covered by the budget. The budget also will reflect, as an appropriation from State funds, the proposed expenditures by the clerks' offices. The provision authorizing a budgetary supplement to the clerks' fees, CJ §2-504.1(c), will no longer be effective.

³ Article III, §32 provides, in full, as follows:

"No money shall be drawn from the Treasury of the State, by any order or resolution, nor except in accordance with an appropriation by Law; and every such Law shall distinctly specify the sum appropriated, and the object, to which it shall be applied; provided, that nothing herein contained, shall prevent the General Assembly from placing a contingent fund at the disposal of the Executive, who shall report to the General Assembly, at each Session, the amount expended, and the purposes to which it was applied. An accurate statement of the receipts and expenditures of the public money, shall be attached to, and published with the Laws, after each regular Session of the General Assembly."

However, CJ §2-504.1 has not been repealed, and there is no inconsistency between its procedural requirements and the constitutional amendment. We conclude that the clerks should continue to prepare their budgets in accordance with CJ §2-504.1(a) and (b). As before, their budgets will be "part of the budget for the executive branch" CJ §2-504.1(b)(4).

The Comptroller's authority under CJ §2-504.1(b)(3) to review the clerks' budgets is unaffected by the constitutional amendment. Likewise, the Comptroller retains the authority granted by CJ §2-505 over the compensation of the clerks' employees. At the same time, the constitutional amendment effectively augments the Comptroller's authority in one important respect: the expenditures and accounting procedures of the clerks' offices are now subject to the same oversight and superintendence as the Comptroller exercises over other agencies funded through appropriations instead of fees. *See* Article IV, §2 of the Constitution and SF §§7-216 through 7-223 and 7-401.

III

Payment of Salaries by Central Payroll Bureau

Article 64A, §38A(a) requires the Central Payroll Bureau of the Comptroller's Office to "handle and provide for the payment of all salaries and wages . . . for and to all officers and employees of the State or any agency thereof whose salaries or wages are paid from funds appropriated by the General Assembly" Article 64A, §38A(c) provides that "the term 'employee' as used in this section shall include nonclassified employees as well as classified employees." Now that all of the expenditures of the clerks' offices, including salaries, will be funded by means of an appropriation, the provisions of Article 64A, §38A apply even though some officers and employees of the clerks' offices are excepted by Article 64A, §3 from the classified service system.⁴

⁴ The change in the law brought about by the constitutional amendment supersedes this office's prior conclusion that the clerks' offices were not subject to mandatory inclusion in the Bureau's payroll system. 68 *Opinions of the Attorney General* 96 (1983).

Article 64A, §38A(b) provides that, “with respect to any officers or employees . . . whose salaries or wages are not, on July 1, 1973, handled by the Central Payroll Bureau, the Bureau shall commence such handling at such date or dates as may be designated by the Governor from time to time.” The phrase “at such date . . . as may be designated by the Governor” is somewhat ambiguous. It can be read to mean “if designated by the Governor”—that is, an office outside the Bureau’s purview on July 1, 1973 is to remain outside unless the Governor provides for inclusion. However, we read the phrase “the Bureau *shall commence* such handling” as reflecting a legislative intent that even the “grandfathered” officers and employees be included in the Bureau’s system. The grant of discretion to the Governor is intended, we think, simply to allow for an orderly transition to the Bureau’s payroll system. Hence, we conclude that the payrolls of the clerks’ offices are to be handled by the Bureau as soon as is practicable, subject to the Governor’s authority to provide for a deferred effective date for the conversion.⁵

IV

Visitorial Power of Judges

Under Article IV, §10 of the Constitution, the office and business of the clerks are “subject to the visitorial power of the Judges of their respective Courts,” who may “make, from time to time, such rules and regulations as may be necessary and proper for the government of said Clerks, and for the performance of the duties of their offices” This portion of Article IV, § 10 was unaffected by the 1986 amendment.

Therefore, the judges retain their power of “supervision, regulation, and direction of *how* the Clerks are to perform their duties.” 68 *Opinions of the Attorney General* 96, 97 (1983) (emphasis in original). See *Peter v. Prettyman*, 62 Md. 566 (1884). The judges also retain their right under Article IV, §26 of the Constitution to designate the number of deputy clerks needed in

⁵ As we understand it, a transition from the clerks’ current payroll system to the Central Payroll Bureau can be effected without significant disruption or delay in any paycheck.

the office, their right under CJ §2-204 and Maryland Rule 1215 to prescribe additional hours and days on which the clerk's office shall be open, and any other rights over the clerk's office afforded by law. Of course, if the carrying out of the judges' direction would entail the expenditure of funds, that expenditure must be consistent with applicable State requirements. *See Part II above. See generally 69 Opinions of the Attorney General 57 (1984).*

V

Conclusion

In summary, it is our opinion that, as a result of the 1986 amendment to Article IV, §10 of the Constitution:

1. Payment of the salaries and wages for employees of the clerks' offices must be handled by the Central Payroll Bureau, subject to the Governor's authority to permit a delay in the conversion to the Bureau's payroll system.

2. The fiscal affairs of the clerks' offices are now subject to greater oversight by the Comptroller than before the ratification of the amendment. The Comptroller not only retains his previous authority to review the clerks' annual budgets, but also now has additional authority to superintend the expenditures and accounting procedures of the clerks' offices.

3. The judges of the circuit courts retain their visitorial power over the clerks' offices.

J. JOSEPH CURRAN, JR., *Attorney General*

JULIA M. FREIT, *Assistant Attorney General*

JACK SCHWARTZ,
Chief Counsel
Opinions and Advice

CONSTITUTIONAL LAW

CRIMINAL LAW—JURY TRIAL—EDUCATION—APPLICATION OF
CONSTITUTIONAL JURY TRIAL RIGHT TO DEFENDANTS
CHARGED WITH VIOLATING COMPULSORY SCHOOL ATTEN-
DANCE LAW.

February 10, 1987

The Honorable Norman L. Pritchett, Clerk
Circuit Court for Prince George's County

You have requested our opinion on whether a defendant charged in juvenile court with a violation of §7-301 of the Education Article ("ED" Article), the compulsory public school attendance law, has a constitutional right to trial by jury, either at the initial trial level or on appeal. The complex web of statutes affecting this offense produces an odd dichotomy: Defendants charged with a violation in District Court obtain a jury trial if they appeal their convictions to circuit court, but defendants charged with the same offense in juvenile court get no jury trial at all. This statutory oddity gives rise to the question of what, if any, constitutional rights to a jury trial apply to this offense.

For the reasons given below, we conclude that a defendant charged in a juvenile court with a violation of ED §7-301(e)(1) has no constitutional right to a jury trial at any level.¹ In light of pending litigation that concerns, in part, the construction to be given the penalty in ED §7-301(e)(2), we express no opinion on whether a defendant charged with a violation of that provision has a right to a jury trial.

I

Compulsory Public School Attendance Law

A. *Attendance Requirement*

ED §7-301(a) provides that "[e]ach child who resides in this State and is 6 years old or older and under 16 shall attend a public

¹ Accordingly, a request for transfer of such a case from juvenile court to circuit court for the purpose of a jury trial may be denied.

school regularly," unless the child is receiving comparable instruction in a different setting. ED §7-301(c) commands that "[e]ach person who has under his control a child who is 6 years old or older and under 16 shall see that the child attends school or receives instruction as required by this section."

The penalties for violation of the compulsory public school attendance law are set out in ED §7-301(e):

"(1) Any person who induces or attempts to induce a child to absent himself unlawfully from school or employs or harbors any child who is absent unlawfully from school while school is in session is guilty of a misdemeanor and on conviction is subject to a fine not to exceed \$500 or imprisonment not to exceed 30 days, or both.

(2) Any person who has control over a child who is 6 years old or older and under 16 who fails to see that the child attends school or receives instruction under this section is guilty of a misdemeanor and on conviction subject to a fine not to exceed \$50 per day of unlawful absence or imprisonment not to exceed 10 days, or both."

B. *Jurisdiction and Trial*

Section 3-804(d) of the Courts & Judicial Proceedings Article ("CJ" Article) contains the following grant of jurisdiction to the juvenile court: "The jurisdiction of the [juvenile] court is concurrent with that of the District Court in any criminal case arising under the compulsory public school attendance laws of this State."² In parallel terms, CJ §4-302(c) provides that "[t]he jurisdiction of the District Court is concurrent with that of the juvenile court in any criminal case arising under the compulsory pub-

² Except in Montgomery County, the circuit court sits as juvenile court. In Montgomery County, the District Court does so. CJ §3-801(i).

As the memorandum accompanying your request points out: "This jurisdiction is distinct from the civil jurisdiction conferred over a child alleged to be in need of supervision because the child is 'habitually truant' ([CJ] §§3-801(f) and 3-804(a)) and from the criminal jurisdiction over an adult who [renders a child in need of supervision] (§§3-804(c) and 3-831)." Memorandum from Elizabeth B. Veronis, Legal Officer, to Robert W. McKeever, Deputy State Court Administrator, at 1 (July 23, 1986).

lic school attendance laws of this State.” Thus, a State’s Attorney may choose to prosecute violations of the compulsory school attendance law in either the District Court or the juvenile court.

Regardless of where prosecution of the offense is initiated, the defendant has no statutory entitlement to trial by jury at this stage. Maryland Rule 910a specifies that hearings in juvenile court are to be conducted “without a jury.” *See also In re Johnson*, 254 Md. 517 (1969).

If the State’s Attorney initiates prosecution in the District Court, CJ §4-302(e) provides that:

“(1) The District Court is deprived of jurisdiction if a defendant is entitled to and demands a jury trial at any time prior to trial in the District Court.

(2) (i) Except as provided in subparagraph (ii) of this paragraph, unless the penalty for the offense with which the defendant is charged permits imprisonment for a period in excess of 90 days, a defendant is not entitled to a jury trial in a criminal case.

(ii) Notwithstanding the provisions of subparagraph (i) of this paragraph, the presiding judge of the District Court may deny a defendant a jury trial if:

1. The prosecutor recommends in open court that the judge not impose a penalty of imprisonment for a period in excess of 90 days, regardless of the permissible statutory or common law maximum;

2. The judge agrees not to impose a penalty of imprisonment for a period in excess of 90 days; and

3. The judge agrees not to increase the defendant’s bond if an appeal is noted.”

The 30 days’ maximum imprisonment authorized by ED §7-301(e)(1) falls below the 90 day ceiling in CJ §4-302(e)(2). Therefore, the defendant has no statutory entitlement to a jury trial, and the District Court cannot be deprived of jurisdiction by the filing of a demand for jury trial.³

³ The maximum imprisonment authorized by ED §7-301(e)(2) is an issue in pending litigation. *See* Part III C below.

C. Appeal

A defendant found guilty in District Court may appeal to circuit court. CJ §§12-401(a) and 12-403(a). The appeal in circuit court is de novo. CJ §12-401(d). See *Harding v. State*, 250 Md. 188 (1968). And the defendant, being "subject to a penalty of imprisonment," may demand a jury trial. CJ §12-401(e). As the Court of Appeals has observed:

"[U]nder the present statutes, a criminal defendant, appealing from a District Court judgment, has a right to a trial by jury in the circuit court de novo proceedings regardless of the seriousness of the criminal charges or whether he or she could have elected a jury trial under [CJ] §4-302[e]." *Hardy v. State*, 279 Md. 489, 496 (1977).

A defendant originally prosecuted in juvenile court has a right of appeal to the Court of Special Appeals. CJ §§3-832 and 12-301. Of course, there is no jury trial in such an appeal, which is based on the record compiled below.

II

Declaration of Rights Guarantee of Trial by Jury

Article 5 of the Maryland Declaration of Rights provides that "the Inhabitants of Maryland are entitled to the Common Law of England and the trial by Jury, according to the course of that Law" And, "in all criminal prosecutions, every man hath a right . . . to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty." Article 21 of the Declaration of Rights. See also Articles 23 and 24 of the Declaration of Rights. These guarantees have been carried forward, essentially unchanged, since the Constitution of 1776.

In Parts III and IV below, we consider the case law that has construed the jury trial right and we apply this body of precedent to prosecutions under ED §7-301(e)(1). We conclude that the Declaration of Rights does not compel the provision of a jury trial, either at the initial trial level or upon subsequent review.⁴

⁴ The jury trial right in the Sixth Amendment to the United States Constitution is discussed in note 7 below.

III

Right to a Jury at Initial Trial Level

A. *Case law*

In the seminal case of *State v. Glenn*, 54 Md. 572 (1880), the Court of Appeals traced the antecedents for summary trial of what it termed "minor and statutory police offenses." Glenn had been tried and convicted by a justice of the peace of "being habitually a disorderly person, leading a dissolute and disorderly course of life" and was sentenced to six months in the House of Correction. 54 Md. at 591-92. The Court of Appeals rejected Glenn's argument that she had a right to a jury trial in the first instance. Describing a long history of summary jurisdiction by justices of the peace "over parties offending against the peace and good order of society," the Court observed: "[W]e are not aware that it has ever been supposed that [the statutes'] provisions were in any way restrained or controlled by the declaratory provisions in the Declaration of Rights." 54 Md. at 602-03.⁵

Rather, the jury trial right in the Declaration of Rights "must be understood as referring to such crimes and accusations as have, by the regular course of the law and the established modes of procedure, as heretofore practiced, been the subjects of jury trial. It could never have been intended to embrace every species of accusation involving either criminal or penal consequences." 54 Md. at 606.

In *Danner v. State*, 89 Md. 220 (1899), the Court of Appeals reiterated that the right to a jury trial "cannot be demanded in many minor offenses." 89 Md. at 226. Without attempting to define the class of offenses that may be reached by summary proceedings, the Court of Appeals held that petit larceny, punish-

⁵ The Court summarized as follows the historical background:

"In England, notwithstanding the provision in the *Magna Charta* . . . which declares that no free man shall be taken, imprisoned or condemned, 'but by lawful judgment of his peers or by the law of the land,' it has been the constant course of legislation in that kingdom, for centuries past, to confer summary jurisdiction upon justices of the peace for the trial and conviction of parties for minor and statutory police offenses; and this jurisdiction has been largely increased and extended in modern times. . . ." 54 Md. at 600.

able by imprisonment for a term of up to 18 months, was not one of them.⁶

More recently, the Court of Appeals has considered whether defendants accused of various offenses had a right to a jury trial at the initial trial level, notwithstanding the limitations on that right in CJ §4-302(e). See Part I B above.

In *Kawamura v. State*, 299 Md. 276 (1984), the Court of Appeals held that the limitation on the defendant's jury trial right in CJ §4-302(e)(2)(ii) could not constitutionally be applied to the offense of theft. Although the maximum authorized imprisonment for the theft offense involved in *Kawamura* was 18 months, the prosecutor had recommended a term not to exceed 90 days and the District Court judge agreed to be bound by that recommendation. Then, pursuant to CJ §4-302(e)(2)(ii), the District Court denied Kawamura's jury trial request.

Summarizing the principles derived from *Glenn* and *Danner*, the Court of Appeals wrote that "the state constitutional jury trial right does attach in the first instance to offenses which historically had been tried before juries. It also attaches to any infamous offense or any offense subject to infamous punishment." 299 Md. at 291.

In concluding that the offense of petty theft fell within that imprecisely defined class of offenses warranting a jury trial in the first instance, the Court of Appeals held that "it is the nature of the offense, and not the disposition in a particular case, which is relevant to the state constitutional jury trial right in criminal cases." 299 Md. at 296. Hence, "to the extent that the length of incarceration or the place of incarceration is relevant . . . , it is the maximum sentence and place of incarceration established by the legislature for the particular offense which controls, and not the maximum sentence or place of incarceration decided by the court in a particular case." 299 Md. at 292. In addition, the intrinsic "nature of the offense"—that is, the social destructiveness of the prohibited conduct—is to be considered:

⁶ Other early cases include *State v. Stafford*, 160 Md. 385 (1931) (jury trial right attaches at initial trial level for assault and battery); *Crichton v. State*, 115 Md. 423 (1911) (no jury trial right in first instance for charges of speeding violations); and *Baum v. Warden of Jail*, 110 Md. 579 (1909) (under *Glenn* and *Danner*, justice of the peace has no jurisdiction to try defendant for assault and battery unless jury trial waived).

"Theft, regardless of the amount involved, is and always has been regarded as an extremely serious offense in Maryland. . . . At common law, a conviction for either petty larceny or grand larceny rendered a witness incompetent to testify due to the 'infamous' character of the crimes." 299 Md. at 296-97.

Two years later, in *Fisher v. State*, 305 Md. 357 (1986), the Court of Appeals held that defendants have a constitutional right to a jury trial for the offense of driving while intoxicated. Relying extensively on *Kawamura*, the Court of Appeals identified the factors to be considered in determining whether the jury trial right attaches at the initial trial level: (i) "whether the offense had historically been subject to . . . summary jurisdiction . . . or whether it had historically been tried before juries"; (ii) "whether the offense is an infamous crime or subject to infamous punishment" (citing *Glenn* and *Danner*); (iii) "the seriousness of the offense"; and (iv) the maximum sentence and place of incarceration established by the General Assembly as punishment for the offense. 305 Md. at 365-66.

Although the Court of Appeals reviewed each of these factors in considering whether the right was applicable to the two offenses in question, it gave particular emphasis to the nature of the punishment and the seriousness of the offense. The Court pointed out that "driving while intoxicated is punishable by maximum imprisonment terms of one year for the first offense and two years for the second offense." 305 Md. at 366. Further:

"[T]he offense of driving while intoxicated is extremely serious. This is shown by the terrible consequences of the offense upon human lives and the manner in which the offense is regarded by the public. The maximum terms of imprisonment authorized by the Legislature constitute further indication of the offense's seriousness." 305 Md. at 367.

Thus, the Court held, "the Maryland constitutional right to a jury trial in the first instance attaches to the offense of driving while intoxicated" 305 Md. at 368. By contrast, the Court observed, if a defendant were charged with the "less serious offense [of] driving while under the influence of alcohol"—punishable by a maximum of two months imprisonment—"the constitutional right to a jury trial would not attach." 305 Md. at 368-69.

Finally, in *State v. Huebner*, 305 Md. 601 (1986), the Court of Appeals held that a defendant charged with resisting arrest had a jury trial right in the first instance. The Court's analysis of the issue was brief. Comparing the crime of resisting arrest to the crime of assault and battery, to which a right to a jury trial attached, the Court noted that both crimes had no statutory ceiling on punishment and therefore "the punishment which may be imposed for committing the offense is obviously infamous. . . ." 305 Md. at 609. Indeed, the Court pointed out, a sentence of 10 years' imprisonment for resisting arrest had been upheld. See *Preston v. Warden*, 225 Md. 628 (1961).

B. Application to ED §7-301(e)(1)

As discussed in Part I A above, an adult who "induces or attempts to induce" a child's absence from school or who "employs or harbors" a truant is subject to a maximum punishment of a \$500 fine and imprisonment for 30 days. ED §7-301(e)(1). The sentence of imprisonment would be served in a county jail, rather than in a prison. See Article 27, §690(c) of the Maryland Code. This punishment is not nearly as onerous as the punishment authorized for the crimes involved in *Danner*, *Kawamura*, *Fisher*, and *Huebner*.⁷

Moreover, without in any way denigrating the importance of regular school attendance, we note that a violation of ED

⁷ We note that, under the Sixth Amendment to the United States Constitution (applied to the states through the Fourteenth Amendment), the length of the maximum authorized term of imprisonment for an offense is generally determinative of the right to trial by jury. See, e.g., *Baldwin v. New York*, 399 U.S. 66, 68-69 (1970) ("In deciding whether an offense is 'petty,' we have sought objective criteria reflecting the seriousness with which society regards the offense . . . and we have found the most relevant such criteria in the severity of the maximum authorized penalty . . . [W]e have concluded that no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized."); *Frank v. United States* 395 U.S. 147, 148 (1969) ("The most relevant indication of the seriousness of an offense is the severity of the penalty authorized for its commission."); and *Duncan v. Louisiana*, 391 U.S. 145, 161 (1968) ("It is doubtless true that there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision and should not be subject to the Fourteenth Amendment jury trial requirement here applied to the States. Crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses.").

Hence, a defendant charged with a violation of ED §7-301(e)(1) has no Sixth Amendment right to a jury trial. Cf. note 9 below.

§7-301(e)(1) involves no threat to life, property, or public peace, nor is the offense "infamous." Indeed, we are confident that, if the offense of driving under the influence of alcohol does not give rise to a jury trial right, as the Court of Appeals suggested in *Fisher*, neither does the offense of harboring a truant school child. Rather, in the words of *Glenn*, a violation of ED §7-301(e)(1) is a "minor and statutory police offense"—precisely the kind of crime for which summary trial is constitutional.

C. Application to ED §7-301(e)(2)

Under ED §7-301(e)(2), "[a]ny person who has control of a child . . . and who fails to see that the child attends school . . . [is] subject to a fine not to exceed \$50 per day of unlawful absence or imprisonment not to exceed 10 days, or both." Two cases currently awaiting argument in the Court of Special Appeals involve, among other issues, the question of whether the phrase "imprisonment not to exceed 10 days" states an absolute maximum or instead authorizes up to 10 days' imprisonment "per day of unlawful absence" together with the \$50 per day fine. Appellant's Brief at 25-26, *In re Jeannette L.*, No. 1032 (Sep. Term, 1986); Appellant's Brief at 19, *In re Shirley P.*, No. 1033 (Sep. Term, 1986).⁸

This issue of statutory construction must be resolved before an assessment of the constitutional issue can be undertaken, for if the statute authorizes 10 days' imprisonment per day of absence, quite lengthy sentences would be possible.⁹ However, in accordance with our longstanding policy, we decline to address in an opinion a matter that is currently before the courts.

⁸ The juvenile court in these two cases evidently viewed ED §7-301(e)(2) as authorizing up to 10 days' imprisonment per day of absence. Perhaps as a consequence of this interpretation of the statute, the juvenile court also granted the defendants' requests for jury trials.

⁹ The aspect of ED §7-301(e)(2) that authorizes a \$50 fine per day of absence itself raises a separate constitutional question. Because the fine under ED §7-301(e)(2) is open-ended, we cannot exclude the theoretical possibility that a defendant who faced a very large fine would have a federal constitutional right to jury trial. See *Muniz v. Hoffman*, 422 U.S. 454, 476 (1975). However, we think that this question would arise only if the potential fine exceeded \$1,000. See *State v. Baumert*, 618 P.2d 1078, 1081 (Ariz. 1980); *Seven Rivers Farm v. Reynolds*, 508 P.2d 1276, 1282 (N.M. 1973); *People v. Cruz*, 492 N.Y.S.2d 872, 880 (N.Y. Crim. Ct. 1985). But see *Douglass v. First Nat. Realty Corp.*, 543 F.2d 894, 902 (D.C. Cir. 1976).

IV

Jury Trial Right on Appeal

A. *Case Law*

The cases discussed in Part III above all dealt with a defendant's right to a jury trial at the initial trial stage. Applying those cases, we conclude that no such right attaches to charges under ED §7-301(e)(1).

However, the Court of Appeals has suggested that, for some offenses, a defendant who did not have a right to a jury trial at the initial stage nevertheless might have that right at the appeal stage. *Kawamura*, 299 Md. at 290-91; *Danner*, 89 Md. at 226. A defendant convicted in District Court of a violation of ED §7-301(e)(1) has a statutory right to a jury trial on appeal; a defendant convicted in juvenile court does not. *See* Part I C above. Therefore, we must address the question of whether a defendant convicted in juvenile court has a constitutional right to a jury trial on appeal.

Our difficulty is that the Court of Appeals has never delineated this theoretical category of offenses. In *Danner*, the Court merely characterized such offenses as "misdemeanors of minor importance." 89 Md. at 227.

Despite the ill-defined bounds of a category of offenses to which a constitutional jury trial right attaches only at the review stage, we are convinced that this category does not embrace *all* minor criminal offenses. That is, the Declaration of Rights permits both trial and appeal of some criminal offenses without jury trial at either stage.

In our view, *State v. Glenn* strongly supports this conclusion. Although the disorderly conduct offense involved in *Glenn* carried with it a statutory right to a jury trial on appeal, the Court of Appeals' rationale was that this offense, like others, could be tried summarily even if there were no such opportunity on appeal:

"These statutes have all co-existed with the several Constitutions of the State; and in the various cases that have occurred, involving their provisions, we have never heard it contended that the proceedings thereby authorized were not constitutional, because the jury trial was

not provided for, *either in the first instance or by an appeal.*" 54 Md. at 604 (emphasis added).¹⁰

Glenn cites, for example, a statute, enacted only a year after the adoption of the Declaration of Rights, under which a justice of the peace had "power of conviction and imprisonment . . ., without appeal." 54 Md. at 603 (citing Chapter 6, Laws of Maryland 1777).

This is not an isolated example. *Glenn* relied on an extensive record of summary punishment under English and Maryland statutes. 54 Md. at 600-02.¹¹ Notwithstanding the newly adopted jury trial right in the Declaration of Rights, the early General Assembly enacted laws for summary trial, with no appeal, of offenses such as vagrancy and prostitution.¹²

Both *Glenn* and later cases approve this mode of summary procedure for some minor offenses. In *State v. Loden*, 117 Md. 373 (1912), for example, the defendant attacked the constitutionality of a criminal statute prohibiting the operation of a motion picture machine without a license. The statute carried a penalty of up to

¹⁰ Two distinguished commentators described the holding in *Glenn* as follows:

"The Act in question . . . did in fact afford an opportunity to the defendant for a jury on appeal. The court, however, sustained the constitutionality of the statute without any reference to this formal opportunity and relied on the historical indications of the summary process." Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv.L.Rev. 917, 960 n. 219 (1926).

¹¹ Blackstone, cited approvingly in *Glenn*, described summary proceedings in which "there is *no* intervention of a jury, but the party accused is acquitted or condemned by the suffrage of such person only, as the statute has appointed for his judge." 4 W. Blackstone, *Commentaries* *280 (emphasis added). These proceedings include "divers petty pecuniary mulcts and corporal penalties denounced by the Act of Parliament for many disorderly offences; such as common swearing, drunkenness, vagrancy, idleness, and a vast variety of others. . . ." *Id.* at *281. See also A. Thomas, *Procedure in Justice Cases*, 261-62 (1905) ("In the case of many minor offenses that could always be reached by summary proceedings before Justices, a jury trial cannot be demanded . . . When summary jurisdiction is conferred on Justices, and the statute conferring jurisdiction does not give the party charged with the offense the right to a jury trial, it does not exist.").

¹² See, e.g., Chapter 15, Laws of Maryland 1785, §15 (vagrancy in Talbot County punishable by commitment to workhouse for up to three months); Chapter 44, Laws of Maryland 1789, §24 (vagrancy and prostitution in Baltimore City punishable by hard labor for up to one year).

a \$50 per day fine and imprisonment up to 90 days, to be imposed by a magistrate or justice of the peace. Chapter 693, Laws of Maryland 1910. The defendant complained that the statute violated the Maryland Constitution because "it vests complete summary jurisdiction in police magistrates and justices of the peace . . . to try and punish violations under it, without providing for trial by jury or for any appeal to a higher Court." 117 Md. at 376. But the Court of Appeals, relying primarily on the analysis in *Glenn*, was "unable to find that the jurisdiction conferred upon justices of the peace by the statute here questioned violates the constitutional provisions" pertaining to jury trial. 117 Md. at 386.

In short, the Declaration of Rights permits a defendant to be denied a jury trial altogether if, but only if, the offense charged is comparable in its character and punishment to those minor offenses that, historically, were tried without a jury at any level. To conclude otherwise would, in effect, transform the constitutional right into one that would be limitless in its scope, despite a century of case law that has carefully preserved the historical limits of the right.¹³ "It could never have been intended to embrace every species of [criminal] accusation. . . ." *State v. Glenn*, 54 Md. at 606.

B. Application to ED §7-301(e)(1)

A violation of ED §7-301(e)(1) is, in our view, somewhat less serious than the disorderly conduct offense sustained by the Court of Appeals in *Glenn* or than the other offenses that histori-

¹³ As the Supreme Court wrote:

"In the face of . . . history, we find it impossible to say that a ninety-day penalty for a petty offense, meted out upon a trial without a jury, does not conform to standards which prevailed when the Constitution was adopted, or was not then contemplated as appropriate notwithstanding the constitutional guarantee of a jury trial. This conclusion is unaffected by the fact that respondent is not entitled to an appeal as a right." *District of Columbia v. Clawans*, 300 U.S. 617, 626-27 (1937).

See also *State v. Shak*, 466 P.2d 422, 427 (Haw. 1970). Cf. *McKane v. Durston*, 153 U.S. 684, 687 (1894) ("A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law.").

cally were prosecuted summarily, without jury trial initially or on appeal (indeed, without any appeal at all).¹⁴ And, while the offense is intrinsically more serious than the licensing violation involved in *State v. Loden*, the maximum term of imprisonment authorized by the statute in *Loden* was three times the maximum authorized by ED §7-301(e)(1). Therefore, although the question is not free from doubt, we conclude that the courts would analyze a violation of ED §7-301(e)(1) under the standards of *Glenn* and *Loden* and would find no constitutional right to a jury trial at any level.

We are not at all suggesting that constitutional guarantees are, in general, irrevocably bound to their original contours. On the contrary, the Constitution is "a continuing instrument of government," the "fundamental purposes" of which are to be carried out through adaption to circumstances that the framers could not have envisioned. *United States v. Classic*, 313 U.S. 299, 316 (1941). But the jury trial right, perhaps more than any other constitutional guarantee, has been applied consistently by the courts in terms of its historical antecedents and confines. Viewed in this context, we believe that a person convicted at the initial trial level of a violation of ED §7-301(e)(1) has no constitutional right to a jury trial on appeal.

V

Conclusion

In summary, it is our opinion that a defendant charged in juvenile court with violation of ED §7-301(e)(1) has no right to a jury trial, either at the initial trial level or on appeal.

We recognize the anomaly here. A prosecutor can, by lodging charges in juvenile court instead of District Court, deprive a defendant of any jury trial right. We know of no other instance in which this result is possible.¹⁵ Moreover, the sequence of legisla-

¹⁴ See notes 11 and 12 above and accompanying text.

¹⁵ Indeed, the potential denial of a jury trial raises equal protection concerns. However, we cannot conclude, in the abstract, that no rational basis for the distinction is conceivable.

tive changes concerning this offense suggests that the General Assembly might not have considered the question of a jury trial for a juvenile court defendant facing jail time.¹⁶ Accordingly, we urge the General Assembly to reassess whether all defendants charged with a violation of ED §7-301(e) should not have the same statutory entitlement to a jury trial.

J. JOSEPH CURRAN, JR., *Attorney General*

JACK SCHWARTZ, *Chief Counsel*
Opinions and Advice

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Editor's Note: Since the issuance of this opinion, the Court of Special Appeals has confirmed that CJ §3-804(d) "confers upon a prosecutor the absolute discretion to determine whether an adult who is accused of violating the compulsory public school attendance laws is to be charged in the district court or juvenile court." *In re Jeannette L.*, 71 Md. App. 70, 80 (1987). The court expressed no opinion about the constitutionality of this provision. With respect to the term of imprisonment authorized by ED §7-301(e)(2), the court held that the provision "allows but one term of no more than ten days." 71 Md. App. at 88.

¹⁶ Prior to 1984, prosecutions under the compulsory school attendance law were within the District Court's exclusive jurisdiction. CJ §4-301(b)(1). In Chapter 664, Laws of Maryland 1984, the General Assembly granted concurrent jurisdiction to the juvenile court and the District Court. At the time, however, violations of ED §7-301(e)(1) and (2) were punishable by a fine only. Violations of ED §7-301(e)(1) and (2) became punishable by imprisonment a year later. Chapter 205, Laws of Maryland 1985.

CONSTITUTIONAL LAW—REFERENDUM—"APPROPRIATION FOR
MAINTAINING STATE GOVERNMENT"—CAMDEN YARDS STA-
DIUM LEGISLATIVE PACKAGE NOT SUBJECT TO REFERENDUM.

May 28, 1987

The Honorable Winfield M. Kelly, Jr.
Secretary of State

You have requested our opinion on the question of whether any of the acts comprising the Camden Yards Stadium legislation, Chapters 122, 123, and 124 of the Laws of Maryland of 1987, may be referred to referendum under the provisions of Article XVI of the Maryland Constitution.

We have concluded that Chapter 124, the financing component of this legislative package, is an "appropriation" and that this appropriation is "for maintaining the State Government," within the meaning of Article XVI, §2 of the Constitution. Moreover, because Chapters 122 and 123 are so integrally related to the stadium financing mechanism that their suspension would effectively nullify the appropriation, these two acts are likewise part of an "appropriation for maintaining the State Government."

Hence, as explained in detail below, we are of the opinion that Chapters 122, 123 and 124 fall within an exception to the referendum power and therefore may not be petitioned to a vote. In our opinion, a petition calling for any of these acts to be submitted to referendum is of no legal effect.

I

The Maryland Stadium Authority and the 1987 Enactments

At its 1986 Session, the General Assembly created the Maryland Stadium Authority. Chapter 283, Laws of Maryland 1986 (codified as Subtitle 7, Title 13 of the Financial Institutions Article ("FI" Article)). The Authority is an instrumentality of the State and a public corporation. FI §13-702. It consists of five members, appointed by the Governor with the advice and consent of the Senate. FI §13-703. The purpose of the Authority is to acquire, construct and operate facilities for professional baseball and football teams. FI §13-708.

Under the 1986 Act, prior to acquiring or leasing a facility site and entering into a construction contract, the Authority is required to submit to the General Assembly and the Board of Public Works a detailed report and findings justifying the acquisition, lease or contract. FI §13-709(c). In particular, the report must include:

1. A detailed plan of the method of funding the acquisition, lease, or contract involving a facility or site;
2. A statement of the economic necessity of the proposed facility or site acquisition, lease, or contract;
3. A detailed comparative analysis between the costs and benefits of the proposed facility or site and the costs and benefits of improving Memorial Stadium; and
4. A detailed analysis justifying the reasons for acquiring a site or constructing a new facility. FI §13-709(c)(2).¹

On December 5, 1986, in accordance with the deadlines established by FI §13-709, the Authority gave notice of its intention to recommend the Camden Yards site for the location and construction of a new facility.² This notice also announced a public hearing

¹ The information required for the detailed report is contained in four volumes published by the Maryland Stadium Authority as follows:

1. Report on Phase I—Evaluation of Stadium Site and Design Alternatives (December, 1986)
2. Volume 1: Report on Phase 2—Evaluation of Stadium Design Concepts and Cost Estimates, Review of Alternative Financing Mechanisms and Recommendations of Design Concept and Financing Package (February, 1987).
3. Volume 2: Architectural Supplement—Preparation and Evaluation of Stadium Concept Alternatives and Cost Estimates for Stadium Development on the Camden Yard Site and for Renovation of Memorial Stadium (February, 1987).
4. Report on the Economic and Tax Impacts of the Camden Yards Stadium Development (March, 1987). All of these have been submitted to the General Assembly and the Board of Public Works.

All of these have been submitted to the General Assembly and the Board of Public Works.

² The Camden Yards site consists of "approximately 85 acres in Baltimore City in the area bounded by Camden Street on the north, Russell Street on the west, Ostend Street on the south, and Howard Street and Interstate 395 on the east." Chapter 122, Laws of Maryland 1987 (to be codified at FI §13-709(f)).

scheduled for March 9, 1987. Following review of the report, the Administration caused four bills to be introduced in each House of the General Assembly at the 1987 Session. This package of companion bills included:

Senate Bill 228/House Bill 254—Maryland Stadium Authority —Approval of Facility Site at Camden Yards, the former of which became Chapter 122;

Senate Bill 229/House Bill 248—Maryland Stadium Authority —Deadline for Site Selection;³

Senate Bill 230/House Bill 249—Maryland Stadium Authority —Powers and Duties, the former of which became Chapter 123; and

Senate Bill 847/House Bill 1382—Maryland Stadium Authority —Financing, the former of which became Chapter 124.

The Senate bills were jointly referred to the Finance Committee and the Budget and Taxation Committee; the House bills were referred to the Ways and Means Committee. The Senate committees held joint hearings on the bills; all three were reported out of committee favorably, with amendments, on March 27. On March 30, after extensive floor debate, the committee reports on the Senate bills were adopted and the package passed on second reader. On April 1, 1987, a cloture vote having been obtained on a motion to limit debate on all three measures, Senate Bills 228, 230, and 847 passed the Senate and were sent to the House of Delegates, where they were assigned to the Ways and Means Committee. On April 2, all three Senate bills were reported favorably to the floor of the House, the committee report was adopted, and the bills passed on second reader. On April 3 they passed third reader and were returned passed to the Senate on April 6. Meanwhile, anticipating that the Maryland Stadium Authority would obtain the funds for its operating budget from the financing mechanism established by Senate Bill 847, the General Assembly struck all general fund appropriations for the Authority from the budget bill.⁴

³ These bills were withdrawn by the sponsors.

⁴ See *Report of the Chairmen of the House Appropriations Committee and Senate Budget and Taxation Committee, 1987 Session* 204 (April 10, 1987) ("Depletes general funds for agency in anticipation of special funds becoming available as part of a stadium financing plan. Gap financing should be provided through the General Emergency Fund if necessary.").

On April 30, the Governor signed the bills into law as Chapters 122, 123, and 124. All three chapters take effect on June 1, 1987.

Chapter 122 expressly authorizes the Maryland Stadium Authority to acquire a facility site at the Camden Yards area of Baltimore City and to enter into a contract for the construction of a facility. It also specifically defines the "Camden Yards" site.⁵

Chapter 123 removes the Maryland Stadium Authority from the Department of Economic and Community Development, and makes it an independent unit in the Executive Branch of State government. This act also amends the Authority's powers in a number of ways, most notably by giving it ordinary and quick-take condemnation authority over private property in connection with the Camden Yards site.⁶

Chapter 124 is the financing element and the centerpiece of the package. This act expresses a preference for financing the construction of the facility with private investments, amends several provisions of law to provide for alternative and complementary means of financing the facility, and imposes several restrictions and conditions on the issuance of bonds for purposes of the Camden Yards site. Among other things, Chapter 124 creates the Maryland Stadium Facilities Fund, a special, nonlapsing fund within the State Treasury held by the Treasurer and accounted for by the Comptroller.

In supplementing the existing ability of the Stadium Authority to issue revenue bonds and to expend their proceeds for its purposes, Chapter 124: (1) requires the Maryland Lottery Commission to conduct at least two, but no more than four, sports lotteries per fiscal year for the benefit of the Stadium Authority; (2) requires Baltimore City to pay \$1 million annually to the Stadium Authority; and (3) authorizes the State to lease or sublease any facility from or to the Authority, whether or not constructed or usable.

Under Chapter 124 the sports lottery proceeds are to be paid into the Facilities Fund and, subject to certain limitations, transferred by appropriation in the budget bill or by budget amend-

⁵ See note 2 above. The term "facility" means stadia for the primary purpose of holding professional football games, major league baseball games, or both. FI §13-701(c). "Facility" also means adjacent properties directly related to stadia, e.g., parking lots and garages. FI §13-701(d).

⁶ Chapter 123 is expressly contingent on Chapter 122's taking effect. If Chapter 122 does not become effective, Chapter 123 is null and void.

ment from that account to the Financing Fund. Baltimore City's annual payment is to be paid directly into the Financing Fund. Any lease payment appropriated by the State is to be paid directly into the Financing Fund. At the end of each fiscal year, monies in the Facilities Fund in excess of \$24 million and the debt service reserve fund will be transferred, dedicated to the Authority, to the State Reserve Fund and are transferable back to the Authority only by an appropriation in the budget bill or through budget amendment. The unspent balance of any revenues for the Authority in the reserve fund will revert to the general fund two years after the end of each fiscal year in which the transfer is made.

According to the Department of Fiscal Services, this package will enable the Authority to proceed as follows:

"[The Authority] may issue \$200 million of tax-exempt bonds for the use of Stadiums in accordance with the Federal Tax Reform Act of 1986. The Authority bond issue will be secured by a lease agreement with the State under which annual rental payments would be sufficient to pay the debt service on the Authority's bonds. A principal advantage of this financing arrangement is that it enjoys the credit strength of the State without a direct State pledge of general obligation, assuming continued annual appropriations by the General Assembly.

As a source of revenue for the State's appropriations, [Chapter 124] created a minimum of two and a maximum of four Sports Lotteries, estimated to yield net revenues of \$16.4 million of the approximately \$17 million in annual revenues needed to service the Authority's debt. Of the remainder, \$1 million is to be contributed by the City of Baltimore. In addition the Authority is expected to generate approximately \$5.3 million in operating revenues." Department of Fiscal Services, *The Sine Die Report, A Summary of Major Legislative Action, 1987 Session* 56 (April 13, 1987).

II

Maryland's Referendum

"From the establishment of the first Constitution of Maryland—and it might be said before that date—until the adoption of

this [Referendum] Article, its people had lived under a well recognized form of representative self-government." *Beall v. State*, 131 Md. 669, 677 (1917). Rooted in the early institutions of England, this representative form of government was reflected in each of the American colonies and was adopted or ratified by the original states in both their respective constitutions and the constitution of their offspring, the United States of America. This principle of representative government "was for many years looked upon as one of the great principles of popular government, and as necessary and indispensable for the preservation of civil order and popular liberty."

However, following the Civil War, "great abuses [such as the selling of franchises and the enactment of special favors] began to creep into legislation and into the administration of the National and State governments." Consequently, there arose various proposals to abolish the principle of representation altogether or to modify it by creating rights such as the referendum, initiative, and recall.⁷ In 1914 a bill amending the Maryland Constitution to create the right of referendum passed the General Assembly and was approved by the voters. Chapter 673, Laws of Maryland 1914 (ratified on November 2, 1915).

The Referendum Article of the Maryland Constitution expressly reserves to the people the power, by timely petition of three percent of the qualified voters of the State based on the votes cast at the last gubernatorial election, to suspend an act or part of an act of the General Assembly, and to require that it be submitted to the voters for approval or rejection at the next ensuing statewide, congressional election. Article XVI, §§1 and 2. The Court of Appeals has characterized this procedure as "a concession to an organized minority and a limitation upon the rights of the people." *Tyler v. Secretary of State*, 229 Md. 397, 402 (1962).⁸

⁷ "During the first two decades of the 20th century, twenty-two states (most of them in the West) adopted constitutional provisions for referendum, initiative, or both. Since then, four more states have added such provisions. Only Maryland and two other states have referendum powers but no initiative provision." Department of Legislative Reference, *Update*, Vol. 87-1, at 1 (May 21, 1987).

⁸ "The exercise of the right of referendum is drastic in its effect. The very filing of a petition, valid on its face, suspends the operation of any of a large class of legislative enactments and provides an interim in which the evil designed to be corrected by the law may continue unabated, or in which a need intended to be provided for, may continue unsatisfied." *Id.*

This referendum power is not, however, without limitation. Not every act of the General Assembly may be petitioned to referendum. There are three exceptions to referendum, two of which are set out in Article XVI, §2:

“No law making any appropriation for maintaining the State Government, or for maintaining or aiding any public institution, not exceeding the next previous appropriation for the same purpose, shall be subject to rejection or repeal under this Section.”

The third is in Article XVI, §6:

“No law, licensing, regulating, prohibiting, or submitting to local option, the manufacture or sale of malt or spirituous liquors, shall be referred or repealed under the provisions of this Article.”

The Constitution directs the Secretary of State to refer to a vote of the people only a law or part of a law “capable of referendum”—that is, not within one of these three exceptions. Article XVI, §2. The only exception potentially applicable to Chapters 122, 123, and 124 is the exception for an “appropriation for the maintaining of State Government.”⁹ Hence, we turn to the meaning of that phrase.

III

Scope of “Appropriations” Under the Referendum Exception

A. *Prior Construction*

In order to come within the exception for a law “making an appropriation for maintaining the State Government”, an act must “(1). . . make an ‘appropriation’ of public funds, and (2) such appropriation must be for ‘maintaining the State Government.’”

⁹ The Stadium Authority is an integral part of the Executive Branch of State government; it is not a “public institution.” The latter phrase refers to “educational and eleemosynary institutions, sometimes designated as State-aided institutions.” 12 *Opinions of Attorney General* 228, 237 (1927). These are “not owned or controlled by the State.” *Id.* at 238. See also *Henderson v. Shreveport Gas, Elec. & Power Co.*, 63 So. 616 (La. 1913). And, of course, the Stadium Authority has nothing to do with liquor regulation.

Bayne v. Secretary of State, 283 Md. 560, 570 (1978). "[A]lthough an act of the General Assembly may be passed for the purpose of maintaining the State government, the act is nevertheless subject to The Referendum, unless it be an act . . . appropriating public funds for that purpose." *Dorsey v. Petrott*, 178 Md. 230, 245 (1940).

The earliest analysis of the nature of an "appropriation" in this context is in 12 *Opinions of the Attorney General* 228 (1927). Attorney General Robinson was asked whether Chapter 118 of the Laws of Maryland 1927, which provided for the imposition and disposition of an additional gasoline tax, was an appropriation within the meaning of the Referendum Article. In concluding that it was, the Attorney General observed:

"In determining what constitutes a law making an appropriation, consideration must be given to the radical change effected by the budget amendment (Article III, Section 52, of the State Constitution ratified one year after the adoption of Article XVI) in the system of financing the State government.

All disbursements of the State's revenues are now controlled by the budget bill and supplemental appropriation bills. If provision for disbursement is not made by either of these methods, appropriated money cannot be withdrawn from the State Treasury.

Under this system, to make an appropriation effective, two steps are required to be taken. First, the tax must be imposed from which the required revenue is to be derived; and second, the disbursement payment or withdrawal of the appropriated monies from the treasury must be authorized in the manner specified by the budget amendment.

In the case of a supplemental appropriation bill, both of these prerequisites are covered by the same statute, but with respect to all other appropriations the revenue producing and the revenue disbursing features are embodied in separate bills.

The budget bill is merely the warrant for the disbursement of the appropriated monies. It cannot stand alone. It is *inseparably connected with the bill prescribing the annual rate and items of the State tax, and other revenue producing measures*, because it is predicated upon the

estimated revenues of the State from practically all sources, during the period covered thereby.

On the other hand, all revenue producing laws (except supplemental appropriation bills) are equally ineffective, unless the proceeds derived therefrom are disbursed by the budget bill.

The budget and revenue producing measures being thus mutually interdependent, it is my opinion that both together must be regarded as appropriation bills, within the meaning of Article XVI.

Within the meaning of Article XVI at the time of its adoption, Chapter 118 is unquestionably an appropriation measure. It imposes the tax from which the revenue required for road construction is to be derived. it also provides, in detail, for the disposition of the proceeds. . . .

In this connection, it should be noted that the word 'appropriation' is not used in the same sense in the budget amendment and in Article XVI. As used in Article XVI, it signifies the act of setting apart or assigning to a particular use or person in exclusion of all other, that is to say, the application to a special use or purpose, as of money to carry out some object. In the budget amendment, it denotes disbursement, payment or the withdrawal of appropriated monies from the State Treasury.

The Budget amendment prescribes the method whereby appropriated funds may be withdrawn from the State Treasury. *Article XVI refers to all laws assigning public monies to a particular use or purpose, regardless of whether such law is adequate or legally sufficient to authorize the payment or disbursement of the appropriated monies.*" 12 *Opinions of the Attorney General* at 233-35 (citations omitted) (emphasis added).

The Court of Appeals agreed. In *Winebrenner v. Salmon*, 155 Md. 563 (1928), the Court concluded that Chapter 118 was an appropriation act even if it was not sufficient to authorize the withdrawal from the State Treasury of monies collected under its provisions. According to the Court, "That act and the budget act are in pari materia, and must be construed together as though they constituted one act." 155 Md. at 567 (citations omitted).

In *Dorsey v. Petrott*, 178 Md. 230 (1940), the Court of Appeals examined the history of the Referendum Article and its interaction with Article III, §52 (the Budget Amendment). Again concluding that an act that is not an appropriation for the purposes of Article III nevertheless may be an appropriation for the purposes of the Referendum Article, a unanimous court wrote:

"It is evident that the Referendum Amendment did not mean to include within the purview of its operation a statute to raise revenues for these specific purposes by a levy of taxes or by the imposition of other fiscal measures. The act for these purposes and the moneys so procured are, therefore, an act and a fund for the maintenance of the State Government; and, so, the act is excepted from the Referendum Amendment. There is no basis to assume that a law passed pursuant to a constitutional requisite and in fulfillment of an authorized undertaking whereby funds had been procured for public use is subject to repeal as a law within the meaning of that term as used in the Referendum Amendment.

Nor is there any sound basis for the construction that a law imposing or providing for a tax levy or other means of raising revenue for the maintenance of the state government is a law referable to the electorate pursuant to the terms of the Referendum Amendment. *If such a law should fail to comply with the conditions created by section 32 of article III of the Constitution, it would be ineffective as an appropriation because of this failure, but it would not thereby become a law within the Referendum Amendment.*" 178 Md. at 240 (citations omitted) (emphasis added).

In the Court's view, the budget bill and revenue bills are necessarily opposite sides of a single appropriation:

"[T]he budget bill is to be implemented by the passage of such money bills or revenue measures as shall produce and supply the moneys necessary for the Treasury to meet the appropriations made by the budget bill. The enactment of such legislation gains the quality of definiteness, in the sum appropriated and the object to which it is applied, by the budget bill, of which the legislation supplying the money is an associated and necessarily component part of one fiscal system.

The essential unity of the revenue measure to provide the funds appropriated by the budget bill gains certainty from its public necessity. The text of the Amendment argues to the same effect. On the one hand the Budget Amendment makes it mandatory upon the executive to submit a budget which shall contain a complete plan of proposed expenditures and estimated revenues for the particular fiscal year to which it relates. Among other duties, he shall make any suggestion he conceives expedient as to methods for the reduction or increase of the State's revenue. On the other hand, the Amendment empowers the Legislature to enact such laws as shall not be inconsistent with the Budget Amendment as may be necessary and proper to carry out its provisions. These two, as well as other provisions for which mandatory legislation is prescribed, as, for example, in the case of the payment of the principal and interest of the public debt, and the exaction of a particular tax to meet the appropriation made by a supplementary appropriation bill, irrefutably indicate that the Budget Amendment contemplates as an integral part the passage of revenue measures to raise the funds the appropriations require. *It follows that revenue measures to raise the public funds to pay the appropriations of the Budget Bill are excepted from the operation of the Referendum Amendment although the revenue thus procured is disbursed by the Treasury through the provisions of the budget without any express authorization in the money bill for its disbursement.* 178 Md. at 243-244 (citations omitted) (emphasis added).

In 1947, citing Attorney General Robinson, Winebrenner, and Dorsey, Attorney General Hammond recognized and applied "the constitutional interpretation theory that revenue bills and the budget bills constitute in substance one single legislative act, so that a revenue producing bill for maintaining the State government is clearly not one subject to referendum." Thereupon, he advised the Governor that Chapter 281 of the Laws of Maryland 1947 (the Sales Tax Act) was not capable of referendum. 32 *Opinions of the Attorney General* 134, 140 (1947).

In 1948, Judge McWilliams, then of the Circuit Court for Anne Arundel County, denied a petition for a writ of mandamus against the Secretary of State for refusal to accept a petition seeking to submit the Sales Tax Act of 1947 to referendum. In so doing, Judge McWilliams said:

"It must be apparent to all literate people that any State government has two basic functions—to raise money and to spend it for the common good. Since the money can't be spent until it is collected, these two functions are for all practical purposes inseparable. It must be admitted that the stricter meaning of the term 'appropriation' is the allotment of funds in hand, or to be collected, to some specific purpose. But it cannot be supposed that the framers of the Referendum Amendment intended a situation which would clothe the legislative act allotting funds to some specific purpose with a halo of sanctity and a garment of immunity and leave its alter ego, the legislative act providing the funds which give life and effect to the act of allotment, to the tender mercies of any group of disgruntled taxpayers with enough energy and initiative to prepare and circulate a petition. Indeed, it is difficult to imagine a more effective method of sabotaging the State government than to deprive it of its anticipated revenues. It cannot be doubted that this is the very thing the exception was designed to prevent." *Black v. Boone*, The Daily Record (Jan. 24, 1948), quoted in Everstine, *The Legislative Process In Maryland*, 10 Md. L.Rev. 145, 154 (1949).

Finally, in 1975, Attorney General Burch opined:

"Since the passage of the Budget Amendment (Chapter 159 of the Laws of Maryland of 1916) which revised the State fiscal procedure, revenue-producing bills have been deemed appropriation bills. The annual budget contemplates as an integral part the passage of revenue measures to raise funding for its various appropriations. Hence, revenue measures to raise public funds to pay the appropriations of the budget are excepted from the operation of the referendum amendment. The budget and revenue-producing measures must be considered together and 'regarded as appropriation bills, as that term is used in Article XVI of the Constitution.'" 60 *Opinions of the Attorney General* 621, 622 (1975) (citations omitted).

Thus, it is well settled in Maryland that acts which produce revenue for the payment of appropriations of the budget are appropriation bills within the meaning of the Referendum Article.

B. Application to Chapter 124

As we indicated earlier, the stadia are to be funded by 30-year Stadium Authority tax exempt revenue bonds with debt service being financed by appropriated lease payments to the Authority from the State, using sports lottery revenues, an annual Baltimore City contribution, and Authority operating revenues to fund the State's appropriations. To provide the revenues for these appropriations, Chapter 124 is unquestionably a revenue-producing bill. It requires sports lotteries, mandates an annual Baltimore City contribution to the Stadium Authority, facilitates the sale of revenue bonds, authorizes the State to make lease payments to help pay for the bonds authorized by the 1986 legislation, and it encourages private financing.

There also is no question that it raises revenues to support appropriations in the budget. The lottery revenues, which constitute significant start-up revenues, will be paid into the State Treasury and appropriated to the Stadium Authority through the budget bill, either as a specific item or through the budget amendment process authorized by the budget bill.¹⁰ Similarly, Chapter 124 requires that Stadium Financing Fund monies exceeding \$24 million and the amounts needed for the debt service reserve fund being held for the Authority be paid annually into the State Treasury until dispersed pursuant to the budget bill, again either directly or through the budget amendment process. Finally, Chapter 124 authorizes the lease-backed financing of the revenue bonds, the payment of the principal and interest on the bonds to be funded ultimately from the proceeds of the sports lotteries, via a lease agreement with State. "This 'lease backed financing' would take the form of a 'master lease structure' by which annual state appropriations would secure the cost of site acquisition and then the stadium." Department of Fiscal Services, *The Stadium*

¹⁰ Pursuant to its authority to enact such laws as may be necessary and proper to carry out the budget provisions of the Constitution, the General Assembly has enacted a statutory budget amendment process and regularly provides in the budget bill itself that certain monies may be expended by that statutory budget amendment process. Article III, §53(13) of the Constitution; §§7-209 and 7-217 of the State Finance and Procurement Article. As we have noted earlier, the Joint Chairmen's report confirms that the General Assembly decided to delete the proposed fiscal year 88 general fund appropriations for the Authority in favor of special fund appropriation via the statutory budget amendment process. In our opinion, that time honored process is a budget bill appropriation for the purposes of Article XVI. See 71 *Opinions of the Attorney General* 3 (1986); 34 *Opinions of the Attorney General* 105, 106 (1949).

Issue, 1987 General Assembly Session (March 1987).¹¹ The appropriations will be supported by lease revenues and grants or loans.

Accordingly, we conclude that Chapter 124 is an appropriation law for the purposes of the Referendum Article.

IV

“Maintaining the State Government”

Even if a law is an “appropriation” for the purposes of Article XVI, it nevertheless is subject to referendum unless it also is an appropriation “for maintaining the State Government.” *Bayne v. Secretary of State*, 283 Md. at 571.

In one sense, “maintaining the government means providing money to enable it to perform the duties which it is required by law to perform.”¹² *Winebrenner v. Salmon*, 155 Md. at 568. Certainly, in this sense, the Stadium package maintains State government. Without it, the Stadium Authority has no State funds and cannot carry out its statutory purposes.

However, the Court of Appeals also has spoken of this requirement in terms of whether the law provides for a “primary function of government.” *Bayne*, 283 Md. at 571. *See also Winebrenner v. Salmon*, 155 Md. at 568. In analyzing the issue, the Court has treated as “primary” those functions traditionally viewed as proper governmental endeavors, particularly when evidenced by a pattern of State funding. *Bayne*, 283 Md. at 572-73. Likewise, in *Winebrenner v. Salmon*, the Court suggested that the key question was whether the funded activity was long recognized “as coming within the sphere of governmental activity,” as distinct from “an entirely new function.” 155 Md. at 568.

¹¹ See also Peat Marwick, Vol. 1: *Report on Phase 2, Evaluation of Stadium Design Concepts and Cost Estimates, Review of Alternative Financing Mechanisms, and Recommendation of Design Concept and Financing Package* 29.

¹² The Court of Appeals long ago rejected the contention that the phrase “maintaining State Government” merely refers to “overhead expenses, such as salaries and expenses incident to keeping the government afloat.” *Bickel v. Nice*, 173 Md. 1, 9 (1937); *Winebrenner*, 155 Md. at 568.

We think it abundantly clear that the construction of stadium facilities is a function long recognized as coming within the sphere of governmental activity—both in Maryland and elsewhere.

Nearly 60 years ago, in *Meyer v. City of Cleveland*, 171 N.E. 606 (Ohio 1930), the Ohio Court of Appeals traced the long history of governmental involvement in the construction of public stadia:

“Stadiums were constructed in Greece 600 years before the Christian era. Rome in the zenith of her power not only constructed the Coliseum at Rome, but caused similar structures to be erected and maintained in various large cities of the empire for the entertainment and edification of the public. In 1896 the stadium at Athens was placed in repair and the Olympian games were revived there. American athletes participated and won most of the prizes. Since then the erection and maintenance of stadiums in America has come into vogue, until now there are hundreds of them in various towns and cities of the United States. In fact, within the forty-eight states of the Union ninety-three municipal stadiums have been erected, or are in process of erection, to say nothing of private stadiums and those of colleges and universities. New York City has two municipal stadiums, one in Manhattan and the other in the Bronx. There are such, also, in Chicago, Philadelphia, San Francisco, Los Angeles and Baltimore. . . .” 171 N.E. at 607.

New Jersey cases are particularly instructive in this area. In *New Jersey Sports & Exposition Authority v. McCrane*, 119 A.2d 457 (N.J. Super. 1971), the court reviewed, with favor, the reasoning of the Ohio Court of Appeals, and noted further the social and economic benefits to a region of a professional sports franchise. The court concluded:

“[T]he view that the construction and maintenance of stadiums and related facilities constitutes a public purpose has received virtually universal approval in most jurisdictions.

Health, recreation, and sports are encompassed in and intimately related to the general welfare of a well-balanced state. Moreover, the activities of the Authority meet the criteria that have been articulated for determining whether a particular function is a proper govern-

mental one. . . . Today stadiums and other professional sports facilities throughout the country are constructed and maintained by governmental agencies. . . .¹³ Public financing is necessary, and the wide variety of recreational and other benefits flowing to that public render the function of the Sports Authority a proper governmental one." 292 A.2d at 598 (citations omitted).

Cf. National League of Cities v. Usery, 426 U.S. 833, 851 (1976) ("provision . . . of recreation" was a "traditional" governmental function).

On appeal, New Jersey's highest court also found a valid public purpose in promoting the recreation or pleasure of the public by building and operating a sports facility. *New Jersey Sports and Exposition Authority v. McCrane*, 292 A.2d 545 (N.J. 1972), appeal dismissed 414 U.S. 991 (1973). See also *City of Oakland v. Oakland Raiders*, 646 P.2d 835, 841 (Cal. 1982); *Alan v. County of Wayne*, 200 N.W.2d 628, 629 (Mich. 1972); *Bazell v. City of Cincinnati*, 233 N.E.2d 864, 870 (Ohio 1968); *City of Anaheim v. Michel*, 66 Cal. Rptr. 543, 546 (Cal. App. 1968); *Ginsberg v. City and County of Denver*, 436 P.2d 685, 689 (Colo. 1968); *Martin v. Philadelphia*, 215 A.2d 894, 898-99 (Pa. 1966); *Page v. Francis*, 120 S.W. 160, 161 (Ark. 1938); and *Cathcart v. City of Columbia*, 170 S.E. 435, 438 (S.C. 1933). Significantly, *McCrane* expressly held that the funneling of racetrack revenues to the New Jersey Authority constituted "the support of government." 292 A.2d at 556.

The State of Maryland and its political subdivisions have a long-standing history of support for athletic facilities. In this cen-

¹³ For example, in addition to Baltimore's Memorial Stadium, Cleveland's Stadium, and New Jersey's Meadowlands, the Pittsburgh Stadium Authority owns Three Rivers Stadium; the Metropolitan Council Sports Facilities Commission owns the Metrodome; the Louisiana Stadium & Exposition District owns the Louisiana Superdome; the Tampa Sports Authority owns Tampa Stadium; the City of Irving owns Texas Stadium; the Pontiac Stadium Authority owns Pontiac Silverdome; the Jackson County (Mo.) Sports Complex Authority owns both Royals Stadium and Arrowhead Stadium; the City of Philadelphia owns Veterans Stadium; King County (Wash.) owns the Kingdome; the City of Atlanta and the Fulton County Recreation Authority own The Omni; the City of Philadelphia owns the Spectrum; and the City of Houston owns the Summit. Maryland Special Advisory Commission on Professional Sports and the Economy, *Professional Sports Arena Plan, Final Report*, 143-48 (September 1985).

tury, as early as 1906 (Chapter 201, Laws of Maryland 1906) and 1908 (Chapter 106, Laws of Maryland 1908), the General Assembly passed legislation for the establishment of athletic fields and playgrounds in Baltimore City.

In 1922, the City of Baltimore acquired property on 33rd Street known as Venable Park. A stadium was constructed on the property, and from 1922 until 1939 this municipal stadium was used for college football games such as the Army-Navy game, track meets and civic events. In 1944, a fire destroyed another stadium, known as Oriole Park at 29th and Greenmount Avenue in which the International League Baltimore Orioles played. Mayor McKeldin offered, and the club accepted, the use of the 33rd Street stadium on a temporary basis. In 1947, when the City offered the club a long-term lease, a taxpayers suit was instituted seeking to have the long-term lease enjoined and the current short-term lease declared void. The petitioners contended, among other things, that the authority of the Department of Recreation and Parks to establish, maintain, operate and control athletic and recreational facilities for the people of Baltimore City did not include the power to execute a lease with a professional team. In rejecting this argument, Chief Judge Marbury, speaking for a unanimous Court of Appeals, wrote:

"Recreation is a broad term, and it would be an unnatural use of it to say that it does not apply to watching a football or baseball game, but only applied to engaging in one. From the onlooker's point of view, a game conducted by professionals is often more interesting than one played by amateurs. The very purpose of a stadium is to afford facilities for spectators. The players need only the ground to play upon.

...

Watching games of baseball, and particularly a game of professional baseball, is to many people in this county the greatest possible recreation with respect to athletic activity. We think the Department has ample power to recognize this, to provide such recreation, and to enter into a long term lease if it and the Board of Estimates think it advisable, and for the interest of the City and its people to do so.

...

This is a use for the benefit of the public, and comes

within the scope of the Charter Provision." *Green v. Garrett*, 192 Md. 52, 61-63 (1949).¹⁴

In 1947, the General Assembly authorized the Mayor and City Council of Baltimore to issue certificates of indebtedness not exceeding \$2,500,000 to construct a stadium in Baltimore. Chapter 97, Laws of Maryland 1947. A special session that same year authorized an additional \$2,500,000 for the same stadium. Chapter 17, Laws of Maryland 1947 (Special Session).¹⁵

In 1950, the General Assembly authorized the issuance of revenue bonds to construct a combination physical education, auditorium and indoor athletics building for the University of Maryland. Chapter 61, Laws of Maryland 1950. In 1957, the Baltimore Civic Center Authority was created. Chapter 127, Laws of Maryland 1956.

In 1971, the Legislature authorized a State debt in the amount of \$7,000,000 for capital improvements to be made to Memorial Stadium in Baltimore. Chapter 425, Laws of Maryland 1971.

In 1972, the General Assembly, declaring that "professional sports add to the economy, the culture and the vitality of Baltimore City, the Greater Baltimore Region and the entire State of Maryland," enacted the Maryland Sports Complex Authority Act. Chapter 178, Laws of Maryland 1972. The purpose, powers and duties of that State agency were substantially the same as the purpose, powers, and duties of the Maryland Stadium Authority under Chapter 283, Laws of Maryland 1986, and the General Assembly expressly declared that the Authority's exercise of its powers should be deemed to be the performance of "an essential public function." The Authority was also given the right

¹⁴ The Court of Appeals has said "on a number of occasions that cities and counties are but local divisions of the State." *Rockville v. Randolph*, 267 Md. 56, 62 (1972). Such political subdivisions "have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions." *Reynolds v. Sims*, 377 U.S. 533, 575 (1964), quoted with approval in *Stevens v. State*, 27 Md. App. 460, 466 n.3 (1975). Thus, Baltimore City's long history of stadium ownership is, as a matter of law, a history of a local division of the State of Maryland assisting in carrying out a State governmental function.

¹⁵ Further, in 1947, the General Assembly authorized the Mayor and City Council of Baltimore to issue certificates of indebtedness up to \$2,500,000 for public park facilities. Chapters 43 and 44, Laws of Maryland 1947. The Legislature also authorized the sale of bonds known as "Cumberland Playground Bonds" for the City of Cumberland (Chapter 375, Laws of Maryland 1947) and created a Recreation Board for Prince George's County. (Chapter 832, Laws of Maryland 1947).

of eminent domain within the area known as the Camden Station Yards.¹⁶

In 1973, the General Assembly amended the definition of "industrial building" to include "any sports stadium or sports arena in Prince George's County," for purposes of issuing industrial revenue bonds. Chapter 396, Laws of Maryland 1973.

In 1975, the Legislature appropriated an \$850,000 loan for the design and preparation of detailed plans and specifications for the renovation of Memorial Stadium. Chapter 816, Laws of Maryland 1975. In 1976, the 1975 Act was amended to repeal the design, plans and specifications limitation. Chapter 598, Laws of Maryland 1976. And, in 1977, the 1975 Act was amended from a loan to a grant. Chapter 691, Laws of Maryland 1976.

In *Reyes v. Prince George's County*, 281 Md. 279 (1977), the Court of Appeals upheld the constitutionality of Chapter 396 of the Laws of 1973. In so doing, the Court specifically rejected the contention that the issuance of industrial revenue bonds to retire financial obligations incurred by a partnership for the acquisition of the sports arena was not a valid public purpose.

For each of the fiscal years from 1978 through 1982, the General Assembly appropriated \$1 million for the renovation of Memorial Stadium. See Chapter 934, Laws of Maryland 1978; Chapter 542, Laws of Maryland 1979; Chapter 707, Laws of Maryland 1980; Chapter 457, Laws of Maryland 1981; and Chapter 662, Laws of Maryland 1982. In 1980, an additional \$300,000 was appropriated for this purpose in Program Open Space funds. Chapter 120, Laws of Maryland 1980. Also in 1980, some \$22 million was appropriated for Memorial Stadium Seating and Field Facilities. Chapter 529, Laws of Maryland 1980 (amended by Chapter 552, Laws of Maryland 1982, and Chapter 496, Laws of Maryland 1983).

In 1982, \$250,000 was appropriated for the Hagerstown Municipal Stadium. Chapter 599, Laws of Maryland 1982.

In 1984, the General Assembly created the Special Advisory Council on Professional Sports and the Economy. See Article 41, §10-701 *et seq.* of the Maryland Code.

In 1985, the General Assembly appropriated \$350,000 for the

¹⁶ The Maryland Sports Complex Authority was abolished in 1976. Chapter 702, Laws of Maryland 1976.

Hagerstown Municipal Stadium. Chapter 337, Laws of Maryland 1985.

In 1986, the General Assembly empowered Charles County to borrow up to \$1,500,000 to construct a multi-purpose stadium in Charles County for the holding of athletic events. Chapter 270, Laws of Maryland 1986.

This chronology of ongoing State legislative and judicial action evidences an indisputable fact: The State's financial support for stadia and similar athletic facilities is traditional and reflects the recognition, by the General Assembly and the Court of Appeals alike, such that support yields important public benefits.

This activity is, in our view, a legitimate and important function of State government—in the terminology of the *Bayne* case, a “primary function of government.” Accordingly, the appropriation made by Chapter 124 is one for the “maintaining of the State Government.”

V

Relationship of Chapters 122 and 123 to the Appropriation in Chapter 124

Under Maryland law, interdependent and legally inseparable bills forming a package on a single subject are considered as one for purposes of interpretation and construction, *Domain v. Bosley*, 242 Md. 1, 7 (1966), and for purposes of severability and effectiveness, *O. C. Taxpayers for Equal Rights, Inc. v. Mayor and City Council of Ocean City*, 280 Md. 585, 597-98 (1977).

Sutherland has set forth the most comprehensive analysis of the non-severability of “package” bills:

“Although separability problems usually arise with reference to different provisions or applications of a single, separate, independent ‘act’ of the legislature, they are not intrinsically confined to that situation. In fact, the conception of legislation being validated and promulgated in separate, self-contained statutory units called acts, corresponding to independent bills did not always figure as prominently as it does now. *Except as constitutional provisions prohibit bills from dealing with more than one subject, there is nothing about the nature of the legislative process which compels either that each separate rule of enacted law be issued in a separate act or*

that every separate act embrace all of the interdependent and inseparable legislative treatment of a single subject. In practice, it is not uncommon for a legislative program, involving relating and interacting provisions, to be embodied in a group of associated bills. This may be done for a variety of reasons, to facilitate referral of different portions of the program to different legislative committees during the enacting process or to simplify the incorporation of different portions of the legislation into different sectors of a compilation after their enactment. None of these reasons has anything directly to do with the considerations which govern the decision on questions of separability. It is possible, therefore, for separate acts to be legally inseparable." *Statutory Construction* §44.02., at 482 (4th ed. 1986) (emphasis added).

See also *Gay v. Laurens County*, 100 S.E.2d 271, 276 (Ga. 1957). This realistic view of the legislative process was embraced by the Court of Appeals in *O. C. Taxpayers for Equal Rights, Inc. v. Mayor and City Council of Ocean City*, 280 Md. at 597-98. There, in rejecting the contention that the issue of severability did not arise when only one of a package of municipal enactments was found invalid, the Court noted:

"[P]artial invalidity subjects the entire scheme to scrutiny. A determination must always be made as to whether this partial invalidity so affects the legislative scheme that it must fall as a whole, or whether its otherwise valid provisions may be separately enforced. It is, of course, customary to find such legislative schemes within the confines of a single legislative enactment. This is, however, by no means obligatory. A legislature may, if it so chooses, embody a single scheme, dealing with a single subject, in associated bills or acts." 280 Md. at 597 (emphasis added).¹⁷

¹⁷ In a referendum exclusion case, the Court of Appeals articulated the rule that the "single subject" requirement in the Maryland Constitution is the only limitation on joining referable and nonreferable items in a single bill excepted from referendum:

"An association in a single enactment of a referable law and one of the kinds excepted from the referendum, if that would be feasible without violation of the constitutional prohibition in article 3, section 29, against including more than one subject, might, perhaps, be found to leave part of an enactment referable, but not part of the excepted law. That law, with its incidents, still could not be referred." *Berlin v. Shockley*, 174 Md. 442, 446 (1938).

The Supreme Court of Michigan has applied these very same principles to conclude that a package of bills constituted an act "making appropriations for State institutions" that was not referable under that State's constitution. In *Michigan Good Roads Federation v. Alger*, 53 N.W.2d 481, 484-85 (Mich. 1952), that Court wrote:

"[The bills] constitute a comprehensive system for the collecting of specific taxes on motor vehicles and motor vehicle fuels, the allocation of funds therefrom, and the use thereof for highway purposes. They were all enacted by the 1951 legislature and became effective at the same time. Construed together, they provide for levying the specific taxes and the use thereof for highway purposes, the manner in which the said appropriations for highway purposes are allocated to said institutions, and the specific highway purposes for which they are to be used by said institutions."

These laws, the court stated, were acts *in pari materia* that had to be considered and construed together. Separate consideration would render them unworkable. 53 N.W.2d at 485. Thus, the court found that one of the bills in the package that opponents sought to petition to referendum constituted an appropriation exempt from referral when considered along with the rest of the package. See also *County Road Association v. Board of State Canvassers*, 282 N.W.2d 774 (Mich. 1979); *Boards of County Road Commissioners v. Riley*, 218 N.W.2d 144 (Mich. 1974).

The Michigan courts are not alone in applying principles of severability and construction *in pari materia* in a referendum setting. For example, in *Baird v. Burke County*, 205 N.W. 17 (N.D. 1925), North Dakota's highest court held that when a vital portion of a statute was repealed by referendum the remaining sections would be rendered legally ineffective and declared void. In *State v. Dallmeyer*, 245 S.W. 1066 (Mo. 1922), the Supreme Court of Missouri held that when one of two statutes *in pari materia* was suspended by the filing of a referendum petition, so too was the second act. See also 82 C.J.S. *Statutes* §146. And courts in South Dakota and Washington have analyzed a bill sought to be referred in conjunction with related but unREFERRED measures enacted at the same session to determine whether the legislation in question fell within a particular referendum exclusion. See *Gravning v. Zellmer*, 291 N.W.2d 751, 754 (S.D. 1980); *State v.*

Meyers, 363 P.2d 121, 124 (Wash. 1961).¹⁸ In fact, we have found no cases embracing a contrary position.

We believe that the Court of Appeals would apply the tenets of the *O.C. Taxpayers* case and related authority in the referendum context. Indeed, in *Winebrenner v. Salmon*, 155 Md. 563 (1928), the Court of Appeals, in holding that a gas tax was not referable, declined to consider the bill in isolation, noting that the "act and the Budget Act . . . are *in pari materia*, and must be construed together as though they constituted one act." 155 Md. at 567. See also *Dorsey v. Petrott*, 178 Md. 230 (1940) (analyzing referred bill and companion bill to conclude that the legislation was referable).

In terms of the policy underlying the Referendum Article, no other approach makes sense. If legally inseparable bills were considered separately for purpose of the "appropriation" exclusion, the legal and practical effect would be the indirect suspension of a money bill or a revenue raiser by the direct referral of another bill in the package. In light of the vital importance of the "appropriation" exclusion for the continued operation of the government, it is hard to believe that the framers of the Referendum Article could have intended such a result or that the Court of Appeals would bless it. Moreover, if an integrated appropriation measure were referable in part simply because of the form in which it was packaged, the way would be opened for legislative game-playing. "It would be a simple matter to load a . . . [package containing a revenue measure or money bill] with riders and clauses in order to insure its passage, only to remove them by the referendum." *Baird v. Burke County*, 205 N.W. at 24.

In our view, Chapters 122, 123, and 124 represent an interdependent and legally inseparable legislative treatment of a single subject—the acquisition of a site and construction of a stadium facility through the expenditure of State monies. The bills were considered by the same committees—fiscal as well as nonfiscal committees—and approved at the same time in committee and on the floor. In addition, each bill amends or makes reference to provisions contained in other bills in the package. For example, both Chapter 123 and Chapter 124 amend FI §§13-712 and 13-719; and all three bills make reference to FI §13-711.

¹⁸ See also *District of Columbia Bd. of Elections & Ethics v. Jones*, 481 A.2d 456 (D.C. 1984) (exception for "laws appropriating funds" in charter provision for initiative applies to measure that, although not itself an appropriation, would force appropriations to be made).

Moreover, each bill amends a single piece of legislation, the 1986 Stadium Authority Act, to give the Maryland Stadium Authority the fiscal and other tools needed to carry out its previously established statutory purposes. Without each component of the package in effect, the entire object of the legislation would be frustrated, including its revenue raising and appropriation features. For example, Chapter 122 defines the location of the project funded by Chapter 124 and gives the prior legislative approval required by the 1986 legislation for acquisition and construction of the stadia. Chapter 123 is expressly made contingent upon the taking effect of Chapter 122. Chapter 123 also gives the Stadium Authority the power of condemnation needed to acquire the property at the Camden Yards site; and, because private property may not be condemned without the payment of just compensation, the funds needed to carry out this task must come from the financing mechanism established by Chapter 124.

Chapter 123 and 124 are integrally connected in at least two other respects: (1) Chapter 123 anticipates changes made by Chapter 124 by providing that Stadium Authority revenue bonds shall be payable from "any other source authorized by law" and by providing that Stadium Authority Financing Fund shall consist of "any additional revenues . . . or other source authorized by law"; and (2) Chapter 123 (along with the budget bill) makes certain changes affecting the operational budget of the Stadium Authority so that the agency will receive no general fund appropriation but will survive and accomplish its statutory purposes only from the special funds appropriated by way of Chapter 124. *See Report of the Chairmen of the House Appropriations Committee and Senate Budget and Taxation Committee—1987 Session* 204 (April 13, 1987).

In short, the dominant purpose of the 1987 stadium legislative package is to facilitate acquisition and construction of stadia at Camden Yards. If any bill in the package is rendered ineffective, the entire package fails. The legislative history demonstrates the unitary nature of the three measures. The General Assembly would not have enacted the funding mechanism in Chapter 124 if property could not be acquired at the Camden Yards site pursuant to Chapter 123 or if construction on that site could not be commenced as authorized by Chapter 122. The latter bills implement and make more specific the financing legislation. In essence, they give to Chapter 124 "the quality of definiteness" in the "object to which [the appropriation] is applied." *Dorsey v. Petrott*, 178 Md. at 243. Their suspension would effectively negate Chapter 124.

Because of this interrelationship, Chapters 122 and 123—like Chapter 124 itself—are within the Referendum Article's exception for an "appropriation for maintaining the State Government."

VI

Conclusion

In our opinion, Chapter 122, 123, and 124 of the Laws of Maryland 1987 may not be petitioned to referendum.

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Editor's Note: In *Kelly v. Marylanders for Sports Sanity*, 310 Md. 437 (1987), the Court of Appeals held that no component of the stadium legislative package was subject to referendum, because the package constituted "a single, inseparable 'law' making an appropriation for maintaining the State government. . . ." 310 Md. at 474.

CREDIT REGULATION

OPEN-END CREDIT PLAN—FINANCE CHARGES—LIMITATION ON
ASSESSMENT OF FINANCE CHARGE ON OUTSTANDING BALANCE
APPLIES TO BILLING PERIOD IN WHICH BORROWER MAKES
FULL PAYMENT.

July 2, 1987

The Honorable Alan T. Fell
Commissioner of Consumer Credit

You have requested our opinion concerning §12-903(d)(1)(i) of the Commercial Law Article ("CL" Article), which limits assessment of a finance charge or interest on outstanding purchase charge obligations under an open-end credit plan. Specifically, CL §12-903(d)(1)(i) prohibits assessment of a finance charge or interest if an outstanding balance is paid within 25 days of the end of a billing period. Your question is whether this prohibition concerns the billing period in which the borrower made full payment or the billing period for which the bill was sent.

For the reasons stated below, we conclude that the prohibition in CL §12-903(d)(1)(i) applies to the billing period in which the borrower made full payment.

I

Statutory Language

CL §12-903(d)(1)(i) provides as follows:

"If the outstanding balance of purchase obligations under an open-end credit plan is paid in full within 25 days after the end of a billing period, a finance charge or interest may not be imposed on a consumer borrower with respect to such balance for that billing period"

The issue centers on the last phrase in the subparagraph, "for that billing period." If "that billing period" refers to the billing period in which the borrower makes full payment, the credit grantor may not assess a finance charge on the carry-over bal-

ance or any new purchase obligations incurred after the billing date.¹ If, on the other hand, “that billing period” refers to the period for which the bill was sent—that is, the billing period preceding the billing date—and the borrower makes full payment within 25 days after the end of that period, a credit grantor would have to rebate the prior billing period’s finance charges but could assess finance charges for the billing period in which payment was made.

For example, suppose that a borrower has an outstanding balance of \$1,000 on June 1, the billing date. On June 21, well within the 25 day grace period, the borrower pays the entire balance of \$1,000. Under the first of the two possible readings of “that billing period,” the credit grantor may not assess a finance charge on \$1,000 for the June billing period but may assess a finance charge on the unpaid balance for the May billing period.² Under the alternative reading, the credit grantor may assess a finance charge on \$1,000 for 20 days (June 1—June 20) but must reduce the bill by whatever portion of the \$1,000 balance reflects finance charges for the May billing period.

II

Analysis

The language in question was enacted in Chapter 143 (Senate Bill 591), Laws of Maryland 1983. In considering the amendment that finally became CL §12-903(d)(1)(i), the General Assembly apparently focused on the provision’s interaction with CL §12-905, which authorizes certain annual and transactional charges. If credit grantors were to be allowed to impose these fees, the General Assembly evidently concluded, then the borrower should have a 25 day float before a finance charge would be assessed on purchase obligations.³ Because the General Assem-

¹ For brevity, we use the term “finance charge” instead of the full statutory phrase “finance charge or interest.”

² In this example, then, the \$1,000 balance properly includes any finance charges accrued in the May billing period. Finance charges may be imposed where a preexisting balance has been carried over from earlier billing periods.

³ Indeed, the amendment that became CL §12-903(a)(1)(i) was entitled “25 Day Free-Ride Amendment (Substitute).”

bly intended that customers have 25 days to pay off a balance, we infer a related intent to allow credit grantors to impose finance charges on balances that were *not* paid in that time period, without rebating the accrued finance charges.

Reading "that billing period" to refer to the period in which payment is made would be consistent with the parallel free-ride period required by CL §12-903(d)(1)(ii):

"If there is no purchase balance at the beginning of a billing period, a finance charge or interest may not be imposed on a consumer borrower with respect to any purchase obligation added to the account during that billing period from the date of purchase to the end of that billing period."

See also CL §12-506(c) and (d) (same usage of "billing cycle" in Retail Credit Account Law).

In contrast, the contrary interpretation would, uniquely, require rebating of finance charges and assessment of finance charges from the beginning of the new billing period. This cumbersome procedure would be inconsistent with a legislative scheme that, in general, was designed to afford credit grantors greater flexibility and ease of operations. It is axiomatic that a statute should not be construed to lead to an unreasonable or illogical result. *Hoffman v. Key Federal Savings and Loan Ass'n*, 286 Md. 28 (1979).

In short, the better reading of CL §12-903(d)(1)(i) is that it allows a credit grantor to include a finance charge in the balance carried forward from the billing period for which a bill is rendered; however, it does not allow a credit grantor to assess a finance charge on that balance for the billing period in which timely, full payment is made. This construction better serves the apparent legislative goal:

"When we pursue the context of statutory language, we are not limited to the words of the statute as they are printed in the Annotated Code. We may and often must consider other 'external manifestations' or 'persuasive evidence,' including a bill's title and function paragraphs, amendments that occurred as it passed through the legislature, its relationship to earlier and subsequent legislation, and other material that fairly bears on the fundamental issue of legislative purpose or goal, which becomes the context within which we read the particular

language before us in a given case." *Kaczorowski v. Mayor and City Council of Baltimore*, No. 162 (September Term, 1986) (May 15, 1987), slip op. at 13.

III

Conclusion

In summary, it is our opinion that CL §12-903(d)(1)(i) prohibits assessment of a finance charge on an outstanding balance for the billing period in which the borrower pays the balance in full within 25 days of the end of the prior billing period. CL §12-903(d)(1)(i) does not require rebating of a finance charge properly assessed for that prior billing period, even if the borrower timely pays the balance in full.

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CREDIT REGULATION—MORTGAGES—SETTLEMENT SERVICES—
LENDER MAY REQUIRE BORROWER TO PAY FOR LEGAL SERVICES
RELATED TO LOAN AND MAY REQUIRE THAT ITS DESIGNATED
ATTORNEY EXAMINE TITLE.

November 6, 1987

The Honorable Kevin Kelly
Maryland House of Delegates

You have requested our opinion on several questions related to mortgage loans and closing costs. Specifically, you ask:

1. "When a loan is to be secured by owner-occupied residential real property, what specific services rendered by the lender's attorney may the borrower be required to pay?"

2. "When a borrower makes a loan application to be secured by owner-occupied residential real property, may the lender refuse to permit the borrower's licensed attorney to perform the necessary title examination, and may the lender predicate the processing of the loan upon the lender's attorney preparing the title examination?" You suggest that §12-120 of the Commercial Law Article prohibits the practice.

3. "In the event that the lender would refuse to permit the borrower's attorney to perform the title examination, what sanctions under the Maryland law may be imposed against the lender?"

For the reasons stated below, we conclude as follows:

1. In general, a mortgage lender may require a borrower to pay for all legal services reasonably related to the loan transaction, including title examination.

2. A lender may require that its attorney, rather than the borrower's attorney, conduct the title examination.

3. Because the practice in question is legally permissible, no sanctions may be imposed against the lender.

I

Introduction

A title examination is required in a mortgage loan transaction, primarily to insure a good and valid lien for the lender. Assurance of good title also benefits the buyer/mortgagor, of course, and typically the cost is borne by the borrower. See §§12-120(b) and 12-1005 of the Commercial Law Article ("CL" Article).¹ See also CL §§12-410(a)(3) and 12-307(a)(2). See generally 67 *Opinions of the Attorney General* 98 (1982).

Your questions arise because several constituents applied for first mortgage loans and requested of the lender that a particular attorney be permitted to certify title. These potential borrowers were informed by the lender that the loans could not be processed unless the lender's attorney performed the title examination.²

We first consider the effect of the 1986 legislation to which you refer specifically in your letter. Then we briefly examine whether the requirements of the antitrust laws or of legal ethics affect the practice about which you inquire.

II

1986 Legislation

Chapter 628 (Senate Bill 393) of the Laws of Maryland 1986 imposed, in the words of the bill's title, "certain requirements and certain restrictions on lenders with regard to loans secured by real property mortgages [or] deeds of trust. . . ."³ One set of re-

¹ CL §12-120, which we discuss further in Part II below, applies to "any loan to be secured by owner-occupied residential real property." CL §12-1005(c)(3)(i), which permits charges for "[a]ttorney's fees for services rendered in connection with the preparation, closing, or disbursement of [a] loan," applies to first or second mortgage loans made under CL Subtitle 10, Credit Grantor Closed End Credit Provisions.

² The lender's requirement is a precondition to its accepting the loan application and predates any contract between the lender and a prospective borrower. See *Jacques v. First National Bank*, 307 Md. 527, 539 (1986).

³ For ease of reference, we use the word "mortgage" to mean "deed of trust" as well.

quirements is codified in §12-120 of the Commercial Law Article ("CL" Article):

"(a) This section applies to any loan to be secured by owner-occupied residential real property.

(b) A lender may require the borrower to pay for services rendered by the lender's attorney in connection with a loan described in subsection (a) of this section only if:

(1) The attorney's fee is limited to legal services attributable to processing and closing the loan and not to unrelated services performed by the attorney for the lender;

(2) The amount of the attorney's fee, if in excess of \$100, is supported by a statement, provided to the borrower at or prior to settlement, that:

(i) Describes the services performed;

(ii) Sets forth the time spent by the attorney and the hourly rate or other basis for determining the fee;

(iii) States that the legal services are being performed on behalf of the lender and not on behalf of the borrower; and

(iv) States that the services are being paid for by the borrower;

(3) The amount of the attorney's fee is reasonable on the basis of the legal services performed; and

(4) The attorney's fee is separately itemized on the loan settlement sheet and identified as a fee to the lender's attorney."

CL §12-120 is patterned after a regulation of the Federal Home Loan Bank Board. This regulation, 12 C.F.R. & 563.35, provides in part:

"(d) In connection with a loan on a home . . . occupied or to be occupied by the borrower, an insured institution or subsidiary thereof may require such borrower to reimburse it for legal services rendered by its attorney, or to directly pay such attorney for such services, only if:

(1) Such attorney's fee is limited to legal services attributable to processing and closing such loan (and not

unrelated services performed for the institution or subsidiary by the attorney);

(2) Such attorney's fee, if in excess of \$100, is supported by a statement provided to the borrower at or prior to settlement which: (i) Describes the legal services being performed, (ii) sets forth the time being spent by such attorney and the hourly rate or other basis for determining such fee, (iii) states that the legal services are being performed on behalf of the insured institution or subsidiary and not on behalf of the borrower, and (iv) states that such services are being paid for by the borrower;

(3) Such attorney's fee does not exceed that which is reasonable and commensurate with the legal services being performed; and

(4) Such attorney's fee is separately itemized on the loan settlement sheet and identified as a fee to the lender's attorney."

Both the federal regulation and CL §12-120 state that certain legal services necessary for the loan "are being performed on behalf of the lender and not on behalf of the borrower," even though they are paid for by the borrower.⁴ But, both the regulation and CL §12-120 also recognize that there are other legal services—characterized as "unrelated" to the loan—rendered to the lender for which the borrower may not be charged.⁵

The restrictions in CL §12-120 are augmented by the disclosure requirements in CL §12-119:

⁴ At time of closing, the lender may well have a greater financial stake in the mortgaged property than does the borrower.

⁵ The federal regulation also contains a tie-in prohibition not included in the Maryland statute:

"No insured institution or service corporation affiliate thereof may grant any loan on the prior condition, agreement, or understanding that the borrower contract with any specific person or organization for the following:

...

(3) Legal services rendered to the borrower. . . ." 12 C.F.R. §563.35(a).

“(a) This section applies to any application for a loan to be secured by a first mortgage or first deed of trust on a borrower’s primary residence.

(b) Within 3 days after the application for a loan described in subsection (a) of this section, or earlier upon request, any lender that imposes fees on borrowers for settlement services, or document review services, performed by a lender designated attorney shall provide a prospective borrower with a written notice stating:

(1) The lender’s requirements concerning selection of an attorney or other person to perform settlement services relating to the purchase of the real property; and

(2) A good faith estimate of the fee or fees to be charged to the borrower.

(c) If notice is required by this section, a copy of the notice, signed by the applicant, shall accompany any executed application for a loan.”

Chapter 628 reflects the General Assembly’s awareness of the common practice of the lender’s designating the attorney to do the title work, for it specifies disclosure of “[t]he lender’s requirements concerning selection of an attorney . . . to perform settlement services” CL §12-119(b)(1).

This legislation resulted from the work of the Governor’s Task Force on Real Property Closing Costs, which preceded the introduction of Senate Bill 393. Among the recommendations considered and rejected by the Task Force was the following:

“Restrict the selection by lenders of settlement service providers, i.e., give the buyer the right to select settlement service procedure.

The Task Force rejected this suggestion as an unworkable intrusion on lenders’ strong interests in having competent and effective settlement services and documentation of the loan and property transfer. The Task Force did approve Recommendation 5 which requires an early disclosure of lender required attorney fees.” Report at 50.

In light of the statutory language, its federal model, and its legislative history, we conclude that CL §§12-119 and 12-120 do not prohibit a lender from designating the attorney who will do

the title work in a mortgage loan transaction. A lender that does so is not subject to sanctions.⁶

The regulatory provisions of CL §§12-119 and 12-120 stand in marked contrast to the following prohibition, applicable to real estate salesmen and brokers, in Article 56, §227C(a) of the Maryland Code:

"It is unlawful for any real estate broker, real estate salesman or lawyer acting as a broker to require as a condition of settlement of single-family dwellings that a buyer employ a particular title insurance, settlement, or escrow company or title attorney."

Should a prohibition of that kind, applicable to lenders, be thought desirable as a matter of policy, the General Assembly should amend the statute accordingly.

With regard to the specific services rendered by the lender's attorney for which the borrower may be required to pay, CL §12-119 refers to "settlement services or document review services"; CL §12-120 refers to "legal services attributable to processing and closing the loan" and to "unrelated services performed for the lender." We cannot draw up an all-inclusive list of legal services, but they surely include a title search; preparation of any deed, note, mortgage, loan agreement, disclosure statement, lien release settlement sheet or other document involved in the loan transaction or necessary for obtaining title insurance; and services incident to conducting the settlement or closing.

In this regard, we note that many lenders allow the borrower to select a qualified attorney to perform necessary services but then have the work and documents reviewed by an attorney of the lender's choice. We believe a reasonable charge for this subsequent review would be authorized under the statute.

⁶ However, CL §12-122 provides as follows:

"Any lender who knowingly and willfully violates any provision of §12-102, §12-103, §12-109.2, §12-113, §12-118, §12-119, §12-120, or §12-121 of this subtitle is guilty of a misdemeanor and on conviction is subject to a fine not exceeding \$500 or imprisonment not exceeding 6 months or both."

A lender who knowingly and willfully fails to give the required disclosures or requires a borrower to pay an attorney's fee that is not reasonable or that is otherwise prohibited could be subjected to the penalties set forth in CL §12-122.

On the other hand, we can envision other legal services that, while a necessary predicate to a loan closing, are not automatically services that may be charged to the borrower. These might include negotiation or litigation to clarify title or to remove a lien or research on a lender's authority to make a particular kind of loan. However, problems of this nature can only be resolved on a case-by-case basis.

III

Antitrust Considerations

The antitrust laws generally do not prohibit a bank from requiring borrowers to pay the bank's attorney to examine and certify title to residential real property that secures a loan. See *Foster v. Maryland State Savings & Loan Ass'n*, 590 F.2d 928 (D.C. Cir. 1978) (interpreting Maryland and federal law). In our view, that requirement is neither an illegal tying arrangement nor otherwise an unreasonable restraint of trade.

Section 1 of the Sherman Act, 15 U.S.C. §1, prohibits contracts "in restraint of trade or commerce among the several States;"⁷ Section 2, 15 U.S.C. §2, prohibits monopolization. A tying arrangement, defined as conditioning the sale of one product (the tying product) on the purchase of a different (or "tied") product, is unlawful under Section 1 if the seller has "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected." *Northwestern Pacific R. Co. v. United States*, 356 U.S. 1, 5-6 (1958).

By definition, two separate products must be involved. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 507 (1969). Products are separate only if the "character of the demand" for the products is different, and, therefore, a different "market" exists for each. *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 1, 19 (1984). If the economic advantages of a

⁷ Similarly, CL § 11-204(a)(1) prohibits contracts that "unreasonably restrain trade or commerce." The Maryland Antitrust Act, however, generally exempts state and national banks and state and federal savings and loan associations. See CL §11-203(9) and (10). Therefore, this opinion considers only the requirements of federal antitrust law.

joint package are substantial, however, the products might be viewed as a unit. 466 U.S. at 40.

In the case of the purchase of residential property loans and legal services that insure the security of the loans, the products do not appear to be separate. Payment of the bank's attorney for performing a title examination "represent[s] an incidental and inseparable part of [the] 'purchase' of the loans, rather than the 'purchase' of a tied product." *Foster v. Maryland State Savings & Loan Ass'n*, 590 F.2d at 931. See also *Amev, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486 (11th Cir. 1985). Moreover, because the legal services are provided to the bank, despite the charge to the borrower, the services are not for separate sale but are incidental to the cost of the loan—a cost that the bank may legally pass on to the borrower. *Foster v. Maryland State Savings & Loan Ass'n*, 590 F.2d at 932-33, citing *Forrest v. Capital Building & Loan Ass'n*, 385 F.Supp. 831 (M.D. La. 1973), *aff'd per curiam*, 504 F.2d 891 (5th Cir. 1974).

Finally, absent a showing that borrowers are prevented from selecting their own attorneys to represent their individual interests or that the borrowers are prevented from obtaining a loan elsewhere, a borrower probably cannot demonstrate an unreasonable restraint of trade in violation of Sections 1 or 2 of the Sherman Act. The Foster court found that this practice imposed only a *de minimus* restraint, and that in any event, the practice, specifically authorized by federal regulation and Maryland law, was reasonable. *Foster v. Maryland State Savings & Loan Ass'n*, 590 F.2d at 933. Thus, the questioned practice of requiring the borrower to pay the bank's attorney for performing a title examination does not appear to violate the federal antitrust laws.

IV

Ethical Considerations

Although we do not ordinarily address ethics matters in an opinion, we observe that the pertinent rules of legal ethics do not bar a lender from requiring that a specific settlement lawyer be used and that the borrower pay for the lawyer's settlement services. Both Maryland Rule of Professional Conduct 1.7, regarding conflict of interest generally, and Rule 1.8(f), regarding compensation from someone other than the client, leave considerable room for client consent to otherwise prohibited practices. See *At-*

torney Grievance Commission v. Lockhart, 285 Md. 586, 593 n. 6 (1979). As the Maryland State Bar Association Committee on Ethics observed, regarding the former disciplinary rules:

"[I]f the borrower has accepted a loan commitment containing the condition precedent (i.e., that the lender's attorney perform settlement services), then, he too has knowledge of the employment of the attorney by the lending institution and his obligation to pay the attorney's fee. Clearly, the attorney does not represent the borrower, but rather the lending institution. The attorney is not necessarily bound to represent the one who pays his fee." Informal Opinion Docket 78-22, at 2 (April 19, 1978).

See also Docket 78-44 (June 5, 1978). *See generally* Annotation, *Attorney and Client: Conflict of Interest in Real Estate Closing Situations*, 68 A.L.R.3d 967 (1976).

V

Conclusion

In summary, it is our opinion that:

1. In general, a mortgage lender may require a borrower to pay for all legal services reasonably related to the loan transaction, including title examination.
2. A lender may require that its attorney, rather than the borrower's attorney, conduct the title examination.
3. Because the practice in question is legally permissible, no sanctions may be imposed against the lender.

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JACK SCHWARTZ

Chief Counsel

Opinions and Advice

CRIME VICTIMS COMPENSATION

CRIMINAL INJURIES COMPENSATION BOARD—DISFIGUREMENT—
LUMP SUM PAYMENTS—ALTERNATIVE COMPENSATION
SOURCES.

September 29, 1987

*The Honorable Bishop L. Robinson, Secretary
of Public Safety & Correctional Services*

You have requested our opinion on a series of questions concerning the interpretation and administration of the Criminal Injuries Compensation Act, Article 26A of the Annotated Code of Maryland. Specifically, you ask:

1. May the Criminal Injuries Compensation Board grant awards for disfigurement, particularly in cases in which the claimant has incurred no compensable expenses or past loss of income?

2. Under what circumstances may a recipient of an award for permanent disability or loss of support be granted payment wholly or partially in a lump sum, rather than in monthly benefits; and, may a claimant who receives a lump sum subsequently be granted additional monthly benefits before the date on which the original award would have been fully paid in monthly benefits?

3. Does Article 26A, §12(d), which requires the reduction of awards by any amount "received or to be received" from other sources, authorize or require the Board to (i) investigate the availability to each claimant of alternative compensation sources, (ii) require claimants to seek payment from those sources as a prerequisite to the grant of any award, and (iii) reduce any award by the amount that the claimant may be entitled to receive from any available source.¹

¹ A provision of the federal Victims of Crime Act prohibits states from using grant money received under that Act to supplant State funds that would otherwise be used to compensate crime victims. 42 U.S.C. §10602(b)(3). As it works to eliminate its backlog of claims, the Board may make an unusually large number of awards in one year, the number in succeeding years dropping to a level reflecting the number of claims actually filed in those years. You originally asked whether the rise and concomitant fall in the amount of money awarded would be viewed by the federal Office for Victims of

continued

For the reasons given below, we conclude as follows:

1. The Criminal Injuries Compensation Board may grant awards for disfigurement, even where it finds no other compensable loss. However, the Board may do so only if it finds that the disfigurement will cause the claimant to incur serious financial hardship from loss of income or from out-of-pocket expenses or that the serious financial hardship requirement is inapplicable under Article 26A, §12(f)(2).²

2. The Board may order payment of a permanent disability or loss of support award wholly or partially in a lump sum if the evidence before it, as set forth in its decision, shows that the requested lump-sum payment is necessary to provide for the living or business needs of the claimant. The Board may subsequently grant the claimant additional monthly benefits before the date on which the original award would have been paid, if the claimant's circumstances make the additional benefits necessary.

3. The Board is required to reduce each of its final awards by the amount that the claimant has received or definitely will receive from any other source of compensation. Therefore, the Board is required to ascertain in each case whether there are any such alternative sources of compensation, and the Board may and generally should require the claimant to seek compensation from those alternative sources as a prerequisite to its grant of a final award.

Note 1 continued

Crime, which administers the Victims of Crime Act, as evidence of "supplantation," rendering the State ineligible for further grants under the Act. However, you have since received assurance from that office that the anticipated reduction resulting from elimination of the backlog will not violate the Act's nonsupplantation provision. Letter from Charles M. Hollis, Program Manager, Office for Victims of Crime, to John J. O'Neil, Assistant Secretary of Public Safety and Correctional Services (June 24, 1987).

² We thus agree with advice previously given to the Board that it has authority to grant awards for disfigurement in appropriate cases that is, when the disfigurement will cause the claimant to suffer serious financial hardship. Letter of Assistant Attorney General Valerie V. Cloutier to Martin I. Moylan, Executive Secretary, Criminal Injuries Compensation Board (October 14, 1982); Letter from Assistant Attorney General William C. Rogers, III, to Martin I. Moylan, Executive Director, Criminal Injuries Compensation Board (May 7, 1982). However, neither of those letters of advice directly addressed the factual findings by the Board necessary to establish a basis for concluding that a particular claimant will incur serious financial hardship as a result of disfigurement. That matter is discussed in Part I C below.

I

Awards for Disfigurement

Awards under the Criminal Injuries Compensation Act are to be "made in accordance with the schedule of benefits and degree of disability as specified in Article 101, §36 (as it existed on July 1, 1974), §37 and other applicable sections of the Code, excluding §66 entitled 'Subsequent Injury Fund.'" Article 26A, §12(b). However, unlike workers' compensation, criminal injuries compensation is not designed to afford compensation for the victim's injury in itself.³ The focus of criminal injuries compensation is on the economic losses caused by the injury and on the claimant's need for assistance in meeting those losses. *Williams v. Criminal Injuries Compensation Board*, 307 Md. 606, 614 (1986). Accordingly, §12(f)(1) ordinarily prohibits any award "[i]f the Board finds that the claimant will not suffer serious financial hardship, as a result of the loss of earnings or support and the out-of-pocket expenses incurred as a result of the injury, if not granted financial assistance pursuant to this article to meet the loss of earnings, support, or out-of-pocket expenses"⁴

On occasion, the Board receives claims from crime victims whose injuries have left them with scars but no permanent impairment of bodily function. You ask whether such disfigurement, since it does not actually make the disfigured person physically unable to work, can cause serious financial hardship. Further, some of those claimants have not directly paid for the treatment of their injuries, nor were their earnings actually suspended during any time that they may have been unable to work because of their injuries. That might be the case, for example, because those losses were covered by insurance or employment benefits or because the claimant was unemployed and the expenses were cov-

³ "Although workmen's compensation in its origin was contemplated simply as a wage-loss insurance payable during actual disability, it has imperceptibly evolved into a process of payment for physical impairment, often regardless of actual or presumed loss of entire wages or earning capacity." *Oros v. City of Baltimore*, 56 Md. App. 685, 690 (1983).

⁴ However, §12(f)(2) provides that the serious financial hardship requirement does not apply in determining an award to a person injured, or to a surviving dependent of a person killed, while trying to prevent a crime or apprehend the perpetrator of a crime under certain circumstances.

ered by government assistance.⁵ You ask whether, in view of the serious financial hardship requirement, the Board is authorized to make awards for disfigurement in those cases.

A. Authority to Grant Disfigurement Benefits Generally

Article 26A, §12(b) reflects the General Assembly's intention to afford eligible crime victims compensation of the same types as are afforded to injured workers under the Workers' Compensation Act. Article 101, §36 provides for compensation for four types of disability: permanent total disability, permanent partial disability, temporary total disability, and temporary partial disability. Permanent partial disability compensation is measured, for the most part, according to a schedule of benefits for particular injuries. Article 101, §36(3). In addition, however, §36(3)(f) provides that "[f]or other mutilations and disfigurements . . . compensation shall be allowed in the discretion of the [Workers' Compensation] Commission, for not more than one hundred weeks in each case having due regard to the character of the mutilation and disfigurement as compared with mutilation and injury hereinbefore specifically provided for."

That provision has been part of the workers' compensation law since 1920. Chapter 456, Laws of Maryland 1920. In incorporating Article 101, §36 into the Criminal Injuries Compensation Act as the measure of benefits, the General Assembly presumably knew of the provision for compensation for disfigurement: It must be assumed that "the General Assembly in enacting legisla-

⁵ Even under such circumstances, the claimant would meet the minimum standard of eligibility set by §7. That section prohibits an award "unless the claimant has incurred a minimum out-of-pocket loss of one hundred dollars or has lost at least two continuous weeks' earnings or support." Section 7 is framed in the alternative that is, it does not preclude an award if the claimant incurred *either* the stated minimum out-of-pocket loss *or* the stated minimum past loss of earnings. Moreover, that section defines "out-of-pocket loss" to mean "reimbursed and unreimbursable expenses or indebtedness reasonably incurred for medical care, mental health counseling, funeral expenses, or other services necessary as a result of the injury upon which such claim is based." Thus, §7 does not itself preclude an award in a case in which the claimant incurred expenses or indebtedness of at least \$100, even if those expenses were reimbursed by insurance or another payor and the claimant incurred no past loss of earnings or support. *Cf. Archer v. Crime Victims Compensation Board*, 305 N.W.2d 259, 260 (Mich. App. 1981) (purpose of provision is to limit claims to those having minimum value, not to deny compensation to claimants who qualify under other sections).

tion does so with a full knowledge as to prior and existing law and judicial decisions with respect to such law." *Criminal Injuries Compensation Board v. Gould*, 273 Md. at 498. Had the General Assembly intended to preclude the Board from ever making awards for disfigurement, we think that it would have made such an exception expressly in §12(b). *Board of Education of Howard County v. Howard County*, 45 Md. App. 358, 368 (1980).⁶

Moreover, throughout its existence, the Board has made awards for disfigurement, and those awards have been reflected in its annual reports, published pursuant to the mandate of Article 26A, §4(h). *E.g.*, *State of Maryland Criminal Injuries Compensation Board Second Annual Report* 19 (1971) (Claim No. 25P-70). It is certainly true that no administrative practice, however venerable, is valid if it contravenes the clear meaning and purpose of a statute. *Holy Cross Hospital v. Health Services Cost Review Comm'n*, 283 Md. 277, 285 (1978). Nonetheless, we think that the Board's longstanding practice of making disfigurement awards, consistently and publicly followed, is persuasive as to the legislative intent. The General Assembly would surely have amended Article 26A to preclude awards for disfigurement if it did not intend the Board to have authority to make such awards in appropriate cases. *Jackson Marine Sales v. State Dep't of Assessments & Taxation*, 32 Md. App. 213, 217 (1976).

B. *Serious Financial Hardship Requirement*

However, §12(f)(1) is a clear limitation on the Board's authority to make any awards, in that it permits an award only to the extent that the claimant would otherwise suffer serious financial hardship. *Williams v. Criminal Injuries Compensation Board*, 307 Md. at 614. Such hardship must result from the pecuniary losses caused by the criminally inflicted injury—that is, loss of income or out-of-pocket expenses incurred. 307 Md. at 614-15. Therefore, if disfigurement is unlikely to cause an economic loss leading to serious financial hardship, §12(f)(1) prohibits awarding compensation for disfigurement.

⁶ Notably, §12(b) does explicitly preclude the Board from increasing a claimant's award to take account, pursuant to Article 101, §66, of the combined effect of the criminal injury and a preexisting condition.

An award of benefits for disfigurement would not be precluded by the fact that the claimant did not incur unreimbursed expenses for the treatment of his or her injuries and did not lose income during a period of inability to work.⁷ The Court of Appeals has clearly indicated that each element of loss must be considered separately in assessing the existence and extent of a crime victim's financial hardship. *Williams*, 307 Md. at 614 and 615. In that case, the court held that a claimant who incurred expenses and lost earnings during a period of temporary total disability is not entitled to compensation for a permanent partial disability where "there is no showing that [the claimant's] permanent disability will in the future cause him additional expenditures or loss of income for which he will have the requisite degree of financial need under §12(f)(1)." 307 Md. at 615-16. The fact that the claimant had shown the requisite level of hardship to entitle him to reimbursement of his out-of-pocket expenses and compensation for his temporary total disability did not entitle him to compensation for a permanent injury that would not cause such hardship.

We think that the converse is equally true: A claimant is entitled to compensation for a permanent injury that will cause loss of income and concomitant serious financial hardship, notwithstanding that he or she did not incur unreimbursed out-of-pocket expenses or loss of income during a period of temporary total disability. It is the economic impact of the disfigurement, not the economic impact of other possible losses, that must be assessed to determine whether or not a claimant should be granted disfigurement benefits.

C. *Serious Financial Hardship Resulting from Disfigurement*

The Court of Appeals long ago considered disfigurement benefits in the context of workers' compensation. Noting that "[t]he general purpose of the [Workers' Compensation] Act is to provide compensation for loss of earning capacity resulting from accidental injuries sustained in industrial employment," the court pointed out:

⁷ Of course a claimant whose injury-caused expenses, whether reimbursed or unreimbursed, did not total at least \$100, and who also did not lose at least two weeks' earnings or support, is not eligible for any award at all. Article 26A, §7. See also note 5 above.

"[A] disfigurement may constitute an economic loss in the sense of diminished power to produce, and it may be as much part of the workman's loss as the loss of a limb. A serious and unnatural disfigurement of the face, for example, may very probably have a harmful effect upon the ability of the disfigured person to retain or secure employment. Such a disfigurement, aside from exceptional cases, may render the person repulsive or offensive to the sight and displeasing to his employer, fellow employees and customers." *Bethlehem-Sparrows Point Shipyard, Inc. v Damasiewicz*, 187 Md. 474, 480 (1947).

Thus, the General Assembly had authorized compensation for disfigurement because it found that many, if not most, employers would be unwilling to hire or retain a disfigured worker. Under those circumstances, "in the majority of cases disfigurement sooner or later may have a harmful effect" on the worker's earnings. 187 Md. at 481. However, because entitlement to workers' compensation was not and is not predicated on financial need or actual income loss, "[t]he [Workers' Compensation] Commission may award compensation even though the claimant has not shown that it diminishes his earning capacity." *Id.* That is, the authorization of disfigurement benefits in workers' compensation embodied a legislative presumption that disfigurement would operate to an individual's disadvantage in employment because employers would discriminate against the disfigured individual.

That implicit presumption was at least arguably applicable to a claim for disfigurement compensation under Article 26A. *See Criminal Injuries Compensation Board v. Gould*, 273 Md. at 498 (General Assembly acts with full knowledge of existing law and judicial decisions interpreting it).⁸ However, since the enactment of Article 26A, the General Assembly has enacted prohibitions against any form of discrimination in employment opportunities on the basis of "physical or mental handicap unrelated in nature and extent so as to reasonably preclude the performance of the employment. . . ." Chapter 875, Laws of Maryland 1974 (provi-

⁸ In view of the serious financial hardship requirement, however, the Board could not give the presumption conclusive effect: §12(f)(1) would prohibit the Board from granting an award for disfigurement if the Board found that the disfigurement would not in fact diminish the claimant's earning capacity. At most, therefore, such a presumption would have made it easier for a claimant to prove his or her entitlement to compensation for disfigurement.

sions now codified at Article 49B, §16).⁹ For the purposes of those prohibitions, "physical handicap" includes "any physical disability, infirmity, *malformation* or *disfigurement* which is caused by bodily injury. . . ." Article 49B, §15(g). Hence, the discharge of or refusal to hire an individual because of his or her injury-caused disfigurement would now, in most cases, be an unlawful employment practice.¹⁰ Under these circumstances, there is no longer a basis for presuming that disfigurement will in every case have a deleterious effect on the individual's earning capacity. In most cases, such an effect is prohibited by law.

Nonetheless, not every instance of different treatment of a handicapped individual is unlawful discrimination. Article 49B, §16 prohibits employment discrimination based on a handicap only if the handicap "is unrelated in nature and extent so as to reasonably preclude the performance of the employment. . . ." A handicap that prevents the individual from effectively performing a particular job may lawfully be the basis for excluding that individual from that job. *B & O Railroad v. Bowen*, 60 Md. App. 299, 307 (1984). *See also 68 Opinions of the Attorney General* 322, 324 (1983). Thus, if the nature of a particular job requires a worker who is not obviously disfigured, the employer may lawfully refuse to employ in that job a person who is so disfigured.

Once a complainant in an employment discrimination case has shown that discrimination occurred, the burden is on the employer to show that the discrimination is justified. *B & O Railroad*, 60 Md. App. at 309. That burden may be carried by estab-

⁹ Article 49B, §16(a)(1) specifically prohibits employers from discharging, refusing to hire, or otherwise discriminating against an individual in the "compensation, terms, conditions, or privileges of employment" on the basis of such a handicap. In addition, §16(a)(2) prohibits limiting, segregating, or classifying employees or applicants on the basis of handicaps "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee. . . ." Similar provisions of §16 apply to employment agencies and labor organizations.

¹⁰ A person who has been the victim of employment discrimination may file a complaint with the Human Relations Commission, and the Commission has power to require reinstatement or hiring of the victim of discrimination with back pay in an appropriate case. Article 49B, §11(e).

lishing that the employer has a factual basis to believe that, to a reasonable probability, the complainant's physical handicap renders him or her unable to perform the duties of the job. *Maine Human Rights Comm'n v. Canadian Pacific Ltd.*, 458 A.2d 1225, 1234 (Me. 1983).¹¹ Therefore, to determine whether a claimant will incur loss of earning capacity as a result of disfigurement, the Board must first determine whether the claimant's usual occupation—that is, the claimant's occupation at the time of the injury or the occupation for which the claimant is suited by training and experience—is one for which an unscarred appearance is a valid qualification. In addition, the Board must determine whether the location and severity of the claimant's scars are such as to be apparent and disfiguring while performing the job.¹² For example, severe facial scarring might well prevent a cosmetics demonstrator from continuing in that occupation but have no effect on the ability of a construction worker to continue performing his or her work. Hence, an award of disfigurement benefits would be permissible because of the disfigurement's impact on earning capacity in the first, but not the second, case. Similarly, a scar on the leg would not affect a cosmetics demonstrator's ability to perform that job and therefore, unlike facial scar-

¹¹ The Board's regulations place the burden of proving entitlement to an award upon the claimant. COMAR 12.01.06B. Such an assignment of the burden of proof is clearly appropriate as to this matter in the context of criminal injuries compensation, where the claimant has readier access than the Board to relevant evidence. Therefore, we think that a claimant who seeks compensation for disfigurement has the burden of proving that, to a reasonable probability, the disfigurement renders the claimant unable to perform the duties of his or her accustomed occupation. That does not, however, relieve the Board of its statutory duty to fully investigate all claims accepted for filing. Article 26A, §8(b); *Criminal Injuries Compensation Board v. Remson*, 282 Md. 168, 178 (1978).

¹² The findings that the Board must make with regard to compensation for disfigurement are thus similar to those required for compensation under Article 101, §36(4) for disabilities not specifically enumerated. Unenumerated disabilities must be compensated on the basis of "the portion or percentage by which the industrial use of the employee's body was impaired as a result of the injury . . . tak[ing] into consideration, among other things, the nature of the physical injury, the occupation, experience, training and age of the injured employee at the time of the injury. . . ." Article 101, §36(4)(a).

ring, would not be a basis for a disfigurement award to that claimant.¹³

In any case, the Board's decision must clearly set forth the findings as to the requirements of the claimant's occupation and the relevance of the claimant's scars to those requirements that lead the Board to conclude that the claimant's earning capacity has been or has not been impaired. Article 26A, §8(f); *Redden v. Montgomery County*, 270 Md. 668, 684-85 (1974); *Crumlish v. Insurance Comm'r*, 70 Md. App. 182, 187-88 (1987).¹⁴

¹³ This is not by any means to say that disfigurement may not have serious adverse effects on a crime victim's life in other ways than in loss of earning capacity. In many cases, disfigurement may have significant psychological or social effects even though it does not lead to the loss of a job or promotion. However, cosmetic surgery may often be able to eliminate or greatly reduce a crime victim's scars, thereby alleviating their psychological or social effects—or, indeed, their effect on the victim's earning capacity. In those cases, the cost of cosmetic surgery would be compensable as an expense "reasonably incurred for medical care . . . or other services necessary as a result of the injury upon which [the] claim is based." Article 26A, §7. Similarly, the Board is expressly authorized to reimburse eligible claimants for the reasonable expense of psychological counseling. *Id.*

¹⁴ In *Redden*, the Court of Appeals noted the inadequacy of an agency's statement of the basis of its decision where the agency merely recited certain undisputed facts and repeated statutory language as its findings. In remanding the case, the court suggested a format for the agency's decision that would ensure its compliance with its obligation to make basic findings:

"[A]n acceptable format for the Board's findings and conclusions upon the remand would be to set out its finding that the particular requirement had, or had not, in its opinion, been established by the applicants and then add 'because the Board finds the following facts to be true:'

(Insert facts here)

'and does not accept as true the following testimony:'

(Insert the rejected testimony here)." 270 Md. at 685.

The Criminal Injuries Compensation Board could adopt a similar format for its findings on such questions as whether a claimant's injury will cause serious financial hardship.

II

Lump Sum Payments

A. *Authority to Grant*

The schedule of benefits set forth in Article 101, §36 provides for payment of disability and survivors' benefits weekly, in amounts based on the average weekly wage of the victim or of workers in the State generally. However, Article 26A, §13 provides in part that "in every case providing for compensation to an employee or his dependent under this article, the Board may, if in its opinion the facts and circumstances of the case warrant it, convert the compensation to be paid in a partial or total lump sum, without discount."¹⁵ In the related context of workers' compensation, the Court of Appeals has pointed out:

"The policy of the statute does not favor lump-sum awards. They are the exception rather than the rule. While necessary in some cases, they are not made of right. The Legislature wisely left the determination of when they should be made, and to what extent, in the discretion of the administrative body charged with special knowledge of the subject. The authority given to the Commission is safeguarded by ample opportunity for review by the courts." *Petillo v. Stein*, 184 Md. 644, 652-53 (1945)."¹⁶

Thus, the Board has discretion to order the payment of an award in a partial or total lump sum in a proper case. But this discretion must not be abused: There must be evidence in the record before the Board to support its conclusion that "the facts and circumstances of the case warrant" a lump-sum payment.

The Court of appeals has indicated that a lump-sum payment is not warranted where it is requested "for a purpose unrelated to the necessary living or business needs of the claimant. . . ." *Bethlehem Steel Company v. Taylor*, 199 Md. 648, 651 (1952).

¹⁵ Section 13 also provides that awards "shall be paid in accordance with the discretion and decision of the Board as to the manner of payment." In the exercise of that authority, the Board typically directs that periodic payments be made at monthly, rather than weekly, intervals.

¹⁶ Article 101, §49 provides, in terms similar to those of Article 26A, §13, for payment of awards other than temporary disability compensation in total or partial lump sums.

Therefore, lump-sum awards should not be allowed "merely to pay debts owed by a claimant, particularly in view of the fact that awards are not attachable." *Id.* See Article 26A, §13 (awards made under Article 26A not "subject to execution or attachment other than for expenses resulting from the injury which is the basis for the claim"). However, the courts in Maryland and elsewhere have found a variety of purposes sufficient to warrant lump-sum payments. For example, in *Taylor*, the court upheld the grant of a lump sum to enable the claimant to pay his indebtedness on an automobile that he needed for transportation to and from work, thereby saving the claimant interest charges on the debt.¹⁷

The facts and circumstances that warrant payment of an award in a lump sum are those of the particular case in which such a payment is requested. For that reason, the decision whether to grant such a payment is committed to the sound discretion of the Board. Nonetheless, these decisions are subject to review by the courts and must be supported by substantial evidence in the record. Article 26A, §10(a). A lump sum payment may not be granted in the absence of evidence that it is "necessary for the proper care" of the injured crime victim or the dependents of a deceased crime victim. *Taylor*, 199 Md. at 650.¹⁸

¹⁷ You specifically mention a case in which the claimant requested a lump sum for the purpose of making a down payment on a home. We do not know the particulars of the case to which you refer, nor have we found a Maryland case discussing the appropriateness of a lump-sum payment for that purpose. However, we are aware of cases from other jurisdictions both upholding and reversing lump sum payments of workers' compensation for such a purpose, depending on the particular circumstances of the claimant requesting it. Compare *Kosgarian v. Fairmount Foundry Co.*, 42 A.2d 891 (R.I. 1945) with *Livingston Oil Corp. v. Henson*, 215 P. 1057 (Okla. 1923). Thus, we think that the Board must determine the appropriateness of granting a lump sum for that purpose by reference to the circumstances of the particular claimant.

¹⁸ You note that the Workers' Compensation Commission often holds hearings on applications for lump-sum payments. Those hearings may be held at the request of the employer or insurer who may be required to make the payment or on the Commission's own motion. COMAR 14.09.01.14C. Because proceedings before the Criminal Injuries Compensation Board are ex parte, they do not involve a private party who may be obligated to pay the claimant and whose rights must therefore be protected. Accordingly, the Board is not required to conduct a hearing to determine whether a requested lump-sum payment is appropriate. Indeed, the Act does not require the Board to hold a hearing before deciding whether to grant or deny a claim in the first instance. Article 26A, §8(d) and 9(b).

B. Grant of Additional Compensation After Lump Sum Payment

Compensation for a crime victim's permanent total disability or to a wholly dependent survivor of a deceased crime victim may be granted initially in a total amount not greater than \$45,000. If the victim's disability or the survivor's dependency continues after that total amount has been paid, payment is continued at the original rate throughout the duration of the disability or dependency. Article 101, §36(1)(a) and (8)(a).

On occasion, a claimant who is receiving such an award in periodic payments requests that a portion of the award be converted into a lump sum and paid immediately. If that request is granted, the date on which the claimant will have received the full amount of the original award is in effect accelerated. If the claimant's disability or dependency continues after the full amount of that original award is received and the claimant is therefore granted additional periodic payments at the original rate, the claimant may ultimately receive a total amount greater than the amount that he or she would have received had the lump sum not been granted. Because that is so, you ask whether, when a lump-sum payment is granted, the claimant is barred from receiving additional benefits before the time when the original award would have been completely paid out in periodic payments at the rate originally set by the award.

Article 101, §49, which authorizes lump-sum payment of workers' compensation, requires that subsequent periodic payments of total disability or dependency benefits be reduced to take account of the lump-sum payment. By that means, the date on which the original award is fully paid and the total amount of compensation ultimately paid to the claimant are left unaffected by the grant of the lump sum.

As originally enacted, Article 26A, §13 provided that "[a]ny award made under this Article shall be paid in accordance with the provisions of Section 36 and other applicable sections of Article 101" Chapter 455, Laws of Maryland 1968. However, §13 was amended in 1973 "to allow the Criminal Injuries Compensation Board to make the manner of payment of awards at their discretion" Chapter 563, Laws of Maryland 1973.¹⁹

¹⁹ That Act also added the last sentence of §13, explicitly "permit[ting] the Board to make payment of awards in partial or total lump sum." *Id.*

Thus, §13 now provides that awards of criminal injuries compensation "shall be paid in accordance with the discretion and decision of the Board as to the manner of payment."

That amendment was enacted in the same session of the General Assembly as the requirement that periodic payments of workers' compensation be reduced if a lump-sum payment is made. See Chapter 671, Laws of Maryland 1973. Taken together, those two enactments clearly evidence a legislative determination that Article 101, §49 should not apply of its own force to criminal injuries compensation awards. Hence, while periodic payments of workers' compensation must be reduced following any lump-sum payment, periodic payments of criminal injuries compensation need not be.

This difference in treatment reflects the fundamental difference between the two systems of compensation: Criminal injuries compensation is based on the claimant's financial need, while workers' compensation is not. Compare *Williams v. Criminal Injuries Compensation Board*, 307 Md. at 614, with *Oros v. City of Baltimore*, 56 Md. App. at 690. Accordingly, the Criminal Injuries Compensation Board is given discretion to determine the manner in which an award should be paid, in order that it may appropriately meet the needs of persons entitled to awards.

Still less do we think that the Board is required to completely deny additional periodic payments after it grants a lump sum. Article 101, §36(1)(a) and (8)(a) both expressly provide that, if the claimant's total permanent disability or total dependency on the decedent continues after the claimant's receipt of \$45,000, compensation payments to the claimant are to continue at the original weekly rate. Those provisions do not indicate that the grant to the claimant of a lump sum after the date of the original award should produce any "gap" in compensation between the claimant's receipt of \$45,000 and the beginning of weekly payments based on the claimant's continuing disability or dependency.

Nor, under those provisions, is there a definite total amount of compensation to which a permanently totally disabled person or a totally dependent survivor is limited. To the contrary, the provisions for continued payment throughout the period of disability or dependency effectively repealed the prior \$45,000 ceiling. See *McKenzie v. C.C. Kottcamp & Sons, Inc.*, 69 Md. App. 413, 420 n.3 (1986). Thus, the compensation provisions applicable to criminal injuries compensation evidence an intent that compensation

for total disability or total dependency should be coextensive with the claimant's financial need for that compensation.

Moreover, the stated purpose of criminal injuries compensation is to provide assistance to crime victims or their dependents who would otherwise "incur financial hardships or become dependent upon public assistance." Article 26A, §1. Even a temporary suspension of a claimant's right to seek continued benefits would, to at least some extent, undermine the purpose of the Act by withdrawing the assistance it was intended to provide from a claimant who is in continuing need of that assistance. Under those circumstances, we believe that a claimant who receives a lump-sum payment award is not thereby precluded from receiving continuing benefits before the date when the original award would have been fully paid in periodic payments.

Where the initial award grants compensation for partial, rather than total, disability or dependency, there is a statutory limit on the amount of that award. *See* Article 101, §36(3)(a) and (f), (4)(a), and (8)(b). Hence, in those cases, any request for additional compensation after the original award has been fully paid can be granted only pursuant to the Board's statutory authority to "reinvestigate or reopen" claims. Article 26A, §4(d). Because that power may be exercised "as the Board deems necessary," we believe that the Board is authorized to grant a supplemental award whenever it finds such an award to be necessary—even if that is before the date on which the original award is fully paid or would have been fully paid in periodic payments.

Because a reopening of a case is authorized only when necessary, a supplemental award may be granted only when the claimant produces persuasive evidence to show that he or she genuinely needs benefits in addition to those originally granted. Thus, such an award ordinarily may be granted only where the claimant's circumstances have worsened significantly since the original award was granted or where the claimant produces evidence not previously available to show that he or she will incur losses as a result of the injury that were not apparent at the time of the original award.

In addition, we believe that the potential impact of a lumpsum payment on the Board's resources is a factor that should be considered in determining whether to grant a request for such a payment. Under Article 26A, §12(a)(2), the Board is prohibited from making any award "unless funds are appropriated and available

for the full amount of the award." If, because of a lump-sum payment, one claimant receives substantially more compensation than originally anticipated, the Board might subsequently be unable to grant an award to another, equally seriously harmed claimant because of a lack of sufficient available funds. *See* 68 *Opinions of the Attorney General* 222, 225-26 (1983). Accordingly, the Board should take care in considering a request for a lump-sum payment to assure itself that the requested payment is necessary and appropriate in light of the claimant's circumstances and that the benefit to the claimant will not be significantly outweighed by the burden of the payment on the Board's financial resources. *Cf. Petillo v. Stein*, 184 Md. at 653 (Workers' Compensation Commission should be careful to see that no damage is done to employer or insurer's fundamental rights by granting request for lump-sum conversions).

III

Set-Off of Benefits From Other Sources

Article 26A, §12(d) requires the Board to set off payments that a claimant may receive from other sources against the amount of an award to which the claimant would otherwise be entitled:

"Any award made pursuant to this article shall be reduced by the amount of any payments received or to be received as a result of the injury (1) from or on behalf of the person who committed the crime, (2) from any other public or private sources, including an award of the Workmen's Compensation Commission under Article 101, (3) as an emergency award pursuant to §11 of this article."

The legislative intent underlying this provision is to make the State's program of criminal injuries compensation the "payor of last resort" for victims of crime. You have asked whether, to effectuate that intent, the Board may or must investigate the availability to each claimant of alternative sources of compensation and require claimants to seek payment from those sources as a prerequisite to the grant of an award. You further ask whether this provision requires the Board to set off against its award the amount of payments that the claimant may be entitled to receive from all other available sources.

A. *Required Investigation*

Article 26A, §8(b) provides that, when a claim is filed, the Board member to whom the claim is assigned “shall thereupon cause an investigation to be conducted into the validity of the claim.” See also Article 26A, §8(c) and (d) and §9(b). Thus, the Board is explicitly required to perform its own investigation of the particulars of every claim filed with it. *Criminal Injuries Compensation Board v. Remson*, 282 Md. 168, 178 (1978).

Clearly, the elements that the Board must investigate include those that pertain to a claimant's basic eligibility—for example, whether a crime was committed and whether the claimant is a person described in one of the provisions of §5 that designate eligible persons. However, we think that the required investigation into the “validity” of a claim is not limited to the claimant's basic eligibility. Under the Act, a claimant who meets the basic eligibility standards nonetheless may not be entitled to an award or may not be entitled to the full amount of compensation claimed. For example, if the Board determines that the crime victim's own conduct contributed to the infliction of his or her injury, §12(e) requires the Board to reduce any award or to reject the claim altogether in accordance with that determination.²⁰ Similarly, if the Board finds that the claimant did not report the crime to police or unjustifiably delayed more than 48 hours in reporting the crime, the Board is prohibited from making an award. Article 26A, §12(a)(1).

We think that these factors clearly affect the validity of the claim to compensation, in the sense that they affect the claimant's entitlement to compensation. The availability to the claimant of other sources of compensation for his or her losses affects the validity of the claim to compensation from the Board for those losses in the same sense. Hence, the Board's investigation of each claim before it must include its ascertaining whether other sources of compensation are available to the claimant, just as the

²⁰ That provision does not apply, however, where the nature of the victim's “responsibility” is his or her efforts to prevent a crime or to apprehend a person who had committed a crime in the victim's presence or had committed a felony. Article 26A, §12(e).

Board's investigation must include its ascertaining whether other factors may require it to reduce or deny an award.²¹

B. *Referral of Claimants to Other Compensation Sources*

To enable the Board to ascertain whether a claimant is in fact entitled to other benefits and to ascertain the amount of those benefits, the Board may require that a claimant make application for compensation from other sources available to him or her as a prerequisite to the grant of criminal injuries compensation. For example, when it appears from the circumstances of the alleged crime that the claimant is entitled to workers' compensation, the Board's practice is to refer the claimant to the Workers' Compensation Commission and defer further action on the claim pending that Commission's determination.²² Likewise, claimants who are covered by insurance that will pay for their medical care or compensate them for their injuries are required to apply for those benefits, and the Board defers action on those claims pending determination of the insurance applications. This practice, in our view, is entirely correct and should be continued.

Ordinarily, however, the Board does not require a claimant to institute legal action against persons who may be liable to him or her in tort as a prerequisite to an award. A crime victim or the victim's survivors undeniably have a cause of action against the assailant who caused the victim's injury or death and may have a cause of action against a third party. However, the likelihood of recovery through such an action is far more speculative than the likelihood of recovery from workers' compensation, medical assistance programs, or insurance.

Assailants, if their identities are known, generally lack resources from which to pay a judgment. Indeed, the extremely low

²¹ The Board's present practice is to require the claimant, as a part of the application for an award, to provide information concerning his or her entitlement to compensation from alternative sources like insurance, workers' compensation, and medical assistance programs. This requirement is entirely appropriate. However, it does not preclude the Board from inquiring further into the particulars of a claimant's situation when that appears to be necessary, nor relieve the Board of its statutory duty to investigate the validity of each claim filed. See n. 6 above.

²² The determination of the Workmen's Compensation Commission as to an individual's entitlement to compensation under Article 101 is binding on the Board. *Criminal Injuries Compensation Board v. Gould*, 273 Md. 486, 519 (1975).

probability of a crime victim's recovery against the criminal in tort was an important impetus behind the original enactment of crime victims' compensation programs. Note, *Crime Victim Compensation: The New York Solution*, 35 Alb. L. Rev. 717, 719-20 (1971). Proving that a third party was in some way responsible for the assault may be extremely difficult. And, in any case, obtaining recovery through law suits is a time-consuming process. Thus, a requirement that claimants pursue their tort claims in court as a prerequisite to awards would in most cases substantially contravene the goal of criminal injuries compensation to provide expeditious assistance to crime victims and their families who are in serious need of assistance. Accordingly, we think that the Board may properly act on a claim without requiring the claimant to institute and await the outcome of a suit against the assailant or a potentially liable third party.²³

C. *Reduction of Award*

Under Article 26A, §12(d), the Board is required to set off against its award not only the amount of payments that the claimant has received at the time of making the award, but also the amount of payments "to be received." That provision clearly requires the Board to take account of future compensation due the claimant, as well as compensation already received.

At the same time, we do not think that the Board is required to reduce an award on account of possible future payments from another source that are essentially speculative, like the possibility of recovery in tort. In our view, the phrase "to be received" denotes payments as to which there is at least some measure of definiteness, in that the claimant's entitlement to and future receipt of the payments is substantially certain. Put another way, we do not think that the Board is required to reduce its award on the basis of mere possibility.²⁴

²³ Of course, if the Board makes an award without regard to possible tort recovery and the claimant subsequently does recover a judgment, the claimant must reimburse the Board for its award. Article 26A, §15.

²⁴ We do not mean to suggest, however, that the Board may always disregard tort recoveries. Where a claimant has obtained a judgment or settlement and the defendant has resources against which the judgment or settlement can be enforced, payment is substantially certain. Under those circumstances, therefore, any award that the Board might make must be reduced by the amount of the judgment or settlement.

A more difficult situation arises from the interplay between criminal injuries compensation and federal Supplemental Security Income ("SSI") benefits, in light of the State's receipt of grant money under the federal Victims of Crime Act (the "VOCA"), pursuant to 42 U.S.C. §10602. SSI benefits are provided for aged, blind, or disabled persons whose income and resources are limited. 42 U.S.C. §1382(a); 20 C.F.R. §416.110. Hence, when a person of limited means is disabled by criminally inflicted injuries, that person may well be eligible for both SSI benefits and State criminal injuries compensation.

In calculating an individual's income to determine SSI eligibility, the Social Security Administration is required to exclude from consideration "assistance, furnished to or on behalf of such individual. . . , which is based on need and furnished by any State or political subdivision of a State" 42 U.S.C. §1382a(b)(6). Conversely, assistance based on need that is not "wholly funded by a State or one of its political subdivisions" is ordinarily considered part of the individual's income. *See* 20 C.F.R. §416-1124(c)(2).

Assistance to crime victims under Article 26A is, of course, quite explicitly based on need. Article 26A, §§1 and 12(f)(1). Before the enactment of the VOCA, criminal injuries compensation was funded wholly by the State. Therefore, it was excluded from consideration in the Social Security Administration's calculation of the recipient's income for the purpose of determining his or her entitlement to SSI benefits. Under those circumstances, the Board calculated the amount of an award to which it found the claimant entitled under Article 26A, subtracted the amount of SSI benefits that the claimant had been found entitled to, and made an award of the difference, if any. The claimant received at least the total amount of benefits to which the Board had found him or her entitled, but received part or all of that amount in SSI benefits.

Because the State's criminal injuries compensation program is now funded partially by the federal government, however, benefits received under Article 26A are now counted as income in determining SSI eligibility. Hence, it appears that the Board's grant of even a partial award may lead to a reduction of the recipient's SSI benefits. If, following such a reduction, the Board increases its award to restore the claimant's total compensation to the amount to which he or she is entitled under Article 26A, SSI benefits may be further reduced. Ultimately, the Board may find itself paying the full amount of criminal injuries compensation to

a crime victim to whom, under prior law, it would have paid only partial compensation.²⁵

Article 26A, §12(d) clearly prohibits the Board from granting compensation that duplicates benefits from any other source. The broad language of §12(d)(2), requiring the Board to offset payments "from any other public or private source," reflects the Act's purpose of providing compensation for economic losses to innocent crime victims who would not be compensated otherwise. *See Criminal Injuries Compensation Board v. Gould*, 273 Md. at 495-96 (Article 26A was enacted to permit unreimbursed crime victims to be compensated). Therefore, the Board may not simply disregard a claimant's entitlement to SSI benefits in calculating its own award.

Nor may the Board treat benefits due but not yet paid under SSI as payments not definitely "to be paid" for the purpose of Article 26A, §12(d), on the ground that the SSI benefits may be withdrawn. SSI benefits may be withdrawn only after the Social Security Administration makes a determination that the recipient is not eligible for the benefits and provides the recipient with notice of that determination and of the recipient's right to seek review of the determination. 20 C.F.R. §416.1404. Accordingly, the Board must reduce its award by the amount of any SSI benefits that the claimant is entitled to receive. If the claimant's SSI benefits are subsequently reduced, the Board may exercise its authority under Article 26A, §4(d) and reopen the case for the purpose of increasing the award as necessary.

²⁵ Disability and survivors' benefits paid under ordinary social security are not based on need, but on the disabled person's or decedent's status as an "insured individual"—that is, one who meets or met certain standards of employment experience. 42 U.S.C. §414. *See also* 42 U.S.C. §412(d), (e), and (f) and §423. Those benefits are not reduced if the disabled person or survivor also receives benefits from another source, although social security benefits may be reduced or ended on account of the disabled person's earnings or the cessation of a survivor's dependency. *See* 42 U.S.C. §402(d)(1), (e)(1), and (f)(1) and §423(e). Consequently, a crime victim's or survivor's receipt of ordinary social security benefits does not create this sort of problem: If those benefits are less than the amount to which the person is found to be entitled under Article 26A, the Board's grant of the difference will not affect his or her social security benefits. Of course, the Board must reduce its award by the amount of those social security benefits, just as it must reduce its award by the amount of benefits from private insurance. Article 26A, §12(d)(2).

IV

Conclusion

1. The Criminal Injuries Compensation Board may grant awards for disfigurement, even where it finds no other compensable loss. However, the Board may do so only if it finds that the disfigurement will cause the claimant to incur serious financial hardship from loss of income or from out-of-pocket expenses or that the serious financial hardship requirement is inapplicable under Article 26A, §12(f)(2).

2. The Board may order payment of a permanent disability or loss of support award wholly or partially in a lump sum if the evidence before it, as set forth in its decision, shows that the requested lump-sum payment is necessary to provide for the living or business needs of the claimant. The Board may subsequently grant the claimant additional monthly benefits before the date on which the original award would have been paid, if the claimant's circumstances make the additional benefits necessary.

3. The Board is required to reduce each of its final awards by the amount that the claimant has received or definitely will receive from any other source of compensation. Therefore, the Board is required to ascertain in each case whether there are any such alternative sources of compensation, and the Board may and generally should require the claimant to seek compensation from those alternative sources as a prerequisite to its grant of a final award.

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Chief Counsel

Opinions and Advice

Editor's Note: In Chapter 250 (House Bill 823) of the Laws of Maryland 1988, the General Assembly made significant changes in the composition and procedures of the Criminal Injuries Compensation Board. In particular, the Board now "recommend[s] a tentative decision" only; the Secretary makes the final agency decision. Article 26A, § 8(d) and (f).

EDUCATION

SCHOOL CONSTRUCTION—ELIGIBILITY FOR STATE PAYMENT OF
DEBT SERVICE COSTS—ABATEMENT OF DEBTS TO STATE.

May 21, 1987

*Dr. David W. Hornbeck, Superintendent
Maryland State Department of Education*

You have requested our opinion on several issues raised by the Legislative Auditor concerning the State's payment of debt service costs incurred by the local subdivisions as a result of public school construction projects. Specifically, your questions are:

1. Does the Department of Education have a legally sufficient basis to conclude that certain projects in Frederick, Somerset and Washington Counties are eligible for State funds?

2. What is the proper construction of the phrase "contracts let before June 30, 1967," which delimits the State's payment obligations under §5-301(d) of the Education Article ("ED" Article)?

3. Are community college projects eligible for State payment of debt service costs under ED §5-301(c) or (d)?

4. By what procedure may a local subdivision's obligation to reimburse the State for payment of ineligible costs be abated?

For the reasons stated below, we conclude as follows:

1. If the Department of Education, upon its review of available documentation and other pertinent factors, is satisfied that costs are eligible for State payment under ED §5-301(c) or (d), no further action is legally required.

2. A cost is not eligible for State payment under ED §5-301(d) unless the cost results from a contract that was awarded by a local board of education prior to June 30, 1967.

3. Debt service costs resulting from community college construction and improvements are not eligible for State payment under ED §5-301(c) or (d).

4. The Central Collection Unit of the Department of Budget and Fiscal Planning ("CCU") has authority to abate a local subdivision's repayment obligation. CCU may abate a debt if doing so

is in the best interest of the State. In our view, the equities of the situation suggest that the debts discussed in this opinion should be abated—if not by CCU, then by the General Assembly.¹

I

Background

Subtitle 3, Title 5 of the Education Article sets out a program of State aid for the counties' school construction projects.² One component of this program involves State payment of the counties' debt service. Under ED §5-301(c)(2):

“Except for general public school construction loan debt outstanding or obligated as of June 30, 1967 for which repayment by a county is no longer required, the State shall reimburse each county for the full costs of principal and interest payments on any local debt for school construction outstanding or obligated as of June 30, 1967.”

ED §5-301(d) further requires the State to pay the counties' debt service cost for school construction indebtedness even if it was incurred on or after June 30, 1967, provided that the debt resulted from “contracts let” prior to that date:

“The State shall pay all of the annual costs of debt service on school construction debt incurred by each county that was outstanding or obligated on or after June 30, 1967 for contracts let before June 30, 1967.”

In 64 *Opinions of the Attorney General* 118, 119-20 (1979), this office summarized the history of this program:

“State responsibility for these costs originated in 1967 when, as part of its school construction aid program, the

¹ These conclusions accord with those in a prior letter of advice on these matters. Letter from Assistant Attorneys General Ellen M. Heller and Susan J. Mathias to State Superintendent of Schools David W. Hornbeck (October 23, 1986).

² In this opinion, as in the Education Article, “county” includes Baltimore City. ED §1-101(c).

State assumed a share of the costs of local debt for school construction on school construction bonds outstanding or obligated as of June 30, 1967. Former Article 77, §222 of the Maryland Code, as enacted by Chapter 142, Laws of Maryland 1967, at 166-70. (In 1968, Article 77, §222 was amended to provide that the State assume a share in local debt incurred after June 30, 1967, for construction contracts let before July 1, 1967 (Chapter 125, Laws of Maryland 1968). . . .

. . .

Beginning July 1, 1973, the State began to pick up progressively larger shares of debt service on school construction debt incurred by local jurisdictions outstanding or obligated on or after June 30, 1967, for contracts let before June 30, 1967, until, as of July 1, 1976, the State assumed the full amount of this debt service. Former Article 77, §130A(i), as enacted by Chapters 245 and 757, Laws of Maryland 1973. Thus, by July 1, 1976, the State was paying the full amount of the payment obligations of the localities as to both the principal of and interest on all local debt if the indebtedness was outstanding or obligated on or before, or the contracts were let before, June 30, 1967."

As we understand the actual administration of ED §5-301(c) and (d), each county pays its own debt service and then requests reimbursement by the State Department of Education. For many years, the Department apparently routinely reimbursed the counties for the amounts that they certified as eligible for State payment, without detailed inquiry into the eligibility of component costs. However, in recent audits of the Department, the Legislative Auditor recommended that the Department tighten up the administration of this payment procedure. Specifically, the Legislative Auditor believed that the Department did not have on file sufficient documentation to support the payments made to the counties. The Auditor recommended that the Department obtain the actual bond indentures and base its payment schedules on the maturity dates reflected in the indentures.

As documentation was received, the Department conducted a review of project eligibility. With advice from this office, the Department concluded that certain debt service costs, for which the State had repaid several counties over the years, were not eligible under ED §5-301. Some costs were ineligible, the Department

concluded, because they were incurred as a result of contracts let on or after June 30, 1967; others were ineligible because they were incurred as a result of community college construction, rather than public school construction. As a consequence, the Department decided to make no future payments of debt service for these ineligible costs. The Department also requested our advice about the recovery of past payments.

According to the latest information from the Department, the State has paid five counties more than \$5.7 million for ineligible costs.³ The Department also intends to withhold from these counties future payments exceeding \$1.4 million.

II

Required Documentation

As discussed in Part I above, the Legislative Auditor recommended that the Department obtain bond indentures to support its payments under this program. However, three counties—Frederick, Somerset, and Washington Counties—were unable to locate the indentures. Nevertheless, based on its review of audit reports and its evaluation of all of the circumstances, the Department was able to conclude that (with one exception) the State could properly continue to pay these counties' debt service costs.⁴

In our view, the question of what documentation suffices to demonstrate cost eligibility is more a practical question of program administration than a legal issue. The statute is silent about the documentation of project eligibility; the Board of Public Works, which has "plenary and supreme" power over the program, has issued no rule on the subject. *See 64 Opinions of the*

³ The total overpayments are as follows: Prince George's County, \$3,028,118; Montgomery County, \$1,719,561; Harford County, \$791,917; Frederick County, \$169,203; and Baltimore City, \$31,912. A more detailed breakdown is set out in the appendix.

⁴ The costs attributable to one project in Frederick County, relating to community college construction, were determined to be ineligible. In the case of Somerset County, the bonds in question, issued in 1956 and 1959, have been completely paid off. The Department has already made all payments due to Somerset County.

Attorney General at 121.⁵ In these circumstances, the Department—the agency responsible for the actual administration of the debt service reimbursement program—must make the factual judgment about eligibility documentation. The Legislative Auditor might well be correct that bond indentures are the best supporting documentation, but we cannot conclude that the availability of a bond indenture is a legal prerequisite to State payment. If the Department is satisfied that the three counties in question have sufficiently documented the eligibility of the costs, no further legal action is required.⁶

III

“Contracts Let”

ED §5-301(d) requires State payment of county debt service costs “incurred by each county that was outstanding or obligated on or after June 30, 1967,” but only “for contracts let before June 30, 1967.” The Department has long taken the position that, “A contract is ‘let’ when the bids for construction have been officially accepted by the proper authority within the local school system, that is the Boards of Education in the twentythree counties and the Board of Estimates in Baltimore City.” Memorandum from

⁵ Under ED §5-301(e)(1), the Board of Public Works has rulemaking authority “for the administration of the programs provided by subsections (b) and (d) of this section.” As the prior opinion observed:

“The Board of Public Works, through its agent the Interagency Committee for State Public School Construction. . . , is empowered to adopt rules, regulations, and procedures for the administration of the public school construction and debt service reimbursement programs and for management of all State monies disbursed to or for the benefit of local school boards under the program. . . . [I]n the administration of the public school construction program, the power of the Board of Public Works is plenary and supreme. . . . [T]he Board may condition the acceptance of funds under the program in any manner that it considers necessary to assure the proper operation of the program and the prudent expenditure of State funds.” 64 *Opinions of the Attorney General* at 121.

⁶ The Department is free to reconsider its decision in light of the Legislative Auditor’s position. However, given the Department’s current position, we have grave doubts that an action to recover the payments made to these counties would be legally feasible.

State Superintendent of Schools James A. Sensenbaugh to Superintendents of Schools (July 23, 1970).

In our opinion, this longstanding construction is entirely consistent with the accepted meaning of the term "let." To "let" a contract is to "choos[e] one from among the number of bidders It is the act of awarding the contract to the proposer, after the proposals have been received and considered." *Black's Law Dictionary* 1048 (5th ed. 1979). The mere submission of a bid in response to an agency's invitation does not create a contract. *See Rofra, Inc. v. Board of Education*, 28 Md. App. 538 (1975).

For purposes of determining eligibility under ED §5-301(d), each contract must be considered individually. That is, the fact that one contract for work on a construction project was awarded before June 30, 1967—for example, for architectural services—does not mean that other contracts for work on that same project, awarded on or after that date, are automatically eligible too. Contracts awarded on June 30, 1967 or later simply do not come within the unambiguous statutory language.⁷

Accordingly, the Department correctly determined that future debt payments attributable to contracts let on or after June 30, 1967, should cease. Moreover, past State repayments for such contracts are a debt to the State. *See* Part V below.

IV

Community College Projects

ED §5-301(c) requires State reimbursement of debt costs "for school construction"; ED §5-301(d) similarly provides for State payment of debt service "on school construction debt." The Department has concluded that community college construction projects are not "school construction," within the meaning of these provisions, and therefore that the debt service costs arising from community college construction projects are ineligible for State payment.

⁷ If local board minutes or other documentation does not reflect the date of the award, the Department may use the date that the contract was executed as the "contract let" date.

In our opinion, the Department is correct. Although the term "school construction" is not separately defined, the term appears to be synonymous with "public school construction," which is used in both the introductory phrase in ED §5-301(c)(2) and elsewhere throughout the section. *See* ED §5-301(a)(1), (b), (h), (i) and (j). "Public schools" means the schools in the public elementary and secondary education system of the State." ED §1-101(k). In turn, "elementary and secondary education" means education and programs of education from and including preschool through the end of high school and of their equivalent." ED §1-101(g). Thus, the straightforward application of these definitions would exclude community college construction.

However, the text is not altogether dispositive, because the program of State payment of county debt for school construction, now codified in ED §5-301(c) and (d), was originally enacted at a time when the term "public schools" was not specifically defined.⁸ Moreover, at that time, the first public two year colleges in the State were housed in high school facilities and were under the jurisdiction of local boards of education. *See* Maryland State Department of Education, "The Development of Public Community Colleges in Maryland" (August 1, 1968). The division of educational facilities into a two-part system, one of higher education and one of elementary and secondary education, did not occur until 1976. *See* Chapters 538 and 539, Laws of Maryland 1976.

While this history introduces some ambiguity into an otherwise straightforward statutory text, other legislative history helps resolve the ambiguity. Since 1961, the General Assembly has provided a separate program of State aid to counties for construction of community colleges. *See* Chapter 373, Laws of Maryland 1961 (General Public Junior or Community College Construction Loan Act of 1961). *See also* Chapter 22, Laws of Maryland 1962; Chapter 27, Laws of Maryland 1964; Chapter 636, Laws of Maryland 1965; Chapter 656, Laws of Maryland 1967; and Chapter 588, Laws of Maryland 1968.⁹ In our view, the

⁸ The State reimbursement program was initiated by Chapter 142, Laws of Maryland 1967 and Chapter 125, Laws of Maryland 1968. *See* Part I above. The term "public schools" was first defined in Chapter 405, Laws of Maryland 1969.

⁹ This State assistance program is now administered by the State Board for Community Colleges in accordance with procedures adopted by the Board of Public Works. ED §16-104(f)(2).

existence of this totally separate program of State financial assistance for community college construction strongly implies that, when the General Assembly contemporaneously initiated a program of State aid for "school construction," it did not intend to overlap the community college program. Rather, we think, the General Assembly intended the 1967 and 1968 enactments of State assumption of debt for "school construction" to benefit elementary and secondary schools—precisely as its subsequent codification in the Education Article indicates. If the General Assembly had intended to include community college construction projects under the program now codified at ED §5-301(c) and (d), it would have so indicated through the use of the terms "community college" or "junior college," as it had done in the aid program for community college construction projects.

Accordingly, we conclude that the Department has properly determined to cease further payments of debt service costs attributable to community college projects. Further, amounts already paid to the counties for these projects are debts owed to the State. *See* Part V below.

V

Abatement of Debts

Having determined that the State reimbursed several counties for ineligible project costs, the Department has made written demand for repayment of these debts to the State. The counties have declined to repay. Hence, the Department has referred the unpaid debts to the Central Collection Unit.¹⁰ With exceptions not pertinent here, "the Central Collection Unit 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." §3-302(a)(1) of the State Finance and Procurement Article ("SF" Article).

In demanding repayment of these debts and then referring the matter to CCU, the Department was properly carrying out its legal obligations. *See* COMAR 17.01.01.04.B. However, you have concluded that, although the projects were ineligible under the

¹⁰ At this writing, the Department has not yet referred the relatively small debt owed by Baltimore City.

statute, nevertheless the funds in question were expended by the counties in good faith for education purposes. Accordingly, you believe that the debts ought to be abated, and you inquire as to the agency authorized to do so.

In addition to its general responsibility for debts owed to the State, as set out in SF §3-302(a)(1), CCU has the following specific grant of power:

“In carrying out its responsibilities, the Central Collection Unit may:

(1) Institute, in its name, any action that is available under State law for collection of a debt or claim; or

(2) Without suit, settle the debt or claim.” SF §3-304(a).

“Settl[ing] the debt” undoubtedly includes abating it. See COMAR 17.01.01.05A and .06C.

In 62 *Opinions of the Attorney General* 743 (1977), this office was asked whether the Board of Public Works had the authority to abate certain overpayments of State aid to community colleges. The opinion concluded that the Board did have this power, flowing from the Board’s statutory authority to dispose of State property.¹¹ Because a debt is a species of property (a chose in action), the settling of a debt would be a disposition of property within the Board’s authority. 62 *Opinions of the Attorney General* at 745. In reaching this conclusion, the opinion relied on an earlier opinion, 45 *Opinions of the Attorney General* 107 (1960), and did not mention CCU’s express statutory authority to settle debts.¹² This latter opinion was written before the creation of

¹¹ This authority is now codified in SF §10-305(a):

“Any real or personal property of the State or a unit of the State government may be sold, leased, transferred, exchanged, granted or otherwise disposed of:

(1) To any person, of the United States or any of its units, or to any unit of the State government, for a consideration that the Board decides is adequate; or

(2) To any county or municipal corporation in the State subject to any condition the Board imposes.”

¹² At the time of the 1977 opinion, CCU’s power to settle a debt was set out in former Article 41, §71(c-1)(1).

CCU, which was established by Chapter 355, Laws of Maryland 1973.

In our view, the specific grant of authority to CCU "to settle any debt or claim" should be given effect in these circumstances, rather than the much more general grant of authority to the Board of Public Works to dispose of property:

"It is an often repeated principle that a specific statutory provision governs over a general one. Thus where one statutory provision specifically addresses a matter, and another more general statutory provision also may arguably cover the same matter, the specific statutory provision is held to be applicable and the general provision is deemed inapplicable." *Lumberman's Mut. Cas. Ins. Co. v. Insurance Comm'r*, 302 Md. 248, 268 (1985) (citations omitted).

We conclude that CCU, to which the debts of the counties for State payment of ineligible project costs have been referred, has the authority to abate those debts.

The Attorney General's Office ordinarily refrains from comment on policy questions. Nevertheless, in this instance, we think that we should state our views on the abatement question, given that we would be responsible for conducting the litigation to recover these debts.¹³ We believe that, in fairness to the counties and their educational needs, the debts should be forgiven. Although the particular costs in question were ineligible for State payment, they are generally of the type that receive State aid, and there is no suggestion of any diversion of funds to projects not related to education. Moreover, although the equitable principle of estoppel may be inapplicable to the State, there is surely some unfairness when the State, after so many years of silent acquiescence, now demands from the counties funds already spent for education.

We recognize that CCU, though it has the authority to abate, will likely defer to legislative resolution of the question. Given the

¹³ The probability of success should the matter be litigated is hard to estimate, in light of the difficulties presented when the State, after making payments to the counties for many years without question, suddenly demands new proof of project eligibility. For instance, it may be that a county now cannot locate any copy of a contract entered 20 years ago that, if found, would establish eligibility.

sums involved and the important policy considerations, this is far from the typical debt referred to CCU for collection or abatement.

To ensure that the General Assembly has time to consider the question, this office will not proceed with collection actions until the debtor counties have had an opportunity to present the matter to the next regular session of the General Assembly. However, if the General Assembly does not then relieve the counties of these debts through legislation, we will have no choice but to commence collection actions on behalf of CCU.

VI

Conclusion

In summary, it is our opinion that:

1. If the Department of Education, upon its review of available documentation and other pertinent factors, is satisfied that costs are eligible for State payment under ED §5-301(c) or (d), no further action is legally required.

2. A cost is not eligible for State payment under ED §5-301(d) unless the cost results from a contract that was awarded by a local board of education prior to June 30, 1967.

3. Debt service costs resulting from community college construction and improvements are not eligible for State payment under ED §5-301(c) or (d).

4. The Central Collection Unit has authority to abate a county's repayment obligation. CCU may abate a debt if doing so is in the best interest of the State. In our view, the equities of the situation suggest that the debts discussed in this opinion should be abated—if not by CCU, then by the General Assembly.

J. JOSEPH CURRAN, JR., *Attorney General*

JACK SCHWARTZ
Chief Counsel
Opinions and Advice

Appendix

County	Past Overpayments			Future Payments		
	Community College	Ineligible Contracts	Total	Community College	Ineligible Contracts	Total
Pr. Georges	\$1,087,609	\$1,940,509	\$3,028,118	\$154,148	\$806,558	\$960,706
Montgomery	1,719,561	—0—	1,719,561	140,156	—0—	140,156
Harford	791,917	—0—	791,917	218,202	—0—	218,202
Frederick	169,203	—0—	169,203	55,290	—0—	55,290
Balto. City	1,729	30,183	31,912	2,839	61,710	64,549
TOTALS	\$3,770,019	\$1,970,692	\$5,740,711	\$570,635	\$868,268	\$1,438,903

FAMILY LAW

DOMESTIC VIOLENCE ACT—SCOPE OF RELIEF—15-DAY LIMIT
APPLIES ONLY TO RELIEF UNDER FL §4-506(e)(1).

February 18, 1987

The Honorable Pauline H. Menes
Maryland House of Delegates

You have requested our opinion on whether all domestic violence protective relief granted under §4-506(e) of the Family Law Article ("FL" Article) is limited to an effective period of not more than 15 days.

For the reasons discussed below, we conclude that the statute places durational limits only on protective relief that (i) requires the alleged abuser to vacate the family home and (ii) grants temporary possession of the home to another individual. The statute imposes no durational limit on other types of relief. Specifically, relief under FL §4-506(e)(1) is limited to a maximum of 15 days and relief under FL §4-506(e)(2) is limited to a maximum of 25 days. Relief under FL §4-506(e)(3), (4), and (5) is not limited to any particular duration.

I

Background

FL §4-506 is a part of the Protection from Domestic Violence Act, enacted in 1980. Chapter 887, Laws of Maryland 1980. The Act provides a mechanism by which a person who has been abused by another member of a household may petition the court for protection from continued abuse. The court may grant a protective order that orders "the alleged abuser to refrain from abusing household members." In addition, the order may require the alleged abuser to vacate the family home and grant temporary possession of the home to another, FL §4-506(e)(1) and (2); award temporary custody of minor household members, FL §4-506(e)(3); require counseling, FL §4-506(e)(4); or provide other necessary relief, FL §4-506(e)(5).

Your specific question seeks clarification of the scope of FL §4-506(e)(1), which provides that, "except in a case of alleged child abuse, [the court may] order the alleged abuser to vacate the family home immediately and grant temporary possession of the family home to the petitioner for not more than 15 days." In a prior unpublished opinion, this office concluded that the 15-day limit in the predecessor of FL §4-506(e)(1) applied only to the specific type of relief authorized by that paragraph. Opinion No. 81-005 (February 10, 1981). However, you have advised us that, since the issuance of that opinion, the 15-day limit often has been interpreted as applying to all relief in any order issued under FL §4-506(e). One result of this interpretation is that protective orders requiring counseling, for example, are not issued because 15 days is too short a period of time for counseling to be arranged or to be of use to the participants.

In light of this continuing problem, you asked us to address once again the applicability of the 15-day durational limit.

II

The Original Act and Opinion No. 81-005

As enacted in 1980 and codified in the Courts Article ("CJ" Article), the Act contained the following provision regarding protective orders:

"If the court determines by clear and convincing evidence that the alleged abuse has occurred, the court may grant a protective order to stop the abuse of the household member. The relief may include the following:

(1) An order to refrain from abusing household members;

(2) The original order may require the respondent to vacate the family home and grant temporary possession of the family home to the petitioner for up to 5 days. In no event may the order and any extensions exceed a total period of 15 days;

(3) An award of temporary custody of a minor; and

(4) An order directing any or all of the household

members to participate in a professionally supervised counseling program." Former CJ §4-503(b).

In Opinion No. 81-005, this office was asked whether the 15-day limit in former CJ §4-503(b)(2) applied only to an order to vacate the family home or applied across-the-board to any relief under the subsection. The opinion observed that "some courts have read the language in item (2)—'In no event may the order and any extension exceed a total period of 15-days'—to require that the orders described in items (1), (3), and (4) also be limited to 15 days." The opinion continued:

"In our opinion, such an interpretation of the application of the 15-day limit is simply incorrect. The clear and unambiguous language of the statute leads inexorably to the conclusion that the 15-day limit applies only to an order requiring an abuser to vacate the family home. Section 4-503(b) enumerates four different types of . . . relief that a court might grant, listing them in four, separately numbered items. The 15-day limit, however, is included only as a part of one of these items: item (2).

We can find no basis for interpreting that limitation so as to apply to the other items as well. Indeed, we believe that, if the General Assembly had intended the 15-day limit to apply to all four types of relief, it would have included the operative language, which now appears within item (2), either as part of the introductory language of §4-503(b) or as a separate paragraph following the complete recitation of all of the various types of relief.

. . . .

In summary, it is our opinion that the 15-day limit set forth in item (2) of §4-503(b) applies only to those orders described in that item—to orders requiring an abuser 'to vacate the family home and grant temporary possession of the family home to the petitioner'. The 15-day limit does not apply to any of the orders described in items (1), (3), and (4) of that section. This does not mean, of course, that, in exercising its discretion, a court is precluded from limiting the duration of these other orders to 15 days; it does mean, however, that a court is not at all required by the Act to so limit the duration of these other orders." Opinion No. 81-005, at 2-3.

III

Recodification and Current Language

In 1984, the Act was recodified as part of the new Family Law Article. Chapter 296, Laws of Maryland 1984. Former CJ §4-503(b) was redesignated, "without substantive change," as FL §4-506(e).¹ Revisor's Note to FL §4-506.

In 1985, FL §4-506(e) was amended to establish additional procedures for protecting the victim of child abuse by a household member. Chapter 493, Laws of Maryland 1985. FL §4-506(e) now reads as follows:

"The protective order shall order the alleged abuser to refrain from abusing household members and may:

(1) except in a case of alleged child abuse, order the alleged abuser to vacate the family home immediately and grant temporary possession of the family home to the petitioner for not more than 15 days;

(2) in a case of alleged child abuse, order the alleged abuser to vacate the family home immediately and grant temporary possession of the family home to an adult household member for not more than 25 days;

(3) award temporary custody of a minor household member;

¹ Former CJ §4-503(b) was amended twice prior to its recodification in the Family Law Article. Chapter 584, Laws of Maryland 1981, amended paragraph (2) to read:

"An order to require the respondent to vacate the family home immediately and grant temporary possession of the family home to the petitioner for up to 5 days. Any extensions to the order to vacate the family home and grant temporary possession of it to the petitioner, granted for good cause shown, may not exceed a total period of 15 days."

Chapter 905, Laws of Maryland 1982, further amended the first sentence of paragraph (2) to read:

"An order to require the respondent to vacate the family home immediately and grant temporary possession of the family home to the petitioner on service of the ex parte order for up to 5 days."

However, neither amendment altered the application of the 15-day limit, as interpreted in Opinion No. 81-005.

(4) direct any or all of the household members to participate in a professionally supervised counseling program; and

(5) order any other relief as necessary.”

The language of FL §4-506(e) is plain and unambiguous. The General Assembly provided that protective orders may include one or more of five types of relief. Only two of these are limited in duration: relief under FL §4-506(c)(1), requiring an alleged abuser (other than one alleged to have abused a child) to vacate the family home immediately and granting temporary possession of the home to the petitioner, which the General Assembly specifically restricted to “not more than 15 days”; and relief under FL §4-506(e)(2), requiring a person alleged to have abused a child to vacate the family home and granting temporary possession of the home to an adult, which the General Assembly specifically restricted to not “more than 25 days.” The General Assembly placed no restrictions on the duration of a grant of temporary custody of a minor under FL §4-506(e)(3), the requiring of counseling under FL §4-506(e)(4), or the provision of any “other relief as necessary” under FL §4-506(e)(5).

Given the presence of *differing* durational limits in paragraphs (1) and (2) and the absence of any limits whatsoever in paragraphs (3), (4), and (5), we conclude that the construction of the statute adopted in the 1981 opinion is even more certain now. The 15-day limit set forth in FL §4-506(e)(1) applies only to relief authorized by that paragraph. The 15-day limit does not apply to relief otherwise authorized by FL §4-506(e). *Cf.* Opinion No. 81-005, at 3.²

² As the Court of Appeals recently reiterated:

“In construing a statute, a court must ascertain and carry out the real legislative intent. The court looks first to the language of the statute, assuming that it is to be afforded its ordinary and generally understood meaning. If the statutory language contains no ambiguity or obscurity, the court generally looks no further.” In *Re Criminal Investigation No. 1-162*, 307 Md. 674, 687 (1986) (citations omitted).

IV

Conclusion

In summary, it is our opinion that:

1. Relief under FL §4-506(e)(1) is limited in duration to 15 days.
2. Relief under FL §4-506(e)(2) is limited in duration to 25 days.
3. Relief under FL §4-506(e)(3), (4), and (5) is subject only to such durational limits as the court, in its discretion, imposes.³

J. JOSEPH CURRAN, JR., *Attorney General*

SARAH R. KAPLAN, *Assistant Attorney General*

JACK SCHWARTZ

Chief Counsel

Opinions and Advice

Editor's Note: In Chapter 247 (House Bill 889) of the Laws of Maryland 1987, the General Assembly increased the durational limit of orders under FL §4-506(e)(1) and (2) to 30 days. The General Assembly did not add durational limits to relief under FL §4-506(e)(3),(4), or (5).

³ House Bill 889, currently pending in the General Assembly, would extend the durational limit for relief under FL §4-506(e)(1) to 45 days and for relief under FL §4-506(e)(2) to 55. Enactment of this bill would not affect our conclusion about the applicability of these limits.

FINANCIAL INSTITUTIONS

BANKS—MUTUAL SAVINGS BANKS—REAL ESTATE DEVELOPMENT
ACTIVITIES PERMISSIBLE THROUGH SERVICE CORPORATION.

August 26, 1987

The Honorable Margie H. Muller
Bank Commissioner

You have requested our opinion on whether a mutual savings bank may engage in certain real estate development activities.

For the reasons given below, we conclude that a mutual savings bank may engage in these real estate development activities through a bank service corporation. It may not do so as a partner in a limited partnership.

I

Background

Your question arises in regard to the application of a State-chartered, federally insured mutual savings bank, to merge into a *de novo* trust company. The shares of the new bank will be acquired by an out-of-State bank holding corporation in conjunction with the merger transaction.¹

In the course of reviewing the savings bank's application, you became aware that the savings bank is a limited partner in a partnership formed for the purpose of acquiring and developing 15 single family residential lots. The savings bank, in addition to being a limited partner, loaned the partnership funds for its activities. The savings bank has a non-voting interest in the partnership with no right to take part in the management, conduct, or control of the partnership's business and operations. The savings bank and the general partner each hold a 50 percent interest in the partnership.

¹ The Federal Reserve Board has approved the application.

II

Real Estate Ownership by Banks

State-chartered banks, including mutual savings banks, may “buy and hold real property only as provided in” §5-503 of the Financial Institutions Article (“FI” Article). In general, ownership is limited to property “that is necessary for the convenient transaction of [the bank’s] business” [FI §5-503(b)(1)] or that the bank has acquired “[i]n satisfaction of a debt contracted in the course of its business” or “[a]t sale on a judgment, decree, or mortgage foreclosure under a security that it holds” [FI §5-503(c)(1)]. The participation of CentraBank in the partnership is not permitted by FI §5-503.²

However, “[n]otwithstanding any other provision of Titles 1 through 5” of the FI Article, State-chartered banks are also empowered, with approval of the Bank Commissioner, to “engage in any additional banking activity or bank related service in which, under federal law, national banking associations may engage.” FI §5-504(a).³ The term “national banking association” is defined as “an institution that is incorporated under federal law as a bank.” FI §5-101(m).

Two types of associations are “incorporated under federal law as a bank,” national banks and federal savings banks. National banks are chartered pursuant to 12 U.S.C. §21. Federal savings banks are chartered pursuant to 12 U.S.C. §1464(a).⁴ Consequently, the term “national banking association” in FI §5-504(a) includes federal savings banks. *See also* Revisor’s Note to FI

² These limitations on the authority of a State-chartered bank to own real estate extend to legal entities that are wholly or partially owned by the bank. Otherwise, the statute would be defeated through mere manipulations of the form of ownership.

³ FI §5-504(b) requires the approval of the Bank Commissioner for an “additional activity or bank-related service.”

⁴ When federal banking law refers to an “association”, that term “means a Federal savings and loan association or a Federal savings bank chartered . . . under section 1464 of this title. . . .”

§5-504, *reprinted in* Financial Institutions Article at 141 (1980).⁵ It follows that a State-chartered commercial bank may engage in the same activity as a national bank, and a State-chartered savings bank may engage in the same activity as a federal savings bank.⁶

At the present time, national banks are not permitted to own or develop real estate that is neither necessary to the conduct of the bank's business transactions nor obtained for a debt previously contracted. 12 U.S.C. §29. Consequently, State-chartered commercial banks do not have the authority to participate in real estate development, apart from their own business premises and real estate acquired for a debt previously contracted.

However, certain real estate activity is a permissible activity for federal savings banks. The pertinent federal regulation provides that "[a] *service corporation* in which a Federal [savings bank] may invest is permitted to engage in" various activities. 12 C.F.R. §545.74(c) (emphasis added). The activities permitted for a service corporation include:

"(i) Maintaining and managing real estate . . .

. . .

(vi) Acquiring real estate for prompt development or subdivision, for construction of improvements, for resale or leasing to others . . .

. . .

(viii) Acquiring improved real estate or manufactured homes to be held for rental or resale, or for remodeling,

⁵ A prior opinion of this office provides further support for this conclusion. The opinion interprets the scope of the predecessor to FI §5-308, which concerns service charges imposed by a "banking institution." In examining the term "bank" in former Article 11, §83, Attorney General Hammond opined that a savings bank was a "bank" as the term was used in former Article 11, §83. "To ascribe a more restrictive meaning to the word 'bank', as used in Section 83, seems to us unduly to limit the obvious intent and meaning of the Legislature." 34 *Opinions of the Attorney General* 88, 91 (1949).

⁶ This opinion does not address the question of whether commercial banks may exercise the powers of savings banks or vice versa if the operations and activities of one are the functional equivalent of the other. *Cf. Department of Banking of Mississippi v. Deposit Guaranty National Bank*, 809 F.2d 266 (5th Cir. 1987).

renovating or demolishing and rebuilding for sale or rental" 12 C.F.R. §545.74(c)(3).

Consequently, a State-chartered savings bank may engage in the same kinds of real estate activity through a service corporation.⁷ Maryland law authorizes a bank, including a savings bank, to form a service corporation. FI §5-405(b). Accordingly, any State-chartered savings bank that wishes to engage in the real estate activity that is described in 12 C.F.R. §545.74 must first obtain approval from the Bank Commissioner to form a bank service corporation. In this regard, the Bank Commissioner may limit service corporation activities, or refuse to permit activities, for supervisory reasons. See FI §§5-405(c)(2) and (3) and 5-407. Cf. 12 C.F.R. 545.74(b).

III

Conclusion

A State-chartered mutual savings bank is empowered to engage in the same real estate activities as a federal savings bank. However, these activities must be performed through a bank service corporation and not through a limited partnership.

J. JOSEPH CURRAN, JR., *Attorney General*

FRANK C. BONAVENTURE, JR., *Assistant
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JACK SCHWARTZ
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Opinions and Advice*

⁷ If, however, a savings bank converts to a commercial bank, the resulting commercial bank may only exercise the powers of that type of bank and not a federal savings bank.

GENERAL ASSEMBLY

STATE TREASURER—"JOINT BALLOT"—VOTING PROCEDURES.

January 19, 1987

The Honorable John Arnick
The Honorable Clarence W. Blount
Co-Chairmen, Joint Legislative Committee
on the Selection of the State Treasurer

By oral request on January 16, 1987, you sought our opinion on several questions relating to the appointment of the State Treasurer by the General Assembly. Specifically, you posed the following questions:

1. May the House of Delegates and the Senate conduct separate balloting for the State Treasurer, or are the two Houses required to appoint the Treasurer at a joint session?

2. Does the "one-person, one-vote" principle of federal equal protection doctrine affect the voting procedure of the General Assembly?

3. What number of votes is sufficient for a nominee for Treasurer to be appointed?

4. May the vote be conducted by secret ballot?

5. Is the General Assembly required to appoint the Treasurer by some particular time?

For the reasons stated below, we conclude as follows:

1. Article VI, §1 of the Maryland Constitution requires that the State Treasurer be appointed on the basis of a single tally in which each Delegate and Senator casts one vote. Historically, the mode of procedure was for each House to cast its ballots separately, in its own chamber, and thereafter for the votes to be combined into a single tally. However, we believe that the two Houses may also follow the more recent practice of meeting in joint session to cast their votes.

2. The "one-person, one-vote" principle does not affect the method of the Treasurer's appointment prescribed in Article VI, §1.

3. A nominee for Treasurer is appointed if he or she receives a majority—i.e., 50 percent plus 1—of the votes cast, assuming the presence of a quorum. A constitutional majority is not required.

4. The General Assembly may vote by secret ballot.

5. Article VI, §1 requires that the Treasurer be appointed at some time during the first regular session of the General Assembly in the Governor's term. Hence, the Treasurer should be selected during the 1987 Regular Session. However, the General Assembly is free to act at such time as it chooses during that session.

I

"Joint Ballot" for Treasurer

A. *Constitutional Provision*

Article VI, §1 provides that the Treasurer is "to be appointed on joint ballot of the two Houses of the Legislature at each regular session in which begins the term of the Governor. . . ." Once appointed, the Treasurer serves a term of four years, until his or her successor shall qualify.

B. *Constitutional History*

The first reference to selection of an official by "joint ballot" is in the Constitution of 1776. Section 25 of that constitution provided as follows regarding the selection of the Governor:

"That a person of wisdom, experience and virtue, shall be chosen governor . . . by the joint ballot of both houses [of the Legislature], to be taken in each house respectively, deposited in a conference room, the boxes to be examined by a joint committee of both houses, and the numbers severally reported, that the appointment may be entered; which mode of taking the joint ballot of both houses shall be adopted in all cases."

The same procedure was prescribed for the election of the council to the Governor and delegates to Congress. See §§26 and 27.

This procedure had two key features. First, as the term "*joint ballot*" suggests, the votes of the members of the two Houses

were combined to determine the winner.¹ Second, the method of voting by ballot assured the secrecy of the vote. By contrast, the election of certain other officials was by voice vote. *See* §§2 and 14.

The provision for the appointment of the Treasurer by "joint ballot" was first enacted in the Constitution of 1851. Although the report of the debates discloses no discussion of this method, a proposal to appoint the Treasurer "by a concurrent vote of both branches of the Legislature" failed in committee.²

The same "joint ballot" procedure was adopted in the Constitution of 1864. During the consideration of that constitution, one member of the convention moved "to amend that portion of [the] section relating to the election of the treasurer by the two houses of the general assembly, by striking out the words 'on joint ballot,' and inserting the words 'by the concurrent vote of the two houses of the general assembly.'" 2 *Debates of the Constitutional Convention of the State of Maryland* 1258 (1864). He proposed this amendment out of a fear that the large delegation from Baltimore City could wield "a sufficient vote to control any election at any time." *Id.* at 1259. Under his proposal for "a concurrent vote of the two houses, each section of the State will have an opportunity to be heard." *Id.* However, his amendment was soundly rejected, 46 to 12, and the "joint ballot" procedure for selecting the Treasurer was retained.

The Constitution of 1867 likewise retained the same selection procedure. As reported by the drafting committee: "There shall be a Treasury Department consisting of a Comptroller . . . and a

¹ That the votes of the two Houses were to be combined is also suggested by the provision in §25 for the breaking of ties:

"But if two or more shall have an equal number of ballots in their favour, by which the choice shall not be determined on the first ballot, then a second ballot shall be taken, which shall be confined to the persons, who on the first ballot shall have had an equal number; and if the ballots should again be equal between two or more persons, then the election of the governor shall be determined by lot, between those who have equal numbers. . ."

² On December 2, 1850, the committee assigned responsibility for framing the article of the Constitution on the Treasury Department was ordered to "consider the expediency of making constitutional provision for the appointment of the Treasurer of the State by a concurrent vote of both branches of the Legislature." *Proceedings of the Maryland State Convention, to Frame a New Constitution* 100 (1850). But the committee instead reported a provision calling for the Treasurer "to be appointed by the two houses of the Legislature at each session thereof on joint ballot. . . ." *Id.* at 234.

Treasurer to be appointed by the members of the Legislature at each regular session thereof, on joint ballot. . . ." *Proceedings of the State Convention of Maryland, To Frame a New Constitution* 86 (1867). There was no debate about this provision.

C. *Construction by the General Assembly*

The actual administration of this selection procedure by the General Assembly reflects a construction of the constitutional provision to which great deference is owed. To ascertain that actual practice, we have examined the journal records of each appointment of a Treasurer. Although the practice has evolved somewhat over the years, one salient fact stands out: Without exception, the selection process involved a combining of the votes of the members of the House and the Senate, with each member casting a single vote.

The early procedure entailed separate nomination of candidates by the two Houses and separate, and evidently secret, collection of ballots. Then, tellers from the two Houses conducted a joint tabulation of the votes to arrive at a result. For example:

"The House then proceeded to ballot for a Treasurer of the State, and the ballots having been collected in the ballot-box for that purpose provided, and upon the call of the roll, it appearing that sixty-four votes on the part of the House had been cast, the ballot-box was sealed, and delivered by the Speaker to . . . Tellers on the part of the House, to join the gentlemen on the part of the Senate, who proceeded to the Senate Chamber, there to count the ballots.

After some time spent therein, [the Tellers] returned and reported that the Tellers on the part of the Senate and House had counted the ballots cast for a Treasurer of the State, that there were 84 ballots, that of that number, James S. Owens, had 59 votes, Dennis Claude, had 24 votes, and there was one blank ballot.

Whereupon, the Speaker declared that James S. Owens had been duly elected Treasurer of the State, according to the constitution and laws thereof." 1852 H. Jour. at 102.

This procedure was followed throughout the 19th Century.

In 1916, the two Houses agreed to a procedure under which the

votes of the individual members would be announced in their respective chambers:

“Each member, in his respective chamber, as his name is called by the Reading Clerk thereof, will advance and hand his ballot to one of the tellers, who shall exhibit it to the other, who shall announce the same; and the Clerk shall make a record thereof. After the ballots shall have been cast they shall be counted by the tellers and the result compared with the result ascertained by the clerk. The tellers appointed by the Senate and by the House of Delegates, respectively, after the vote has been cast, shall meet together, canvass all the returns, and immediately report the same to their respective bodies.” 1916 H. Jour. at 71; 1916 S. Jour. at 75.

As in prior years, each House nominated the candidates of its choice but, for the first time, the members supporting each candidate were identified in the Journal. *See, e.g.*, 1916 H. Jour. at 72; 1916 S. Jour. at 84.³

In 1963, the two Houses met in joint session for the first time to select the Treasurer. As in elections of the Treasurer dating back to 1916, the agreed procedures included announcement of the votes as they were cast in the joint session. 1963 H. Jour. at 38-39; 1963 S. Jour. at 21-22. This method of election—a tallying of the votes cast in joint session—has been followed through 1983.

D. Conclusion

In light of the language used in Article VI, §1 of the Constitution, the history of the provision, and the actual practice of the General Assembly, we have no doubt whatever that the State Treasurer is to be appointed by means of a tally of the votes of all of the members of the General Assembly, with each member casting a single vote. Concurrent voting by the two Houses separately would be inconsistent with the plain language and, indeed,

³ The same procedures, including the vote of each member, are recorded in the journals for the 1918 Session. 1918 H. Jour. at 103-04; 1918 S. Jour. at 63-64. In 1920, the same procedures were agreed upon. The House Journal contains no record of individual votes, but the Senate Journal does. *Compare* 1920 H. Jour. at 45-46, 50, and 58 with 1920 S. Jour. at 41-42. The practice of recording individual votes in the journals has varied since.

was rejected by the framers. See *State v. Shaw*, 9 S.C. 94 (1878). Cf. *Thomson v. Robb*, 328 S.E.2d 136, 140 (Va. 1985).

In our view, as long as the selection is accomplished by a tally of combined votes, the General Assembly is free to determine the exact procedure—i.e., whether to collect the votes in separate chambers and then tally them together, as was done for over a century; or to assemble in joint session for the vote, as has been done since 1963. The phrase “joint ballot” surely permits the latter, albeit recently-adopted, procedure. See *Black's Law Dictionary* 131 (5th ed. 1979).⁴ Cf. 53 *Opinions of the Attorney General* 267, 285 (1968) (in light of its history and application, phrase “joint majority” in Article II, §4 requires a joint session of the House and Senate). See also 53 *Opinions of the Attorney General* 292, 299 (1968) (joint session to elect Treasurer established “by custom and usage alone”).

II

“One-Person, One-Vote”

Your question about the possible applicability of the equal protection principle recognized in the landmark case of *Baker v. Carr*, 369 U.S. 186 (1962), presumably stems from the simple arithmetical fact that, in a combined tally of the votes of the members of the House and the Senate, Senators are at a disadvantage. Even though each Senator and Delegate represents the same population, for every senatorial vote, there will be three delegate votes.

However, the one-person, one-vote principle of *Baker v. Carr* and its progeny has no bearing on this legislative election procedure. The one-person, one-vote doctrine assures that legislative bodies are apportioned so that no citizen's right to vote is effectively diluted. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). The ap-

⁴ *Black's* defines “joint ballot” as follows:

“In parliamentary practice, an election or vote by ballot participated in by the members of both houses of a legislative assembly *sitting together as one body*, the result being determined by majority of the votes cast by the joint assembly thus constituted, instead of by concurrent majorities of the two houses.” (Emphasis added.)

portionment of the Maryland General Assembly comports with this requirement. See *In re Legislative Redistricting*, 299 Md. 658 (1982). Hence, every citizen in this State will be equally represented in the vote for Treasurer.

In any event, the doctrine has been held by the Supreme Court to be inapplicable to a state's selection of an official through the joint vote of its legislature. *Fortson v. Morris*, 385 U.S. 231 (1966). As one treatise has summarized the point:

"The state can choose to appoint members to an official position rather than elect them. If there is no popular election, the one-person, one-vote rule does not apply." 2 Rotunda, Nowak, & Young, *Treatise on Constitutional Law* §18.36, at 658 (1986).

III

Required Majority

You inquire as to the degree of support required for a nominee for Treasurer to be appointed. The alternatives are (i) a constitutional majority of 95—i.e., the "majority of the whole number of members elected" that is required by Article III, §28 for the passage of any bill or resolution; (ii) a simple majority of the votes cast; and (iii) a mere plurality, assuming that there are three or more nominees.

In our view, a constitutional majority is not required. This question was fully considered and resolved in the opinion dealing with the election by the General Assembly of a Governor, and we concur with the conclusion set out in 53 *Opinions of the Attorney General* at 288.⁵

⁵ That opinion observed:

"[T]here are certain basic differences in the procedure for electing a Governor, as opposed to the procedures for passing a bill or resolution. For example, . . . in electing a Governor equal weight is given to the vote of every member of each House. Such is not the case when matters are considered separately by each of the Houses since one of the Houses consists of 142 members, and the other of but 43. The framers of the Constitution may

continued

Likewise, relying on the analysis in that opinion, we conclude that a plurality of votes is insufficient. "We find no support whatever for the proposition that a Governor may be elected by less than a simple majority of those present and actually voting." *Id.* at 289. Indeed, with respect to the election of the Treasurer, the General Assembly has long construed the requirement in Article VI, §1 to mean a majority, not a plurality. In 1870, there were four nominees. On the first ballot, out of a total vote of 110, the tally was as follows:

Merryman	54
Fowler	31
Vansant	16
Pannell	9

The joint committee appointed to count the votes then reported "that neither of the nominees having received a majority of the votes cast, there is therefore no election." 1870 H. Jour. at 82. On a second ballot Merryman received 62 votes, "being a majority of all the votes passed by the two branches of the General Assembly," and was, accordingly, elected. 1870 H. Jour. at 96.⁶

This construction by the General Assembly of the voting procedure for Treasurer accords with the general rule that a majority of a quorum may act for a body. *See, e.g., Murdoch v. Strange*, 99 Md. 89, 110-11 (1904). *See generally* 59 Am. Jur.2d *Parliamentary Law* §8, at 324 (1971) ("In the absence of an express regula-

Note 5 continued

very well have decided that their early application of the principle of 'one-man, one-vote' to be followed in electing a Governor made it unnecessary to require a constitutional majority for such an election to be achieved.

Whatever the reason of the framers of the Constitution, however, it is obvious that when they intended that a constitutional majority be required, they clearly so stated, as they did in Section 28 of Article III. Since they did not make a similar requirement in the provisions of Section 4 of Article II, we must conclude that only a simple majority is required for the election of a Governor." 53 *Opinions of the Attorney General* at 288.

⁶ In 1916, similarly, a nominee who received a plurality, but not a majority, was not elected. *See, e.g.,* 1916 H. Jour. at 73; 1916 S. Jour. at 85. The Senate Journal for this protracted election reflects the tellers' report "that no candidate [had] received a constitutional majority [and therefore] there is no election." 1916 S. Jour. at 85, 91, and 103 (emphasis added). However, the House Journal's report is inconsistent [*compare* 1916 H. Jour. at 73 *with* 1916 S. Jour. at 91], and in any event we believe that this passing and probably inadvertent reference does not evidence a considered interpretation of the constitutional provision.

tion to the contrary, when a quorum is present a proposition is carried by a majority of the votes cast. . . .").⁷

IV

Secret Ballot

In our view, the General Assembly unquestionably may conduct its vote for Treasurer by secret ballot.⁸ The very term "ballot" implies secret voting, particularly in its original sense. See *Norris v. Baltimore*, 172 Md. 667, 677-78 (1937).⁹ Indeed, the entire 19th Century practice of the General Assembly under Article VI, §1 reflects the understanding that the "ballot" was a secret one.¹⁰

Yet, as discussed in Part I C above, since the early part of this century the General Assembly has introduced greater openness into the selection process by announcing—and, on occasion, entering into its journals—the votes of its individual members. In light of this history, we believe that a court would give deference to the General Assembly's choice in the matter. Hence, we

⁷ For a discussion of the counting of a quorum in a joint session, see 53 *Opinions of the Attorney General* 292 (1968).

⁸ Under Article III, §22, "[t]he yeas and nays of members on any question, shall at the call of any five of them in the House of Delegates, or one in the Senate, be entered on the Journal." However, we believe that this provision does not apply to the appointment of the Treasurer:

"A question is a motion or proposition presented for action to a legislative body . . . The election of a speaker . . . is not a 'question' within the meaning of [the provision of the New Hampshire Constitution that requires "the yeas and nays, upon any question," to be entered in the journal"]. *Opinion of the Justices*, 278 A.2d 475, 477 (N.H. 1971).

⁹ As one court has summarized:

"An examination of the authorities discloses that from a very early time 'voting by ballot' has been a term used to distinguish open voting from secret voting. The privilege of secrecy is of the essence of voting by ballot." *Smith & Son v. MacAulay*, 196 A. 281, 283 (Vt. 1938).

¹⁰ When the Constitution requires an election by the General Assembly to be conducted by open voting, it so provides expressly. Article II, §4 ("Every election of Governor or Lieutenant Governor . . . by the General Assembly shall be determined by a joint majority . . . and the vote shall be taken viva voce"). See 53 *Opinions of the Attorney General* at 289-90.

believe that your Committee, in recommending procedures for the selection of the Treasurer, may propose one or the other form of voting.¹¹

V

Time of Appointment

Your final question is whether the General Assembly has discretion to choose the time at which it appoints the Treasurer. The language of Article VI, §1 simply refers to the appointment of the Treasurer "at each regular session in which begins the term of the Governor. . . ." Although the appointment has traditionally been made at the start of the session, the precise timing has varied, and we see no legal requirement that the appointment be made at any particular time during that session.¹²

¹¹ A century ago, the South Carolina Supreme Court construed that state's constitutional requirement that "a Judge shall be elected by joint ballot of the General Assembly" to mean that (i) a secret ballot was essential; and (ii) a judge elected by voice vote, instead of secret ballot, had no valid title to the office and was subject to ouster. *State v. Shaw*, 9 S.C. 94 (1878).

However, we doubt that this aspect of the *Shaw* case would be followed by the courts of Maryland, should the General Assembly choose to disclose individual votes in the selection of the Treasurer. First, this aspect of *Shaw* derived in part from the particular evolution of the provision in South Carolina. See 9 S.C. at 139. Second, the meaning of the term "ballot" is not so rigid as to exclude the possibility of a nonsecret ballot. See *Black's Law Dictionary* at 130-31 (separately defining "ballot" and "secret ballot"). Cf. *Norris v. Baltimore*, 172 Md. at 677 (citing approvingly a definition of "ballot" as the "[a]ct of voting, usually in secret") (emphasis added). Third, the practice of the General Assembly in this century of announcing votes for the Treasurer would be given considerable deference. Cf. Article III, §19 (each House shall "determine the rules of its own proceedings"). Finally, in construing the Constitution, the courts will, we think, recognize that the modern emphasis on open government—manifested, for example, in the Open Meetings Law, §§10-501 through 10-510 of the State Government Article—makes appropriate the General Assembly's departure from the early meaning of the term "ballot" in this context. "The meaning of the Constitution is not restricted to the meaning of particular words employed as they were understood at the time of its adoption." *Clauss v. Board of Educ.* 181, Md. 513, 523 (1943).

¹² In 1896, for example, the Treasurer was not elected until February 26th. 1896 H. Jour. at 472; 1896 S. Jour. at 484. The incumbent Treasurer serves until the qualification of his successor. See *Archer v. State*, 74 Md. 410 (1891); 58 *Opinions of the Attorney General* 130 (1973).

VI

Conclusion

In summary, it is our opinion that:

1. Article VI, §1 of the Maryland Constitution requires that the State Treasurer be appointed on the basis of a single tally in which each Delegate and Senator casts one vote. Historically, the mode of procedure was for each House to cast its ballots separately, in its own chamber, and thereafter for the votes to be combined into a single tally. However, we believe that the two Houses may also follow the more recent practice of meeting in joint session to cast their votes.

2. The “one-person, one-vote” principle does not affect the method of the Treasurer’s appointment prescribed in Article VI, §1.

3. A nominee for Treasurer is appointed if he or she receives a majority—i.e., 50 percent plus 1—of the votes cast, assuming the presence of a quorum. A constitutional majority is not required.

4. The General Assembly may vote by secret ballot.

5. Article VI, §1 requires that the Treasurer be appointed at some time during the first regular session of the General Assembly in the Governor’s term. Hence, the Treasurer should be selected during the 1987 Regular Session. However, the General Assembly is free to act at such time as it chooses during that session.

J. JOSEPH CURRAN, JR., *Attorney General*

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Opinions and Advice

HEALTH

MENTAL HEALTH—CONDITIONAL RELEASE—COURTS—HEARINGS—COURT MAY CONDUCT HEARING ON DEPARTMENT'S APPLICATION FOR CONDITIONAL RELEASE OF COMMITTED INDIVIDUAL.

July 9, 1987

The Honorable Kurt L. Schmoke
State's Attorney for Baltimore City

Ellen Finkelstein, Esquire
Assistant State's Attorney

You have requested our opinion on whether a court may conduct a hearing on an application by the Department of Health and Mental Hygiene ("DHMH") for the conditional release of an individual committed to DHMH following a finding of criminal nonresponsibility.

For the reasons given below, we conclude that the court may conduct a hearing of this kind.

I

Background

Title 12 of the Health-General Article ("HG" Article) applies to mental health matters arising from criminal cases. The title provides the standards governing incompetence to stand trial, criminal nonresponsibility by reason of insanity, and commitment and release from DHMH of individuals found not to be criminally responsible. Your inquiry involves the procedural mechanisms through which a committed individual may be released from inpatient DHMH treatment.

Title 12 provides for two release alternatives for committed individuals: application by the committed individual for discharge or conditional release, pursuant to HG §12-118; and application by DHMH for conditional release, pursuant to HG §12-119. *See Dorsey v. Solomon*, 435 F. Supp. 725, 729 (D.Md. 1977) *aff'd in part*

and remanded in part, 604 F.2d 271 (4th Cir. 1979); *Bremer v. State*, 18 Md. App. 291, 341 (1973), *cert. denied*, 415 U.S. 930 (1974).¹

If the committed individual petitions the court for release under HG §12-118(c), the individual "shall send a copy of the petition for release to [DHMH] and the State's Attorney." HG 12-118(c)(2). Either agency would be able to oppose the petition before the court or a jury, which is required to "[r]ender a verdict," obviously after a hearing. HG §12-118(c)(4) and (5).

By contrast, HG §12-119 does not specify a detailed adjudicatory procedure when DHMH applies for an individual's conditional release. Section 12-119(b) provides:

"Within 30 days after receipt of the Department's application, the court shall issue an order that is in accordance with the provisions of §12-113 of this title for:

(1) Continued commitment; or

(2) Conditional release under the conditions it imposes after giving consideration to the recommendations of specific conditions from the Department."

Thus, the question arises as to the court's authority to conduct a hearing under HG §12-119.

II

The DHMH Application Statute

The DHMH application process now codified at HG §12-119 originated in 1967 as part of a comprehensive revision of the insanity statutes. Chapter 709, Laws of Maryland 1967, codified at former Article 59, §12. *See Strawderman v. State*, 4 Md. App. 689, 692 (1967). The procedure, redesignated as former Article

¹ The original legal process for a redetermination of "sanity" was habeas corpus. *See Devilbiss v. Bennett*, 70 Md. 554, 559 (1889). In Chapter 685, Laws of Maryland 1949, the General Assembly required that the State's Attorney apply to the court for a writ of habeas corpus for a patient recommended for release by hospital officials. *Miller v. Spring Grove State Hospital*, 198 Md. 659 (1951), indicated that statutory judicial release procedures, and not habeas corpus, are the appropriate means for court determination of the issue of release. This remains current practice.

59, §28 in 1970, was subsequently revised in minor respects only.² Even the overall revision of the insanity law in 1984 left the procedure essentially unchanged, although the 1984 revision added to HG §12-119 standards for release eligibility. *See* HG §§12-119(b) and 12-113(c).³

This provision enables DHMH to seek judicial review of its authority to continue inpatient commitment, based on the individual's current clinical condition. This procedure also permits direct access by DHMH to the courts if the committed individual and DHMH agree that conditional release is warranted.

III

Opportunity for a Hearing

For several reasons, we are of the view that a court is free to hold a hearing on DHMH's application:

First, eligibility for release is to be established by a preponderance of the evidence. HG §12-113(d). This burden of proof requirement itself implies that a hearing might be necessary so that the court can assess whether the burden has been carried.

In addition, DHMH is required to send copies of its application to the committed individual, his or her counsel, and the State's Attorney. HG §12-118(c)(2). This requirement makes little sense unless the General Assembly intended that these recipients have an opportunity to make their views known to the court, and a hearing is a traditional way for this to be done.

More generally, we believe that a court with jurisdiction over a matter has inherent authority to conduct a hearing with respect

² *See* Chapter 407, Laws of Maryland 1970; Chapter 551, Laws of Maryland 1971; Chapter 21, Laws of Maryland 1982; Chapter 501, Laws of Maryland 1984.

³ The evidentiary issue when DHMH applies for conditional release is whether "[the] individual would not be a danger, as a result of mental disorder or mental retardation, to self or to the person or property of others if released from confinement with conditions imposed by the court." HG §12-113(c). The Governor's Task Force to Review the Defense of Insanity recommended the addition of a reference to the standards in §12-113 "to make clear that the court may not deny an application if the release criteria provided by this title have been established." Task Force Comment to §12-119, *re-printed in* Health-General Article at 164 (1986 Supp.).

to any question before the court, if the court views a hearing as appropriate:

"The powers of a judge are those that are conferred upon him by the constitution and by statute and those that are inherent in his office. The duties of the office of judge include all those that fairly lie within its scope, those that are essential to the accomplishment of the main purposes for which the office was created, and those that, although incidental and collateral, are germane to or serve to promote or benefit the accomplishment of the principal purposes." 46 Am. Jur. 2d *Judges* §21, at 109 (1969).

A judge should not "allow court business to be disposed of summarily without ample opportunity for hearing all matters which are material and relevant to the cause." 48A C.J.S. *Judges* §60, at 643 (1981).

A DHMH application for conditional release under HG §12-119 is, in essence, a motion, because DHMH is applying for an order of the court directing the conditional release of a committed individual.⁴ A hearing on a motion is a traditional part of the court's decisional process. See Rule 2-311(f). Indeed, statutes that relate to motions are given a liberal interpretation in order to simplify and expedite procedure. See *Sutherland Statutory Construction*, §67.05, at 360 (4th ed. 1986). A liberal construction of HG §12-119 would authorize the court to hold a hearing on the application, given that an individual's liberty interest is involved.

To be sure, the language of the DHMH application statute does not compel the court to conduct a hearing on conditional release eligibility. If neither the court, the State's Attorney, nor the committed individual opposes the conditional release application, dispensing with the formality of a hearing in open court spares judi-

⁴ Generally, a motion is any application for an order made to a judge. See Rule 2-311 ("An application to the court for an order shall be by motion. . ."). See also *People v. Thomas*, 341 N.E.2d 178 (Ill. App. 1976); *Black's Law Dictionary* 913 (5th ed. 1979). In our view, the DHMH application is best characterized as a civil motion. Under HG §12-118(c)(3), "[i]f the committed individual requests a trial by jury, the trial shall be held in a circuit court with a jury as in a civil action at law." See also HG §12-113(d) (specifying burden of proof typical of civil, not criminal, matters). We see no reason why an application under HG §12-119 should not also be viewed as civil in nature, even though the court that decides the matter is the court with criminal jurisdiction. See HG §12-101(c).

cial resources and saves the public and the parties time and expense.

But, as we read it, HG §12-119 by no means prohibits a hearing. In some situations, the State's Attorney, the patient, or the court may desire to challenge, or to seek to clarify, DHMH's conditional release application by DHMH. Indeed, the committed individual might have a due process right to a hearing, under some circumstances. We understand that, since the passage of the DHMH application statute in 1967, courts have occasionally conducted hearings involving testimony by the committed individual, facility witnesses, and others. Under the general principles pertaining to the disposition of issues in judicial proceedings, a hearing may be conducted to resolve any questions raised by the application or responses to it.

IV

Conclusion

Maryland's law governing the commitment of those found not criminally responsible strikes a delicate balance between the liberty interest of the committed individual and the public safety. Part of that balancing process entails the opportunity to challenge a conditional release application by DHMH under HG §12-119. In our opinion, a court may hold a hearing if the application is contested or if the court, the State's Attorney, or the committed individual seeks clarification of the application.

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HEALTH OCCUPATIONS

MORTICIANS—UNLICENSED PERSONS MAY NOT SOLICIT, OFFER,
OR EXECUTE A CONTRACT FOR THE PROVISION OF FUNERAL
GOODS OR SERVICES.

February 11, 1987

The Honorable Thomas Patrick O'Reilly
Senate Of Maryland

You have requested our opinion on whether the Maryland Morticians Act prohibits anyone other than a person who is licensed under the Act from soliciting or offering a contract to provide funeral goods and services or, conversely, whether the Act permits an unlicensed agent or employee of a licensee to solicit or offer such a contract.

For the reasons given below, we conclude that the Act bars all persons except licensees from arranging or assisting in arranging funerals, including soliciting, offering, or executing contracts for the provision of funeral goods or services.¹

I

Background

Under the Maryland Morticians Act, §§6-101 through 6-602 of the Health Occupations Article ("HO" Article), the State Board of Morticians has authority to examine, license, and discipline seven classes of practitioners: morticians, apprentices, funeral directors, surviving spouses, corporations, funeral establishments, and courtesy card holders. See HO §6-101(h)(2). Only a licensee may "practice, attempt to practice, offer to practice, or assist in the practice of mortuary science in this State. . . ." HO §6-501.²

¹ You also asked whether, in our view, the public interest would be better served by permitting unlicensed employees or agents of licensees to solicit or offer such contracts. As to this policy matter, we defer to the General Assembly.

² An unlicensed person who assists in the practice of mortuary science is guilty of a misdemeanor, the penalty for which is a fine of up to \$100 or imprisonment of up to one year. HO §6-508. Practice under either an apprentice license or a surviving spouse license is explicitly limited to assisting a licensed mortician. HO §§6-306 (apprentice) and 6-308 (surviving spouse).

The Morticians Act defines the scope of both mortuary science and the more limited practice of "funeral direction" to include "[f]or compensation, to arrange for or make final disposition of a dead human body." HO §6-101(n)(1)(ii) and (o)(1)(iii).³ Further, the Act explicitly prohibits certain forms of solicitation of mortuary business. Thus, an applicant for a license or a licensee is subject to disciplinary action if he or she "[e]mploys, pays, or offers to pay a 'capper', 'steerer', 'solicitor', or any other person to obtain business either in general or for a particular mortician, funeral director, or funeral establishment" or "[d]irectly or indirectly pays or offers to pay to obtain mortuary science business." HO §6-315(a)(8) and (9).

The likelihood of unlicensed persons being employed to solicit business is generally increased in the context of "pre-need" contracts for the provision of funeral goods and services. Such a contract is "an agreement between a consumer and a licensed funeral director or licensed mortician to provide any goods and services purchased prior to the time of death." HO §6-101(p).⁴ Thus, in this context there is clear opportunity for the involvement of agents or employees to solicit business.

However, under HO §6-404(b), "[o]nly a licensed mortician, a licensed funeral director, or a holder of a surviving spouse license may offer or agree, directly or indirectly, to provide services or merchandise under a pre-need contract." HO §6-504 similarly provides that "[u]nless a person is a licensed mortician, a licensed funeral director, or a holder of a surviving spouse license, the person may not offer or agree, directly or indirectly, to provide services or merchandise under a pre-need contract."

³ The practice of funeral direction includes all aspects of mortuary science except preparing a dead human body for disposition, including disinfecting and embalming. HO §6-101(n)(2). Funeral director licenses may be issued only to persons who held such licenses before May 2, 1973 and who have renewed their licenses annually. HO §§6-307 and 6-313(f). By this means, the "funeral director" class of licenses is being phased out of existence.

⁴ This provision, before its amendment by Chapter 728 of the Laws of Maryland 1986, defined a pre-need contract as one "to provide to a then living individual on the death of that individual" certain goods and services. Chapter 8, Laws of Maryland 1981, sec. 2 (enacting former HO §6-101(n)). Thus, the present definition is apparently designed to permit a consumer to enter into an agreement regarding the funeral goods and services to be provided upon the death of another individual. In either case, of course, the former and present definitions maintain the essential distinction between pre-need contracts and the more common "at-need" contracts—those entered into upon the death of an individual.

II

Analysis

In our view, these provisions prohibit unlicensed persons from soliciting or offering pre-need contracts, notwithstanding that they do so on behalf of licensees. We recognize that HO §6-404(a) defines the “seller” under a pre-need contract simply as “a person who agrees to provide services or merchandise, directly or indirectly, under a pre-need contract.” However, we view that definition as essentially a device of convenience, designed to avoid the necessity of repeated, cumbersome references to “a licensed mortician, a licensed funeral director, or a holder of a surviving spouse license” who makes such an agreement. We do not think that the definition can be read as a substantive authorization for any person to make pre-need contracts. To the contrary, HO §§6-404(b) and 6-504 both prohibit any but the specified licensees from offering or agreeing to such contracts, whether directly or indirectly. Thus, an unlicensed individual—or, indeed, a licensee in a class other than those specified—is barred not only from directly entering into and performing preneed contracts, but also from soliciting such contracts on behalf of those who would perform them.

We also think that the Act’s anti-solicitation provisions prohibit the use of unlicensed individuals to seek out and negotiate with consumers for business under either pre-need or at-need contracts. HO §6-315(a)(7) through (9) explicitly prohibit the use of agents to obtain business.⁵ Moreover, HO §6-315(a)(5) subjects to discipline any licensee or license applicant who “[a]ids or abets an unauthorized person in the practice of mortuary science”—which, under HO §6-101(n)(1)(ii) and (o)(1)(iii), includes arranging for final disposition of a dead human body.

To be sure, these provisions do not prohibit all employment of unlicensed persons to provide consumers with information about

⁵ These provisions do not prohibit truthful and non-misleading advertising, which is a form of speech protected by the First Amendment to the United States Constitution. *In re R.M.J.*, 455 U.S. 191 (1982). Rather, they aim at arrangements under which an agent is employed to make in-person solicitations of business from consumers and, generally, the agent’s payment is contingent on actually obtaining business for the employer. Such activities may constitutionally be regulated to prevent the use of unfair pressure tactics or deception. Antitrust Division, Office of the Attorney General, *Report on the Maryland State Board of Morticians* 20-21 (August 27, 1985) (“*Antitrust Report*”). See also note 8 below.

available goods and services. Such information is undeniably necessary to consumers seeking to choose the most appropriate funeral arrangements. Indeed, federal regulations require disclosure of prices and other information regarding available or legally required funeral goods and services. 16 C.F.R. §§453.2 through 453.5.⁶ A small funeral home—especially one operated by a sole proprietor—may not have a licensed mortician or funeral director available at all times and may need to employ non-licensees to provide such information to consumers at the funeral home.

The federal regulations require that the mandated information be available to consumers in written form. *E.g.*, 16 C.F.R. §453.2(b)(2)-(4).⁷ Thus, the provision of this information may be accomplished without negotiating with the consumer regarding the goods and services to be provided—indeed, it may be accomplished by simply reading or giving the printed matter to the consumer. Where the information is supplied by a nonlicensee, it may not be coupled with discussion of the particular goods and services to be furnished to that consumer. A licensed mortician or funeral director from the funeral home may subsequently contact the consumer to discuss and reach agreement on the funeral arrangements, but non-licensees must limit their discussions with consumers to the provision of information regarding the kinds of arrangements that are available.⁸

⁶ Those regulations do not limit or specify the persons who are to make the actual disclosures, although they clearly place responsibility for disclosure on the “funeral provider”—that is, the person or business entity actually engaged in the funeral business. *E.g.*, 16 C.F.R. §453.2(a). Certainly, nothing in those regulations requires that unlicensed persons be permitted to do more than supply the required consumer information.

⁷ The federal regulations further require that, when a consumer inquires about funeral arrangements in person, the mandated disclosures be made upon beginning discussion of funeral arrangements. *E.g.*, 16 C.F.R. §453.2(b)(4).

⁸ A report prepared as part of this office's general review of possible antitrust problems with rules, regulations, and practices of the State's occupational licensing and regulatory boards likewise approved of the use of non-licensees to supply consumers with needed information. *Antitrust Report* at 15. If nonlicensees could not be used in this way, small funeral homes would be at a competitive disadvantage in relation to large establishments employing several morticians. However, that report did not conclude that non-licensees may go beyond providing such information to develop contracts with consumers.

This limitation on the use of non-licensees, in our view, is consistent with the legislative distinction drawn elsewhere in the Morticians Act between activities that may appropriately be engaged in by non-licensees and those that require licensure. For example, an unlicensed person acting under the direction of a licensed mortician or funeral director may pick up, remove, or transport human remains. HO §6-101(o)(3).⁹ These tasks are relatively menial, must be performed on short notice, and do not usually involve direct contact with bereaved persons.

In contrast, the making of funeral arrangements, whether pre-need or at-need, requires discussion directly with consumers of a delicate and emotional subject. At-need arrangements, moreover, typically bring the seller of funeral goods and services into contact with consumers immediately after their bereavement. The General Assembly has apparently determined that the performance of these tasks is best restricted to those whose education, training, and professional conduct is subject to the regulatory provisions of the Morticians Act and the enforcement powers of the Board of Morticians.¹⁰

That determination is not seriously undermined by the inclusion of "surviving spouse" licensees among those licensees who may offer or agree to pre-need contracts. The surviving spouse license enables the surviving spouse of a deceased mortician to continue to operate the mortician's business. Thus, it recognizes and preserves the value to a mortician's family of the funeral home as a going concern. *Cf. Brooks v. State Board of Funeral Di-*

⁹ This provision was enacted by Chapter 728 of the Laws of Maryland 1986. The Board requested this legislation in response to this office's advice that the Act did not then authorize the issuance of "courtesy cards," designed to entitle out-of-state morticians to pick up human remains in Maryland for removal to another state. *Antitrust Report* at 18-19. The Board determined that the best course was to obtain explicit authority to issue courtesy cards and also to permit non-licensees to pick up and transport dead human bodies under the supervision of licensed morticians or funeral directors.

¹⁰ In this regard, we note that corporations and funeral establishments may operate their businesses only if the actual practice of mortuary science is conducted by a licensed individual. HO §§6-309(d) (corporation) and 6-310(c)(2) (funeral establishment). Thus, the ability of corporations and funeral establishments to provide services under pre-need contracts is not unduly circumscribed by HO §§6-404(b) and 6-504. Rather, as in all other aspects of its operations, the business entity is simply required to act through an individual licensee, who offers or solicits and executes the contract.

rectors & Embalmers, 233 Md. 98, 114 (1963) (permitting funeral direction by certain corporations had purpose of preserving existing investments or values). The license also affords the community a measure of continuity in the operation of the funeral home by one presumably familiar with the business. HO §6-315 subjects the surviving spouse to the same regulatory provisions as other licensees; in addition, the surviving spouse may operate the business only under the direct supervision of a licensed mortician. Hence, the involvement of surviving spouses in sales of pre-need contracts—notwithstanding that they are not themselves licensed morticians—is unlikely to raise the kinds of concerns that may arise from the involvement of unregulated non-licensees.¹¹

III

Conclusion

In summary, it is our opinion that the Maryland Morticians Act, HO §§6-101 through 6-602, prohibits individuals not licensed under the Act from soliciting or offering contracts for the provision of funeral goods and services, even if they do so as agents or employees of identified licensees.

J. JOSEPH CURRAN, JR., *Attorney General*

HARRY J. MATZ, *Assistant Attorney General*

JACK SCHWARTZ

Chief Counsel

Opinions and Advice

¹¹ The presently authorized scope of the involvement of surviving spouses in sales of preneed contracts is not entirely clear, however. HO §§6-404(b) and 6-504 include surviving spouses among those who may “offer or agree, directly or indirectly, to provide services or merchandise under a pre-need contract.” However, a pre-need contract is defined as “an agreement between a consumer and a licensed funeral director or licensed mortician. . . .” HO §6-101(p). The Board anticipates seeking legislation to eliminate this discrepancy between the substantive and definitional provisions.

HEALTH OCCUPATIONS—PHYSICIANS—LICENSING—DISCIPLINE—BOARD OF MEDICAL EXAMINERS LACKS AUTHORITY TO DENY LICENSE RENEWAL OR REINSTATEMENT BASED ON BOARD'S DETERMINATION THAT PHYSICIAN HAS COMMITTED DISCIPLINARY VIOLATION.

March 31, 1987

Arthur T. Keefe, Jr., M.D.
Secretary, Board of Medical Examiners

You have requested our opinion concerning the authority of the Board of Medical Examiners, under the Maryland Medical Practice Act, to deny an application for renewal or reinstatement of a physician's license. Specifically, you ask whether the Board may deny a licensee's application for renewal or reinstatement on the basis of its determination that the licensee has violated §14-504 of the Health Occupations Article ("HO" Article), which specifies the grounds for discipline of a licensee.

For the reasons given below, we conclude that the Board may not base its denial of a licensee's application for renewal or reinstatement on its finding that the licensee has violated HO §14-504. If the Board has reason to believe that the licensee violated HO §14-504, it should take no action on the licensee's renewal application and instead should refer the matter to the Commission on Medical Discipline.

I

Physician Licensing

The Board of Medical Examiners is responsible for the licensing of physicians in this State. An unlicensed person, termed "an applicant," must meet the requirements set out in HO §14-305.¹ The Board, in addition to determining whether an applicant meets the qualifications in HO §14-305, may also "deny a license to an applicant for any of the reasons that are grounds for action under §14-504 of this title." HO §14-205(a)(1)(iii).

¹ In addition to satisfying requirements concerning age, education, successful completion of an examination, and English language competency, an applicant "shall be of good moral character." HO §14-305(b). See note 5 below and accompanying text.

A renewal of a physician's license is treated in a separate section, HO §14-314, which specifies the maximum term of a license and the procedures to be followed by the licensee and the Board. In particular, HO §14-314(c) provides:

“Before the license expires, the licensee periodically may renew it for an additional term, if the licensee:

- (1) Otherwise is entitled to be licensed;
- (2) Pays to the Board a renewal fee equivalent to an annual fee of \$25; and
- (3) Submits to the Board:
 - (i) A renewal application on the form that the Board requires; and
 - (ii) Satisfactory evidence of compliance with any continuing education requirements set under this section for license renewal.”

HO §14-314(e) provides, “The Board shall renew the license of each licensee who meets the requirements of this section.”

HO §14-315 provides for the reinstatement of lapsed licenses:

“The Board shall reinstate the license of a physician who has failed to renew the license for any reason if the physician:

- (1) Meets the renewal requirements of §14-314 of this subtitle;
- (2) Pays to the Board a reinstatement fee set by the Board; and
- (3) Submits to the Board satisfactory evidence of compliance with the qualifications and requirements established under this title for license reinstatements.”

II

Physician Discipline

The Commission on Medical Discipline is responsible for the disciplining of licensed physicians. The Commission has various powers and duties associated with the investigation and determi-

nation of allegations against physicians. *See generally* HO Subtitle 5, Title 14.

HO §14-504 specifies 28 separate grounds for discipline.² The section also provides that, subject to the hearing procedures of the Administrative Procedure Act, "the Commission, on the affirmative vote of a majority of its full authorized membership, may reprimand any licensee, place any licensee on probation, or suspend or revoke a license if the licensee" commits one of the specified acts.

III

Analysis

Both the particular language used in the Maryland Medical Practice Act and the overall design of the Act lead us to believe that the General Assembly has precluded the Board from denying an application for renewal or reinstatement based on its determination that the licensee has engaged in a practice prohibited by HO §14-504.

The wording of the Act distinguishes between the issuance of an original license and the periodic renewal of that license. One who seeks an initial license is "an applicant" and must meet the education and examination requirements in HO §14-305. A person seeking a renewal of a license is termed "a licensee" and need only meet the abbreviated requirements for renewal in HO §14-314.³ The Board's authority under HO §14-205(a)(1)(iii) to "deny a license to an applicant for any of the reasons that are grounds for action under §14-504 of this title" by its terms speaks only to the denial of an initial application for licensing, not to a licensee's application for renewal.

To be sure, the Board may deny a licensee's application for renewal if the licensee is not "otherwise . . . entitled to be li-

² The most recently enacted ground for discipline, "[f]ail[ing] to educate a patient being treated for breast cancer of alternative methods for treatment as required by §20-113 of the Health-General Article," will be effective on July 1, 1987.

³ The Act's terminology elsewhere reflects the difference between initial "issuance" of a license and subsequent "renewal" of it. *See* HO §14-206(a)(1).

censed." HO §14-314(c)(1). But this language cannot reasonably be viewed as an indirect way of authorizing the Board to inquire into a licensee's compliance with HO §14-504. The requirement that a renewal applicant "otherwise [be] entitled to be licensed" is merely standard language that enables the Board to deny a renewal if it learns that a condition for licensure—for instance, attainment of the education and training specified in HO §14-305(d)—in fact was not met.⁴

As we read it, HO §14-314(c)(1) authorizes the Board to deny a renewal application if the licensee is not "of good moral character," one of the requirements for initial licensure in HO §14-305. And, a circumstance identified in HO §14-504 might properly be viewed by the Board as evidence that a licensee is not of good moral character—in particular, the fact that a licensee has been convicted of "a crime involving moral turpitude." HO §14-504(6). In this situation, the Board would be acting under its grant of authority in HO §14-314(c)(1); it would not be applying HO §14-504 as such.⁵ However, there is no indication whatever in the language of the statute that the Board is generally empowered to take HO §14-504 directly into account when it considers a renewal or reinstatement application.⁶

The statutory language that restricts the Board's consideration of HO §14-504 to initial licensing only furthers an important goal

⁴ The Revisor's Note describes HO §14-314(c)(1) as "standard language added for clarity." See Health Occupations Article at 381 (1981). The same phrase appears throughout the Health Occupations Article. See, e.g., HO §§4-309(c)(1)(ii) (dentists), 5-309(c)(1) (electrologists), 15-308(c)(1) (podiatrists), and 21-308(c)(1) (well drillers).

⁵ In our view, the Board's denial of an application for renewal or reinstatement of a license because of the licensee's asserted noncompliance with HO §14-314(c)(1) is a "contested case," within the meaning of §10-210(c)(2) of the State Government Article, and therefore must be undertaken in compliance with the notice and hearing requirements of the Administrative Procedure Act. This definition includes "the . . . renewal . . . of a license that is required by law to be determined only after an opportunity for an agency hearing." In our view, the Due Process Clause of the Fourteenth Amendment is "law" that requires the Board to afford the opportunity for a pre-denial hearing. See, e.g., *Keney v. Derbyshire*, 718 F.2d 352, 354-55 (10th Cir. 1983); *Herz v. Degnan*, 648 F.2d 201, 208 (3d Cir. 1981).

⁶ Indeed, when the Health Occupations Article was enacted, a Revisor's Note described HO §14-315, concerning reinstatement of expired licenses, as intended in part "to clarify the distinction between non-renewal of a license under §14-314 of this subtitle and suspension of a license under §14-504 of this title." Health Occupations Article at 382 (1981).

of the Act as a whole—namely, to invest in the Commission on Medical Discipline exclusive responsibility for determining whether a licensee has committed an act prohibited by HO §14-504 and, if so, for imposing an appropriate sanction. The very existence of the Commission reflects a legislative judgment that questions of physician discipline should be resolved by a separate body, the Commission, instead of the licensing body that had previously dealt with disciplinary matters as well. *See* Chapter 469, Laws of Maryland 1968.⁷

In furtherance of this purpose, HO §14-504 begins with a grant of authority to the Commission alone: "Subject to the hearing provisions of §14-505 of this subtitle, the Commission, on the affirmative vote of a majority of its full authorized membership, may reprimand a licensee, place any licensee on probation, or suspend or revoke any license if the licensee" is guilty of any of the enumerated acts. In several other sections of the subtitle, the General Assembly has specified procedural requirements and protections for an accused physician that expand upon the general requirements of the Administrative Procedure Act and that have no analogue in the subtitle governing the Board. *See* HO §§14-505 (hearings), 14-506 (findings and orders), 14-508 (review of decision), and 14-510 (Commission documents).⁸ We regard these procedural provisions as further evidence of the General Assembly's intention to invest in the Commission sole responsibility for determining whether a licensee has committed an act for which one of the various forms of discipline may be imposed.⁹

⁷ Chapter 469, recommended by the Medical and Chirurgical Faculty of Maryland, was intended to "completely revise the present laws concerning disciplinary action against physicians. The present law authorizes the Board of Medical Examiners to revoke a license which has been issued and lists a number of possible causes for revocation. The proposal is to establish a Commission on Medical Discipline. . . . This group would have the duty and obligation of considering charges against physicians for a list of possible offenses, after which there would be power to reprimand, place on probation, revoke or suspend a license, or dismiss the charges." Legislative Council of Maryland, *Report to the General Assembly of 1968* at 187.

⁸ *See also* HO §14-510.1, manifesting the General Assembly's intention to provide special protection for a physician's privacy when disciplinary allegations are investigated by the Commission. There is no comparable provision regarding records of the Board.

⁹ The differing roles of the Board and the Commission are also made clear in HO §14-509, which provides that "the Board may reinstate the license of an individual whose license has been suspended or revoked . . . only in accordance with" the Commission's order.

Finally, the Board has a specific and unqualified duty to "[r]eport to the Commission any conduct of a licensed physician that may be cause for disciplinary action under [HO] §14-504. . . ." HO §14-205(b)(1)(iv). This provision, too, suggests that the Board has no authority to act independently on HO §14-504 allegations against a physician, whether in the context of license renewal or otherwise.

In short, the refusal by the Board to renew or reinstate a license because of its conclusion that the physician has committed an act prohibited by HO §14-504 is no different in effect than a suspension or revocation of that license. For the reasons stated above, the Board lacks authority to take that disciplinary action.

We appreciate and support the Board's desire to contribute to the improvement of medical care in Maryland. However, as is true of all State agencies, the Board must carry out its activities within the confines laid down by the General Assembly. If the Board believes that a physician who has applied for renewal or reinstatement of a license has committed an act prohibited by HO §14-504, the Board should defer action on the application and report promptly to the Commission the facts underlying its belief. See HO §14-205(b)(1)(iv).¹⁰

IV

Conclusion

In summary, it is our opinion that the Board of Medical Examiners may not deny a physician's application for license renewal or reinstatement based on its determination that the physician violated HO §14-504.

J. JOSEPH CURRAN, JR., *Attorney General*

JUDSON P. GARRETT, JR., *Deputy Attorney General*

¹⁰ Under §10-404 of the State Government Article, a licensee whose renewal application is held pending investigation by the Commission on Medical Discipline would be entitled to practice under the old license until the matter is resolved.

JACK SCHWARTZ
Chief Counsel
Opinions and Advice

Editor's Note: In Chapter 109 (Senate Bill 508) of the Laws of Maryland 1988, the General Assembly created the State Board of Physician Quality Assurance in lieu of the now-abolished Board of Medical Examiners and Commission on Medical Discipline.

HEALTH SERVICES COST REVIEW COMMISSION

PHYSICIAN IDENTIFICATION—CONFIDENTIALITY—COMPILATION OF PUBLIC DATA BY HOSPITAL ASSOCIATION NOT PROHIBITED, BUT COMMISSION'S PLAN TO ASSURE FULLER PROTECTION OF IDENTITIES WILL PROPERLY CARRY OUT LEGISLATIVE INTENT.

September 10, 1987

*The Honorable Thomas V. Mike Miller, Jr.
President, Senate of Maryland*

You have requested our opinion regarding the permissible use of physician identifier numbers under §19-213 of the Health General Article ("HG" Article). Specifically, you ask whether the current practice of the Maryland Hospital Association ("MHA") in compiling and then marketing these numbers in a published report is prohibited by HG §19-213(4). Under this provision, all Maryland hospitals are required to submit to the Health Services Cost Review Commission ("HSCRC") information that includes:

"physician information sufficient to identify practice patterns of individual physicians across all facilities. The names of individual physicians are confidential and are not discoverable or admissible in evidence in a civil or criminal proceeding, and may only be disclosed to the following:

- (i) The utilization review committee of a Maryland hospital;
- (ii) The Medical and Chirurgical Faculty of the State of Maryland;
- (iii) The State Board of Medical Examiners; or
- (iv) The Commission on Medical Discipline of Maryland."

For the reasons stated below, we conclude that MHA's publication, which analyzes physician practice patterns across all hospitals based on physician identifier numbers but which does not disclose the names of those physicians, is not prohibited under HG §19-213(4). Nevertheless, the subsequent use of the published information by a hospital to place pressure on a physician

to change his or her admitting practices to that hospital's advantage would be inconsistent with the purpose of HG §19-213. Hence, we support the HSCRC's current effort to develop a new reporting methodology that will assure greater confidentiality of physicians' identification.

I

Background

The HSCRC has been requiring Maryland hospitals to report discharge data since 1976. These reports include clinical, demographic, and charge data for all inpatient cases discharged from general acute care hospitals. The original data set included a physician identifier number for both the attending and operating physician in each case. This number was a hospital assigned physician identifier that preserved the confidentiality of the names of individual physicians involved.

The HSCRC sought this information in order to monitor the practice patterns of physicians in particular hospitals, so as to carry out more effectively its hospital cost containment responsibilities. However, the HSCRC's performance of this function was restricted by its inability to track physician practice patterns across hospitals.

HG §19-213(4), enacted as part of Chapter 112 of the Laws of Maryland 1985, was intended to solve this problem. The provision embodies one of the recommendations made by the Governor's Task Force on Health Care Cost Containment.¹ The Task Force recommended that the HSCRC have the authority "to collect and utilize information identifying practice patterns of individual physicians, including patterns of practice across different hospitals." *Report to the Governor*, Recommendation No. 11, at 31 (December 14, 1984). The Task Force believed that the data obtained by the HSCRC would be "of value to all Maryland practitioners, health planners and policy makers, and hospital medical boards," to make utilization review easier and to assist the HSCRC in its examination of the impact on hospital costs of physician practice patterns. Report at 32. However, the Task Force emphasized that

¹ The Task Force was convened by Governor Hughes in August 1984 to address the problem of the rapid escalation in health care costs. The Task Force developed a series of specific recommendations to address each of its concerns.

"[i]ndividual physicians should not be subject to public disclosure." *Id.*

II

Confidentiality Requirements

In response to HG §19-213(4), the HSCRC modified its physician identifier reporting regulations to require a physician identification system that was not hospital-specific. The development of the modified identification system resulted from the participation of the Medical and Chirurgical Faculty of Maryland ("Med Chi"), the MHA, and the HSCRC staff. The modified system became effective on July 1, 1985. *See* 12:13 Md. Reg. 1280 (June 21, 1985).

Under the system, each hospital submits the name and physician license number of all physicians reported on the HSCRC discharge data base to Med Chi in order to obtain a unique physician identification number. The hospital then reports the number obtained from Med Chi to HSCRC on the appropriate discharge record. *See* COMAR 10.37.06.

This system was designed to permit the tracking of physician practice patterns across hospitals while maintaining the confidentiality of individual physician names. The physician identification number, but not the physician's name, is included in the HSCRC's nonconfidential data base. The number itself is properly treated as public information. Thus, an MHA report that simply compiles this public information does not violate the confidentiality provisions of HG §19-213(4).

However, we share your concern about any hospital that, with the capacity to correlate identification numbers with the names of its own physicians, then examines the practice patterns of those physicians across other hospitals and is able, as you put it, "to place pressure on a physician to change his admitting practices to that hospital's advantage." Nothing in the history behind the enactment of HG §19-213(4) or in the law itself suggests that a hospital may use the physician identifier for this purpose.² Indeed, only the utilization review committee of a hospital is legally au-

² To the contrary, the Task Force recommended that the data not be made public "in a way that will improperly focus public attention on particular physicians. . . ." Report at 32.

thorized to be privy to the name of an individual physician that is reported by the hospital to the HSCRC. HG §19-213(4)(i).

To correct what it believes to be a misuse of the physician identifier, the HSCRC intends to implement a new alternate identification system this year. Under the new system, recommended by Med Chi, each physician will be assigned two identification numbers: one given to a hospital for its reports, the alternate disclosed to the public on the nonconfidential data base. Each hospital will have access only to the physician identifier it submitted on the discharge data base; a hospital will not be able to examine the practice patterns of its physicians across other hospitals, because it will not be able to match up its physician identifiers with the alternates. The new system will restrict the tracking of practice patterns of physicians across hospitals to the legally authorized entities only. It will thereby carry out the purpose of the confidentiality requirement of HG §19-213(4).

III

Conclusion

In summary, it is our opinion that the use by the Maryland Hospital Association of the nonconfidential, unique physician identification number in its reports of physician practice patterns is not prohibited under HG §19-213(4). At the same time, a hospital's subsequent use of this number to place pressure on a physician to change his or her admitting practices to that hospital's advantage is contrary to the intent underlying HG §19-213(4). To correct this misuse of the physician identifier, the HSCRC is implementing this year an alternate identification system that will allow the tracking of practice patterns of physicians across hospitals without impairing the confidentiality guaranteed by HG §19-213(4).

J. JOSEPH CURRAN, JR., *Attorney General*

STANLEY LUSTMAN, *Assistant Attorney General*

JACK SCHWARTZ

Chief Counsel

Opinions and Advice

HOMEOWNERS ASSOCIATION ACT

DISCLOSURE REQUIREMENTS—RECISSION RIGHTS—WAIVER PROHIBITION.

August 14, 1987

The Honorable Laurence Levitan
Senate Of Maryland

You have requested our opinion on several questions related to the Maryland Homeowners Association Act, Chapter 321 of the Laws of Maryland 1987. In general, your questions relate to the disclosures that sellers must make to buyers of houses in a development subject to the fees and restrictions of a homeowners association.

Given the number and detail of your questions, we do not think it feasible to summarize our conclusions. After setting out the pertinent provisions of the Act, we shall state your questions and our response to each.

I

The Act's Disclosure Requirements

The overall purpose of the Maryland Homeowners Association Act, according to its title, is "the regulation of homeowners associations in this State." The Act applies to property subject to a recorded instrument "that creates the authority for a homeowners association to impose on lots, or on the owners or occupants of lots . . . any mandatory fee in connection with the provision of services or otherwise for the benefit of some or all of the lots, the owners or occupants of lots, or the common areas." §11B-101(d)(1) of the Real Property Article ("RP" Article).

The disclosure requirements that are the subject of your request are a principal form of regulation under the Act. RP §11B-106(a) provides as follows:

"A contract for the resale of a lot within a development, or for the initial sale of a lot within a development containing twelve or fewer lots, to a member of the pub-

lic who intends to occupy or rent the lot for residential purposes, is not enforceable by the vendor unless:

(1) The purchaser is given, on or before entering into the contract for the sale of such lot, the disclosures set forth in subsection (b) of this section; and

(2) The purchaser is given any substantial and material amendment to the disclosures after they become known to the vendor."¹

The disclosures, to be provided to the buyer in writing, concern matters like the fees imposed by the homeowners association and the nature of any restrictive covenants.²

¹ The Act uses the term "purchaser" to denote the person buying a lot and the terms "vendor" and "owner" to denote the person selling a lot. In this opinion, we shall use the simpler terms "buyer" and "seller," respectively.

² RP §11B-106(b) provides:

"The vendor shall provide the purchaser the following information in writing:

(1) A statement as to whether the lot is located within a development;

(2) (i) The current monthly fees or assessments imposed by the homeowners association upon the lot;

(ii) The total amount of fees, assessments, and other charges imposed by the homeowners association upon the lot during the prior fiscal year of the homeowners association; and

(iii) A statement of whether any of the fees, assessments, or other charges are delinquent;

(3) The name, address, and telephone number of the management agent of the homeowners association, or other officer or agent authorized by the homeowners association to provide to members of the public, information regarding the homeowners association and the development, or a statement that no agent or officer is presently so authorized by the homeowners association;

(4) A statement as to whether the owner has actual knowledge of:

(i) The existence of any unsatisfied judgments or pending lawsuits against the homeowners association; and

(ii) Any pending claims, covenant violations actions, or notices of default against the lot; and

(5) A copy of the declaration and all covenants, restrictions, rules, and regulations, if applicable, relating to the development and the homeowners

continued

RP §11B-107 gives a buyer certain rescission rights:

“(a) A person who signs a contract as a purchaser but who has not received the disclosures required by §11B-105 or §11B-106, as applicable, shall, prior to settlement, be entitled to rescind the contract and to the immediate return of deposits made on account of the contract.

(b) Any purchaser may within three days following receipt by the purchaser of a substantial and material amendment to the disclosures required by §11B-105 or §11B-106, as applicable, which adversely affects the purchaser, rescind in writing the contract without stating a reason and without liability on the part of the purchaser, and the purchaser shall be entitled to the return of deposits made on account of the contract.

(c) The rights of a purchaser under this section may not be waived in the contract and any attempted waiver is void. However, if any purchaser proceeds to closing the purchaser's right to rescind under this section is terminated.”³

The Act was originally introduced two years ago at the request of the Governor's Commission on Condominiums, Cooperatives, and Homeowners Associations. That bill, Senate Bill 630 (1985 Session), contained substantially the same disclosure requirements and rescission rights as in the 1987 Act. Last year's bill, Senate Bill 475 (1986 Session), which failed of Senate passage at the eleventh hour, was identical. The Governor's Commission characterized the disclosure requirements as “self-enforcing consumer protections. . .,” intended to “solve the problem of disclosure now faced by consumers.” 1985 Final Report at 11.

Note 2 continued

association, to which the purchaser shall become obligated upon becoming the owner of the lot, including a statement that these obligations are enforceable against an owner and the owner's tenants, if applicable.”

RP §11B-105 imposes far more extensive disclosure requirements on the first seller of a lot in a development containing more than 12 lots.

³ RP §11B-108 also gives the buyer a right of action against the seller if the seller has made “an untrue statement of a material fact” or has omitted “a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading. . . .”

II

Timing of Disclosures

Your first set of questions relates to the requirement that the purchaser be given, "on or before entering into the contract for the sale of [a] lot," the required disclosures. As you put it "the threshold question is what is meant by 'on or before entering into the contract?'":

"Does this mean that the purchaser must be given all disclosures when the purchaser first signs the contract (before the seller signs) which is actually an offer to buy from the [purchaser] and does not become a contract presumably until it is accepted by the seller?"

Not necessarily. The evident intent of the provision is that a buyer be provided the facts that will allow the buyer to make a rational judgment about whether to contract for the particular house. This objective is satisfied so long as the buyer receives the required disclosures at a time when the buyer still has an opportunity to decide whether to enter a binding contract. The Act's legislative history supports this construction in a reference to the consequences of the seller's failure to provide the required information: "If the seller does not give the required disclosures *before the contract of sale is entered into*, the contract is unenforceable and the buyer may rescind the contract up to the time of closing and get his deposits back." Report of Senate Judicial Proceedings Committee on Senate Bill 96, at 1 (February 17, 1987) (emphasis added).

Your second question is related:

"Does the Act allow the seller, when receiving the offer and prior to the purchaser being given any disclosures, to accept the offer with a counter addendum which is the information required by [RP §11B-106(b)]?"

Yes. Under the sequence suggested, the seller's addendum will convey to the buyer the required disclosures before the buyer consummates the contract. That is, if the buyer does not sign the seller's proposed addendum, there is no contract. This sequence accords with the overall legislative purpose discussed above.

Your next question deals with the situation in which the seller does not have all of the required information:

"Does the Act require that all disclosures that are

available (those that have been promulgated, disseminated and, where appropriate, recorded among the land records), *whether or not in the possession of the seller*, must be given to the purchaser on or before entering the contract or may they be given at a subsequent time pursuant to [RP §11B-106(a)(2)]?

The scenario here would be that a seller knows that there are dues and knows that there are assessments; however, he does not know the exact dollar amount and leaves that disclosure blank with the intent to provide it later. Also, the seller knows that there are rules and regulations, rights of way and by-laws, but does not have them available and wants to provide them later. Can this be accomplished within the framework of [RP §11B-106(a)(2)] or is it too late because they are previously known by the sellers, just not available?" (Emphasis in original.)

In our view, the seller has a duty to obtain and disclose to the buyer, prior to the formation of the contract, all of the information described in RP §11B-106(b)(1), (2), (3), and (5). If the seller does not know the information, or does not have a copy of a document that is required to be disclosed, the seller has a duty to obtain the information or the document and provide it to the buyer prior to the consummation of the contract.

The duty to obtain the information, when it is not already known, follows not only from the flat command in the introductory phrase of RP §11B-106(b) but also from the implication of RP §11B-106(b)(4), which requires "a statement as to whether the owner has actual knowledge of" certain judgments and claims. Actual knowledge, then, is a component of the seller's duty to disclose only as to the information required by RP §11B-106(b)(4). It is not a limitation on the seller's duty to disclose the other information required by RP §11B-106(b). As the Governor's Commission observed, "since the owner can obtain certain information more easily than the purchaser, it was the Commission's belief that the owner should have the burden of providing at least a minimal amount of information concerning the Homeowners Association to the purchaser." 1986 Report at 9. *Cf.* Article 56, §224(r) of the Maryland Code and COMAR 09.11.02.01D (real estate agent's duty "to ascertain" and disclose material facts about property).

Thus, in your examples, if a seller knows that there are dues

and knows that there are assessments, the seller is required to ascertain the exact dollar amount and may not leave the disclosure blank merely because he or she does not presently know the amounts. Similarly, a seller must obtain rules and regulations, rights of way, and by-laws and provide them to the buyer prior to the formation of a contract; the seller's failure to do so gives the buyer the right to rescind under RP §11B-107(a).

Your final question under this topic makes the point differently:

"The thrust of the above question is the following: Can substantial and material amendments to disclosures be validly given subsequent to entering into the contract when they were in fact *known* to the vendor at or prior to execution of the contract, but just not available to him at that time?" (Emphasis in original.)

No, for the reasons stated above.

III

Amended Disclosures

Your next question relates to the procedure under which the seller makes amendments to disclosures:

"Can the 'substantial and material amendment' be a unilateral giving from the seller to the purchaser without acknowledgment or receipt by the purchaser? There could very well be a time when the purchaser might refuse to sign the addendum containing the amendment thereby retaining the option to rescind under [RP §11B 107(a)]."

RP §11B-106 speaks of the seller's duty to "giv[e]" or to "provide" the buyer with the required information. RP §11B-107 is drafted in terms of the buyer's having "received" the disclosures. The intent, apparently, is that the seller deliver the disclosures into the buyer's actual possession. If actual delivery is made, the statutory requirement will have been satisfied even if the buyer refuses to acknowledge receipt. However, a prudent seller ought to have some proof of delivery.

If an amendment is embodied in a proposed contract addendum and is actually delivered to the buyer, the buyer will have the

right to rescind within three days, under RP §11B-107(b). In our view, under these circumstances the buyer would not have an entitlement under RP §11B-107(a) to rescind without time limit, which is the remedy if the buyer "has not received the disclosures. . . ."

Your other questions related to an amendment contained in a contract addendum are as follows:

"a. Can a buyer refuse to accept the addendum and attachments in any manner? or

b. Can he accept the documents, but refuse to sign the addendum?

c. If yes to either a or b above, is the contract still rescindable by the buyer?"

As the discussion above indicates, while the buyer can choose to ignore an amendment actually delivered to the buyer by the seller, the buyer would no longer have the unlimited right to rescind under RP §11B-107(a). Nor would a buyer's refusal to sign an addendum containing the amendment itself invalidate the contract. Rather, the buyer would have the more limited right to rescind under RP §11B-107(b).

IV

Rescission

You next ask about a buyer's right to rescind a contract after receipt of an amendment:

"Does [RP §11B-107(b)] indicate a three day rescission for the purchaser after he receives a substantial and material amendment. Although this subsection indicates that the amendment information must adversely affect the purchaser to enable him to rescind, there is no standard by which to assess this; the section states that the purchaser may rescind 'without stating a reason.' How is the seller to ascertain whether or not the amendment 'adversely affects the purchaser?'"

RP §11B-107(b) states that the buyer may "rescind in writing the contract *without stating a reason* and without liability on the

part of the purchaser . . .” Given this language, we see no way in which the seller can require an explanation of how the amendment “adversely affects” the buyer. Stated differently, this provision in practical effect allows the buyer to be the sole judge of whether an amendment “adversely affects” the buyer.

Your next question deals with the right of rescission and its relation to settlement:

“With regard to the same subsection, does the right to rescind automatically expire with completion of the settlement? In other words, the substantial and material amendment may be given to the purchaser one day before settlement and settlement occurs the next day. Does the purchaser then have two more days to rescind the contract and the settlement?”

RP §11B-107(c) provides that “if any purchaser proceeds to closing the purchaser’s right to rescind under this section is terminated.” Hence, we conclude that if a buyer proceeds with settlement, notwithstanding that the buyer has been given an amendment only the day before, the buyer’s right to rescind under RP §11B-107(a) will have terminated at settlement.

On the other hand, the three day rescission period under RP §11B-107(b) is plainly intended to allow the buyer three days to consider the effect of the amendment on his or her buying decision. In the example that you give, where the amendment is provided to the buyer only a day before settlement, we believe that the buyer has an implied right under RP §11B-107(b) to postpone settlement for two days, to allow for the full three day period within which to rescind.

V

Waiver

Your final question deals with the prohibition on a buyer’s waiver:

“[RP §11B-107(c)] states that a purchaser may not waive his rights in a contract. May a purchaser in the contract or in an appropriate addendum acknowledge receipt of certain information and disclosures, acknowl-

edge that other information is required to be given to him and affirmatively state that he does not wish to see or obtain any additional information?"

No. A contract clause of this kind is nothing more than a waiver of the statutory right to receive the required disclosures and is void under RP §11B-107(c). Obviously, nothing in the Act prevents a buyer from ignoring the disclosures, if that is what the buyer wants to do. But a clause waiving entitlement to the information is prohibited.

J. JOSEPH CURRAN, JR., *Attorney General*

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Opinions and Advice

Editor's Note: In Chapter 82 (House Bill 388) of the Laws of Maryland 1988, the General Assembly significantly amended many provisions of the Homeowners Association Act.

INSURANCE

DENTAL PLANS—DENTAL PLANS LICENSED PURSUANT TO SUBTITLE 42 OF ARTICLE 48A ARE GENERALLY SUBJECT TO REQUIREMENTS OF INSURANCE CODE AS A WHOLE.

September 18, 1987

The Honorable Edward J. Muhl
Insurance Commissioner
Department of Licensing and Regulation

You have requested our opinion concerning the relationship of Subtitle 42 of Article 48A, the Dental Plan Organization Act, with other elements of Article 48A, the Insurance Code. Specifically, you ask whether a dental plan organized and licensed pursuant to Subtitle 42 “is subject to all, a portion, or none of the remainder of Article 48A.”

For the reasons stated below, we conclude that dental plans licensed pursuant to Subtitle 42 of Article 48A are generally subject to requirements codified elsewhere in the Insurance Code, except to the extent that a provision in Subtitle 42 is more specific than a requirement on the same subject elsewhere in the Insurance Code.

I

Introduction

In 1984, the General Assembly enacted the Dental Plan Organization Act, Chapter 603 of the Laws of Maryland 1984, codified as Subtitle 42 of Article 48A.¹ The Act’s title states its purpose as broadly “providing for the regulation of prepaid dental plans. . . .” “Dental plans” are defined in Subtitle 42 as “any contractual arrangement for dental services provided, arranged for, or administered directly on a prepaid, postpaid individual, or

¹ Prior to the enactment of Subtitle 42, dental plans, for the most part, were entirely unregulated. Indeed, few dental plans had been regulated anywhere in the country at that time.

group capitation basis." §581(b). A "dental plan organization" is defined as "any person who undertakes to provide directly, arranges for, or administers a dental plan that provides dental services." §581(c).²

Dental plans, whether formed pursuant to Subtitle 42 or offered by a traditional insurer, generally operate in a similar manner. The dental plan organization enters into a contract with participating dental care providers, who agree to provide dental care to plan enrollees at reduced rates. These rates generally are prearranged between the plan and providers and are not subject to negotiation by enrollees.

In exchange for providing low cost dental care to the plan's enrollees, each provider receives payment from the plan. This payment may be fixed or variable, the latter based upon the number of enrollees who visit the particular provider within the payment period.

A plan negotiates either group or individual contracts with enrollees, who are charged a specific fee on a monthly, yearly, or other periodic basis. The enrollee is then entitled to receive dental services for the term of the contract. Fees to enrollees under these plans are generally much lower than the expense of traditional dental care, because the overall cost of providing the dental services is spread among large numbers of enrollees.

II

Legislative History of the Dental Plan Organization Act

The legislative history of House Bill 281, which was enacted as Chapter 603 of the Laws of Maryland 1984, is sparse. However, that history reveals the General Assembly's preeminent concern: that these plans be adequately regulated.

Testimony from proponents of House Bill 281, including the Maryland State Dental Association, graphically pointed out the

² "Dental services" encompass "any service included in the practice of dentistry. . . ." Article 48A, §581(d). See §4-101(e) of the Health Occupations Article.

need for regulation of dental plans. The Dental Association testified that unchecked and unregulated dental plans have been havens for unscrupulous and possibly criminal behavior nationwide. Examples were given of plans organized in Pennsylvania, one of which closed its doors with \$1 billion in liabilities and less than \$100,000 in assets, leaving 2,700 patients without the care for which they had contracted. Similarly, a California plan closed in 1982, leaving behind 70,000 participants. The plan had \$250,000 in assets and \$10 billion in liabilities at the time it closed. The Dental Association's testimony described numerous other plans nationwide that failed due to lack of regulatory control.

House Bill 281 was intended to prevent a comparable problem from arising in Maryland: "The purpose of this bill is to provide financial and other protection to subscribers of prepaid dental plans." Report of the Senate Economic Affairs Committee, *Summary of Committee Report* (House Bill 281), at 2 (1984). To that end, "The Insurance Commissioner would have authority to regulate all pre-paid dental plans in Maryland, except ERISA regulated plans." *Summary* at 1.

Hence, we have clear evidence that the General Assembly was aware of the urgent need for regulatory control of dental plans in Maryland. Moreover, it specifically intended that the Insurance Commissioner exercise his regulatory powers to protect the consuming public and to provide the necessary oversight for dental plan operations.³

³ The legislative history also reveals that the General Assembly sought to achieve regulation that would apply equally to both large, structured, corporate dental plans and to plans operating on a small, individualized basis. According to a staff document in the legislative file, an amendment to House Bill 281 that would have imposed a flat \$75,000 surplus requirement upon all dental plan organizations, without exception, was rejected

"because it would prohibit small dental plans from functioning within the marketplace, would reduce competition, and would thus hurt the consumers. Most of the dental plans that would be adversely affected by this amendment would be small plans formed by individual practitioners who offer their services to individual enrollees within a community."

Instead of this specially burdensome requirement, the General Assembly provided for a different exemption procedure. See §586(c). In general, small plans are able to compete equally within the regulatory framework to which all plans are subject.

III

Harmonization of Subtitle 42 with Article 48A

A. *Dental Plans as "Insurers"*

A threshold question in making the determination of whether Subtitle 42 entities are subject to the remainder of the Insurance Code is whether a dental plan, as defined in Subtitle 42, is an "insurer" within the meaning of Article 48A, §3.⁴ We conclude that, although dental plans also engage in providing certain health care services, the plans themselves are primarily engaged in the business of insurance and are, therefore, "insurers."

"Insurance" is defined as "a contract whereby one undertakes to indemnify another or pay or provide a specified or determinable amount or benefit upon determinable contingencies." Article 48A, §2. Historically, determining the precise boundaries of insurance has proved to be quite difficult. *See* 63 *Opinions of the Attorney General* 422, 424 (1978). In that opinion, the Attorney General identified five elements characterizing a contract of insurance:

(a) The insured possesses an interest of some kind susceptible of pecuniary estimation, known as an insurable interest.

(b) The insured is subject to a risk of loss through the destruction or impairment of that interest by the happening of designated perils.

(c) The insurer assumes that risk of loss.

(d) Such assumption is part of a general scheme to distribute actual losses among a large group of persons bearing somewhat similar risks.

(e) As consideration for the insurer's promise, the insured makes a ratable contribution, called a premium, to a general insurance fund." 63 *Opinions of the Attorney General* at 425 (quoting Vance, *Law of Insurance* §1 (3rd ed. 1951)) (emphasis omitted).

See also 55 *Opinions of the Attorney General* 196, 198 (1970).

⁴ Article 48A, §3 provides: "Insurer" includes every person engaged as indemnitor, surety, or contractor in the business of entering into contracts of insurance."

Dental plans collect fees, akin to insurance premiums; indemnify participants against the risk of high cost dental care; and pay a specified or determinable benefit on behalf of each participant upon the determinable contingency of necessary dental care. Accordingly, we conclude, they are engaged in the business of insurance. Indeed, the entire premise behind dental plan operations is to spread the "risk" of high cost care among as large a number of participants as possible. As this office previously stated: "Distribution of risk of loss among a large group of persons bearing somewhat similar risks lies at the heart of the concept of insurance." 63 *Opinions of the Attorney General* at 425.

That opinion determined that a prepaid dental plan, operating prior to the enactment of Subtitle 42, was engaged in the business of insurance. In reaching that conclusion, the Attorney General observed that the plan, "whether sold on either an individual or group basis, meets the statutory definition of insurance and also contains the paramount elements of insurance." Those "elements" were identified as:

- "1. The assumption of a binding obligation to pay benefits which are fixed or determinable upon the happening of certain events which are for the most part beyond the control of the insured;
 2. Its use of the application of the law of large numbers;
 3. The payment of a premium to make it function;
 4. Clear disparity in bargaining power between the members and the plan; and
 5. Its potential for deception and misleading public solicitation as well as the danger of financial insolvency."
- 63 *Opinions of the Attorney General* at 426.

Dental plans organized pursuant to Subtitle 42 contain precisely the elements of insurance enumerated above and therefore are providing "insurance", as defined in Article 48A, §2. Accordingly, dental plans are "insurers."

B. Scope of Regulation

As insurers, dental plans are subject to regulation under Article 48A unless the General Assembly has exempted the plans

from its scope. We find no basis for the conclusion that the General Assembly intended to create a blanket exemption from the rest of the Insurance Code for Subtitle 42 dental plans.

When interpreting a statute, the primary concern is to ascertain and carry out the legislative "purpose, aim, or policy." *Kaczorowski v. City of Baltimore*, 309 Md. 505, 513 (1987). See also, e.g., *Equitable Trust Company v. State Commission on Human Relations*, 287 Md. 80, 86 (1980). We have already determined that the overriding concern of the General Assembly was to provide regulation for dental plans in order to protect the public. See Part II above.

Had the General Assembly concluded that this goal could be achieved even though some or all dental plans were to be exempt from the remainder of the Insurance Code, we believe that it would have set out the exemption explicitly within the four corners of the statute. Indeed, in other situations the General Assembly has fashioned precisely this type of exemption. Organizations created pursuant to Subtitle 19 (fraternal benefit societies) and Subtitle 20 (non-profit health service plans) are specifically exempt from the remainder of the Insurance Code. Article 48A, §305 exempts fraternal benefit societies:

"Except as herein provided, societies shall be governed by this subtitle and Title 6, Subtitle 4 of the Corporations and Associations Article and shall be exempt from all other provisions of the insurance laws of this State, not only in governmental relations with the State, but for every other purpose. No law hereafter enacted shall apply to them, unless they be expressly designated therein."

Similarly, §354(a) provides:

"Any corporation without capital stock heretofore or hereafter organized for the purpose of establishing, maintaining and operating a non-profit health service plan . . . shall be governed and regulated by the provision of this subtitle, and by no other law relating to insurance unless such law is referred to under this subtitle, and no law hereafter enacted shall apply to such corporations unless they are expressly designated therein, and specifically refer to such corporations."

To further stress the fact that these exemptions are to be interpreted as all-encompassing, the General Assembly enacted §9,

which unequivocally exempts Subtitle 19 and 20 entities from the general regulation of the Insurance Code.

Had the General Assembly intended to create a similar exemption for dental plans, it could have—and, we believe would have—done so. We conclude that comparable language is not within Subtitle 42 because the General Assembly intended no such exemption.

To be sure, the General Assembly created a relatively comprehensive regulatory scheme for dental plans.⁵ Nevertheless, Subtitle 42 and the remainder of Article 48A are complementary, rather than mutually exclusive. Where possible, statutes “which deal with the same subject matter must be construed together if they are not inconsistent with one another. Thus, to the extent possible, full effect should be given to each.” *Management Personnel Services v. Sandefur*, 300 Md. 332, 341 (1984). It is possible, in this case, to give full effect to all applicable provisions.

To the extent that Subtitle 42 contains more specific provisions than similar provisions in the remainder of the Insurance Code, the specific provisions relating to dental plans will control over provisions relating to insurers generally. This construction carries out the mandate of Article 48A, §11, which provides:

“Provisions of this article relative to a particular kind of insurance or a particular matter shall prevail over provisions relating to insurance in general or insurers in general or to such matter in general.”

For example, §586 sets out dental plan surplus or bond requirements. This will control, rather than §§47 and 48, which deal with capital and surplus requirements generally.

However, in instances where Subtitle 42 is silent, the general provisions will control—for example, in the application of Subtitle 17, “Stock and Mutual Insurers”; the rulemaking authority of the Insurance Commissioner (§26); the power of the Insurance Com-

⁵ Subtitle 42 provides for application for certificates of authority (§583); approval by the Commissioner for the issuance of certificates of authority (§585); surplus requirements (§586); investigations by the Insurance Commissioner (§588); annual reporting requirements (§590); grounds for suspension or revocation of certificates of authority (§593); and the Commissioner’s authority to issue cease and desist orders and injunctions (§§594, 595).

missioner to subpoena witnesses (§27); and the power of the Insurance Commissioner to enforce those provisions of the Unfair Trade Practices Act (Subtitle 15) not specifically preempted by Subtitle 42. See *Lumbermen's Mutual Casualty Co. v. Insurance Commissioner*, 302 Md. 248 (1985).

We find further support for this construction in Subtitle 42 itself. Were dental plans not subject to the remainder of Article 48A, the applicability of the Insurance Commissioner's rulemaking authority would be in doubt.⁶ Yet Subtitle 42 clearly indicates that the General Assembly contemplated instances in which the Commissioner may choose to adopt regulations. For example, §593(a) states, in part:

"The Commissioner may suspend or revoke any certificate of authority issued to a dental plan organization under this subtitle if the Commissioner finds that any of the following conditions exists:

...

(7) The dental plan organization has failed to comply with this subtitle or any rules and regulations promulgated pursuant to it."

But Subtitle 42 itself contains no grant of rulemaking authority. Had the General Assembly intended Subtitle 42 dental plans to be exempt from Article 48A, and therefore beyond the Commissioner's rulemaking authority, it would not reference the Commissioner's use of that very authority in §593(a)(7).

To interpret Subtitle 42 otherwise would thwart the stated legislative intent of "providing for the regulation of prepaid dental plans," for the Insurance Commissioner would, for example, be unable to penalize fraudulently filed financial statements (§221), illegally collected premiums (§230), or refusals to pay dental providers under the plan (§230A). The General Assembly intended to carve certain exceptions for dental plans out of the formidable mass of regulations applicable to all insurers, in order to preserve plans that could service small communities. In our view, it did not intend to truncate the Insurance Commissioner's ability to fully regulate all plans in order to protect the public interest.

⁶ Section 26 states, in pertinent part: "The Commissioner may make reasonable rules and regulations necessary for or as an aid to effectuation of any provision of this article." See *Insurance Commissioner v. Blue Shield of Maryland*, 295 Md. 496 (1983).

IV

Conclusion

In summary, it is our opinion that dental plans licensed pursuant to Subtitle 42 of Article 48A are generally subject to requirements codified elsewhere in the Insurance Code, except to the extent that a provision in Subtitle 42 is more specific than a requirement on the same subject elsewhere in the Insurance Code.

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LOCAL GOVERNMENT

MUNICIPAL CORPORATIONS—BOUNDARY CHANGE—DETACHMENT
OF TERRITORY.

August 28, 1987

The Honorable Reginald M. Felton
Mayor of Highland Beach

You have requested our opinion concerning the procedures by which the act incorporating the Town of Highland Beach may be changed to correct an apparently erroneous description of the town's boundaries. Mr. Frederick C. Sussman, the town attorney, has advised you that the General Assembly is prevented by the Municipal Home Rule Amendment to the Maryland Constitution from amending the act of incorporation to redescribe the town's boundaries.

For the reasons stated below, we agree with Mr. Sussman's conclusion: The General Assembly lacks authority to amend the act incorporating Highland Beach (or the town's charter, which incorporates the act's description of the boundaries). It might be possible for Highland Beach itself to adopt a corrective amendment, but its authority to do so is not clear. We suggest that the General Assembly consider enactment of legislation, applicable to all municipalities, that provides procedures for the detachment of territory.

I

Background

The Town of Highland Beach was incorporated by Chapter 213, Laws of Maryland 1922. Chapter 213 provided that "the ground included within the boundaries of the said town of Highland Beach shall be all [the] ground" specified in an 1893 deed, totalling 40 acres. That land, we are informed, includes 13 1/3 acres now known as the community of Venice Beach. Your opinion request points out that, "In the 65 years since the Town was incorporated, the community of Venice Beach has never been consid-

ered a part of the Town either by town officials or by the property owners and residents of the Venice Beach community.”

As Mr. Sussman observed in his opinion to the Board of Commissioners, this longstanding view of the situation by all concerned does not alter the legal consequences of what the General Assembly enacted in 1922:

“It would be pure speculation to guess as to whether the description of the Town’s boundaries by the General Assembly intentionally or inadvertently included all 40 acres, including what is now known as Venice Beach. That description of the Town’s boundaries has never been altered by the General Assembly, and it is perpetuated in Article I, Section 104, of the Highland Beach charter. The fact that the Town government may have never recognized the community of Venice Beach as being within the corporate limits of the Town makes little difference. As a matter of law, those properties lying within the community of Venice Beach lawfully are part of the Town and are subject to the same benefits and burdens as other property within the corporate limits.” Letter from Frederick C. Sussman, Esquire, at 2 (November 17, 1986).

The current issue, therefore, is whether the description of the town’s boundaries in its act of incorporation and charter can be made to conform to the historical reality.

II

Uniformity Requirement

Article XI-E, §1 of the Constitution prohibits the General Assembly from enacting any law “relating to the incorporation, organization, government or affairs” of any municipal corporation, if the law “will be special or local in its terms or in its effect. . . .” See generally *Prince George’s County v. Laurel*, 262 Md. 171 (1971). Instead, “the General Assembly shall act in relation to the incorporation, organization, government or affairs of any such municipal corporation only by general laws which shall in their terms and in their effect apply alike to all municipal corporations

in one or more of the classes provided for in Section 2 of this Article.”¹

Thus, since the enactment of the Municipal Home Rule Amendment in 1954, the General Assembly has been prohibited from “enact[ing] local legislation to amend charters of individual municipalities.” *Hitchins v. City of Cumberland*, 208 Md. 134, 143 (1955). We agree with Mr. Sussman that legislation to change the description of the boundaries of Highland Beach would run afoul of this prohibition. See 58 *Opinions of the Attorney General* 153, 157 (1973).

III

Alternative Procedures

You have also asked whether any procedure to redesignate the corporate boundaries of Highland Beach is available, if the General Assembly may not pass a curative act.

One possible procedure is for the town itself to amend its charter, although this course is legally uncertain. In 41 *Opinions of the Attorney General* 133 (1956), this office was asked for an opinion “as to the procedure by which a municipal corporation may provide for detachment or excision of territory.” The opinion concluded that detachment might be accomplished by charter amendment:

“The power to detach territory from a municipal corporation is analogous to the power of annexing new territory. Annexation may be achieved by statute or by charter amendment. And the same is true of detachment. As Article XI-E confers all powers of municipal government to the municipal corporation except those reserved to the

¹ Article X1-E, §2 directs the General Assembly to “classify all such municipal corporations by grouping them into not more than four classes based on population. . . .” The General Assembly has created but a single class, encompassing all municipal corporations. Article 23A, §10 of the Maryland Code. (The City of Baltimore is not a municipal corporation for purposes of the Municipal Home Rule Amendment or its implementing statute. Article X1-E, §1; Article 23A, §9(a).)

Legislature or brought about by general legislation by the Legislature, there would seem to be no doubt that a municipal corporation has power and authority to detach. Since the Legislature has not provided a statutory method to achieve detachment as it has to achieve annexation, the alternative procedure by detachment by charter amendment is available to the municipal corporation." 41 *Opinions of the Attorney General* at 134 (citations omitted).

See Birge v. Town of Easton, 274 Md. 635, 644 (1975) ("A municipality possesses the power and authority to amend its charter with respect to matters relating to its internal 'incorporation, organization, government or affairs'").²

We caution, however, that this conclusion is not at all free from doubt and is not supported by any reported case in Maryland regarding detachment of territory by a municipality. As the opinion observed, the General Assembly has provided a detailed procedure for annexation of land by a municipality. See Article 23A, §19. The detachment of land would be comparable in its effect on the residents of the detached area and of the municipality itself. If presented with the question, a court might well conclude that the power to detach territory is not a part of the residual home rule power granted by Article XI-E, §3 of the Constitution. *See generally* 68 *Opinions of the Attorney General* 295, 297-98 (1983).

The best solution to the problem—one that would assist Highland Beach and any other municipality that might discover a similar problem, while at the same time preserving the rights of those affected—would be enactment by the General Assembly of a general law specifying detachment procedures, comparable to the procedures for annexation in Article 23A, §19. Without such legislation, Highland Beach's effort to correct the problem on its own will entail substantial legal risk.

² Under Article 23A, §9(e), "The term 'municipal charter' shall include the existing charter and all local laws of the General Assembly relating to the incorporation, organization, government, or affairs concerning administration and services, of said municipal corporation."

IV

Conclusion

In summary, it is our opinion that:

1) The General Assembly lacks authority to effect a change in the boundaries of Highland Beach through amendment of the town's act of incorporation or charter.

2) Although Highland Beach arguably has authority to detach territory through a charter amendment, this course is legally uncertain.

We suggest that the General Assembly consider the enactment of general legislation providing for the detachment of territory by a municipality.

J. JOSEPH CURRAN, JR., *Attorney General*

JACK SCHWARTZ
Chief Counsel
Opinions and Advice

LOCAL GOVERNMENT—MUNICIPAL CORPORATIONS—ANNEXATION
PROCEDURES—REFERENDUM PETITION—VOTER WHO MEETS
MUNICIPALITY'S QUALIFICATIONS FOR VOTING AT TIME PETI-
TION IS CIRCULATED MAY SIGN PETITION.

September 30, 1987

*Charles W. Elgin, Sr., President
The Commissioners of Poolesville*

You have requested our opinion concerning the qualification of voters to sign a petition seeking a referendum on an annexation resolution. Your question turns on the meaning of "qualified voters of the municipal corporation" in Article 23A, §19(g) of the Maryland Code. Specifically, your questions are:

1. May a person who is a qualified voter of the Town of Poolesville on the date an annexation resolution is enacted sign a referendum petition, even though the person was not a qualified voter at the time of the last regular or special election in the Town?

2. If so, may a person who registers to vote within the 45 day period immediately following the enactment of an annexation resolution sign a referendum petition and vote in the referendum?

The Town Attorney, Richard S. McKernon, Esquire, has stated his opinion as follows with regard to your questions:

"[A]ny person who is a qualified voter of the Town of Poolesville on the date a referendum petition on an annexation resolution is presented for signature may sign that petition regardless of the fact that such person was not a qualified voter at the time of the last town regular or special election. It is also my opinion that under the provisions of the Poolesville Charter any otherwise qualified person may register to vote and sign a referendum petition during the 45 day period following the enactment of annexation resolution." Letter to Jack Schwartz, Chief Counsel for Opinions and Advice, at 1 (August 25, 1987) (copy attached).

For the reasons stated below, it is our opinion that, under Article 23A, §19(g), a voter who meets the qualifications for voting specified in the municipal charter at the time a referendum petition is presented for signature may sign the petition, even if the

voter (i) was not a qualified voter at the last election or (ii) became a qualified voter after enactment of the resolution. The qualifications for voting in the Poolesville Charter are consistent with this requirement. Accordingly, we concur with Mr. McKernon's conclusions.

I

Discussion

An enlargement of a municipality's boundaries "may be initiated by resolution regularly introduced into the legislative body of the municipal corporation" Article 23A, §19(b). However, the resolution is subject to referendum if 20 percent of "the qualified voters of the municipal corporation" sign a petition calling for a referendum:

"At any time within the forty-five (45) day period following the final enactment of the resolution, a number of persons equal to not less than twenty per centum (20%) of the qualified voters of the municipal corporation may, in writing, petition the chief executive and administrative officer of the municipal corporation for a referendum on the resolution. Upon the presentation of a petition to the officer, he shall cause to be made a verification of the signatures thereon and shall ascertain that the persons signing the petition represent at least twenty per centum (20%) of the qualified voters of the municipal corporation. Upon verifying that the requirements of this subsection have been complied with, the officer shall by proclamation suspend the effectiveness of the resolution, contingent upon the results of the referendum." Article 23A, §19(g).

In general, the determination of who is a "qualified voter" is to be made by reference to the qualifications set out in the charter of the municipality. Article 23A, §9(d) provides that "the term 'qualified to vote' or 'qualified voter' shall mean those persons who under the terms of a municipal charter shall be authorized to vote in elections within that municipal corporation."¹ The question of

¹ Article 23A, §9(d) reflects the fact that municipalities are generally free to establish their own qualifications and procedures for municipal elections. See Article 33, §1-1(a)(6); Article 23A, §2(b)(29); *Hanrahan v. Altzman*, 41 Md. App. 71, 78 (1979). See also 55 *Opinions of the Attorney General* 84 (1970).

State law that you raise is whether a municipality may, in effect, cut off the qualification of voters prior to enactment of the resolution.²

We believe that §19(g) contemplates that the qualification of the voter is to be measured at the time the voter signs the petition. The requirement that the municipality make "a verification of the signatures thereon" implies as much. As in other like situations, the "verification" is whether the signature is that of a voter on the registration rolls at the time that he or she signed. *Cf. Barnes v. State et rel. Pinkney*, 236 Md. 564 (1964).

A voter's failure to be qualified at some prior election is not relevant to his or her qualification at the time of signing. While a town is free to establish reasonable procedures regulating voter registration, including periods when the registration books are closed, we believe that these procedures may not defeat the statutory purpose of allowing the requisite percentage of the contemporary electorate to bring about a referendum.

As the Town Attorney points out, the Poolesville Charter permits "continuous registration." Residents may register "up to and including thirty (30) days prior to any election or vote held in conjunction with the municipal activities of the Town of Poolesville. . . ." §82-6C. We also agree with the Town Attorney that this same provision means that persons who register to vote within the 45 day period immediately following the enactment of an annexation resolution may legally sign a referendum petition

² When originally introduced as Senate Bill 5 in the 1955 Session of the General Assembly, the Municipal Home Rule Act provided that an annexation resolution was to be put to referendum if the requisite number of "registered voters of the municipal corporation" signed the petition. By amendment, the term "registered voters" was changed to "qualified voters." Also by amendment, the definition of "qualified voter" in §9(d) was added.

In general, registration is not itself a qualification. *See, e.g.*, Article 33, §3-4. By substituting the word "qualified" for the word "registered," the General Assembly might be taken to have intended that persons meeting a municipality's requirements on matters like age and residency are entitled to sign a referendum petition (and vote in the ensuing election) even if they are not registered.

However, we think that, in this context, the change from "registered" to "qualified" need not—and should not—be read as precluding a municipality from establishing registration as a qualification. This change, coupled with the definition in §9(d), is better understood as an accommodation of municipalities that may not require registration at all. But §§9(d) and 19(g) leave a municipality free to establish registration as one such qualification. *See Board of Supervisors of Elections v. Goodsell*, 284 Md. 279, 284-85 (1979).

and vote in the ensuring referendum, which could not be held sooner than 30 days after the end of this 45 day period. *See* Article 23A, §19(i).

II

Conclusion

In summary, we agree with the Town Attorney that any person who meets the qualifications for voting set out in the Poolesville Charter at any time during the 45 day period following enactment of an annexation resolution may sign a petition calling for a referendum on the petition and may vote in the referendum election itself.

J. JOSEPH CURRAN, JR., *Attorney General*

JACK SCHWARTZ

Chief Counsel

Opinions and Advice

August 25, 1987

Jack Schwartz, Esquire

Chief Counsel

Opinions and Advice

Office of the Attorney General

Dear Mr. Schwartz:

Recently the Town of Poolesville requested the opinion of your office as to whether anyone who is a qualified voter of the town on the date an annexation resolution is enacted may sign a referendum petition regardless of the fact that the person in question may not have been a qualified voter at the time of the last town regular or special election. Assuming an affirmative answer to

the first question, your opinion was also requested as to whether persons who register to vote within the 45 day period immediately following the enactment of an annexation resolution may legally sign a referendum petition.

You have stated in an August 17, 1987 letter to the President of the Commissioners of Poolesville that you will require my professional opinion on the above questions before the issuance of an opinion by your office.

For the reasons set forth below it is my opinion that any person who is a qualified voter of the Town of Poolesville on the date a referendum petition on an annexation resolution is presented for signature may sign that petition regardless of the fact that such person was not a qualified voter at the time of the last town regular or special election. It is also my opinion that under the provisions of the Poolesville Charter any otherwise qualified person may register to vote and sign a referendum petition during the 45 day period following the enactment of an annexation resolution.

The provisions of State law governing petitioning annexation resolutions to referendum are contained in Sections 19(f)–(l), and (r) of Article 23A of the 1957 Annotated Code of Maryland. Section 19(g) provides for a referendum on an annexation resolution by a petition signed by at least 20% of the qualified voters of the municipal corporation. Nowhere in Section 19 or in Article 23A is the term “qualified voter” defined. On the contrary, Section 19(r) appears to leave this determination to the municipalities by providing as follows:

“(r) *Conduct of election; tabulation of results; expenses*—. The mayor and council, by whatever name known, of every municipal corporation is hereby authorized and empowered, by ordinance, resolution or regulation, to make proper provision for conducting, and for tabulating the results of any referendum to be held under the provisions of this section. The mayor and council of the municipal corporation shall pay in full for the expenses of any referendum”.

The foregoing conclusion is further supported by the fact that Section 2(b) 29 of Article 23A authorizes municipalities, “to provide for special elections for municipal purposes, at such times and places as may be determined, and subject to the provisions of the charter of said municipality”. Further authority for municipal control over its electoral process and voter qualification is found

in the general grant of governmental authority in Section 3 of Article XI-E of the Constitution of Maryland.

Pursuant to the foregoing grants of authority the Town of Poolesville has provided in Section 82-6D of its charter, a copy of which is enclosed, that persons may register to vote "up to and including thirty (30) days prior to any election or vote held in conjunction with municipal activities of the Town of Poolesville or for the election of Commissioners". The definition of what constitutes a qualified voter appears in Section 82-6A and 82-6D of the Town Charter which provides:

A. Definitions. All persons who have been properly registered as hereinafter provided shall be qualified voters of the Commissioners of Poolesville, hereinafter referred to in this Section as the "Town of Poolesville".

D. Qualification of voters. Residents of the Town of Poolesville shall be registered and qualified as voters if they are citizens of the United States of America, over the age of eighteen (18) years on or before the date of election, residents of the Town of Poolesville for thirty (30) days preceding an election, have not been convicted of an infamous crime (unless pardoned by the Governor), and are not under guardianship proceedings or a judgment of non compos mentis.

Based on the foregoing provisions of State law, it is my opinion that the Town of Poolesville has the right to determine who is a qualified voter who may legally sign a referendum petition on an annexation resolution. The Town, in my opinion, also has the authority to determine at what point in time registration will be closed for persons who want to become qualified voters for purposes of signing a referendum petition on an annexation resolution. The Town of Poolesville has specified in Sections 82-6A and D of its Charter the qualifications of voters and has further provided in Section 82-6C that persons may continue to qualify to vote up to and including thirty days prior to any election. Since an election on a referendum petition on an annexation resolution cannot be scheduled until the election has been advertised for two successive weeks and an additional 15 days have elapsed, people who register within the 45 day period after enactment of the annexation resolution may legally do so under Section 82-6C of the Poolesville Charter.

I trust that the foregoing opinion will assist you in rendering an opinion on the questions presented. The Commissioners of

Poolesville have had two annexation resolutions under consideration for some time and need to have a prompt response from your office to enable them to quickly and carefully take final action on the resolutions. Please call me if you need any additional information.

Very truly yours,

RICHARD S. MCKERNON, *Town Attorney*

LOCAL GOVERNMENT—CHILD CARE FACILITIES—PREEMPTION—
COUNTIES—ZONING—COUNTY LACKS AUTHORITY TO REGU-
LATE STATE-LICENSED CHILD CARE FACILITIES, EXCEPT BY
GENERALLY APPLICABLE ZONING AND SIMILAR ORDINANCES.

November 4, 1987

The Honorable John C. Astle
Maryland House Of Delegates

You have requested our opinion on whether State law preempts county regulatory authority over child care homes and institutions licensed by the Juvenile Services Agency ("JSA").

For the reasons given below, it is our opinion that State law and regulations have fully occupied the field of licensing and regulating those child care facilities. Local regulations that apply to child care facilities, as distinguished from other uses or structures, are therefore invalid. However, generally applicable local health, safety, or zoning regulations are not preempted and may be applied to child care facilities licensed by JSA.

I

Anne Arundel County Regulations

A. Zoning Ordinance

In 1986, Anne Arundel County adopted a zoning ordinance addressing various aspects of the establishment of group homes in residential zoning districts. For that purpose, the term "group home" is defined by Article 25, §10-122(a) of the County Code to mean facilities "licensed or supervised by a Federal, State or local agency," which are described as being six types:

(i) "Family care facilities," which are private residences in which services and supervision are provided for one to six persons who are unrelated to the resident household and who are handicapped, aged, or in need of supervision;

(ii) "Group care facilities," which are similar to family care facilities, except that they provide services to seven or more individuals who are handicapped, aged,

or undergoing mental, emotional, or physical rehabilitation;

(iii) "Sheltered housing," facilities licensed by the Maryland Office on Aging that provide housing and support services for 4 to 11 elderly persons who are unrelated to the resident household;

(iv) "Life care facilities," which consist of a combination of independent and group living units and provide services for elderly individuals that include medical supervision;

(v) "Family foster/boarding homes," which provide care and supervision for one to six minors; and

(vi) "Group foster/boarding homes," which provide care and supervision for seven or more minors.

Group homes, regardless of type, are organized for regulatory purposes into three classifications, distinguished by the number of persons served in a facility and the type of dwelling unit in which the facility is located. Classification one includes all group homes located in single-family detached dwellings and serving no more than six persons; classification two includes all group homes located in any other type of dwelling unit and serving no more than four persons; and classification three includes group homes serving seven or more persons in a single-family detached dwelling or five or more persons in any other type of dwelling unit, with the exception of sheltered housing serving no more than 11 persons. Anne Arundel County Code, Article 25, §10-122(b).¹

¹ The regulations of JSA describe "juvenile care facilities" as being of five types:

(i) "Community residences," which are series of separate dwellings on the same ground or single dwellings that serve more than 12 youths;

(ii) "Special treatment centers," which provide therapeutic services as well as general care and supervision, without regard to the number of youths served;

(iii) "Structured shelter care" facilities, which provide short-term care for any number of youths awaiting more permanent placements;

(iv) "Youth group homes," which provide care to 5 to 12 youths; and

(v) "Runaway homes," which provide temporary shelter and aid to runaway or homeless youths aged 12 to 17 and their families. COMAR 25.03.01B.

Group homes in the first two classifications are permitted as of right and without conditions in all residential zoning districts. However, group homes in classification three, while permitted in all residential zoning districts, are permitted only as conditional uses.² The special conditions applicable to classification three group homes are set forth in County Code, Article 28, §2-204(b)(5) and incorporated by reference into the provisions applicable to each of the other residential zoning districts. *E.g.*, County Code, Article 28, §2-903(b)(8) (classification three group homes in R-44 High Density Multi-family Districts).

The conditions limit classification three group homes to no more than 20 in any one assessment district or to housing no more than three percent of the assessment district population, whichever is less, and require a minimum distance of one-half mile between such group homes. County Code, Article 28, §2-204(b)(5)(i) and (ii).³ The conditions also limit the number of independent dwelling units and the percentage of the facility's maximum population who may be housed in independent dwelling units: No more than 10 dwelling units per acre of net area are generally permitted, housing no more than 10 percent of the number of residents for

Note 1 continued

Thus, any child care facility might fall within the County's definition of classification three group homes, depending on the size of the facility. For example, we understand that a facility has been proposed that would provide temporary shelter for six boys, aged nine to twelve, who have been abused or neglected. That facility would fall into classification one if it would be in a single-family detached house, but into classification three if it would be in any other type of dwelling unit; if it were to serve seven children, it would fall into classification three regardless of the type of dwelling unit used.

² The zoning ordinances of Anne Arundel County provide for permitted uses, conditional uses, and special exceptions in the various zoning districts. Permitted uses are those on which no special requirements or restrictions are imposed; conditional uses are those permitted without special authorization, but on which special requirements or restrictions are imposed; special exceptions are those uses for which special authorization is required, to be granted only upon specific findings relating to the suitability of the proposed use, and which are subject to special requirements or restrictions set forth in the County Code. *See* County Code, Article 28, §12-104.

³ For these purposes, group homes located on adjacent properties, under common ownership, and housing no more than 20 persons in each home are regarded as a single group home. In addition, any life care facility or group care facility that has separate living units on a single site is considered to be a single group home.

whom the facility has capacity, unless the facility is a life care facility approved by the State Office on Aging. County Code, Article 28, §2-204(b)(5)(iv). Group homes are required to be located on sites of at least 40,000 square feet, of which no more than 60 percent may be covered by structures or parking areas. County Code, Article 28, §2-204(b)(5)(v). Finally, the conditions specify the number of parking spaces that must be provided for residents and employees, determined in part on the basis of the type of facility concerned. County Code, Article 28, §2-204(b)(iii).

Under Article 28, §1-128 of the County Code, a zoning certificate of use must be obtained from the County's Office of Planning and Zoning before using or altering any premises or structure other than a single-family residence. Article 28, §10-122(c) requires that any application for a zoning certificate of use for a classification three group home must be sent by the County's Office of Planning and Zoning to the County's Office of Community Services and Information "for notification to the appropriate community associations and to any residence within 175 feet of the proposed group home site."⁴

B. Proposed Ordinance

We understand that an additional ordinance has been proposed pertaining to child care homes. Anne Arundel County Sun, Oct. 28, 1987, at 4, cols. 1-3. That ordinance would require an annual County license for the operation of such a facility and would subject juvenile care facilities to regulations adopted by the County's Departments of Health and of Inspections and Permits. As a prerequisite to licensure, the applicant would be required to notify

⁴ State law requires JSA to give notice of the filing of an application for a license to the governing bodies of the county and municipality concerned and, upon request, to the members of the General Assembly from the district where the facility is proposed to be located. Article 41C, §2-125(c). Thus, State law requires that the community be notified of proposals for facilities that Anne Arundel County would classify as classification one or two group homes, as well as classification three. While JSA is not required to send its notice directly to neighboring residences, it is required to notify officials who are in positions to apprise the immediately affected neighborhood of any proposal.

nearby property owners and the neighborhood's community association of the application, by registered mail.⁵

II

Legal Background

A. General Principles

Although local jurisdictions ordinarily have authority, concurrent with that of the State, to regulate a wide variety of matters, that authority may be preempted by the State. Preemption may occur expressly, when the General Assembly explicitly prohibits local legislation, or by implication, when the General Assembly acts with such force in a particular field as to evidence an intent to preclude local legislation. *Ad + Soil, Inc. v. County Comm'rs of Queen Anne's County*, 307 Md. 307, 324 (1986). In 69 *Opinions of the Attorney General* 183 (1984), this office summarized the factors that the Maryland Court of Appeals has found to be significant in determining whether local legislative authority has been preempted: (i) the comprehensiveness of the State legislative and regulatory provisions, which is the primary indicator of preemption; (ii) the likelihood that a dual system of State and local regulation would cause serious confusion; (iii) the existence or lack of a tradition of State regulation or of a constitutional mandate for State supervision of activity in the field; and (iv) the chronology of the enactment of State and local legislation.⁶ 69 *Opinions of the Attorney General* at 190-93. See also *Ad + Soil, Inc.*, 307 Md. at 325-26.

⁵ We understand that the sponsor of the proposed ordinance has stated that it is based on an ordinance adopted by Montgomery County in 1977. An official of Montgomery County has stated that the ordinance has never been subjected to legal challenge; however, the official has also acknowledged that Montgomery County has never denied a license application. *Id.*

⁶ The General Assembly is presumed to be aware of any preexisting local legislation in a field when it enacts State legislation in that field. Therefore, the lack of an express repeal or preemption of preexisting local law is an important indication that the General Assembly did not intend to preempt the field. *City of Baltimore v. Sitnick*, 254 Md. 303, 322 (1969).

Moreover, even where the State has not fully preempted local regulation of a matter, local laws or regulations are ineffective insofar as they conflict directly or indirectly with State law or regulations. Local jurisdictions may not prohibit what the State expressly requires or permits. *East v. Gilchrist*, 296 Md. 368, 373-74 (1983); *City of Baltimore v. Sitnick*, 254 Md. 303, 317 (1969).⁷

B. County Licensure of Group Homes

In 63 *Opinions of the Attorney General* 377, 393 (1978), the Attorney General concluded that a Prince George's County ordinance purporting to require county licensure for group homes was invalid, because it had been preempted by State licensing and certification provisions. In reaching that conclusion, the Attorney General noted (i) the comprehensiveness of State legislation concerning the licensing of group facilities of all kinds; (ii) the confusion and duplication of effort that would result from any dual licensing system for those facilities; and, (iii) as to child care facilities in particular, State legislative provisions expressing an intention that those facilities be required to obtain only one license, issued by the State, and that the rules and regulations pertaining to those facilities be comparable. *Id.*

In addition, the opinion concluded that local zoning permit restrictions are inapplicable to State-licensed child care facilities, except to the extent that State law requires those facilities to comply with local zoning restrictions. 63 *Opinions of the Attorney General* at 398.⁸ The Attorney General noted that, while local authority in the realm of zoning is strong, local jurisdictions nonetheless do not have unlimited power "to interfere with the property, policies, or regulatory authority of the State" through

⁷ Likewise, local jurisdictions may not authorize what State law expressly prohibits. *Backus v. County Board of Appeals*, 224 Md. 28, 33 (1960).

⁸ The regulations of JSA require that child care facilities comply with local zoning requirements as to their physical plants. COMAR 10.25.03.16A, B, and E. The physical plants of the facilities must also satisfy the requirements of local environmental safety, health, and fire authorities as a prerequisite to licensing, and JSA must request an onsite inspection report on the facility from the local health department at the time a license is applied for and annually thereafter. COMAR 10.25.03.16B and C.

zoning. *Id.* That is particularly so as to matters over which local authority is otherwise weak, as is the case with regard to licensing and certification of group homes. Therefore, the opinion concluded:

"[G]roup facilities which are funded, operated, or licensed by the State, to achieve a public purpose, participate in the State's immunity from local zoning restrictions insofar as the power to distinguish among occupants making the same physical use of premises is beyond the reach of the zoning powers conferred in Article 25A, Section 5(X), Md. Ann. Code. Such restrictions are also invalid wherever they may contravene State policy, State authorization, or State licensure for group homes under Public General Law." *Id.*⁹

III

Scope of Preemption

We continue to adhere to the conclusion of 63 *Opinions of the Attorney General* 377 that the State has preempted the field of licensing and certifying group homes, including child care facilities. Put another way, the State has reserved for itself exclusive dominion over determinations as to whether and where child care facilities should be established and how they should be operated. *See Ad + Soil, Inc.*, 307 Md. at 324.

Our view in this regard is bolstered by the General Assembly's expressions of the State's strong interest in the welfare of children. For example, the first enumerated purpose for which juve-

⁹ The Court of Appeals has held that the State's use of land leased from a private owner is not subject to local zoning control. *City of Baltimore v. State*, 281 Md. 217, 224 (1977). Likewise, the use by a private entity of State-owned land for a public purpose is not subject to local zoning control. *City of Baltimore v. State Dep't of Health & Mental Hygiene*, 38 Md. App. 570, 578 (1978). No reported decisions have addressed whether privately owned land used by the owner for a public purpose under State regulation is also immune to local zoning. In *Carroll County v. Raymond I. Richardson Found.*, 71 Md. App. 422, 445 (1987), the operator of a home for boys argued, and the Court of Special Appeals held, that the home was a school and thus, under the County's zoning ordinance, permitted as a matter of right in an agricultural district.

nile court proceedings were established is “[t]o provide for the care, protection, and wholesome mental and physical development” of children coming within the jurisdiction of the court. §3-802(a)(1) of the Courts Article (“CJ” Article). Under those proceedings, a child may be placed in the custody of the JSA or a “licensed private agency” when that is best suited to the child’s needs. CJ §3-820(c)(2). See *In re David K.*, 48 Md. App. 714 (1981).¹⁰

Thus, the licensing of child care facilities—that is, determining whether a particular facility should become or remain authorized to care for children for whom the State is responsible—is, in our view, an integral part of the State’s provisions for the care and protection of those children. Indeed, the General Assembly originally enacted provisions for the licensing of child care facilities in furtherance of “its conviction that the paramount consideration of [those provisions] is the protection of the children affected by [them].” Chapter 600, Laws of Maryland 1947 (enacting former Article 88A, §16A). Viewed in this light, we think that the evidence of legislative intent to preempt the licensing of child care facilities is particularly persuasive. See *Kaczorowski v. City of Baltimore*, 309 Md. 505, 515 (1987) (legislative purpose must be determined from context of legislation).

The regulations adopted by JSA to carry out its statutory mandate to license and regulate child care facilities address in detail every aspect of the establishment and operation of those facilities. See, e.g., COMAR 10.25.03.14 (number, qualifications, and duties of staff). Those regulations require the license applicant to provide a description of the service proposed to be provided, “including capacity, eligibility requirements, and statement of territory covered and admission standards or requirements,” so that those factors may be considered in determining whether to grant the license. COMAR 10.25.03.03B. Further, JSA is required to inspect each facility at least annually to ensure compliance with the State regulations. COMAR 10.25.03.09.

Moreover, the General Assembly has expressed an intent that “[a]ll children whose care is the responsibility of this State shall

¹⁰ The purpose for removing a child from his or her home is “to secure for him custody, care, and discipline as nearly as possible equivalent to that which should have been given by his parents[.]” CJ §3-802(a)(4).

have similar protection for their health, their safety, and the quality of their care; and . . . [t]he rules and regulations of agencies that are charged with child care shall be comparable." Article 41C, §2-125(a). To accomplish those purposes, the General Assembly has required other State agencies involved in child care to cooperate with JSA. Article 41C, §2-113. Further, it has expressly provided that "[a] child care home or institution may not be required to obtain a license from more than 1 State agency" and has authorized State licensing agencies to "make cooperative arrangements with any other State agency to this end." Article 41C, §2-125(e). In light of that expressed legislative intent to ensure uniformity in licensing decisions and regulations pertaining to child care facilities, we concur in the view expressed in 63 *Opinions of the Attorney General* at 390-91: Had the General Assembly intended that the political subdivisions have concurrent power to license and regulate child care facilities, it would have provided likewise for cooperation between State and local licensing agencies.

For all of these reasons, we think that the General Assembly intended to preempt the field of determining where facilities licensed by JSA are to be located and how they are to be operated. Therefore, it is our opinion that the proposed Anne Arundel County ordinance, which would purport to impose County licensing and regulatory requirements on child care homes, would be invalid and could not be given effect.¹¹

Certain provisions of the County's existing zoning ordinance are likewise invalid, in our opinion. The zoning ordinance does not explicitly purport to authorize the County to determine whether or where child care homes may be established, as a licensing ordinance would. Nonetheless, provisions such as the large minimum lot size clearly would have the effect of restricting the locations at which facilities in the County's classification

¹¹ We understand that there is particular concern for ensuring that residents receive notice of plans to establish child care homes in their neighborhoods. Article 41C, §2-125(c) requires JSA to give notice of its receipt of a license application to the governing body of the affected county. See note 4 above. We do not mean to suggest that the County could not by ordinance direct its Office of Community Services and Information or other appropriate agency to forward that notice to residents in the vicinity of the proposed child care facility. An ordinance of that nature would relate to the County's internal procedures for handling the notice, rather than to the licensing or regulation of child care facilities.

three could be established. And the restriction on the number of classification three group homes that may be established in any one assessment district would directly limit the total number of classification three child care homes that might be established in the County.

Local regulations that might be determinative of whether or where a child care facility may be established undeniably impinge on the State's authority to license those facilities.¹² We see no substantive difference between the exercise of control over the establishment and operation of child care facilities through the mechanism of a zoning ordinance and the exercise of the same control through the mechanism of a direct licensing ordinance.¹³ See *Town of Poughkeepsie v. Hopper Plumb. & Heating Corp.*, 260 N.Y.S.2d 901, 905 (N.Y. Sup. Ct. 1965), *aff'd*, 272 N.Y.S.2d 974 (N.Y. App. Div. 1966). *Accord Hall v. City of Taft*, 302 P.2d 574, 582 (Cal. 1956). In our view, regulations that specially address State licensed child care facilities have been preempted by the State, whether those regulations take the form of direct licensing requirements or zoning restrictions.

This is not to say, however, that county laws are wholly inapplicable to State-licensed child care facilities. We do not think that the General Assembly has clearly expressed an intent to preempt the power of local jurisdictions to regulate health, safety, and land use matters in general, merely because those general regulations are applicable to State-licensed child care facilities. Rather, we think that local jurisdictions retain their power to ensure that the physical plant of any facility will be compatible with the neighborhood in which it is located and will conform to health

¹² If local regulations of this sort were effective, they could, for example, nullify a JSA determination that a facility housing seven or more children is needed at a location within one-half mile of an existing classification three group home or on a lot with a net area of less than 40,000 square feet. The child care facility would be a classification three group home under County Code Article 28, §10-122. Its establishment under these circumstances would contravene County Code Article 28, §2-204(b)(5)(ii) or (v).

¹³ Nor is the County's power to enact zoning ordinances so much greater than or so different from its power to enact licensing ordinances as to immunize zoning ordinances from preemption. Both powers have been granted by the provisions of Article 25A, §5 (the "Express Powers Act"). Accordingly, local laws enacted in the exercise of either power are subject to preemption by public general laws. See *Woodlawn Area Citizens Ass'n v. Board of County Comm'rs for Prince George's County*, 241 Md. 187, 190 (1966) (local governing body has no inherent power to zone or rezone).

and safety standards that the jurisdiction has found to be generally necessary. Hence, requirements or restrictions applicable generally to uses or structures in the neighborhood in which a child care facility is to be located, or to uses or structures similar to the facility, are equally applicable to that facility. For example, a juvenile care facility may not exceed a building height restriction applicable to all structures located in the zoning district in which the facility is to be located.¹⁴

However, a regulation or restriction putatively applicable to all structures or uses, but in actuality capable of application only to juvenile care facilities, would be invalid. A regulation specially designed to apply only to juvenile care facilities is no less a special regulation of those facilities than is a regulation that explicitly applies only to juvenile care facilities. Hence, what we have said regarding local laws that overtly seek to control the location of child care facilities is equally applicable to laws that, while facially general or neutral, would have the effect of imposing the identical control. *Cf. East v. Gilchrist*, 296 Md. 368, 373 (1983) (county charter provision that would have effect of preventing compliance with valid State regulatory order, without expressly prohibiting compliance, cannot be given effect).¹⁵

¹⁴ As we have noted, JSA regulations require that child care facilities comply with local health, safety, and zoning requirements as to their physical plants. *See* note 8 above. Therefore, we need not consider the effect that a conflict between a local law of general applicability and a JSA decision to license a particular facility would have on the applicability of the local law to that facility. *See Rowe v. Chesapeake & Potomac Telephone Co.*, 65 Md. App. 527, 532 (1985) (county charter provision could not be given effect where its application would conflict with State licensing decision).

¹⁵ We recognize that the application of certain kinds of regulations pertaining to physical plant necessarily is, to some extent, use-specific. For example, the number of parking spaces needed for any particular use must be determined by reference to the nature of the use. Similarly, fire-safety needs may be significantly different for a retail store, which is occupied for only part of the day and does not house activities likely to create fire hazards, than for a home. In our view, regulations pertaining to physical plant that are based on generally applicable principles but of necessity vary in the details of their effect on particular uses may properly be regarded as general regulations. For example, we believe that the County may enact a regulation that specially prescribes the number of parking spaces required for child care facilities, so long as it represents a good-faith application of the same principles for determining parking needs and frequency of use that the County generally applies to determine the number of spaces required for other uses. COMAR 10.25.03.16A through E.

IV

Conclusion

In summary, we conclude that State law and regulations have fully occupied the field of licensing and regulating those child care facilities. Local regulations that apply to child care facilities, as distinguished from other uses or structures, are therefore invalid. However, generally applicable local health, safety, or zoning regulations are not preempted and may be applied to child care facilities licensed by JSA.

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Opinions and Advice

LOCAL GOVERNMENT—MUNICIPAL CORPORATIONS—DETACHMENT
OF TERRITORY—MUNICIPALITIES MAY DETACH TERRITORY
THROUGH CHARTER AMENDMENT.

December 30, 1987

The Honorable Laurence Levitan
Senate Of Maryland

You have requested our opinion concerning the authority of a municipal corporation to detach a portion of its territory. Your question arises from a proposal by the Town of Somerset to detach a tract of land within the current boundaries of that municipality.

For the reasons stated below, we conclude that a municipal corporation has the authority to detach territory by amending its charter. However, this conclusion is by no means free from doubt, and we urge the General Assembly to consider the enactment of generally applicable procedures for detachment.

I

Background

The Town of Somerset was incorporated by Chapter 795, Laws of Maryland 1906. We understand that the town's boundaries, though subsequently altered through annexation, have always encompassed the particular 18.19 acre tract of land in question.

The owner of the tract, Community Somerset, seeks to develop it. The town has opposed these plans, and the proposal to detach Community Somerset's land from the town is evidently but one battle in a long war over the land's development. However, the merits of this controversy are immaterial to the question you have posed; whether a municipality has power to detach territory does not turn on the reasons underlying its desire to do so.

II

The 1956 Attorney General's Opinion

The owner of the land has submitted a legal memorandum, attached to your inquiry, arguing that the town lacks the authority to detach territory. The Town of Somerset has submitted a legal memorandum arguing that it does have that authority under the Municipal Home Rule Amendment, Article XI-E of the Maryland Constitution.

Among other disagreements, the developer and the town dispute the correctness of a 1956 Opinion of the Attorney General directly on point. In 41 *Opinions of the Attorney General* 133 (1956) ("1956 Opinion"), the Attorney General was asked for an opinion "as to the procedure by which a municipal corporation may provide for detachment or excision of territory." Pointing out that the Municipal Home Rule Amendment "confers all powers of municipal government to the municipal corporation except those reserved to the Legislature or brought about by general legislation by the Legislature," the 1956 Opinion concluded that "there would seem to be no doubt that a municipal corporation has power and authority to detach." 41 *Opinions of the Attorney General* at 134. In the absence of any statutory procedure for detachment, "the alternative procedure of detachment by charter amendment is available to the municipal corporation." *Id.*

Issued only two years after ratification of the Municipal Home Rule Amendment, the 1956 Opinion is the kind of contemporaneous and longstanding construction of the law that is "entitled to substantial weight." *Williams v. Loyola College*, 257 Md. 316, 329 (1970). The General Assembly "has not seen fit to interfere with such construction by annulling it through legislation." *Popham v. Conservation Comm'n*, 186 Md. 62, 71 (1946). Moreover, the conclusion in the 1956 Opinion has since been followed in both the actions of municipalities and the advice-giving of this office. See, e.g., Resolution of the Burgess and Commissioners of Middletown (December 11, 1978); letter of advice from Assistant Attorney General Richard E. Israel to Delegate Timothy F. Maloney (February 7, 1984).

However, a passage in a recent opinion expressed some uncertainty about the conclusion in the 1956 Opinion. 72 *Opinions of the Attorney General* 176, 179 (1987). The question presented in the recent opinion was whether the Municipal Home Rule Amend-

ment prevented the General Assembly from amending the Town of Highland Beach's act of incorporation to excise land originally included within the town's boundaries by mistake. The opinion concluded that the amendment did prohibit legislation to change the town's boundaries. Citing the 1956 Opinion, we went on to suggest that Highland Beach consider whether the objective could be accomplished by an alternative means, charter amendment by the town itself. We also observed that "this course is legally uncertain." Apart from this discussion in passing, our opinion did not address the charter amendment question. Nevertheless, the developer's legal memorandum characterizes the holding of the 1956 Opinion as having been "seriously undermined, if not destroyed," by our recent opinion. Memorandum from Robert R. Harris, Esquire to Community Somerset Associates, at 13 (Sep. 22, 1987) ("Harris Memorandum"). The 1956 Opinion is said to be "an anachronism with no precedential value." Harris Memorandum at 6.

Although the opinions of this office do not have the binding effect of judicial decisions, nevertheless they "serve as important guides to those charged with the administration of the law." *Mitchell v. Register of Wills*, 228 Md. 305, 310 (1962). In the absence of judicial decisions, Attorney General opinions promote steady application of the law. Accordingly, this office stands by its precedent, much as a court would. Like the judicial doctrine of *stare decisis*, our respect for precedent is not simply reflexive conservatism. It "serves the broader societal interests in even-handed, consistent, and predictable application of legal rules. When rights have been erected or modified in reliance on established rules of law, the arguments against their change have special force." *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980) (Stevens, J.). We do not overrule a prior opinion simply because we might have resolved a close question the other way, were we first presented with it. See 67 *Opinions of the Attorney General* 98, 99 (1982). At the same time, we will not perpetuate a significant mistake in legal reasoning. We are also prepared to recognize that a prior opinion has been eroded by changed circumstances. See *White v. King*, 244 Md. 348, 354 (1966).

The developer argues in part that the 1956 Opinion was wrong because it ignored the significance of the legislative history of Article 23A, §19 of the Maryland Code, the annexation provision of the Home Rule Act. Further, the developer suggests that a subsequent Court of Appeals decision on annexation "effectively

overrules the [1956] opinion." Harris Memorandum at 7. In Part III below, we discuss the Act's legislative history; in Part IV, the scope of the Amendment.

III

Home Rule Act

The Home Rule Act, Article 23A of the Maryland Code, contains no procedures for the detachment of territory. This omission stands in striking contrast to the specification of detailed procedures for annexation in §19.

The legislative history makes clear that this omission was intentional. As introduced, the bill that became the Home Rule Act contained a provision specifying the procedures for any change in corporate boundaries, whether to increase or decrease the size of the municipality. Senate Bill 5 of the 1955 Session of the General Assembly initially provided as follows:

"The legislative body, by whatever name known of every municipal corporation in this State may change the corporate boundaries thereof as in this sub-heading provided. The change may be either to increase or to decrease the area within the corporate boundaries."

By amendment, however, the second sentence of this subsection was deleted, and the term "change" was altered to "enlarge."¹ See Chapter 423, Laws of Maryland 1955.² Plainly, the General Assembly consciously decided to exclude detachment procedures from the Home Rule Act.

However, though this action is clear, its significance is not. If the General Assembly thought that the Municipal Home Rule Amendment itself did not empower municipalities to detach terri-

¹ The amendment made corresponding changes to the rest of §19. The original bill's phrase "the area to be affected" was changed throughout to "the area to be annexed."

² Article 23, §19(a) now reads as follows: "The legislative body, by whatever name known, of every municipal corporation in this State may enlarge the corporate boundaries thereof as provided . . . in this subheading . . ."

tory, the deletion of this provision would reflect a legislative intent to leave municipalities powerless in this regard. On the other hand, if the General Assembly thought that the Municipal Home Rule Amendment itself empowered municipalities to detach territory, the excision of statutory procedures might merely reflect a legislative intent that the power be exercised through the ordinary charter amendment process, rather than through a special statutory procedure.

Given the dearth of legislative history, the point cannot be established conclusively. However, the General Assembly did have before it several reports to the effect that the proposed Home Rule Bill was merely procedural in nature, and that if the bill were not enacted, the powers of self-government granted by the Municipal Home Rule Amendment would be "left open to individual handling by the separate towns and cities of the State by way of amendments to local charters in each instance." 1 Legislative Council Report (1955 Session) at 205. *See also* Report of the Commission on the Administrative Organization of the State of Maryland (Sobeloff Commission) at 5 (1952).

We conclude that the omission of detachment procedures from the Home Rule Act does not preclude the exercise of the power.³ Hence, we turn to the Municipal Home Rule Amendment to determine if the Amendment itself grants that power.

IV. Municipal Home Rule Amendment

A. *Introduction*

Article XI-E, §3 of the Maryland Constitution vests in the Town of Somerset, and all other municipal corporations, "the power and authority, (a) to amend or repeal an existing charter for local laws relating to the incorporation, organization, government, or affairs of said municipal corporation heretofore enacted by the General Assembly of Maryland, and (b) to adopt a new

³ We note one indication in the Home Rule Act of the General Assembly's seeming recognition of a municipality's power to detach land through charter amendment. Article 23A, §9A(a)(4) provides for deposit with the Department of Legislative Reference of a "charter amendment, ordinance, referendum or any other device by which the corporate boundaries of the municipality are enlarged or *otherwise changed*"

charter, and to amend or repeal any charter adopted under the provisions of this Article." The 1956 Opinion concluded, with certitude but without elaboration, that "there would seem to be no doubt that a municipal corporation has power and authority to detach" under the Municipal Home Rule Amendment. 41 *Opinions of the Attorney General* at 134. Given the state of the law, we are more doubtful.

B. Maryland Case Law

The general purpose of Article XI-E is "to permit municipalities to govern themselves in local matters." *Birge v. Town of Easton*, 274 Md. 635, 644 (1975). Citing the report of the Sobeloff Commission, which led to enactment of the Municipal Home Rule Amendment, the Court of Appeals went on to observe that "final determination of what constitutes a matter of purely local or municipal concern, i.e., a matter relating to the 'incorporation, organization, government, or affairs' of the municipality, is for the courts to make in light of existing circumstances." *Id.* The standard is whether the effect of the action "is likely to be felt by a considerable number of people outside the city and in a rather strong degree" *Id.*, quoting C. Antieau, *Municipal Corporation Law* §3.36 (1973). See also 62 *Opinions of the Attorney General* 275, 291-92 (1977).

To our knowledge, Maryland courts have never decided the question of whether the detachment of territory is "a matter relating to the 'incorporation, organization, government, or affairs' of the municipality." On the one hand, few things could be more integral to the "incorporation, organization, government, or affairs" of a municipality than the description of the territory encompassed within it. "[A] description of the boundaries of a municipal corporation is said to be an essential part of its charter, and to be essential to corporate existence." 2 McQuillan, *Municipal Corporations* §7.02, at 271 (3d ed. 1979) ("McQuillan"). See Article 23A, §22. For that reason, we concluded that the General Assembly lacked the power to legislate regarding the detachment of territory from one municipality. 72 *Opinions of the Attorney General* at 178. If the General Assembly lacks the power, it follows that each municipality enjoys it.

On the other hand, the Court of Appeals has suggested that municipalities "have no inherent powers to add to their size," notwithstanding the Municipal Home Rule Amendment. *Mayor and*

Commissioners of Rockville v. Brookeville Turnpike Construction Co., 246 Md. 117, 129 (1967). *Brookeville* involved the question of whether a municipality might impose conditions on annexation. The decision characterized Article 23A, §19 as a provision "for the power to annex . . ." 246 Md. at 129. Annexation, then, is not "a matter of purely local or municipal concern," for it places the correlative benefits and burdens of the municipality on persons outside the municipality. See *Prince George's County v. Laurel*, 262 Md. 171, 189-90 (1971). As the leading treatise summarizes, annexation "relates to matters extramural to the municipal corporation . . . [and] is not a proper function of local self-government." 2 McQuillan §7.10, at 297-98.

Detachment is different in one respect: it removes the benefits and burdens of the municipality from persons within the municipality. It does not "affect[t] persons residing beyond a municipality . . ." *Prince George's County v. Laurel*, 262 Md. at 190. However, it does affect, at least incidentally, the affairs of another political subdivision—the county that might be required to provide services previously provided by the municipality. See 44 *Opinions of the Attorney General* 136, 137 (1959).

C. Other Case Law

Out-of-state precedent can be found on both sides of the question. Some cases hold that detachment is not merely local in nature and therefore is not within a municipality's home rule powers. For example, in *State ex rel. Anderson v. Leahy*, 199 N.W.2d 713 (Neb. 1972), the Nebraska Supreme Court considered whether the power to detach territory was among the local legislative powers delegated to a municipality by state statute. The court held that it was not: "There is no doubt that the detachment of territory from a municipal corporation, like annexation, is a matter of statewide concern, and not one of local or municipal concern." 199 N.W.2d at 715. See also *Village of Beachwood v. Board of Elections*, 148 N.E.2d 921, 923 (Ohio 1958) ("the detachment of territory from a municipality is not a subject which falls within the sphere of local self-government and to be left to the whims of each municipality . . .").⁴

⁴ In *Williams v. City of Wilmington*, 171 N.E.2d 757, 769 (Ohio Ct. C.P. 1960), the court allowed a taxpayer to intervene in a detachment proceeding because "a matter of the public boundaries of a municipality involves the public generally."

Other out-of-state authority supports the proposition that municipalities enjoying constitutional home rule may detach territory through charter amendment by virtue of their constitutional power alone. The Oregon Supreme Court put it this way: "[A] change in the boundaries of a municipality excluding territory, theretofore subject to its authority, is a legitimate amendment of its charter which may be accomplished by the vote of its legal electors." *Flavel Land and Development Co. v. Leinenweber*, 158 P. 945, 946 (Or. 1916). See also *People v. Ellis*, 97 N.E. 697, 699 (Ill. 1912); *Schmidt v. City of Cornelius*, 316 P.2d 511, 517 (Or. 1957); *State ex rel. Shawaro v. Engel*, 177 N.W. 33 (Wis. 1920). See generally 2 McQuillan §7.24, at 403.

D. Summary

The question of whether municipalities have power under the Home Rule Amendment to detach territory through charter amendment cannot be answered confidently, given the current state of the law. On balance, the better view is that the Amendment does itself grant power to detach.⁵ Were we to conclude otherwise, we would have to overrule not only the 1956 opinion but also 72 *Opinions of the Attorney General* 176 (1987), which advised that the General Assembly lacked the power to detach territory from a particular municipality. But, in our view, these opinions are not wrong. The main effect of detachment, unlike annexation, falls on residents and property owners within a municipality, and so is primarily of local concern.

Moreover, as a practical matter, detachment would sometimes be the best solution to correct a vexing problem—a misdescribed boundary, to take the recent example. The Amendment ought to be construed to accommodate that practical interest.

⁵ A municipality unquestionably has power under the Home Rule Amendment to repeal its charter altogether—in a sense, to detach all of its territory. See Article XI-E, §4. But the effect of charter repeal is drastic. See Article 23A, §42. That a municipality may terminate its existence altogether does not imply that a municipality may also detach some part of its territory while maintaining its existence.

V

Conclusion

Over thirty years ago, this office concluded that the Municipal Home Rule Amendment empowers a municipality to detach land through charter amendment. Municipalities have acted on that view of Article XI-E, and the General Assembly has evidently been content enough with the conclusion that it has enacted no law on the subject. To be sure, we think that the question is closer than the 1956 Opinion suggests. However, the 1956 Opinion took a reasonable position—indeed, the better view of the law—and we find no basis on which to overrule that opinion now.

At the same time, we continue to be concerned that charter amendment procedures may not adequately protect the interest of those most affected by a municipality's decision to detach land, those who live or own property there.⁶ We reiterate what we said in our recent opinion about the detachment of territory from the Town of Highland Beach: "The best solution to the problem—one that would assist Highland Beach and any other municipality that might discover a similar problem, while at the same time preserving the rights of those affected—would be enactment by the General Assembly of a general law specifying detachment procedures, comparable to the procedures for annexation in Article 23A, §19." 72 *Opinions of the Attorney General* at 179.

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Opinions and Advice

⁶ We should not be understood as addressing the particular situation in Somerset. As stated in Part I above, we are not concerned with the merits of that controversy and express no views about it. Rather, we have in mind the potential for unfairness, or even discrimination, when the majority of voters in a town may excise a group of the town's residents over the latter's objections.

NOTARIES PUBLIC

CONSTITUTIONAL LAW—EQUAL PROTECTION—PRIVILEGES AND
IMMUNITIES—DURATIONAL RESIDENCY REQUIREMENT FOR
NOTARIES PUBLIC IS CONSTITUTIONAL.

October 30, 1987

The Honorable Winfield M. Kelly, Jr.
Secretary of State

You have requested our opinion on the constitutionality of the one-year durational residency requirement that applies to the appointment of notaries public. Article 68, §1(b)(1) of the Maryland Code provides that “[e]very person appointed shall be . . . a resident in this State for a period of 1 year prior to appointment, and a resident of the senatorial district and subdistrict from which he or she is appointed.”¹

For the reasons given below, we conclude that Maryland’s one-year residency requirement for the appointment of notaries public is constitutional.

I

Equal Protection

A. *Introduction*

A durational residency requirement means that, for a given purpose, residents of a state are classified solely on the basis of the date on which they entered the state. A classification of this kind raises serious questions under the Equal Protection Clause

¹ Two exceptions apply to court reporters, for whom a notary commission is essential. The residency requirements do not apply to anyone appointed “as an official court reporter by any court of any county or Baltimore City.” Article 68, §1(b)(2). They also do not apply to “out-of-state court reporters applying for appointment as a notary public in this State.” §1(b)(3).

In addition, a notary public commissioned in a state other than Maryland who moves to this State and applies for a Maryland notarial commission is subject to a six-month residency requirement, rather than a one-year requirement. §1(b)(4).

of the Fourteenth Amendment.² And, indeed, durational residency requirements have been found to violate the Equal Protection Clause in a variety of contexts. However, as the Supreme Court wrote in a case sustaining a durational residency requirement, "none of [the Court's] cases intimated that the States might never impose durational residency requirements, and such a proposition was in fact expressly disclaimed." *Sosna v. Iowa*, 419 U.S. 393, 406 (1975).

As is true of equal protection issues generally, a crucial preliminary matter is the determination of the standard of review. The Court of Appeals has distilled the controlling principles into this summary:

"'Strict scrutiny' is required of a legislative classification when it creates a distinction based upon 'suspect' criteria or when it deprives, infringes upon, or interferes with personal rights or interests deemed to be 'fundamental.' Laws which are subject to this rigorous standard violate the equal protection guarantee unless the State can demonstrate that the statute is necessary to promote a compelling governmental interest. A suspect class is a category of people who have experienced a history of purposeful unequal treatment or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities. Classification based on race, national origin and ancestry are several examples of such suspect criteria. Rights or interests are 'fundamental' for purposes of equal protection analysis under the fourteenth amendment if they are 'explicitly or implicitly' guaranteed by the federal constitution. Fundamental rights include, among others, those guaranteed by the first amendment, the right to vote, the right of interstate travel, the right of equal access to a criminal appeal, and the right to procreate.

...

Where neither a suspect class or a fundamental right or interest is involved or impaired, or rights or classes

² A nondurational residency requirement, which treats all residents alike, does not raise comparable equal protection questions. See *Martinez v. Bynum*, 461 U.S. 321, 328-29 (1983). However, differential treatment of nonresidents might implicate the Privileges and Immunities Clause. See Part II below.

which would trigger heightened review are implicated, the least demanding of review is implied. Under this standard, a statutory classification will be invalidated only if the means chosen by the legislature are wholly irrelevant to achievement of the State's objective. This 'deferential' review of legislative classification, variously referred to as the 'reasonable' or 'rational' basis test, upholds the statute when any state of facts reasonably may be conceived to sustain it." *Hornbeck v. Somerset County Board of Education*, 295 Md. 597, 641-42 (1983) (citations omitted without ellipsis).³

A durational residency requirement does not implicate a suspect classification. Hence, we turn to a consideration of whether the durational residency requirement of Article 68, §1(b)(1) interferes with a fundamental right and therefore would be subject to strict scrutiny.

B. Durational Residency Requirements—Impact on Fundamental Rights

"[A]ll citizens [are] free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations

³ The Court of Appeals also identified the characteristics of an intermediate level of equal protection review, "heightened scrutiny":

"'Heightened scrutiny' of a legislative classification is a less exacting standard of review and is applied when a statute impacts upon 'sensitive,' although not necessarily suspect criteria of classification (i.e., gender discrimination), or where a statute affects 'important' personal rights or works a 'significant' interference with liberty or a denial of a benefit vital to the individual. A legislative classification, to withstand heightened scrutiny analysis, must be reasonable, and not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly situated and circumstanced will be treated alike. This level of review does not tolerate random speculation concerning possible justification for a challenged enactment; rather, it pursues the actual purpose of a statute and seriously examines the means chosen to effectuate that purpose." 295 Md. at 641-42.

We do not believe that a durational residency requirement would likely invoke "heightened scrutiny" review. If such a requirement indeed impinged upon important personal rights or vital benefits, it would so affect the right to travel as to invoke strict scrutiny. See Part II B below.

which unreasonably burden or restrict this movement." *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969). A one-year residency requirement for welfare benefits abridged this fundamental right: "An indigent who desires to migrate, resettle, find a new job, and start a new life will doubtless hesitate if he knows that he must risk making the move without the possibility of falling back on state welfare assistance during his first year of residence, when his need may be most acute." 394 U.S. at 629. By blocking access for a significant period of time to a vitally important government entitlement program, the durational residency requirement at issue in *Shapiro* in effect penalized interstate migration.

As the Supreme Court later characterized the point, "the right of interstate travel must be seen as insuring new residents the same right to *vital* government benefits and privileges in the State to which they migrate as are enjoyed by other residents." *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 261 (1974) (emphasis added) (durational residency requirement for freemedical care subject to strict scrutiny). Thus, a durational residency requirement that prevents new residents from voting for a substantial period of time affects a basic right and so penalizes interstate travel; therefore, it is subject to strict scrutiny review. *Dunn v. Blumstein*, 405 U.S. 330 (1972). So, too, might a durational residency requirement that prevents new residents from pursuing career advancement. *Bruno v. Civil Service Comm'n*, 472 A.2d 335 (Conn. 1984). Cf. *Attorney General v. Waldron*, 289 Md. 683, 722 (1981).

But not every governmental benefit or opportunity is so important that its temporary denial, through a durational residency requirement, impermissibly penalizes persons who have exercised their right to travel. Courts have applied rational basis review, and have sustained, durational residency requirements for various benefits and privileges that are not necessities like welfare benefits or medical care—for example, reduced college tuition, *Starns v. Malkerson*, 326 F. Supp. 234 (D. Minn. 1970), *aff'd mem.* 401 U.S. 985 (1971); preferential rates for mooring privileges in recreational boat harbors, *Hawaii Boating Ass'n v. Water Transp. Facilities Div.*, 651 F.2d 661 (9th Cir. 1981); and the opportunity to participate in interscholastic athletics, *Niles v. University Interscholastic League*, 715 F.2d 1027 (5th Cir. 1983).

Along with the nature of the interest affected, the courts also look to the duration of the disparate treatment brought about by the residency requirement. Compare, e.g., *Dunn v. Blumstein*,

405 U.S. 330 (1972), with *Marston v. Lewis*, 410 U.S. 679 (1973). The longer a new resident is subject to a disadvantage, the more likely it is that the disadvantage will penalize interstate migration. A permanent disadvantage will likely be subject to strict scrutiny even if the interest affected is merely "substantial" or "significant," rather than "vital." *Attorney General v. Soto-Lopez*, 476 U.S. 898 (1986) (veteran's preference).

Perhaps the most litigated type of durational residency requirement is that applicable to candidates for elective office. The courts have been split over the proper standard of review. See generally Annotation, *Validity of Requirement That Candidate or Public Officer Have Been Resident of Governmental Unit for Specified Period*, 65 A.L.R.3d 1048, 1064-67 (1975). Those applying strict scrutiny emphasize the impact on voter choice. *E.g.*, *Lentini v. City of Kenner*, 479 F. Supp. 966, 969 (E.D. La. 1979). Those applying a lesser standard emphasize that, because candidacy "is not itself a fundamental right (such as voting) nor a basic necessity of life (such as welfare benefits for the poor), the compelling state interest test is inappropriate." *City of Akron v. Bell*, 660 F.2d 166, 169 (6th Cir. 1981).

Even under strict scrutiny, durational residency requirements for candidates have sometimes survived. *E.g.*, *Sununu v. Stark*, 383 F.Supp. 1287 (D.N.H. 1974), *aff'd mem.*, 420 U.S. 958 (1975); *Chimento v. Stark*, 353 F.Supp. 1211 (D.N.H.), *aff'd mem.*, 414 U.S. 802 (1973). See *White v. Manchin*, 318 S.E.2d 470, 48889 (W.Va. 1984) (collecting cases).⁴ On the other hand, durational residency requirements typically fail equal protection review, sometimes even under rational basis review, when the office in question is local and the residency period exceeds one year. See, *e.g.*, *Green v. McKeon*, 468 F.2d 883 (6th Cir. 1972) (two years for city office); *Brill v. Carter*, 455 F. Supp. 172 (D. Md. 1978) (four years for county office); *Alexander v. Kammer*, 363 F.Supp. 999 (S.D. Ohio 1973) (five years for city commission); *Wellford v. Bat-*

⁴ As one treatise summarizes: "The Constitution itself requires candidates for federal elective office to meet certain residency standards. Therefore unless the residency requirement is patently unreasonable in length for the particular elective office the courts usually have sustained such qualifications on the right to candidacy." 2 Rotunda, Nowak, & Young, *Constitutional Law* §18.32, at 633 (1986).

taglia, 343 F.Supp. 143 (D. Del. 1972), *aff'd*, 485 F.2d 1151 (3d Cir. 1973) (five years for mayor).⁵

C. *Article 68, §1(b)(1)—Impact on Fundamental Rights*

In Maryland, the constitutional position of notary public is recognized as a State public office, and a commissioned notary public in Maryland is an officeholder in the traditional sense. *Moser v. Howard County Board*, 235 Md. 279 (1964). *See also Taggart v. Mandel*, 391 F.Supp. 732 (D. Md. 1975). However, the office is appointive, not elective. Article IV, §45 of the Maryland Constitution. Therefore, no fundamental right of voters is affected by the residency requirement for notaries public.

Moreover, we do not believe that a one-year durational residency requirement for notaries public otherwise significantly burdens the right to travel. As one court put it, in rejecting the argument that a lengthy residency requirement for Governor penalized interstate migration:

"[B]ecause of the nature of the residency requirement, the relationship between it and the right to travel is indirect and remote It cannot be seriously argued that the inability to run for Governor is a real impediment to interstate travel." *Chimento v. Stark*, 353 F.Supp. at 1218.

See also Walker v. Yucht, 352 F.Supp. 85, 96-97 (D. Del. 1972). But *see Brill v. Carter*, 455 F.Supp. at 174 (four-year residency requirement for county office infringes upon right to travel). In our view, it cannot be argued seriously that a wait of one year before a new resident may become a notary public is a real impediment to interstate travel. Surely the opportunity to become a notary

⁵ One writer summarizes the state of the law as follows:

"The trend . . . is for the courts to invalidate local laws, but to uphold state constitutional provisions, which establish durational residency requirements for candidates. Similarly, the courts seem more disposed to invalidate durational residency requirements which deal with city, county, or municipal level offices, and less disposed to invalidate such requirements which deal with state level offices The length of the required residence has frequently been a crucial factor in the court's determination." Annotation, 65 A.L.R. 3d at 1054-56.

public is not a "vital" government benefit or privilege, akin to welfare or medical treatment. *Cf. Memorial Hospital v. Maricopa County*, 415 U.S. at 261. And, even if the opportunity were thought "significant," *cf. Attorney General v. Soto-Lopez*, 106 S.Ct. at 2324, the duration of its denial, one year, is the same as that typically sustained as to candidacy for elective office.

For these reasons, we believe that rational basis review applies to Article 68, §1(b)(1).

D. *Interests Underlying Residency Requirement*

Maryland's notary public residency requirement was first enacted nearly two centuries ago. Chapter 86, Laws of Maryland 1801.⁶ For the purposes of rational basis review, this ancient requirement conceivably serves several legitimate governmental interests. First, the duties of the State's notaries involve them in matters of governmental, legal, and commercial importance. Therefore, the State has an interest in qualifying only notaries public who, through their residency, have had an opportunity to familiarize themselves with the policies, the law, and the institutions of the State.⁷ As the senatorial approval process in Article 68, §1(a)(1) and (c) evidences, the State also has an interest in assuring that responsible persons familiar with the applicant have time and opportunity to investigate the moral character and integrity of prospective notaries public. Finally, the General Assembly might also have recognized a value in having its notaries establish a stake in the community through the normal legal relations and responsibilities concomitant with a period of residence.

⁶ The two-year residency requirement adopted at the 1801 session of the General Assembly remained unchanged until 1980, when the General Assembly reduced the residency requirement to one year. Chapter 201, Laws of Maryland 1980.

⁷ Notaries public are empowered to administer oaths in all matters of a civil nature and to certify that fact under a notarial seal as "sufficient evidence of [the notary's] having administered such oath"; "to receive the proof or acknowledgment of all instruments of writing relating to commerce or navigation and such other writings as have been usually proved and acknowledged before notaries public"; and "to make protests and declarations respecting negotiable instruments and testify the truth thereof" under seal "concerning all matters done by [the notary] in virtue of his office." Article 68, §§3 and 4.

In short, the one-year residency requirement in Article 68, §1(b)(1) bears a reasonable relation to legitimate State interests.⁸ Because the requirement is properly subject merely to rational basis review, it does not violate the Equal Protection Clause.

II

Privileges and Immunities

A. *The Piper Case*

In *Supreme Court of New Hampshire v. Piper*, 470 U.S. 75 (1985), a Vermont resident was denied admission to the New Hampshire Bar under a rule of the New Hampshire Supreme Court that limited bar admission to residents of New Hampshire. The United States Supreme Court struck down the rule, holding that it violated the Privileges and Immunities Clause of the Constitution.⁹

The primary purpose of the Privileges and Immunities Clause is to prevent "economic protectionism." *Piper*, 470 U.S. at 285 n. 18. However, "it is '[o]nly with respect to those "privileges" and "immunities" bearing on the vitality of the nation as a single entity' that a State must accord residents and nonresidents equal treatment." 470 U.S. at 279 (quoting *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 383 (1978)).

⁸ We are not dissuaded from this view by *Taggart v. Mandel*, 391 F.Supp. 732 (D. Md. 1975), in which the court held that a citizenship requirement for notaries public violated the Equal Protection Clause, even under rational basis review. In support of this requirement, the State argued that citizenship—which, we note, takes much longer than one year to acquire—would lead to greater familiarity with local custom. The court was unpersuaded, given "the largely ministerial nature of the tasks of a notary public . . ." 391 F.Supp. 740. See *Bernal v. Fainter*, 467 U.S. 216 (1984). But the court went on to observe: "[T]o the extent that the State feels that familiarity with the language and customs of this country is a necessary qualification for the position of notary public, the equal protection clause demands that it choose some criteria of selection more narrowly confined to that end." *Id.* Local residency is one such criterion.

⁹ The Privileges and Immunities Clause provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Article IV, §2.

In *Piper*, the Supreme Court found that the practice of law is one such protected "privilege." Like other occupations, "the practice of law is important to the national economy." 470 U.S. at 281. Moreover, "the legal profession has a noncommercial role and duty" that invokes the protection of the Privileges and Immunities Clause—namely, the lawyer's role in "the vindication of federal rights" and the "champion[ing of] unpopular causes." *Id.*

Once the Clause is found to be applicable, a state that discriminates against nonresidents must carry a heavy burden if it is to justify the discrimination. It must show that "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonrespondents bears a substantial relationship to the State's objective." 470 U.S. at 284. The justifications offered by the Supreme Court of New Hampshire for its refusal to admit nonresidents were that "nonresident members would be less likely: (i) to become, and remain, familiar with local rules and procedures; (ii) to behave ethically; (iii) to be available for court proceedings; and (iv) to do *pro bono* and other volunteer work in the State." 470 U.S. at 285. The Supreme Court concluded that all of these failed to meet the test of "substantiality" required by the Privileges and Immunities Clause. *Id.*

B. Application to Article 68, §1(b)(1)

The Privileges and Immunities Clause applies to a distinction between residents and nonresidents if the State is "imposing unreasonable burdens on citizens of other States in their pursuit of common callings within the State" *Baldwin v. Fish & Game Comm'n*, 436 U.S. at 383.¹⁰ Here, there is no "unreasonable" burden on a nonresident's occupational endeavors; indeed, there is hardly a cognizable burden at all. The true effect of the residency requirement in Article 68, §1(b)(1) is that a nonresident who might otherwise want to augment the income from his or her real

¹⁰ As we point out in Part I C above, the position of notary public is a public office. The applicability of the Privileges and Immunities Clause to public offices and employment is unclear. See *United Bldg. & Constr. Trades Council v. Mayor and Council of Camden*, 465 U.S. 208 (1984). A few older cases stand for the proposition that the Clause applies only to the "private rights of the citizen, and do[es] not include the right to hold office. *Hogan v. Hartwell*, 7 So.2d 889, 891 (Ala. 1942). See also *Heiser v. Rhodes*, 305 F. Supp. 269, 272 (S.D. Ohio 1969).

job with notary fees is deprived, for one year, of that slight additional remuneration.¹¹ But a residency requirement having only this effect does not impair the privilege of occupational opportunity. *International Org. of Masters, Mates & Pilots v. Andrews*, 626 F.Supp. 1271, 1282-83 (D. Alaska 1986).¹²

Moreover, the Maryland requirement does not run counter to the "noncommercial" aspects of the Privileges and Immunities Clause identified in *Piper*—the protection of those, like lawyers, who advance other interests "important to the 'maintenance or well-being of the Union . . .'" 470 U.S. at 281 (quoting *Baldwin v. Fish & Game Comm'n*, 436 U.S. at 383)). To be sure, the acts of a notary public are necessary and important to the daily functions of government and commerce. But a notary public, whose duties are essentially clerical and ministerial, does not advance the interests of national unity in the way that a lawyer at least potentially can. See *Bernal v. Fainter*, 467 U.S. 216 (1984).

In short, there is no indication that Maryland's one-year residency requirement for notaries has an adverse impact on any of "those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity . . ." *Baldwin*, 436 U.S. at 383. Therefore, it is not subject to the strictures of the Privileges and Immunity Clause.

However, if the Clause were held to be applicable to Article 68, §1(b)(1), we cannot predict that the residency requirement would be found to be sufficiently justified. As discussed in Part I D above, the one-year residency requirement serves the State's interest in protecting citizens from those who are not familiar with

¹¹ In the case of a court reporter, for which a notarial commission is a requirement of the position and may, for that reason, be considered a basis of the reporter's livelihood, Article 68, §1(b) imposes no residence requirement on out-of-state court reporters who apply for a notarial commission in Maryland. See note 1 above.

¹² At issue in *Andrews* was a wage differential for certain state employees, given to Alaska residents only. The effect was that nonresident employees earned less for the same work. In holding that the opportunity to receive this wage adjustment was not a privilege protected by the Privileges and Immunities Clause, the court pointed out that, unlike residency requirements that had run afoul of the Clause, the wage differential did not erect economic or other barriers that effectively barred nonresidents "from practicing their profession altogether." 626 F.Supp. at 1283. If, as a matter of economic reality, service as a notary public were itself a means of livelihood, we would view the residency requirement differently; but, in reality, it is not.

the law, policies, and institutions of the State and from those who are not seriously committed to the interests of the community. It also allows time to insulate the position from those who do not have the moral character and integrity demanded by this public office.

These justifications are surely enough to satisfy rational basis equal protection review. But in light of the Supreme Court's rejection of New Hampshire's comparable arguments in *Piper*, we doubt that they would be substantial enough under the Privileges and Immunities Clause. Thus, if a court were to disagree with our belief that the Clause is inapplicable, Article 68, §1(b)(1) would not likely survive.

III

Conclusion

In summary, it is our opinion that the one-year residency requirement in Article 68, §1(b)(1) violates neither the Equal Protection Clause nor the Privileges and Immunities Clause of the United States Constitution.

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Opinions and Advice

PERSONNEL

DEBT TO STATE—CONSTITUTIONAL LAW—DUE PROCESS—STATE
MAY MAKE DEDUCTIONS FROM PAY TO OFFSET DEBT BUT
MUST PROVIDE NOTICE TO EMPLOYEE AND OPPORTUNITY TO
REBUT CLAIM.

January 28, 1987

*Mr. Frank Farrow, Executive Director
Department of Human Resources
Social Services Administration*

You have requested our opinion on whether the State, as an employer, may withhold the paycheck of a State employee to offset a debt owed by the employee to the State. If such an offset is permissible, you further ask about the procedures to be followed in withholding a paycheck.

For the reasons given below, we conclude that the State may make deductions from a State employee's wages or salary to offset the employee's debt. However, the employee must be given prior notice of such a proposed deduction and an opportunity to rebut the State's claim. In addition, the amount that may be withheld from an employee is limited in some cases by the federal Fair Labor Standards Act.

I

State's Right to Set-Off

Various cases have arisen in which an employee of the State has become indebted to the State. For example, an employee may have obtained reimbursement for travel expenses in excess of the amount of expenses he or she actually incurred or may have destroyed or misappropriated State property. In each such case, the employee is liable to the State for reimbursement of money improperly received or for restitution of the value of the property.

Section 7-222 of the State Finance and Procurement Article ("SF" Article) provides:

"Unless a person and the Comptroller or any duly authorized agent or representative designated by the

Comptroller have entered into an agreement for the payment of the person's indebtedness to the State and the payments are current or unless, for good cause shown, the Board of Public Works grants a waiver, the Comptroller, the Chief Deputy Comptroller, or a deputy comptroller may not issue to a person a warrant for payment of a claim due to the person in the person's own right, if the person owes \$50 or more to the State, a unit of the State government, or any governmental entity under the control of the State."

The language of SF §7-222 does not clearly limit the types of claims to which it applies. And, an employee's right to be paid for the work he or she has performed is unquestionably a claim against the State due to the employee in his or her own right. See *Mass Transit Administration v. Household Finance Corporation*, 292 Md. 313, 316-17 (1982). Thus, SF §7-222 on its face appears to be applicable to State employees' claims to wages or salary.

That conclusion is, nonetheless, not entirely clear. The provision for set-offs against claims against the State was originally enacted by Chapter 180 of the Laws of Maryland 1862, which "relat[ed] to the adjustment of claims against the State." That Act established a procedure for making claims "for errors in the payment of [the claimant's] State taxes, or for sums erroneously paid into the Treasury" In addition, the Act required the Comptroller to deduct amounts due to the State before issuing a warrant for payment of claims against the State.¹ It thus appears that, as originally enacted, the statutory set-off requirement may have been intended to apply only to the particular kind of claims against the State addressed in Chapter 180—claims for refund of amounts the claimant had erroneously paid to the State.

However, Chapter 701 of the Laws of Maryland 1941 repealed the provisions for claiming refunds that had been enacted by Chapter 180, substituting provisions in Article 81 that relate specifically to refunds of erroneously paid taxes.² Nonetheless, the

¹ The provisions of that Act were subsequently codified at Article 19, §§19 and 20.

² Substantially the same provisions are now codified at §§14-904 and 14-905 of the Tax-Property Article.

1941 enactment left then Article 19, §19, requiring set-offs, in place.³ Such an action taken after the enactment of a statute may furnish guidance as to the statute's intended scope. *Vournas v. Montgomery County*, 300 Md. 123, 129-30 (1984).

In our view, the separation of the set-off requirement from the provisions for claiming refunds indicates that the General Assembly viewed the set-off requirement as being more generally applicable than the refund provisions. That is, the General Assembly thereby indicated that the set-off applies to all claims against the State, whatever their nature. Accordingly, we think that SF §7-222 requires that a State employee's claim to salary or wages, like any other claim against the State, be offset by any debt that the employee owes to the State.

Even were that not so, the general creditor's right of setoff would justify withholding the employee's pay in these cases. Set-off is the right of parties indebted to each other "to set off their respective debts by way of mutual deduction" 80 C.J.S. *Set-off and Counterclaim* §3 (1953). "The right of set-off is based on principles of right, justice, and benevolence. The doctrine is remedial in character, and is a mode which equity adopts to compel the ultimate payment of a debt by one who in justice, equity, and good conscience ought to pay it." *Id.* The doctrine applies to an employer whose employee has improperly obtained excessive payments or has destroyed property of the employer. Indeed, one federal court has commented that "[t]o require an employer to pay wages due an employee who is indebted to the employer for an outright theft or embezzlement would be a perversion of justice" *Marshall v. Hendersonville Bowling Center, Inc.*, 483 F. Supp. 510, 516 (1980).⁴

Hence, we think that the State does have the right to make deductions from a State employee's pay to offset the employee's in-

³ Present SF §7-222 is a recodification, with subsequent amendment, of the former Article 19 set-off requirement.

⁴ The General Assembly, while acting to protect employees from unjustified wage deductions, has nonetheless recognized that employers' offsets against wages may be appropriate. The Maryland Wage Payment and Collection Law prohibits nonconsensual deductions except pursuant to law, regulation, or court order or those that "[a]re allowed by the Commissioner [of Labor and Industry] because the employee has received full consideration for the deductions." Article 100, §94(d)(4).

debtedness to the State.⁵ At the same time, there are restrictions on the exercise of that right.

II

Due Process Requirements

A. Notice and Hearing

The Due Process Clause of the Fourteenth Amendment requires a State to give notice and an opportunity for some kind of hearing before it may finally deprive a person of property. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972).⁶ The wages or salary due to an employee is, of course, property of the employee. *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 341 (1969).

To be sure, the Due Process Clause does not necessarily prohibit summary seizure of property without notice or an opportunity for a prior hearing. *E.g.*, *Fahey v. Mallonee*, 332 U.S. 245 (1947). But cases approving summary seizure are exceptional:

"These cases recognize that either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at sometime after the initial taking, can satisfy the requirements of procedural due process." *Parratt v. Taylor*, 451 U.S. 527, 539 (1981).

We do not think that a case in which the State seeks to recover money or property from a State employee presents such a situa-

⁵ Our view in this regard is bolstered by the General Assembly's abrogation of the common law rule that public employees' wages are not subject to garnishment by third party creditors. See *City of Baltimore v. Comptroller*, 292 Md. 293, 301 (1982); *Mass Transit Administration v. Household Finance Corp.*, 292 Md. 313, 314 (1982). Section 15-607 of the Commercial Law Article, enacted by Chapter 489 of the Laws of Maryland of 1982, authorizes garnishment of wages due from governmental entities in the same manner and to the same extent as wages due from private employers. The General Assembly thus has clearly expressed its intent that public employees' liability for their debts be fully enforceable.

⁶ The Due Process Clause provides that "[n]o State shall . . . deprive any person of life, liberty or property, without due process of law . . ." U.S. Const. amend. XIV, §1.

tion. In determining whether a predeprivation hearing is required, the Supreme Court has considered (i) the private interest at stake, (ii) the risk of an erroneous deprivation of that interest, and (iii) the governmental or public interest to be served, including the government's interest in avoiding undue fiscal and administrative burdens. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Only where the public interest is extremely strong—as, for example, in a case involving misbranded drugs—has it been held to outweigh the risk of erroneous deprivation of an important private interest so as to justify summary seizure of property. See *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950).

The State's interest in the expeditious recovery of debts owed to it, with a minimum of administrative burdens, is undeniable. See *Phillips v. Commissioner of Internal Revenue*, 283 U.S. 589, 595 (1931). Nonetheless, we do not think that interest is of the same quality as the imminent threat to the public health, safety, or welfare involved in such cases as *Ewing*. Hence, in our view, the State's interest in protecting the public fisc is not so overriding, when balanced against the other considerations, as to justify summary seizure of a State employee's wages or salary.

The Supreme Court has repeatedly acknowledged the strength of the private interest at stake when government actions affect an individual's livelihood. *E.g.*, *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 543 (1985); *Bell v. Burson*, 402 U.S. 535, 539 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970); *Sniadach*, 395 U.S. at 340. The drain on a family's income resulting from the State's seizure of some or all of a wage-earner's paycheck cannot be gainsaid.

Moreover, cases in which it is claimed that a State employee is indebted to the State are likely to involve factual disputes. Consequently, "some opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision." *Loudermill*, 470 U.S. at 543.⁷ Hence, we think that the Due Process Clause requires the State to give an employee notice and an opportunity to be heard before it may institute a set-off against the employee's pay. *Cf. Sniadach*, 395 U.S. at 342 (pre-

⁷ The Supreme Court further noted in *Loudermill* that, in similar cases, a governmental employer also has an interest in accurate decisionmaking, to avoid "taking the possibly erroneous and counter-productive step of forcing its employees onto the welfare rolls." 470 U.S. at 544.

judgment garnishment of wages, without notice and hearing, violates due process).

B. *Nature of Hearing*

This is not to say, however, that the required hearing need be elaborate. In *Loudermill*, the Supreme Court considered the nature of the hearing that must be afforded to tenured public employees before they may be discharged. Notwithstanding the strong interest of those employees in retaining their employment, the Court concluded that “the pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.” 470 U.S. at 545-46. The Court held, therefore, that an employee need not be afforded a full evidentiary hearing before the termination: “The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer’s evidence, and an opportunity to present his side of the story.” 470 U.S. at 546.

We think that the holding in *Loudermill* is equally applicable to set-offs against State employees’ paychecks. While there is no denying the significance of even a temporary deprivation or reduction in pay, we think that such a deprivation is somewhat less severe than the termination of employment. Therefore, we think that an employee who is apparently indebted to the State is entitled to notice of a proposed deduction from his or her pay, an explanation of the evidence on which the allegation of indebtedness is based, and an “opportunity to present reasons, either in person or in writing, why the proposed action should not be taken” *Id.*

We note that the regulations of the Department of Budget and Fiscal Planning that govern the collection of debts owed to the State require that written demand for payment be made, “inform[ing] the debtor of the amount and reason for the indebtedness and the date when payment is due.” COMAR 17.01.01.04B(1). Those regulations also require creditor agencies to “undertake personal interviews and telephone contact with their debtors” COMAR 17.01.01.04C. We think these existing procedures for the collection of debts in general could be adapted to provide at least the minimum process due in cases in

which the debtor is a State employee. That is, the demand for payment should inform the employee of the agency's intention to set off the employee's debt against his or her pay. The demand for payment should also advise the employee of his or her right to present reasons why the proposed set-off should not be instituted.⁸ If the employee does offer such reasons, he or she should be informed in writing of the agency's determination of the matter.⁹

Article 64A, §54 establishes a grievance procedure, culminating in arbitration or an evidentiary hearing, that is available to State employees whose employment status or conditions of employment are adversely affected by agency actions. In any case in which the disputed claim is one owed to the employee's employing agency, the employee has a clear statutory right to complain of the institution of an offset in such a proceeding. Article 64A, §53. A claim against the employee by another agency is not clearly a "grievance" as that term is defined in Article 64A, §52(b). *See 64 Opinions of the Attorney General* 146, 148 (1979). However, due process requires that similar hearing procedures be afforded the employee in such a case, and, as a practical matter, the grievance procedure is used for resolution of all employment-related disputes.

If the final decision of the Secretary of Personnel in that proceeding is favorable to the employee, the Secretary is expressly empowered to grant the employee back pay. Article 64A, §54(b). Further, the final decision of the Secretary is subject to judicial review. *Comptroller of the Treasury v. Myers*, 59 Md. App. 118 (1984).

⁸ In this regard, we note particularly that SF §7-222 excepts from the set-off requirement those cases in which the debtor and the Comptroller or an authorized agent or representative of the Comptroller have entered into an agreement for the payment of the indebtedness.

⁹ In some cases, the State's claim is one against an employee who has resigned or been discharged and who, consequently, is due only one or two additional paychecks when the claim arises. If at all practicable, the mandated pre-deprivation hearing in such a case should occur before the date on which the employee would regularly receive the paycheck from which the offset will be deducted. Any necessary delay in the employee's receipt of the paycheck pending the employee's response to notice of the offset must be kept to a minimum.

In our opinion, this procedure by which an employee may obtain an evidentiary hearing after the institution of a set-off, if coupled with predeprivation notice and an opportunity to respond, meets the requirements of due process. This procedure is no less formal than that approved by the Supreme Court in *Loudermill* for cases of employment termination. 470 U.S. at 547.¹⁰

III

Fair Labor Standards Act Requirements

The federal Fair Labor Standards Act (the "FLSA"), 29 U.S.C. §§201 through 219, establishes minimum wage requirements for most employees. In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the Supreme Court held that the FLSA applies to states, as well as to private employers. Accordingly, the State may not, by offsetting an indebted State employee's pay, reduce the employee's wages below the minimum wage in contravention of the FLSA.

Nonetheless, the FLSA does not prevent the State from offsetting against a State employee's pay amounts previously misappropriated by the employee. In such a case, a temporary reduction in the employee's wages to a level below the minimum wage does not conflict with the FLSA:

"As a matter of law the employee would owe such amounts to the employer, and as a matter of fact, the repayment of moneys taken in excess of the money paid to the employee in wages would not reduce the amount of his wages . . . In such a case there would be no violation

¹⁰ In 70 *Opinions of the Attorney General* 151, 157 (1985), we concluded that the existing procedures for the discharge of classified State employees—which include a pretermination evidentiary hearing—"clearly meet the due process requirements enunciated in *Loudermill*." We also recognized, however, that the decision in *Loudermill* does not require a formal pretermination hearing. By the same token, the State certainly could make a full evidentiary hearing available to an employee indebted to the State before instituting any deduction from wages or salary to offset the employee's indebtedness to the State. Such a procedure may, indeed, be preferable. Nonetheless, we think that the due process principles enunciated in *Loudermill* do not require such a formal predeprivation hearing.

of the [FLSA] because the employee has taken more than the amount of his wage and the return could in no way reduce his wage below the minimum." *Mayhue's Super Liquor Stores, Inc. v. Hodgson*, 464 F.2d 1196, 1198 (5th Cir. 1972).

Accord Brennan v. Heard, 491 F.2d 1, 4 n. 2 (5th Cir. 1974). Thus, the FLSA does not limit the State's right to set off against an employee's pay the value of money, paid leave, or property obtained by the employee through theft, misappropriation, or fraud.

However, if a State employee is indebted to the State for any other reason, the FLSA does limit the amount of any set-off against that employee's pay. By enacting the FLSA, "Congress has determined that the individual worker should have the freedom and responsibility to allocate his minimum wage among competing economic and personal interests. . . . The FLSA decrees a minimum unconditional payment and the commands of that Act are not to be vitiated by an employer" *Brennan*, 491 F.2d at 4. Accordingly, in any case in which an employee's indebtedness is not the result of the employee's having previously obtained an actual or effective overpayment of wages through misconduct, deductions from the employee's pay to offset the indebtedness must be limited to amounts that will not reduce the employee's pay below the minimum prescribed by the FLSA. Even the employee's consent to larger deductions in such a case is not effective to waive the employee's right to receive the minimum wage. *Mayhue's Super Liquor Stores*, 464 F.2d at 1197.

V

Conclusion

In summary, it is our opinion that the State may make deductions from a State employee's pay to offset a debt that the employee owes to the State. However, the employee must be given prior notice of such a proposed withholding and an opportunity to rebut the State's claim against the employee. In addition, the FLSA prohibits deductions that would reduce the employee's wages below the minimum wage unless the employee's indebtedness arises out of his or her theft, misappropriation, or fraud against the State.

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Opinions and Advice

PERSONNEL—SMOKING POLICY—EXECUTIVE ORDERS—GUIDELINES—RULEMAKING—“INTERNAL MANAGEMENT” EXCEPTION.

July 8, 1987

*Mr. Theodore E. Mathison
State Aviation Administrator
Maryland Department of Transportation*

You have requested our opinion on several questions related to Executive Order 01.01.1987.13, entitled “Executive Agency Policy on Smoking.” Specifically, you ask:

1. Does the Executive Order apply to space at Baltimore/Washington International Airport that, although accessible to the general public, is leased to private persons?

2. Are the smoking policy guidelines that are to be established by each agency subject to the rulemaking requirements of the Administrative Procedure Act?

3. Does the Executive Order’s procedure for resolution of “employee concerns about their treatment” under the smoking policy supplant existing employee grievance procedures?

For the reasons stated below, we conclude as follows:

1. Executive Order 01.01.1987.13 does not apply to State-owned property that, like portions of Baltimore/Washington International Airport, is leased to private parties and is used by the general public to transact business with those private lessees.

2. The smoking policy guidelines for each agency are not subject to the rulemaking requirements of the Administrative Procedure Act.

3. The dispute resolution procedures contemplated by the Executive Order supplement, rather than supplant, existing employee grievance procedures.

I

Executive Order on Smoking Policy

On May 6, 1987, Governor Schaefer issued Executive Order 01.01.1987.13, "Executive Agency Policy on Smoking."¹ The Executive Order sets out the following broad prohibition:

"In addition to those areas governed by State laws, smoking is prohibited in general public access areas, Government operated shuttle buses, and designated areas of cafeterias and dining rooms." §1(A).²

The Executive Order also sets out the procedures for implementation and enforcement of this overall smoking policy. Each department and agency is to establish its own Smoking Policy Review Committee.³ These committees have two principal tasks: to develop guidelines to implement the smoking policy, which are to be established by October 1, 1987; and to resolve specific problems that might arise under the guidelines. §2(B) and (C).

Although the Executive Order gives little specific direction to the committees, the order's reference in §1 to "the needs and concerns of smokers and nonsmokers alike" implies what would be obvious anyway—each committee is to act in a fair and even-handed way, consistent with the order's emphasis on protecting all employees and visitors from the hazards of smoking. Where interests conflict, the priority set by the Executive Order is clear: "In the development of specific guidelines or the resolution of specific problems relating to the State's smoking policy, the Committee shall give reasonable priority to the needs of nonsmokers." §2(C).

¹ Under §3-401 of the State Government Article, an executive order may prescribe "rules of conduct" for State employees and "persons who deal with them."

² Section 1(B) provides that the order "does not apply to the ground and first floor of the State House and spaces assigned to the legislative and judicial branches of government."

³ Section 2(A) provides that the "size and composition of the Committee shall be determined by each Secretary or agency head, but shall include both smokers and nonsmokers as well as supervisory and nonsupervisory personnel."

II

Applicability of Executive Order to Leased Spaces

The overall purpose of the smoking policy is "to provide a healthful working environment in areas of buildings occupied by Executive branch agencies" §1. The scope of the order is also suggested by language in the preamble speaking of the State's responsibility "to promote a healthy and safe environment for all employees and individuals who conduct business *in State offices*." Preamble ¶14 (emphasis added).

Given this language, we believe that the order was not intended to apply to the property of an Executive Branch agency that (i) is leased to a private business and (ii) is used by the general public solely to conduct business with a private lessee and not with State employees. Construing the order in this way avoids conflict with existing lease arrangements, which typically contemplate that the lessee is responsible for determining an operational policy like smoking by customers in the leased premises.

Thus, we conclude that the order does not apply to the portions of Baltimore/Washington International Airport that are leased to concessionaires and other private businesses.

III

Applicability of Rulemaking Requirements

A. Definition of "Regulation"

Section 10-101(e) of the State Government Article ("SG" Article) defines "regulation" quite broadly:

"(1) 'Regulation' means a statement or an amendment or repeal of a statement that:

- (i) has general application;
- (ii) has future effect;
- (iii) is adopted by a unit to:

1. detail or carry out a law that the unit administers;

2. govern organization of the unit;
 3. govern the procedure of the unit; or
 4. govern practice before the unit; and
- (iv) is in any form, including:
1. a guideline;
 2. a rule;
 3. a standard;
 4. a statement of interpretation; or a statement of policy.

(2) 'Regulation' does not include:

(i) a statement that:

1. concerns only internal management of the unit; and
2. does not affect directly the rights of the public or the procedures available to the public.

...

(3) 'Regulation', as used in §§10-110 and 10-111.1, means all or any portion of a regulation."

This office has consistently construed the definition of "regulation" as broadly as its language and apparent underlying intent direct. See 70 *Opinions of the Attorney General* 208 (1985) (automatic waiver program as to certain tax penalties); 66 *Opinions of the Attorney General* 151 (1981) (Home Improvement Commission policy change); 65 *Opinions of the Attorney General* 396 (1980) (Racing Commission policy regarding Sunday racing); 64 *Opinions of the Attorney General* 208 (1979) (lottery prize structure); Opinion No. 75-099 (July 21, 1975) (Financial Disclosure Advisory Board procedures); Opinion No. 75-064 (May 22, 1975) (rules relating to State contracts); and Opinion 75-033 (March 4, 1975) (Central Collection Unit rules). Cf. 68 *Opinions of the Attorney General* 9 (1983) (narrow exception for proprietary price setting).

We have little doubt that each agency's smoking policy guidelines will be a statement of "general application" and "future effect" adopted by each agency to detail and carry out Executive

Order 01.01.1987.13.⁴ Hence, the guidelines meet the basic definition of a "regulation" in SG §10-101(e)(1). They are subject to APA rulemaking requirements, therefore, unless they are excluded from the definition by SG §10-101(e)(2)(i)—that is, unless they "concer[n] only internal management" and "d[o] not affect directly the rights of the public or the procedures available to the public."

B. Criteria for Application of "Internal Management" Exception

As far as we are aware, no reported case has construed the "internal management" exception to the rulemaking requirements of the Maryland Administrative Procedure Act. Two opinions of this office refer to the exception, but neither describes its boundaries.⁵

⁴ A statement might be of "general application" even if it affects only a discrete subset of the citizenry:

"[T]o be of general application, a rule need not apply to all persons within the state. Even though an action applies only to persons within a small class, the action is of general application if that class is described in general terms and new members can be added to the class." *Citizens for Sensible Zoning v. Department of Natural Resources*, 280 N.W.2d 702, 707-08 (Wis. 1979).

At the same time, not every agency statement affecting a definable class is necessarily a regulation. For example, a group of persons in a contractual relationship with a State agency might be affected by agency directives authorized under the contract. We are not suggesting that these directives are of "general application," with the meaning of the APA.

⁵ In 57 *Opinions of the Attorney General* 478 (1972), the office briefly discussed the status, under the Maryland APA, of a six-volume manual of the Social Services Administration. One of the volumes, *Laws and Rules*, was adopted under APA rulemaking procedures; the other five, characterized by the agency as concerning only internal management, were not. The opinion recognized that, "to the extent that the provisions of [one of the five other volumes] exceed the requirements of the Laws and Rules volume, such provisions are unenforceable." 57 *Opinions of the Attorney General* at 479.

The other opinion, 61 *Opinions of the Attorney General* 3 (1976), merely concluded without analysis that "the standing operating procedures for the Public Defender's Office and [its] panel attorneys" fell within the exception.

From the statutory phrase "does not affect *directly* the rights of the public or the procedures available to the public," we infer the General Assembly's recognition of the fact that virtually every internal management directive will have at least some tangential effect on the public, however attenuated. This is inevitably so, given the public responsibilities of State agencies. Thus, the key in applying this exemption is to determine whether an instruction to staff or other management directive that is primarily addressed to State personnel nevertheless has significant direct effects on the public, as distinct from the inevitable indirect ones.

The problem most often arises when an agency issues detailed instructions, addressed to its staff, on how to implement a statute. Some instructions of this kind merely spell out operational details like what forms to fill out, what approvals to obtain, or what evidence to look at to determine whether an applicant meets a statutory standard. This type of staff directive does not have a direct, substantial effect on the public and therefore is within the "internal management" exception. *Doe v. Chang*, 564 P.2d 1271 (Haw. 1977); *Rogue Flyfishers, Inc. v. Water Policy Review Bd.*, 660 P.2d 1089 (Ore. App. 1983); *Island County Comm. on Assessment Ratios v. Department of Revenue*, 500 P.2d 756 (Wash. 1972). Cf. *T.S.C. Motor Freight Lines v. United States*, 186 F.Supp. 777 (S.D. Tex. 1960), *aff'd mem.* 366 U.S. 419 (1961).

On the other hand, some instructions go beyond the specification of processing steps or other tasks that the agency's staff must accomplish. This second type of instruction, for example, imposes application procedures on members of the public, establishes eligibility criteria not set forth in a statute, restricts access to a statutory benefit, or imposes fees. This type of staff directive does have a direct, substantial effect on the public and therefore is beyond the "internal management" exception. See *Joseph v. Civil Service Comm'n.*, 554 F.2d 1140, 1153 n.23 (D.C. Cir. 1977); *Seaboard World Airlines v. Gronouski*, 230 F.Supp. 44, 46 (D.D.C. 1964); *Senn Park Nursing Center v. Miller*, 455 N.E.2d 153 (Ill. App. 1983), *aff'd in part and rev'd in part on other grounds*, 470 N.E.2d 1029 (Ill. 1984). See also 57 *Opinions of the Attorney General* 478 (1972).

In summary, then, whether a staff directive or other similar statement is exempt from rulemaking by virtue of the "internal management" exception depends on the practical consequences for members of the public. The exception applies only if the internal guidance does not significantly affect either the procedural

steps that interested persons must take in their dealings with an agency or the allocation of substantive benefits or burdens.

C. Application to Smoking Policy Guidelines

Like the Executive Order itself, the guidelines address internal management concerns only. In general, "the internal management of an agency necessarily includes the custodial management of public property entrusted to the agency." *Holdman v. Olim*, 581 P.2d 1164, 1170 (Haw. 1978). A directive, primarily addressed to the on-the-job behavior of State employees, that seeks to ameliorate an environmental problem in the workplace is, we think, a classic instance of this kind of "custodial management of public property."

As we see it, the smoking policy guidelines would affect the general public only indirectly or incidentally. The only effect of the guidelines on members of the public is that those who smoke would be prohibited from smoking, under circumstances defined in the Executive Order and the implementing guidelines, during the brief period of their visit to a State office building. Citizens come to State offices to conduct business, not to smoke. Nothing in the guidelines will impair their opportunity to conduct that business. *Cf. Holdman v. Olim*, 581 P.2d at 1170-71 (dress code for visitors to prison does not affect visitors' rights and is within "internal management" exception).

Put differently, those who transact public business do not have a right to smoke while doing so. Quite apart from the guidelines, visitors and employees alike have been subject to the authority of those in charge of public buildings to ban smoking. *See* Letter of Advice from Assistant Attorney General Catherine M. Shultz and Staff Attorney Beth Pepper to The Honorable Larry W. Shipley, Clerk of the Circuit Court for Carroll County (December 10, 1985).⁶

⁶ Ms. Shultz and Ms. Pepper pointed out that "no court has held that smokers have a 'right to smoke' or a liberty interest encompassed by the Fourteenth Amendment." Letter of Advice at 2. Moreover, even "if we assume that a right to smoke exists, the smoking ban would be upheld nonetheless, because there is a rational basis for a rule banning smoking in the work place." *Id.* at 3.

In sum, it is our view that the specific smoking policy guidelines to be developed by each agency pursuant to the Executive Order fall within the "internal management" exception in the Maryland APA. They "concer[n] only internal management" and "d[o] not affect directly the rights of the public," within the meaning of SG §10-101(e)(2)(i). Therefore, each agency may put them into effect without undertaking the procedures required of regulations.

IV

Effect on Grievance Procedures

If action is taken against an executive branch employee because of his or her non-compliance with an agency's guidelines for implementation of the smoking policy, that employee has a statutory right to present a grievance. Article 64A, §53(a).⁷ The definition of "grievance" includes "any cause of complaint . . . arising between an employee and his employer over the interpretation and application of . . . any . . . policies over which management has control." Article 64A, §52(b).

The apparent intent of §2(C) of the Executive Order is to provide an alternative forum for the informal resolution of problems. Ideally, the work of an agency's Smoking Policy Review Committee would resolve problems that would otherwise result in grievances. But the Executive Order may not be construed to impair an employee's right to present a grievance about the application of the smoking policy.⁸

⁷ Certain persons are excepted from the grievance procedures. See Article 64A, §53(c).

⁸ An executive order issued pursuant to Subtitle 4, Title 3 of the SG Article, "although it has the force of law, may not be contrary to existing express statutory provisions." 64 *Opinions of the Attorney General* 180 (1979).

V

Conclusion

In summary, it is our opinion that:

1. Executive Order 01.01.1987.13 does not apply to State-owned property that, like portions of Baltimore/Washington International Airport, is leased to private parties and is used by the general public to transact business with those private lessees.

2. The smoking policy guidelines for each agency are not subject to the rulemaking requirements of the Administrative Procedure Act.

3. The dispute resolution procedures contemplated by the Executive Order supplement, rather than supplant, existing employee grievance procedures.

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PROCUREMENT LAW

SOLICITATION NOTICES—PRE-BID/PRE-PROPOSAL CONFERENCES
—ATTENDANCE AT CONFERENCE MAY NOT BE MADE MANDATORY.

March 3, 1987

Robert J. Colborn, Jr., Administrator
Division of State Documents

You have requested our opinion on whether solicitation notices for competitive procurements may include a provision mandating attendance at a pre-bid or pre-proposal conference. The form currently used by the Division of State Documents to obtain the information necessary to advertise a State procurement in the Maryland Register includes a section in which the procuring agency states whether attendance at such a conference is mandatory.

For the reasons given below, we conclude that a bid or proposal may not be rejected on the ground that the offeror failed to attend a pre-bid or pre-proposal conference, even if the agency designated attendance at the conference to be mandatory.¹ Accordingly, we suggest that the solicitation form currently used by the Division of State Documents be changed to eliminate the agency's option to advertise that attendance at a pre-bid or pre-proposal conference is mandatory.

I

Background

If a contract is required by the Procurement Law to be awarded by competitive sealed bidding, "[p]ublic notice of the invitation for bids shall be given prior to the date for the opening of bids." §13-202(c)(1) of the State Finance and Procurement Article

¹ This conclusion applies to all conferences held as a part of a competitive procurement, whether or not a solicitation notice is published. See note 3 below and accompanying text.

("SF" Article). Comparable public notice is required if the contract is to be awarded by competitive negotiation. SF §13-203(b).² In either case, if the contract amount is expected to be over \$25,000, the notice must be published in the Maryland Register.³ This published advertisement of the invitation for bids ("IFB") or the request for proposals ("RFP") is commonly referred to as the solicitation notice.

Pre-bid conferences, held prior to the submission of bids by bidders under competitive sealed bidding, and pre-proposal conferences, held prior to the initial submission of proposals by offerors under competitive negotiation, have become common. The solicitation notice typically identifies the time and place of any conference and states whether attendance by would-be contractors is mandatory. Compare, e.g., ID No. M/C 54-87 (attendance not mandatory) with ID No. MR32 (attendance mandatory), 14 Md. Reg. 222 (Jan. 23, 1987). However, the Procurement Law itself does not address pre-bid or pre-proposal conferences. The procurement regulations expressly authorize pre-bid conferences but do not say whether they may be made mandatory:

"Pre-bid conferences may be conducted by the procurement officer or his designee to explain the procurement requirements. They shall be announced to all prospective bidders who were sent an invitation for bids or who have obtained the bidding documents. The pre-bid conference should be held long enough after the invitation for bids has been issued to allow prospective bidders to become familiar with it, but sufficiently before bid opening to allow consideration of the pre-bid conference results in the preparation of bids. Nothing stated at the pre-bid conference shall change the invitation for bids unless a change is made by the procurement officer by

² In Chapter 840, Laws of Maryland 1986, the General Assembly enacted extensive revisions to the Procurement Law. These revisions take effect July 1, 1987 and, among many other amendments, change the name of the competitive negotiation procurement method to "competitive sealed proposals." See future SF §11-111. The conclusions reached in this opinion are applicable to competitive sealed proposals. More generally, this opinion applies equally to both the pre-and post-July 1, 1987 versions of the law.

³ SF §13-202(c)(2) provides as follows: "Notices for bids on State contracts for which the bid amount is reasonably expected to be over \$25,000 . . . shall be published in the Maryland Register."

written amendment. If a summary of the conference is made, it shall be supplied to all prospective bidders who were sent an invitation for bids or who have obtained the bidding documents. If a transcript is made, it shall be a public record." COMAR 21.05.02.07.

II

Competitive Bidding

A. *Introduction*

The Procurement Law generally does not authorize an agency to reject a bid unless the bid is not "responsive" or the bidder is not "responsible." See SF §13-202(g). Thus, a bidder's failure to attend a "mandatory" pre-bid conference may result in rejection of its bid only if that absence affects responsiveness or responsibility.

B. *Responsiveness*

SF §13-101(i) defines a responsive bidder as "a person who has submitted a bid . . . which conforms in all material respects to the requirements of the solicitation." The Maryland State Board of Contract Appeals ("MSBCA") has described the nature of a responsive bid as follows:

"It is a well established principle of procurement law that in order for a bid to be responsive it must constitute a definite and unqualified offer to meet the material terms of the IFB. The material terms of an IFB are those that could affect the price, quantity, quality or delivery of the goods or services sought by the IFB." *Long Fence Co.*, Docket No. MSBCA 1259, 2 MSBCA Decisions (MICPEL) ¶123, at 6 (February 13, 1986) (citations omitted).⁴

⁴ The MSBCA is an independent agency within the Executive Branch with exclusive jurisdiction to hear and decide State contract formation disputes (bid protests). SF §17-202. Issues concerning bid responsiveness and bidder responsibility arise in the context of such bid protests.

Statements at a pre-bid conference may not, in and of themselves, alter the terms of the solicitation unless they become part of the solicitation by amendment: "Nothing stated at the pre-bid conference shall change the invitation for bids unless a change is made by the procurement officer by written amendment." COMAR 21.05.02.07.⁵ Accordingly, a bidder's failure to attend a pre-bid conference cannot affect the extent to which its bid constitutes a definite and unqualified offer to meet the material terms of the solicitation.

Moreover, responsiveness must be determined from the face of the bid:

"[The MSBCA] has repeatedly held that a bid must be determined responsive from the face of the bid document and not from information subsequently obtained through the verification process or *other extrinsic evidence*." *Calvert General Contractors Corp.*, Docket No. MSBCA 1314 (Dec. 24, 1986) (emphasis added).

See also, e.g., *Inner Harbor Paper Supply Co.*, Docket No. MSBCA 1064, 1 MSBCA Decisions (MICPEL) ¶24, at 4 (Sep. 9, 1982). Accord, *Grade-Way Construction v. United States*, 7 Cl.Ct. 263, 266 (1985). Hence, responsiveness does not turn on whether a bidder attended a pre-bid conference.

C. Responsibility

SF §13-101(h) defines a "responsible bidder or offeror" as a "person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance." Responsibility embraces matters such as financial resources, ability to perform in the face of other business commitments, record of performance on other contracts, record of integrity, experience, skill, business organization, equipment and technical resources, and all like matters generally relating to the capability and qualifications of the bidder. See, e.g., *Federal Elec. Corp. v. Fasi*, 527 P.2d 1284, 1291 (Haw. 1974).

⁵ Amendments to an invitation for bids must be in writing and receipt of all amendments must be acknowledged by the bidder in its bid. COMAR 21.05.02.08.

A procurement officer necessarily has broad discretion with respect to responsibility determinations. *See, e.g., Board of Education v. Allender*, 206 Md. 466, 475 (1955); *Allied Contractors, Inc.*, Docket No. MSBCA 1191, 1 MSBCA Decisions (MICPEL) ¶79, at 8 (Aug. 16, 1984). *See also* 43 Comp. Gen. 228 (1963). However, there is no logical connection between attendance at a pre-bid conference and a bidder's experience, qualifications, integrity and like factors relating to responsibility. Responsibility involves an assessment of the bidder's capability to perform a contract, and that assessment may be logically based upon the bidder's activities prior to the contract, such as its experience in related work. We fail to discern, however, any connection between attendance or non-attendance at a pre-contract event such as a pre-bid conference and the bidder's capability to perform the contract requirements after the contract is let.

III

Competitive Negotiation

Unlike competitive sealed bidding, competitive negotiation affords a procuring agency an opportunity to discuss an offeror's commitment after the established due date for receipt of initial proposals.⁶ Thus, the concept of responsiveness is not applicable to competitive negotiation. *Tower Building Corp.*, Docket No. MSBCA 1057, 1 MSBCA Decisions (MICPEL) ¶13, at 8 (April 2, 1982); *Beilers Crop Service*, Docket No. MSBCA 1066, 1 MSBCA Decisions (MICPEL) ¶25, at 5 (Sept. 16, 1982). It follows that an offeror's failure to attend a pre-proposal conference cannot raise a responsiveness issue.

Once received, proposals initially are classified by the procurement officer as acceptable, potentially acceptable, or unacceptable. COMAR 21.05.03.03B. The concepts of acceptability and responsibility are related under the procurement regulations:

"The term 'responsible offerors' includes only those firms who submitted proposals that are acceptable or potentially acceptable. The term does not include firms

⁶ The due date for receipt of proposals is competitive negotiation's equivalent to the date of bid opening under competitive sealed bidding.

which submitted unacceptable proposals." COMAR 21.05.03.03C(1).⁷

Any negotiations conducted must include all responsible offerors. SF §13-203(e).

Absent a written amendment, the terms of an RFP may not be changed at a pre-proposal conference. COMAR 21.05.03.03C(3).⁸ The material terms of the RFP must be in writing and must be included in the RFP. An offeror's failure to attend a preproposal conference does not affect the offeror's commitment to be bound by its proposal. Thus, attendance at a pre-proposal conference is not relevant to the acceptability of the offeror's proposal.

More generally, the concept of responsibility is the same under both competitive sealed bidding and competitive negotiation. SF §13-101(h). Therefore, for the reasons discussed in Part II C above with regard to responsibility under competitive sealed bidding, the failure of an offeror to attend a preproposal conference is not pertinent to the offeror's responsibility.⁹

IV

Conclusion

In summary, it is our opinion that, while a solicitation provision strongly encouraging attendance at a pre-bid or preproposal con-

⁷ Despite the link between acceptability and responsibility, a procurement officer initially may determine a proposal to be acceptable or potentially acceptable but then, before award, determine that the offeror submitting that proposal is not responsible. Responsibility of a bidder or offeror is determined as of the time of award of the contract. *Louise T. Keelty, Esq.*, Docket No. MSBCA 1195, 1 MSBCA Decisions (MIC-PEL) ¶85, at 7 (Sep. 26, 1984).

⁸ With some minor exceptions, not applicable here, amendments to an RFP are subject to the same requirements as amendments to an IFB. COMAR 21.05.03.03E. See note 5 above.

⁹ The decisions of the Comptroller General of the United States, who decides bid protests against award of federal contracts, are consistent with our view that the rejection of a bid or proposal may not turn on attendance at a pre-bid or pre-proposal conference. See 50 Comp.Gen. 355 (1970); *Southeastern Services, Inc., et.al.*, B-183108, 75.1 CPD ¶1.

ference is permissible, neither the solicitation nor the solicitation notice may mandate such attendance. Failure to attend a “mandatory” pre-bid or pre-proposal conference may not result in rejection of a bid or proposal. Moreover, absent a proper written amendment, nothing stated at a conference may alter the terms of an invitation for bids or request for proposals.

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PUBLIC ETHICS

LAW ENFORCEMENT OFFICERS BILL OF RIGHTS ("LEOBR")—
ETHICS COMMISSION HAS AUTHORITY TO INVESTIGATE OFFI-
CERS PROTECTED BY LEOBR'S REQUIREMENTS CONCERNING
INVESTIGATIONS, INTERROGATIONS, HEARINGS, AND DETERMI-
NATIONS.

October 30, 1987

*Mr. John E. O'Donnell, Executive Director
State Ethics Commission*

On behalf of the State Ethics Commission, you have requested our opinion concerning the relationship of the Law Enforcement Officers Bill of Rights ("LEOBR") and the Maryland Public Ethics Law ("Ethics Law"). Specifically, you ask about LEOBR's impact on (1) the "investigation and preliminary determination powers" of the Ethics Commission and (2) the Commission's "hearing provisions and final determination authority."

For the reasons stated below, we conclude as follows:

1. The Ethics Commission may conduct investigations of complaints against State law enforcement officers for violations of the Ethics Law. However, any interrogation of a State law enforcement officer during the course of an investigation by the Ethics Commission must be done by a law enforcement officer in accordance with LEOBR.

2. Any disciplinary action against a State law enforcement officer for a violation of the Ethics Law must be taken (i) in accordance with the hearing and decisional provisions of LEOBR; and (ii) by the agency employing the officer, not by the Ethics Commission.

I

Introduction

A. *The Ethics Law*

The Maryland Public Ethics Law, codified as Article 40A of the Maryland Code, is a comprehensive statutory scheme de-

signed to assure the impartiality and independent judgment of public officials. Article 40A, §1-102 contains the following statement of legislative policy:

“(a) The General Assembly of Maryland, recognizing that our system of representative government is dependent in part upon the people maintaining the highest trust in their public officials and officers, finds and declares that the people have a right to be assured that the impartiality and independent judgment of public officials and officers will be maintained.

(b) It is evident that this confidence and trust is eroded when the conduct of the State’s business is subject to improper influence and even the appearance of improper influence.

(c) For the purpose of guarding against improper influence, the General Assembly enacts this Public Ethics Law to require State officials and public officials to disclose their financial affairs and to set minimum standards for their conduct of State and local business.

(d) It is the intention of the General Assembly that this article, except its provisions for criminal sanctions, be liberally construed to accomplish this purpose.”

Generally, the Ethics Law regulates conflicts of interest on the part of State officials and employees in four basic areas: employment restrictions (Article 40A, §§3-103 and 3-105); use of the prestige of one’s office (§3-104); solicitation or acceptance of gifts (§3-106); and disclosure of confidential information (§3-107).

As to officers and employees of the executive branch of government, the Ethics Law is administered by the State Ethics Commission. The Commission is charged with the overall administration of the Ethics Law and the enforcement of its substantive provisions. The Commission is expressly empowered to receive and investigate complaints (§2-105) and to seek enforcement of its orders and other relief (§7-101).

B. The Law Enforcement Officers Bill of Rights

LEOBR, codified at Article 27, §§727 through 734D, was enacted primarily to assure certain procedural guarantees to police

officers during any investigation or hearing that could lead to disciplinary action. *DiGrazia v. County Executive*, 288 Md. 437 (1980); *Nichols v. Baltimore Police Department*, 53 Md. App. 623 (1983).¹

Subject to certain exceptions not relevant to this opinion, LEOBR applies to a person who in his or her official capacity is authorized by law to make arrests and who is a member of one of the law enforcement agencies enumerated in §727(b).² Although LEOBR contains some substantive provisions, essentially it is a statute that deals with procedure, not substance.³ LEOBR addresses how investigations and interrogations of complaints against officers are to be handled (§728) and how hearings are conducted and decisions made (§§730, 731 and 734A).⁴ LEOBR is not itself a tenure statute, *Windsor v. Bozman*, 69 Md. App. 223, 228 (1986); does not apply to management decisions that are not punitive in nature, *Montgomery County Dep't of Police v. Lumpkin*, 51 Md. App. 557, 567 (1982); and does not create or remove unrelated substantive rights, *Elliott v. Kupferman*, 58 Md. App. 510, 523 (1984); Chief, *Baltimore County Police Department v. Marchsteiner*, 55 Md. App. 108, 115-16 (1983).

¹ Maryland was the first state to enact LEOBR statewide. Other states (Virginia, California, Florida, Illinois) have followed the Maryland model. LEOBR, based on the Maryland model, has also been implemented in many places by city or county ordinance, pursuant to collective bargaining contracts, executive orders, and other methods.

² The State law enforcement agencies whose officers come under the umbrella of LEOBR include: the Maryland State Police, the Police Department of the University of Maryland, the State Aviation Administration Police, the Mass Transit Administration Police, the Maryland Toll Facilities Police, the Maryland Port Administration Police, the Natural Resources Police, and the Alcohol and Tobacco Tax Enforcement Unit of the Comptroller's Office.

³ See Article 27, §§728(a), 729, 729A, and 734C for LEOBR's main substantive provisions.

⁴ LEOBR also provides that an individual who is otherwise subject to its coverage may seek the aid of a circuit court in obtaining any right otherwise provided for under LEOBR (§734) and may appeal any decision imposing disciplinary action to the courts (§732).

II

Applicability of State Ethics Law to State Law Enforcement Agencies

"[T]he Public Ethics Law applies to those agencies, officials, and employees generally deemed to be a part of our State government." 67 *Opinions of the Attorney General* 244 (1982). Police officers employed by the State agencies enumerated in Article 27, §727(b), and therefore subject to LEOBR, are also subject to the Ethics Law.⁵ Indeed, as pointed out in your letter, the Ethics Commission has issued several advisory opinions with regard to employees of the Maryland State Police, for the most part concerning secondary employment. See Commission Opinions 83-42, 83-26, 83-16, 83-10, 82-12, 81-36 and 79-2.

In recognition of the applicability of the Ethics Law, the Maryland State Police has incorporated the entire text of the Ethics Law in its manual governing the conduct of employees. See Maryland State Police Administrative Manual, Chapter 7, Section III, Subsection 3-0. Additionally, the rules of conduct for employees of the Maryland State Police, as found in Chapter 5, Section I of the Administrative Manual, contain a number of provisions dealing with matters that come under the aegis of the State Ethics Commission.⁶ See also, e.g., Chapter 4, Section XV of the Maryland

⁵ See note 2 above.

⁶ For example:

"Rule 6-2: An employee is prohibited from using his official position or his official identification card or badge for personal or financial benefit or as a means of obtaining privileges not otherwise available to him.

Rule 11-1: A police employee shall not solicit, seek or accept any gift or gratuity, including food or drink, for himself or another, from any individual, business establishment, or merchant, where such offer of acceptance can be construed to be an effort to influence his official conduct as a Maryland State Trooper.

Rule 11-2: A police employee shall not receive, seek, solicit, or share in any fee, reward, or other reimbursement for the performance of his official duties, or for his failure to perform official duties, except as directed by the Superintendent.

Rule 14-0: A police employee shall not be employed in any capacity in any other business, trade, occupation, or profession while employed by the Maryland State Police, except as established by agency policy and approved by the Superintendent."

State Police Administrative Manual (statement of policy and procedure concerning secondary employment by State Police officers).⁷

III

Investigatory Authority of the Ethics Commission

A. *Generally*

The Ethics Commission investigates alleged violations through its staff counsel. Article 40A, §2-105(d). Upon referral of a complaint, staff counsel is to "collect evidence relating to the allegations of the complaint and refer that evidence to the Commission for disposition." §2-105(d)(1). In the event of a hearing, staff counsel is to "present to the Commission all evidence available to him relating to the complaint." §2-105(d)(5).

The Ethics Law is otherwise silent as to the process of investigation of complaints. However, under its rulemaking authority, the Ethics Commission has adopted detailed complaint and investigative procedures. These procedures provide for confidentiality, prohibit ex parte communications, set forth the manner in which complaints are received and issued, provide for preliminary staff investigation and review, and provide for a preliminary Commission determination prior to any formal hearing. COMAR 19A.01.03.02 through .05.

⁷ One of the prohibitions on secondary employment of the Maryland State Police is worthy of particular note. Subsection 3-0(d)(7) of Section XV of Chapter 4 of the State Police Administrative Manual states, in pertinent part:

"Secondary employment is also prohibited in any type of outside employment which could possibly impair the independence of judgment of a State employee in the performance of his duties or employment which comes about as a direct result of or for the intention or use of the prestige of a State office for the benefit of an employer or for the benefit of another. For example, no member of the agency could accept secondary employment as an accident reconstruction expert for private attorneys because the reason they would be employed as such would relate directly to their expertise gained as a Maryland State Trooper."

We understand that this example was inserted into the State Police Administrative Manual as a direct result of an advisory opinion rendered by the Ethics Commission.

B. *Effect of LEOBR*

In our view, LEOBR does not divest the Ethics Commission of its authority to investigate law enforcement officers covered by the Ethics Law. However, as discussed in Part III C below, LEOBR does impose certain requirements should the Commission's staff counsel seek to interrogate an officer.

As we read it, LEOBR does not preclude the investigation of an officer by an agency acting within the scope of its investigative authority, even if the agency is not one of the law enforcement agencies itemized in Article 27, §727(b).⁸ First, it is clear that LEOBR does not confine the power to investigate to the officer's own employer only. In *Mayor and Commissioners of Westernport v. Duckworth*, 49 Md. App. 236 (1981), the Chief of the Westernport Police Department had requested the Maryland State Police to investigate an officer's involvement in an accidental shooting and, based on that investigation, sought to fire the officer. The Court of Special Appeals found "no merit" in the argument that only the employing law enforcement agency had the authority to investigate the officer. 49 Md. App. at 241.⁹ At a minimum, then, other law enforcement agencies have authority to investigate. The unsettled question is whether an entity that is *not* a law enforcement agency may do so.¹⁰

⁸ Article 27, §728(b) begins as follows: "Whenever a law enforcement officer is under investigation or subject to interrogation by a law enforcement agency . . ." The term "law enforcement agency" has reference to the agencies itemized in §727(b). See note 2 above.

⁹ However, the Court of Special Appeals also held that the firing contravened LEOBR's hearing requirements. See Part IV below.

¹⁰ In *Gerwig v. Maryland State Police*, Civil No. 85CG447 (Cir. Ct. for Baltimore County March 6, 1985), then Lieutenant Colonel William T. Gerwig of the Maryland State Police challenged the authority of the Attorney General of Maryland to conduct an investigation of him. The Attorney General had been requested by the Superintendent of the Maryland State Police to conduct the investigation. One of Gerwig's claims was that only another law enforcement officer or agency could investigate a police officer under LEOBR. In its opinion, the Circuit Court agreed with this contention.

This decision was appealed to the Court of Special Appeals but was dismissed as moot upon the enactment of Chapter 249 of the Laws of Maryland 1985, which amended the definition of "interrogating officer" in §727H of LEOBR to include "any sworn law enforcement officer or, if requested by the Governor, the Attorney General

continued

One decision of the Court of Special Appeals, later vacated by the Court of Appeals and therefore without precedential value, suggests that when LEOBR specifies investigative criteria concerning a particular type of complaint, an agency that is not a law enforcement agency may not investigate a complaint of that type. In *Prince George's County v. State Commission on Human Relations*, 40 Md. App. 473 (1978), vacated 285 Md. 205 (1979), the Human Relations Commission sought records from the Prince George's County Police Department concerning allegations of police brutality. The records were sought pursuant to the Human Relations Commission's authority under Article 49B, §3(a) to make "surveys and studies" concerning human relations and racial problems in the State. The Court of Special Appeals held that the Human Relations Commission was not a law enforcement agency as defined in LEOBR, and, in view of the specific provisions of LEOBR concerning the investigation of brutality complaints (§728(b)(4)), was not authorized to investigate the matter.¹¹

Nevertheless, whatever might be the restrictions on investigations of brutality complaints, we do not believe that LEOBR ought to be read so as to preclude the Ethics Commission from investigating a violation of the Ethics Law by an officer protected by LEOBR. Were LEOBR construed so restrictively, the result would be that a class of State employees whom the Ethics Law purports to encompass would, in reality, be exempt. If the Ethics Commission received a complaint involving a potential violation of the Ethics Law by a State law enforcement officer subject to LEOBR, the Ethics Commission could do nothing. Its only possible recourse would be to refer the matter to the chief of the appro-

Note 10 continued

of Maryland." While instructive and entitled to due consideration, this case did not present for decision a situation involving another agency that had been granted, by statute, investigatory powers necessary to carry out the agency's functions. Here, the Ethics Commission has been empowered to conduct investigations, as discussed in Part III A above.

¹¹ Upon appeal to the Court of Appeals, the judgment of the Court of Special Appeals was vacated, because in the interim the County Police Department and the Human Relations Commission had reached agreement regarding the records. The Court of Appeals stated: "Obviously, this action leaves open the issues decided in the opinion of the Court of Special Appeals." 285 Md. at 207.

priate police department. The chief could potentially decide that no investigation would be conducted or action taken; the liberal construction to be given the Ethics Law would thereby be defeated. See Article 40A, §1-102(d). In reading statutes, we are to adopt a construction that "comports with common sense and avoids illogical or absurd results." *Kaczorowski v. City of Balto.*, 309 Md. 505, 517 (1987). Statutes must be construed in a reasonable fashion, keeping in mind the purposes that each seeks to accomplish. See *Montgomery v. State*, 292 Md. 155 (1981); *Howard County Association for Retarded Citizens, Inc. v. Walls*, 288 Md. 526 (1980); *Comptroller of the Treasury v. Louis*, 285 Md. 527 (1979). LEOBR, too, must be read and interpreted in conjunction with other statutes and ordinances dealing with related matters. See, e.g., *Hoyt v. Police Commissioner*, 279 Md. 74 (1977).

We do not see any irreconcilable conflict between the investigative provisions of the Ethics Law and the investigative provisions of LEOBR. If conducted properly, an investigation by the Ethics Commission need not deprive an otherwise covered State law enforcement officer of the procedural safeguards contained in LEOBR.

C. Interrogation

Although there is no irreconcilable conflict between LEOBR and the Ethics Law concerning investigations in general, the investigatory powers of the Ethics Commission must be applied so as to give effect to the procedures specified in LEOBR regarding the interrogation of an officer.

Formal action of the Ethics Commission can be disciplinary in nature, given its authority to issue reprimands. Article 40A, §2-105(d)(8). Also, if the Commission finds that a person otherwise subject to its authority has violated any of its provisions, that person may be subject to termination and suspension of salary until compliance. §§7-103(1) and 7-104(2). These disciplinary sanctions trigger LEOBR's procedural requirements. Article 27, §728(b).¹²

¹² "[D]emotion, dismissal, transfer, loss of pay, reassignment or similar action which would be considered a punitive measure . . ." are the disciplinary actions within the scope of LEOBR.

The Ethics Law contains no detailed provisions concerning interrogation. In discussing investigations, it does make a brief reference to notification. Article 40A, §2-105(d)(3) provides that, before referring evidence to the Commission, the staff counsel is required to notify the complainant and respondent. The Commission's regulations elaborate slightly: "Before presenting any evidence to the Commission, the Staff Counsel shall notify the complainant and respondent and shall afford the respondent an opportunity to cure any alleged violation" COMAR 19A.01.03.04B. The regulations also provide that the respondent is "entitled to be represented by counsel during all stages of the proceeding." COMAR 19A.01.03.02E.

By contrast, LEOBR is extraordinarily detailed about all aspects of an interrogation. These interrogation provisions are meant as a key part of LEOBR's procedural safeguards. See *Nichols v. Baltimore Police Department*, 53 Md. App. 623 (1983); *Montgomery County Department of Police v. Lumpkin*, 51 Md. App. 557 (1982). Article 27, §728(b) provides that an interrogation of an officer on any matter that could lead to disciplinary action must be conducted under the following constraints:

1. The interrogation must occur at a reasonable hour at a time when the officer is on duty, except in unusual circumstances.
2. The interrogation must take place at the office of the command of the investigating officer or where the incident allegedly occurred, or at some other "reasonable and appropriate place."
3. The officer must be informed of the name, rank, and command of the officer in charge of the investigation, the interrogating officer, and all persons present during the interrogation.
4. All questions directed to the officer must be asked by and through one interrogator during any one interrogating session.
5. The officer must be informed in writing of the nature of the investigation prior to any interrogation.
6. Interrogation sessions must be for reasonable periods with allowance for any personal necessities and rest periods.
7. A complete record (written, taped, or transcribed)

must be kept of the interrogation, including all recess periods.

8. If the officer under interrogation is under arrest or is likely to be placed under arrest as a result of the interrogation, he must be informed of all rights prior to the beginning of the interrogation.

9. The officer has a right to be represented at the interrogation by counsel or other representative of his choosing.

Section 728(b) of LEOBR provides that the interrogation requirements are triggered by an investigation that could lead to disciplinary action, if the agency chooses to interrogate the officer. An agency is not required to interrogate an officer. However, we can easily foresee that, in the "collection of evidence" by staff counsel of the Ethics Commission, staff counsel might wish to interview or otherwise interrogate the officer who is the subject of a complaint.

The Ethics Law stresses cooperation with State agencies in the Commission's carrying out of its statutory responsibilities. In light of the legislative purpose underlying the interrogation provisions of LEOBR, we believe that the Ethics Law must be applied consistently with them. *See* Article 27, §734B.¹³

To ensure compliance with LEOBR, the Ethics Commission staff counsel investigating a complaint should contact the State law enforcement agency employing the officer and request an interview of the officer. The agency then would become aware of the complaint and would initiate the procedural requirements of LEOBR. Staff of the Ethics Commission could meet with investigators assigned by the agency and determine the matters to be covered in an interrogation of the officer. The agency then would issue its notice to the officer under LEOBR and set up an interrogation.

Indeed, we see no reason why Ethics Commission staff could not be present during the interrogation. Section 728(b)(3) of LEOBR envisions the possible presence of persons other than the

¹³ Section 734B provides that LEOBR supersedes any other law in the event of conflict. *See* Part IV below. As we construe it, the Ethics Law may be administered so as to avoid conflict with LEOBR.

officer doing the questioning, because it requires disclosure to the officer concerning "all persons present during the interrogation."¹⁴ Staff of the Ethics Commission would not be prohibited from conducting discussions with the department interrogator during the course of the interrogation. The only requirement is that the questions must be asked through one interrogator. Likewise, staff counsel would not be prohibited from including the results of the interrogation with his or her findings to the Ethics Commission.¹⁵

Whether or not this somewhat cumbersome procedure would unduly interfere with the orderly process of the Ethics Commission, and therefore should be the subject of legislative attention, is a matter for determination by the Commission. We conclude only that the interrogation provisions of LEOBR, when read together with the investigative powers of the Ethics Commission, allow us to give effect to both statutes in the manner outlined above.

V

The Enforcement Provisions of the Ethics Law and the Hearing Provisions of LEOBR

LEOBR was originally enacted as Chapter 722 of the Laws of Maryland 1974. Uncodified section 2 of the enactment provided "that all laws or parts of laws, public general or public local, inconsistent with this Act, are repealed to the extent of the inconsistency."

In *Abbott v. Administrative Hearing Board*, 33 Md. App. 681 (1976), the Court of Special Appeals dealt with the question of "whether the provisions of the Prince George's County merit sys-

¹⁴ Section 728(b)(3) contemplates that the persons present would ordinarily be law enforcement officers, because it requires disclosure of the "rank" of each. But neither this paragraph nor any other provision of LEOBR prohibits the presence of persons other than law enforcement officers. LEOBR should not be construed to prohibit the presence, for example, of an Assistant State's Attorney.

¹⁵ Of course, an officer may choose to waive his or her right for compliance with the interrogation provisions of §728 by executing a written waiver under §734D.

tem ordinance and the County Charter governing employee appeals from administrative disciplinary actions are, when applied to cases involving police officers, preempted by [LEOBR]." 33 Md. App. at 682. The court held that, because the appeal provisions of the County ordinances concerning disciplinary actions conflicted with those of LEOBR, LEOBR prevailed. The *Abbott* decision made no mention of Section 2 of Chapter 722. The court instead relied on general principles governing conflicts between public general laws and locally enacted laws. 33 Md. App. at 687.

The *Abbott* decision left open the question of LEOBR's precedence over another public general law. Subsequently, the General Assembly added §734B to LEOBR. Chapter 366, Laws of Maryland 1977. Section 734B, as later amended by Chapter 679 of the Laws of Maryland 1981, reads as follows:

"Except for the administrative hearing process provided for in Article 41, §4-201 concerning the certification enforcement power of the Police Training Commission, the provisions of this subtitle shall supersede any *State*, county, or municipal law, ordinance, or regulation that conflicts with the provisions of this subtitle and any local legislation shall be preempted by the subject and material of this subtitle." (Emphasis added.)¹⁶

Hence, the hearing procedures of LEOBR are to prevail over those of the Ethics Law, to the extent of any conflict.

Under the Ethics Law, if a complaint is not dismissed, the Commission must hold a hearing. §2-105(d)(4). At the hearing, staff counsel presents evidence to the Commission regarding the complaint and may make recommendations. In general, the hearing is to be conducted under the provisions of the Administrative Procedure Act. §2-105(d)(5). The Commission makes findings of fact and conclusions of law and either dismisses the complaint

¹⁶ Article 41, §4-201(d)(6) provides that the Police Training Commission may certify as police officers persons who have complied with the Commission's standards. After completing the appropriate probationary period, a police officer must maintain current certification. In the event of a lapse of the certificate or of a certificate being in danger of lapsing, the Commission is empowered to hold a hearing to determine the circumstances of failure to meet certification. However, the hearing must be conducted pursuant to LEOBR. Article 41, §4-201(i)(2).

(§2-105(d)(7)) or, if a violation is found, issues an order of compliance. §2-105(d)(6), (7), and (8).

Under LEOBR, an officer is entitled to a formal hearing before a hearing board of his or her peers prior to the imposition of any disciplinary action. Article 27, §§727(d)(1) and 730(a). Section 730(a) states in pertinent part:

"If the investigation or interrogation of a law enforcement officer results in the recommendation of some action, such as demotion, dismissal, transfer, loss of pay, reassignment, or similar action which would be considered a punitive measure . . . before taking that action, the law enforcement agency shall give notice to the law enforcement officer that he is entitled to a hearing on the issues by a hearing board. The notice shall state the time and place of the hearing and the issues involved."

The hearing is to be conducted in much the same fashion as any other administrative hearing. The officer has an opportunity for the presentation of evidence, cross-examination, representation, and written findings.

The hearing requirement is triggered by the results of any investigation or interrogation. LEOBR does not say that only an investigation conducted by the agency in question triggers a hearing requirement. In *Mayor and Comm'rs of Westernport v. Duckworth*, the Court of Special Appeals wrote as follows:

"[W]e think that the LEOBR read as a whole manifests a legislative intent that every law enforcement officer covered by the Act is entitled to a hearing before dismissal for disciplinary reasons. We reach this conclusion in spite of the inartfulness and lack of precision with which the Act, in many respects, is drawn." 49 Md. App. at 242.

The court rejected the argument that the hearing requirements of LEOBR did not apply because the investigation was not done by the agency employing the officer. 49 Md. App. at 243. Regardless of who conducts the investigation, compliance with LEOBR's hearing procedure is a prerequisite to any disciplinary action. See also *DiGrazia v. County Executive*, 288 Md. 437 (1980).

Moreover, while the decision of the Court of Special Appeals in *Prince George's County v. State Commission on Human Relations* was vacated, its analysis on this point is instructive:

"We do not believe that the legislature ever intended to erect a protective shield around a police officer when the officer is confronted by an investigation conducted by a law-enforcement agency and at the same time deny that protection to the officer if the investigation is made by another type of Commission or agency. Such a result would cause the 'Law Enforcement Officers Bill of Rights' to mean little more than a verbalizing of 'rights' which are devoid of substance." 40 Md. App. at 484.

In light of §734B and the case law, we conclude that the hearing provisions of LEOBR take precedence over the hearing authority of the Ethics Commission. Nevertheless, we believe that the Ethics Law can be administered in conformity with LEOBR's hearing requirement. Article 40A, §2-105(d)(8) provides as follows:

"If the Commission decides that the respondent has violated any of the provisions of this article, the Commission may issue an order of compliance to cease and desist from the violation, may issue a reprimand, or may recommend to the appropriate authority, if provided by law, for the censure, the removal, or other appropriate disciplining of the respondent." (Emphasis added.)

In this context, "appropriate authority" would be the chief administrative officer of the State law enforcement agency involved. While not crystal clear, the Ethics Law likewise envisions the possibility that final action of a disciplinary nature may be taken not by the Ethics Commission but by the agency employing the individual. Another enforcement provision of the Ethics Law provides as follows:

"In addition to any other enforcement provisions in this article, a person who is subject to the provisions of this article and who is found by the Commission or a court to have violated its provisions, is:

(1) In the case of a public official or employee, subject to termination or other disciplinary action as may be warranted; and

(2) In the case of a public official or employee who receives a salary or other compensation is suspended from receiving payment or salary or other compensation pending full compliance with the terms of an order of the Commission or a court." §7-103.

The Ethics Law is otherwise silent as to the manner in which, and by whom, disciplinary action should be taken against a State officer or employee for a violation of any of its provisions.

In the event that an investigation by the Ethics Commission's staff counsel results in a recommendation to the Commission that a formal proceeding be undertaken, the Ethics Commission is free to transmit the entire matter to the chief administrative officer of the State law enforcement agency involved. This transmittal could include a preliminary finding on the part of the Commission that some substantive provision of the Ethics Law had been violated and that appropriate disciplinary action should be initiated. Upon receipt, the chief administrative officer of the agency could then direct that administrative charges be placed against the individual.¹⁷ Thereafter, a hearing board would be established to hear and decide the violation and make findings and a recommendation to the chief, who then must make the final decision under §731.

This construction allows effect to be given to the legislative purpose of both statutes, avoids illogical and absurd results, and at the same time preserves the procedural safeguards granted to officers by LEOBR. If the Ethics Commission believes that, with regard to substantive matters within its purview, it should have independent authority to take enforcement action against State law enforcement officers covered by LEOBR, the Commission should seek corrective legislation.

¹⁷ We note that LEOBR itself envisions that conflicts of interest may be an appropriate subject of disciplinary action. Section 729 of LEOBR provides:

"A law enforcement officer may not be required or requested to disclose any item of his property, income, assets, source of income, debts, or personal or domestic expenditures (including those of any member of his family or household), unless that information is necessary in investigating a *possible conflict of interest with regard to the performance of his official duties*, or unless such disclosure is required by State or federal law." (Emphasis added.)

VII

Conclusion

In summary, it is our opinion that:

1. The Ethics Commission, pursuant to its statutory authority, may conduct investigations of complaints against State law enforcement officers for violation of substantive provisions of the Ethics Law. However, any interrogation of a State law enforcement officer during the course of an investigation by the Ethics Commission must be done by a law enforcement officer in accordance with LEOBR.

2. Any disciplinary action against a State law enforcement officer subject to the provisions of LEOBR for a violation of the Ethics Law must be taken (i) in accordance with the hearing and decisional provisions of LEOBR; and (ii) by the agency employing the officer, not by the Ethics Commission.

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Opinions and Advice

Editor's Note: Since the issuance of this opinion, the General Assembly has amended the Ethics Law as follows: "The provisions of [LEOBR] do not apply to the activities carried out by the State Ethics Commission under this article." Article 40A, §1-104(b). See Chapter 405 (House Bill 428), Laws of Maryland 1988.

PUBLIC LIBRARIES

FEES—PUBLIC LIBRARIES MUST PROVIDE ACCESS TO INFORMATION RESOURCES WITHOUT CHARGE BUT MAY IMPOSE FEES FOR ANCILLARY CONVENIENCES.

December 9, 1987

Stuart Yael Gordon, Esquire
Committee Counsel
Joint Committee on Administrative, Executive,
and Legislative Review

On behalf of the Committee, you have requested our opinion on the imposition of fees by public libraries. Specifically, you have asked (i) whether State law permits county public libraries to charge user fees for services; and (ii) if it does, what services are subject to charge.

For the reasons stated below, we conclude that the public libraries of this State generally must provide access to their information resources without charge, regardless of the format in which the information is presented.¹ However, public libraries may charge fees for the use of ancillary conveniences like copiers, typewriters, and computers for management of personal data. They may also charge fees when a patron exceeds reasonable limitations on the use of library resources. A proposed regulation of the State Board of Education on library services, now before the Committee, is consistent with this construction of the statute.

I

Introduction

Public libraries have their historical antecedents in the public education system. In the early 1800's, school district libraries were established by statute in New York State. The school dis-

¹ This conclusion confirms prior advice on the matter. Letter from Assistant Attorney General Richard E. Israel to Delegate Joan B. Pitkin (February 20, 1987).

trict library "did much to establish certain principles which formed the basis of our present public system. For one thing, it provided for taxation for free library service and also for state aid to libraries, both important milestones in library history. Even more significant, perhaps, it recognized the library as an educational agency, an extension of the system of public education beyond the formal instruction offered by the schools." C. Joeckel, *The Government of the American Public Library* 12 (1935). By the mid-nineteenth century, public libraries as we know them today were essentially developed and defined.

In Maryland, the General Assembly has declared expressly that "public library resources and services are essential components of the educational system." ED §23-101(a)(1).² This legislative finding reflects a long-accepted understanding of the educational role of public libraries: "[These] institutions form an integral part of a system of free public education and are among its most efficient and valuable adjuncts," the Court of Appeals wrote more than a half-century ago. A government has "no more important duty or higher purpose," the Court of Appeals continued, "than to provide free public libraries for the benefit of its inhabitants." *Johnson v. Mayor and City Council of Baltimore*, 158 Md. 93, 103-04 (1930).

Under ED §23-301, a county governing body may establish a public library system, governed by a board of trustees or equivalent agency. The local board of library trustees is responsible for the daily operation of the county libraries, subject to the oversight power of the State Board of Education. ED §§23-104 and

² Public libraries in the State of Maryland have a venerable history. In 1696, the Maryland Assembly passed one of the earliest pieces of colonial library legislation, providing that Rev. Thomas Bray's Annapolitan Library, consisting of 1,095 volumes, should be housed in a public office at the State House in Annapolis so that "any person desirous to study or read any of these said books may have recourse thereunto and the use thereof." E. Stone, *American Library Development, 1600-1899*, at 211 (1977) ("Library Development"). In 1704, the General Assembly passed an "act for securing the Parochial Libraries of this Province," which provided for a province-wide library system, called "parish libraries," under the general control of the church, with local commissioners appointed by the Governor. *Library Development* at 212.

In Chapter 377 of the Laws of Maryland 1872, the General Assembly enacted a comprehensive revision of the laws on public education. One section of that law provided that, "[f]or the further encouragement of education, district libraries ought to be established in each school-house district . . ." out of funds appropriated for school purposes.

23-305. The State Board is empowered to adopt "rules and regulations necessary to administer" Title 23 of the Education Article. ED §23-104(b)(1).

The State's policy is to "[p]rovide the widest possible access to the library and information resources of the State." ED §23-101(b)(2)(i). To that end, each county board is required "to establish and operate the library to provide free service to residents of the county in which it is located." ED §23-305(b)(1).³ Presently, most public libraries provide services to local residents without charge. However, some county libraries charge for services or materials that libraries describe as "enhanced"—for example, computer searches and videocassette rentals.

The State Board of Education recently proposed a regulation, after receiving and considering the recommendations of the Advisory Council on Libraries, that defines "free library services" as follows:

"the use of all library material and services available for reference/information and for circulation to library users regardless of format, including:

- (1) Printed materials;
- (2) Films;
- (3) Recordings;
- (4) Videocassettes;
- (5) Computer software;
- (6) Online databases; or
- (7) Other forms of electronic storage of information." Proposed COMAR 13A.05.04.06C, *published at* 14:20 Md. Reg. 2160-61 (Sep. 25, 1986).

The Committee's question, in essence, is whether this regulation reflects a restriction on fees commanded by ED §23-305(b)(1) or

³ This requirement originated in Chapter 515 of the Laws of Maryland 1898, which declared that: "Every library and reading room established under this Act shall be forever free to the use of the inhabitants of the town or city where it is located, always subject to such reasonable rules and regulations as the library board may adopt, in order to render the use of said library and reading room of the greatest benefit to the greatest number of the people . . ."

whether the statute affords county public libraries wider opportunity to charge for their services.

The word "free," used in connection with provision of a service, can mean either open to the public or offered without charge. See generally 17A *Words and Phrases* 216-18 (1958). In the first sense, a service is "free" if it is open to the public, even if a charge is imposed—"free for the public use, but not free from the collection of tolls." *Dugan v. Mayor and City Council of Baltimore*, 5 G&J 357, 375 (1833) (collecting wharfage fees along the Baltimore City waterfront). *Accord, Webber Hospital Association v. McKenzie*, 71 A. 1032 (Me. 1908) (free hospital is one open to the public, not free of charges for services rendered); *Bernstein v. City of Pittsburgh*, 77 A.2d 452 (Pa. 1951) (city may charge admission fees to special events in "free" public park).

ED §23-305(b)(1) unquestionably uses the term "free" in the second sense of the term, that a service is to be rendered without charge, just as the term is consistently used about the public schools. See *Clark v. Maryland Institute*, 87 Md. 643, 661 (1898). See also, e.g., *Aurora East Public School Dist. No. 131 v. Cronin*, 442 N.E.2d 511 (Ill. 1982); *Bond v. Public Schools of Ann Arbor School Dist.*, 178 N.W.2d 484 (Mich. 1970); *Concerned Parents v. Caruthersville School Dist.* 18, 548 S.W.2d 554 (Mo. 1977); *Sneed v. Greensboro City Board of Educ.*, 264 S.E.2d 106 (N.C. 1980); *Board of Educ. v. Sinclair*, 222 N.W.2d 143 (Wis. 1974). Cf. *Lander v. Village of South Orange*, 279 A.2d 633 (N.J. 1971) ("free public playground" means open to the public and free of charge).

The question of whether "free" public schools nevertheless may charge fees of various kinds has been litigated frequently. In Part II below, we examine the principles that govern the imposition of fees by public schools. Then, in Part III, we apply these principles to the analogous problem of "free service" by public libraries.

II

Free Schools

A. Background

Beyond affirming the simple proposition that a "free" school means one that does not charge tuition, the case law is badly split over whether schools may charge fees for ancillary services. See

generally Annotation, Validity of Exaction of Fees from Children Attending Elementary or Secondary Public Schools, 41 A.L.R.3d 752 (1972, 1987 Supp.). For example, one court approved a school board's charging of fees for an after-hours program of supervised activities, because the program was merely "a supplemental educational experience." *Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 285 S.E.2d 110, 114 (N.C. App. 1981) (emphasis in original). See also, e.g., *Ambroiggio v. Board of Educ.*, 427 N.E.2d 1027 (Ill. App. 1981); *Hamer v. Board of Educ.*, 292 N.E.2d 569 (Ill. App. 1973); *Sneed v. Greensboro City Board of Educ.*, 264 S.E.2d at 112-13.

Other courts reject efforts to parse the educational offerings of a school into those that are central and those that are merely supplemental. Under a broad reading of a "free schools" guarantee, "all educational activities—curricular or 'extracurricular'—offered to students by school districts" are to be free of charge. *Hartzell v. Connell*, 679 P.2d 35, 43 (Cal. 1984). See also, e.g., *Granger v. Cascade County School Dist.*, 499 P.2d 780, 786 (Mont. 1972) (fee invalid if "a given course or activity [is] reasonably related to a recognized academic and educational goal").

However, even decisions that reflect so broad a view of "free schools" acknowledge that fees may be charged for activities that are merely recreational or social—that is, activities outside even an expansive definition of a school's educational mission. See, e.g., *Paulson v. Minidoka County School Dist. No. 331*, 463 P.2d 935, 938 (Ida. 1970). As the California Supreme Court put it: "Educational activities are to be distinguished from activities which are purely recreational in character. Examples of the latter might include attending weekend dances or athletic events." *Hartzell v. Connell*, 679 P.2d at 43 n. 14. Moreover, items that are customarily furnished by students for their own personal use are also viewed as outside the scope of a "free schools" requirement. See *Board of Educ. v. Sinclair*, 222 N.W.2d at 148.

B. Maryland Law

Article VIII, §1 of the Maryland Constitution provides that: "The General Assembly . . . shall by Law establish throughout the State an efficient System of Free Public Schools; and shall provide by taxation, or otherwise, for their maintenance." See also ED §1-201 ("There shall be throughout this State of Maryland a general system of free public schools . . ."). The constitu-

tional requirement "means that the schools must be open to all without expense." *Clark v. Maryland Institute*, 87 Md. at 661.

We are not aware of any reported case that identifies the range of activities embraced by the term "free" in Article VIII, §1. Hence, we cannot say whether Maryland courts would go as far as courts in some states in categorizing the activities that must be offered without charge. But, whatever the outer limits of Maryland's "free public schools" guarantee, we are safe in saying that anything directly related to a school's curriculum must be available to all without charge. To borrow the North Dakota Supreme Court's formulation, whatever is an "integral part of the educational system" must be free. *Cardiff v. Bismarck Public School Dist.*, 263 N.W.2d 105, 113 (N.D. 1978).

Moreover, the "free schools" requirement is not limited to traditional curricular offerings.⁴ In 57 *Opinions of the Attorney General* 176 (1972), this office concluded that a county was prohibited from charging a fee of \$25 per student to underwrite the cost of its driver education program, which was part of the school curriculum. "[T]he concept of charging fees to public school students . . . [for] courses in the public schools," the Attorney General wrote, "is contrary to constitutional and statutory principles regarding free public education." 57 *Opinions of the Attorney General* at 177.⁵

III

Free Libraries

Public libraries in Maryland "are essential components of the educational system." ED §23-101(a)(1). Accordingly, we believe that the core principle identified by the Court of Appeals and ap-

⁴ In a different context, the Court of Appeals has recognized that modern educational needs are more diverse than those of the nineteenth century, and the construction of the provisions of the Constitution dealing with the public schools ought likewise to be construed flexibly. *Clauss v. Board of Educ.*, 181 Md. 513, 522-23 (1943).

⁵ The opinion implied that fees for instruction outside a school's courses would not necessarily be forbidden. In its regulations, the State Board of Education authorizes local boards to charge a fee "for any driver education program or portion of a program offered outside of the established school day or school year." COMAR 13A.04.03.05A(1).

plied by this office to schools ought to apply to libraries as well: A fee may not be imposed for a service that is part of the institution's basic mission. As this office's driver education opinion suggests, when a school's curriculum expands to meet modern needs, even a nontraditional course must be offered without charge.

Applying this principle to the myriad of services offered by modern public libraries is not easy. Certainly, a library may not charge a patron who wishes to borrow a copy of *Othello*, any more than a public school may charge tuition for an English course. But may a library exact a fee when a patron borrows a film of the play on videocassette or a recording of the Verdi opera on compact disc, or searches a computer data base to locate references to *Othello* in recent works?

In our view, these differences in form—that is, in the technological embodiments of human knowledge and art—are immaterial. All are to be “free,” because all are an integral part of a public library's contemporary role.

Quantum leaps in technology, unimaginable even 100 years ago, have made it possible to provide access to more timely information in far less space than printed material can provide. But new tools and new methods of providing a service do not change the basic task. When a librarian searches indexes and other sources of information to assist a patron, the librarian is carrying out a fundamental aspect of library service, regardless of whether the search involves books or computer data bases.

Similarly, the lending of videocassettes, filmstrips, recordings, and other entertainment media is a library service that must be provided without charge, even though their format is not the printed word and their purpose is entertainment. Public libraries long ago yielded to the reality that the artifacts of modern culture do not arrange themselves into nice categories.⁶

In our view, the purpose of the “free service” requirement of ED §23-305(b)(1) is to assure that patrons are not charged for ac-

⁶ Librarians once debated whether fiction should be included in public library collections. *Library Journal*, Sep.-Oct. 1879, at 367. The debate itself now seems quaint. As the first Director of the Enoch Pratt Free Library observed, perhaps with equal parts insight and resignation: “The public library is most connected with the civilization of the age—so closely that the two are becoming almost inseparable.” Steiner, *The Future of the Free Public Library*, *Library Journal*, Dec. 1890, at 45.

cess to a library's information resources, no matter what form of technology conveys the information.⁷ The State Board's proposed regulation applies this concept in detail and therefore properly implements the statute.

Our conclusion that all informational resources of a public library must be provided without charge does not mean that *every* library service must be free. Some activities or services that are offered in a library, like some activities or services in a school, might not be an integral part of its educational mission. For example, although lending books and other materials is at the core of a library's function, providing a patron with a permanent personal copy of material is not; therefore, a library may charge for copying service.

In addition, the State Board has the authority to decide that various other conveniences may be subject to charge. In its proposed regulation, the State Board directs that each county library board describe its "[c]harges for utilities or conveniences available to library users, such as copying machines, coin-operated typewriters or other equipment, and pay computers for experienced users." COMAR 13A.05.04.06A(3).

Fees may also be imposed as a means of enforcing restrictions on patron use of otherwise free material. Libraries have historically placed limitations on the numbers of items permitted to be borrowed as well as on the duration of borrowing. Limitations of this kind are obviously necessary if libraries are to "provide the widest possible access to library and information resources of this State" and to "[e]nsure more effective and economical services to all library users." ED §23-101(b)(2). These restrictions would become meaningless if libraries lacked the power to enforce them through charges. The "free library service" requirement in ED §23-305(b)(1) has never been understood to prohibit fees of this kind, and we do not construe it that way now.⁸

⁷ The Attorney General of California has characterized the import of that state's "free library service" requirement similarly: "If the transaction involves the satisfaction, with library resources, of a patron's request for information (whether for education, recreation, or entertainment purposes), such transaction is a 'library service.'" 61 *Op. Att'y Gen.* 512 (Cal. 1978). See also *Op. Att'y Gen.* 26-84 (Wis. 1984).

⁸ The classic charge is a per-day fine for overdue books. Its contemporary analogue would be a charge for an "excess" computer search—i.e., beyond reasonable, generally applicable limits of cost or time. See proposed COMAR 13A.05.04.06A(2).

IV

Conclusion

In summary, it is our opinion that the public libraries of this State generally must provide access to their information resources without charge, regardless of the format in which the information is presented. However, public libraries may charge fees for the use of ancillary conveniences like copiers, typewriters, and computers for management of personal data. They may also charge fees when a patron exceeds reasonable limitations on the use of library resources. The proposed regulation of the State Board of Education on library services is consistent with this construction of the statute.

J. JOSEPH CURRAN, JR., *Attorney General*

CHRISTINE STEINER, *Assistant Attorney General*

JACK SCHWARTZ

Chief Counsel

Opinions and Advice

Editor's Note: Since the issuance of this opinion, the General Assembly added the following provision to ED §23-305: "In Baltimore and Prince George's Counties, the board of library trustees may permit a library to charge fees for the rental of video cassettes." ED §23-305(b)(2). See Chapter 773 (Senate Bill 782). Laws of Maryland 1988.

PUBLIC OFFICERS

“OFFICE OF PROFIT”—GENERAL ASSEMBLY—POLICE OFFICER—
SIMULTANEOUS SERVICE AS MEMBER OF HOUSE OF DELEGATES AND OFFICER OF UNIVERSITY OF MARYLAND POLICE
FORCE PROHIBITED.

January 13, 1987

The Honorable R. Clayton Mitchell, Jr.
Maryland House Of Delegates

You have requested our opinion on whether a person who has been elected to the House of Delegates may continue to serve as an officer of the University of Maryland Police Force after taking the oath of office as a Delegate.

For the reasons stated below, we conclude that simultaneous service as a member of the House of Delegates and an officer of the University of Maryland Police Force is prohibited by Article 35 of the Maryland Declaration of Rights. Accordingly, upon taking the oath of office as a Delegate, the member will have abandoned, by operation of law, his position as a police officer.

I

Discussion

Article 35 of the Declaration of Rights provides, in pertinent part, that “no person shall hold, at the same time, more than one office of profit, created by the Constitution or Laws of this State” When a person who holds one office of profit accepts a second office of profit, the first office is deemed to have been abandoned. *Hetrich v. County Commissioners*, 222 Md. 304, 308 (1960); *Truitt v. Collins*, 122 Md. 526, 530 (1914); 59 *Opinions of the Attorney General* 121, 127 (1974); 48 *Opinions of the Attorney General* 323, 324 (1963).

This office has summarized the criteria for determining an “office of profit” as follows:

- “1. The position was created by law and involves continuing and not occasional duties.

2. The holder performs an important public duty.
3. The position calls for the exercise of some portion of the sovereign power of the State.
4. The position has a definite term for which a commission is issued and a bond and an oath are required.
5. The position is one of dignity and importance." 59 *Opinions of the Attorney General* 154, 156 (1974).

See *Board of Supervisors of Elections v. Attorney General*, 246 Md. 417, 439 (1967). See also, e.g., 65 *Opinions of the Attorney General* 285, 286 (1980). Of these tests, "the single most important characteristic of a public officer is that the 'public servant exercise[s] in his own right some of the sovereign powers of government for the benefit of the public.'" 68 *Opinions of the Attorney General* 358, 361 (1983) (quoting *Duncan v. Koustenis*, 260 Md. 98, 105 (1970)).

Members of the General Assembly unquestionably hold an "office of profit." 50 *Opinions of the Attorney General* 57, 63 (1965). Therefore, the determinative question is whether an officer of the University of Maryland Police Force also holds an office of profit.¹

Under §13-107(b)(1) of the Education Article, "[a] University of Maryland police officer is and has all the powers of a peace and police officer in this State." Applying the pertinent criteria, we have no doubt that a police officer—including a University of Maryland police officer—holds an office of profit.

A police officer exercises a portion of the sovereignty of the State through the authority to enforce the criminal laws. Moreover, an officer takes an oath of office and plainly performs important public duties that are continuing in nature. As the Court of Special Appeals observed:

"[A] police officer has been held to be a public official even though the officer does not generally serve for a fixed term The police officer does, however, take an oath, exercise on a daily, if not minute-to-minute basis, some of the powers of the State and exercises those

¹ A University of Maryland police officer receives a salary. Therefore, the office is "of profit." See 60 *Opinions of the Attorney General* 121, 124 (1975).

powers for the benefit of the public." *Macy v. Heverin*, 44 Md. App. 358, 362 (1979).

See also 22 *Opinions of the Attorney General* 473 (1937) (constables, as "peace officers," hold office of profit); 22 *Opinions of the Attorney General* 470 (1937) (special policeman, "endowed with all the powers of common law constables and City policemen," holds office of profit).

II

Conclusion

In summary, it is our opinion that a police officer—including a University of Maryland police officer—holds an "office of profit," within the meaning of Article 35 of the Declaration of Rights. Therefore, simultaneous service as a member of the General Assembly and a University of Maryland police officer is prohibited. A police officer who takes the oath of office as a member of the General Assembly thereby abandons the former position.²

J. JOSEPH CURRAN, JR., *Attorney General*

JACK SCHWARTZ
Chief Counsel
Opinions and Advice

² In light of this conclusion, we need not consider another constitutional restriction on the holding of a second office by a member of the General Assembly. See Article III, §11. See generally 59 *Opinions of the Attorney General* 121 (1974).

PUBLIC OFFICERS—GOVERNOR—CONSTITUTIONAL LAW—RECESS
APPOINTMENT—GOVERNOR MAY WITHDRAW NOMINATION OF
RECESS APPOINTEE.

April 2, 1987

The Honorable Thomas V. Mike Miller, Jr.
President of the Senate of Maryland

You have requested our opinion on the authority of the Governor to withdraw the nomination of a recess appointee. This question arose when it appeared that Governor Schaefer intended to withdraw the nomination of an appointee who was holding office under a recess appointment by Governor Hughes.¹

For the reasons stated below, we conclude that the Governor may withdraw the nomination of a recess appointee.²

I

Background

On May 2, 1986, Governor Hughes appointed Jacques E. Leeds, Sr. to the Workers' Compensation Commission. *See* Article 101, §1(b) of the Maryland Code. Mr. Leeds was duly commissioned and qualified. In accordance with Article II, §11 of the Maryland Constitution, Governor Hughes submitted the name of Mr. Leeds to the Senate on January 14, 1987, and nominated him for the remainder of the unexpired 12-year term that commenced on February 1, 1979. On February 11, 1987, Governor Schaefer requested that Mr. Leeds be withdrawn from consideration. Subsequently, Governor Schaefer rescinded his withdrawal of the

¹ In this particular instance, Governor Schaefer ultimately decided not to withdraw the nomination. Nevertheless, you requested that we address the underlying legal issue.

² This conclusion confirms the advice previously rendered to you. Letter from Assistant Attorney General Linda H. Lamone to the Honorable Thomas V. Mike Miller, Jr., President of the Senate (February 23, 1987).

nomination and Mr. Leeds' appointment was confirmed by the Senate.

II

Constitutional Provision

Article II, §11 of the Maryland Constitution provides as follows:

"In case of any vacancy during the recess of the Senate, in any office which the Governor has power to fill, he shall appoint some suitable person to said office, whose commission shall continue in force until the end of the next session of the Legislature, or until some other person is appointed to the same office, whichever shall first occur; and the nomination of the person thus appointed during the recess, or of some other person in his place, shall be made to the Senate on the first day of the next regular meeting of the Senate."

This provision originated in the Constitution of 1851.³ We have examined the debates of the constitutional convention that drafted the language in question. Those who participated in the reported debates had two purposes in mind: to vest in the Governor sufficient authority to prevent any function of government from being disrupted by a vacancy during the lengthy recess of the Senate;⁴ and, at the same time, to limit the tenure of appointees who assumed office without the prior consent of the Senate. See 1 *Debates and Proceedings of the Maryland Reform Convention to Revise the State Constitution* 468-71, 499-505 (1851).

³ The only substantive change made in this provision since 1851 is in the clause relating to the time at which the nomination must be submitted to the Senate. Originally, the nomination was to be made "within thirty days after the next meeting of the Legislature." Article II, §11 was amended in 1956 to require submission of a nomination "on the first day of the next regular meeting of the Senate." Chapter 626, Laws of Maryland 1955 (ratified November 6, 1956).

⁴ Under Article III, §7 of the Constitution of 1851, the General Assembly was ordinarily to meet every other year. Cf. Article 23 of the Constitution of 1776 (providing for annual meetings of General Assembly).

III

Initial Appointment and Nomination

Under Article II, §11, the Governor is free to appoint any "suitable person" to a vacancy that the Governor is empowered to fill. The appointment of that person assures that the office is filled until the Senate has an opportunity to act on the Governor's nomination for the remaining portion of the statutory term.

However, this initial appointment does not predetermine who the later nominee will be. Article II, §11 expressly preserves the Governor's discretion to nominate "some other person" in place of the recess appointee. As this office long ago concluded: "[U]nder Section 11 of Article II of the Constitution, the Governor does not have to nominate to the Senate the same person whom he appointed as the recess appointee to an office requiring Senate confirmation, but may nominate to the Senate some other person in his place." 21 *Opinions of the Attorney General* 281, 282 (1936).

Moreover, the Court of Appeals has held that the Governor's nomination of "the person thus appointed during the recess," rather than of "some other person in his place," does not necessarily mean that the recess appointee has been nominated to a term beyond that of the recess appointment itself:

"The Governor, in the early part of each session of the Legislature, sends to the Senate the names of those appointed to office to fill vacancies during the preceding recess; and if the Senate approve, the nominations are confirmed; but the party appointed, whether approved or disapproved by the Senate, continues to hold, by virtue of his commission, until some other person is appointed in his place, or until the end of the session of the Legislature, whichever may first occur. And it has never been understood or supposed that, by thus sending to the Senate the name of the party appointed during the recess and the confirmation of such appointment, the party acquired a right to hold the office beyond the period for which he was originally appointed and commissioned." *Kroh v. Smoot*, 62 Md. 172, 176 (1884).

"[T]he period for which he was originally appointed and commissioned" is limited by Article II, §11 to the end of the session of the General Assembly at the latest.

If the Governor intends to nominate the recess appointee to a term that extends beyond the end of the session, the Governor

must manifest that intention. And, indeed, the nominations of recess appointees do expressly manifest the Governor's intention either to nominate the appointee to the remainder of the statutory term or, much more rarely, to nominate the appointee to the recess appointment only. *See, e.g.*, 1986 S. Jour. at 19-31; 1985 S. Jour. at 39-51; 1951 S. Jour. at 1657-77. Moreover, although the records regarding recess appointments are not arranged so as to permit a thorough canvass, we have identified at least one recorded instance in which a person other than the recess appointee was nominated for the balance of the recess appointment only and a different person was later nominated for the statutory term of that office. *Compare* 1951 S. Jour. at 1664 *with* 1951 S. Jour. at 1713 (Democratic Substitute Supervisor of Elections, Frederick County).

Indeed, in 44 *Opinions of the Attorney General* 272 (1959), this office advised that even if a recess appointee of the predecessor Governor were confirmed for the recess appointment, nevertheless the successor Governor had authority to make his own nominations for the remainder of the statutory term:

"It is therefore obvious that, even if the recess appointments are confirmed, there will be vacancies existing in all of the offices to which the recess appointments were made commencing on the first day after the Senate adjourns. You should, therefore, submit the nominations of the persons whom you desire to hold those positions for the unexpired term of office to the Senate for confirmation while it is in session." 44 *Opinions of the Attorney General* at 273.

In short, the Governor has broad discretion with respect to recess appointments. The Governor may simply nominate the recess appointee to serve out the balance of the recess appointment—that is, until the end of the session or the qualification of a successor, whichever occurs sooner; the Governor may nominate the recess appointee to the remainder of the statutory term; or the Governor may nominate "some other person" for either.⁵

⁵ If the Governor fails to send any name to the Senate, the recess appointment would end at the adjournment of the Senate and the office would be vacant. *Sappington v. Slade*, 91 Md. 640, 646 (1900). The same would be true if the Senate rejected the nomination of the recess appointee or of another person nominated instead, or took no action on the nomination. 43 *Opinions of the Attorney General* 86, 89 (1957); 21 *Opinions of the Attorney General* at 282.

IV

Governor's Discretion After Nomination

We next turn to your specific question: When the Governor has chosen to nominate the recess appointee for the remainder of the statutory term, may the Governor—most likely, a new Governor—later withdraw that nomination and substitute a new nominee?⁶

In general, nothing prevents the Governor from withdrawing a nomination that has not been acted upon by the Senate. A leading decision summarizes the point this way: "[I]n cases where the nomination must be confirmed before the officer can take the office or exercise any of its functions, the power of removal is not involved and nominations may be changed at the will of the executive until title to the office is vested." *McChesney v. Sampson*, 23 S.W.2d 584, 587 (Ky. 1930). *See also, e.g., McBride v. Osborn*, 127 P.2d 134, 137 (Ariz. 1942); *State ex rel. Todd v. Essling*, 128 N.W.2d 307, 312 (Minn. 1964). *See generally* 65A Am. Jur. 2d Public Officers and Employees §113, at 753 (1984). Prior to Senate action, a nomination is a "completely voluntary" act of the Executive. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 155 (1803).

Well-reasoned precedent supports the application of this general principle to the nomination of a recess appointee. In Florida, statutory procedures for the filling of vacancies parallel the constitutional procedures in Maryland.⁷ An incoming governor

⁶ In our view, there is no difference between the authority of an incumbent Governor and that of a newly elected Governor:

"The Office of the Governor is a continuing one, irrespective of the person who occupies it, and a succeeding Governor has the same power over an appointment as the predecessor Governor would have had if he continued in office." *Burke v. Schmidt*, 191 N.W.2d 281, 283 (S.D. 1971).

⁷ Florida law creates the same dichotomy between the recess term and the remainder of the statutory term:

"When a vacancy occurs in an office which must be filled by appointment by the Executive and confirmation by the Senate, two terms arise: The ad interim term runs from the date of the first appointment until the end of the next ensuing session of the Senate unless confirmation is sooner made by the Senate of an appointee for the unexpired portion; the next term is the *unexpired term* of the office which begins upon appointment by the Governor and confirmation by the Senate." *In re Advisory Opinion to Governor*, 247 So.2d 428, 431 (Fla. 1971) (emphasis in original).

asked the Florida Supreme Court whether he had the power to withdraw the nomination of a recess appointee made by his predecessor and substitute a new nominee for the unexpired portion of the term. The Florida Supreme Court held that he did:

"Although, under the statute, an officer duly appointed for the ad interim term cannot be removed during such term except for good cause, the name of any other qualified person to fill the unexpired term may be submitted to the Senate for confirmation. Until confirmed by the Senate, the Governor may recall any name and substitute another." *In re Advisory Opinion to Governor*, 247 S.2d 428, 433 (Fla. 1971).

This discretion, the Florida court held, is essential to the carrying out of the Governor's responsibilities:

"The Chief Executive, selected by the people, is charged with the responsibility of completing the program he presented to the electorate while seeking the office. It is important that he be allowed to exercise a freedom of choice in selecting those appointees whom he feels are qualified, as the people look to him for leadership in the operation of their government." *Id.*

In our view, the Governor has the same "freedom of choice" under the Maryland Constitution.⁸

We emphasize that the Governor's decision to withdraw the nomination of a recess appointee does not oust the appointee from office. The appointee would continue to serve the only term to which the appointee has title—the term of the recess appointment itself, limited by Article II, §11 to the earlier of the adjournment of the General Assembly or the qualification of the appointee's successor. The Governor's issuance of a commission and the appointee's taking of the oath complete the appointment for that limited term. See *Barrett v. Duff*, 217 P. 918 (Kan. 1923); *McChesney v. Sampson*, 23 S.W.2d at 587. See generally Annotation,

⁸ Other out-of-state authority upholds the power of a governor to withdraw an unconfirmed nomination made by a predecessor. *Petition of Commission on Governorship of California*, 603 P.2d 1357, 1364-66 (Cal. 1979) (governor has authority to withdraw unconfirmed appointment by acting governor); *Burke v. Schmidt*, 191 N.W.2d at 284-85 (incoming governor has authority to withdraw appointments of predecessor). Cf. *United States v. Woodley*, 751 F.2d 1008, 1009 (9th Cir. 1985) (discussing president's withdrawal of nomination of recess appointee).

Consideration of Appointment, or Confirmation of Appointment, to Office, 89 A.L.R. 132, 135 (1934).

V

Conclusion

In summary, it is our opinion that the Governor may withdraw the nomination of a recess appointee. If the nomination is withdrawn, the recess appointee continues in office until the adjournment of the General Assembly or the qualification of the appointee's successor, whichever occurs first.

J. JOSEPH CURRAN, JR., *Attorney General*

JACK SCHWARTZ
Chief Counsel
Opinions and Advice

PUBLIC OFFICERS—JUDICIAL NOMINATING COMMISSION—ELIGIBILITY—STANDING EXAMINER APPOINTED BY CIRCUIT COURT DOES NOT HOLD “OFFICE OF PROFIT OR TRUST.”

July 9, 1987

The Honorable James H. Norris, Jr.
State Court Administrator

You have requested our opinion on whether a standing examiner appointed by the judges of a circuit court of a county holds an “office of profit or trust under the Constitution or laws of this State,” within the meaning of the executive order that precludes public officers from serving on a Judicial Nominating Commission.

For the reasons stated below, we conclude that a standing examiner does not hold a public office. Accordingly, a standing examiner is not precluded from service on a Judicial Nominating Commission.

I

Background

Under Executive Order 01.01.1987.06 (January 29, 1987), Governor Schaefer reestablished the Appellate and Trial Courts Judicial Nominating Commissions. These commissions recommend to the Governor nominees for vacancies in the respective courts.

Members of the commissions may not hold “offices of profit or trust under the Constitution or laws of this State . . .” Executive Order 01.01.1987.06, ¶¶B(1) and C(1). Hence, if a standing examiner holds an office of profit or trust, he or she may not serve on a Judicial Nominating Commission.

In 68 *Opinions of the Attorney General* 358, 359 (1983), this office concluded that the identical phrasing in a predecessor executive order was intended to mirror the various provisions in Maryland law that refer to public officers and to apply prior interpretations of those provisions. Hence, we apply this body of law to the position of standing examiner.

II

Standing Examiners

Under Rule 2-542(a)(1), "[a] majority of the judges of the circuit court of a county may appoint a standing examiner and shall prescribe the compensation, fees, and costs of the examiner." A standing examiner "serves at the pleasure of the appointing court and is an officer of the court in which the referred matter is pending." Rule 2-542(a)(3).

The task of an examiner is to take evidence pursuant to the court's order of reference.¹ An examiner generally has all powers necessary to the conduct of an evidentiary hearing.² However, the examiner does not have the power to rule on objections or refusals to answer; these must be referred to the court. Rule 2-542(d)(3).

Upon the completion of the hearing, the examiner certifies the hearing record to the court. Rule 2-542(f). Any party "may file exceptions to the accuracy, completeness, or authenticity of the record or for the purpose of presenting to the court objections made before the examiner."

¹ Rule 2-542(b) provides:

"On motion of any party or on its own initiative, the court may refer to an examiner, for the taking of evidence, issues in uncontested proceedings not triable of right before a jury and proceedings held in aid of execution of judgment pursuant to Rule 2-633. The order of reference may prescribe the manner in which the examination is to be conducted and may set time limits for the completion of the taking of evidence and the submission of the record of the examination."

² Rule 2-542(c) provides:

"Subject to the provisions of the order of reference, an examiner has the power to regulate all proceedings in the hearing, including the powers to:

- (1) Direct the issuance of a subpoena to compel the attendance of witnesses and the production of documents or other tangible things;
- (2) Administer oaths to witnesses;
- (3) Examine witnesses;
- (4) Convene, continue, and adjourn the hearing, as required; and
- (5) Recommend contempt proceedings or other sanctions to the court."

III

Analysis

Of the criteria for determining whether a position is a public office, "the single most important characteristic of a public officer is that the 'public servant exercise[s] in his own right some of the sovereign powers of government for the benefit of the public.'" 68 *Opinions of the Attorney General* at 361 (quoting *Duncan v. Koustenis*, 260 Md. 98, 105 (1970)). See also, e.g., Opinion No. 87-010 (February 19, 1987) (unpublished); 72 *Opinions of the Attorney General* 271 (1987); 65 *Opinions of the Attorney General* 381 (1980); 64 *Opinions of the Attorney General* 255 (1979).³

In 24 *Opinions of the Attorney General* 612 (1939), this office determined that the position of equity examiner was not a public office, for purposes of Article 35 of the Declaration of Rights. Although lacking a full explanation for its conclusion, the opinion suggested that an examiner exercised no sovereign power, for all of the examiner's actions were later passed upon by the court. Cf. 17 *Opinions of the Attorney General* 191, 192 (1932). Accord, 26 *Opinions of the Attorney General* 281 (1941). More recently, this office held that a hearing officer in the Department of Personnel was not a public officer:

"The hearing officer does render decisions on employee controversies, but they are not final decisions and are subject to approval, rejection or modification by the Secretary of Personnel. Therefore, the decision making power is really vested in the Secretary, and not in the hearing officer. Moreover, according to the job specifica-

³ The generally accepted characteristics of a public office are as follows:

"(1) The position was created by law and involves continuing and not occasional duties.

(2) The holder performs an important public duty.

(3) The position called for the exercise of some portion of the sovereign power of the State.

(4) The position has a definite term for which a commission issued and a bond and an oath are required.

(5) The position is one of dignity and importance." 59 *Opinions of the Attorney General* 154, 156 (1974).

tions, the hearing officer is supervised by the Director of Employer-Employee Relations. These factors, we feel, preclude the hearing officer from exercising any portion of the sovereignty of the State 'in his own right', since he . . . serves under the 'direction and control of superiors.'" 57 *Opinions of the Attorney General* 266, 268-69 (1972) (quoting *Howard County Commissioners v. Westphal*, 232 Md. 334, 343 (1963)).

Likewise, an examiner renders no final decisions. Decision-making power is vested in the judge, not in the examiner. Moreover, the examiner's activities are subject to the court's definition (in the order of reference) and supervision.

We find especially pertinent the precedent regarding masters. "[U]nder the Maryland Constitution a master is entrusted with no part of the judicial power of this State. . . ." *Matter of Anderson*, 272 Md. 85, 106 (1974). Accordingly, the Court of Special Appeals has held that masters are not public officers, for purposes of certain special pension benefits. *Cohen v. Goldstein*, 58 Md. App. 699 (1984). If a master is not a public officer, we do not see how an examiner could be viewed as one. See *Bris Realty Co. v. Phoenix Savings & Loan Ass'n*, 238 Md. 84, 89 (1965).⁴

In short, we conclude that an examiner is not a public officer, primarily because an examiner does not exercise any of the sovereign powers of the State. Although the gathering of evidence is important, it is not akin to final adjudicatory decisionmaking.

IV

Conclusion

In summary, it is our opinion that a standing examiner does not hold an "office of profit or trust," within the meaning of Exec-

⁴ Prior to *Anderson* and *Cohen v. Goldstein*, this office gave inconsistent opinions about the public officer status of masters. Compare 44 *Opinions of the Attorney General* 157 (1959) (juvenile master holds public office) and 50 *Opinions of the Attorney General* 57 (1965) (examiner-master holds public office) with 53 *Opinions of the Attorney General* 522 (1968) (juvenile master does not hold public office—unclear decision). In light of the more recent cases and this opinion, 44 *Opinions of the Attorney General* 157 and 50 *Opinions of the Attorney General* 57 are overruled.

utive Order 01.01.1987.06. Accordingly, a standing examiner is not precluded from service on a Judicial Nominating Commission.

J. JOSEPH CURRAN, JR., *Attorney General*

JACK SCHWARTZ
Chief Counsel
Opinions and Advice

Editor's Note: Since the issuance of this opinion, the Governor has reissued his executive order governing the Judicial Nominating Commissions. See Executive Order 01.01.1988.06 (March 31, 1988). However, the provision discussed in the opinion was not changed.

PUBLIC OFFICERS—"OFFICE OF PROFIT"—INCOMPATIBLE POSITIONS—DEPUTY, ASSISTANT, AND SPECIAL ASSISTANT STATE'S ATTORNEYS DO NOT HOLD PUBLIC OFFICE.

November 9, 1987

The Honorable Philip Carey Foster
State's Attorney for Talbot County

You have requested our opinion on the applicability of dual office prohibitions to various positions, particularly those of Assistant State's Attorney, Deputy State's Attorney, and Special Assistant State's Attorney. Specifically, you have asked the following questions:

(1) Are the positions of Assistant State's Attorney and Deputy State's Attorney offices of profit or public offices?

(2) Is the position of Special Assistant State's Attorney an office of profit or public office?

(3) Do any of the following persons vacate the positions they hold if they serve as a Special Assistant State's Attorney:

- (a) a State's Attorney;
- (b) an Assistant or Deputy State's Attorney;
- (c) the Attorney General;
- (d) an Assistant or Deputy Attorney General;
- (e) the State Prosecutor;
- (f) an Assistant or Deputy State Prosecutor;
- (g) any other elected official, for example, members of a county council or the General Assembly.

(4) Do any factors, such as the duration of the special appointment, whether compensation is paid for the special appointment, or the particular function to be performed, have any impact on any of the above questions?

(5) If the position of Special Assistant State's Attorney is an office of profit or if legal difficulties result from exchanging prosecutors between jurisdictions, does

Chapter 737, Laws of Maryland 1987, solve these problems for Talbot County?

For reasons given below, we conclude in response to your principal questions that the positions of Assistant State's Attorney, Deputy State's Attorney, and Special Assistant State's Attorney are neither offices of profit nor public offices. Persons who hold these positions may serve as Special Assistant State's Attorneys. The answers to your remaining questions appear below under the appropriate heading.

I

Background

A. *The Goldberg Decision*

The primary stimulus for your inquiries is the opinion of the Court of Special Appeals in *Goldberg v. State*, 69 Md. App. 702 (1987), cert. granted 309 Md. 521 (1987). In this case, the defendant appealed a conviction principally on the ground that a Deputy or Assistant State Prosecutor could not be appointed or serve as a Special Assistant State's Attorney. In affirming the conviction, the Court of Special Appeals declined to rule on the issue of whether the positions in question were offices of profit. 69 Md. App. at 718. It also did not hold that the positions were incompatible. 69 Md. App. at 721. It simply stated that the consequence of holding two offices of profit or incompatible posts would be the vacating of the former positions, not the invalidation of either the appointment of the Special Assistant State's Attorney or the indictment obtained. 69 Md. App. at 718 and 721-22.

However, in dicta, the *Goldberg* opinion referred to all of the positions as "offices" and suggested that the positions might be incompatible. 69 Md. App. at 720-21. The *Goldberg* case is now pending in the Court of Appeals and the Attorney General's Office has asked the Court to clarify and correct the lower court's dicta.¹

¹ Ordinarily, this office refrains from issuing opinions on questions that are involved in pending litigation. However, because the practice under which one jurisdiction uses the services of another jurisdiction's prosecutors in special cases is widespread, we believe it appropriate to reiterate in this opinion—as we do in the brief in *Goldberg*—our view that the practice does not violate dual office prohibitions.

B. *Dual Office Restrictions Generally*

The general constitutional proscription against holding certain dual offices is found in Article 35 of the Maryland Declaration of Rights, which provides in relevant part that "no person shall hold, at the same time, more than one office of profit, created by the Constitution or Laws of this State"² To the extent that it has not been altered by the State Public Ethics Law, Article 40A of the Maryland Code, the common law of Maryland also prohibits the holding of incompatible offices and positions. *Hetrich v. County Commissioners*, 222 Md. 304 (1960); 60 *Opinions of the Attorney General* 121, 133-34 (1975).

The initial issue to be considered in determining whether these prohibitions have been violated is whether either of the positions held by the person in question is an "office." The traditional criteria for a public office were set out by the Court of Appeals in *Board of Supervisors of Elections v. Attorney General*, 246 Md. 417, 439 (1967):

"1. the position was created by law and casts upon the incumbent duties which are continuing in nature and not occasional; 2. the incumbent performs an important public duty; 3. the position calls for the exercise of some portion of the sovereign power of the State; 4. the position has a definite term, for which a commission is issued, a bond required and an oath required; 5. the position is one of dignity and importance."

In terms of the weight to be given these factors, the Court of Appeals has ascribed the least significance to the "dignity and importance" component. See *Carder v. Steiner*, 225 Md. 271 (1961). Somewhat greater importance is given to the oath requirement. See *Gary v. Board of Trustees*, 223 Md. 446, 450-51 (1960). But of these criteria, "the single most important characteristic of a public officer is that the 'public servant exercises in his own right some of the sovereign power of government for the benefit of the public.'" 68 *Opinions of the Attorney General* 358, 361 (1983) (quoting *Duncan v. Koustenis*, 260 Md. 98, 105 (1970)). Almost invariably, if a person does not exercise sovereignty in his or her own right, that person will be found to be an "employee" and not

² More stringent provisions governing dual office holding apply to specific classes of offices, such as legislators (Article III, §11 of the Constitution) and judges (Article 33 of the Declaration of Rights).

a "public officer." See, e.g., *Gary v. Board of Trustees*, 223 Md. at 450.

Even if a position constitutes an "office" under these tests, it will not be an "office of profit" within the meaning of Article 35 of the Declaration of Rights unless compensation in the form of salaries, fees, or the like attaches to the office. See 60 *Opinions of the Attorney General* 121, 124 (1975); 24 *Opinions of the Attorney General* 618 (1939); 11 *Opinions of the Attorney General* 236 (1926).

Finally, in *Hetrich v. County Commissioners*, the Court of Appeals summarized the test for incompatibility as follows:

"The fundamental test of incompatibility at common law is whether there is a present or prospective conflict of interest, as where one office is subordinate to the other or subject to supervision by the other, or where the incumbent of one office has the power to appoint or remove or to set the salary of the other." 222 Md. at 308.

Because the incompatibility doctrine is a common law rule, it can be altered, modified, or abrogated by statute. See 60 *Opinions of the Attorney General* 121 at 134.

With these principles in mind, we turn to the questions you have raised.

II

Status of Deputy and Assistant State's Attorneys

In 44 *Opinions of the Attorney General* 110 (1959), Attorney General Sybert concluded that the position of Deputy State's Attorney in Frederick County, established by Senate Bill 90 of the 1959 Session of the General Assembly, was not a public office. The opinion noted that:

"Senate Bill No. 90 does not require that the Deputy State's Attorney for Frederick County post a bond or take the oath of office before assuming his duties, and we have found no other provisions in either the Constitution or the statutes of this State which require that he do so. The Bill provides for no definite term of office for the position, but simply provides that the Deputy State's Attorney shall be appointed by the State's Attorney with the

approval of the resident Judge of the Circuit Court for Frederick County. There is no provision in the Bill that he receive a commission

The only other question to be determined is whether or not, under the provisions of this Bill, the Deputy State's Attorney for Frederick County will exercise a part of the sovereignty of the State. We are of the opinion that he will not since the statute specifically provides that his duties shall be performed under the direction of the State's Attorney. This means that any decisions made will be those of the State's Attorney and the Deputy State's Attorney will simply carry them out under his supervision. He will be an employee and agent of the State's Attorney and simply act under his guidance. We have inquired and found that in the other counties of the State where the position of Deputy State's Attorney exists, the position has always been treated as a mere employment rather than as an office. . . ." 44 *Opinions of the Attorney General* at 111-12.

This conclusion was reaffirmed in later opinions. See, e.g., 59 *Opinions of the Attorney General* 121, 122 (1974); 57 *Opinions of the Attorney General* 595, 600 (1972). In 1963, Attorney General Finan reached a similar conclusion with respect to the position of Assistant State's Attorney. 48 *Opinions of the Attorney General* 323, 325 (1963).

Although a number of factors touching on the status of Deputy and Assistant State's Attorneys have changed since the issuance of these opinions, we see no reason to alter the office's earlier conclusions. For example, a quarter of a century ago, most State's Attorneys were not expressly authorized by Article 10, §40 of the Maryland Code to appoint deputies or assistants, though they impliedly had that power. Now Article 10, §40 contains a separate provision for each county State's Attorney's office, which typically governs the appointment of Deputy and Assistant State's Attorneys.³ In addition, these modern provisions in most cases specify the powers and duties of deputies and assistants, typically stating that they have "the same legal powers as the State's Attorney" to represent the State before grand juries in the trial of

³ The appointment of a Deputy and Assistant State's Attorneys in Baltimore City is governed by Article V, §9 of the Maryland Constitution.

criminal proceedings and in other matters. *See, e.g.*, Article 10, §40(d)(5) and (x)(2). As to some jurisdictions, §40 qualifies this grant of power by expressly stating what we believe is implied as to the others— that assistants and deputies exercise their powers “under the direction” of the State’s Attorney. *See, e.g.*, Article 10, §40(n)(6) and (p)(8).

In our view, these statutory provisions merely place some limits on numbers of assistants and obviate any question of their authority before the grand jury or in court. These provisions were not intended to make deputies and assistants independent of their respective State’s Attorney or grant them discretionary power to be exercised in their own right. *See Gary v. Board of Trustees*, 223 Md. at 452-53.⁴ Nor do these provisions authorize deputies and assistants to “exercise police powers as conservators of peace.” *Duncan v. Koustenis*, 260 Md. at 106.

We also note that §40 still does not accord deputies or assistants tenure or require a term, a commission, or the posting of a bond. Nor does the statute or the constitution *require* them to take an oath of office. We are fully aware that, in some counties and in Baltimore City, Assistant State’s Attorneys take an oath. *See State v. Ensor*, 277 Md. 529, 532 (1976). But the major significance of an oath in determining whether a position is a public office lies in whether the oath is required by law. “It is not the taking of the oath that is decisive but rather the statutory requirement that it be taken, which offers legislative indication that the position is an office.” *Gary v. Board of Trustees*, 223 Md. at 451. The law contains no such requirement for assistants and deputies. *See Hammond v. Lancaster*, 194 Md. 462, 477 (1949) (Assistant Attorneys General, who take no oath and serve at the pleasure of the Attorney General, are employees, not public officers.).

⁴ Only in one jurisdiction, Washington County, does the statute speak to the power of a deputy or assistant to act in the “absence” of the State’s Attorney. *See* Article 10, §40(v)(4) (“Under the direction of the State’s Attorney or in the absence of the State’s Attorney, the deputy State’s Attorney and the assistant State’s Attorneys shall perform acts and duties in relation to all criminal proceedings, all having the same legal powers as the State’s Attorney, to represent the State in all proceedings in relation to grand jury, circuit court, the District Court, boards, commissions or agencies of this State or any county or political subdivision.”) Here again, we do not view this language as authorizing exercise of prosecutorial powers in the absence of prior instruction, subsequent review, and overall responsibility by the State’s Attorney.

Finally, we do not believe that the status of assistants and deputies as "employees," rather than "officers," is undercut by the fact that these personnel enjoy prosecutorial immunity. That immunity is not grounded in Maryland's common law "official immunity," the test for which is similar to that for determining who is a public officer in other contexts. *See Leese v. Baltimore County*, 64 Md. App. 442, 479 (1985). Rather, the absolute prosecutorial immunity that is shared by assistant prosecutors is historically and qualitatively different from official immunity. *See Imbler v. Pachtman*, 424 U.S. 409, 421-24 (1976). Thus, the fact that assistants and deputies may assert prosecutorial immunity from liability does not mean that they are independent public officers, rather than employees subject to the control and direction of the State's Attorney. Because these persons are not officers, they do not hold "offices of profit," even though they are compensated for their services.

III

Status of Special Assistant State's Attorneys

State's Attorneys in some counties have explicit statutory authority to appoint "Special Assistant State's Attorneys." However, in *Goldberg v. State*, the Court of Special Appeals held that this power was implicit in the State's Attorney's statutory duty to prosecute and defend cases of interest to the State. 69 Md. App. at 711. *See* Article 10, §34.

Goldberg also distinguished the position of Special Assistant State's Attorney, appointed by the State's Attorney, from the post of "assistant counsel for the State" or "special prosecutor" appointed by a Circuit Court pursuant to §2-102(b) of the Courts Article:

"A Special Assistant State's Attorney is imbued with all the powers of a State's Attorney and may institute criminal proceedings, either by way of indictment or information. He is a member of the State's Attorney's staff, *subject to the State's Attorney's control*, and receives any compensation to which he is entitled from the State's Attorney. A Special Prosecutor in the form of assistant counsel for the State, however, is not a member of the State's Attorney's staff and operates independently of it. The Court, not the State's Attorney, determines the

amount of compensation to which assistant counsel is entitled." 69 Md. App. at 715-716 (emphasis added).⁵

Thus, like other assistants, a Special Assistant State's Attorney's powers are subject to the control of the State's Attorney. Moreover, the post of Special Assistant displays no greater indicia of a public office than that of an ordinary assistant.⁶ Hence, it is our opinion that such a position is not a public office.⁷

IV

Service as Special Assistant State's Attorney

You have also asked about the consequences of service as a Special Assistant State's Attorney. Specifically, you inquire whether persons serving in various positions would vacate them if they served in the capacity of Special Assistant State's Attorney. Of

⁵ In 59 *Opinions of the Attorney General* 121, 125 (1974), this office stated that:

"Ordinarily, . . . the status of the special prosecutor would be equivalent to that of a Deputy or Assistant State's Attorney, neither of whom is a holder of a public office in the constitutional sense. . . [But when] [g]iven the full authority of the State's Attorney the Special Prosecutor meets the test of exercising a portion of the sovereign power of the State. Should he in fact exercise the sovereign authority ordinarily exercised by the State's Attorney, it logically follows that a Special Prosecutor holds an office of profit. . . ."

However, *Goldberg's* description of the independence of a Special Prosecutor, 69 Md. App. at 715, suggests that this position is in no way equivalent to that of an employee of a State's Attorney. The 1974 opinion on special prosecutors also did not appear to consider the issue of whether the "occasional" nature of the prosecutor's duties by itself removed the position from the category of public office. See *Board of Supervisors of Elections v. Attorney General*, 246 Md. at 439-40. Because you have raised no issue with respect to special prosecutors, there is no need to presently consider whether the 1974 opinion is correct in every respect.

⁶ In fact, unlike the duties of an ordinary Assistant State's Attorney, those of a Special Assistant are not "continuing in nature". See *Board of Supervisors of Elections v. Attorney General*, 246 Md. at 439-40.

⁷ Even if it were, it might not be an "office of profit." Typically, when an Assistant Attorney General or an Assistant State Prosecutor is appointed as a Special Assistant State's Attorney, he or she receives no additional compensation for that service. See *Goldberg v. State*, 69 Md. App. at 706.

the eleven positions you have mentioned, five are offices of profit—*viz.*, State's Attorney, Attorney General, State Prosecutor, County Council member, and member of the General Assembly. The other positions—Assistant or Deputy State's Attorney, Assistant or Deputy Attorney General, and Assistant or Deputy State Prosecutor—are not.

Under Article 35 of the Declaration of Rights, a person holding an office of profit who assumes a second such office is deemed to have vacated the first. *Moser v. Board of County Commissioners*, 235 Md. 279, 284 (1964). However, Article 35 does not dictate that result if the second position is not an office of profit—as we have concluded is the case with regard to a Special Assistant State's Attorney.

In our view, more substantial questions are raised as to whether the appointment as Special Assistant State's Attorney of some of these persons is inconsistent with statute or violative of the common law rule of incompatibility of positions. For example, a major contention in the *Goldberg* case is that the State Prosecutor statute precludes the State Prosecutor, his deputy, and his assistants from serving as Special Assistant State's Attorneys. See Article 10, §§33A-33F. In addition, it also can be argued that statutory provisions requiring a State's Attorney or his assistant to "serve full time" might bar their appointment as a Special Assistant State's Attorney in another county.⁸ Although it is our position that these statutory provisions do not bar service as a Special Assistant State's Attorney, we prefer to await the outcome of *Goldberg* before giving more definite advice on the point.

Turning to the incompatibility issue, we noted earlier that the doctrine applies to "positions" as well as offices. See Part I B above. In addition, the same "penalty" that occurs when Article 35 is violated—the vacating of the initial position—can also be imposed when a second incompatible position is assumed. See *Hetrich v. County Commissioners*, 222 Md. at 308.

In *Goldberg*, the Court of Special Appeals strongly suggested that, even aside from difficulties with the State Prosecutor Law, the common law incompatibility rule might also be offended when

⁸ A similar contention with respect to the State Prosecutor's duty of full time service is being made in *Goldberg*. See Article 10, §33B(k).

an Assistant State Prosecutor serves as a Special Assistant State's Attorney. The Court noted that:

"[A]n individual who is a member of both offices serves not one but two masters and is simultaneously subject to the supervisory control of both the State Prosecutor and the State's Attorney. We can only hypothesize the difficulties which might arise if the two masters had differing concepts respecting the prosecution of a particular cause." 69 Md. App. at 721.

However, in *State v. Ensor*, the Court of Appeals found it "immaterial" that an Assistant Attorney General was serving at the request of a State's Attorney as a Special Prosecutor: "A member of the bar with no such connection could have been approved in the same manner." 277 Md. at 548.

Even without the apparent authority of *Ensor*, we would not conclude that simultaneous service as a Special Assistant State's Attorney by Assistant and Deputy State Prosecutors, Assistant and Deputy Attorneys General, or Assistant or Deputy State's Attorneys from another jurisdiction breaches the incompatibility rule. As we see it, neither position is subordinated to the other or subject to the supervision of the other; nor are the quite similar functions of these posts "inherently inconsistent," "repugnant" to each other, or contrary to "public policy". See 63A Am. Jur.2d *Public Officers and Employees* §65, at 717-18 (1984); Mechem, *The Law of Public Offices and Officers* §422, at 269 (1890). Cf. *Hetrich v. County Commissioners*, 222 Md. at 308 (incompatibility found when the second office has appointment, removal, and salary-setting power over the first). In fact, such cooperation and sharing of resources among prosecutors serves a desirable public purpose. We reach the same conclusion as to service by a State's Attorney or the State Prosecutor as a Special Assistant State's Attorney, although it might be more prudent for these officers to use their staffs for such sharing arrangements.

On the other hand, incompatibility problems might well arise if the Attorney General were to serve as a Special Assistant State's Attorney, subject to the authority of a State's Attorney. Even this partial subordination might be considered incompatible with the Attorney General's duty under Article V, §7 of the Constitution to recommend removal of State's Attorneys. Similar problems might arise were a County Council member or a member of the General Assembly to serve in such a post. The counties approve the budget for the Office of State's Attorney, and the General Assembly

in most cases sets the salary level for the State's Attorney and his or her assistants.⁹ We cannot say with certainty whether such service would or would not offend the incompatibility doctrine; in any event, we believe that an advisory opinion on the applicability of Ethics Law restrictions should be obtained before such an appointment is made.¹⁰

V

Talbot County Statute

In 1987, the General Assembly enacted Chapter 737, which added the following provision to Article 40, §10(u)(5):

"(i) The State's Attorney for Talbot County may appoint special assistant State's Attorneys as the State's Attorney for Talbot County deems necessary to serve in an investigation or a case.

(ii) The compensation for a special assistant State's Attorney who is appointed under subparagraph (i) of this paragraph shall be paid by the Talbot County Council in the form and amount authorized by order of the Talbot County Circuit Court.

(iii) A person who serves on a temporary basis as a special assistant State's Attorney for Talbot county may not be considered as holding an office for profit.

(iv) A person may not be considered to have vacated any public office or employment in another State's Attor-

⁹ In 59 *Opinions of the Attorney General* 121, 127 (1974), this office stated that "we are unable to say with certainty" that appointment of a State Legislator as a special prosecutor "would not violate the separation of powers doctrine."

¹⁰ Title 3 of the State Public Ethics Law, and county and city ordinances enacted pursuant to State law, regulate dual employment by officers and employees. However, even though there might be some overlapping between the Ethics Law restrictions and the common law rule of incompatibility, we cannot say that the entire common law doctrine has been statutorily abrogated. See 63A Am. Jur.2d *Public Officers and Employees* §65, at 717-18 ("The common law developed this doctrine of incompatibility to preclude a person from holding two public offices the duties of which could give rise to possible conflicts of governmental, as distinguished from personal or private, interests.").

ney's office by virtue of the person's service on a temporary basis as a special assistant State's Attorney for Talbot County.

(v) A person who serves as a special assistant State's Attorney for Talbot County may not receive compensation as an employee of any other State's Attorney's office, the Office of the Attorney General, or the Office of the State Prosecutor."

The portions of this statute that seek to foreclose a finding that a Special Assistant State's Attorney does not hold an office of profit would not be binding on a court. *See* Bill Review Letter (House Bill 1357) from Attorney General Curran to Governor Schaefer at 2 (May 14, 1987). Nevertheless, §10(u)(5)(iv) and (v) evidence a legislative intent that the incompatibility doctrine or any potential statutory bar not be applied to an Assistant or Deputy State's Attorney, Attorney General, or State Prosecutor serving as a Special Assistant State's Attorney. In this regard, at least for Talbot County, Chapter 737 mitigates some of the legal problems we have noted.

VI

Conclusion

In summary, it is our opinion that a Deputy or Assistant State's Attorney, a Deputy or Assistant Attorney General, or a Deputy or Assistant State Prosecutor may serve as a Special Assistant State's Attorney without violating the constitutional prohibition against holding two offices of profit or the common law rule against holding two incompatible positions.

J. JOSEPH CURRAN, JR., *Attorney General*

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Chief Counsel

Opinions and Advice

PUBLIC PROPERTY

DEPARTMENT OF NATURAL RESOURCES—LAND ACQUISITIONS—
APPLICATION OF STATUTORY LIMIT TO CONSERVATION EASE-
MENT PURCHASED FROM NATURE CONSERVANCY.

February 6, 1987

The Honorable John N. Bambacus
Senate Of Maryland

You have requested our opinion on whether a conservation easement purchased by the Department of Natural Resources ("DNR") from the Nature Conservancy and involving 400 acres of property in Garrett County known as "the Glades" is subject to the ceiling on DNR land acquisitions in the County imposed by §5-207(a)(2) of the Natural Resources Article ("NR" Article) of the Maryland Code.

It is our opinion that §5-207(a)(2) applies only to acquisitions of ownership interests, e.g., fee simple interests, and not to purchases of nonpossessory interests in land or property such as a conservation easement.

I

Statutory Framework

The Department of Natural Resources is subject to various statutory restrictions with respect to its ability to acquire new properties in Garrett County. Since 1947, State law has prevented the agency and its predecessors from purchasing an "individual tract of land in excess of one hundred acres" without the approval of the County Commissioners. NR §5-207(a). In 1983, the General Assembly prohibited the Department from using Program Open Space funds "to acquire land in Garrett County in excess of the total amount of land owned by the Department in that county on June 1, 1983," although DNR was permitted to exchange land "as long as the total acreage does not exceed the amount owned by the Department on June 1, 1983." Chapter 679, Laws of Maryland 1983.

In 1986 similar prohibitions were enacted in two separate measures. An amendment to legislation establishing a Heritage Conservation Fund, Chapter 847 of the Laws of Maryland 1986, prevented DNR from using funds to acquire new land in Garrett County after June 30, 1986. NR §5-1507. And Chapter 848 amended §5-207(a), which sets forth DNR's general authority "to purchase and manage lands" for forest and park reserves, to provide:

"(2) Notwithstanding any other provision of this Code, after June 30, 1986, the Department may not use any funds, whether under Program Open Space or otherwise, to acquire land in Garrett County in excess of the total amount of land owned by the Department in that county on June 30, 1986. This . . . does not prohibit the Department from using any funds to exchange land in Garrett County, as long as the total acreage does not exceed that amount owned by the Department on June 30, 1986." NR §5-207(a)(2).

Significantly, Chapter 848, which took effect July 1, 1986, contained a preamble describing specific DNR fee simple land holdings in the County as of 1980 and noting that the County "has a declining tax base because of the ownership of a large amount of land by the State of Maryland."¹ Chapter 848, Laws of Maryland 1986. The Senate Committee Report on the bill stated in relevant part:

"The State owns 82,000 acres of land in Garrett County, or nearly 20% of the entire county. Testimony at the hearing indicated that county residents feel that further land acquisition by the State in Garrett County will reduce the county's tax base and result in a higher tax rate."

Other statutory provisions relevant to our inquiry are NR §5-1222 and §7-218 of the Tax-Property Article (the "TP" Article). NR §5-1222 authorizes the Secretary of DNR to "enter into agreements with the Nature Conservancy for the State to acquire title to or an interest in property owned by the Nature Con-

¹ An updated listing of these fee simple holdings was contained in a February 4, 1986, DNR Bill Report on Senate Bill 362, which was enacted as Chapter 848. See File of Senate Economic and Environmental Affairs Committee.

servancy or property on which the Nature Conservancy holds an option or a contract to purchase." TP §7-218 exempts from tax property that is owned by the Nature Conservancy and is used to assist in the preservation of a wild nature area, to establish a nature reserve or other protected area, or to promote conservation.

II

Factual Background

The Glades is a 400-acre peatland area considered of unique importance by environmentalists. In 1982, the Nature Conservancy attempted to purchase the property but was outbid by the Garrett County Processing and Packaging Corporation ("GC-PPC"), a business interested in mining peat in the area. What followed was an extended period of disagreement among environmental groups, GCPPC and State agencies that culminated in the filing of two lawsuits in 1985 by the Sierra Club: a federal suit against GCPPC alleging violations of the federal Water Pollution Control Act and seeking an injunction requiring the first to cease operations in the Glades; and a State court action against State environmental officials to require them to enforce certain State permit and licensing statutes against GCPPC.

Even before the onset of this litigation, DNR began negotiations to acquire title to the Glades. In November, 1984, the agency requested the Department of General Services to obtain two appraisals of the property. One appraisal valued the land at \$400,000; the other at \$467,700. These figures were substantially lower than GCPPC's final asking price of \$650,000. And as of July 1, 1986—the date the new ceiling on DNR land acquisitions took effect—the agency and the company were still approximately \$200,000 apart in their negotiations. In addition, we are advised that DNR was not in a position to offer 400 acres of its existing holdings in the County to offset acquisition of the Glades in accordance with NR §5-207(a)(2).

Early in 1986, DNR had contacted the Nature Conservancy, a non-profit environmental preservation organization, to interest the group in contributing towards the State purchase of the Glades. After July 1, 1986, the Nature Conservancy indicated a willingness to acquire and own the property if DNR would contribute to the acquisition price by purchasing from the organization a conservation easement under NR §5-1222. The parties

then agreed upon a \$650,000 purchase price, \$450,000 of which was to eventually come from DNR. On September 16, 1986, GC-PPC and the Nature Conservancy executed an option contract to purchase the property. The company's willingness to sell was conditioned upon all suits by the Sierra Club being dismissed, with no attorney's fees. The Sierra Club agreed to that condition.

Acting upon advice of counsel that the 1986 Garrett County statutory ceiling did not apply to such transactions, DNR presented to the Board of Public Works the question of DNR's purchase of the conservation easement for \$450,000.

The Board met on October 8, 1986, to consider the matter. According to the transcript of that meeting, members of the Board were very much aware of the 1986 acquisition ceiling in Garrett County and concerned that DNR eventually acquire title to the property at a future time:

"GOVERNOR HUGHES: If you cannot work out an exchange, I suppose, of land in Garrett County—in other words, reduce some-

MR. SEBODA:—Equivalent.

GOVERNOR HUGHES:—existing owned state property of equal size to this, then this is the only way to do it. If you do this, then this is the only way to do it. If you do this, and in the future you can work out some swap, this isn't preventing it; it's just setting the stage for it, it seems to me.

MR. JAMES: That's right.

GOVERNOR HUGHES: Otherwise, we're going to hold the thing up.

MR. GOLDSTEIN: I don't want to hold it up. I want to be sure what we do here today, that we can go ahead and to make a swap in the future, and that the Nature Conservancy will go along with it.

* * *

GOVERNOR HUGHES: Would the Nature Conservancy be willing at some time in the future, if we repaid them the \$200,000, to deed the property to the state in fee simple?

MR. NELSON: I believe that to be the case, but we have a representative of the Nature Conservancy here

who would probably be willing—if you want to address this.

* * *

MR. KLOCKNER: And the scenario that the Governor described is something that we've done with the Department of Natural Resources many times in the past; and, in fact, it would be an ideal situation, as far as the Nature Conservancy is concerned. Unfortunately, we have a special case in Garrett County with this law on the books that makes it difficult for the state to acquire land there, and we see this, because of the law, as a situation where the Conservancy would come in and help acquire this important natural area the way that it's described before you, but I see no problem in the future, if the situation changes, of some sort of buy out, or swap couldn't be done. In fact, that's what we would prefer."

Transcript at pp. 63-66.

After discussion, the Board members unanimously voted to approve purchase of the easement.

Thereafter, a deed of conservation easement was duly prepared, granting the State a permanent easement on the Glades to preserve the property and prevent future mining or development. In December, 1986, settlement of all the transactions occurred, with a deed passing from GCPPC to the Nature Conservancy and \$650,000 being paid to the company. The Nature Conservancy received a check from the State for \$450,000, and executed the deed granting a conservation easement to the State. The Sierra Club suits were settled. And, because property owned by the Nature Conservancy is exempt from property tax if used to preserve the environment and promote conservation, the 400-acre tract was removed from the tax rolls of the County.

III

Principles of Statutory Construction

The precise legal question raised by these facts is whether DNR's purchase of a conservation easement is subject to the 1986 ceiling on "land" acquisition in Garrett County. The answer to that question turns on the intent of the General Assembly.

The Court of Appeals has said that in ascertaining legislative intent the Court "considers the language of an enactment in its natural and ordinary signification." *Md. National Capital Park and Planning Comm. v. Mayor and Council of Rockville*, 272 Md. 550, 556 (1974). If there is no ambiguity or obscurity in the language of a statute, there is usually no need to look elsewhere to ascertain the legislative intent. *Id.* It is proper to look to the spirit and purpose of an enactment to determine legislative intent "only when the literal words of a statute say something that the Legislature could not possibly have meant." *Amalgamated Cas. Ins. Co. v. Helms*, 239 Md. 529, 535 (1965).² In other words, in the absence of ambiguity, the courts "confine themselves to a construction of a statute as written, and [do] not attempt, under the guise of construction to supply omissions or remedy possible defects in the statute, or to insert exceptions not made by the Legislature." *Amalgamated Cas. Ins. Co. v. Helms*, 239 Md. at 535-36.

IV

Legal Analysis

"The word 'land' has in law a well settled meaning. It includes the surface of the ground, and everything that is on it and under it, but does not comprehend incorporeal hereditaments." *Whitlock v. Greacen*, 21 A. 944, 944 (N.J.Ch. 1891).³ When land is "acquired," it means that one "become[s] the owner of the property," because "[i]n the final analysis 'acquire' imports 'ownership'." *Weinberg v. Baltimore & Annapolis R.R.*, 200 Md. 160, 165 (1952).

As a general proposition, an easement is an "incorporeal right or hereditament to which corporeal property is rendered sub-

² The "spirit of the law" certainly does not override the plain language of a statute "when the only bases for a construction other than a literal one are either that the Legislature should not have said what it did, or that it would not have said it, had it been in possession of all the facts." *Clark v. Tawes*, 187 Md. 195, 199 (1946).

³ *Whitlock* notes that at common law the word "land" did not include incorporeal property interests. 21 A. at 944.

ject." 25 Am. Jur. 2d *Easements and Licenses* §2. It is property or an "interest in land," but it gives no title to the land on which it is imposed and confers no right to participate in the profits arising from the land. *Id.* More importantly, "[i]t is not an estate in land, nor is it 'land' itself." *Id.* See also *Chicago R. I. and P. R. R. Co. v. Ottumwa*, 83 N.W. 1074, 1078 (Iowa 1900) ("A mere easement is 'neither a lot nor a parcel of land' [within the meaning of the statute in question]. . . . It will hardly be claimed that, according to the approved usage of language, the owner of an easement is the owner of a lot or parcel of land."); *Henry Bickel Co. v. Texas Gas Transmission Corp.*, 336 S.W.2d 345, 347 (Ky. 1960) ("While an easement is property in the nature of land it is an incorporeal right, separate and distinct from the right to occupy and enjoy the land itself. . . . An easement is a right *distinguished from ownership*. . . . It is not a normal incident of a possessory land interest. . . . It is a privilege or an interest in land . . . , but it is not an *estate* in land nor is it 'land' itself. . . .") (emphasis in original).⁴ In particular, the General Assembly has specifically defined a conservation easement as "an incorporeal property interest in . . . water or land areas, or the improvement or appurtenance thereto" to which it applies. Md. Code, Real Property Article, §2-118(a).

This does not mean that the General Assembly could not define the word "land" or the phrase "to acquire land" to include an "easement" or an "interest in property." See, e.g., Transportation Article, §§8-301(c) and 8-314 (acquisition of scenic easements by State Highway Administration); NR §7-601(d) (abandoned mines); NR §7-901(d) (abandoned mine reclamation). However, the literal, ordinary and natural meaning of the phrase, excludes an easement.

Thus, in our opinion the language of the 1986 statutory ceiling on DNR land acquisition does not include the purchase of conservation easements pursuant to NR §5-1222. Nonetheless, we have examined the legislative history of §5-207(a)(2) as well as contem-

⁴ According to 3 Powell, *Real Property*, §405, the definition of an easement stresses six factors; an easement (1) is an interest in land in the possession of another; (2) is an interest of a limited use or enjoyment of the land in which the interest exists; (3) can be protected against interference by third persons; (4) cannot be terminated at the will of the possessor of the servient land; (5) is not a normal incident of a possessory land interest; (6) is capable of creation by conveyance.

poraneous enactments and similar provisions of the Natural Resources Article, to determine whether, in the literal words of the 1986 law, the General Assembly has said something that it "could not possibly have meant." *Amalgamated Cas. Ins. Co. v. Helms*, 239 Md. at 535.

First, we note that both the preamble of the 1986 statute and materials in the committee file reveal a concern with property "owned" by DNR in fee simple. However, in the detailed list of holdings contained in those documents, no mention is made of DNR's interest in a 151-acre conservation easement obtained in Garrett County in 1984, notwithstanding that a contemporaneous enactment created a 100 percent tax credit for unimproved property subject to such an easement. Tax-Property Article, §9-107 (enacted by Chapter 621, Laws of Maryland 1986).⁵

Second, other 1986 legislation, the Heritage Conservation Fund statute, authorizes DNR to manage "land or interests in land acquired" for purposes of the program. NR §5-1504(a). Nevertheless, an amendment to the legislation prohibits the Department from using funds only "to acquire land" in Garrett County. NR §5-1507.

Third, in various places in the Natural Resources Article, the General Assembly has recognized the distinction between acquiring land or property and acquiring an incorporeal interest in land or property such as an easement. See e.g., NR §§3-104(h), 3-208, 3-905(i), 5-1202(a), 5-1504(a), and 8-904. Thus, the General Assembly's omission of incorporeal property interests from §5-207(a)(2) is not "something it could not possibly have meant."

Fourth, the purpose of the 1986 ceiling—to prevent property from being removed from the tax rolls—would not necessarily be frustrated by DNR purchases of property easements. The only reason such a result occurred here was because of the Nature Conservancy's tax exempt status. An easement purchase from a taxable entity would not cause the property's removal from the tax rolls.

⁵ NR §5-207(a) requires County Commissioner approval for DNR "purchase" of individual tracts of land in excess of 100 acres. For purposes of this provision, DNR also apparently viewed an easement as not constituting a purchase and did not seek approval prior to accepting the 1984 easement.

V

Conclusion

In summary, although the matter is not entirely free from doubt, it is our opinion that the phrase "to acquire land" in NR §5-207(a)(2) does not apply to incorporeal interests such as a conservation easement, and the Department continues to have the discretion to obtain conservation easements beyond the limits of the cap established by NR §5-207(a)(2). However, it is certainly within the power of the General Assembly to curb that discretion by amending the law.

J. JOSEPH CURRAN, JR., *Attorney General*

JUDSON P. GARRETT, JR., *Deputy Attorney General*

ROBERT A. ZARNOCH, *Assistant Attorney General*

Editor's Note: In Chapter 50 (Senate Bill 1036) of the Laws of Maryland 1987, the General Assembly amended NR §5-207(a) extensively and repealed NR §5-1507.

RACING

RACING COMMISSION—TELEPHONE BETTING—AUTHORITY TO
ADOPT REGULATION PERMITTING RACE TRACK TO ACCEPT
BETS ON RACE BEING RUN AT DIFFERENT TRACK.

August 4, 1987

The Honorable James C. Simpson
The Honorable Larry Young
Joint Committee on Administrative,
Executive, and Legislative Review

The Committee has requested our opinion on the authority of the Maryland Racing Commission (the "Commission") to adopt a proposed emergency regulation on telephone betting.

This inquiry raises difficult, and interrelated, legal and policy concerns. In this opinion, we necessarily address only the legal question of statutory construction.

For the reasons stated below, we conclude that the proposed regulation is within the Commission's rulemaking authority under Article 78B, §11A of the Maryland Code.

I

Proposed Regulation

The Commission has submitted a proposed emergency regulation entitled "Telephone Betting," to be codified at COMAR 09.10.01.78. In essence, the regulation would permit one licensed race track to accept bets on a race taking place at another track in Maryland.¹ Initially, the betting system would be used to allow

¹ COMAR 09.10.01.78A would provide: "[The system of betting] is limited to betting at the racetrack of an Association which is not itself conducting a race on which betting is being taken (the 'Receiving Track') on a race which is being conducted live or by simulcast on a licensed racing day at the racetrack of another association (the 'Sending Track'). All betting under this regulation must take place within the confines of the racetrack of the Receiving Track."

wagering at Laurel Race Course on races run at Pimlico. The proposed regulation would require that all money wagered at Laurel be included in the mutuel pools at Pimlico and that all pari-mutuel information regarding the money wagered at Laurel be transmitted by telephone wire directly to Pimlico. Proposed COMAR 09.10.01.78C.²

II

The Telephone Betting Statute

Article 78B, §11A reads as follows:

“(a) The Commission may establish a system of betting by telephone on any races at any track licensed under this article.

(b) Each track licensed under this article may implement the system of betting by telephone on any race as established by the Commission.

(c) Computation of the take-out and breakage for wagering made under this section shall be the same as that normally applicable to racing conducted by the licensee.”

This provision was enacted as Chapter 753, Laws of Maryland 1984.³ The legislation grew out of the report of the Task Force to Study Off-Track Wagering, submitted to the Governor in February, 1982 (“Task Force Report”). The Task Force examined several types of “Wagering in Absence,” telephone wagering, off-track betting, and teletrack. The Task Force clearly rejected any notion of authorizing off-track betting or teletrack, recommending only that “enabling legislation be enacted to allow telephone wagering.” Task Force Report at 15.⁴ The report was not

² For ease of reference, we shall refer in this opinion to Pimlico and Laurel, although the proposed regulation itself is drafted in general terms.

³ An amendment to §11A not pertinent to this discussion was contained in Chapter 7, Laws of Maryland 1985.

⁴ The purpose of this recommendation was to “expand racing’s fan base and increase the industry’s total handle without excessive new costs to the industry, while possibly resulting in new revenues to the state.” Task Force Report at page 7.

definitive in the kind of telephone wagering proposed, although it did include a description of the system at a race track in Kentucky:

"At Louisville Downs, bettors may establish a phone account with a minimum deposit of \$100. Bettors with an account may then place bets on any Louisville Downs race up to starting time and any winnings are automatically credited to the appropriate account." Task Force Report at 13-14.⁵

By comparison, testimony at the committee hearing in the Senate by one of the sponsors of the enabling legislation indicated that there is a variety of forms of "telephone betting" including "call-ins," the use of cable television, or a combination.⁶

III

Authority for Proposed Regulation

The proposed regulation may not be given effect unless it is authorized by Article 78B, §11A. *See* §10-106 of the State Government Article.⁷ Although the question is very close, we think that the statute does authorize the regulation.

Under the statute, the Commission "may establish a system of betting by telephone." While the use of a "telephone" must be involved, the words "may establish" and "system" suggest that the

⁵ At least one Task Force document, but not the Task Force Report itself, differentiated between telephone betting and "other track wagering," which was not further described. Memorandum from Rafael L. Cortada, Chairman, to Task Force Members (December 3, 1981).

⁶ Like the Task Force, neither the sponsors nor the Legislature indicated any support for off-track betting or teletrack.

⁷ The Commission does not assert that the proposed regulation is within the Commission's power under Article 78B, §11(a) to "make rules governing, restricting or regulating betting on [horse] races" The Commission has evidently historically viewed this grant of authority as limited to the betting on races at a particular race track. The proposed regulation is also not authorized by Article 78B, §31, which deals with the special situation of wagering on races conducted outside Maryland.

Commission was not mandated to put in place a specific kind of telephone betting, such as the kind employed in Kentucky, but was given some discretion in its rulemaking activity. However, in addition to the involvement of a telephone, any system established by the Commission would have to include certain elements to constitute lawful betting by a patron not physically present at the track where the race bet on is conducted. These include:

- 1) The system must be implemented by a licensed track;
- 2) The money bet must become part of the pari-mutuel pool at the track where the race is run; and
- 3) Computation of the take-out and breakage for wagering must be the same as if the wagering were done in person at the track where the race is run.

As we understand the regulation, all the above elements would be present, leaving only the question whether the proposed regulation sufficiently involves the use of a "telephone." In its narrowest meaning, the term "telephone" could be construed as including only an individual call from a patron to the track at which the race is conducted. In its broader sense, it could describe a kind of "wagering in absence" wherein a patron not in attendance would communicate a bet to the track through the use of telephone equipment.⁸ The Commission, in exercising the authority granted to it by the General Assembly, used the broader definition, requiring only that "[a]ll pari-mutuel information regarding the money wagered at the 'Receiving Track' [shall] be transmitted by telephone wire directly to the Sending Track" The Commission would not require individual telephone calls by each individual bettor to the track where the race is being run.

In today's society, the use of the telephone encompasses considerably more than picking up the phone and communicating with a person on the other end. Telephones can be used to get information from or relay information to computers, and other terminals, and two or more people can communicate by computer, with the information traveling by telephone lines. In keeping with these advances in telephone technology, courts have interpreted the term "telephone" broadly. Thus, "telephone company" has been

⁸ Either interpretation would appear to carry out the legislative purposes. See note 5 above.

defined as a company "that directly facilitates two-way communication between a significant number of persons or businesses." *U.S. Transmission Sys. v. Bd. of Assessment*, 715 P.2d 1249 (Colo. 1986). And the equipment necessary for radio transmission of beeper signals has been classified as a "telephone wire." *Digital Paging, Etc. v. Public Service Comm'n*, 360 N.Y.S.2d 931, 934-35 (N.Y. App. 1974) ("That Radio Relay's transmission of the 'beep' sound, by use of its company owned and/or operated . . . equipment . . . represents 'telephonic communication' is amply demonstrated in the record."). See also *Radio Relay Corp. v. Illinois Commerce Comm'n*, 370 N.E.2d 528, 531 (Ill. 1977).

Given the great diversity of uses of the telephone common to our society, we do not think that legislative authorization for the Commission to "establish a system of betting by telephone" is inherently limited to one particular system. We could conclude that the Commission lacked authority to adopt the proposed regulation only if we read into the statute an unarticulated restriction: that the General Assembly intended only a specific form of telephone betting. In view of the limited legislative history and the broad language of the statute, we cannot do so. See *Kaczorowski v. Mayor & City Council of Baltimore*, 309 Md. 516 n.4 (1987).

Indeed, the Task Force Report contained an account of a Pennsylvania law that authorized telephone betting expressly restricted to bets against a preestablished line of credit at a track. Task Force Report at 35a. See Race Horse Industry Reform Act & 218(b), P.L. 435, No. 135, Acts of 1981 ("[A]ll telephone messages to place wagers must be to a place within the track enclosure; [a]nd . . . all moneys used to place telephone wagers be on deposit in an amount sufficient to cover the wager at the race track where the account is opened."). But the General Assembly did not enact legislation as restrictive as Pennsylvania's.

IV

Conclusion

In summary, it is our opinion that the Maryland Racing Commission has the statutory authority to adopt the particular system of telephone betting embodied in the proposed regulation.

J. JOSEPH CURRAN, JR., *Attorney General*

JACK SCHWARTZ
Chief Counsel
Opinions and Advice

Editor's Note: The proposed emergency regulation discussed in this opinion failed to receive approval from the Joint Committee on Administrative, Executive, and Legislative Review. The committee's initial vote to approve the regulation was negated after the Attorney General advised that a proxy vote was legally impermissible. See letter from Chief Counsel for Opinions and Advice Jack Schwartz to Senator Howard A. Denis (October 2, 1987). Later in Chapter 7 (Senate Bill 88) of the Laws of Maryland 1988, the General Assembly authorized the Racing Commission to establish a system of intertrack wagering under certain conditions.

RACING COMMISSION—ADMINISTRATIVE LAW—SCOPE OF “RACING”—COMMISSION HAS AUTHORITY TO PERMIT ARABIAN RACING BUT MAY DO SO ONLY THROUGH ADOPTION OF REGULATION.

September 15, 1987

*Mr. Kenneth A. Schertle, Executive Director
Maryland Racing Commission*

You have requested our opinion on three questions concerning the Request of the Laurel Racing Association, Inc. (“Laurel”) that the Racing Commission authorize it to conduct races for Arabian horses, with wagering, during its fall meeting. Specifically, you ask:

1. Does the Commission have the statutory authority to grant this request?
2. If so, is the Commission required to adopt regulations for the conduct of Arabian racing in order to exercise that authority?
3. If Arabian racing were authorized, is a clarification of Article 78B, §11(b)(4), regarding the allocation of purse money, necessary?

For the reasons given below, we conclude as follows:

1. The Commission has authority to permit Arabian racing at a track licensed under Article 78B, §7.
2. In order to exercise that authority, the Commission is required to adopt, pursuant to the Administrative Procedure Act, regulations governing the conduct of Arabian racing.
3. Article 78B, §11(b) must be given full effect as to the allocation of purses and mutuel pools resulting from Arabian racing. The Commission has some authority, consistent with the statute, to regulate the allocation of purse money, so as to take account of the fact that Arabian horses are racing. Whether any aspect of this subsection ought to be changed is a policy question that we do not address.

I

Statutory Authority

A. *Commission Authority Generally*

The Commission draws its authority from Article 78B of the Maryland Code (the "Act"). Section 1 vests the Commission with "the powers and duties in this article specified and also the powers necessary or proper to enable it to carry out fully and effectually all the purposes of this article." The Act further grants the Commission power "to prescribe rules, regulations and conditions under which all horse races shall be conducted within the State of Maryland." Article 78B, §11(a). This grant of power is necessarily broad in order to give the Commission the flexibility to respond to changing circumstances in racing. See *Final Report of the Commission to Study the Racing Laws of the State of Maryland* 2 (November 6, 1946). See generally *Jacobson v. Maryland Racing Comm'n*, 261 Md. 180 (1971).

Unlike racing laws in other states, Article 78B does not specifically provide for the licensing of "thoroughbred racing" as such; indeed, the word "thoroughbred" did not appear in the law until 1962, when the Maryland-Bred Race Fund was established. Chapter 137, Laws of Maryland 1962. Cf., e.g., Cal. Bus. & Prof. Code §1953; Fla. Stat. Ann. §550.40. Instead, §7, under which Laurel is licensed, simply provides for the licensing of "racing":

"Any person or person, association or corporation, desiring to conduct racing within the State of Maryland during any calendar year, shall apply to the Maryland Racing Commission for a license to do so." §7(a).

Similarly, §7(b) instructs the Commission to award dates "for racing." By contrast, Article 78B elsewhere addresses itself to several specific types of racing. See §§17 (trotting and pacing), 27 (steeplechase racing), 27A (matinee racing), and 27B (quarterhorse racing). The law is silent about Arabian racing.

The question, then, is one of legislative intent: Is the undefined term "racing" in §7 intended to refer to thoroughbred racing only, so that another form of racing may be permitted by the Racing Commission only under specific statutory warrant? Or is the term "racing" sufficiently inclusive that, coupled with the Racing Commission's plenary power over racing, the Commission may permit a §7 licensee to conduct a nonthoroughbred race? Answering this question requires consideration of the words of the Act against the background of its legislative history and "other mate-

rial that fairly bears on the fundamental issue of legislative purpose or goal, which becomes the context within which we read the particular language before us in a given case." *Kaczorowski v. City of Baltimore*, 309 Md. 505, 515 (1987). See also, e.g., *Department of Tidewater Fisheries v. Sollers*, 201 Md. 603, 611 (1953).

B. *Legislative History*

What is now Article 78B was enacted as Chapter 273 (House Bill 183), Laws of Maryland 1920. The basic licensing provisions of §7 have, in all relevant aspects, remained the same from that time to the present.

Contemporaneous accounts of the consideration of House Bill 183 indicate that the primary issue facing the General Assembly was not what type of racing should be conducted.¹ Rather, it was whether wagering on horse races should be prohibited, regulated, or left alone. The regulation of horse racing itself was simply a necessary corollary of the regulation of wagering.

Maryland was, in 1920, one of only three states (Kentucky and Nevada being the others) to permit wagering on horse races, and pressure was on to end it here as well. Bills had been introduced in 1916, 1918, and 1920 to eliminate wagering on horse racing.² Each of those years also saw the introduction of bills to create a commission to regulate racing.³ Popular speculation was that advocates of a more laissez-faire approach to gambling would support the regulatory commission bills until the defeat of the anti-

¹ The law at the time did not limit racing to any particular breed of horse. Chapter 285, Laws of Maryland 1898, authorized wagering "within the ground of any agricultural association, race course or driving park, upon the result of any trotting, pacing or running race of horses. . . ."

² Senate Bill 166 (1916 Session); House Bill 218 (1916 Session); Senate Bill 50 (1918 Session); House Bill 33 (1918 Session); and Senate Bill 127 (1920 Session).

³ Senate Bill 508 (1916 Session); Senate Bill 501 (1916 Session); Senate Bill 498 (1916 Session); Senate Bill 495 (1916 Session); Senate Bill 128 (1920 Session); and House Bill 183 (1920 Session).

gambling measures was assured, then turn their energies to the defeat of the commission bills as well.⁴

The sole evidence of legislative consideration of the type of racing to be conducted is found in the testimony of opponents of the anti-gambling bill. These witnesses testified that horse racing is necessary to the breeding of quality horses for other purposes, and that wagering is necessary to the continued existence of horse racing.⁵ These witnesses referred would apply to any type of horse racing. In addition, although their arguments prevailed, in that gambling was not prohibited, the sole provision of the bill o even mention breeding was deleted before the bill was passed.⁶

Other amendments also indicate that the concerns of the General Assembly involved issues other than the type of racing to be conducted or the effect of racing on the breeding of horses. Instead the amendments addressed such matters as the disposition of the license fees (to the State rather than the counties); the political affiliation of the Commissioners (no more than two from the same party); the number of days to be raced in a year (reduced from 112 to 100); and the tracks that could be licensed (only those conducting racing in each of the three years prior to 1920).

Thus the Act, as passed after long and detailed consideration by the General Assembly, did not contain either the word "thoroughbred" or any indication of the type of racing to be conducted.

⁴ See *Forces Marshalled on Race Track Fight*, Baltimore Evening Sun, March 10, 1920; *Law Makers Face Big Problem Over Question of Race Tracks*, Baltimore Sun, March 6, 1920 at 7. The latter article also reflects a second issue facing the Legislature with respect to racing: that of race track involvement in politics. It was apparently believed at the time that regulation of the tracks would end this involvement, which some saw as a bad influence. See also *Big Fight Due Over Racing in Maryland*, Baltimore Sun, March 11, 1920; and Thomas Clyde, *The Relation of Horse Breeding to Racing and How Racing Should Be Conducted* (1920).

⁵ See *Race Betting Friends and Foes Heard*, Baltimore Sun, March 3, 1920; Yates, *Sport of Kings and Kings of Sport*, Baltimore Evening Sun, March 11, 1920, p. 18. Among those testifying were representatives of the U.S. Army, who testified that racing was crucial to the development of good horses for the cavalry.

⁶ That provision, removed from §11, stated:

"In the performance of the powers granted to it in this Act the Commission shall regard horse racing in the light of an institution for the development of the breed of horses, and as a sport for the amusement of the public, and not as a means of profiting by the conduct of such races beyond a reasonable return on the investment in the permanent improvements necessary or advisable for the conduct of such meetings."

This omission is especially significant in comparison to another racing bill, Senate Bill 128, considered and rejected by the General Assembly in the 1920 Session. Senate Bill 128 Specifically referred to "running races" and excluded trotting and pacing races from its coverage.⁷

The absence of a delineation of the types of racing to be conducted under that Act is also significant in light of the fact that many of the fair tracks, which also were to be licensed to "conduct racing," were conducting trotting and pacing matches in the summer and fall of 1919,⁸ is no indication in the Act that the General Assembly intended to change this practice.

C. Contemporaneous Construction

The early actions of the Racing Commission indicate that it construed the Act as authorizing it to license and regulate all types of horse racing. Early rules promulgated by the Commission Specifically authorized the associations to conduct harness racing;⁹ and the fair tracks continued to do so.¹⁰ In addition, Commission minutes indicate that the Commission has required \$7 tracks to conduct steeplechase racing, at which nonthoroughbred horses might run.¹¹ This view, taken by the Commission soon after the passage of Article 78B, is persuasive evidence of the meaning of the statute and "should not be disregarded except for the strongest and most urgent reasons." *Holy Cross Hospital of Silver Spring, Inc. v. Health Services Cost Review Comm'n*, 283 Md. 677, 685 (1978).

⁷ Some earlier bills had required that one or more commissioners be thoroughbred breeders. See Senate Bill 179 (1916 Session), Senate Bill 495 (1916 Session) and Senate Bill 498 (1916 Session).

⁸ The Baltimore Sun sports pages reported on three fairs—Pocomoke, Wicomico, and Rockville—that conducted trotting and pacing races between August 21 and August 29, 1919.

⁹ See minutes of June 25, 1923, amending Rule 258.

¹⁰ The Commission minutes of September 5, 1923 refer to an inconsistent driving case in Pocomoke City, and in September of 1946 the Carroll County Fair was licensed to conduct a harness meet.

¹¹ This was done by rule in January of 1926. Some tracks were apparently required to conduct steeplechase as late as 1941. See minutes of July 19, 1941.

D. Conclusion

In light of this background, we conclude that the 1920 Act authorized the Commission to license nonthoroughbred racing at the tracks existing at that time, and we do not believe that the Commission's authority to do so has since been removed. To be sure, the General Assembly has subsequently provided specifically for nonthoroughbred racing of various kinds. Article 78B, §§17, 27, 27A, and 27B. And, these provisions have been characterized as "authorizing" those forms of racing. *See, e.g., 65 Opinions of the Attorney General* 429, 431 (1980); *33 Opinions of the Attorney General* 215 (1948).

However, in light of the scope of the 1920 Act, these later enactments can best be viewed as a legislative specification of racing dates, places, wagering, and related matters for types of racing that were authorized but otherwise unaddressed by the 1920 Act. As this office characterized the 1947 enactment of what is now §17:

"It seems clear that the Legislature had two purposes in mind when it passed this legislation. One is that it would provide a source of revenue to the State, and the other to limit the number of days on which such racing may be run at any one track, thus protecting the betting public and the community from unreasonable or excessive betting." *33 Opinions of the Attorney General* at 216.

The provision on steeplechase racing, to take another example, is not at all worded like a grant of authority; instead, reads like a limitation on the Commission's existing authority.¹²

As the General Assembly added to the Act specific directions and limitations about other types of racing, it also added references to "thoroughbred" racing. *E.g.,* §§2(a)(1), 8A(a), 11(b), and 14(a). These references serve to differentiate the General Assembly's requirements as to that form of racing from its requirements as to other forms—especially harness racing.

In short, we do not read the enactments since 1947 as intended to reduce the broad scope of "racing" originally authorized by §7

¹² Section 27 was added to the Act in 1953. Chapter 781, Laws of Maryland 1953. It begins: "In addition to the other provisions of this article, there shall be no less than two or more than eight days for steeplechase or turf racing each year. The days of racing shall be held by the . . . Commission for the use of the Cecil County Breeders' Fair, Inc. . . . at Fair Hill, Maryland."

in 1920—or, indeed, to transform racing events previously licensed by the Commission into criminal acts. *See* Article 27, §240. In recent years, we recognize, §7 tracks have conducted thoroughbred races only—and the General Assembly has been aware of that fact and has legislated in light of it. But we do not believe that the General Assembly has repealed by implication the authority that it vested in the Commission in 1920. Therefore, it is our opinion that the Commission has the authority to permit the conduct of Arabian horse racing at the tracks of §7 licensees.¹³

II

Rulemaking

“Regulation” is defined, for purposes of the rulemaking requirements of the Administrative Procedure Act (“APA”), as follows:

“‘Regulation’ means a statement or an amendment or repeal of a statement that:

- (i) has general application;
- (ii) as future effect;
- (iii) is adopted by a unit to:

1. detail or carry out a law that the unit administers;

2. govern organization of the unit;

3. govern the procedure of the unit; or

4. govern practice before the unit; and

(iv) is in any form, including:

- 1. a guideline;

¹³ We do not address the question of whether the Commission may authorize a §7 licensee to conduct a form of nonthoroughbred racing that, under the Act, is to be conducted by separately licensed tracks. *See* 51 *Opinions of the Attorney General* 180 (1966). Rather, the question we resolve is whether the Commission may authorize a §7 licensee to conduct a form of nonthoroughbred racing that is not specifically dealt with elsewhere in the Act.

2. a rule;
3. a standard;
4. a statement of interpretation; or
5. a statement of policy." §10-101(e) of the State Government Article ("SG" Article).

As we recently observed, "This office has consistently construed the definition of 'regulation' as broadly as its language and apparent underlying intent direct." 72 *Opinions of the Attorney General* 230, 233 (1987).

Indeed, one prior opinion that found rulemaking to be necessary is directly on point. In 65 *Opinions of the Attorney General* 396 (1980), this office considered whether the Racing Commission's action in authorizing Sunday racing for the first time required rulemaking. The opinion concluded that it did. In reaching this conclusion, the Attorney General considered four factors:

1. the significance of the change, in light of the Commission's longstanding policy against Sunday racing and the fact that in other states Sunday racing had been implemented by legislation;
2. the widespread effect of the Commission's action;
3. the fact that the action was not adjudicatory in nature; and
4. the fact that the action, although termed experimental, had the potential to be a permanent change.

See 65 *Opinions of the Attorney General* at 405-06.

However, these four factors are not to be viewed as if they were all necessary elements in a formula. Instead, as later opinions illustrate, these factors simply help to structure a more basic inquiry: Is the agency's action a prospective exercise in policymaking that will have a significant effect on members of the public, including members of a regulated industry? If so, the APA's rulemaking requirement applies. See 70 *Opinions of the Attorney General* 208, 211 (1985); 66 *Opinions of the Attorney General* 151, 160 (1981). This is especially likely if an agency uses its authority to set policy on a subject matter that the statute leaves unaddressed. 66 *Opinions of the Attorney General* at 160 n.6.

In this instance, the Commission's application of the term "racing" in §7 to Arabian racing would be a new and important policy

decision. Although the Commission once permitted other types of racing at the tracks of §7 licensees, that policy has changed over the years and the §7 tracks have been widely understood as limited to thoroughbred racing. The first evidence of this change was in 1947, when the Commission determined that it would not award the new dates made available for harness racing to existing licensees.¹⁴ In addition, although the Commission may not have had "a conscious policy" of prohibiting Arabian racing (as it did with respect to Sunday racing), the Commission has rejected an application for Arabian racing with pari mutuel privileges.¹⁵ That this is an important policy question is further illustrated by its treatment in other states: of the eight states that currently permit Arabian racing, six have implemented that change by legislation.¹⁶

In our view, a Commission decision to authorize Arabian racing would have a widespread effect the second pertinent factor discussed in the Sunday racing opinion. We recognize that, at present, only Laurel has expressed an interest in conducting this type of racing, and for a limited time at that. But, once the Commission has authorized Arabian racing, we do not see how it could decline to do so when asked again. Thus, the Commission would be opening up a significant future opportunity for §7 tracks generally. In addition, Arabian racing would affect not only the tracks but also the breeders, owners, and trainers of both Arabian and thoroughbred horses.

Moreover, like the Sunday racing decision, this decision has few of the indicia of agency adjudication. The decision would be based on judgments about future, not past, conduct and would have future effect only. In addition, the decision would not be a response to a unique set of facts before the Commission, nor based on characteristics unique to Laurel.

Because we view the action requested of the Commission as an important policy decision having a significant future effect on members of the public apart from Laurel, we think that the ac-

¹⁴ See minutes for July 3, 1947.

¹⁵ This request was made by Timonium for its 1983 meeting. See minutes of February 10, 1983.

¹⁶ Cal. Bus. & Prof. Code §19543; Del. Code Title 28, §328(m); Fla. Stat. Ann. §550.02(8)(b); Mich. Stat. Ann. §18.966(39)(b); Okla. Stat. Ann. Title 3A §200.1A.5; Wash. Rev. Code Ann. §67.16.010.

tion comes within the APA's rulemaking requirements even though Laurel's request is for a limited time and has been described as an "experiment." Neither the labeling of an agency decision as an "experiment" nor the limiting of its duration excuses compliance with otherwise applicable rulemaking requirements. See *Piercy v. Tarr*, 343 F.Supp. 1120, 1128-29 (N.D. Cal. 1972) (certain "temporary instructions" of agency held to be "regulation" under federal APA).¹⁷

In summary, authorization for Arabian racing, even for a limited time, would be a significant interpretation by the Commission of the Act's broad authorization of "racing." Even in instances where the General Assembly has addressed itself Specifically to a type of racing, the Commission has adopted implementing regulations. See COMAR 09.10.01 (thoroughbred racing); 09.10.02 (harness racing); 09.10.01.07X (steeplechase racing).¹⁸ In our view, the APA does not allow the Commission to authorize Arabian racing without comparable regulations.¹⁹

III

Purse Money Allocation

You have also asked whether Article 78B, §11(b)(4), regarding the allocation of purse money, needs to be clarified.

Section 11(b)(4) provides:

"(i) 7.70 percent of the regular mutuel pools, 8.70 percent of the multiple mutuel pools involving two horses,

¹⁷ We emphasize that not every agency action invokes the rulemaking process. See 65 *Opinions of the Attorney General* at 405. Some agency "experiments" may well not fit the definition of "regulation." But if the definition does apply, as here, the experimental nature of the action does not excuse compliance with the APA.

¹⁸ The one exception is for quarterhorse racing, for which there are no Commission rules. We do not know whether quarterhorse racing has in fact been authorized. In any event, the Act itself incorporates by reference other applicable provisions. Article 78B, §27B.

¹⁹ In light of this conclusion, we need not address the question of whether individual rules now applicable to races at thoroughbred tracks, dealing with matters like registration, the scale of weights, or the identification of horses, need to be changed.

and 11.70 percent of the multiple mutuel pools involving three or more horses shall be allocated for purse money. The Commission may authorize a deduction from purse money of 0.25 percent of all mutuel pools to a Maryland Backstretch Employees' Pension Fund, if this Fund is established and administered by the organization representing a majority of horsemen racing in the State.

(ii) The formula for distribution of the purse money shall be determined by an agreement between an organization representing the horsemen and the tracks, the agreement to be subject to the approval of the Commission. It is the intention that the allocation shall be made in the approximate amount of 85 percent to the current year's overnight races and 15 percent not to exceed 17 percent to the current year's stake races.

(iii) An amount to be determined by the organization, equal to not less than 1 percent but not more than 2 percent, shall be deducted from all open purses and paid to the organization representing a majority of the horsemen in the State."

This provision must be read together with §11(a), which provides that the Commission "may regulate the size of the purse, stake or reward to be offered for the conduct of such races."²⁰

Section 11(b) as a whole reflects the undoubted fact that §7 licensees in recent years have conducted thoroughbred racing only. The General Assembly has simply legislated in accordance with this state of facts. Hence, the subsection's application to non-thoroughbred racing leads to seemingly odd results. For example, money derived from betting on Arabian racing would go to support the Maryland-Bred Race Fund, established in 1962, the purpose of which is "to advance the breeding and racing of thoroughbreds foaled in Maryland." 62 *Opinions of the Attorney General* 755 (1977). See §11(b)(1)(iii).

Nevertheless, unless §11(b) is amended, all of its provisions apply fully to Arabian racing, including §11(b)(4). That paragraph

²⁰ This latter provision was in the 1920 Act and, therefore, authorized the Commission to regulate the purses of nonthoroughbred races.

does not specifically address the allocation of purses when a breed of horse other than thoroughbred is racing. Under this provision, the specified percentages of the mutuel pools from all races at §7 tracks, regardless of the breed of horse, are to be "allocated for purse money." The same broad language would permit purse money to be allocated to nonthoroughbred races, subject to the agreement of the horsemen's organization and the approval of the Commission. In addition, under §11(a) the Commission has the power to clarify the allocation of purses to some extent by regulation. For example, the Commission could require that money generated by wagering on one breed be allocated to purses for that breed. However, these are policy matters for the Commission in the first instance, and ultimately for the General Assembly.

IV

Conclusion

In summary, we conclude as follows:

1. The Commission has authority to permit Arabian racing at a track licensed under Article 78B, §7.
2. In order to exercise that authority, the Commission is required to adopt, pursuant to the Administrative Procedure Act, regulations governing the conduct of Arabian racing.
3. Article 78B, §11(b) must be given full effect as to the allocation of purses and mutuel pools resulting from Arabian racing. The Commission has some authority, consistent with the statute, to regulate the allocation of purse money, so as to take account of the fact that Arabian horses are racing. Whether any aspect of this subsection ought to be changed is a policy question that we do not address.

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Opinions and Advice

Editor's Note: In Chapter 7 (Senate Bill 88) of the Laws of Maryland 1988, the General Assembly barred the Commission from permitting "[t]he racing of breeds of horses not previously authorized by statute, regulation, or regulations proposed prior to" February 29, 1988. Article 78B, §11(a)(2)(i).

RETIREMENT SYSTEMS

TAX DEFERMENT—"PICKUP" PROGRAM—INITIATION OF PROGRAM
REQUIRES LEGISLATIVE ACTION, WHICH MAY BE TAKEN AT
THE GENERAL ASSEMBLY'S 1988 SESSION.

October 27, 1987

The Honorable Charles J. Ryan
Maryland House of Delegates

You have requested our opinion on the requirements of Chapter 802 (House Bill 1550), Laws of Maryland 1986, dealing with the State's "pickup" of employee pension contributions. Specifically, you ask:

1. "Does implementation of the new program require positive action by the General Assembly?"
2. "If positive action is required, is it reasonable and lawful to defer that action until the 1988 Session?"
3. "If positive action by the General Assembly is not required, is the Board of Trustees [of the Maryland State Retirement and Pension Systems] required to implement an employer pick-up program before the 1988 General Assembly, under the circumstances?"

For the reasons stated below, we conclude that:

1. Chapter 802 requires action by the General Assembly to implement the employer pickup program developed by the Board of Trustees.
2. Nothing precludes the General Assembly from acting at the 1988 Session.
3. Given the need for further legislation, the Board of Trustees may not implement an employer pickup program before the 1988 Session of the General Assembly.

I

Background

A. Employer Pickup Programs

Section 402(a) of the Internal Revenue Code of 1954 (the "Code") provides that an employee's share of a qualified pension plan is not taxable to the employee until the plan distributes that amount, typically in the form of retirement benefits.¹ Under another provision of the Code, §414(h), an employee's contributions to a qualified retirement or pension plan may gain the same favorable tax treatment if the employee's governmental employer pays—that is, "picks up"—contributions for members of its plans and designates those picked-up contributions as employer contributions. When the technique is adopted by a governmental employer and approved by a determination letter or ruling from the Internal Revenue Service, the employee's contributions may be reported to the IRS in a way that makes them not subject to federal withholding and not subject to the income tax itself until received later.

B. Maryland's Proposed Plan

Chapter 802 of the Laws of Maryland 1986 is an uncoded act that, among other things, directs the Board of Trustees for the Maryland State Retirement and Pension Systems on or before October 1, 1986 to:

1. "develop a program for the State or other employer of a member of the State retirement or pension systems . . . to pick up the retirement or pension contributions required to be made by the member as to qualify the program for the tax treatment under §414(h) . . .";² and

¹ The IRS has determined that Maryland's retirement and pension plans are qualified plans.

² The State retirement and pension systems for employees and teachers, the judges' contributory plan, and the State Police Retirement System are covered by the proposed pickup program.

Pursuant to Article III, §15(2) of the Constitution of Maryland, the General Assembly Compensation Commission establishes "[a]ny compensation and allowances paid to members of the General Assembly . . ." Thus, a pickup plan for members of the General Assembly would have to be established by the General Assembly Compensation Commission.

2. "apply for a letter of determination or ruling from the Internal Revenue Service that the program qualifies for the tax treatment under §414(h)" These two duties were to be carried out by October 1, 1986.

It is our understanding that the Board of Trustees indeed prepared a pickup plan and submitted it to the IRS for a determination letter or ruling on October 1, 1986. However, shortly thereafter (on October 22, 1986), President Reagan signed into law the Tax Equity and Reform Act of 1986 ("Reform Act"), which made extensive changes in the tax treatment of qualified retirement and pension plans. While the Reform Act seemingly did not change the reporting technique for qualified public retirement plans authorized by §414(h), it did make other changes in the Code that, on first impression, appeared to make adoption of the employee pickup plan less attractive than it would have been under the provisions of the prior Code. Thus, at the start of the 1987 Session of the General Assembly, there was considerable uncertainty as to whether implementation of a pickup plan should be pursued. Moreover, at that time the IRS had not yet issued its response to the Board of Trustees.

Section 1(c)(3) of Chapter 802 deals with these contingencies:

"If no final response is received from the IRS prior to the beginning of the 1987 Session of the General Assembly, the Board of Trustees shall submit to the General Assembly for consideration during the 1987 Session amendments to the law to implement the employer pickup program developed by the Board of Trustees. The effective implementation of the program shall be contingent on a letter of determination or ruling from the Internal Revenue Service that the program qualifies for the tax treatment under §414(h) of the [Code]."

In addition, Section 1(d) sets out specific amendments to the law to be included by the Board of Trustees in its 1987 submission to the General Assembly.

In fact, no implementing legislation was introduced or considered during the 1987 Session of the General Assembly. The Secretary to the Board of Trustees observed in a letter that Chapter 802 "does not appear to specifically address the intent of the General Assembly with respect to implementation under the present circumstances"—that is, uncertainties caused by the Reform Act. Letter from Bennett H. Shaver to Delegate Charles J. Ryan,

at 2 (April 6, 1987). Mr. Shaver went on to suggest that "advice from the Attorney General be solicited and implementation be delayed until the 1988 General Assembly can evaluate the alternatives and authorize the appropriate action." *Id.* Your request for this opinion followed.

Subsequently, the Secretary to the Board of Trustees learned that the suspected adverse impact to State employees from the Reform Act would, in reality, be minimal. Then, on July 10, 1987, the IRS issued a ruling approving the pickup plan submitted by the Board of Trustees.

II

Implementation of a Plan

A. Necessary Action by the General Assembly

The favorable letter of determination from the IRS provides that "[t]he effective date for the commencement of any proposed pick-up as specified in the final resolution cannot be any earlier than the later of the date the final Resolution is signed or the date it is put into effect." Letter from Allen Katz, Chief, Employee Plans Rulings Branch, to Board of Trustees, at 3 (July 10, 1987). Therefore, insofar as the IRS is concerned, implementation of the employer pickup program does not require positive action by the General Assembly—only adoption of a final resolution by the Board of Trustees.

However, whether Board action alone is sufficient to implement the new program under State law is a question of what the General Assembly intended in Chapter 802. In seeking to identify the legislative purpose or goal, we look to both the language of the law and its context. *Kaczorowski v. City of Balto.*, 309 Md. 505, 514-15 (1987).

Section 1(c) of Chapter 802 lists three alternative courses of action for the Board of Trustees to take during the 1987 Session, depending on whether the IRS had rejected, approved, or given no final response to the submitted pickup plan prior to the beginning of that session. Paragraph (1) tells the Board of Trustees that if the IRS had rejected the program for tax treatment under §414(h) of the Code prior to the beginning of the 1987 Session of the General Assembly, "no further action of the Board of Trust-

ees is required and an employer pickup program will not be pursued."

Paragraph (2) states that if the IRS had issued a favorable letter or ruling on the program prior to the 1987 Session, "the Board of Trustees shall submit to the General Assembly for consideration during the 1987 Session amendments to the law to implement the employer pickup program developed by the Board of Trustees and approved by the Internal Revenue Service."

Paragraph (3), which turns out to address the actual circumstances, tells the Board of Trustees that if the IRS had not responded before the start of the 1987 Session, the Board must take the same action required by paragraph (2) had the IRS approved the plan—that is, "submit to the General Assembly for consideration during the 1987 Session amendments to the law to implement the employer pickup program developed by the Board of Trustees." Further, paragraph (3) makes implementation contingent on receipt of a favorable letter of determination or ruling from the IRS.

In addition to the implementation amendments that the Board of Trustees is asked to submit under paragraph (2) or (3) of subsection (c), subsection (d) requires the Board to submit the following amendments:

1. appropriate addition and subtraction modifications for State income tax purposes, to prevent the pickup program from either reducing State income tax revenues or doubling State income taxation of employees' retirement contributions;

2. amendments that the Board considers necessary to "protect against the adverse impact of the employer pickup program on any aspect of employee compensation and benefits"; and

3. amendments deemed necessary "to protect against the adverse impact from the pickup program on employer costs."

It seems to us that, by requiring the Board of Trustees to submit implementation amendments for consideration by the 1987 General Assembly, Chapter 802 plainly contemplates action by the General Assembly before the pickup program may be inaugurated. This view is supported both by the general scheme of Chapter 802 and the specific language used: that the Board of Trustees "develop" the plan, seek a ruling from the IRS, and, unless the IRS disapproves, come back to the General Assembly with proposed amendments to the law to "implement" the program.

Conversely, we find nothing in Chapter 802 to indicate that the General Assembly intended the Board's plan to be self-executing.³ Indeed, subsection (c)(2) makes it clear that, even if IRS approval had been obtained prior to the 1987 Session, the Board nevertheless was required to submit amendments to the law at that session to implement the program. Moreover, the General Assembly not only contemplated submission of enabling legislation by the Board but also required inclusion of certain specific provisions, to prevent the program from adversely affecting the State's revenues and costs and its employee compensation scheme. Section 1(d). In light of the General Assembly's evident intent to establish a cost-free employer pickup plan, it seems to us that the General Assembly must have intended that all amendments necessary to assure that result be in place before the pickup program could become effective.⁴

Accordingly, it is our opinion that action by the General Assembly is required to effectuate the employer pickup program developed by the Board of Trustees and approved by the IRS. It follows that the Board of Trustees should take no action to adopt its final resolution until it has submitted all necessary implementing amendments to the General Assembly for its consideration and the General Assembly has acted upon those amendments.

³ In this respect, Chapter 802 contrasts markedly with former §67(a) of Article 73B, the enabling legislation for the State's deferred compensation plan:

"The Secretary of Personnel, in furtherance of the existing duties conferred upon him by law, and with the advice of the Governor's task force on deferred compensation, shall promptly develop a deferred compensation plan for State employees which will meet the criteria for approval by the Internal Revenue Service, and shall report his recommendations to the Governor. *Upon receipt of the Secretary's recommendations, the Governor may, by executive order, promptly inaugurate and implement the plan, without the need for further legislative action.* Nothing herein, however, shall preclude the General Assembly from further legislating with respect to the plan." (Repealed by Chapter 741, Laws of Maryland 1985) (emphasis supplied).

⁴ Senate Bill 886, introduced at the 1987 Session, would have allowed State employees to defer payment of State taxes on their employee contributions to a State retirement or pension system until after retirement. The fiscal note accompanying the bill indicated that it would decrease State revenues by \$5,000,000 and local revenues by \$2,500,000 in fiscal year 1988. Similar revenues would be lost to the State if proper addition and subtraction tax modifications were not enacted for the proposed employer pickup program developed by the Board of Trustees.

B. Action at 1988 Session

The General Assembly possesses all of the legislative power of the State and may exercise that power subject only to restraints placed on it by the United States and Maryland Constitutions. *Perkins v. Eskridge*, 278 Md. 619 (1976); *Kenneweg v. Allegheny County Commissioners*, 102 Md. 119 (1905). Since we know of no State or federal constitutional impediment to prevent the General Assembly from considering amendments to a law at a later session than it originally contemplated, we have no hesitation in concluding that the General Assembly may implement an employer pickup plan at its 1988 Session. The actions of the General Assembly at one session cannot ordinarily restrict the General Assembly in future sessions: "Within the purview of the constitution . . . all legislatures are co-equal; what one may do a succeeding one may also do or undo." *Wright v. Wright's Lessee*, 2 Md. 429, 449 (1852). Here, moreover, considering the uncertainties engendered by 1986 Reform Act and the belated approval by the IRS of the Board's proposed pickup plan, the General Assembly had no practical choice but to defer action on implementation at its 1987 Session and to consider the question afresh at its 1988 Session.

C. Action by Board

In light of our response to your first question, we conclude that the Board of Trustees may not implement an employer pickup plan before the 1988 Session of the General Assembly.

III

Conclusion

In summary, it is our opinion that:

1. Chapter 802 requires action by the General Assembly to implement the employer pickup program developed by the Board of Trustees.
2. Nothing precludes the General Assembly from acting at the 1988 Session.

3. Given the need for further legislation, the Board of Trustees may not implement an employer pickup program before the 1988 Session of the General Assembly.

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Opinions and Advice

Editor's Note: In Chapter 430 (House Bill 561) of the Laws of Maryland 1988, the General Assembly acted to implement the employer pickup program.

SOCIAL SERVICES

CHILD SUPPORT ENFORCEMENT—EARNINGS WITHHOLDING—
COURT FILINGS TO BE SIGNED BY ATTORNEY FOR ENFORCE-
MENT AGENCY—CLERK OF COURT TO PERFORM CERTAIN MIN-
ISTERIAL FUNCTIONS.

November 3, 1987

*Ann Helton, Executive Director
Child Support Enforcement Administration*

You have requested our opinion concerning the provisions of the Family Law Article ("FL" Article) that deal with the withholding of earnings from a person obligated to pay child or spousal support. Specifically, you pose the following questions concerning these provisions, codified at FL Title 10, Subtitle 1, Part III:

1. Must a motion for an earnings withholding order and a request for service of an earnings withholding order be signed by an attorney if the motion or request is filed by a support enforcement agency?
2. Is the court or the support enforcement agency responsible for (i) sending certain required documents to the obligor upon receipt of a request for service of an earnings withholding order; (ii) serving the employer with a copy of the earnings withholding order; and (iii) providing the recipient and the support enforcement agency with notice of the filing of a motion for a stay of an earnings withholding order?

For the reasons given below, we conclude as follows:

1. A motion for an earnings withholding order and a request for an earnings withholding order filed by a support enforcement agency must be signed by an attorney representing the agency.
2. The clerk of the circuit court, not the support enforcement agency, is required to send notice to the obligor of the filing of a request for service of an earnings withholding order, serve the

employer with the order, and notify the recipient and the support enforcement agency of the filing of a motion for stay.¹

I

Signature of Attorneys

FL §10-120(b)(1) provides as follows:

“Any order under this Part III of this subtitle that is passed before July 1, 1985 shall become an immediate and continuing withholding order on all earnings of the obligor that are due on or after the date of the withholding order on the filing by the recipient or support enforcement agency of:

- (i) a motion for a withholding order on the earnings of the obligor; and
- (ii) a current support order.”

Similarly, FL §10-123(a) provides:

“If an obligor accrues support payment arrears amounting to more than 30 days of support, the recipient or the support enforcement agency may file a request for service of the earnings withholding order.”

You are asking, in effect, whether the language granting authority to the support enforcement agency to file a motion under FL §10-120(b)(1) and a request under FL §10-123(a) implicitly authorizes agency employees who are not attorneys to sign those papers on behalf of the agency.

A person who has not been admitted to the bar “may not practice the profession or perform the services of an attorney-at-law

¹ You also asked whether an earnings withholding order is binding on each present and future employer of the obligor and, if so, whether the language of the order nevertheless should specify the name of the obligor's current employer. FL §10-125(b) provides:

“An earnings withholding order is binding on each present and future employer of the obligor on whom a copy of the order is served.”

The language of this subsection could not be clearer. Accordingly, an order should not specify the current employer but should instead provide generally that all employers who employ the obligor are subject to the order.

... ." Article 10, §1 of the Maryland Code. The boundaries of legal practice, as distinct from activities that a nonlawyer may perform, are not always clear. *See generally* 65 *Opinions of the Attorney General* 28 (1980). However, it is clear that "[e]very pleading or paper" filed in court "shall be signed by at least one attorney admitted to practice law in this State" Maryland Rule 1-311(a).² More broadly, a nonlawyer may not represent another person or entity before an adjudicatory body. *See Lukas v. Bar Association of Montgomery County*, 35 Md. App. 442 (1977).

To be sure, the General Assembly has latitude in defining the nature of unauthorized practice of law. *See* 65 *Opinions of the Attorney General* at 29.³ However, we have little difficulty in concluding that the language of FL §§10-120(b)(1) and FL 10-123(a) does not implicitly authorize nonlawyer employees of a support enforcement agency to file wage withholding requests and motions in court themselves, without the signature of an attorney representing the agency. These sections merely confer authority on State and local support enforcement agencies, as distinct from the support recipients themselves, to file these wage withholding papers.

The Maryland Code is replete with provisions that confer authority on State agencies to participate in legal proceedings. *E.g.*, §2-609 of the Environment Article (Department of Environment may enforce air quality requirements); §3-304 of the State Finance and Procurement Article (Central Collection Unit may institute civil action to collect debts). A legislative directive authorizing an agency to participate in a legal proceeding simply does not reflect an intent to authorize persons who are not attorneys to practice law on behalf of the agency. In our view, there is no basis to believe that the statutory authorization for a support enforcement agency to participate in an earnings withholding proceeding authorizes agency personnel to practice law—especially when a separate statute specifically designates certain attorneys to provide legal representation to the Child Support Enforcement Administration in civil support litigation. FL §10-115.

² This requirement applies to the filings "of a party represented by an attorney"; filings by "a party who is not represented by an attorney shall be signed by the party." Rule 1-311(a).

³ Final authority for determining the scope of unauthorized practice is with the Court of Appeals. *See Public Service Comm'n v. Hahn Transportation, Inc.*, 253 Md. 571, 583 (1969).

II

“The Court”

Your second question asks for our opinion on the meaning of the term “court,” as used in FL §§10-124(a), 10-124(b) and 10-130(d). Specifically, you wish to know whether the circuit court or the support enforcement agency must perform certain ministerial functions described in these sections. This question stems from a suggestion from the clerks in a few jurisdictions that the term “court” in these sections should be construed to refer to the support enforcement agency, since the agency performs other court-related ministerial functions.

In pertinent part, FL §10-124 provides:

“(a) When the court receives a request for service of the earnings withholding order under §10-123 of this subtitle, the court shall send [the various documents specified in paragraphs 1 through 6] to the obligor, by certified mail, return receipt requested and first class mail, the home address or, if the home address is unknown, the place of employment last reported to the court:

. . .

(b) If the obligor fails to move for a stay under §10-130 of this subtitle, the court shall immediately cause a copy of the earnings withholding order to be served on the employer of the obligor.”

Further duties are placed upon the “court” in FL §10-130(d). This subsection states:

“Upon receipt of a motion for a stay of the withholding order under subsection (a) of this section, the court shall immediately notify the recipient and the support enforcement agency, if applicable, and shall schedule a hearing within 15 days.”

In this instance, we believe that the words of the statute, given their ordinary meaning, unmistakably express the legislative purpose or aim. See *Kaczorowski v. City of Baltimore*, 309 Md. 505, 515 (1987). The terms “court” and “support enforcement agency” are used separately throughout the statute. We cannot find in the language in the statute, or in its history or context, anything that suggests a legislative intention to use these terms in-

terchangeably. It is our view that the General Assembly used the word "court" in its ordinary sense and not as an awkward synonym for the support enforcement agency.⁴

Elsewhere in the Family Law Article, the General Assembly has expressly authorized the support enforcement agencies to perform certain ministerial court functions. For example, both local and State support enforcement agencies collect and distribute support payments whenever a court orders an obligor to make payments to a public agency. FL §10-108(b). However, these functions are clearly identified as the responsibility of the support enforcement agency.

It is reasonable to assume that a distinction between terms was intentional when those terms are used separately in various parts of a statute. See *Supervisor of Assessments v. Chase Associates*, 306 Md. 568, 575 (1986). See generally 2A *Sutherland, Statutory Construction* §47.16, at 161 (4th ed. 1984). Here, the term "court" cannot reasonably be read as referring to the support enforcement agency, because elsewhere in the same statute the duties of the support enforcement agency are expressly set out.

Moreover, treating the terms "court" and "support enforcement agency" as if they were interchangeable would create several anomalies and render parts of the statute nugatory or surplusage. For example, the statute requires certain notices to be sent to both the court and to the support enforcement agency. *E.g.*, FL §§10-127(1), 10-128(a), and 10-129. A construction that assumes that "court" includes "support enforcement agency" would make the latter term in these sections surplusage. No word, clause, or phrase of a statute should be construed into meaninglessness. *Management Personnel Serv. v. Sandefur*, 300 Md. 332, 341 (1984).

Similarly, that construction would require the support enforcement agency to notify itself of the filing of a motion to stay. FL §10-130(d). Statutory constructions that are unreasonable, illogi-

⁴ Indeed, when the General Assembly intended to extend the term "local support enforcement office" to include the circuit court—that is, beyond the term's ordinary usage—it did so expressly. FL §10-101(e)(2) defines the phrase "local support enforcement office" as "(1) a county agency; or (2) a component of the circuit court for a county."

cal, or inconsistent with common sense should be avoided. *Potter v. Bethesda Fire Dep't*, 309 Md. 347, 353 (1987).

In short, there is no basis for our reading "court" to mean "support enforcement agency." Stated conversely, the General Assembly used the term "court" in the earnings withholding statute when it intended the court, and not the support enforcement agency, to perform certain ministerial functions.⁵

III

Conclusion

In summary, it is our opinion that:

1. A motion for an earnings withholding order and a request for an earnings withholding order filed by a support enforcement agency must be signed by an attorney representing the agency.

2. The clerk of the circuit court, not the support enforcement agency, is required to send notice to the obligor of the filing of a request for service of an earnings withholding order, serve the employer with the order, and notify the recipient and the support enforcement agency of the filing of a motion for stay.

J. JOSEPH CURRAN, JR., *Attorney General*

JOSEPH B. SPILLMAN, *Assistant Attorney General*

JACK SCHWARTZ

Chief Counsel

Opinions and Advice

⁵ We recognize that the term "court" is used in some parts of the statute to refer to the judge and in other parts to the clerk. As indicated in a prior memorandum to the clerks, we believe that the term "court" refers to the judge when a judicial function is described and to the clerk when a ministerial function is described. Memorandum from Assistant Attorney General Julia M. Freit to All Clerks of the Circuit Court (May 15, 1987). However, the need to differentiate two different senses of the word "court" for this purpose does not, in our view, permit us to give the word a construction far beyond its ordinary meaning or its usage in the statute.

STATE GRANTS

CONSTITUTIONAL LAW—FIRST AMENDMENT—PLANNED PARENTHOOD'S PUBLICATION OF LEGISLATIVE RATING REPORT, INVOLVING NO USE OF STATE GRANT FUNDS, WAS LAWFUL EXERCISE OF FIRST AMENDMENT RIGHTS.

March 31, 1987

The Honorable Martha S. Klima

The Honorable Robert R. Staab
Maryland House Of Delegates

You have requested our opinion on whether any legal questions arise when a private organization that receives State funds publishes a report on the voting records of members of the General Assembly. Specifically, you ask whether the publication by Planned Parenthood of Maryland of a report that rates members of the General Assembly on their support for Medicaid funding of abortions and other family-planning measures was legally improper.

For the reasons given below, we conclude in general that, although an organization's use of State funds must be consistent with the terms on which those funds were granted, the organization's acceptance of State funds does not itself affect the organization's right, under the First Amendment, to address issues of public concern.¹ Publishing a report that characterizes the voting record of legislators is unquestionably a form of protected speech.

The particular report about which you inquire was produced with funds from sources other than the State and therefore did not involve an improper use of State funds. Rather, the publication was a lawful exercise of First Amendment rights.

I

Background

Planned Parenthood of Maryland is a private, nonprofit organization. Approximately 16% of the organization's budget is funded

¹ Cf. note 4 below.

by grants from the State and federal governments. In 1986, the State granted approximately \$570,000 to Planned Parenthood for a comprehensive program of contraceptive services and community education.²

In May of 1986, Planned Parenthood of Maryland published a document entitled *Reproductive Health Report*. That report indicated, for each member of the General Assembly, the member's voting record on legislation before the General Assembly in 1983, 1984, and 1985 regarding Medicaid funding for abortions. Each member's record was stated as a percentage of "Pro-Choice Votes." In addition, the report identified those members who, in 1986, had signed a letter to then-Governor Hughes urging increased funding for programs designed to reduce the rate of pregnancies among teenagers in Maryland.

II

Funding of Reproductive Health Report

The *Reproductive Health Report* was published by Planned Parenthood's Public Affairs Division, evidently as part of the organization's advocacy of Medicaid funding for abortions. As officials of Planned Parenthood readily acknowledge, the purposes for which it may use the State's grant do not include such advocacy of legislative action. Therefore, the use of State grant money to publish and distribute the report would, in the organization's view, be inconsistent with the terms of the State's grant.

However, this question need not be discussed further, for State funds in fact were not used for that purpose. At the request of the House Appropriations Subcommittee on Health and Environment, the Department of Health and Mental Hygiene—the agency through which the State's grant was made to Planned Parenthood—conducted an audit of the organization's records to determine whether State funds had been used to publish the report. The audit indicated that the funds used for the report were

² The grant award letter provides that the funds are to be used "primarily in support of family planning services in Baltimore City, although some use of these funds for some support of family planning services in the Maryland counties is permissible. . . ." Undated letter from A.S. Zachary, M.D., P.P.H., Assistant Director for Maternal Health, Family Planning & Hereditary Disorders, to Diana Gurieva, Executive Director, Planned Parenthood of Maryland.

not received from the State. State funds "were used exclusively for the intended grant programs." Letter from Richard J. Bandelin, Director, Office of Financial Planning and Management Analysis, Department of Health and Mental Hygiene, to Delegate Howard P. Rawlings, Chairman, House Appropriations Subcommittee on Health and Environment (March 19, 1987).

Hence, publication of the report raises no issue of possible improper use of the State funds granted to Planned Parenthood. Nor was this form of advocacy otherwise legally improper. Indeed, as discussed in Part III below, we think that publication of the report was protected by the First Amendment's guarantee of freedom of speech.

III

First Amendment Principles

The United States Supreme Court has pointed out that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Consequently, the State may not compel citizens to contribute to a private organization's political activities that they oppose. *Aboud v. Detroit Board of Education*, 431 U.S. 209, 234-35 (1977). But no such compulsion exists here, for the State funds appropriated to Planned Parenthood are granted and used for public purposes other than the advocacy of particular legislative action.³

Conversely, the grant of State funds to a private organization does not, without more, restrict the uses that the organization may make of its other funds. The First Amendment "secures the right to proselytize religious, political, and ideological causes

³ On a related question, Assistant Attorney General Linda H. Lamone previously advised that the use of State funds by the Maryland Commission for Women to advocate Medicaid funding for abortions was consistent with the purposes for which that agency had been created. Accordingly, such advocacy did not violate either the Maryland constitutional requirement that public funds be spent for public purposes or the First Amendment rights of taxpayers who disagree with the Commission's position. Letter from Linda H. Lamone, Assistant Attorney General, to Delegate Martha S. Klima (January 28, 1985).

... ." *Wooley*, 430 U.S. at 714. That principle applies whether the speaker is an individual or a corporation or other association. *Pacific Gas & Electric Company v. Public Utilities Commission of California*, 475 U.S. 1, 8 (1986).

Thus, Planned Parenthood's advocacy of Medicaid funding for abortions and its distribution to the public of information regarding the voting records of the members of the General Assembly on this issue are clearly protected by the First Amendment. Indeed, such communications are precisely the kind of contributions to the discussion of matters of public concern that the First Amendment seeks to foster. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978). While the State need not grant public funds to a private organization that engages in such activities, it may not, merely by granting funds to be used for other purposes, restrict the organization's exercise of its First Amendment right. See 435 U.S. at 784-85.⁴

IV

Conclusion

In summary, it is our opinion that the publication by Planned Parenthood of Maryland of its *Reproductive Health Report* raises no issue as to improper use of State funds and, moreover, was protected by the First Amendment.

J. JOSEPH CURRAN, JR., *Attorney General*

C.J. MESSERSCHMIDT, *Assistant Attorney General*

JACK SCHWARTZ

Chief Counsel

Opinions and Advice

⁴ The grant to Planned Parenthood, though restricting the purposes for which State funds were to be used, did not purport to restrict the activities carried out by Planned Parenthood with other funds. Accordingly, we have no occasion to consider whether the State may expressly condition a grant on an organization's agreeing to refrain altogether from exercising specified constitutional rights. See *Buckley v. Valeo*, 424 U.S. 1, 57 n. 65 (1976). Cf. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

TAXATION

RETAIL SALES TAX—FIRST AMENDMENT—LEVYING OF SALES
TAX ON COMPONENTS OF FREE PUBLICATIONS DOES NOT VIOLATE
FIRST AMENDMENT

September 28, 1987

The Honorable Lewis R. Riley
Senate of Maryland

You have requested our opinion on whether the State's levying of sales tax on the components used in the production of free publications violates the First Amendment's guarantee of freedom of the press.

For the reasons stated below, we conclude that this application of the sales tax does not violate the First Amendment.

I

Transactions Subject to Sales Tax

A. *Specific Exemptions*

Under the Retail Sales Tax Act, most retail transactions in which title or possession of tangible personal property is transferred for a consideration are subject to tax. Article 81, §324(d).¹ The seller is required to collect the tax from the buyer in an amount that is based on the price of the sale. §325(a).

In drafting the Retail Sales Tax Act, the General Assembly exempted various narrow categories of transactions, by reference either to the nature of the item or to the identity of those engaged in the transaction. For example, certain materials needed by farmers and watermen are exempt from the tax. §326(h), (v), and (y). The Act also exempts certain sales by charitable, educational, veterans', and senior citizen's groups; sales made to a nonprofit religious institution or organization; and sales by a bona fide

¹ All statutory references in this opinion are to Article 81.

church or religious organization when made for the general purpose of the church or religious organization.²

In general, publications are not exempt from the retail sales tax.³ One exception by type of publication is for the "printing and sales of newspapers of any and all types, and the sales of any photographic materials used in the composition and printing of newspapers." §326(n).⁴

B. *Free items*

In order to be subject to the retail sales tax, a transaction must involve a "sale"—that is, a transfer of property for consideration. Therefore, the distribution of free goods to the ultimate consumer is not a taxable transaction under the Retail Sales Tax Act.

To avoid double taxation, the sale of an item to be "consume[d] . . . directly and predominantly" or "use[d] or incorporate[d] . . . as a material or part of other tangible personal property to be produced *for sale* by manufacturing, assembling, processing or refining" is not subject to tax. §324(f)(ii) and (iii) (emphasis added). See also §§326(dd) and (ff) (printers' products). If both intermediate goods and final products were taxed, the result would be improper double taxation. As the Court of Appeals has observed, "the purpose of Maryland's resale exclusion is to avoid

² Exemptions of this type apply to sales made by hospital thrift groups, §326(hh); sales to nonprofit religious or educational institutions or organizations or volunteer fire departments or rescue squads, §326(i); and sales of food by churches, religious organizations, schools, colleges and hospitals, §326(b). See also §326(c), (i) and (u).

³ Certain publications are exempt as an incidence of other general exemptions. For example, sales of publications by religious organizations may be exempt when all sales by a religious organization are exempt from the retail sales tax. In addition, the statute exempts a few other types of publications. *E.g.*, §326(oo) (sales of official government documents, records or publications); §326(tt) (catalogues distributed outside the State).

⁴ The Comptroller has adopted a regulation defining "newspaper" for purposes of this exemption. Among other criteria, a publication must be published at least once a week to qualify. A "shopping advertiser, community newsletter . . . or other publication which is not a newspaper in the common and popularly accepted usage of the term, is not a newspaper for the purpose of this exemption." COMAR 03.06.01.05(2).

the 'pyramiding' of taxes and to have the tax burden rest on only the final consumer of an item." *Macke Co. v. Comptroller*, 302 Md. 18, 28 (1984).

However, this rationale does not apply to the sale of intermediate goods used in producing items that are *not* intended for sale. In this case, the sale of the intermediate goods is taxable.

This approach to taxation is not exclusively directed at publications. However, as a consequence of it, materials used to produce publications for sale are not subject to tax; instead, the tax is assessed on the sale of the finished publication. Materials used to produce publications that are not to be sold are subject to the tax; subsequently, no tax is assessed on the free distribution of the finished publication.

II

First Amendment Considerations

A. Case law

In their consideration of the effect of the First Amendment on state taxation, the United States Supreme Court and the Maryland Court of Appeals have identified certain controlling principles. On the one hand, a state may subject publications to "generally applicable economic regulation without creating constitutional problems." *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 581 (1983). See also *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936); *Baltimore v. A. S. Abell Co.*, 218 Md. 273, 289 (1958). On the other hand, "a discriminatory tax on the press burdens rights protected by the First Amendment." *Arkansas Writers' Project, Inc. v. Ragland*, 107 S.Ct. 1722, 1726 (1987). Accordingly, it cannot stand unless it is "necessary to serve a compelling state interest and is narrowly drawn to achieve that end." 107 S.Ct. at 1728. See also *Minneapolis Star*, 460 U.S. at 582.⁵

⁵ A tax can be discriminatory if it either treats the press differently from other business enterprises or singles out some publications for special tax burdens. *Arkansas Writers' Project*, 107 S.Ct. at 1727.

Thus, the inquiry in this instance is whether the retail sales tax is a generally applicable, nondiscriminatory tax; or whether it impermissibly targets free publications as a group. In the words of the Court of Appeals, taxes on publications are unconstitutional if they are "so single in nature and the range of their impact is so narrow . . . that their effect makes them constitute a restraint upon the freedoms of speech and of the press" *A.S. Abell*, 218 Md. at 288-89.

The Supreme Court cases are instructive on the limits of constitutionally permissible differentiation. In *Grosjean v. American Press Co.*, the Supreme Court invalidated a license tax that was paid by only a few large-circulation newspapers. Later, in *Minneapolis Star*, the Supreme Court invalidated a tax on the cost of ink and paper used in publications that, again, was imposed on only a few newspapers.⁶ Most recently, in *Arkansas Writers' Project*, the Supreme Court invalidated a sales tax that discriminated among publications based on content. In addition, in *Baltimore v. A. S. Abell*, 218 Md. 273, in a decision consistent with these Supreme Court cases, the Court of Appeals invalidated a tax levied only on the gross sales price of advertising space in publications, billboards, radio and television.

B. *Applicability of Sales Tax to Free Publications*

In our view, the Maryland Retail Sales Tax Act does not contain any of the infirmities identified in these cases. First, the tax does not discriminate among publications based on content.⁷ Sec-

⁶ In *Minneapolis Star*, Minnesota exempted newspapers from its retail sales tax but imposed a different type of tax, a use tax, on ink and paper used specifically in publications. In addition, the state exempted the first \$100,000 from taxation. In rejecting this scheme, the Supreme Court held that the use tax impermissibly singled out the press.

⁷ House Bill 1529 (1987 Session), if enacted, would have created an exemption for the components of "independent advertising publications"—a category that, among other defining characteristics, was to exclude "house organs, publications of membership organizations, [and] instruction manuals." A classification of this kind would require an examination of the content of a publication at least in some instances, and in our opinion, would be vulnerable to a First Amendment challenge.

ond, we are not aware of any evidence suggesting that the sales tax was intended to, or has the effect of, impressing a special burden on a small group of publications. Any differential impact among types of publications reflects an across-the-board determination concerning the taxation of all intermediate goods. Therefore, the Retail Sales Tax Act does not uniquely single out any publication.

Nevertheless, it is true that transactions for goods used to produce free publications are subject to tax, while transactions for goods used to produce for-sale publications are not. Thus, there is some differential treatment resulting from the application of the tax. However, for-sale publications are also taxed, albeit based on the final sale. In effect, the retail sales tax targets different stages of the production process, but it does not exempt either type of publication entirely.

Nor, in our view, does the exemption for newspapers in §326(n) render the Maryland taxing scheme unconstitutional. In *Arkansas Writers' Project*, the petitioner argued that the Arkansas tax scheme violated the First Amendment because of the different treatment of newspapers and magazines. The Supreme Court expressly refused to decide whether such a distinction constituted a basis for invalidating the sales tax. Accordingly, while some uncertainty remains as to the range of permissible distinctions that may be made among publications, we think it fair to conclude that the Supreme Court does not view the First Amendment as precluding any kind of distinction among different types of publications. Indeed, the Supreme Court has not invalidated any taxing scheme because of the exclusion of newspapers from taxation. This type of exemption has a long and unique history in this country, and we believe that it would survive a constitutional challenge.⁸

⁸ We are aware of one state decision that a newspaper exemption is unconstitutional. *Louisiana Life, Ltd. v. McNamara*, 504 So. 2d 900 (La. App. 1987). However, that case was decided prior to *Arkansas Writers' Project* and does not fully reflect the Supreme Court's analysis.

III

Conclusion

In summary, it is our opinion that the Maryland Retail Sales Tax Act is constitutional as applied to free publications.

J. JOSEPH CURRAN, JR., *Attorney General*

CARMEN M. SHEPARD, *Assistant Attorney General*

JACK SCHWARTZ

Chief Counsel

Opinions and Advice

TAXATION—PROPERTY TAX—ASSESSMENTS— UNIFORMITY—TAX
CREDIT IN §9-105 OF TAX-PROPERTY ARTICLE VIOLATES ARTI-
CLE 15 OF DECLARATION OF RIGHTS.

November 11, 1987

The Honorable James W. Campbell
Maryland House of Delegates

You have requested our opinion on the constitutionality of the tax credit set forth in §9-105 of the Tax-Property Article ("TP" Article), which generally provides, "[F]or the taxable years 1986-1987 and 1987-1988," a property tax credit for properties that are assessed at more than 15% of the prior year's assessment. Specifically, you ask whether the Attorney General's Office continues to view TP §9-105 as violative of the uniformity requirement of Article 15 of the Maryland Declaration of Rights.

For the reasons stated below, this office continues to believe that TP §9-105 violates Article 15 of the Declaration of Rights.

I

Property Tax Credits and
the Uniformity Requirement

Article 15 of the Declaration of Rights provides, in relevant part, that:

"[T]he General Assembly shall, by *uniform* rules, provide for the separate assessment, classification and sub-classification of land, improvements on land and personal property, as it may deem proper; and all taxes thereafter provided to be levied by the State for the support of the general State Government, and by the Counties and by the City of Baltimore for their respective purposes, shall be *uniform* within each class of sub-class of land, improvements on land and personal property which the respective taxing powers may have directed to be subjected to the tax levy. . . ." (Emphasis added).

In February 1977, Attorney General Burch, at the request of the Governor, considered the constitutionality under Article 15 of a host of property tax reform proposals, one of which would have imposed a percentage limitation on the increase in residential assessments from year to year. See 62 *Opinions of the Attorney General* 54 (1977). Attorney General Burch stated that:

“While this plan would provide some relief to many taxpayers, the grēatest relief would be afforded to the taxpayers whose property was increasing in value at the greatest rate. Those owning property in declining areas which either decreases in value, retains the same value or increases in value at an insignificant rate would not benefit from this proposal. Additionally, a percentage limitation would violate the uniformity provision of Article 15 of the Declaration of Rights. For example, certain residential properties might dramatically increase in market value while others remained the same or increased insignificantly. Nevertheless, the assessments of all of these properties would remain within the statutory percentage of the previous year’s assessment. A person whose property increased 20% in value would be assessed, because of the limitation, at considerably less than 50% of market value, while a person whose property remained at the same value would be assessed at 50% of market value. Persons with the less valuable properties would pay more than their share of taxes in relation to the value of their property. The result would be an unconstitutional lack of uniformity.” 62 *Opinions of the Attorney General* at 61.

That same year, the General Assembly enacted Chapter 959 (House Bill 1281), Laws of Maryland 1977, which mandated a credit, subject to certain conditions, against county and municipal property taxes for a homeowner whose assessment increased from the prior year by more than 15 percent. This tax relief was expressly limited to a two-year period and, according to the bill’s preamble, was aimed at the homeowners “now faced with the financial hardships of assessments which are increasing in a proportion far greater than their incomes.” These factors led Attorney General Burch, in his bill review letter on the Homeowner’s Tax Credit legislation, to conclude that the measure resulted in only a “temporary lack of uniformity” that might not be unconstitutional. See Bill Review Letter (House Bill 1281) from Attorney

General Burch to Governor Mandel (May 20, 1977), reprinted at 62 *Opinions of the Attorney General* 859 (1977).¹

The General Assembly extended the Homeowner's Tax Credit in 1978 for an additional year. Chapter 177 (Senate Bill 543), Laws of Maryland 1978. Then, in 1979, it extended the credit for two more years. Chapter 747 (House Bill 918), Laws of Maryland 1979. In approving the constitutionality of the 1978 bill, this office's bill review letter stated that, on the basis of the 1977 bill review letter concerning House Bill 1281, "we do not believe that this extension of the credit for one additional year would cause the provision to be unconstitutional." Bill Review Letter (Senate Bill 543) from Attorney General Burch to Acting Governor Lee (April 19, 1978).² The next year, in approving the constitutionality of House Bill 918, Attorney General Sachs advised that:

"The question presented by this bill is whether the extension of the percentage limitation on homeowners assessments for a fourth and fifth year is of sufficient du-

¹ Specifically, the Attorney General stated that:

"In 62 *Opinions of the Attorney General* 54 (1977) we stated that any statutory scheme to place a percentage limitation on assessment increases over a long duration would become unconstitutional as applied. However, the duration of the benefit provided by House Bill 1281 is limited to two years. Additionally, the bill's "Preamble" specifies that its purpose is to provide relief to certain homeowners from the financial hardship imposed by assessments which increase annually at a more rapid pace than incomes. The Court of Appeals has specifically recognized that perfect uniformity is unattainable and that temporary inequities do not render an entire assessment plan invalid. *Rogan v. Co. Commrs.*, 194 Md. 288, 311 (1949).

Consequently, we can not say that the temporary lack of uniformity which would result from the limited relief provided by House Bill 1281 would be of such a constitutional dimension so as to offend Article 15." 62 *Opinions of the Attorney General* at 859-60.

² The 1978 bill review letter added that:

"This conclusion is reinforced by the fact that should House Bill 766 or Senate Bill 435, both of which increase the inflation allowance for homestead property be signed into law, very few homeowners will receive a tax credit as a result of Section 12F-7 for the 1978-1979 tax year."

ration to violate the general requirement that assessments be calculated in terms of full value and in the same proportion as other assessments in the same class. It is our view that the extension for a fifth year is not constitutionally excessive. In upholding the 1977 enactment, the opinion of this office cited the case of *Rogan v. Commissioners of Calvert County*, 194 Md. 299, 310 (1950), in which a quinquennial assessment system was upheld. If it is permissible to make an assessment based on full value only once every five years, it is not unreasonable to conclude that a limitation on annual assessments during a similar period is also permissible.

"It is, then, our view that House Bill 918, which extends for a fourth and fifth year the tax credit for homeowners experiencing assessment increases exceeding fifteen percent, is constitutional. However, it must be reiterated that any statutory scheme to place a percentage limitation on assessment increases over a long duration would become unconstitutional as applied." Bill Review Letter (House Bill 918) from Attorney General Sachs to Governor Hughes (May 25, 1979).

In 1980, the General Assembly continued the credit for an additional year. See Chapter 858 (House Bill 1049), Laws of Maryland 1980. In his review of the legislation, Attorney General Sachs determined that the extension was "of doubtful constitutionality," noting that:

"Although a particular taxpayer may only qualify for a credit in one year but not in others, at the heart of the program is an overall, statutory limitation on the rise in assessments which House Bill 1049 would extend for a sixth year. Although it is difficult to say when a limitation of this sort has continued for such a length of time as to become unconstitutional, it is our view that there is clear authority, based on the *Rogan* case, only for a limit which does not exceed five years. Accordingly, we conclude that the General Assembly lacks clear authority to enact House Bill 1049 which would, in effect, extend the limitation for a sixth year." Bill Review Letter (House Bill 1049) from Attorney General Sachs to Governor Hughes (May 21, 1980).

Although no bill was enacted in 1981, in every subsequent session through 1986, the General Assembly extended the Home-

owner's Tax Credit.³ On each occasion, Attorney General Sachs advised the Governor of the constitutional problems with the legislation. *See* Bill Review Letter (House Bill 64) from Attorney General Sachs to Governor Hughes (May 18, 1982) (extension is "of increasingly doubtful constitutionality"); Bill Review Letter (Senate Bill 298) from Attorney General Sachs to Governor Hughes (May 25, 1983) ("[W]ith each extension of this program, it becomes increasingly difficult to defend as a legal matter."); Bill Review Letter (House Bill 65) from Attorney General Sachs to Governor Hughes (May 24, 1984) ("Although it is difficult to state at what point the extension would unquestionably be unconstitutional, we wish to advise you that we would be unable to approve any extension beyond a 10th year, i.e., 1986-1987, without an amendment to Article 15 of the Declaration of Rights."); Bill Review Letter (House Bill 321) from Attorney General Sachs to Governor Hughes (May 20, 1985) ("[W]e will be unable to approve the extension of this program beyond the tenth [year] without an amendment to the Uniformity Clause."); Bill Review Letter (House Bill 789) from Attorney General Sachs to Governor Hughes (May 21, 1986) ("As the General Assembly has not proposed an amendment to Article 15, we are unable to approve [this bill].").⁴ Despite efforts of individual members of the General Assembly to remedy this problem by way of a proposed constitutional amendment, no such proposal has been approved by the General Assembly.

³ *See* Chapter 597 (House Bill 64), Laws of Maryland 1982 (extension for a seventh year); Chapter 673 (Senate Bill 298), Laws of Maryland 1983 (eighth year); Chapter 755 (House Bill 65), Laws of Maryland 1984 (ninth year); Chapter 609 (House Bill 321), Laws of Maryland 1985 (tenth year); Chapter 854 (House Bill 789), Laws of Maryland 1986 (eleventh year).

⁴ This view of the unconstitutionality of the extension of the credit was also reflected in various letters of advice issued by attorneys in the Attorney General's Annapolis Office. *See, e.g.*, Letter of Advice to Delegate Idamae Garrott (February 10, 1986); Letter of Advice to Senator Laurence Levitan (February 13, 1981).

II

Application to TP §9-105

It has been the consistent position of this office that anything but a temporary percentage limitation on increases in residential assessments would offend the uniformity requirement of Article 15. For the reasons stated in 62 *Opinions of the Attorney General* 54 and reiterated over the years, we agree with the view of our predecessors that the Homeowner's Tax Credit results in a lack of uniformity that favors persons with valuable properties. We have found no Maryland case since the issuance of Attorney General Burch's 1977 opinion that would support the constitutionality of the statute in its present form.

The only remaining issue is whether the exemption they recognized for a "temporary" program of tax relief could be said to apply to a percentage limitation that has been in effect for more than a decade. In our view, to frame the question is to answer it: It is highly unlikely that a court would find a statute such as TP §9-105—nominally temporary but in fact the latest in a lengthy series of reenactments—to be consistent with Article 15.

III

Conclusion

In summary, it is our opinion that §9-105 of the Tax-Property Article violates Article 15 of the Maryland Declaration of Rights. As in the past, the Attorney General's office will offer whatever assistance the General Assembly desires to develop constitutionally permissible alternatives to the Homeowner's Tax Credit or to facilitate approval of a constitutional amendment to validate legislation like TP §9-105.

J. JOSEPH CURRAN, JR., *Attorney General*

ROBERT A. ZARNOCH, *Assistant Attorney General*

JACK SCHWARTZ

Chief Counsel

Opinions and Advice

Editor's Note: In Chapter 776 (House Bill 244) of the Laws of Maryland 1988, the General Assembly extended and revised the local property tax credit program. In our bill review letter of May 23, 1988, we advised as follows: "To the extent that the bill merely extends the existing program even at a reduced rate, . . . it is unconstitutional. However, to the extent that the bill revises the program to base the credit on income, . . . it can be upheld as constitutional."

VEHICLE LAWS

DRIVER'S LICENSE—SUSPENSION—EXTENT OF MVA AUTHORITY
TO ISSUE RESTRICTED LICENSES IN LIEU OF TOTAL SUSPEN-
SION.

July 2, 1987

Mr. W. Marshall Rickert
Motor Vehicle Administrator

You have asked whether the Motor Vehicle Administration ("MVA") is permitted to modify a suspension of a driver's license under §§16-205 and 16-206 of the Maryland Vehicle Law, neither of which expressly authorizes modification of a suspension.¹ Specifically, you ask whether the MVA, when it suspends a license under these sections, may permit a licensee to drive for employment purposes.

For the following reasons, we conclude that the MVA is authorized under §§16-205 and 16-206 to modify a suspension or issue a restricted license—including a restriction that driving be limited to employment purposes only—in lieu of a total suspension of the driver's license.

I

Background

Your question arises because of a difference in wording among the provisions of the Vehicle Law dealing with license suspension and revocation:

Under Maryland's point system, the MVA is required to suspend the license of an individual who accumulates 8 points and to revoke the license of an individual who accumulates 12 points.

¹ All statutory references in this opinion are to the Transportation Article.

§16-404(a)(3).² However, §16-405 authorizes an MVA hearing officer to “[d]ecline to order the suspension or revocation” or to “[c]ancel or modify the suspension or revocation” if the loss of driving privileges “would adversely affect the employment or opportunity for employment” of the licensee. §16-405(a).

Similarly, under §16-205.1(f)(4), the MVA is required to suspend the license of a driver who refuses to take a chemical test for alcohol when charged with alcohol-related driving offenses. However, §16-205.1(f)(5) authorizes the MVA to “modify this suspension or issue a restrictive license” under specified circumstances.³

By contrast, two other provisions for license suspension or revocation are silent about the MVA’s authority to allow limited purpose driving, notwithstanding the suspension or revocation. Under §16-205, the MVA “may revoke” or “may suspend” a license if a driver is convicted of any of a number of alcohol or drug related offenses. And, under §16-206, the MVA “may suspend” a license upon a showing that a driver is unfit or unsafe, among other grounds. You ask whether the MVA may modify a suspension or revocation under §§16-205 or 16-206 by issuing a restricted license, or whether the MVA may do so only if the General Assembly adds to these provisions express authorization comparable to that in §§16-405(a) and 16-205.1(f)(5).⁴

² A detailed discussion of the point system may be found in 70 *Opinions of the Attorney General* 218 (1985).

³ These circumstances are:

- “(i) The licensee is required to drive a motor vehicle in the course of employment;
- (ii) The license is required for the purpose of attending an alcoholic prevention or treatment program; or
- (iii) [MVA] finds that the licensee has no alternative means of transportation available and without the license, the licensee’s ability to earn a living would be severely impaired.”

⁴ A person convicted of driving under the influence or while intoxicated—the offenses that lead to license suspension or revocation under §16-205—is assessed 8 and 12 points, respectively, for those convictions. §16-402(a)(16) and (24). Hence, the person is subject to suspension or revocation under §16-404. Thus, as a practical matter, the modification provisions of §16-405(a) are available to a hearing officer whenever action is taken under both §§16-205 and 16-404.

II

Analysis

We begin with the premise that the MVA would lack authority to modify a suspension or revocation ordered pursuant to §§16-404(a)(3) or 16-205.1(f)(4), absent express statutory authority to do so. Both of these provisions *require* MVA to suspend or revoke the driver's license if the conditions set out in the statute are met. Were it not for the grants of authority in §§16-405(a) and 16-205.1(f)(5), the MVA would be wholly without discretion; it would be required simply to carry out the statutory directive. "[T]he 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 (1985).⁵

By contrast, the provisions regarding license suspension and revocation in §§16-205 and 16-206 give the agency discretion—the MVA “*may* revoke” or “*may* suspend.” In exercising this discretion, the MVA has at its disposal any of the other available tools for protecting the public safety.⁶

⁵ In Opinion No. 81-009 (March 4, 1981) (unpublished), this office concluded that the MVA's authority under §16-405(a) to modify a suspension applied only to suspensions under §16-404; it did not extend to mandatory suspensions under §16-205.1. §16-205.1 was then amended to give the MVA that authority. Chapter 243, Laws of Maryland 1981.

We agree with this opinion—the authority to modify in §16-405(a) does not apply to any provision for suspension other than §16-404. However, the opinion does not address the MVA's authority in other contexts.

⁶ We note that §16-206(d) permits the MVA to “modify” a suspension if a licensee does not request a hearing. There is no logic in a statutory scheme that authorizes modification of a suspension if a hearing is not requested but precludes it if a hearing is requested. There is also reason to doubt the constitutional validity of such a distinction. In any event, a construction leading to this absurd result is to be avoided. See *B.F. Saul Co. v. West End Park North, Inc.*, 250 Md. 707, 722 (1968). In fact, the predecessor statute to §16-206 specifically stated that, after the hearing, the MVA was permitted to “modify” the suspension. Former Article 66½, §6-206(b). Although that passage was deleted in 1975, when the various provisions of the Vehicle Law relating to administrative hearing procedures were amended to improve their clarity, we see no indication that a substantive change was intended. See Chapter 645, Laws of Maryland 1975 (title). See generally *Kaczorowski v. Mayor and City Council of Baltimore*, No. 162 (September Term, 1986), slip op. at 15 (May 15, 1987).

Pursuant to §16-113, the MVA may impose restrictions on the license instead of suspending or revoking it. Those restrictions include a restriction prohibiting "the licensee from driving or attempting to drive a motor vehicle while having alcohol in his blood" and "any other restriction applicable to the licensee that the Administration determines appropriate to assure the safe driving of a motor vehicle by the licensee."⁷ In our view, this broad wording authorizes the MVA to impose a restriction that a licensee may drive for employment purposes only.

Because the MVA may exercise discretion under §§16-205 and 16-206 in determining whether to suspend or revoke a license, it may choose not to suspend driving privileges totally, but rather to suspend only the privilege to engage in driving for pleasure by imposing an "employment only" restriction on the license. *See* 68 *Opinions of the Attorney General* 432, 438 n.7 (1983). The authority for imposing the restriction derives from both the MVA's authority to modify a suspension under the permissive language of §§16-205 and 16-206 and its general authority to impose restrictions under §16-113.

III

Conclusion

In summary, it is our opinion that the MVA is authorized to modify a suspension or revocation under §§16-205 and 16-206 of

⁷ Section 16-113(a) permits the MVA to impose a restriction on a licensee "when it issues a driver's license." While this language, at first blush, suggests that a restriction may be imposed only upon issuance of an original license, that narrow reading does not comport with the MVA's goal of promoting safety on the highway, nor is that reading consistent with the MVA's practice. After a license is issued, the MVA imposes restrictions for a variety of reasons, the most prominent of which is suspected alcohol abuse. The better reading of §16-113(a) is that it grants the MVA the authority to impose a restriction not only at the time of issuance but at any time while the licensee has the privilege to drive in Maryland. As the Court of Appeals observed in a different context, "[A] suspension of a registration or license is an administrative sanction imposed upon owners or drivers for the purpose of protecting the public safety and welfare" *Rentals Unlimited, Inc. v. Administrator*, 286 Md. 104, 114 (1979). In our view, a provision like §16-113(a), intended to promote public safety, is to be given a liberal interpretation in favor of its objectives. *See* 3A *Sutherland Statutory Construction* §71.04, at 537 (4th ed. 1986).

the Maryland Vehicle Law in order to issue a restricted license to permit driving for employment purposes only.

J. JOSEPH CURRAN, JR., *Attorney General*

EDWARD R. K. HARGADON, *Assistant Attorney General*

JACK SCHWARTZ

Chief Counsel

Opinions and Advice

VEHICLE LAWS—DRIVING RECORDS—EXPUNGEMENT—PROBATION BEFORE JUDGMENT—ALCOHOL-RELATED OFFENSES.

September 1, 1987

Mr. W. Marshall Rickert
Motor Vehicle Administrator

You have requested our opinion on two questions involving driving records. Specifically, you ask:

1. When a driving record is required to be expunged under §16-117.1 of the Transportation Article ("TR" Article), may the record be retained after expungement in a confidential file that is open to inspection only by the Motor Vehicle Administration ("MVA"), courts, and other government agencies and officials?

2. When a separate, segregated MVA record contains information about a licensee's probation before judgment on a charge under TR §21-902, which prohibits driving while intoxicated or under the influence of alcohol or drugs, may that information be used at an administrative hearing concerning the licensee?

For the reasons given below, we conclude that:

1. An expunged driving record may not be retained in a manner that makes it readily available for inspection by governmental entities.

2. The MVA's records or notations of any probation before judgment on a charge of violating TR §21-902 are to be available to the hearing officer and to the licensee or the licensee's attorney in an administrative hearing.

I

Expungement of Driving Records

A. *Introduction*

TR §16-117.1 provides that, "if a licensee applies for the expungement of the licensee's public driving record, the [MVA] shall

expunge the record” if it meets certain criteria.¹ That section does not specifically designate the manner in which expungement must be accomplished. The MVA’s practice has been to fully expunge a driving record that meets the statute’s criteria, rendering it entirely unavailable for inspection. However, the statutory reference to “the licensee’s public driving record” leads you to ask whether TR §16-117.1 instead contemplates that the licensee’s driving record will be simply removed from public accessibility, but retained in files open to inspection by the MVA itself, courts, and other government agencies and officials.

B. Meaning of “public driving record”

Under TR §12-111, the MVA maintains two categories of records. In general, the MVA’s records “are public records and open to public inspection. . . .” TR §12-111(b)(1). However, the MVA may classify records as “confidential and not open to public inspection” if they are more than five years old or if they pertain to events that occurred more than five years earlier. TR §12-111(b)(2). This classification may be accomplished without the necessity of a request from the driver. Records so classified, although not open to public inspection, “shall be open to inspection by authorized representatives of any federal, State, or local gov-

¹ A licensee is entitled to expungement if:

“(1) The licensee has not been convicted of a moving violation or a criminal offense involving a motor vehicle for the preceding 3 years, and the licensee’s license never has been suspended or revoked;

(2) The licensee has not been convicted of a moving violation or a criminal offense involving a motor vehicle for the preceding 5 years, and the licensee’s record shows not more than one suspension and no revocation; or

(3) The licensee has not been convicted of nor been granted probation before judgment for a violation of §21-902 of this article nor been convicted of any other moving violation or criminal offense involving a motor vehicle for the preceding 10 years, regardless of the number of suspensions or revocations.”

As explained in note 4 below, the record of a conviction or probation before judgment on a charge of driving while intoxicated or under the influence of alcohol or drugs is not itself ever subject to expungement.

ernmental agency." TR §12-111(b)(3).² Therefore, by virtue of TR §12-111, a driver may have a "public driving record"—that is, his or her current record—and a confidential record—that is, his or her old record.

The reference to expungement of a "licensee's public driving record" in TR §16-117.1 thus gives an eligible licensee a right to have expunged only those records that have not been classified as confidential because of their age.³ We recognize that this produces a somewhat ironic result: a licensee who waits more than five years after an event to request expungement will find that the record has become confidential, is no longer a "public driving record," and accordingly is not subject to expungement.⁴

C. *Meaning of "expunge"*

As applied to criminal records other than records pertaining to violations of vehicle or traffic laws, "expungement" means:

"[T]he effective removal of these records from public inspection:

- (i) By obliteration;
 - (ii) By removal to a separate secure area to which the public and other persons having no legitimate reason for being there are denied access; or
 - (iii) If effective access to a record can be obtained only by reference to other records, by the expungement of the other records, or the part of them providing the access."
- Article 27, §735(c).

² The MVA has proposed new regulations that will mandate confidentiality for all records more than five years old or that pertain to events that occurred more than five years earlier. 14:14 Md. R. 1589 (July 2, 1987) (to be codified at COMAR 11.17.10.01-05).

³ TR §12-111, conversely, operates to withdraw from public access any records that are not current, including records of licensees who are not entitled to have their records expunged.

⁴ It is for this reason that the record of a conviction or probation before judgment for violating TR §21-902 is never subject to expungement. A driver who has such a record is not entitled to expungement before more than five years after the conviction or probation. TR §16-117.1(b)(3). After the expiration of five years, however, the record would become confidential and no longer subject to expungement.

Records so expunged may not be reviewed by or disclosed to any person without a court order entered after notice to the person to whom the record pertains and a hearing to show good cause for opening the record. Article 27, §739.⁵ Any review or disclosure of an expunged record without a court order is a misdemeanor. Moreover, unauthorized review or disclosure of an expunged record by a public official or employee subjects that person to removal or dismissal from his or her post on grounds of misconduct in office. Article 27, §739(d).

While TR §16-117.1 contains no comparable provisions regarding the disposition of expunged records and penalties for their unauthorized use, we nonetheless believe that the term "expungement" in that statute was intended to denote an equivalent removal of a driving record from all inspection, not merely from public inspection. We find the contrast between the language of TR §§16-117.1 and 12-111 persuasive in this regard. Under TR §12-111, old records are not "expunged," but classified as not open to public inspection; however, those records are expressly made available to governmental agencies. Had the General Assembly intended to authorize the same treatment of current records under TR §16-117.1, we think that it would surely have used similar language. At a minimum, we think that it would not have used the term "expunge" without elaboration, for that term's ordinary meaning is to obliterate or erase. *Black's Law Dictionary* 522 (5th ed. 1979); *Webster's New International Dictionary* 899 (2d ed. 1953).⁶

Further, we note that a bill was introduced in the 1986 legislative session that would have required that certain information from expunged driving records be retained and made available to

⁵ Article 27, §739(c), however, authorizes a court to grant an ex parte order permitting a law-enforcement agency to review an expunged record when the record is needed in a pending criminal investigation and immediate access to the record is required to avoid jeopardizing the investigation or endangering life or property.

⁶ The requirement that certain records be expunged thus appears to conflict with the requirement of TR §12-111(b)(3) that "[a]ny record or record entry of any age shall be open to inspection" by governmental agencies. TR §12-111 concerns the records of the MVA in general, including but not limited to the driving records of individual licensees. TR §16-117.1 applies specifically to the driving records of particular licensees. Therefore, to the extent that TR §16-117.1 and TR §12-111(b)(3) cannot both be given full effect, TR §16-117.1 must control the determination of whether records required to be expunged may be retained in a way that makes them accessible to governmental agencies.

the MVA, the courts, criminal justice agencies, and the licensee or the licensee's attorney. Senate Bill 826 (1986) at 2-3. That bill, which was proposed by the Governor's Task Force on the Drinking Driver, failed to pass. The bill's failure is at least some indication that TR §16-117.1 does not, in its present form, permit expunged records to be reviewable by anyone. See *Demory Brothers, Inc. v. Board of Public Works*, 273 Md. 320, 326 (1974). But see *Automobile Trade Ass'n v. Insurance Comm'r*, 292 Md. 15, 24 (1981).

Finally, our view is bolstered by the MVA's consistent practice in the past of completely expunging records of a licensee who is entitled to expungement. Such a consistent administrative practice, reflecting the agency's view of a statute's meaning, is entitled to considerable weight in construing the statute. That is particularly so where, as here, the General Assembly has declined to amend the statute to explicitly require or authorize a different practice. *National Asphalt Pavement Ass'n v. Prince George's County*, 292 Md. 75, 80 (1981).

Hence, we think that the MVA's current practice of completely obliterating the public driving record accurately reflects the General Assembly's intent in requiring the MVA to expunge certain driving records at the request of the licensee. Absent express statutory authorization, we believe that those expunged records may not be made available to any person or agency, including the MVA itself.

II

Use of Probation Before Judgment Records

A. Introduction

When a person is convicted of a crime or pleads nolo contendere, the trial court may stay the entering of judgment and place the person on probation pursuant to Article 27, §641.⁷ Upon fulfillment of the terms and conditions of probation, the person is entitled to be discharged without a judgment of conviction, and such a disposition "is not a conviction for purposes of any disqual-

⁷ However, the court may not grant such probation before judgment for an incident of driving while intoxicated or while under the influence of alcohol that occurred within five years of a previous incident of this kind. Article 27, §641(a)(2).

ification or disability imposed by law because of conviction of crime." Article 27, §641(c).⁸

Administrative hearings are held by the MVA to consider whether a license or privilege should be refused, suspended, or revoked. TR §§12-202 and 12-203. In the course of such a hearing, the hearing officer reviews the applicant's or licensee's driving record. However, the record reviewed by the hearing officer does not, under current administrative practice, include any notation of any probation before judgment that the applicant or licensee may have received for a violation of TR §21-902, although the MVA keeps segregated records of those events. Your question is whether the MVA may make those records available to the hearing officer in an administrative hearing.

B. *Consideration of Records*

TR §16-117(b)(2) provides that the MVA "shall keep convenient records or make suitable notations showing the convictions or traffic accidents in which each licensee has been involved and every probation before judgment disposition of any violation of §21-902 of this article." Those records are not to be made available to the general public, but "shall be available only to the [MVA], the courts, criminal justice agencies, and the defendant or his attorney." TR §16-117(b)(2). *See also* TR §16-117(b)(5). However, "[t]hese records or notations shall be made so that they are readily available for consideration by the [MVA] of any license renewal application and at any other suitable time." TR §16-117(b)(3).

Records of the MVA's administrative hearing are ordinarily public information, pursuant to TR §12-111(b)(1). *See* Part I B above. Thus, there is some concern that the introduction of a record of a probation before judgment into the records of a hearing would violate TR §16-117(b)(2) and (5) by making that record available to the general public. However, we think that TR §16-117(b)(2) and (5), which specifically require that probation be-

⁸ When the offense for which a person is given probation before judgment is driving while intoxicated or while under the influence of alcohol, the court must ordinarily require as a condition of the probation that the person participate in an alcohol treatment or education program approved by the Department of Health and Mental Hygiene. Article 27, §641(a)(1)(ii).

fore judgment records be withheld from public disclosure, supersede the more general provision in TR §12-111(b)(1) that MVA records be open to the public "[e]xcept as otherwise provided by law" Accordingly, if the record of an administrative hearing includes a record of a probation before judgment disposition, that portion of the hearing record must be withheld from the general public.⁹ The ordinarily public nature of administrative hearing records thus does not preclude the introduction of a probation before judgment record into the administrative record of a hearing and consideration of it in making a decision. However, if anyone other than the licensee or the licensee's attorney asks to inspect the record of the proceeding, the probation before judgment record and references to it should be deleted from the information released.

TR §16-117(b)(3) provides that records of probations before judgment are to be available when the MVA considers a license renewal application "and at any other suitable time." In our view, an administrative hearing to consider suspension, revocation, or refusal of a license is an eminently "suitable" time to consider a licensee's record of probations before judgment. The objective of this type of hearing is to determine whether a licensee's driving history is such that he or she should be prevented from continuing to drive. Likewise, the objective in considering a license renewal application is to determine whether the applicant should be allowed to continue to drive. By stating that the MVA may consider probations before judgment in reviewing license renewal applications "and at any other suitable time," the General Assembly has, in our view, implied that the MVA may also consider probations before judgment in taking other actions that may result in depriving a person of his or her driving privilege.

C. *Effect of Records*

However, a probation before judgment may not be the basis for suspension or revocation of a driver's license under either TR §16-205 or TR §16-404. The first of those sections provides for

⁹ The Maryland Public Information Act itself similarly provides that certain information in otherwise public records is nondisclosable. §10-617 of the State Government Article. Thus, it is by no means unprecedented for public records to be in part disclosable and in part nondisclosable.

suspension or revocation of the license of a driver based on his or her history of convictions for violating the various provisions of TR §21-902; the second provides for revocation or suspension of the license of a driver based on his or her accumulation of points under TR §16-402 for violations of various driving-related laws, including TR §21-902. Under each of those statutes, the imposition of a sanction is authorized only when the licensee has been convicted. *See 70 Opinions of the Attorney General* 218 (1985). Article 27, §641, which authorizes the imposition of probation before judgment, expressly provides that discharge of a person who has fulfilled the terms and conditions of such a probation "shall be without judgment of conviction and is not a conviction for purposes of any disqualification or disability imposed by law because of conviction of crime." Article 27, §641(c). We think that this provision, by its broad terms, precludes the MVA from regarding a probation before judgment as a conviction for the purposes of either TR §16-205 or §16-402.

For example, TR §16-205(a)(1) authorizes revocation of the license of a person who has been convicted of driving while intoxicated. But the MVA may not revoke, pursuant to that provision, the license of a person who has received a probation before judgment on a charge of driving while intoxicated but who has never been convicted of such a charge. Likewise, the MVA may not assess points against an individual, pursuant to TR §16-402, on the basis of that individual's receipt of probation before judgment and may not take account of a probation before judgment in determining whether a person has accumulated sufficient points to trigger suspension or revocation of his or her license under TR §16-404.

However, those are not the only statutes that provide for suspension, revocation, or refusal to renew a license. Under TR §16-206(a)(1)(ii), the MVA may also take such action "on a showing by its records or other sufficient evidence that the applicant or licensee . . . [i]s an unfit, unsafe, or habitually reckless or negligent driver of a motor vehicle" We think that the MVA may properly consider a licensee's receipt of probation before judgment for a violation of TR §21-902, in the context of the licensee's overall driving record, in determining whether to proceed under TR §16-206. That section, in our view, is intended to authorize the MVA to take action in appropriate cases to prevent dangerous drivers from continuing to drive. *See 70 Opinions of the Attorney General* at 225.

That is not to say that a license may be suspended or revoked under TR §16-206 on the basis of the licensee's receipt of proba-

tion before judgment on a single occasion. We think that the phrase "unfit, unsafe, or habitually reckless or negligent" must be read together as expressing a legislative intent that sanctions normally be imposed only on drivers whose records evince a pattern of dangerous behavior.¹⁰

We believe that the use of probation before judgment records in this way would be consistent with the legislative intent in requiring the MVA to keep such records. While the enactment of that requirement was under consideration in the Senate, an amendment was offered that would have specified that records of probations before judgment "may not be used by the [MVA] for disciplinary or punishment purposes but shall be used for recordkeeping purposes only." That amendment was withdrawn, and no similar amendment was subsequently offered. 1981 Maryland Senate Journal 969. We think that this history is at least some evidence of the General Assembly's intent that the records would indeed be used for purposes that might be regarded as "disciplinary or punishment"—that is, the suspension, revocation, or refusal to renew the license of a driver whose history of probations before judgment on charges related to alcohol or drug use indicates that he or she is an unfit, unsafe, or habitually reckless or negligent driver.

We do not think that the MVA's failure to make this use of probation before judgment records in the past precludes the MVA from doing so now. We believe that the legislative intent to have those records available when the MVA determines whether a licensee is an unfit or unsafe driver is clear. Under such circumstances, the MVA is not estopped from conforming its procedures to the statutory mandate. See *Dixon v. United States*, 381 U.S. 68, 72 (1965).

Nor do we think that taking such action would violate the rights of licensees. Under TR §16-206(c), except in exigent circumstances, a license may be suspended or revoked only after no-

¹⁰ However, there may be cases in which a single conviction would give rise to action under TR §16-206—for example, if the circumstances surrounding the incident show that the licensee poses an immediate and serious threat to the public or if the licensee suffers from an ongoing physical or mental condition that makes the licensee an unfit or unsafe driver. See also note 11 below.

tice to the licensee and the opportunity for a hearing.¹¹ The notice of a hearing must provide the licensee with a statement of, among other things, the legal authority and facts that are the basis for the proposed action. TR §12-204(2) and (3). Thus, licensees against whom the MVA contemplates taking action because of their receipt of probations before judgment must be given notice of that fact sufficient to enable them to prepare their defense. However, the MVA is not prevented from taking such action in an appropriate case by the mere fact that it has not previously done so.

III

Conclusion

In summary, it is our opinion that:

1. Driving records required to be expunged under TR §16-117.1 may not be retained and made available for inspection by the MVA, courts, or other governmental agencies of officials.

2. The MVA's records or notations of any probation before judgment on a charge of driving while intoxicated or under the influence of alcohol or drugs are to be available to the hearing officer and to the licensee's attorney in an administrative hearing.

J. JOSEPH CURRAN, JR., *Attorney General*

C. J. MESSERSCHMIDT, *Assistant Attorney General*

JACK SCHWARTZ

Chief Counsel

Opinions and Advice

¹¹ Immediate suspension of a license pending the hearing is permitted only if the MVA "determines that there is a likelihood of substantial and immediate danger and harm to the licensee or others if the license is continued pending a hearing . . ." TR §16-206(c)(1). Under those circumstances, a hearing must be granted within seven days of the licensee's request, and the hearing officer must decide immediately after the hearing whether to continue the suspension or revoke the license.

**SYNOPSIS
OF
UNPUBLISHED
OPINIONS**



SYNOPSIS OF OPINIONS

ALCOHOLIC BEVERAGES

CARROLL COUNTY—WINE TASTING

(i) Article 2B, §39E does not authorize a holder of a wine tasting license to sell a container from which samples have been given, and other provisions of Article 2B prohibit the practice; (ii) and even if the practice were not prohibited by statute, the Carroll County Board of License Commissioners may prohibit it.

Opinion No. 87-027

To:

Paul Zimmerman, Esquire

July 1, 1987

Assistant County Attorney

LIQUOR CONTROL BOARDS—INTER-COUNTY SALES.

(1) Article 2B, §163(b) and (f) authorizes the Worcester County Liquor Control Board to purchase from the Montgomery County Department of Liquor Control alcoholic beverages on which the Department has paid the taxes imposed by Article 2B, §133.

(2) In view of the lack of certainty in the matter, legislative clarification is suggested.

Opinion No. 87-017

To:

The Honorable Mark O. Pilchard

March 17, 1987

Maryland House of Delegates

GOOD SAMARITAN LAW

IMMUNITY—VOLUNTEER FIRE COMPANIES AND RESCUE SQUADS—EFFECT OF COMPENSATION.

1) Under §5-309.1 of the Courts Article, volunteer firemen who provide ambulance service are generally immune from liability in connection with that service, regardless of the nature of their compensation. The company itself is likewise immune from liability.

2) In addition, a volunteer fire company and its personnel are immune from liability pursuant to §5-309 of the Courts Article in connection with their rendering of emergency medical care, provided that they are not compensated by those to whom the service is provided.

Opinion No. 87-055

To:

The Honorable Norman H. Conway

November 17, 1987

Maryland House of Delegates

HEALTH OCCUPATIONS

PHYSICAL THERAPISTS—MEDICAL PRACTICE ACT—RESPIRATORY CARE.

The enactment of SB 691, "Respiratory Care Practitioners," would not require certification by the Board of Medical Examiners of any licensed physical therapist whose activities were within the scope of practice of physical therapy, even if those activities also constituted "respiratory care."

Opinion No. 87-012

To:

The Honorable Paula C. Hollinger

March 2, 1987

Senate of Maryland

LOCAL GOVERNMENT

COUNTIES—MUNICIPALITIES—CHANGE IN BOUNDARY LINE—GENERAL ASSEMBLY.

MC/PG 3-87, the proposal to alter the boundary line between Montgomery and Prince George's Counties in order to unify the City of Takoma Park, is constitutional.

Opinion No. 87-004

To:

The Honorable Michael R. Gordon

February 5, 1987

Maryland House of Delegates

COUNTIES—MUNICIPALITIES—ROAD MAINTENANCE.

If there are Garrett County roads within the Town of Mountain Lake Park, then Garrett County is legally obligated to maintain

them. However, to the extent that the County provides special services for the Town Government, such as planning and zoning services and procurement, it is not legally obliged to continue these services.

Opinion No. 87-046

To:

Robert E. Watson, Esquire

October 26, 1987

HARFORD COUNTY COUNCIL— QUADRENNIAL ELECTIONS AMENDMENT.

Article XVII of the Maryland Constitution does not permit the Harford County Charter to be amended to provide for staggered terms for members of the County Council.

Opinion No. 87-059

To:

*The Honorable John W. Hardwicke
President, County Council for
Harford County*

December 22, 1987

TAXATION—COUNTIES—MUNICIPALITIES.

Municipal governments in Prince George's County are subject to an energy tax levied by the County pursuant to legislative authorization. However, the County has the authority to exempt them.

Opinion No. 87-041

To:

*The Honorable Leo E. Green
Senate of Maryland*

September 23, 1987

PREVAILING WAGE LAW

WAGE RATE DETERMINATIONS.

Under the current Prevailing Wage Law and its implementing regulations, a contracting agency may not advertise for bids after the expiration of the prevailing wage rate determination for the particular project. However, an agency is not precluded from receiving bids after the expiration date.

Opinion No. 87-015

To:

Mr. William P. Kaczorowski,

March 4, 1987

*Member, Advisory Council on
Prevailing Wages
Building and Construction
Trades Council*

PUBLIC ETHICS

BOARDS AND COMMISSIONS—"ESTABLISHED BY LAW."

Because the Maryland Juvenile Justice Advisory Council is an "executive agency established by law," its members are subject to the Maryland Public Ethics Law.

Opinion No. 87-011

To:

February 23, 1987

*Mr. John E. O'Donnell
Executive Director
State Ethics Commission*

REGIONAL PLANNING COUNCIL

SPECIALIZED PLANNING SERVICES—"APPROPRIATE REIMBURSEMENT."

Article 78D, §20 requires the Regional Planning Council to recover as "appropriate reimbursement" all costs reasonably related to the performance of specialized planning contracts, including all overhead expenses allocated pursuant to generally accepted accounting principles, absent unusual circumstances that justify reduced reimbursement in a particular case.

Opinion No. 87-042

To:

September 23, 1987

*Mr. Alfred P. Gwynn
Executive Director,
Regional Planning Council*

RETIREMENT SYSTEMS

OFFICERS—ADMINISTRATIVE DIRECTOR OF CALVERT COUNTY.

The Administrative Director of Calvert County is a public officer. Therefore, the holder of the position is an "appointed official" for purposes of Article 73B, Sec. 11(12).

Opinion No. 87-056

To:

Mr. Bennett H. Shaver

November 24, 1987

*Executive Director, Maryland State
Retirement and Pension Systems*

**PUBLIC OFFICERS—EXECUTIVE DIRECTOR OF
BOARD OF TRUSTEES OF STATE UNIVERSITIES AND
COLLEGES.**

The Executive Director of the Board of Trustees of the State Universities and Colleges of Maryland is not a public officer and therefore is not entitled to the special retirement benefits provided by Article 73B, Sec. 11(12).

Opinion No. 87-010

To:

Mr. Bennett H. Shaver

February 19, 1987

*Executive Director, Maryland State
Retirement and Pension Systems*

**STATE POLICE RETIREMENT SYSTEM—
SURVIVORS' BENEFITS.**

The Maryland State Retirement and Pension Systems must, under Article 88B, §53A(f), apply a cost-of-living adjustment to the initial survivors' benefits payable under Article 88B, §53(n).

Opinion No. 87-018

To:

Mr. Bennett H. Shaver

March 25, 1987

*Executive Director, Maryland State
Retirement and Pension Systems*

STATE TOBACCO AUTHORITY

TOBACCO SALES—SALES AGENCIES.

The State Tobacco Authority may not compel a tobacco sales agency to forfeit its sales quota if it moves its place of business.

Opinion No. 87-008

To:

The Honorable Wayne A. Cawley, Jr.

February 11, 1987

Secretary, Department of Agriculture

TORT CLAIMS ACT

SOIL CONSERVATION DISTRICTS.

The Maryland Tort Claims Act does not apply to an official or employee of a soil conservation district.

Opinion No. 87-058

To:

The Honorable Wayne A. Cawley, Jr.

December 21, 1987

Secretary, Department of Agriculture

VEHICLE LAWS

DUMP TRUCKS—LOAD EXEMPTIONS.

A vehicle that has obtained a dump service ("DT") registration, carrying a load of commingled loose and solid material is not entitled to the weight and axle load exemptions provided in §13-919 of the Maryland Vehicle Law.

Opinion No. 87-026

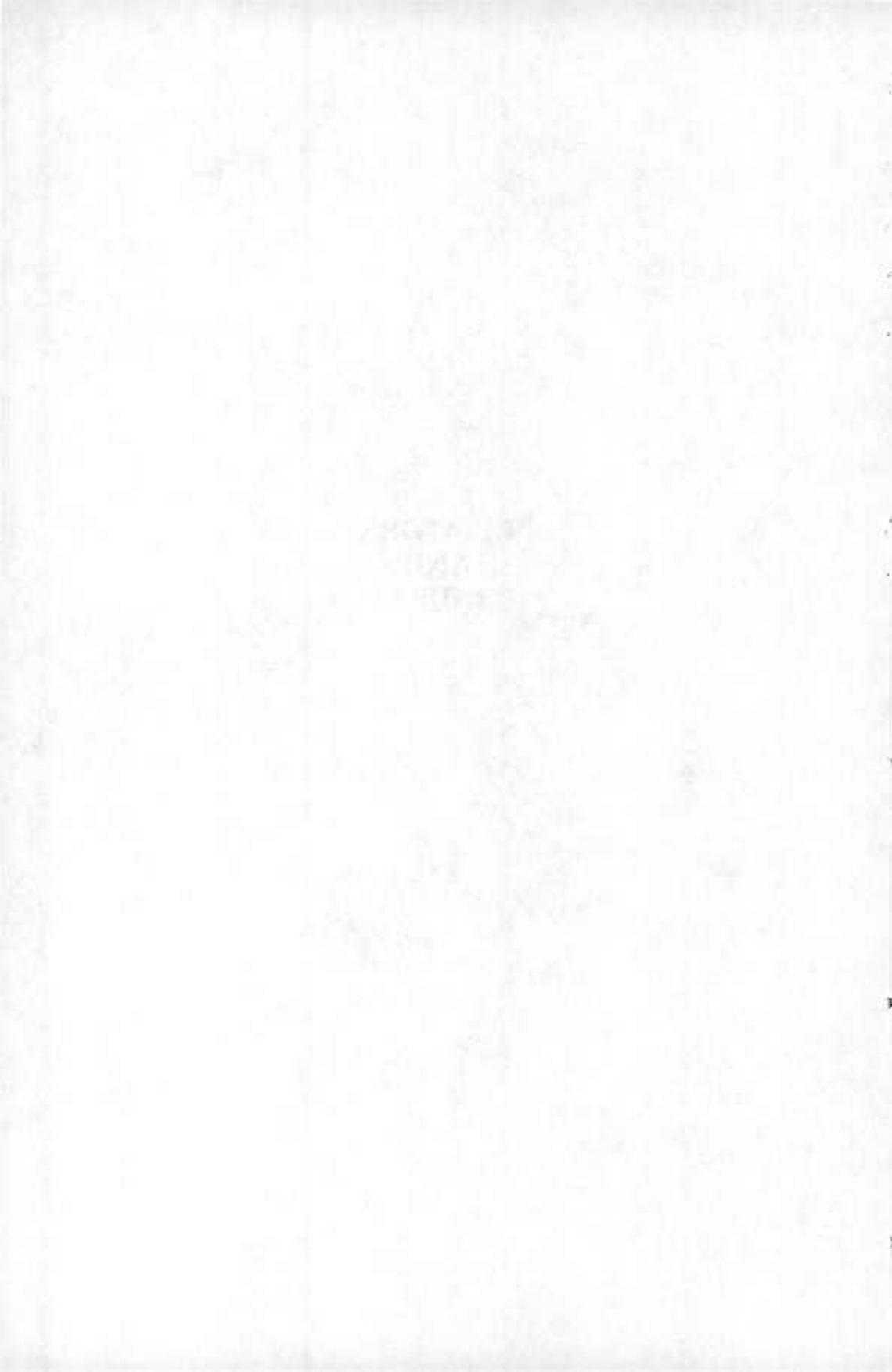
To:

Mr. W. Marshall Rickert

June 24, 1987

*Administrator**Motor Vehicle Administration*

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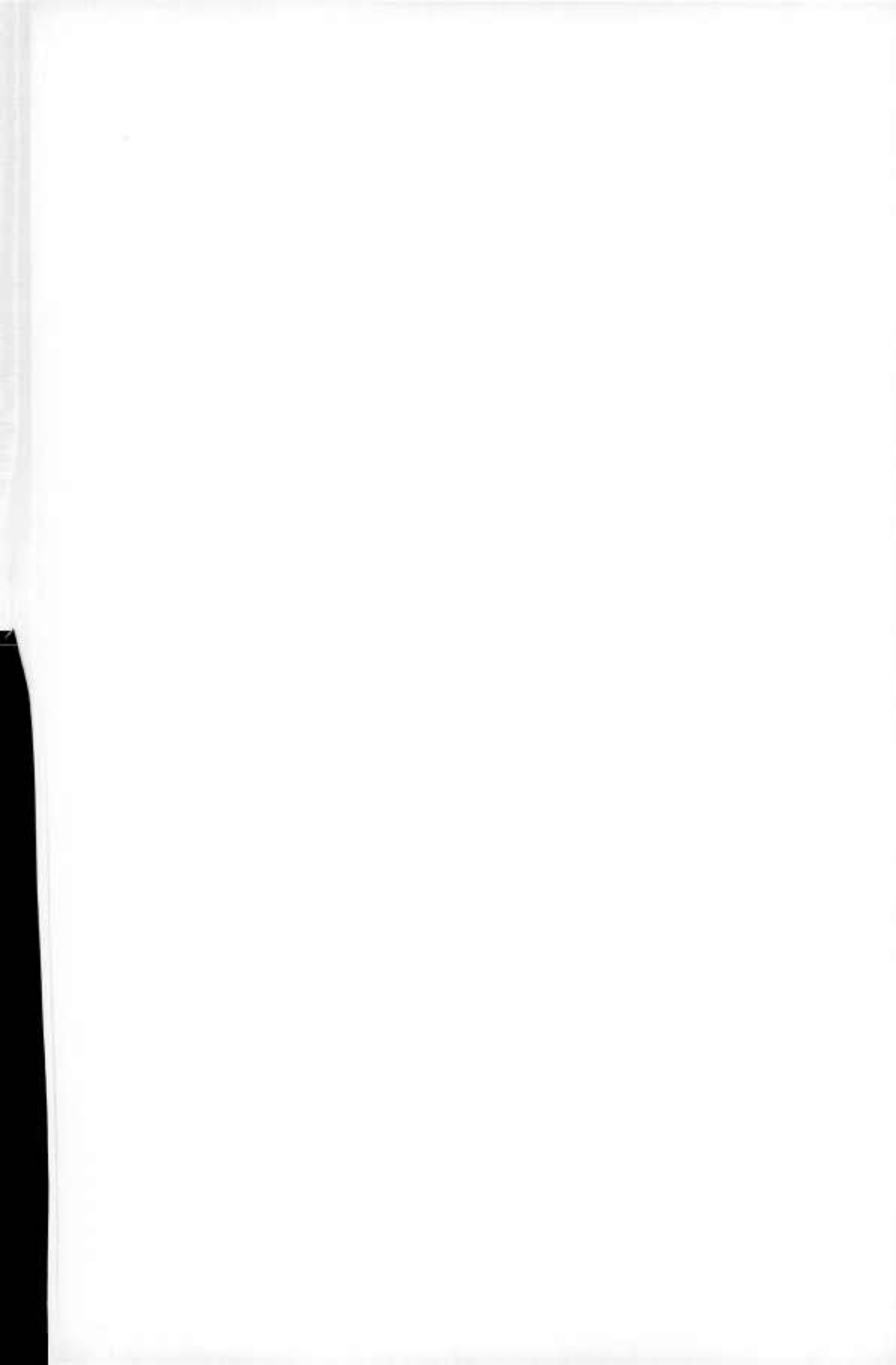
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