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ANNUAL REPORT
AND
OFFICIAL OPINIONS
OF THE
ATTORNEY GENERAL
OF
MARYLAND

1988

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Superseded by Carroll.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Plater I of St. Mary's County (Prot.), appears as acting Attorney General, for the crown, as early as 23 April 1691; superseded by Wynne.
- Edward Wynne of St. Mary's County (Prot.), sworn crown Attorney General, 5 April 1692; died in office shortly before 8 Sept. 1692.
- Col. George Plater I, sworn 8 Sept. 1692; resigned to be Naval Officer of Patuxent shortly before 21 Oct. 1698. He was Receiver of Patuxent and, until Nov. 1696, Collector of the Same. He married, about 1694, Anne, dau. of Thomas Burford above.
- Maj. William Dent of Charles County (Prot.), com. by Gov. Nicholson, 22 Oct. 1698, resigned 8 May 1702. He was again commissioned by Gov. Seymour, 16 May 1704, and continued to serve until his death in Nov. 1704. He was also Naval Officer of North Potomac, and in May, 1704, he became joint Commissary General.
- Col. William Bladen of Annapolis (Prot.), wife (Cath.), com. by Gov. Seymour as Her Majesty's Attorney General, succeeding Dent, 4 Dec. 1704; sworn His Lordship's Attorney General, succeeding

- Carroll, 1 May 1716; died in office 1 Aug. 1718. He was Naval Officer of Annapolis, and in Aug., 1708, he became sole Commissary General.
- 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 of Dorchester County (Prot.), sworn 8 April and com. 4 June 1766. Resigned in October, 1768; member of the Continental Congress 1774-1776; High Sheriff of Dorchester County, September 1761 to 1764; member of the Council of Safety in 1775; member of the Provincial Assembly from 1764 to 1766; member of the Convention which framed Maryland's Constitution; State Senator from 1777 to 1782; Died Dec. 22, 1788.
- Thomas Jennings of Annapolis (Prot.), sworn 18 Oct. and com. 27 Oct. 1768; recom. 29 April 1773. He was appointed State Attorney General in April 1777, but was succeeded, on 6 Jan. 1778, by Benjamin Galloway. He was a relative of former Deputy Secretary Edmund Jennings.

Luther Martin	1778
William Pinkney	1805
John Thomas Mason	1806
John Johnson	1806
John Montgomery	1811
Luther Martin	1818
¹ Nathaniel Williams, Assistant Attorney General	1820
Thomas B. Dorsey	1822
Thomas Kell	1824
Roger B. Taney	1827
Josiah Bayley	1831
George R. Richardson	1845
Robert J. Brent	1851
² Alexander Randall	1864
Isaac D. Jones	1867
Andrew K. Syester	1871
Charles J. M. Gwynn	1875
Charles B. Roberts	1882
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 Nathaniel Williams, Assistant Attorney General, to act as Attorney General.

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

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

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

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

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

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

⁹Elected at election of November, 1962.

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

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

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

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JUDSON P. GARRETT, JR.....	Deputy Attorney General
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Port Administration —

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 Louisa H. Goldstein

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Andrea D. Johnson

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Sidney S. Campen, Jr.	Daniel F. McMullen, Jr.
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*Donald C. Fry	Peyton Paul Phillips
Robert L. Gray	George H. White
Lloyd J. Hammond	Frank W. Wilson

Uninsured Employers Fund —

Charles R. Goldsborough, Jr., *Supervising Attorney*
 George W. Elder

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, Dep't. 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, Dep't. 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	Department of Natural Resources

Catherine M. Shultz
 Ralph S. Tyler

Civil Division
 Department of Human Resources

1985

Jane F. Barrett

Hazardous Waste Unit, Dep't. of Health
 and Mental Hygiene

Ben C. Clyburn

Department of Transportation

Louisa H. Goldstein

State Highway Administration, Dep't. of
 Transportation

Illona Sheffey-Rawlings

Department of Personnel

Richard B. Rosenblatt

Criminal Appeals and Correctional
 Litigation Division

David M. Sheehan

Civil Division

Marlene Trestman

Civil Division

Susan Zimmerman Whitman

Maryland Industrial Development
 Financing Authority, Dep't. of
 Economic and Community Development

1986

Peter V. Berns

Consumer Protection Division

Edward S. Harris

Contract Litigation Unit, Dep'ts. of
 Transportation and General Services

Peter Keith

Civil Division

Norman E. Parker, Jr.

Department of Economic and Community
 Development

Christine Steiner

Educational Affairs Division

1987

Delia Anne Burke

Securities Division

Ellen S. Cooper

Antitrust Division

Ann Marie DeBiase

Department of the Environment

Susan J. Mathias

Educational Affairs Division

Anthony K. Waters

Department of Licensing and Regulation

1988

James P. Abbott

Consumer Protection Division

Sandra J. Cohen

Department of Housing and Community
 Development

Andrea D. Johnson

State Highway Administration, Dep't. of
 Transportation

C.J. Messerschmidt

Opinions and Advice, Civil Division

Kathleen M. Sweeney

Department of Licensing and Regulation

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 selects one Assistant Attorney General to receive this award in recognition of special achievement in the field of health, human services or education. The award recognizes 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 recipients of these awards are:

1987 — Susan Sugar Nathan

1988 — James J. Mingle

ANNUAL REPORT FOR 1988

December 31, 1988

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 work of the Attorney General's Office for the calendar year 1988.

Educational Affairs Division

The Educational Affairs Division played a leading role in the extraordinary transformation of public higher education in Maryland in 1988.

Division attorneys worked closely with the Governor and Lieutenant Governor in drafting comprehensive legislation to revamp the governance structure of Maryland's public colleges and universities. The Governor's 179-page bill, formally titled "Administration Action Plan for Higher Education — 1988," was enacted by the Maryland General Assembly in May and became effective on July 1. Among the new law's most important features is the codified, visionary "Maryland Charter for Higher Education." This replaces the State Board for Higher Education and the State Scholarship Commission with a single, newly constituted executive agency, the Maryland Higher Education Commission, endowed with enhanced coordinating and planning authority over public and private institutions of postsecondary education in the State; created the new cabinet-level position of "Secretary of Higher Education"; consolidates the five-campus University of Maryland and the six-campus State University of Maryland System; mandates the enhancement of the University of Maryland College Park, Morgan State University, and the State's other historically black institutions, and substantially increases the overall level of State funding for higher education.

Much of the Educational Affairs Division's efforts in 1988 were devoted to the implementation of the new legislation. Division attorneys acted as counsel to the newly appointed Maryland Higher

Education Commission and Board of Regents of the University of Maryland System, drafted bylaws and operating procedures, and served as active members of task forces established to develop personnel and procurement policies for the consolidated University of Maryland System.

In 1988, the Educational Affairs Division continued its tradition of managing one of the heaviest litigation caseloads in the Attorney General's Office. The Division handled more than two hundred formal judicial and administrative cases encompassing constitutional, contractual, employment-related, statutory, and personal injury claims.

Finally, as it has done for almost a decade, the Educational Affairs Division sponsored unique preventive counseling programs designed to assist educational administrators in anticipating legal problems and avoiding litigation. In 1988, Division attorneys organized and participated in programs on campus safety, religious freedom on campus, copyright and patent policy, affirmative action plans, relations with federal regulatory agencies, and access to information — sunshine laws, public information laws and student records.

Department of Health and Mental Hygiene

The Department of Health and Mental Health Hygiene's operations and priorities were substantially restructured during 1988 in accordance with a variety of legislative directives. The Attorney General's staff responded to these developments with a number of office-wide and interagency initiatives.

During 1988, the two major regulatory bodies governing physician licensure and discipline were abolished. A new regulatory body, the Board of Physician Quality Assurance, was appointed by the Governor to regulate the profession and allied support personnel. Numerous Assistant Attorneys General were involved in resolving a sizable caseload of prosecutions prior to the establishment of the new Board. During the first six months of 1988, this initiative resulted in the resolution of several dozen ongoing investigations and active prosecutions. Since July of 1988, members of this office have worked with Departmental representatives and professional associations to restructure the existing regulatory system. The impact of these efforts was discernible in the last quarter of the year, when the number of emergency judicial enforcement proceedings significantly increased.

The Attorney General's health law staff collaborated with other agency personnel in developing a Department-wide response to important federal legislation that revamped the licensing and

reimbursement systems governing major health institutions. These collaborative efforts helped preserve millions of dollars in federal funding and permitted the agency to pursue a far more activist licensing posture with regard to hospitals and nursing homes.

The Department's litigation needs continued to grow in 1988. Major cases involving personnel, employment discrimination, civil rights and procurement were successfully resolved during the year. A decade-old suit brought by the U.S. Justice Department challenging the adequacy of services provided to the developmentally disabled at Rosewood Hospital Center was brought to a conclusion. The Fourth Circuit dismissed a major civil rights suit against 15 Mental Hygiene Administration officials responsible for managing medical services at the State's largest psychiatric institution. In addition, the self-insurance requirements of the Tort Claims Act necessitated a major increase in the legal resources devoted to institutional tort litigation.

Despite these litigation demands, attorneys working the Department continued their preventive law focus. In areas as diverse as medical reimbursement, food inspections, confidentiality of psychiatric medical records and due process commitment procedures for substance abusers, the Attorney General's staff worked successfully with the judiciary, advocacy groups, and industry representatives to advance concrete solutions to long-term health problems.

Consumer Protection

The Consumer Protection Division had an extremely successful year in 1988. Major victories or accomplishments were experienced by all Units within the Division. Through its various activities, the Division has heightened the protection available to consumers and provided education and advice that helped many avoid problems. In addition, the Division was instrumental in obtaining more than \$850,000 in refunds and savings for consumers.

Our Complaint Handling Unit continues to be the first point of contact with the Division for most Maryland consumers. During 1988, the Complaint Handling Unit received 65,075 telephone calls on its hotline. These calls were handled by four supervisors and approximately 40 volunteers, who provided the equivalent workforce of five full-time employees.

In addition to the hotline work, the Unit handled an estimated 7,400 written consumer complaints. Of these complaints, approximately 40% were mediated by our office, with the results proving satisfactory to the consumer in 64% of the cases. An estimated \$277,000 in refunds or

savings, as well as satisfactory non-monetary relief, was realized by these consumers.

The Health Education and Advocacy Unit received a total of 561 complaints during 1988 and closed more than 92% of these cases during the year. Of the closed complaints, 410, or 80%, were mediated by the office. Of the mediated complaints, 83% were resolved to the satisfaction of the consumers, with more than 48% resulting in refunds or savings to consumers amounting to more than \$151,214.

In addition to its mediation activities, the Health Education and Advocacy Unit has been a regular contributor to the *Consumer Courier*, the Division's newspaper, providing articles on "Durable Medical Equipment" and "Reading Drug Prescriptions." Plans to produce a number of educational booklets and brochures were also prepared in 1988.

The Health Club Unit continues to accomplish the formidable task of assuring that all health club programs in Maryland comply with the registration and bonding requirements of the State health club law. By the end of the year, there were 411 registered facilities, including 215 health clubs, 103 self-defense schools, and 84 weight reduction centers. Bonds, letters of credit or other securities totalling more than \$8.5 million now are available to protect consumers. More than \$68,000 in registration fees were collected during the year.

Our Education Unit continued to regularly produce the *Consumer Courier*, articles for weekly papers, radio advisories, and reprints of existing consumer education publications. Several new publications also were begun or completed, including a Consumer Guide on Condominiums. Numerous radio, TV and public speaking appearances were made.

Notably, the Unit won two awards — for the *Consumer Courier* and the *Health Care Shoppers Guide*, both of which were cited as among the best consumer education materials in the country.

The Division's Arbitration Program continues to provide a valuable service. Two hundred and ninety-two new cases were heard, and 286 decisions were rendered. An additional 21 businesses signed on with the Division's program, agreeing in advance to submit all consumer disputes to binding arbitration.

The Division's Law Enforcement activities involved us in 30 court cases, one administrative proceeding, and 45 investigations. Assurances of discontinuance or settlements were obtained in 12 matters; judicial determinations were obtained in 10. As a result of these cases, the Division obtained almost \$400,000 in restitution for consumers,

as well as \$500,000 in penalties for use by the State. More than \$30,000 was paid to fund education programs. Some of the more notable matters included:

- Settlement of the Hecht's case by the Enforcement Unit. A consent decree was signed enjoining the company's deceptive advertising of mattress prices. The company paid \$500,000 to the State in lieu of a civil penalty. This is the largest settlement ever made under the State's consumer protection law.
- The Auto Advertising Monitoring Program concluded negotiations involving Herb Gordon Auto World and Thompson Motors. Both companies signed assurances of discontinuance, promising to cease questionable advertising practices and follow fair advertising guidelines.
- The Enforcement and Health Advocacy Units obtained a settlement with the Mid-Atlantic Milk Marketing Association, prohibiting the group from using misleading advertising that suggests whole milk is a low-fat food.
- The Enforcement Unit also successfully overturned a circuit court's ruling barring the press from attending the hearings in the *Cottman* auto transmission case.

Department of Human Resources

The Department of Human Resources (DHR) operates at the cutting edge of law and social policy; consequently so do the Assistant Attorneys General who represent it. Since DHR was created, it has had to address increasingly complicated social concerns, and our Assistant Attorneys General have handled increasingly challenging tasks as a result. 1988 was representative of this trend.

During this period, we added an attorney to our staff assigned to the department, bringing the total number to 12. As a result, we have been able to provide vigorous representation to the Office of Child Care Licensing and Regulation (OCCLR), which was established in DHR as a part of a gubernatorial initiative to consolidate the important responsibility of regulating child care in one cabinet agency. We have assisted OCCLR in its regulatory and enforcement function, and we expect these activities to expand steadily as OCCLR strives to achieve a delicate balance between protecting children and enhancing the number of providers available to care for them.

Similarly, we have been heavily involved in representing DHR on other sensitive social issues. For instance, we have given advice on

obtaining treatment and services for low-income persons with AIDS, and we have given advice on operation of family support centers, which are partially funded by DHR and designed to serve low-income individuals and families at risk of dysfunction. In the area of adoption, we have litigated cases raising novel and complex issues as diverse as access to adoption records and rescission of adoption. We also persisted in our aggressive representation of DHR and its individual social workers who seek court protection for children who are abused, abandoned or neglected by their biological parents and other caretakers. In such matters, we have worked closely with state's attorneys and counsel for the local departments of social services, principally in appeals involving child support, paternity, children in need of assistance and termination of parental rights. Our efforts in these cases have continued to yield State appellate decisions favorable to DHR.

With respect to DHR's benefit programs, we have helped the agency perform at the vanguard of social change by advising DHR on the legality of its new projects, such as those for increasing child support collections through wage withholdings and by anticipating and implementing federal welfare reform requirements as expeditiously as possible.

As in past years, we have provided service to DHR consistent with its longstanding commitment to maintain equal employment opportunity in its workforce. Likewise, we have continued to press to obtain for DHR the maximum monies available under its federally funded grant programs. In this regard, we were successful in helping DHR obtain a waiver from the federal Department of Health and Human Services for penalties sought for alleged quality control errors in the Aid to Families with Dependent Children (AFDC) program. Significantly, the waiver prevented the State from having to forfeit more than \$3 million in AFDC grants for low-income Marylanders.

To summarize, in our zealous representation of DHR, we have employed a wide range of talents on a variety of fronts, from the legislature to the courts. In this way, our Division has helped strengthen DHR's performance on many issues of critical importance to the low-income citizens of this State.

Criminal Investigations Division

During 1988, the Criminal Investigations Division achieved the enviable — indeed, perfect — conviction rate of 100% in all of its cases that were called for trial. Jail sentences were imposed in more than 80% of those cases.

Included among the defendants who were convicted were a 14-year employee with the Maryland Department of the Environment for theft of \$130,000, a Baltimore-area owner of two restaurants for embezzlement of approximately \$100,000 in State sales tax monies, and an employee of the Motor Vehicle Administration for bribery. The Division recovered through fines, restitution, tax and penalties in excess of \$500,000.

This year the Criminal Investigations Division also obtained indictments against 21 defendants for crimes such as false entry into public records, bribery, misappropriation by a fiduciary, theft, minority business enterprise fraud, forgery, and criminal tax offenses.

In 1988, the Division also assumed supervision of the investigation, prosecution and completion of pending criminal cases undertaken by the State as a result of the savings and loan crisis in 1985. One such case involved Jerome Cardin, one of the owners of Old Court Savings and Loan, who began serving his fifteen year sentence on October 13, after his motions to reduce, suspend and/or revise his sentence were denied.

Criminal Appeals Division

In 1988, 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 United States Supreme Court.

One criminal appeal, *Mills v. Maryland*, was accepted for full briefing and argument by the United States Supreme Court in 1988. The issue in *Mills* was the constitutionality of jury instructions in capital sentencing proceedings.

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

Medicaid Fraud

This was another successful year for the Medicaid Fraud Control Unit. In 1988, the Unit exceeded its record for number of convictions

and obtained restitution orders, fines, and civil settlements totalling almost \$1 million.

The Unit prosecuted two psychiatrists for Medicaid fraud, both of whom were incarcerated. One of the defendants, a Prince George's County psychiatrist who was a full-time State employee, was ordered to pay more than \$300,000 in restitution and fines to several victims, including the Maryland Medicaid Program, the Federal Medicare Program, and two private insurance companies. The other psychiatrist, who worked for the Veterans Administration, paid \$120,000 in restitution and fines as a result of his conviction.

Another noteworthy case prosecuted by the Unit was one in which a general practitioner pled guilty to Medicaid fraud, agreed to repay the money for fraudulent office visits for which he billed the State, and also agreed to repay the costs of prescriptions paid for by the Medicaid Program. The doctor had been prescribing controlled drugs without even examining the patients, and his agreement to reimburse the State for the cost of these medications is the first such restitution we have obtained.

The Medicaid Fraud Unit also prosecuted a laboratory for Medicaid fraud; a pharmacist for shorting prescriptions, generic substitutions, and other fraudulent practices; and a pediatrician for falsely billing for laboratory tests that were not performed.

In a unique case, the fraud unit prosecuted a physician's assistant for the unauthorized practice of medicine. We also obtained a conviction of that physician's assistant on Medicaid fraud charges, along with a physician who was supposed to have been supervising the physician's assistant in a medical clinic. In fact, the physician was rarely on the premises of the clinic, and the physician's assistant was engaging in the practice of medicine.

Finally, the Unit obtained the conviction of the owner and administrator of a nursing home on Medicaid fraud charges — and obtained an additional tax fraud conviction against the owner — in a case involving the inclusion of the owner's and administrator's personal expenses on cost reports submitted to the Medicaid Program. Restitution in that case was ordered in the amount of approximately \$125,000.

All these cases represent examples of the variety of medical providers who were investigated and prosecuted by the Unit over the past year. The Unit has continued to ferret out fraud among health care providers, and has begun focusing on fraud and harm to the public caused when physicians improperly prescribe controlled drugs that frequently are abused.

The Unit also hosted the 1988 Annual Meeting of the National Association of Medicaid Fraud Control Units in Annapolis in November. The five-day meeting brought together directors of fraud units from all over the country, as well as auditors and investigators.

Environmental Crimes

The Attorney General's Environmental Crimes Unit saw a significant increase in the sentences imposed in environmental crimes cases during 1988. Two first-time defendants sentenced in 1988 served jail time as part of their penalty. The amount of fines ordered has also exceeded the amounts obtained in cases over previous years.

The Environmental Crimes Unit saw a significant growth in referrals to the office during 1988. A new system of tracking referrals was initiated in July. Statistics for the last half of 1988 show 56 matters referred to the Unit.

Approximately 40% of these investigations resulted in the opening of a case. On average, 10% of the cases opened result in the filing of criminal charges. Since April, 1987, every criminal charge filed by the Environmental Crimes Unit has produced a conviction.

Presently, the Unit has 24 active cases in the investigative stage. Eighteen of the cases were referred from the Hazardous and Solid Waste Management Administration (HSWMA). Twelve of these relate primarily to CHS violations, three involve industrial water pollution and two are medical waste cases. One incident is being pursued as an oil pollution case, although it came to our attention through the HSWMA.

Only two of the cases presently being investigated came to us from the Water Management Administration. We are trying to develop a way to encourage more referrals from this administration. With the creation of the Department, the Sediment and Stormwater Administration has become an additional source of cases and we anticipate referrals in the future. At this time there are virtually no criminal penalties associated with air or solid waste violations. If legislation providing for criminal sanctions is enacted, this would create additional referrals.

Our final source of cases is the general public, other law enforcement agencies and proactive investigations. We are presently investigating four cases from these sources.

Antitrust

In May 1988, the Antitrust Division joined with its counterparts in 18 other states in filing suit against 31 American and British insurance firms, alleging that they conspired to limit the commercial general liability (CGL) insurance available to businesses, public agencies and non-profit groups.

Among the companies named as defendants in Maryland's 57-page suit are the Hartford Fire Insurance Company, Allstate Insurance Company, Aetna Casualty and Surety Company and Signa Corporation. Also accused of participating in the alleged conspiracy are eight of the "syndicates," or insurance firms, that are part of Lloyd's of London; the Reinsurance Association of America and six of its members; the Insurance Services Offices (ISO), a trade group representing 1,500 insurance firms, and three insurance brokers.

The states that simultaneously filed suit with Maryland are Connecticut, New Jersey, Pennsylvania, Ohio, Colorado, Montana, Washington, Alaska, and Michigan. In March of 1988, nine other states — California, New York, Minnesota, Massachusetts, Texas, West Virginia, Alabama, Wisconsin and Arizona — filed similar suits against the same companies.

The Antitrust Division's suit accuses the insurance firms of using the threat of a boycott, which is banned by antitrust laws, to manipulate the U.S. market for commercial liability insurance. The companies allegedly sought to compel the adoption of "stripped-down" insurance policies that reduced or eliminated protection against pollution risks, the payment of legal costs if the policyholder is sued, and the period of coverage.

According to the suit, for years the standard CGL insurance policy in the U.S. offered "occurrence-based" coverage, meaning it protected the insured from any losses that occurred during the term of the policy — usually a year — regardless of when the loss was discovered and the claim was made, which could be long after the policy term had ended. To reduce costs by cutting back on coverages, the firms allegedly conspired to force on the American market a "claims-made" policy, meaning coverage would be provided only for claims reported during the policy term, not when the loss of injury occurred.

The alleged conspiracy forced an unprecedented evaporation of insurance in the commercial lines available to businesses, municipalities and non-profit groups. The Antitrust Division's suit seeks an injunction against the insurance firms and financial damages in an amount to be determined later. In addition, the suit seeks a requirement that

ISO support new CGL policies offering adequate protection for purchasers, as well as payment by the defendants of an undetermined amount of money into a fund that would protect public agencies from major losses.

Comptroller

On July 29, 1988, the Court of Appeals rendered its decision in *NCR Corporation v. Comptroller of the Treasury*, 313 Md. 118, a long-running corporate income tax case involving the years 1972 through 1977. The court held that there were no statutory or constitutional bars to State taxation of gross-up income received from subsidiary corporations that were part of the taxpayer's unitary business. Similarly, the court held there were no statutory or constitutional bars to taxing interest income generated from short-term investments. The taxpayer failed to show that the interest income was not received and used in furtherance of its unitary business.

In an issue that attracted national attention, the court held that NCR was not entitled to modify its apportionment formula to include in it the property, payroll and sales of those subsidiaries which paid royalties to NCR that were taxable by Maryland, and that a remand was necessary for further findings to determine whether NCR was entitled to modify its apportionment formula to include therein the property, payroll and sales of those subsidiaries which paid NCR dividends that were taxable by Maryland. The court held that the royalty income was similar to income from the sale of a machine, for which no modification to the apportionment formula was appropriate. With respect to the dividends, the court ordered a remand to determine whether exclusion of the factor relief produced a distortion and, if so, whether the distortion was of constitutional dimension.

In another major development this year, the Maryland Legislature enacted a Tax-General Article, culminating six years of work by a commission that included the Counsel to the Comptroller. The new law combines in one article virtually all non-property taxes in Maryland. In addition to rewriting and reorganizing the Maryland tax law, the new Tax-General Article contains for the first time a separate subtitle on tax procedures. All of the attorneys who represent the Comptroller, as well as numerous other tax administrators and practitioners, were involved in this effort to produce a simplified and better organized body of Maryland tax law.

Correctional Litigation

The Correctional Litigation Unit experienced a significant increase in the number of class action lawsuits filed in 1988 on behalf of

prisoners within the Division of Correction and Patuxent Institution. The AIDS issue has been raised in one class action case presently pending in federal court. One segment of the inmate population is challenging the constitutionality of the current policy of the Division of Correction regarding AIDS testing and isolation of all HIV-positive inmates. Federal Judge J. Frederick Motz has identified two distinct plaintiff groups for purposes of the class action lawsuit: those who are not afflicted with AIDS and seek mandatory testing for all inmates and the isolation of all HIV-positives; and those who are identified as HIV-positive.

Other class actions are challenging Division regulations relating to the new objective classification system, personal property restrictions, and censorship of publications. With regard to the classification system, the plaintiff class alleges that the new classification system violates the *ex post facto* clause of the Constitution for all prisoners serving sentences prior to January 18, 1988. They contend that the system makes it more difficult for the prisoner to progress to minimum security and pre-release and therefore more difficult to secure parole.

The class actions concerning the restrictions of personal property and certain publications and periodicals raise questions as to the degree of authority that correctional officials have to maintain security and control within the institutions. Inmates are challenging the property restrictions on the basis that the regulations limit their ability to maintain law books, trial transcripts and religious books and thereby interfere with their First Amendment rights, such as their right of access to court and the freedom to practice religion as they choose. Another class action lawsuit challenges the Division's authority to restrict publications and periodicals that prison officials believe to be a threat to a prison's security and control.

In addition to the lawsuits challenging prison policies and regulations, a class action lawsuit has been filed challenging the conditions at the newest correctional institution within the Division of Correction, the Eastern Correctional Institution in Somerset County. The lawsuit alleges that there are numerous conditions, including overcrowding, which violate their constitutional right to be free from cruel and unusual punishment.

General Services

Perhaps the most significant development during 1988 in which this office assisted the Department of General Services involved the

opening of the first group day care center for the children of State workers.

In 1986, the General Assembly authorized the creation and operation of group day care centers in State-occupied buildings to meet the child care needs of State employees. Sometime after its creation in 1987, the Department of the Environment decided to provide group day care services for its employees at the Department's new offices on Broening Highway in Baltimore. It was the first agency of the State government to do so. An ad hoc committee was formed consisting of representatives of the Departments of the Environment, General Services, Health and Mental Hygiene, and Human Resources. This committee worked in conjunction with the Governor's office to plan and execute the procurement of space and the services of a private day care provider. An Assistant Attorney General assigned to General Services was asked to advise the committee on how best to procure the day care services.

Over the next year, this office gave the committee advice on a variety of pertinent legal issues, especially involving questions of procurement law, and drafted a 40-page Request for Proposals that was issued to prospective bidders. Bids were finally received and a contractor was selected. During that stage, extensive advice was given to the Department of the Environment on the process of reviewing proposals and selecting a provider. The contract was signed and the center opened in the fall of 1988, making it the only one of its kind in the State so far.

Department of Housing and Community Development

In 1988 much of the legal work performed by the Assistant Attorneys General assigned to the Department of Housing and Community Development ("DHCD") related to the issuance of housing revenue bonds, the closing of loans and grants for numerous Departmental programs, and the extensive drafting of regulations and legislation. Attorneys for the Division of Housing Finance worked on 12 housing bond issues totalling approximately \$286 million in revenue for the financing of various single family and multi-family projects in Maryland. The office also provided counsel in the issuance of the Community Development Administration's first series of infrastructure bonds designed to obtain tax-exempt proceeds to assist local governments in implementing sewer, water, street and other public improvements.

The Assistant Attorneys General also represented the Department in the closing of 47 loans totalling about \$43 million for 2,218 units of rental housing under programs financed by tax-exempt bond proceeds, as well as State-appropriated funds. The attorneys also assisted in the closing of six loans totalling \$6.5 million for local infrastructure projects throughout the State financed by the Administration's first series of bonds.

In addition to drafting regulations for 14 new or substantially modified Departmental housing finance and insurance programs, the office also provided counsel to the Secretary of the Department in drafting the regulations and the program documents for the Partnership Rental Housing Program, a demonstration program providing financing to local governments for the construction of housing for occupancy by lower income Marylanders. Under this innovative program, local governments own the projects and tenants must play a contributing role in their operation and maintenance.

Additionally, in 1988 attorneys represented the Division of Historical and Cultural Programs in the drafting and review of closing documents for 34 contracts, grants and loans for historic preservation and survey purposes, as well as in the negotiation of 28 preservation easements. Attorneys for the Division of Community Assistance also drafted and reviewed 165 grant agreements and contracts totalling approximately \$28.7 million in financial assistance that generally will go to local governments and nonprofit organizations for numerous projects, ranging from home maintenance and repair for the handicapped and elderly to energy assistance grants. The Assistant Attorneys General for these two divisions also assisted in the drafting of five sets of regulations for several new programs, including two adopted by the 1988 General Assembly: the Maryland Maritime Archaeology Program and the State Action Loans for Targeted Areas Program.

The Maryland Maritime Archaeology Program arose from legislation authorizing the Maryland Historical Trust, an agency of DHCD, to issue and administer permits for the excavation or disturbance of archaeological historic property on submerged lands over which the State has sovereign control. The State Action Loans for Targeted Areas Program provides sponsors for the purpose of improving housing and other forms of development in targeted areas.

In 1988 the Assistant Attorney General performing the Department's administrative legal work prepared five sets of regulations addressing DHCD's administrative responsibilities as a newly-established unit of the State and worked with the Department in

resolving difficult and innovative personnel and procurement issues.

Finally, the counsel, deputy counsel and several Assistant Attorneys General prepared 16 pieces of proposed legislation for the 1989 General Assembly. Some of the legislation consists of substantial revisions to existing law for purposes of updating and streamlining authorizing program statutes. Other pieces represent new initiatives for the Department, such as a Community Energy Loan Program and an Assisted Housing Preservation Act. If enacted, the Community Energy Loan Program will provide financial assistance for certain energy conservation improvements and the Assisted Housing Preservation Act establishes procedures to mitigate displacement of tenants from federally assisted rental housing units that are expected to be lost from Maryland's stock of affordable housing during the next decade.

Department of Personnel

During 1988, the Legal Division representing the Department of Personnel handled six court cases, two of them new law suits filed during the year. Two of the cases were concluded in favor of the Department of Personnel.

In the area of preventive counseling, we participated in a seminar/mock hearing focusing on personnel issues, including disciplining and firing.

In addition to litigation and the day-to-day counseling of our clients in the Department, we also engaged in numerous administrative proceedings in 1988, representing our client before the Equal Opportunity Commission, the Maryland Commission on Human Relations, and other agencies and groups.

Public Safety and Correctional Services

Litigation in the Department of Public Safety and Correctional Services continued to increase at a substantial pace during 1988. This increase in litigation is due primarily to a growth in the number of claims filed under the State Tort Claims Act; an increase in the number of appeals taken to the Circuit Court from decisions of the Inmate Grievance Commission; and a substantial increase in the number of appeals taken to Circuit Court by employees following disciplinary decisions by the Department of Personnel. Additional litigation involving certain aspects of the operation of the Patuxent Institution,

and a review of the policies and procedures of that institution, was an important aspect of the work of the office during 1988.

The office continued to be involved in the monitoring and implementation of various decrees and settlement agreements concerning conditions in the State's major prisons. The volume of such "overcrowding" suits should start to decrease as the State moves into implementation of its long-term plan for prison construction and improvements.

Litigation involving the Maryland State Police remained relatively stable, but with a welcome decrease in the number of discrimination complaints. The office was instrumental in initiating a series of training programs for supervisors of the Maryland State Police in areas that present the greatest potential for liability. Likewise, in corrections, the office participated in a number of training programs.

Securities

Perhaps the most significant development in 1988 affecting the Securities Division of the Attorney General's Office was a Court of Special Appeals ruling that rejected the contention of a Baltimore securities broker that Maryland's securities law is unconstitutionally vague. The United States Supreme Court and the Maryland Court of Appeals have both denied certiorari of the Court of Special Appeals decision, which upheld the Securities Commissioner's discipline of the licensed stockbroker.

The stockbroker was fined and her license suspended upon the Commissioner's finding that she had made an unsuitable recommendation of a high risk stock in a telephone "cold call" to a first-time investor, and then urged the customer to falsify his net worth in order to qualify to make the purchase. The court found that the section of the Maryland Securities Act permitting disciplinary actions against stockbrokers for "dishonest or unethical practices" did not violate due process and that the Commissioner's order did not violate the stockbrokers' First Amendment rights. The opinion's language is strong and will offer valuable precedent in Maryland and other states in our efforts to set limits on the high-pressure telemarketing sales tactics employed by some securities salespersons.

Maryland Stadium Authority

This has been a momentous year for the Maryland Stadium Authority. On May 5, 1988, the Authority reached agreement with

the Baltimore Orioles on a 15-year lease of a new stadium to be constructed at Camden Yards in Baltimore. On September 20, all contingencies in the lease were met, thus permitting the Authority to go forward with the issuance of bonds for land acquisition and baseball stadium construction, pursuant to an Opinion of the Attorney General dated September 27. On December 22, the Authority closed on the sale of its \$60,000,000 Bond Anticipation Note to Chase Manhattan Bank, N.A., and drew down \$1,220,300 of such financing in order to partially finance the acquisition of the Southern Seafood Company facility, located at Camden Yards. The city, the State, the new stadium — and the Orioles — are on their way.

Department of Transportation

In 1988, Assistant Attorneys General for the Motor Vehicle Administration helped obtain the largest fine for violation of the State's Transportation Article ever levied by the Motor Vehicle Administration. Lawyers from this office advised the Administration in an investigation of a Maryland dealer who was purchasing cars from a foreign distributor not licensed in the State of Maryland. Such activity is in violation of Section 15-314 of the Transportation Article of the Annotated Code of Maryland. The investigation resulted in the dealer's entering into a consent order with the Administration whereby it agreed to pay a fine of \$32,500.

The Assistant Attorneys General assigned to the Maryland Port Administration represented it in the negotiation and drafting of several important agreements in connection with the expansion of facilities for the Port of Baltimore. These attorneys represented the Administration in the purchase of property formerly owned by the Maryland Shipbuilding and Drydock Company and the resultant lease of the property to the Toyota Corporation. The Administration attorneys also were involved in the negotiation and drafting of various construction and usage agreements with CSX Transportation, Inc. relating to the intermodal container transfer facility adjacent to the soon-to-be completed Seagirt Marine Terminal.

The Assistant Attorney General representing the State Railroad Administration was involved in the negotiation and drafting of a new contract between it and the National Railroad Passenger Corporation (Amtrak), under which Amtrak continues to provide commuter rail service between Baltimore and Washington. This service, known as MARC Service, has grown dramatically in recent years. Because of a large increase in ridership, the Administration has undertaken

an extensive construction program that has required continual advice from its attorney.

The attorney for the State Railroad Administration was also involved in drafting legislation which would codify as part of the Transportation Article a statute setting forth the powers and duties of the State Railroad Administration. This legislation will be introduced in the 1989 session of the General Assembly as departmental legislation.

In addition, an Assistant Attorney General in the General Counsel's office advised the MEDEVAC Helicopter procurement team on the procurement of six new helicopters for the Maryland Institute for Emergency Medical Services Systems and the Maryland State Police. He assisted in the drafting of the Request for Proposals and the drafting and negotiation of the contract with the successful offeror. This attorney also acted as co-counsel with the Chief of the Contract Litigation Unit in a bid protest filed with the Board of Contract Appeals in which the State successfully defended its selection of the helicopter supplier. This Assistant Attorney General continues to provide guidance in the administration of the procurement contract.

The Assistant Attorneys General representing the State Aviation Administration and from the General Counsel's office represented and continue to represent the State of Maryland in a lawsuit filed by 38 individuals living in the Glen Burnie area. These residents complain of noise and other environmental by-products from the operations of Baltimore-Washington International Airport and Routes 3 and 100. The Plaintiffs allege negligence, nuisance, and the creation and maintenance of patently dangerous public improvements, and claim aggregate damages of \$38,000,000. This lawsuit is in an early stage of litigation in the Circuit Court for Anne Arundel County.

Also on the courtroom front, Assistant Attorneys General for the State Highway Administration have been representing that Administration in environmental litigation involving a challenge to the reconstruction of Maryland Route 214 in Prince George's County. The Administration prevailed in *Cinnamon Ridge Condominium Association v. State Highway Administration* in the Circuit Court for Prince George's County. This case has now been appealed to the Court of Special Appeals of Maryland.

An Assistant Attorney General in the General Counsel's office also has provided ongoing advice to the department's MBE Task Force and has represented the department in proceedings to take administrative action against certain previously certified MBEs. These actions led to the recently successful criminal prosecutions of certain

firms. This Assistant Attorney General also has worked with the Criminal Investigations Division in investigating and prosecuting various MBE fraud cases.

I believe all Marylanders can be proud of the exceptional dedication, energy and skill of the lawyers and support personnel who work on their behalf in the Attorney General's Office. I also want to thank you and your office for the assistance we have received from your staff throughout the year.

J. Joseph Curran, Jr.
Attorney General

**CASES IN WHICH THE
OFFICE OF THE ATTORNEY GENERAL HAS
PARTICIPATED
FOR CALENDAR YEAR 1988**

Supreme Court of the United States (Includes Petitions for Certiorari)	35
United States Court of Appeals for the Fourth Circuit ..	207
Other United States Courts of Appeal	11
TOTAL	253
United States District Court for the District of Maryland	1,151
Other United States District Courts	54
TOTAL	1,205
Court of Appeals of Maryland (Includes Petitions for Certiorari and Answers to Petitions)	
Civil Appeals	95
Criminal Appeals	136
TOTAL	231
Court of Special Appeals of Maryland	
Civil Appeals	228
Criminal Appeals	982
TOTAL	1,210
Circuit Court of Maryland	4,995
District Court of Maryland	2,155
Maryland Tax Court	1,127
Workmen's Compensation Hearings	10,647
Miscellaneous Administrative Hearings	3,258

6,801 of these cases have been completed

7,454 are in the process of trial

8,289 new cases have been opened

**FINANCIAL STATEMENT
OFFICE OF THE ATTORNEY GENERAL
FOR THE FISCAL YEAR 1988**

Appropriations and Budget Amendments		
Program 001	\$	3,090,496
Program 002		928,569
Program 003		496,567
Program 004		638,487
Program 005		2,367,190
Program 006		871,198
Program 008		191,436
Program 009		1,217,881
Program 014		1,291,422
Program 015		999,511
Program 016		637,795
Program 017		706,504
Program 018		510,631
Total	\$	<u>13,947,687</u>

Program 001

Legal Counsel & Advice

Appropriation	\$	2,997,481
Budget. Amendments		<u>93,015</u>
Total Funds Available		<u>3,090,496</u>

Salaries

Attorney General	\$	72,494
Deputy Attorney General (3)		147,625
Senior Executive Associate Atty. General (2)		129,494
Program Executive III		14,565
Division Director II		5,839
Principal Counsel		1,831
Asst. Attorney General VII, General Counsel (1)		53,683
Asst. Attorney General VI, General Counsel (2)		121,731
Administrator IV (1)		46,056
Executive Associate Attorney General (1)		61,300
Asst. Attorney General V, General Counsel (2)		108,578
Asst. Attorney General IV, General Counsel		1,131
Fiscal Administrator II		1,402
Fiscal Specialist III		970

Staff Attorney II	14,898
Fiscal Specialist II (1)	33,930
Personnel Officer II (1)	33,930
Staff Attorney I (1)	15,454
Administrative Officer II (2)	63,006
Associate Librarian II (1)	30,596
Administrative Officer I (1)	29,241
Administrative Specialist III (1)	48,856
Legal Assistant II (2)	51,204
Fiscal Associate II	20,577
Fiscal Associate I (1)	640
Legal Assistant I	577
Personnel Clerk (1)	10,625
Library Assistant III (5)	12,161
Management Associate (3)	111,929
Administrative Aide I (3)	75,507
Office Secretary III	2,117
Services Specialist (1)	4,050
Stenographer, Law & Legislative (2)	33,189
Office Secretary II (1)	20,048
Fiscal Clerk II (1)	14,369
Office Secretary I	3,062
Office Secretary I, General (1)	12,249
Office Clerk I (4)	53,182
Office Assistant III (1)	11,782
Total Salaries	<u><u>\$ 1,473,878</u></u>

Additional Salary Related Expenses

Overtime	16,773
Miscellaneous Adjustments	16,460
Fringe Benefits	351,846
Other Adjustments/Turnover	<u>(146,922)</u>
Total Additional Expenses	<u><u>238,157</u></u>
Total Salaries & Related Expenses	<u><u>1,712,035</u></u>

Other Expenses

Technical and Special Fees	124,188
Communications	190,499
Travel	18,243
Motor Vehicle Operation & Maintenance	27,406
Contractual Services	(365,317)
Supplies and Materials	114,440

Equipment—Additional	90,897
Fixed Charges	<u>1,178,105</u>
Total Other Expenses	<u>\$ 1,378,461</u>
Total Expenditures—001	<u>\$ 3,090,496</u>

Program 002—Division of Asbestos

Appropriation	911,387
Budget Amendments	<u>17,182</u>
Total Funds Available	<u>\$ 928,569</u>

Salaries

Division Director II (1)	59,200
Asst. Atty. General V, General Counsel (4)	139,008
Asst. Atty. General VI, General Counsel	12,265
Staff Attorney I (1)	223
Legal Assistant II (1)	17,468
Staff Attorney II (1)	30,271
Staff Attorney III	25,990
Administrative Aide I	10,325
Stenographer, Law and Legislative (3)	<u>40,460</u>
Total Salaries	<u>\$ 335,210</u>

Additional Salary Related Expenses

Overtime	23,143
Fringe Benefits	<u>85,938</u>
Total Additional Expenses	<u>\$ 109,081</u>
Total Salaries & Related Expenses	<u>\$ 444,291</u>

Other Expenses

Technical and Special Fees	135,587
Communication	11,801
Travel	14,073
Contractual Services	255,071
Supplies and Materials	1,671
Equipment—Additional	8,000

Fixed Charges	<u>58,075</u>
Total Other Expenses	<u>\$ 484,278</u>
Total Expenditures—002	<u>\$ 928,569</u>

Program 003—Division of Savings and Loan

Appropriation	906,976
Budget Amendments	13,997
Less Reversion	<u>-424,406</u>
Total Funds Available	<u>\$ 496,567</u>

Salaries

Asst. Atty. General VI, General Counsel	36,658
Asst. Atty. General V, General Counsel (2)	65,018
Administrator II (1)	38,353
Fiscal Specialist III (3)	91,744
Staff Attorney II	15,482
Staff Attorney I (1)	3,963
Legal Assistant I (1)	20,894
Stenographer, Law and Legislative (1)	<u>15,114</u>
Total Salaries	<u>\$ 287,226</u>

Additional Salary Related Expenses

Overtime	316
Fringe Benefits	74,657
Other Adjustments/Turnover	<u>876</u>
Total Additional Expenses	<u>\$ 75,849</u>
Total Salaries & Related Expenses	<u>\$ 363,075</u>

Other Expenses

Technical and Special Fees	37,525
Communication	950
Travel	4,125
Motor Vehicle Operation & Maintenance	729
Contractual Services	27,415
Supplies and Materials	1,537
Equipment—Additional	12,223

Fixed Charges	<u>48,988</u>
Total Other Expenses	<u>\$ 133,492</u>
Total Expenditures—003	<u><u>\$ 496,567</u></u>

Program 004—Division of Securities

Appropriation	612,535
Budget Amendments	<u>25,952</u>
Total Funds Available	<u><u>\$ 638,487</u></u>

Salaries

Division Director II (1)	59,200
Asst. Atty. General VII, General Counsel	36,419
Asst. Atty. General VI, General Counsel (2)	63,044
Asst. Atty. General V, General Counsel (1)	36,844
Staff Attorney II (1)	29,503
Administrative Specialist III (3)	73,176
Legal Assistant II (1)	24,465
Administrative Aide I (1)	23,165
Office Secretary III (1)	41,464
Stenographer, Law and Legislative (2)	17,066
Typist Clerk IV (1)	<u>14,546</u>
Total Salaries	<u><u>\$ 418,892</u></u>

Additional Salary Related Expenses

Additional Assistance	1,202
Overtime	822
Miscellaneous Adjustments	3,464
Fringe Benefits	116,232
Other Adjustments/Turnover	<u>2</u>
Total Additional Expenses	<u><u>\$ 121,722</u></u>
Total Salaries & Related Expenses	<u><u>\$ 540,614</u></u>

Other Expenses

Technical and Special Fees	15,648
Communication	7,406
Travel	1,139
Motor Vehicle Operation & Maintenance	(178)
Contractual Services	60,392

Contractual Services	60,392
Supplies and Materials	(310)
Equipment—Additional	5,520
Fixed Charges	8,256
Total Other Expenses	\$ 97,873
Total Expenditures—004	\$ 638,487

Program 005—Division of Consumer Protection

Appropriation	2,205,310
Budget Amendments	78,515
Total Funds Available	\$ 2,283,825
Special Fund Expenditure	83,365
Total Funds Available	\$ 2,367,190

Salaries

Division Director II (1)	59,200
Asst. Atty. General VII, General Counsel (1)	53,720
Asst. Atty. General VI, General Counsel (3)	150,699
Asst. Atty. General V, General Counsel (3)	128,617
Administrator II (2)	53,646
Chief Investigator Consumer Fraud (1)	36,560
Administrative Officer III (2)	66,541
Public Affairs Officer II (1)	33,929
Administrative Officer II (2)	62,387
Administrative Officer I (2)	58,482
Consumer Affairs Supervisor (4)	94,282
Public Affairs Specialist III (1)	24,335
Administrative Specialist II (1)	17,553
Consumer Affairs Specialist III (10)	223,621
Publications Specialist II (1)	23,398
Data Processing Operations Technician II (1)	20,240
Data Processing Operations Technician I (1)	4,575
Consumer Affairs Specialist II (1)	498
Administrative Aide I (1)	23,398
Office Secretary III, Stenographic (1)	21,739
Stenographer, Law and Legislative (6)	80,868
Office Secretary II (1)	15,899
Office Clerk II (1)	12,820
Total Salaries	\$ 1,267,007

Additional Salary Related Expenses

Overtime	11,005
Miscellaneous Adjustments	7,335
Fringe Benefits	345,919
Other Adjustments/Turnovers	(379)

Total Additional Charges	\$ 363,880

Total Salaries & Related Expenses	\$ 1,630,887

Other Expenses

Technical and Special Fees	240,030
Communication	60,612
Travel	9,508
Motor Vehicle Operation & Maintenance	5,963
Contractual Services	395,927
Supplies and Materials	(4,794)
Equipment—Additional	19,137
Fixed Charges	9,920

Total Other Expenses	\$ 736,303

Total Expenditures—005	\$ 2,367,190

Program 006—Antitrust Division

Appropriation	842,011

Budget Amendments	29,187

Total Funds Available	\$ 871,198

Salaries

Division Director II (1)	59,200
Asst. Atty. General VI, General Counsel (5)	129,004
Asst. Atty. General V, General Counsel (2)	147,623
Accountant Auditor IV (1)	22,271
Legal Assistant II (2)	43,114
Administrative Aide I (1)	23,398
Stenographer, Law and Legislative (2)	32,190
Office Secretary I (1)	11,421
Total Salaries	\$ 468,221

Additional Salary Related Expenses

Overtime	(12)

Miscellaneous Adjustments	2,215
Fringe Benefits	123,171
Other Adjustments/Turnover	(189)
Total Additional Expenses	<u>\$ 125,185</u>
Total Salaries & Related Expenses	<u>\$ 593,406</u>
Other Expenses	
Technical and Special Fees	10,334
Communication	2,296
Travel	15,513
Motor Vehicle Operation & Maintenance	1,458
Contractual Services	243,625
Supplies and Materials	(689)
Equipment—Additional	1,988
Fixed Charges	3,267
Total Other Expenses	<u>\$ 277,792</u>
Total Expenditures—006	<u>\$ 871,198</u>

Program 008—State's Attorneys' Coordinator

Appropriation	186,264
Budget Amendments	<u>5,172</u>
Total Funds Available	<u>\$ 191,436</u>

Salaries	
State's Attorneys' Coordinator (1)	51,700
Administrative Aide I	<u>23,398</u>
Total Salaries	<u>\$ 75,098</u>

Additional Salary Related Expenses	
Overtime	347
Fringe Benefits	<u>20,390</u>
Total Additional Expenses	<u>\$ 20,737</u>
Total Salaries & Related Expenses	<u>\$ 95,835</u>

Other Expenses	
Technical and Special Fees	4,095

Communication	2,330
Travel	2,513
Motor Vehicle Operation & Maintenance	997
Contractual Services	76,960
Supplies and Materials	220
Equipment—Additional	7,433
Fixed Charges	<u>1,053</u>
Total Other Expenses	<u>\$ 95,601</u>
Total Expenditures—008	<u>\$ 191,436</u>

Program 009—Medicaid Fraud Control Unit

General Fund Appropriation	286,712
Budget Amendments	<u>10,355</u>
Total	<u>\$ 297,067</u>
Federal Fund Expenditure	<u>920,814</u>
Total Funds Available	<u>\$ 1,217,881</u>

Salaries

Principal Counsel (1)	44,565
Asst. Atty. General VII, General Counsel (1)	53,720
Asst. Atty. General VI, General Counsel (1)	79,493
Chief Investigator, Medicaid Fraud (1)	38,851
Asst. Atty. General V, General Counsel (2)	61,570
Fiscal Administrator II (1)	42,644
Fiscal Administrator I (1)	39,485
Fiscal Specialist III (3)	109,681
Staff Attorney I (1)	27,382
Medicaid Fraud Investigator III (2)	58,234
Medicaid Fraud Investigator II (5)	114,495
Administrative Aide I (1)	23,398
Stenographer, Law and Legislative (3)	<u>57,346</u>
Total Salaries	<u>\$ 750,864</u>

Additional Salary Related Expenses

Miscellaneous Adjustments	2,256
Fringe Benefits	<u>196,130</u>
Total Additional Expenses	<u>\$ 198,386</u>
Total Salaries & Related Expenses	<u>\$ 949,250</u>

Other Expenses	
Communication	10,538
Travel	10,814
Motor Vehicle Operation & Maintenance	10,129
Contractual Services	34,699
Supplies and Materials	649
Equipment—Additional	19,950
Grants, Subsidies and Contributions	86,465
Fixed Charges	95,387
Total Other Expenses	\$ 268,631
Total Expenditures—009	\$ 1,217,881

Program 014—Civil Litigation Division

Appropriation	1,238,134
Budget Amendments	53,288
Total Funds Available	\$ 1,291,422

Salaries

Senior Executive Associate Atty. Gen. (1)	61,606
Principal Counsel (1)	53,869
Asst. Atty. General VII, General Counsel (3)	146,997
Asst. Atty. General VI, General Counsel (5)	245,625
Asst. Attorney General V, Special Counsel (3)	131,197
Staff Attorney II (2)	31,415
Legal Assistant II (1)	23,669
Administrative Aide I (3)	66,222
Stenographer, Law and Legislative (3)	55,195
Total Salaries	\$ 815,795

Additional Salary Related Expenses

Overtime	1,139
Miscellaneous Adjustments	3,054
Fringe Benefits	222,798
Other Adjustments/Turnovers	87,712
Total Additional Expenses	\$ 314,703
Total Salaries & Related Expenses	\$ 1,130,498

Other Expenses

Technical and Special Fees	84,746

Communication	6,855
Travel	6,631
Motor Vehicle Operation & Maintenance	4,417
Contractual Services	48,841
Supplies and Materials	805
Equipment—Additional	7,180
Fixed Charges	1,449
Total Other Expenses	<u>\$ 160,924</u>
Total Expenditures—014	<u>\$ 1,291,422</u>

Program 015—Criminal Appeals Division

Appropriation	957,099
Budget Amendments	42,412
Total Funds Available	<u>\$ 999,511</u>

Salaries

Division Director II (1)	57,254
Asst. Attorney General VII, General Counsel (2)	103,908
Asst. Attorney General VI, General Counsel (1)	108,123
Asst. Atty. General V, General Counsel (8)	220,026
Asst. Atty. General IV, General Counsel (1)	35,762
Administrative Aide I (1)	22,629
Office Secretary III (1)	31,729
Stenographer, Law and Legislative (3)	48,396
Office Secretary II (1)	17,749
Total Salaries	<u>\$ 645,576</u>

Additional Salary Related Expenses

Overtime	52
Miscellaneous Adjustments	4,166
Fringe Benefits	176,318
Other Adjustments/Turnovers	13,262
Total Additional Expenses	<u>\$ 193,798</u>
Total Salaries & Related Expenses	<u>\$ 839,374</u>

Other Expenses

Technical and Special Fees	69,100
Communication	3,524
Travel	3,282

Motor Vehicle Operation & Maintenance	2,916
Contractual Services	77,491
Supplies and Materials	182
Equipment—Additional	1,986
Fixed Charges	<u>1,656</u>
Total Other Expenses	<u>\$ 160,137</u>
Total Expenditures—015	<u><u>\$ 999,511</u></u>

Program 016—Criminal Investigations Division

Appropriation	613,387
Budget Amendments	<u>24,408</u>
Total Funds Available	<u><u>\$ 637,795</u></u>

Salaries

Division Director II (1)	57,254
Asst. Attorney General VII, General Counsel (1)	51,954
Asst. Attorney General VI, General Counsel (1)	61,883
Asst. Atty. General V, General Counsel (2)	75,913
Fiscal Administrator II (1)	41,242
Fiscal Specialist III (1)	66,159
Legal Assistant II	18,573
Administrative Aide I (1)	22,629
Stenographer, Law and Legislative (2)	<u>26,946</u>
Total Salaries	<u><u>\$ 422,553</u></u>

Additional Salary Related Expenses

Additional Assistance	(585)
Overtime	707
Miscellaneous Adjustments	42
Fringe Benefits	113,253
Other Adjustments/Turnover	<u>18,173</u>
Total Additional Expenses	<u><u>\$ 131,590</u></u>
Total Salaries & Related Expenses	<u><u>\$ 554,143</u></u>

Other Expenses

Technical and Special Fees	13,536
Communication	1,966
Travel	12,983
Motor Vehicle Operation & Maintenance	2,442

Contractual Services	37,440
Supplies and Materials	111
Equipment—Additional	12,590
Fixed Charges	<u>2,584</u>
Total Other Expenses	<u>\$ 83,652</u>
Total Expenditures—016	<u>\$ 637,795</u>

Program 017—Educational Affairs Division

Appropriation	680,445
Budget Amendments	27,520
Less Reversion	<u>-(1,461)</u>
Total Funds Available	<u>\$ 706,504</u>

Salaries

Division Director II (1)	52,032
Asst. Attorney General VII, General Counsel (1)	45,880
Asst. Attorney General VI, General Counsel (3)	131,486
Asst. Atty. General V, General Counsel (2)	72,080
Staff Attorney II	21,794
Staff Attorney I (1)	105
Administrative Aide I (1)	22,629
Office Secretary III (2)	40,387
Stenographer, Law and Legislative	<u>18,699</u>
Total Salaries	<u>\$ 405,092</u>

Additional Salary Related Expenses

Overtime	112
Miscellaneous Adjustments	16,649
Fringe Benefits	114,909
Other Adjustments/Turnover	<u>12,985</u>
Total Additional Expenses	<u>\$ 144,655</u>
Total Salaries & Related Expenses	<u>\$ 549,747</u>

Other Expenses

Technical and Special Fees	56,662
Communication	2,444
Travel	3,006
Motor Vehicle Operation & Maintenance	1,698
Contractual Services	85,952

Supplies and Materials	223
Equipment—Additional	5,163
Fixed Charges	<u>1,609</u>
Total Other Expenses	<u>\$ 156,757</u>
Total Expenditures—017	<u><u>\$ 706,504</u></u>

Program 018—Correctional Litigation Division

Appropriation	490,056
Budget Amendment	<u>20,575</u>
Total Funds Available	<u><u>\$ 510,631</u></u>

Salaries

Asst. Attorney General VII, General Counsel (1)	51,954
Asst. Attorney General VI, General Counsel (5)	192,419
Asst. Atty. General V, General Counsel	28,996
Administrative Aide I (1)	22,629
Stenographer, Law and Legislative (2)	<u>36,461</u>
Total Salaries	<u><u>\$ 332,459</u></u>

Additional Salary Related Expenses

Overtime	139
Fringe Benefits	89,809
Other Adjustments/Turnover	<u>11,557</u>
Total Additional Expenses	<u><u>\$ 101,505</u></u>
Total Salaries & Related Expenses	<u><u>\$ 433,964</u></u>

Other Expenses

Technical and Special Fees	13,021
Communication	2,543
Travel	2,627
Motor Vehicle Operation & Maintenance	2,187
Contractual Services	55,197
Supplies and Materials	291
Equipment—Additional	587
Fixed Charges	<u>214</u>
Total Other Expenses	<u><u>\$ 76,667</u></u>
Total Expenditures—018	<u><u>\$ 510,631</u></u>

Total FY 89 Expenditures	<u><u>\$ 13,947,687</u></u>

OFFICIAL OPINIONS
OF THE
ATTORNEY GENERAL
OF
MARYLAND

OPINIONS PUBLISHED IN FULL

See also page 363 for synopses of additional Opinions

ADMINISTRATIVE LAW

REGULATIONS—INCORPORATION BY REFERENCE—INTERNALLY PRODUCED HANDBOOK SETTING REGULATORY GUIDELINES MAY BE INCORPORATED BY REFERENCE.

January 28, 1988

The Honorable Martin W. Walsh, Jr.
Secretary of the Environment

You have requested our views on the legal status of a handbook on soil erosion and sediment control. Specifically, you ask whether this handbook constitutes a “regulation” under the Administrative Procedure Act and, if so, whether it must be published in full in the Maryland Register.

It is our view that the handbook is a regulation. We also conclude that the Administrator of the Division of State Documents acted well within his authority in approving the incorporation by reference of this document.

I

The Handbook

COMAR 08.05.01.10 provides as follows:

The handbook titled “1983 Maryland Standards and Specifications for Soil Erosion and Sediment Control”, is hereby incorporated by reference by the Administration, and shall serve as the official guide for erosion and sediment control principles, methods, and practices.

Plainly, the handbook has “general application” and “future effect”; in the form of “a guideline,” it has been “adopted by a unit to . . . detail or carry out a law that the unit administers.” Accordingly, it meets the definition of “regulation” in §10-101(e) of the State Government Article (“SG” Article). *See 72 Opinions of the Attorney General* 230, 233-34 (1987). *See also* Letter of Advice from Assistant Attorney General Linda H. Lamone to Stuart Y. Gordon, Counsel to the AELR Committee (March 3, 1986).

II

Incorporation by Reference

Ordinarily, the full text of each regulation is required to be published in the Maryland Register. *See* SG §§10-112, 10-113, and 10-114.

However, some components of regulations are not published in the Maryland Register, because their publication is expressly prohibited. SG §7-207 provides as follows:

(1) Unless the Committee provides otherwise, the Code of Maryland Regulations; and the Register may not reprint any text from:

- (i) the Annotated Code of Maryland;
- (ii) the Session Laws;
- (iii) the United States Code;
- (iv) the United States Statutes at Large;
- (v) the Code of Federal Regulations;
- (vi) the Federal Register; or
- (vii) any other generally available publication that the Administrator specifies.

(2) These publications may be incorporated by reference.

Many State regulations, for example, import federal definitions or requirements that are found in the United States Code or the Code of Federal Regulations. These provisions are fully as much a “regulation” under State law as any other component of a regulation. However, they are incorporated by reference, not published in full text. *See, e.g.*, COMAR 08.13.08.10A(1) (requiring submission of “all the information required to be filed by 18 C.F.R. Part 274”).

The first six enumerated items in SG §7-207 are legal materials that are published elsewhere. However, the grant of authority to the Administrator with respect to “any other generally available publication” comprehends other types of documents. For example, the Administrator has approved incorporation by reference of the components of regulations that adopt a national standard-setting organization’s highly detailed and technical code. *See, e.g.*, COMAR 05.01.07.02B (incorporating by reference an ANSI standard on hand-capped accessibility).

As a matter of statutory construction, the Administrator is free to conclude that a comparably detailed and lengthy internally produced publication, like the sediment control handbook in question, should also be incorporated by reference rather than set out in full text in the Maryland Register. Of course, the publication must be “generally available,” a requirement that can be satisfied through its availability in depository libraries. See §§23-2A-01 and 23-2A-04 of the Education Article. Indeed, unless the Maryland Register and COMAR are to become unmanagable, some discretion as to full-text reprinting of enormous technical publications is essential. The incorporation by reference of the sediment control handbook reflects a settled administrative practice—for example, the incorporation by reference of the State Health Plan adopted by the Health Resources Planning Commission. See COMAR 10.24.07. Known view, this practice is legally sound.

III

Conclusion

In sum, it is our opinion that COMAR 08.05.01.10 states a proper regulatory requirement, in conformance with the Administrative Procedure Act.

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

JACK SCHWARTZ

Chief Counsel

Opinions and Advice

Editor's Note: The preceding opinion was originally written as a letter of advice. It is published here in a slightly revised format.

ADMINISTRATIVE LAW—VOTING PROCEDURES—CHESAPEAKE BAY CRITICAL
AREA COMMISSION—COMMISSION MAY NOT SET VOTING REQUIREMENT
DIFFERENT FROM THAT IN STATUTE.

October 7, 1988

The Honorable Walter M. Baker
Senate of Maryland

You have asked for our opinion concerning the scope of the Chesapeake Bay Critical Area Commission's authority to adopt rules concerning its voting procedures. Specifically, you have asked whether the Commission has the authority to adopt a voting requirement stricter than that provided by statute.

For the reasons stated below, we conclude that the Commission may not apply a voting requirement different from the requirement set out in the statute.

I

Background

The Chesapeake Bay Critical Area Commission, created by Chapter 794 of the Laws of Maryland 1984, consists of 26 voting members appointed by the Governor. §8-1804(a) of the Natural Resources Article ("NR" Article).¹ It has the authority to develop criteria for local programs to protect the Chesapeake Bay, NR §8-1808(d); to review local programs, NR §8-1809(d); to develop programs for those local jurisdictions that fail to do so themselves, NR §8-1809(b); to review certain project approvals, NR §8-1811(b); and to enforce the subtitle, NR §8-1815.

¹ Originally, the Commission consisted of 25 voting members. The Commission gained a new member when the former Department of Economic and Community Development was bifurcated. Chapter 306, Laws of Maryland 1987. See NR §8-1804(a)(4).

The General Assembly provided for geographic and interest group diversity in the Commission's composition. NR §8-1804(a)(2) and (3). Moreover, the General Assembly sought to assure active participation by the members, through the device of a minimum attendance requirement. NR §8-1804(c)(6). *See* Opinion No. 86-024, at 4 (April 2, 1986) (unpublished). However, the original statute had no quorum or voting requirements.

Two years after the Commission was created, the General Assembly enacted Chapter 601 (House Bill 1345) of the Laws of Maryland 1986, setting quorum and voting requirements for the Commission. NR §8-1804(e)(1) provides that a quorum "consists of one member more than a majority of the full authorized membership of the Commission." Thus, the statute increased the number previously required for a quorum under the common law.² In addition, the law now provides that the Commission may not take any action unless it is supported by "a majority of the members who are present and eligible to vote." NR §8-1804(e)(4)(ii).³

This latter provision merely condifies the common law rule. *Gemeny v. Prince George's County*, 264 Md. 85, 88, 285 A.2d 602 (1972). A majority of the members present can act for the body if a quorum is present, unless the organic law which created the body provides otherwise. *Zeiler v. Central Railway Co.*, 84 Md. 304, 322-323 (1896). This rule applies to administrative bodies. *FTC v. Flotill Products, Inc.*, 389 U.S. 179, 184-85 (1967).

The legislative history of Chapter 601 reveals that it was enacted in response to complaints from those who, believing that attendance by Commission members at public hearings was inadequate, argued that if more members attended, they might have a better understanding of local concerns.⁴ Thus, the primary concern of the General Assembly was to assure that citizens affected by the decisions of the Commission be afforded more fully attended hearings at which to express their concerns.⁵ The bill's title recites that its purpose was, in

² Under the common law, a quorum consists of a simple majority of the membership. *Heiskel v. City of Baltimore*, 65 Md. 125, 149 (1886). *See* text accompanying note 8 below.

³ §NR 8-1804(e)(3) also provides that neither the Commission nor a panel of members may hold a public hearing "unless a quorum is present."

⁴ *See* Testimony of the Maryland Association of Counties, Inc. and the State of Maryland Institute of Home Builders, Inc. on Senate Bill 528 (1986 Session).

⁵ *See* Testimony of the Honorable Richard Colburn before the Environmental Matters Committee, and the Committee Report for House Bill 1345 (1986 Session).

part, to “preven[t] the Commission or a panel of the Commission from holding a public hearing unless a quorum is present.” The bill was opposed by the Commission, which argued that the requirement of a quorum at every hearing was too “cumbersome.” In addition, the Commission contended that the bill’s requirement for majority decisionmaking was “simply . . . not needed,” given the voting requirement in the Commission’s bylaws discussed in Part II below.⁶

II

The Commission’s Bylaw

The Commission adopted its bylaws shortly after its creation in 1984. Article V of the bylaws provides:

A quorum shall be a majority of all the voting members. On all issues, other than amendment of the by-laws, a simple majority of the voting members shall decide the question.

This voting requirement is stricter than that in NR §8-1804(e)(4)(ii). Under the bylaw, at least 14 votes—a majority of the 26 members entitled to vote—are necessary to approve an action. Under the statute, as few as 8 votes—a majority of the minimum possible quorum—would suffice. In forming its bylaws, the Commission obviously believed that the potential for action by so few members might frustrate the statute’s objective of broad participation in the Commission’s decisionmaking.⁷

During the 1986 Session, the Commission asked for advice concerning the effect of House Bill 1345 on its voting requirement bylaw. The Commission’s counsel concluded that the purpose of the legislation was to assure that minimum due process procedures were established and to give the Commission guidance concerning its public hearing

⁶ See Testimony of Solomon Liss and Sarah J. Taylor on House Bill 1345 and Senate Bill 528. The bill was also opposed by the Chesapeake Bay Commission, a tri-state legislative advisory group, which testified that the proposal would impose an undue burden on the membership of the Commission and would delay implementation of the critical areas programs. See Testimony of Chesapeake Bay Commission, February 19, 1986.

⁷ At the time that the bylaw was adopted, the Commission consisted of 25 members, so that application of the common law principle would have allowed a mere 7 members—a bare majority of the minimum possible quorum of 13—to act for the Commission.

hearing and decisionmaking procedures. In the view of its counsel, the Commission's stricter voting requirement was in harmony with the overall intent of the bill, to strengthen the Commission's procedural safeguards. Thus, counsel advised that the stricter voting requirement could remain in effect if the bill passed. Upon further analysis, we conclude that the bylaw may not be given effect.

III

Analysis

The Court of Appeals has held that the legislative bodies of municipalities lack power to adopt quorum or voting requirements stricter than the common law. For example, in *Heiskel v. City of Baltimore*, 65 Md. 125 (1886), the Court held that City Council could not set its quorum at two-thirds, rather than a simple majority:

The City Council is the creature of the Legislature, and if it can exercise no powers not expressly granted to it, neither can it *deprive* itself by its own action of the powers that are granted to it. We have shown before that a *majority* of the Council constituted the legal body, and competent to do every act that the Council could do. It would be an anomaly indeed if the Council itself could *deprive itself* of the right that it admittedly had.

65 Md. at 151-52 (emphasis in original).⁸

Similarly, in *Murdoch v. Strange*, 99 Md. 89 (1904), the Court held that the City Council of Annapolis could not adopt a rule treating a blank ballot as a vote in dissent when, under the common law, a blank ballot was treated as a nullity and those who cast such a ballot are considered to have acquiesced in the action of the majority. 99 Md. at 110. The Court specifically held that: "[N]o rule can be established by custom or otherwise, that will substantially affect the determination of the majority, otherwise than according to the principles of the common law." 99 Md. at 107.

⁸ See also *Borough of Florham Park v. Dept. of Health*, 146 A. 354 (N.J. 1929); *Traino v. McCoy*, 455 A.2d 602, 607 (N.J. Super. 1982); 4 McQuillan, *Municipal Corporations* §13.27, at 698 (3rd ed. 1985).

This reasoning has been extended to a situation quite similar to that at hand. In *Barnett v. City of Paterson*, 6 A. 15 (N.J. 1886), the New Jersey Supreme Court held that a city council could not, by rule, require a two-thirds majority for passage of items involving money, where, under the common law, a simple majority was all that was required.⁹

These cases stand for the proposition that common law quorum or voting requirements—and, it must follow, statutory requirements that codify or change the common law—establish not only minimum standards, but also maximum ones. The standard establishes the power of the municipal body to act or decide once that standard is met; the body may not, by rule, divest itself of that power.

This background underscores the General Assembly's decision in 1986 to insert in the Commission's governing statute the common law decisional principle that a simple majority of the quorum controls. Administrative agencies, like municipal corporations, derive their power from the Legislature and may not act in excess of a statutory grant. *Annapolis v. Annapolis Waterfront Co.*, 284 Md. 383, 394, 396 A.2d 1080 (1979). While the Commission has the power to adopt rules of procedure governing its conduct [NR §8-1806], it may not contravene the statute—in this instance, by adopting a more rigorous majority requirement.

We believe that the Commission's bylaw was a good-faith effort to fashion a consensus-building tool in harmony with the intent of the original statute. The Commission retained the bylaw in the belief that the General Assembly's 1986 enactment merely provided a statutory minimum. For the reasons stated above, however, the Commission's bylaw may no longer be applied.¹⁰

⁹ But see 62 C.J.S. *Municipal Corporations* §404a, at 764 (1949), which indicates that a municipal body may determine for itself the number of votes required to elect an officer or pass a particular measure. The cases cited, however, involve election of officers and procedural rule changes and not the passage of ordinances or other measures affecting the public.

¹⁰ We are advised by Commission Chairman Liss that the Commission has operated with a remarkable degree of consensus, dissenting votes being non-existent or few in number. Indeed, we understand that in dozens of Commission meetings since the bylaw was adopted, no vote of the Commission has succeeded or failed by a margin that called the bylaw into question, save for one vote on a matter that became moot soon after the vote was taken.

IV

Conclusion

In summary, it is our opinion that the Chesapeake Bay Critical Area Commission may not apply a bylaw that varies from the voting requirement in NR §8-1804(e)(4)(ii).

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

KATHRYN M. ROWE, *Assistant Attorney General*

JACK SCHWARTZ

Chief Counsel

Opinions & Advice

AGRICULTURE

PEST CONTROL—GYPSY MOTH CONTROL PROGRAM—PESTICIDES—
SECRETARY OF AGRICULTURE HAS BROAD AUTHORITY TO DETERMINE
NATURE AND DETAILS OF PROGRAM, INCLUDING PESTICIDE USE.

December 2, 1988

The Honorable Joan B. Pitkin
The Honorable William C. Bevan
Maryland House of Delegates

You have requested our opinion on a series of questions pertaining to the State gypsy moth control program. You ask:

1. Does the State or a county have legal authority to spray for gypsy moth control?
2. Does the State have the discretionary authority, once it decides to spray, to alter its course and not spray at all?
3. Are there any federal or State laws that govern how or when citizens are to be notified about spraying?
4. Do federal or State laws forbid or restrict the use of the pesticide Dimilin?
5. Is the use of Dimilin to control the gypsy moth banned in any state?
6. Is Dimilin's use consistent with State laws protecting the Chesapeake Bay?
7. When spraying, is the State or a county required to post warning signs and pass out the consumer information required by §5-208 of the Agriculture Article ("AG" Article), the pesticide "right-to-know" law?

Additionally, you have asked the following questions regarding the rights of a citizen when the State decides to spray:

8. Do any federal or State laws give a citizen the right not to have his or her property sprayed?

9. Do any State laws protect the privacy of an individual who protests to the Department of Agriculture about the use of Dimilin on his or her property?

We recognize that the gypsy moth control program, particularly its use of Dimilin, is controversial. An opinion of the Attorney General cannot appropriately address any of the policy questions concerning the program. Our legal analysis leads us to conclude as follows:

1. The State and counties have the authority to spray for gypsy moth control.

2. The Secretary of Agriculture has broad discretionary authority over the details of the gypsy moth control program and may alter any program requirement. Accordingly, the Secretary may rescind his initial decision to spray an area.

3. No federal or State law governs how or when citizens are to be notified of any proposed spraying.

4. Both federal and State law allow, but restrict, the use of Dimilin.

5. The use of Dimilin to control gypsy moths is not banned in any state.

6. The Department of Agriculture's use of Dimilin to control the gypsy moth is consistent with State laws protecting the Chesapeake Bay.

7. When spraying for gypsy moth control, neither the State nor a county is required to distribute pesticide information or to post a sign pursuant to the "right-to-know" law.

8. If the Secretary of Agriculture finds it necessary to do so, the Secretary may spray for gypsy moth control even without a landowner's consent.

9. The Maryland Public Information Act generally requires disclosure of letters to the Department of Agriculture objecting to the use of Dimilin or any pesticide. However, certain personal information in a letter of this kind would be protected from disclosure.

I

The Gypsy Moth Problem

The gypsy moth is responsible nationwide for extensive defoliation of valuable forest and shade trees.¹ This forest pest, native to Europe, was introduced to North America in 1869 by a naturalist, Leopold Trouvelot, who brought them to his laboratory in Medford, Massachusetts, for silkworm experiments. However, the insect accidentally escaped and its descendants arrived in Maryland in 1971. M. Gerardi and J. Grimms, *The History, Biology, Damage and Control of the Gypsy Moth* 21 (1979).

The moth is a public nuisance. "Public nuisances . . . [are] those nuisances which have a common effect and produce a common damage . . . [and include] those which prejudice public health or comfort . . ." *Burley v. City of Annapolis*, 182 Md. 307, 312, 34 A.2d 603 (1943). When wooded areas are infested with larvae that move up and down trees during the day, trees are soon defoliated and normally cooler wooded areas are warmed. These environmental changes may cause snakes and other animals to be driven into populated areas, and the unpleasant odor of dying larvae often permeates a defoliated area. United States Department of Agriculture, *The Gypsy Moth: Research Toward Integrated Pest Management* 19 (1981) ("*Gypsy Moth Research*").

Federal, state, and local control efforts include quarantines and the use of pesticides.² According to the Maryland Department of Agriculture, Maryland's 1988 gypsy moth infestation was so severe that only about 60% of the infested area, or 167,000 acres, could be treated. Many urban areas, such as portions of Baltimore City, came

¹ Oak, apple, American beech, birch, hawthorn, linden, sweetgum, and willow are target trees for the gypsy moth. Trees weaken and die after repeated defoliations.

² A federal gypsy moth quarantine, which applies to all northeastern states and other infested areas, is monitored by the U.S. Department of Agriculture. *Gypsy Moth Research* at 19, 33. The Maryland Department of Agriculture has determined that the gypsy moth is a dangerously injurious plant pest and has established a State quarantine to restrict its spread. State Department of Agriculture, *Gypsy Moth Quarantine* (1972).

under heavy gypsy moth attack. Using helicopters or fixed wing aircraft, the Department of Agriculture and other cooperating State and local agencies conducted a suppression program by applying two pesticides: Dimilin, over heavily infested forested or populated areas; and B.t., near environmentally sensitive areas like the Chesapeake Bay and its tributaries.³

Before spraying, the Department informs the general public of designated treatment areas: neighborhoods are divided into proposed spray blocks, marked with aerial balloons, and landowners are notified of estimated spray dates by mail. The Department drops the property of any objector from a spray block. Its policy on this subject states:

Removal of the property of an objector is accompanied by at least a 100 foot buffer zone of no-spray area between it and the remainder of the proposed spray block, unless the property owner waives that provision. Thus, the accommodation of an objector usually results in other properties, previously notified of the State's intent to treat, being dropped. . . . In this case a reasonable effort is made to inform the landowners so affected about the change in status. This is done usually by recording an announcement of changes which is available via the toll-free information number.

Maryland Department of Agriculture and U.S. Department of Agriculture Forest Service, *Environmental Assessment, 1988 Cooperative Gypsy Moth Suppression Project* 42-43 (March 1988) ("Ag. Dept. E.A. 1988")⁴

³ The pesticide B.t. (*Bacillus thuringiensis*) consists of naturally occurring bacteria that kill gypsy moth caterpillars. B.t. does not affect as many groups of arthropods (e.g. insects, crustaceans) as Dimilin, but Dimilin is more effective against the gypsy moth. Maryland Department of Agriculture, *Gypsy Moth Spray Notification* at 2 (undated). See *Farm Chemicals Handbook* 88 at C-24 (74th ed. 1988) (B.t. is "[h]armless to humans, animals, and useful insects; safe for the environment"). B.t. specifically kills immature insects in the Order Lepidoptera (butterflies and moths).

⁴ The details of the Maryland gypsy moth program are reported fully in this environmental assessment, which was prepared as part of the Forest Service's Final Environmental Impact Statement for federal funding for states in a nationwide gypsy moth suppression program. The environmental assessment describes the plan of action; alternative plans; affected environment; environmental and human health risks; and public involvement and notification.

Many residents who want spraying are dropped from spray blocks because a neighbor objects. Given that a 100-foot buffer zone is maintained around each objector's property, a few strategically located objectors can make it impossible for the Department to spray a block. Some residents ask for the names and addresses of objectors in an attempt to change their minds. However, since the Department has to act within a relatively short period to kill the most gypsy moth caterpillars, it lacks flexibility to change its schedule to accommodate those objectors who do change their minds and who then want spraying.⁵

II

Authority For Gypsy Moth Control Program

A. *Secretary of Agriculture*

The Secretary of Agriculture has broad authority to conduct a program to manage or control the gypsy moth. The Secretary has the power to develop and to direct the details of any program "to control, retard or eradicate dangerously injurious plant pests. . . ." AG §5-304.⁶ Also, the Secretary may establish and rescind quarantines against plant pests or infected plants and direct the movement of plant or nonplant materials from quarantined areas. AG §5-304(2) and (3).

The Secretary is expressly empowered to use aircraft: "If the Secretary determines that an infestation, infection, or disease exists, he may control or retard its spread by aircraft dissemination of pesticides, notwithstanding any other provision of law." AG §5-305(b). Furthermore, when aircraft are used, the Secretary may expend funds appropriated for pest control "for use in controlling incipient, emergency, or persistent insect, fungus, or disease outbreaks which the Secretary determines require immediate elimination as a menace

⁵ The Department must apply pesticides by aircraft at just the right time to kill the insects. Wind speeds must be between 2 to 10 mph; the temperature must be below 80 degrees fahrenheit, but high enough to ensure the flow of pesticide; tree foliage must be dry with no threat of rain for 4 to 6 hours following application; oak foliage development must be from 15% to 75%; and an effective application must be made after egg hatch and larvae are present. Ag. Dept. E. A. 1988 at 22.

⁶ The Secretary has determined that the gypsy moth is a dangerously injurious plant pest. See note 2 above. See generally Ag. Dept. E. A. 1988 at 1-5.

to the economic welfare and health of the people of the State.” AG §5-305(c). Additionally, “[h]e may employ personnel and execute work undertaken pursuant to this section by contract or open account as he deems to be in the best interest of the State.” AG §5-305(d). Finally, “[t]he Secretary may cooperate with any other state or federal agency in determining the necessity for and conducting aircraft dissemination of pesticides.” AG §5-305(e).

These provisions vest in the Secretary full authority to determine where and how the gypsy moth control program is to be carried out, including such details as the kind of pesticide to be used, the use of aircraft, the areas of the State to be sprayed, and the means of notification when spraying is done.⁷

B. *Local Government*

The Department of Agriculture gives counties information about the gypsy moth and its control. Although counties and municipalities do not have express authority to spray pesticides for gypsy moth control, nevertheless this authority exists as an aspect of their broad authority to prevent and remove nuisances. *Adams v. Commissioners of Trappe*, 204 Md. 165, 174, 102 A.2d 830 (1954) (“[T]he Legislature may delegate to administrative officers the authority to determine whether certain things constitute public nuisances, with the power to abate them . . .”). See Article 23B, §22; Article 25, §3(n); Article 25A, §5J; Article 25B, §13.⁸

III

The Pesticide Dimilin

Dimilin is one of the pesticides that the Department of Agriculture uses to control the gypsy moth. Under federal and State law, any

⁷ The Secretary’s gypsy moth program receives technical or financial support from federal, State, and local governments. In 1987 and 1988, both federal and State funds were appropriated for the program. Chapter 121, Laws of Maryland 1987; Chapter 10, Laws of Maryland 1988.

⁸ At present no counties have spray programs; all rely on the State program. Information supplied by Dr. Charles Puffinberger, Assistant Secretary, Maryland Department of Agriculture. However, if a county were to adopt a gypsy moth control program, it would have broad discretionary authority to determine any program requirement, such as when spraying is to be done and when residents are to be notified.

pesticide must be registered with the U.S. Environmental Protection Agency and the Maryland Department of Agriculture before it can be sold or used in Maryland. *See* Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §136 *et seq.*; AG §5-105. Dimilin is so registered.

Every registered pesticide has a federally approved label that defines and restricts its use. Dimilin's label states that it can be used for gypsy moth control: "Dimilin 25W Insecticide is effective against the larval stages of the gypsy moth." Aerial application is authorized at recommended rates. Dimilin is recommended for use in state gypsy moth quarantine programs like Maryland's.

Dimilin's label also restricts and directs its use and handling.⁹ For example, the label states that it is a "restricted use pesticide"; this means that it may only be sold to, or applied by, a certified applicator or a person under that applicator's direct supervision.¹⁰ The label warns of human health risks: "Hazardous to Humans. Avoid contact with skin." It also warns of environmental hazards: "Do not apply directly to water or wetlands, except under the forest canopy when used to control forest pests."

Thus, label instructions restrict the use of Dimilin; however, gypsy moth use is allowed. No other State or federal law prohibits this use. Moreover, we are informed by the Forest Service of the U.S. Department of Agriculture that Dimilin is not banned in any other state.

Additionally, the Department of Agriculture's use of Dimilin does not violate any State law to protect the environment or the Chesapeake Bay. Since Dimilin may be toxic to certain aquatic and invertebrate animals, it is the Department's policy not to spray near

⁹ It is a violation of both federal and State law for a person to use any pesticide, including Dimilin, in violation of label directions. 7 U.S.C. §138; COMAR 15.05.01.01B(2). *See generally* University of Maryland, *Maryland Pesticide Applicators Training Series Core Manual* 14-21 (1987).

¹⁰ A certified applicator is a person who is trained and certified by the Department of Agriculture to handle pesticides. AG §5-207. Under the Department's gypsy moth program, Dimilin is applied by a licensed firm and under the direct supervision of a pesticide applicator certified in pest control Category II or Category X (regulatory pest control). Information supplied by Robert Tichenor, Chief, Forest Pest Management, Maryland Department of Agriculture.

lakes, ponds, rivers, or the Bay.¹¹ Rather, when spraying near these areas, the Department uses B.t., which is reported to be non-toxic to aquatic life and will not harm water quality.

This policy is consistent with the Chesapeake Bay Critical Area Protection Program. See §§8-1801 through 8-1816 of the Natural Resources Article. See also COMAR 14.15 (regulations of Chesapeake Bay Critical Area Commission). In fact, laws protecting the Bay presumably allow pesticides to be used in the Critical Area. COMAR 14.15.01.01B(2) and (28), 14.15.05, and 14.15.06. In any event, the Department's policy is to avoid this area and to minimize harm to water quality and animal habitats.¹²

In summary, federal and State law allow Dimilin to be used for Maryland's gypsy moth control program. This use in itself does not violate any law to protect the Bay.¹³

IV

Pesticide Warning Signs and Customer Information

You asked whether an agency of the State or a county is required to provide the public with consumer information or to post warning signs in connection with the gypsy moth program. Specifically, you

¹¹ The Department does not use Dimilin in the 1,000 foot "Initial Planning area" of the Bay Critical Area, and it maintains a 100 foot no-spray buffer zone if it determines that it is necessary to use Dimilin near any lake, river, or pond. Ag. Dept. E.A. 1988, at 24.

¹² Even though it does not apply Dimilin over water, the Department has contracted with the University of Maryland to monitor certain Maryland water sources for Dimilin. In addition, before spraying any area, Department officials consult the United States Fish and Wildlife Service, the State Department of Natural Resources, and private conservation organizations for advice on avoiding pesticide contamination to rare or endangered species. Ag. Dept. E.A. 1988 at 24 and 25.

¹³ The Department sprays trees with Dimilin but does not spray it over water areas like the Bay and its tributaries. The only way that Dimilin conceivably could enter the Bay would be from nonpoint source runoff. In any case, this runoff would not violate the Federal Water Pollution Control Act, 33 U.S.C. §1251 *et seq.*, since a pesticide pollutant from a nonpoint source is not subject to control under the Act. *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 371 (10th Cir. 1979). However, it is possible that a violation of State law could be found if significant pesticide runoff is found in the Bay as a result of the Department's spraying. See COMAR 26.08.02 (regulations on water pollution).

question whether AG §5-208(a) requires a government agency to pass out consumer information to each person whose property is sprayed. AG §5-208(a) provides as follows:

(a) When a pesticide is applied, or at the time a customer enters into a contract with a licensee for pest control, *a licensee* shall provide a customer with the following written information:

- (1) Name of licensee;
- (2) Maryland pesticide business license number;
- (3) Telephone number of licensee;
- (4) Common name of pesticide or active ingredient applied;
- (5) Pertinent safety information, as determined by the Department, including health risks for humans and animals, about pesticide in the end-use dilution applied;
- (6) Maryland Poison Center telephone number; and
- (7) Any other information required by the Department.

(Emphasis added.)

The customer information requirement in this section applies only to a “licensee” — that is, a private business entity doing pest control work; it does not apply to a government agency doing the same work. *Compare* AG §5-207(e) and (f) *with* AG §5-207(i) (a government agency is not a “licensee” but a “permittee,” a holder of a public agency permit). *See also* COMAR 15.05.01.11 (regulations requiring licensees to provide pesticide information to customers).

You also question whether AG §5-208(c)(1) requires a government agency to post warning signs on a landowner’s property each time it sprays against the gypsy moth.¹⁴ By its terms, AG §5-208(c)(1) only applies when a government agency is “applying a pesticide to a lawn or exterior landscape plants.” The Department of Agriculture has determined, and we agree, that this requirement does not govern gypsy moth spraying, because pesticides are applied only to forest trees

¹⁴ If this were required, State and local governments would be responsible for posting over 100,000 signs on treated properties. Information supplied by Robert Tichenor, Chief, Forest Pest Management, Maryland Department of Agriculture.

or to shade trees in residential areas and not directly to lawns or to landscape plants.¹⁵ Thus, it is our view that the State or a county government may do gypsy moth control work without providing customer information or posting a warning sign.¹⁶

V

Objections to Gypsy Moth Spraying

The current gypsy moth suppression program is voluntary; the Department will remove any objector's property from a spray block with a surrounding 100-foot buffer to reduce possible pesticide drift from nearby areas.¹⁷ However, it is our opinion that the law allows the Department to spray over the objection of residents, if the Secretary were to make that policy choice.

That the gypsy moth is a pest in need of control is clear. If the gypsy moth is allowed to destroy many of the State's forest and shade trees, obvious environmental and economic consequences will follow, including the loss of enjoyment and value of real estate; destruction of recreational areas; harm to the lumber industry; and the destruction of animal habitats. Ag. Dept. E.A. 1988 at 7. After the Department locates a gypsy moth infestation, it determines which areas will be sprayed. Of course, if enough residents protest and are able to

¹⁵ When doing pest control work, both private pest control and public agency applicators are to be certified in the appropriate category. COMAR 15.05.01.04. When doing gypsy moth control, the State contracts with a pest control firm licensed in pest control Category II (Forest Pest Control); when applying a pesticide to a lawn or shrub, an applicator must hold a pest control Category III (Ornamental or Turf) certificate (license). The Department of Agriculture has determined that the sign posting requirement only applies to a person or agency that holds pest control Category III license or permit and not to one that holds a license or permit in Category II. COMAR 15.05.01.10.

¹⁶ The Department takes various steps to notify landowners about gypsy moth spraying. See Ag. Dept. E.A. 1988 at 40-43. In 1988, over 90,000 residents and property owners were notified. Information supplied by Robert Tichenor, Chief, Forest Pest Management, Maryland Department of Agriculture.

¹⁷ Ag. Dept. E.A. 1988 at 26.

stop these efforts, gypsy moth control would come to a halt and this pest would spread unchecked into nearby areas.¹⁸

The Secretary of Agriculture has been given broad statutory to "enter any ... private land ... to inspect ... or destroy ... dangerously injurious plant pests," and the owner may not "deny access [or] offer any resistance to" these activities. This authority is found in AG §5-306:

(a) To accomplish the purpose of this subtitle [plant pest control], the Secretary may enter any public or private land or property, vehicle, vessel or aircraft in the State to inspect, destroy, treat, or experiment with dangerously injurious plant pests. It is unlawful to deny access to, offer any resistance to, hinder, misrepresent or conceal facts from the Secretary or his agent in the performance of their duties.

(b) If the Secretary determines that any dangerously injurious plant pest can be controlled without destroying the plant, then he shall order it treated. If the person notified fails to comply with the order, the Secretary shall apply the appropriate control measures and the owner shall pay the cost. If the owner refuses to pay the cost, it shall be collected as provided in §5-307. The Secretary may treat any suspicious plant found in dangerous proximity to those infested or infected in order to prevent dissemination.¹⁹

Of course, the Secretary's authority to inspect private property is subject to the requirements of the Fourth Amendment concerning searches and seizures. The Department inspects private property for the gypsy moth. After this is done, it knows where to spray. Although few, if any, residents object, if one does, the Secretary must obtain

¹⁸ Moths from the property of a person who has an infestation are likely to spread to adjoining properties. A person does not have the right to use his property to harbor a public nuisance nor to create a nuisance to adjoining property owners. *Burley v. City of Annapolis*, 182 Md. 307, 34 A.2d 603 (1943); *Toy v. Atlantic Gulf & Pacific Co.*, 176 Md. 197, 4 A.2d 757 (1939).

¹⁹ Because this statute authorizes government authorities to enter on private property to destroy any dangerously injurious plant pest, it affords a defense to a charge of trespass. See *Heinze v. Murphy*, 180 Md. 423, 433, 24 A.2d 917 (1942) ("It is not a trespass for an officer of the law to go upon another's premises in the line of his duty..."). See also *Restatement (Second) Torts* §211 (1986) (legislatively created authority carries with it the privilege of government authorities to enter on private property to perform a duty or responsibility, if reasonably necessary).

a warrant to inspect those places where a person has a “constitutionally protected reasonable expectation of privacy.” *Katz v. United States*, 389 U.S. 347, 360 (1967). This would include a person’s private home, vehicle, vessel, or aircraft, but would not include open areas on private property where there is no reasonable expectation of privacy. *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986); *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 312 (1978); *Camara v. Municipal Court*, 387 U.S. 523 (1963). The application of pesticides on private property does not involve a search; hence, any person who objects cannot claim a violation of any right protected by the Fourth Amendment. See *California v. Ciraolo*, 476 U.S. 207 (1986); *Dow Chemical Co. v. United States*, 467 U.S. 227.

VI

Letters to the Department About Gypsy Moth Spraying

You have asked whether any State laws protect the privacy of those who express their views to the Department about its gypsy moth program.²⁰ Before each spraying season, the Department asks residents for their views. In 1988, it received approximately a thousand letters, both for and against spraying; some expressed concern about health hazards caused by Dimilin and B.t.²¹ Since spraying is voluntary, any protester’s land is excluded. However, when this happens, a neighbor who wants spraying might be excluded. And with enough protesters, whole residential areas have been denied spraying.²² After receiving protest letters, the Department receives letters from angry neighbors demanding to know who protested.

²⁰ Part of your request involves an actual incident between the Department and a person who opposed spraying with Dimilin. We would be pleased to explore this particular matter further if you were able to supply us with the identity of the person involved.

²¹ The Department take precautions to reduce pesticide exposure to residents, who are advised to stay indoors during spraying. Most spraying is done when residents are indoors. Poison Control Centers are notified of spraying and are given clinical and toxicological information on Dimilin and B.t. in case of an accident. Spraying is done to the tree foliage canopy, which drastically reduces exposure to humans. Agricultural areas, including gardens and animal grazing areas, are avoided. Ag. Dept. E.A. at 26.

²² The aircraft cannot spray in a zig-zag fashion to avoid some properties while spraying others.

Any letters the Department receives are subject to the Maryland Public Information Act ("PIA"), codified at §§10-601 through 10-628 of the State Government Article ("SG" Article). The PIA affords "access to information about the officers of government and the official actions of public officials and employees." SG §10-612(a). To accomplish the widest possible disclosure, the PIA requires that, "[e]xcept as otherwise provided by law, a custodian shall permit a person or government unit to inspect any public record at any reasonable time." SG §10-613(a).²³ The term "public record" means any documentary material — expressly including correspondence — that is made or received by a unit of State government in connection with its conduct of public business. SG §10-611(f). Thus, the PIA applies to letters received by the Department about the gypsy moth program. Unless they are specifically exempt from PIA disclosure, they must be made available to anyone who requests them. See *Superintendent, Maryland State Police v. Henschen*, 278 Md. 468, 369 A.2d 558 (1977).

Under SG §10-615 of the PIA, public records must be withheld from disclosure if (i) the information they contain is made privileged or confidential by law, or (ii) inspection of a public record would be contrary to State or federal law (or a court rule or order). Even if a person asks that his or her letter be kept confidential, these exemptions do not apply to letters to the Department from persons who merely express their views on gypsy moth spraying.²⁴ "Privileged or confidential" records are those protected by common law or statutory privileges; none applies to the letters you have questioned. See 66 *Opinions of the Attorney General* 98, 103 (1981); 64 *Opinions of the Attorney General* 236, 237 (1979). Furthermore, no federal or State law (or court order or rule) prevents their inspection.

The PIA also lists certain types of records that must be withheld from public disclosure. SG §§10-616 and 10-617. While letters to the Department on the gypsy moth program generally do not fall within this list of protected records, SG §10-617(b) might apply to prevent

²³ The "custodian" of a public record is the governmental officer or employee who is responsible for keeping the public record or who actually has physical custody and control of the record. SG §10-611(c).

²⁴ We assume that such a letter contains only the author's view on gypsy moth spraying and no other information that would require the letter to be withheld from disclosure.

disclosure if a letter states any medical or psychological information about an individual.²⁵ However, this exemption would not prevent access to the entire letter; instead, it would require deletion of medical or psychological information before the letter is released.

VII

Conclusion

In summary, it is our opinion that the Secretary of Agriculture has broad authority to determine the requirements of any gypsy moth control program, including the kind of pesticide to be used and where and when it is to be sprayed. The Secretary's conduct of the program has been consistent with federal and State laws on the use of pesticides and on environmental protection.

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

CRAIG A. NIELSEN, *Assistant Attorney General*

JACK SCHWARTZ

Chief Counsel

Opinions & Advice

²⁵ This could happen if the author cites medical or psychological reasons for objecting to spraying.

ALCOHOLIC BEVERAGES

LICENSES—CLASS D LICENSE DOES NOT AUTHORIZE LICENSEE TO
OPERATE BAR IN ONE BUILDING AND PACKAGE GOODS STORE IN
ANOTHER BUILDING ON SAME TRACT OF LAND.

January 26, 1988

The Honorable John N. Bambacus
Senate Of Maryland

On behalf of the Board of Alcoholic Beverages License Commissioners of Allegany County, you have requested our opinion on whether a person who holds a Class D beer, wine, and liquor license may operate a bar and restaurant in one building and a package goods store in an adjacent building to be built on the same tract of land, which the licensee owns.

For the reasons given below, it is our opinion that the Class D license does not authorize the operation of a package goods store and a bar and restaurant in the manner contemplated.

I

Background

The particular licensee whose situation gives rise to your request operates a bar and restaurant as an adjunct of a motel. The licensee wishes to add a package goods store in a separate building, which would be located across a driveway from the bar and restaurant. The driveway is used to provide services to some of the motel's meeting rooms and, because of the layout of the site, is necessary for that purpose.

Article 2B, §21 provides for the issuance of Class D beer, wine, and liquor licenses to taverns and similar businesses. A Class D license "authorizes the holder to keep for sale and sell all alcoholic beverages at retail at the place described in it for consumption on the premises or elsewhere." Thus, a Class D licensee may sell package goods, as well as operate a bar. Your question is whether the package goods element of a business operated under a Class D beer, wine and liquor license must be conducted within the same building that houses the

bar element of the business, or may be conducted in an adjacent building, so long as the building housing the package goods element is situated on the same lot as the building housing the bar element.

II

“Place” of Single License

In our view, the reference in §21(a) to “the place described” in a Class D license is intended both as a definition of what the license authorizes and as a limitation on the scope of that authorization. That is, the license is not a blanket permit to carry on the business of selling alcoholic beverages at any location the licensee may at any time choose. Instead, the license pertains only to the designated location, and all sales of alcoholic beverages, whether as package goods or in the operation of the bar, must be conducted at the place to which the license applies.

It has been suggested that the “place described” in the license is the equivalent of the business’s “premises” and that, for this purpose, the term “premises” has the meaning given to it in §120(h). That provision prohibits drinking or displaying “in any bar . . . or any other licensed place any alcoholic beverages other than those which may lawfully be sold by the licensee therein” and requires the posting of warning signs on the “premises” of those licensed to sell only beer and wine. And, “[f]or the purposes of this section, the word ‘premises’ shall be construed to include any building, parking lot, terrace or grounds which form an integral part of the said licensed premises.” Applying that definition to §21(a) might well authorize the licensee to conduct package goods sales in a building separate from that housing the licensee’s bar.¹ However, we do not think that the definition of “premises” in §120(h) is determinative of what constitutes the “place” to which a license pertains under §21(a).

Section 120(h) specifies that it defines the word “premises” only “[f]or the purposes of this section.” Moreover, the word does not have a single, immutable meaning: “The word ‘premises’ has a varied

¹ It might be concluded that the separate building proposed to be constructed would not “form an integral part of the said licensed premises”—that is, the bar and restaurant for which the license was originally issued. In that case, the separate building would not be included in the “premises” of the bar and restaurant and alcoholic beverages could not be sold in the separate building under the Class D license. In view of our conclusion below, however, we need not address this issue.

meaning depending upon its context and the object to which it is applied.” *Jackson v. Birgfeld*, 189 Md. 552, 554, 56 A.2d 793 (1948). In the context of the prohibition in §120(h), a broad construction of the word is clearly appropriate and, indeed, necessary to ensure that the prohibition will be fully effective. We do not believe that an equally broad construction of the word “place” is likewise appropriate in the context of §21(a), however. To the contrary, we believe that such a construction would be inconsistent with legislative policy concerning the location of alcoholic beverages businesses.

Several provisions of the alcoholic beverages laws reflect the General Assembly’s concern with ensuring that alcoholic businesses would be conducted at locations suitable to those businesses. For example, §45(d)(1) vests the Allegany County Board of Alcoholic Beverage License Commissioners with discretion to deny a license “when the place for which the license is applied for is not a proper one with reference to the public peace and general welfare of the neighborhood or to the character of its inhabitants”

Moreover, the community that would be affected by the establishment of an alcoholic beverages business is to be accurately informed as to the location for which such a business is proposed, and the community’s view of the suitability of the location is to be considered in determining whether to grant or deny the license. The license application must include a “certificate signed by at least ten citizens who are owners of real estate and registered voters of the precinct in which the business is to be conducted” stating, among other things, that they “are familiar with the premises upon which the proposed business is to be conducted, and that they believe that the premises are suitable for the conduct of the business of a retail dealer [in] alcoholic beverages.” §56(18)(a). Before granting a license, the Allegany County Board of Alcoholic Beverages License Commissioners must publish notice of the application in the town or city nearest to the proposed place of business, and the notice must specify the location of the place of business. §60(c).

Clearly, the suitability of a proposed alcoholic beverages business that is to be situated on a large site may depend in part on the precise location of the business upon that site—if, for example, one portion of the site adjoins an existing commercial area, while another portion adjoins an existing residential area. Hence, we think that the restriction of alcoholic beverages sales to the place described in the license is intended to ensure that the business actually conducted will be that which was found to be suitable. That is, we believe that a license granted for a business to be conducted on one portion of a large tract would not authorize the conduct of an alcoholic beverages

business on a different portion of the tract instead.

The description of the place where a licensee will carry on the business is supplied by the licensee in applying for the license. Section 56 requires that the license application include a statement of "[t]he particular place for which a license is desired, designating the same by street and number if practicable; if not, by such other apt description as definitely locates it, and also a description of the portion of the building in which the business will be conducted" Article 2B, §56(7). The reference in §21 to "the place described" in a license must be read in conjunction with this provision in §56. *In re Criminal Investigation No. 1-162*, 307 Md. 674, 690, 516 A.2d 976 (1986). Doing so makes it apparent, in our view, that the authority granted by a Class D license to sell alcoholic beverages "at the place described in it" is intended to authorize sales only at the "*particular place*," including the "description of the portion of the building in which the business will be conducted," supplied in the license application.

Where a Class D beer, wine, and liquor licensee undertakes to separate the business's package goods sales from its bar and relocate the package goods sales into a separate building, the potential impact on the community may well be even greater than the impact of relocating the entire operation from one portion of the property to another. The relocation and expansion of the package goods sales contemplated here would in effect amount to the establishment of a second business under the auspices of the original license. In view of the legislative concern for locating alcoholic beverages businesses appropriately in relation to their surrounding communities, we do not think that the General Assembly intended to authorize such a result.

This is not to say that we believe §21(a) was intended to prohibit any licensee from ever extending the area occupied by the business. Such a prohibition would ignore the commonly recognized fact that, with the passage of time, any business may need to alter or expand its facilities and would prevent alcoholic beverages licensees from ever responding appropriately to changes in their needs. We do not think that these provisions should be read so rigidly as thus to straitjacket alcoholic beverages licensees. *See Comptroller v. John C. Louis Co.*, 285 Md. 527, 539, 404 A.2d 1045 (1979) (statutes should be construed to avoid results inconsistent with common sense). Hence, we think that minor expansions reasonably necessary for the business purposes of the licensed business should not be regarded as amounting to the conduct of the business in a place other than that described in the license, so long as the business continues to be conducted in the

building described in the license.²

III

Separate Licenses on Same Property

In our view, a separate package goods store could be established on the same property as the bar and restaurant, if a separate Class A bar, wine, and liquor license were issued for it.³ Although §41(a) prohibits the issuance of more than one license for the same premises, we do not believe that this provision prohibits licensure of two separate businesses in separate buildings on the same property.

In 21 *Opinions on the Attorney General* 106 (1936), the Attorney General concluded that licenses might be issued for a tavern and a night club located in the same building, but on separate floors. The establishments had separate entrances, had no internal connection with each other, and were under different ownership and management. Under those circumstances, the Attorney General concluded that the two establishments constituted different "premises" for the purpose of §41(a).⁴ In the Attorney General's view, "the prohibition against two licenses for the same premises was designed to prevent two licenses for the identical location described therein, . . . but was not intended to prevent the issuance of two licenses for the same building, if the establishments were physically separated." 21 *Opinions of the Attorney General* at 107.

We think that the 1936 opinion correctly construed the word "premises" for the purposes of §41(a). Hence, we think that separate

² We understand that the licensee has suggested that the proposed package goods store would be in the same building as the bar and restaurant if the roof of the new structure were extended to meet the roof of the existing structure. In our view, that expedient will not serve. The two structures would nonetheless be separate and distinct, with no common wall, common entrance, nor interior access from one to the other, and would continue to be separated by a driveway in regular use. Under these circumstances, we do not think that they can be regarded as a single building, merely because the roof of one meets the roof of the other.

³ However, a license for the package goods store may not be issued to the person or for the use of the partnership, corporation, or unincorporated association that holds the license for the bar and restaurant. §41(a).

⁴ The prohibition was then codified at Article 2B, §21, but was substantially identical to present §41(a). See Chapter 2, Laws of Maryland 1933 sec. 1 at 35.

buildings on a single tract of land would clearly constitute separate and distinct premises for which licenses could be issued.

Moreover, we think that this view of the matter comports best with one of the underlying purposes of the alcoholic beverages laws: to prevent the concentration of the alcoholic beverages business in the hands of a few. *Baltimore Retail Liquor Package Stores Association v. Board of License Commissioners*, 171 Md. 426, 433-34, 189 A. 209 (1937).⁵ Construing §21(a) to authorize a Class D licensee to establish package goods operations separate from its bar would tend to undermine that policy. In contrast, construing §41(a) to permit the issuance of separate licenses for a package goods operation and a bar in separate buildings on the same tract of land would be consistent with that policy. Accordingly, to give full effect to both §21(a) and §41(a), we think that §21(a) must be construed as authorizing the conduct of package goods sales by a Class D licensee only in the same building as the bar; §41(a) should be construed as authorizing the establishment of separate package goods and bar operations under separate licenses. *Kaczorowski v. City of Baltimore*, 309 Md. 505, 516-17, 525 A.2d 628 (1987).

IV

Conclusion

In summary, it is our opinion that a Class D beer, wine, and liquor license does not authorize its holder to operate a bar and restaurant in one building and a package goods store in an adjacent building to be built on the same tract of land. However, a different licensee may operate a package goods store in a different building on the same tract of land.

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Opinions & Advice

⁵ That purpose is reflected in other provisions of Article 2B, as well as in §41(a). For example, a license applicant must furnish statements that the applicant has no pecuniary interest in any other licensed establishment and that no one other than the applicant has a pecuniary interest in the establishment for which the license is sought. Article 2B, §56(12) and (15).

ALCOHOLIC BEVERAGES—MONTGOMERY COUNTY BOARD OF LICENSE COMMISSIONERS — ADMINISTRATIVE SANCTIONS — WITH ONE EXCEPTION, BOARD HAS AUTHORITY TO IMPOSE ADMINISTRATIVE SANCTIONS ON LICENSEES WHO HAVE VIOLATED LIQUOR LAWS BUT HAVE NOT BEEN CRIMINALLY CONVICTED.

July 14, 1988

The Honorable Brian Frosh
Maryland House of Delegates

You have requested our opinion on whether the Board of License Commissioners of Montgomery County (the "Board") may impose administrative sanctions, including fines, on alcoholic beverages licensees who have violated Article 2B of the Maryland Code but have not been convicted of any criminal offense.

For the reasons given below, we conclude that the Board may impose sanctions in those cases, except that it may not impose any sanction for allegedly selling an alcoholic beverage to a person under age 21 if the licensee has been found not guilty or granted probation before judgment on the same charge and the person who induced the unlawful sale has been convicted.

I

Relevant Statutory Provisions

The Board's authority to impose sanctions on licensees is set forth in Article 2B, §§69 and 203. In relevant part, §69(a) provides as follows:

Any license or permit issued under the provisions of this article may be revoked or suspended by . . . the board of license commissioners for Baltimore City, or any county . . . for any cause which in the judgment of the . . . board . . . shall be necessary to promote the peace or safety of the community in which the place of business is situated, and such license or permit must be revoked or suspended . . . for the following causes: (1) conviction of the licensee or permitted for violation of any of the provisions of this article

Additionally, §69(b) provides that: "[r]evocation and suspension of licenses is also authorized for such other offenses as specified in other

parts of this Article.”

Revocation or suspension of a license or permit are not the only sanctions that the Board may impose, however. Under §203(p), the Board “may, in lieu of suspending or revoking an alcoholic beverages license for any cause for which the board is permitted but not required to suspend or revoke a license pursuant to §69 of this article, impose a fine for any such violation,” subject to certain conditions. One of those conditions is a determination by the Board “that the public welfare and morals would not be impaired by allowing the licensee to operate during the suspension period and that payment of the fine will achieve the desired disciplinary purposes.”

Section 118 provides for criminal prosecution of licensees who make sales of alcoholic beverages to underage persons. In addition, §118(a)(3) places a significant restriction on the Board’s power to impose sanctions on a licensee criminally charged with that offense:

If any licensee shall be found not guilty, or placed on probation without a verdict, of any alleged violation of this subsection, this finding operates as a complete bar to any proceeding by any alcoholic beverage law-enforcement or licensing authorities on account of the alleged violation, provided that the person inducing the sale in question has been found guilty by a court under one of the sections of Article 27 of the Annotated Code of Maryland numbered 400 to 403, both inclusive.¹

II

Analysis

On its face, §69 provides for revocation or suspension of an alcoholic beverages license under three sets of circumstances: (i) Under §69(a), revocation or suspension is discretionary “for any cause which in the judgment of the . . . board . . . shall be necessary to promote the peace or safety of the community”; (ii) also under §69(a), revocation or suspension is mandatory for certain designated causes, including conviction of a criminal offense under Article 2B; and, (iii) under §69(b),

¹ The provisions of Article 27 referred to impose criminal penalties on a person under age 21 or other person who, by knowingly misrepresenting the underage person’s age or otherwise, induces a licensee to sell alcoholic beverages for consumption by the underage person.

revocation or suspension “is *also* authorized for such other offenses as specified in other parts of this article.”² Thus, by its terms, although §69 requires suspension or revocation for certain enumerated causes including conviction of a violation of Article 2B, it does not make a conviction or other enumerated cause a prerequisite to revocation or suspension of a license in all cases. The Board has authority to impose sanctions in cases other than those specifically enumerated in §69(a) — that is, in cases involving offenses specified in other parts of Article 2B, and in situations that threaten the public “peace or safety.”

The distinction between cases giving rise to mandatory sanctions and those giving rise to discretionary authority to impose sanctions is explicitly recognized in §203(p). That provision authorizes the imposition of fines only in cases in which the Board has discretion to determine whether or not to impose the sanction of revocation or suspension. The provisions of §69(a) and (b) and §203(p), read together, thus establish a general scheme of administrative enforcement designed to be adaptable to the varying circumstances in which charges of misconduct may be brought against licensees.

Some cases involve clear misconduct that the General Assembly determined to be so inherently serious that it should always be followed by at least temporary loss of the licensee’s privilege to do business. One such kind of misconduct is a conviction for a criminal violation of the alcoholic beverages laws. In other cases, determining

² The causes for which revocation or suspension is mandatory under §69(a), in addition to conviction of an offense under Article 2B, are the following:

- (1) Willful failure or refusal to comply with the provisions of Article 2B or regulations adopted under it;
- (2) Making a material false statement in an application;
- (3) Two or more convictions of the licensee’s employees for offenses under Article 2B committed on the licensed premises within two years;
- (4) Possession on the licensed premises of alcoholic beverages on which taxes are due but have not been paid;
- (5) Violation of §110, which prohibits manufacturers, wholesalers, distillers, and the like from holding financial interests in retail establishments or in businesses conducted by retail licensees;
- (6) Willful failure to keep or to allow inspection of records as required by Article 2B;
- (7) Possession of any alcoholic beverage that the licensee is not authorized to sell;
- (8) Suspension or revocation of a permit issued to the licensee by the Federal Alcohol Administration or conviction of the licensee for violating any federal law relating to alcoholic beverages; and
- (9) Failure to furnish the bond required by Article 2B.

whether revocation, suspension, a fine, or no sanction is most appropriate requires consideration of the particular circumstances of the licensee's misconduct. This category of cases clearly includes those in which the licensee has not been convicted of a criminal violation of the alcoholic beverages laws, but has been found, after an appropriate administrative proceeding, to have violated those laws³

In some of these cases, the imposition of administrative sanctions may be a more appropriate method of achieving the disciplinary and deterrent goals of sanctions than a criminal prosecution would be. The circumstances of a particular violation may be such that the case simply does not warrant the imposition of a criminal penalty, yet the "peace or safety of the community" may necessitate some sanction. In addition, the administrative proceeding may be more appropriate because it is less burdensome for law-enforcement agencies, as well as the licensee. Accordingly, the availability of administrative sanctions in cases in which criminal proceedings are not desirable comports well with the flexibility of the general scheme for enforcement of the alcoholic beverages laws. Indeed, the provision for discretionary sanctions in §69(a) indicates that the ability to discipline licensees for causes for which criminal penalties either are not warranted or could not be obtained is an integral part of the enforcement scheme.

We think that this flexible scheme of administrative enforcement was not abandoned by the General Assembly in those cases in which the misconduct charged is the selling of an alcoholic beverage to an underage person. To be sure, a finding of not guilty or a grant of probation without a verdict to the licensee, coupled with a conviction of the person who induced the sale, precludes the imposition of any administrative sanction. Put another way, where court proceedings have determined, in effect, that a person other than the licensee was at fault in the making of a prohibited sale, the General Assembly has mandated that the licensee likewise may not be subjected to

³ House Bill 1023 (1988) would have amended §69 to authorize the Board to revoke or suspend a license or impose a fine if the Board found that the licensee or an employee had negligently or willfully violated a provision of Article 2B or a rule or regulation of the Board. It appears that the Board presently has that authority in any case in which it finds that the "peace or safety of the community" is threatened by the violation. House Bill 1023 would also have required the Board to promulgate rules establishing the criteria it would use in determining whether to revoke or suspend a license or to impose a fine. Assistant Attorney General Robert A. Zarnoch, Counsel to the General Assembly, pointed out that §203(p)(1)(iv), which requires the Board to promulgate rules and regulations "necessary to carry out the purposes of this subsection" authorizing the imposition of fines, appears to require the Board to establish those criteria. Letter to Del. Michael R. Gordon (June 1, 1988).

administrative penalties. Thus, where a court acts on a criminal charge under §118, its action is determinative of whether any administrative sanction may be imposed on the basis of the same charge.⁴

However, this does not necessarily mean that only a court may determine whether administrative sanctions are to be imposed in cases of sales to underage persons. On occasion, no prosecution is instituted against an alcoholic beverages licensee despite the existence of evidence that the licensee in fact made a prohibited sale. A decision not to prosecute may be reached for any of a myriad reasons. Construing §118 to prohibit the Board from taking any action in those cases would render the Board powerless to discipline a licensee who in fact engaged in a prohibited sale, solely because another agency found it inadvisable to subject the licensee to the possibility of criminal sanctions. In light of the State's concern with drinking by persons under age 21, we do not believe that the General Assembly intended that result. See *Kaczorowski v. City of Baltimore*, 309 Md. 505, 517, 525 A.2d 628 (1987) (statutes should be construed in light of purpose and objective, avoiding illogical or absurd results).

The statutorily declared general policy underlying the alcoholic beverages laws is to regulate and control all aspects of trade in alcoholic beverages "to obtain respect and obedience to law and to foster and promote temperance." §1(a). Moreover, the General Assembly has determined that:

[S]uch policy will be carried out in the best public interest by empowering the Comptroller of the Treasury, the various local boards of license commissioners and liquor control boards, all enforcement officers and the judges and clerks of the various courts of this State with sufficient authority to administer and enforce the provisions of this article.

§1(a)(2). We think that the General Assembly, having determined that boards of license commissioners should have all needed enforcement authority, did not intend to entirely withdraw discretionary authority from them in an area regarded as of special importance — sales of alcoholic beverages to persons under 21. Accordingly, we do not construe §118(a) to make conviction of the licensee, a condition precedent to administrative sanctions. Rather, that provision establishes a

⁴ That is, under the circumstances described, the board may not impose an administrative sanction. If the licensee is convicted under §118, an administrative sanction is required by §69(a). If the licensee is found not guilty or granted probation before judgment and the purchaser is not prosecuted or is found not guilty or granted probation before judgment, the board may impose an administrative sanction.

complete bar to administrative sanction under one narrow set of circumstances: a finding of not guilty or grant of probation before judgment to the licensee coupled with the conviction of the person who induced the unlawful sale. In all other circumstances, the boards have either a mandatory duty or a discretionary power to impose sanctions.

III

Conclusion

In sum, it is our opinion that the Board of License Commissioners of Montgomery County may impose administrative sanctions, including fines, on alcoholic beverages licensees who have violated Article 2B but have not been convicted of any criminal offense, except that it may not impose any sanction for allegedly selling an alcoholic beverage to an underage person if the licensee has been found not guilty or granted probation before judgment in criminal proceedings on the same charge and the person who induced the sale has been convicted.

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Editor's Note: As a result of Chapter 434 (House Bill 575) of the Laws of Maryland 1988, Article 2B, §118(a)(3) no longer requires that the person who induced the sale to an underaged person be convicted in order for the licensee's acquittal or probation before judgment to serve as a bar to sanctions.

AVIATION ADMINISTRATION

TAXICAB REGULATION—BWI AIRPORT—ADMINISTRATION MAY ENTER EXCLUSIVE CONTRACT WITH TAXICAB COMPANY TO PICK UP PASSENGERS AT BWI AIRPORT.

July 5, 1988

Mr. Theodore E. Mathison
Administrator
Maryland State Aviation Administration

You have requested our opinion on whether the State Aviation Administration may (i) prohibit a taxicab from picking up passengers at Baltimore/Washington International Airport unless the taxicab is operated under a concession contract with the Administration and (ii) enter a concession contract with a single taxicab company.

For the reasons stated below, we conclude that the Administration may (i) prohibit taxicabs not under contract from picking up passengers at BWI Airport; and (ii) enter an exclusive contract with a taxicab company to provide this service, if the Administration concludes that an exclusive contract would most effectively serve airport operations.

I

Restrictions on Dual Regulation of Taxicabs

BWI Airport is situated in Anne Arundel County. Until its purchase by the State in 1972, the airport was owned and operated by Baltimore City under the name of Friendship International Airport. This geographic circumstance presented a risk of biased regulation of taxicabs: Each jurisdiction might have been pressured to regulate taxicabs serving the airport in a manner that would protect its locally based taxicabs but impose a burden on the airport's patrons.¹ To avert this risk, the General Assembly enacted Chapter 383 of the Laws of

¹ Under §33-46 of the Anne Arundel County Code (1957), taxicabs "operated in Baltimore City or in other communities outside of the county" were permitted to bring passengers into Anne Arundel County "but shall not receive any passengers within the county...."

Maryland 1963, then codified as Article 1A, §16A and now codified as §5-413(b) of the Transportation Article ("TR" Article). TR §5-413(b) provides:

Notwithstanding any public local or other law, the operator of a taxicab authorized and licensed to operate in a political subdivision of this State may, *without being required to obtain an additional permit or license from any other political subdivision*:

(1) Transport passengers to Baltimore-Washington International Airport from the political subdivision in which the taxicab is authorized and licensed to operate; and

(2) After transporting passengers to the airport from that political subdivision, pick up passengers at the airport and transport them to the political subdivision on its return trip.

(Emphasis added.)²

The term "political subdivision" is defined as follows: "'Political subdivision' includes: (1) Any county or municipal corporation; and (2) Unless the context requires otherwise, any special taxing district." TR §1-101(g).

The State or one of its agencies, such as the Administration, is not included in the term "political subdivision," either under this definition or in general. See *Maryland-National Capital Park and Planning Commission v. Montgomery County*, 267 Md. 82, 296 A.2d 692 (1972). TR §5-413(b) does not prohibit the Administration, a State agency, from requiring a taxicab operator to obtain a license under contract as a condition to picking up passengers at BWI. Indeed, because the prohibition is phrased in terms of "an additional permit or license from any other political subdivision," it impliedly recognizes that an operator might well be subject to licensure by the State, apart from that of a political subdivision.

² As phrased in the original enactment, a licensed taxicab was authorized to serve the airport in the specified ways "without being required to obtain an additional permit or license from any other County or political subdivision." Chapter 383, Laws of Maryland 1963.

Indeed, the Administration has express statutory authority to license concessionaires. TR §5-408(a) provides, in pertinent part, as follows:

In its operation of an airport, airport facility, or air navigation facility owned or controlled by this State, the Administration, with the approval of the Secretary, may contract, lease, or otherwise arrange with any person to:

...

(2) Grant to the person the privilege of:

...

(ii) Supplying services, facilities, goods, commodities, or other things at the airport or facility.

A taxicab company supplies "services . . . at the airport . . ." We do not believe that TR §5-413(b) could properly be construed to delimit the Administration's authority under TR §5-408.³

In addition, the Administration has broad power to regulate operations at BWI Airport. *See* TR §§5-204(b) and 5-412. The Administration also has specific power to regulate traffic at BWI Airport. TR §5-426(a). Preventing a potentially chaotic free-for-all among taxicabs is plainly related to legitimate concerns about safety and efficiency.

In sum, the Administration may exercise its contracting and regulatory authority so as to place limits on the taxicab operators who may pick up passengers at BWI Airport. In so doing, the Administration does not contravene TR §5-413(b).⁴

³ The General Assembly recently amended TR §5-408 by providing, in a new subsection (c), that "commercial activity"—defined to mean "the sale, merchandising, marketing, or promotion of any goods or services"—is permitted at BWI Airport "only when expressly authorized by and in a manner prescribed by the Administration." Chapter 558 (Senate Bill 155), Laws of Maryland 1988 (effective July 1, 1988). To the extent that taxicab operators solicit business at BWI Airport, this new subsection reinforces the Administration's authority to regulate taxicab service there.

⁴ Consistently with TR §5-413(b), Anne Arundel County may regulate some aspects of taxicab service at BWI (for instance, cabs from Baltimore City that bring passengers to the airport, which is allowed under TR §5-413(b)(1), but then pick up passengers bound for a location in Anne Arundel County, which is beyond the scope of TR §5-413(b)(2)). Whether the county could restrict practices expressly authorized by the Administration is a question that we need not address at present.

II

Antitrust Considerations

An agreement between the Administration and a taxicab operator under which the latter would receive the exclusive right to pick up passengers at BWI Airport raises questions under the antitrust laws. Section 1 of the Sherman Antitrust Act declares illegal "[e]very contract . . . in restraint of trade . . ." A contract that awards an exclusive right to serve patrons at a transportation terminal might, under some circumstances, violate the Sherman Act. See *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947).

However, immunity from antitrust liability is available to a State agency, under the state action doctrine, if its anticompetitive action "is undertaken pursuant to a clearly articulated policy of the State itself, such as a policy approved by a state legislature . . ." *Southern Motor Carriers Rate Conf. v. United States*, 471 U.S. 48, 63 (1985).⁵ In our view, state action immunity would apply to an exclusive contract between the Administration and a taxicab operator.

By enacting TR §5-408, the concession authority set out in Part I above, the General Assembly unequivocally established that it was going to rely on regulation rather than commercial competition to set the standards for commercial activity—including taxicab operations—at BWI Airport. In terms of state action antitrust immunity, TR §5-408(b)(1) establishes a clear State policy to substitute regulation for competition: "For the privileges granted, the Administration may establish any terms and conditions and fix any charges, rentals, or fees . . ."⁶

TR §5-408 thus establishes antitrust immunity for the Administration's limitation of taxicab operations at BWI. In two recent cases, a statute very similar to TR §5-408 was found to confer state action immunity on municipalities when they were sued for granting exclusive contracts to taxicab companies at municipal airports.

⁵ The private beneficiary of the State's anticompetitive policy would enjoy antitrust immunity if that policy is not only "clearly articulated" but also "'actively supervised' by the State itself." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978)). Cf. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 n.10 (1985). See note 6 below.

⁶ Moreover, TR §5-408(b)(2) establishes a mechanism for active State oversight of the private conduct that has supplanted competition.

Independent Taxicab v. Greater Houston Transp. Co., 760 F.2d 607 (5th Cir. 1985); *Woolen v. Surtran Taxicabs, Inc.*, 615 F. Supp. 344 (N.D. Tex. 1985), *aff'd* 801 F.2d 159 (5th Cir. 1986). As the federal district court put it in *Woolen*: "The decision to grant an exclusive airport taxicab franchise—to utilize the 'single-operator concept,' in the parlance of these actions—is a logical and reasonable consequence of the State's broad allocation of authority to cities to . . . operate municipal airports." 615 F.Supp. at 348.

III

Conclusion

In summary, it is our opinion that the Administration may (i) prohibit taxicabs not under contract from picking up passengers at BWI Airport; and (ii) enter an exclusive contract with a taxicab company to provide this service, if the Administration concludes that an exclusive contract would most effectively serve airport operations.

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Opinions & Advice

BUDGETARY ADMINISTRATION

CONSTITUTIONAL LAW—"LEGISLATING IN THE BUDGET"—SALARY CAP—
GENERAL EMERGENCY FUND.

July 27, 1988

The Honorable Charles L. Benton
Secretary of Budget & Fiscal Planning

You have requested our opinion on the effect of certain restrictive language in the FY 1989 Budget Bill's appropriation for salary adjustments. This budget restriction, part of the appropriation for the Annual Salary Review ("ASR") and cost-of-living adjustments, sets a dollar amount cap on the salaries of various middle and senior management positions. Specifically, you ask whether there is any legally permissible mechanism by which one of these managers might receive a salary or other payment in excess of the cap, should exceptional circumstances justify that payment.

For the reasons stated below, we conclude that the budget restriction in question is a proper exercise of the General Assembly's constitutional power to condition or limit appropriations. The restriction prohibits the use of both the salary adjustments appropriation and the appropriations to the various Executive Branch agencies to pay a salary above the cap. However, the restriction does not prohibit the Board of Public Works from paying, out of the General Emergency Fund, an amount that would bring a manager's effective income above the cap, if the Board concluded that unanticipated and exigent circumstances justify the payment.¹

I

The 1988 Legislation

A. The Executive Management Salary Cap

As you have noted, the FY 1989 Budget Bill (Chapter 10, Laws of Maryland 1988) contains a provision limiting the funds that may

¹ You also asked whether the budget restriction affects bona fide promotions, reclassifications, or new positions authorized by law. Nothing in the restriction's language, context or apparent purpose suggests any such effect. Personnel actions of this kind are not limited by the restriction.

be expended to pay certain salaries. In particular, as amended by the General Assembly, the traditional salary adjustments item (26.01.07.01) in the Department of Personnel's budget was amended to include a list of so-called executive management positions, a specific salary for each, and a proviso "that no funds may be expended from this appropriation to pay salaries in excess of the salaries listed . . . for each position classification. Apart from this 'executive management cap,' the salaries listed shall be inclusive of Annual Salary Review and cost-of-living adjustment." The General Assembly also reduced the proposed lump sum appropriation and called for the development of a salary plan for executive management positions.

B. The Pay Plan Statute

Chapter 543 (House Bill 741) of the Laws of Maryland 1988 was an omnibus personnel system reform bill introduced at the request of the Department of Personnel. Among other things, Chapter 543 amended the pay plan statute, Article 64A, §27.

Prior to the enactment of Chapter 543, the pay plan statute required the Governor to establish a pay plan for all classes of positions in both the classified and unclassified service. Amendments for specific classes of positions could be made to the plan from time to time when recommended by the Secretary of Personnel and approved by the Governor. However, with one exception, those amendments could not take effect unless and until funds were provided in the next State budget. That exception was "cases of acute emergency. . . if the amendment is necessary in order to procure or to retain in the State services essential career administrative employees performing executive functions, or essential professional or technical employees, and upon the approval of the Board of Public Works. . . ."²

Chapter 543 significantly expanded the authority of the Secretary to make pay plan amendments that are effective immediately. No

² Former Article 64A, §27(a) read, in pertinent part, as follows:

Notwithstanding anything to the contrary and solely in cases of acute emergency, amendments may be made from time to time in the pay plan to take effect at any time prior to the effective date of the next State budget, if the amendment is necessary in order to procure or to retain in the State service, essential career administrative employees, performing executive functions, or essential professional or technical employees, and upon approval of the Board of Public Works, after recommendation by the Secretary, shall have the force of law, in the same manner as if they had been originally incorporated in the schedule.

longer are such amendments limited to acute emergencies. Now “[t]he Secretary . . . may amend the pay plan for specific classifications of positions in order to recruit or retain competent personnel or to ensure that compensation rates adequately compensate the skills, knowledge, effort, responsibility, and working conditions.” Moreover, every approved pay plan amendment now takes effect immediately, subject to being rejected by the General Assembly at its next regular session. Article 64A, §27(a).³ Furthermore, the approval of the Board of Public Works is no longer required; gubernatorial approval is sufficient.⁴

In order to answer your question, we must determine whether the executive management salary cap is a constitutionally permissible budget limitation and, if it is, what appropriations the General Assembly intended to limit.

II

The General Assembly’s Budget Authority

A. *The Executive Budget Amendment*

In order to put an end to budget deficits and provide for an orderly system of planned state expenditures, the Constitution of Maryland was amended, in 1916, to establish an executive budget system. See *Kelly v. Marylanders for Sports Sanity*, 310 Md. 437, 452-55, 530 A.2d 245 (1987). That amendment, commonly known as the “Executive Budget Amendment,” is set forth at Article III, §52 of the Constitution.

Section 52 requires the Governor to present to the General Assembly, at the beginning of each regular session, a budget that contains a complete plan of proposed appropriations and estimated revenues for the next fiscal year and a bill, to be known as the “Budget Bill,” that contains the proposed appropriations. Article III, §52(3) and (5). The Budget and the Budget Bill must present a balanced budget; the proposed appropriations may not exceed the estimated revenues. §52(5a).

³ If the General Assembly rejects a pay plan amendment, the rejection becomes effective at the beginning of the next fiscal year.

⁴ However, if a budget amendment is required in order to fund a pay plan amendment, the Board must approve the budget amendment. See §7-209(d) of the State Finance and Procurement Article.

"The heart of the executive budget system is subsection (6) of §52, which restricts the authority of the General Assembly to amend the Budget Bill." *Maryland Action For Foster Children, Inc. v. State*, 279 Md. 133, 142, 367 A.2d 491 (1977). Section 52 permits the General Assembly to amend the Budget Bill by increasing or diminishing items relating to the General Assembly or the Judiciary. Section 52 prohibits the General Assembly from amending the Budget Bill so as to affect State debt obligations, constitutionally mandated salaries, or certain public school appropriations; neither may it decrease the salary or compensation of any public officer during his term of office.⁵ Indeed, as to items not relating to either itself or the Judiciary, the General Assembly "may not alter the [Budget] bill, except to strike out or reduce items therein." §52(6). It may not increase such items.⁶

Subsection (6) also prevents the Governor from vetoing the Budget Bill as passed by the General Assembly. Under subsection (6), the Budget Bill becomes a law immediately upon passage by both Houses. It is not presented to the Governor; his approval is not required; and he has no opportunity or power to veto the Budget Bill. *Mayor and City Council v. State*, 281 Md. 217, 378 A.2d 1326 (1977).⁷

In view of the Executive Budget Amendment's significant limitation of the General Assembly's power to alter the Budget Bill and its insulation of that bill from gubernatorial veto in whole or in part, this office has long cautioned against "legislating in the budget." See 63 *Opinions of the Attorney General* 60 (1978); 61 *Opinions of the Attorney General* 454 (1976); 61 *Opinions of the Attorney General* 73 (1976); 59 *Opinions of the Attorney General* 70 (1974); 48 *Opinions of the Attorney General* 19 (1963); 46 *Opinions of the Attorney General* 13 (1961); 38 *Opinions of the Attorney General* 110 (1953); 37 *Opinions of the Attorney General* 139 (1952); 22 *Opinions of the Attorney General* 201 (1937). For example, in 1952 Attorney General Hammond

⁵ Article III, §35 expands this prohibition to include the increase as well as the diminution of a public officer's salary or compensation.

⁶ If the General Assembly desires to appropriate moneys for such items in excess of those provided by the Governor or for those not provided for in the Budget Bill, it may do so only by the passage of a supplementary appropriation bill, which must be limited to a single object or purpose and must provide the revenue necessary to pay the appropriation by a tax to be levied and paid as directed in the supplementary appropriation bill. §52(8). See generally *Panitz v. Comptroller*, 247 Md. 501, 509-13, 232 A.2d 891 (1967).

⁷ To the extent of any inconsistency between this provision and the general and item veto provisions of Article II, 17, this provision expressly prevails. See Article III, §52(14).

advised, "The function and effect of the Budget Bill as a law is restricted by its purposes, and the mechanics set up by Section 52 of Article III carry out those purposes. That function and effect is to appropriate money, not to legislate generally." 37 *Opinions of the Attorney General* at 141. And in 1953 Attorney General Rollins said, "[T]he Budget Bill may not be employed as a vehicle of general legislation, since it, unlike other Acts, is not subject to gubernatorial veto, and thus does not enjoy the safeguards provided by the Constitution against hasty and ill considered legislation." 38 *Opinions of the Attorney General* at 110. Nevertheless, "[t]he Legislature may decrease or eliminate an expenditure proposed by the Governor and in the performance of this power, could . . . cut down by condition or limitation on the use of the facility for which money was appropriated." 37 *Opinions of the Attorney General* at 142.

In 1978, this office reviewed its prior advice, concluded that the General Assembly's authority to reduce or strike out an item of appropriation includes the authority to condition or limit the use of the money appropriated or the use of the facility for which the money is appropriated, and approved the limiting of the FY 1979 medical assistance appropriation so as to prohibit its use for the funding of abortions under all or certain specified circumstances. 63 *Opinions of the Attorney General* 60 (1978). In so doing, the office enunciated and applied a three-pronged test for determining whether a budget condition or restriction is valid or impermissibly constitutes "legislating in the budget."

In *Bayne v. Secretary of State*, 283 Md. 560, 392 A.2d 67 (1978), the Court of Appeals agreed and adopted that test. Speaking for a unanimous court, Judge Orth said:

The General Assembly's authority to reduce or strike out an item of appropriation necessarily includes the authority to condition or limit the use of money appropriated, or the use of the facility for which the money is appropriated, provided the condition or limitation is directly related to the expenditure of the sum appropriated, does not, in essence, amend either substantive legislation or administrative rules adopted pursuant to legislative mandate, and is effective only during the fiscal year for which the appropriation is made. See [63] *Opinions of the Attorney General* [60] (1978). The conditions here meet this test. These are an integral part of the appropriation, directly related to the spending of the sum appropriated. They do not constitute an amendment of substantive legislation or administrative rules adopted pursuant to a legislative mandate; they do not require that the

program of Medical Assistance be implemented in a manner contrary to statute or regulation. And, of course, the conditions are effective only during the fiscal year for which the appropriation was provided.

283 Md. at 574. Thus, in order to be constitutionally permissible, the executive management salary cap must pass muster under the test approved in *Bayne*.

The salary cap is a restriction directly related to the expenditure of the salary monies appropriated and is effective only during the fiscal year for which the appropriation is made. It therefore satisfies the first two of the three criteria. Consequently, unless the cap in essence amends substantive legislation or administrative rules adopted pursuant to legislative mandate, it does not constitute “legislating in the budget” and is constitutionally permissible.

B. *Salary Increase Statutes*

There are only two statutes that the salary cap might be thought to amend. One is the pay plan statute, Article 64A, §27. The other is the statutory budget amendment procedure, §7-209 of the State Finance and Procurement Article (“SF” Article). There are no arguably applicable legislatively mandated regulations.

1. *The pay plan statute*

As we observed in Part I B above, the pay plan statute, as amended by Chapter 543, authorizes the Secretary of Personnel, with the approval of the Governor, to “amend the pay plan for specific classifications of positions in order to recruit or retain competent personnel or to ensure that compensation rates adequately compensate the skills, knowledge, effort, responsibility, and work conditions.” Article 64A, §27(a). However, the pay plan statute also expressly provides that a pay plan amendment “may not take effect unless sufficient funds have been included within the budget for that purpose.” *Id.* Thus, the statute does not confer unbridled authority to amend the plan. Rather, the authority to amend the pay plan is dependent upon the General Assembly’s exercise of its constitutional discretion to appropriate or not (in whole or in part, with or without valid restrictions) the funds required to fund the amended plan. Consequently, budget language like the ASR salary cap, which restricts the funds available for pay plan amendments, does not in essence amend the pay plan statute and is not “legislating in the budget.” Rather, such a budget restriction is consistent with the statute and therefore is valid and binding. In the words of Attorney General Burch, such a restriction is “budgeting in the budget.” 63 *Opinions of the Attorney General* at 75.

2. *Statutory budget amendment*

The initial appropriation for every program, including salaries, is set forth in an appropriation act, which in this instance is the Budget Bill. SF §7-206. However, the Governor has statutory authority to amend the budget for programs in the Executive Branch. SF §7-209.⁸ Under this budget amendment process, an officer or agency head may submit a proposed amended appropriation to the Secretary of Budget and Fiscal Planning, who, in turn, must review the proposal and submit it, together with his recommendation, to the Governor. SF §7-209(b).

This budget amendment process is subject to two express general limitations: First “[a]n amendment of an appropriation for a program may not increase the sum of the appropriation for all the programs” of the officer or agency. SF §7-209(g). Second, “[a] budget amendment may not change any language or substantive provision in the State budget.” SF §7-210(a).⁹ There also is a special limitation regarding salary increases. If a proposed amendment would increase the salary for a “nonclassified position listed in the budget bill in accordance with §7-109” so as to exceed the amount set by the most recently enacted State budget, the Governor may approve the amendment only if the Board of Public Works has approved the increase and compliance with the pay plan statute is documented. SF §7-209(d)(2)(i). If the proposed amendment would increase the salary for any other position so that it exceeds the amount set in the most recently enacted State budget, the Governor may approve the amendment only if the Board of Public Works has approved the increase in accordance with the pay plan statute or as authorized by the Department of Personnel. SF §7-209(d)(2)(ii).

The majority of positions listed in the salary adjustments appropriation are “nonclassified positions listed in the budget in accordance with §7-109.”¹⁰ Thus, the budget amendment statute permits an amendment increasing those salaries only upon compliance with the pay plan statute. But, as we have noted earlier, the pay plan statute permits an increase in salary only if sufficient funds have been included in the budget for that purpose. Consequently, by incorporating the “sufficient funds” requirement of the pay plan statute,

⁸ Parallel authority is vested in the President of the Senate, the Speaker of the House, and the Chief Judge of the Court of Appeals. See SF §§7-208 and 7-208.1.

⁹ This limitation “does not apply to the monetary figures of an appropriation.” SF §7-210(b).

¹⁰ Approximately fourteen of the listed positions are classified.

the budget amendment statute has itself deferred to the General Assembly's budget discretion to strike out or reduce—and therefore the discretion to limit or condition—items in the Budget Bill. Thus, there is no inconsistency between the salary cap and the budget amendment statute, at least insofar as proposed budget amendments would increase the salaries of “nonclassified positions listed in the Budget Bill in accordance with Article 64A.” In other words, when the Budget Bill sets a salary for such a position in one item, but in another item appropriates unrestricted funds that may be transferred by budget amendment, the Governor and the Board may approve an increase that exceeds the specific amount set in the first item if the amendment would not increase the sum of the appropriations for all the programs of the officer or agency. But, when the Budget Bill appropriates a specified salary for such a position and restricts that appropriation and all other appropriations from which funds may be transferred by budget amendment, the budget amendment statute itself prohibits a salary increase.

Thus, the budget amendment statute provides a process whereby, within certain limits, funds from otherwise unrestricted appropriations may be made available for other purposes. But by no means does the budget amendment statute limit the General Assembly's constitutional prerogative to strike out, reduce or limit items in the Budget Bill.¹¹

As to the classified positions listed in the salary cap, to the extent that approval is in accordance with the pay plan statute, the result is the same. If the only available funds are restricted, the budget amendment statute prohibits a salary increase above the amount set in the Budget. Similarly, if approval is based on the authorization of the Department of Personnel, the Department may not authorize a salary increase absent an available appropriation.

¹¹ See 46 *Opinions of the Attorney General* 13, 15 (1961), in which Attorney General Finan concluded that, notwithstanding the Governor's budget amendment authority, “it is entirely proper for the Legislature to attach any lawful condition or limitation to the expenditure of any appropriation as it may choose, provided such limitation or condition be directly related to the sum appropriated.”

III

The Reach Of The Salary Cap

A. The Salary Adjustments Appropriation and the Agency Appropriation

The Budget Bill typically contains at least two appropriations for salaries. First, each agency's budget contains an appropriation (under object .01—salaries and wages) sufficient to cover the agency's salary burden at the levels established in the State pay plan. Second, the Department of Personnel's budget contains a lump sum appropriation (item 26.01.07.01—Salary Adjustments) that may be transferred by the statutory budget amendment process to the various agency budgets for the cost of living adjustment ("COLA"), the ASR, and certain other costs.

As discussed in Part I A above, the General Assembly amended the FY 1989 lump sum salary adjustments appropriation proposed by the Governor. Among other things, the General Assembly inserted an executive management cap: "no funds may be expended from *this* appropriation to pay salaries in excess of the salaries listed below for each position classification." Chapter 10, Laws of 1988 (emphasis supplied). Because the appropriation that contains this cap is item 26.01.07.01, Salary Adjustments, a literal reading of the cap would merely prohibit the use of the \$83.6 million salary adjustments appropriation to pay salaries in excess of those listed. Under this reading, if an agency had funds in its budget otherwise available for salary increases, the executive management cap would not prevent the raising of salaries in accordance with the pay plan statute and the budget amendment statute. For the following reasons, we think that such a literal reading would not be a correct interpretation of the General Assembly's intent.

In interpreting legislative acts, including the provisions of the Budget Bill, we seek to ascertain and effectuate legislative intent, the primary source of which is the language of the act itself. *Boulden v. Mayor*, 311 Md. 411, 414, 535 A.2d 477 (1988). This is the so-called plain meaning rule. *Kaczorowski v. City of Baltimore*, 309 Md. 505, 514, 525 A.2d 628 (1987). However, "the plain meaning rule does not force us to read legislative provisions in rote fashion and in isolation." *Id.* We are not to "examine the trees so closely that we do not see the forest." 309 Md. at 514.

What we are engaged in is the divination of legislative purpose or goal. Indeed, as we have explained, the plain-meaning rule "is not a complete, all-sufficient rule for ascertaining a legislative intention . . ." The "meaning of the plainest

language” is controlled by the context in which it appears. The aim or policy of the legislation, against which we measure the words used, is “not drawn . . . out of the air; it is evinced in the language of the statute as read in the light of other external manifestations of that purpose.”

Id. (citations omitted). “[R]esults that are unreasonable, illogical or inconsistent with common sense should be avoided whenever possible with the real legislative intention indicated prevailing over the intention by the literal meaning.” *State v. Fabritz*, 276 Md. 416, 422, 348 A.2d 275 (1975). Thus, using all relevant external materials, we examine legislative text “in the context of [its] adoption and from that perspective determine what the legislature was trying to achieve.” *Carolina Freight Carriers v. Keane*, 311 Md. 335, 339, 534 A.2d 1337 (1988).

We find in both the Budget Bill itself and its legislative history evidence that the General Assembly’s goal was to apply the salary cap not only to the salary adjustments appropriation but also to the individual agency appropriations. Section 3 of the Budget Bill contains a listing of unclassified positions and the level of compensation for each. This portion of the Budget Bill carries out a requirement set forth in SF §7-109:

So that the General Assembly may know the extent and cost of the non-classified positions that the General Assembly has created and wants to maintain outside the classified service, each budget bill shall contain a separate section that, by unit of the State government states:

- (1) the job classification of each non-classified position in the unit with flat rate or per diem compensation;
- (2) the number of positions in each of those job classifications; and
- (3) the amount proposed for each of those job classifications.

SF §7-109, in other words, requires that each Budget Bill give a complete and accurate picture of what the unclassified positions are and how much each is paid.

Section 3 of the FY 1989 Budget Bill carries out that mandate by listing each position and an annual salary. The salary level listed in the tabulation for the positions, however, does not take into account the ASR or COLA. Instead, Section 3 provides that its listing is “subject to modifications *and restrictions* provided for in the annual salary

review and the authorization *and restrictions* provided in Program 26.01.07.01—Salary Adjustments . . . ” (Emphasis added.) The underscored language (“and restrictions”) was added to Section 3 by amendment, corresponding to the salary cap amendment to the salary adjustments appropriation. These parallel amendments, we believe, are persuasive evidence of the General Assembly’s intention to apply the cap to the ordinary components of each unclassified manager’s salary—that is, the portion of the salary derived from the agency’s appropriation plus the portion of the salary derived from the salary adjustments appropriation.

This understanding of the legislative intent is bolstered by language in the Joint Chairmen’s Report. Its explanation of the cap is that “[t]his action establishes salary levels for FY 1989 inclusive of ASR and COLA for executive positions in State government.” *Report of the Chairmen of the House Appropriations Committee and Senate Budget and Taxation Committee, 1988 Session, Final Action on Senate Bill 270 and Related Recommendations* at 87 (April 1988). And the Joint Chairmen’s explanation of Section 3 is that this “language provides for salary levels of certain positions consistent with the pay plan provided in this bill under program 26.01.07.01.” *Id.* at 281.

Finally, the General Assembly would have accomplished no practical goal if the executive management salary cap were applicable only to the salary adjustments appropriation and not to the agency appropriations. By slowing the pace at which it fills vacancies, an agency could free up funds that could then be made available for salary adjustments. Thus, a salary cap that did not reach the agency appropriations would be less a cap than a sieve. “We should not presume that the legislative body intended to enact an ineffective . . . law.” *Swarthmore Co. v. Kaestner*, 258 Md. 517, 527, 266 A.2d 341 (1970).

For these reasons, we conclude that the General Assembly intended to cap both the salary adjustments appropriation and the individual agency appropriations.

B. *The General Emergency Fund*

The Maryland Constitution expressly recognizes the authority of the General Assembly to place “a contingency 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." Article III, §32. Pursuant to that authority, the General Assembly traditionally has made a General Emergency Fund available to the Board of Public Works through an appropriation in the Budget Bill. The FY 1989 Budget Bill includes a \$2 million General Emergency Fund appropriation. As usual, the Budget Bill contains a general statement of the purposes for which the fund may be used:

To the Board of Public Works to be used by the Board in its judgment: (1) for supplementing appropriations made in the budget for Fiscal Year 1989 when the regular appropriations are insufficient for the operating expenses of the government beyond those that are contemplated at the time of the appropriation of the budget for this fiscal year, or (2) for any other contingencies that might arise within the State or other governmental agencies during the fiscal year or any other purposes provided by law, when adequate provision for such contingencies or purposes has not been made in this budget.

Chapter 10, Laws of Maryland 1988 (item 23.05.01.02).

This language contemplates the use of the fund when either of two broadly defined conditions are met: when the General Assembly has foreseen a need and appropriated funds to meet it, but unforeseen circumstances have rendered the need greater than that contemplated; or when the General Assembly simply did not make provision for a need that later must be met. The General Assembly has largely left to the judgment of the Board of Public Works the responsibility of identifying when either of these conditions are satisfied.

Use of the fund to pay for the future services of a State employee might be permissible under either of the conditions. If, for instance, a new federal law required the creation of a position not budgeted, the Board may fund the position out of the General Emergency Fund. Similarly, the Fund could be used to meet a salary obligation created by legislation enacted in the closing hours of a legislative session, after the Budget Bill had passed. 32 *Opinions of the Attorney General* 89 (1947). The Board may also augment a budgeted salary amount if, in the Board's judgment, that appropriation is "insufficient" — that is, if circumstances not contemplated by the General Assembly render its appropriation inadequate to the effective operation of the agency.

Indeed, the Budget Book submitted by the Governor specifically expressed the intention that the General Emergency Fund be available for supplementing salaries.¹² This intention reflects prior practice. As this office once observed, “raises have been implemented in the past through the mechanism of the General Emergency Fund . . .” 60 *Opinions of the Attorney General* 823 (1975). See 32 *Opinions of the Attorney General* 209 (1935).¹³

Of course, if the executive management salary cap were intended to restrict the General Emergency Fund as well as the salary adjustments and agency appropriations, this overall power of the Board could not be used. In our opinion, however, the cap was not intended to apply to the Fund.

As a general rule, we think it unwise and contrary to the intent underlying the constitutional and budgetary recognition of the need for a general emergency fund to construe any other provision of the Budget Bill as a restriction on the Board’s broad discretion in using the fund, absent clear and unmistakable budgetary language to the contrary. There is no such language in the FY 1989 Budget Bill. Rather, we think that the General Assembly intended to prevent wholesale salary adjustments under normal circumstances but did not intend to restrict the Board’s ability to deal with bona fide, extraordinary, unanticipated situations within the relatively modest limits of the General Emergency Fund appropriation.

¹² “This program represents the amount to be appropriated to the Board of Public Works as a contingency fund to be allocated by the Board in supplementing appropriations made in the budgets for this fiscal year where it is found that the regular appropriations are insufficient for the salaries and operating expenses of State agencies.” *The Maryland State Budget for the Fiscal Year Ending June 30, 1989*, at I-145 (January 20, 1988).

¹³ But see the 1973 Joint Chairmen’s Report which objected to the inappropriate use of Section 2 of the General Emergency Fund to provide a specific salary increase. *Report of the Chairmen of the Senate Finance Committee and the House Appropriations Committee on the Budget Bill* (S.B. 332) and the Bond Bill (S.B. 333), (April 5, 1973), p. 9.

IV

Conclusion

In summary, it is our opinion that the salary cap in the FY 1989 Budget Bill's salary adjustments appropriation is a proper exercise of the General Assembly's constitutional power to condition or limit appropriations. The restriction prohibits the use of both the salary adjustments appropriation and the appropriations to the various Executive Branch agencies to pay a salary above the cap. However, the restriction does not prohibit the Board of Public Works from paying, out of the General Emergency Fund, an amount that would bring a manager's effective income above the cap, if the Board concluded that unanticipated and exigent circumstances justify the payment.

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JACK SCHWARTZ

Chief Counsel

Opinions & Advice

CHESAPEAKE BAY CRITICAL AREA COMMISSION

PROGRAM DEVELOPMENT CRITERIA—SCOPE OF COMMISSION'S DISCRETION
TO INTERPRET CRITERIA.

January 5, 1988

The Honorable Solomon Liss
Chesapeake Bay Critical Area Commission

You have requested our opinion concerning the interpretation of the criteria for local program development adopted by the Chesapeake Bay Critical Area Commission. Specifically, you have asked us to define the degree of discretion afforded the Commission to interpret the criteria, as it determines under §8-1809 of the Natural Resources Article ("NR" Article) whether local programs meet the standards of the Critical Area Law and the criteria.

In your request, you specifically refer to three types of criteria about which you seek guidance. As you describe them, some of the criteria are "clear mandates" — for example, the development restriction in COMAR 14.15.02.05C(4). Others are "merely directory" — for example, the encouragement of incentive programs in COMAR 14.15.10.01K. Finally, some criteria, though in one sense mandatory, are drafted seemingly so as to leave room for some further interpretation or elaboration — for example, the definitional standard relating to sewer or water service in COMAR 14.15.02.04A(4).

For the reasons stated below, we conclude as follows:

1. Mandatory criteria, typically those using terms like "shall" or "may not," must be applied by the Commission as written and must be adhered to without variance by those to whom the criteria apply. COMAR 14.15.02.05C(4) is mandatory and must be applied according to its terms.

2. Criteria written in directory terms — for example, using words like "should," or, as in COMAR 14.15.10.01K, "encourage" — reflect an intent to foster consideration of a matter. Accordingly, they should be construed to require that those preparing, submitting, or reviewing local programs at least considered the particular matter. However, the Commission should not disapprove a program solely because it does not include a program element of this kind.

3. In applying criteria that admit of more than one reasonable construction — for example, COMAR 14.15.02.04A(4) — the Commission should consider how the particular program element in question relates to the Commission's underlying policy objective. While the Commission may not approve a local program element that is outside the scope of the pertinent criterion, taking into account the principles of interpretation described in this opinion, the Commission has broad discretion to determine that a proposed element is consistent with the intent underlying the criterion.

I

The Commission's Role in Adopting Criteria

In enacting the Chesapeake Bay Critical Area Law, the General Assembly made the following finding:

There is a critical and substantial State interest for the benefit of current and future generations in fostering more sensitive development activity *in a consistent and uniform manner* along shoreline areas of the Chesapeake Bay and its tributaries so as to minimize damage to water quality and natural habitats.

NR §8-1801(a)(9) (emphasis added). Accordingly, the stated purposes of the legislation were to:

1. Establish a Resource Protection Program for the Chesapeake Bay and its tributaries by fostering more sensitive development activity for certain shoreline areas so as to minimize damage to water quality and natural habitats, and

2. Implement the 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 and oversight*.

NR §8-1801(b) (emphasis added).

The General Assembly also stated its intent that "each local jurisdiction shall have primary responsibility for developing and implementing a program, subject to review and approval by the Commission." NR §8-1808(a)(1). This "cooperative endeavor between the State and local governments ... is at the heart of the legislation." 72 *Opinions of the Attorney General* 14, 18 (1987). Under the Act's

scheme, each local jurisdiction in the Critical Area is given the opportunity to legislate a program to meet the goals of the Act.

The General Assembly directed in NR §8-1808(b) that local programs are to serve certain goals:

A program shall consist of those elements which are necessary or appropriate to:

1. Minimize adverse impacts on water quality that result from pollutants that are discharged from structures or conveyances or that have run off from surrounding lands;
2. Conserve fish, wildlife, and plant habitat; and
3. Establish land use policies for development in the Chesapeake Bay Critical Area which accommodate growth and also address the fact that, even if pollution is controlled, the number, movement, and activities of persons in that area can create adverse environmental impacts.

In NR §8-1808(c), the General Assembly set forth a list of elements that each program must have “at a minimum” to be “sufficient to meet the goals stated in subsection (b).”

The General Assembly also recognized that other program elements might be necessary to meet the goals of NR §8-1808(b) and that, to achieve consistency and uniformity, additional standards for the content of various program elements would have to be determined. Accordingly, the General Assembly established the Chesapeake Bay Critical Area Commission and empowered it to fashion “criteria for program development and approval.” NR §8-1808(d).

Under NR §8-1808(d), the Commission was to adopt criteria that are “necessary or appropriate to achieve the standards stated in subsection (b) of this section.” NR §8-1808(d) required that the criteria be “promulgate[d] by regulation” and that the Commission hold extensive rounds of hearings both before developing and before adopting the criteria. NR §8-1806 also generally empowered the Commission “to adopt regulations *and criteria*” in accordance with the Administrative Procedure Act. In uncodified Section 3 of Chapter 794 of the Laws of Maryland 1984, the General Assembly reserved to itself authority “at the 1986 Session [to affirm] by joint resolution that the criteria are reasonable and acceptable to accomplish the goals of this subtitle.”

The General Assembly, instead of legislating the criteria itself in the Critical Areas law, chose to follow the well-established practice of giving an administrative body the task of acquiring information

and working out the details of statutory administration. See *Department of Natural Resources v. Linchester*, 274 Md. 211, 218, 334 A.2d 514 (1975). The resulting criteria, codified at COMAR 14.15.01 through 14.15.11, are legislative rules.

As a general proposition, legislative rules adopted by an administrative agency have the force of law, equal to that of a statute. *Comptroller of the Treasury v. Rockhill, Inc.*, 205 Md. 226, 234, 107 A.2d 93 (1954). They are binding not only on the affected public but also on the adopting agency. *Hopkins v. Maryland Inmate Grievance Comm'n*, 40 Md. App. 329, 335, 391 A.2d 1213 (1978).

The General Assembly's intent that the criteria be binding could hardly have been more clearly expressed. First, the General Assembly required unusually elaborate procedures for the criteria's adoption. See NR §8-1808(d). Second, the General Assembly reserved to itself authority to approve the criteria. As we noted last year:

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.

72 Opinions of the Attorney General at 17.

As the Commission developed the criteria, necessarily it made difficult judgments on specific matters left open by the statute. The job of the Commission was to listen to the public; develop relevant facts; finely balance rights, costs, harms, and benefits; and derive “necessary or appropriate” criteria — all within the statutory framework handed down by the General Assembly. The Commission often had to choose one among a range of reasonable alternatives without absolute standards to guide it. For example, the judgment that housing density in the Resource Conservation Area should average one dwelling unit per 20 acres (COMAR 14.15.02.05C(4)), rather than one per 50 or one per 15, rests upon an empirical basis. But, in the final analysis, the decision to say “this far and no more” was simply a reasoned judgment call.

II

The Commission's Review of Local Programs

To further its goal of achieving consistency and uniformity among the local programs, the General Assembly gave the Commission a supervisory role over local programs. Under NR §8-1809, local programs may not be enacted by local jurisdictions unless they have been approved by the Commission. The General Assembly set the following prerequisites for approval in NR §8-1809(i):

The Commission shall approve programs and amendments that meet:

1. The standards set forth in §8-1808(b)(1) through (3) of this subtitle; and
2. The criteria adopted by the Commission under §8-1808 of this subtitle.

The operative word in the legislative description of the Commission's approval process is "meet." We infer from the context of the Critical Area law that the General Assembly intended "meet" to mean conformity with the criteria, for this usage furthers the overall goal of consistency and uniformity. *Webster's New International Dictionary* 1529 (2d ed. 1953) defines "meet" in this sense to mean "to come up to; to conform to; ... to equal; match ..."

Criteria expressed in clear and mandatory terms leave no doubt as to what a local program must do to "meet" them; other criteria leave room for alternatives. As to the latter, the issue is the degree of variance permitted. In some instances, the Commission expressly solicited a range of proposals. In other instances, the Commission chose wording that is more ambiguous but that at least potentially might be met by more than one proposal.

In interpreting the scope of the criteria, the Commission may rely upon the knowledge that its members and staff have about the background of the criteria. However, the Commission's inquiry must focus on the scope of the criteria as adopted, even if the Commission, with hindsight, would now prefer their scope to be different. In reaching its decisions under NR §8-1809(i), the Commission does not have authority to interpret the criteria to be either broader or narrower than they presently are. It must give effect to the criteria as adopted and as approved by the General Assembly. "The Commission is without authority to effect significant changes in the substance of the criteria." 72 *Opinions of the Attorney General* at 18.

The Commission should interpret the criteria in accordance with accepted principles of statutory construction. "Our holdings relative to the interpretation of statutes are equally applicable to the interpretation of rules." *Maryland Port Admin. v. Brawner Contracting Co.*, 303 Md. 44, 60, 492 A.2d 281 (1985).

As is true of statutes, rules have "some object, goal, or purpose"; the task of construction is to discern that purpose and carry it out sensibly. *Kaczorowski v. City of Balto.*, 309 Md. 505, 513, 525 A.2d 628 (1987). "Of course, in our efforts to discover purpose, aim, or policy we look at the words of the statute ..., because what the legislature has written in an effort to achieve a goal is a natural ingredient of analysis to determine that goal." *Id.* Indeed, "sometimes the language in question will be so clearly consistent with apparent purpose (and not productive of any absurd result) that further research will be unnecessary." 309 Md. at 515. At other times, the meaning of the text must be informed by context. *Id.*

Some criteria direct local jurisdictions to include certain elements in their programs or specify the content of those individual elements. As discussed in more detail in Part III below, the mandatory language in these criteria denotes an unambiguous intent. When a criterion is so worded, there is no room for a local jurisdiction to fashion, or for the Commission to approve, a program element different than that which the criterion mandates.

Many of the criteria, while mandating that a type of program element be included, leave room for a variety of proposals by local jurisdictions about the specific content of that program element. In those instances, the Commission determined that the goal of consistency and uniformity could be reached by requiring each jurisdiction to address the program element but permitting the details to vary from program to program. The General Assembly, by approving the Commission's criteria as "reasonable and acceptable to accomplish the goals of this subtitle," accepted the Commission's judgment.¹

¹ By stating its goals of consistency and uniformity, the General Assembly did *not* mean that every property owner in all local jurisdictions must be treated identically. Zoning requirements vary from jurisdiction to jurisdiction, so that property owners similarly situated in different jurisdictions may be treated differently. By basing the State's Critical Area Law on local legislative powers, and by approving criteria that contemplate differing program elements, the General Assembly intended that citizens in the several jurisdictions might, by local option, continue to be regulated in differing fashion under many of the criteria.

The Commission faces two difficult interpretive questions regarding the criteria: first, determining whether a particular criterion admits of only one or of differing program elements; and second, if differing program elements are permissible, determining which of the possible alternatives nevertheless fall so short of the criterion's objective as to fail to "meet" the criterion. As to both questions, although "an agency is best able to discern its intent in promulgating a regulation," *Maryland Commission on Human Relations v. Bethlehem Steel*, 295 Md. 586, 593, 457 A.2d 1156 (1983), the Commission may not in effect amend the criteria through its application of them.

With these principles as background, we turn to the particular criteria cited in your letter.

III

Required Program Elements

COMAR 14.15.02.05C(4) begins as follows: "Land within the Resource Conservation Area may be developed for residential uses at a density not to exceed one dwelling unit per 20 acres." In your letter, you suggest that this "one-in-twenty" density requirement for the Resource Conservation Area is expressed in terms that do not admit of alternative program proposals.

We agree. "In [the Maryland Code] and any rule, regulation, or directive adopted under it, the phrase 'may not' or phrases of like import have a mandatory negative effect and establish a prohibition." Article 1, §26. The phrasing of COMAR 14.15.02.05C(4) is of "like import" to the phrase "may not."

Addressing the most common indicator of mandatory intent, the word "shall," the Court of Appeals wrote:

The question of whether a statutory provision using the word "shall" is mandatory or directory "turns upon the intention of the Legislature as gathered from the nature of the subject matter and the purposes to be accomplished ... [T]he word 'shall' is not treated as signifying a mandatory intent if the context in which it is used indicates otherwise ... [M]ere words do not control. The whole surroundings, the purposes of the enactment, the ends to be accomplished, the consequences that may result ... must all be considered in determining whether particular words shall have a mandatory or a directory effect ascribed to them."

Resetar v. State Bd. of Education, 284 Md. 537, 547-48, 399 A.2d 225 (1979) (citations omitted).

From their context, from what we can discern of their "legislative history," and from the benefit of our previous exploration of a quite similar question (Opinion No. 86-053, October 6, 1986 (unpublished)), we conclude that when the Commission's criteria use words of mandate like "shall" or "may not," the criteria impose flat requirements. COMAR 14.15.02.05C(4) and comparably worded criteria cannot be met by anything other than unvarying compliance with the terms of the requirement.

IV

Discretionary Program Elements

Under COMAR 14.15.10.01K, local jurisdictions "are encouraged to establish a program that provides tax benefits and consider other financial incentives" aimed at promoting voluntary development restriction. While each individual criterion must be separately assessed, we generally believe that the Commission's use of words like "should," "encourage," or other equivalent constructions connotes a matter that is directory rather than mandatory.

As we noted in Opinion No. 86-053, at 4:

The drafters relied upon materials that treat "should" as directory and that are designed to assist drafters of legislative documents in Maryland. . . . Moreover, the Commission, in the course of considering the criteria and before it adopted them was similarly advised by its counsel of the effects of "should."

The intention to make the guidelines in which "should" is used directory only is made manifest by the regulation's contrasting use of "shall" and "should." Had the drafters intended a mandatory effect in the guidelines, presumably they would have used the same word "shall" that they in fact used to achieve a mandatory effect elsewhere in the same in the same regulations.

However, a directory provision may not simply be ignored:

"[T]he differences between mandatory and directory, or between prohibitory and permissive, represent a continuum involving matter of degree instead of separate, mutually exclusive characteristics. It has been said, for example, that because a statute has been classified for some purposes as directory does not mean that for all purposes 'it can be ignored at will.'"

In re James, S., 286 Md. 702, 707, 410 A.2d 586 (1980), quoting 1A Sutherland, *Statutory Construction* §25.04 (4th ed. 1972). Thus, a local government's program development process should entail some consideration of the matter contained in a directory provision, even if the program does not carry the provision into effect.

In the criterion you have cited as an example, COMAR 14.15.10.0IK, the Commission directs local governments to consider inclusion of the recommended elements (tax and financial incentives, an easement purchase program, and so forth) in local programs. However, given the directory nature of this criterion, the absence of such elements should not, in and of itself, cause the Commission to reject a program.

V

Other Interpretive Issues

Your last specific example, COMAR 14.15.02.04A(4), reflects a mandatory criterion that nevertheless requires interpretation. The subsection establishes the definition of Limited Development Areas, one feature of which is “[a]reas having public sewer or public water, or both.”

The defining characteristics of Limited Development Areas are mandatory: “These areas *shall* have at least one of the following features” Therefore, the Commission does not have the discretion to approve a local program that classifies an area as a Limited Development Area if that classification is not consistent with the defining characteristics.

However, the criterion in question, COMAR 14.15.02.04A(4), is itself not formulated with specificity. Inevitably, the Commission must apply its informed discretion, on a case-by-case basis, in deciding whether particular areas are ones “having public sewer or public water, or both.”

Though the Commission's discretion in this regard is broad, it is not limitless. The term “*having* public sewer or public water” would lose all content if the area in question were not in reasonable proximity to existing sewer or water lines — ones that are “in the ground.”²

² This conclusion was previously set out in a memorandum to you from Assistant Attorney General Lee R. Epstein (May 22, 1987). The Commission evidently did not contemplate that sewer or water systems necessarily be hooked up. Another criterion, describing Intensely Developed Areas, refers to areas where “[p]ublic sewer and water ... systems are currently serving the areas” COMAR 14.15.02.03A(3).

The limitation imposed by this criterion on the exercise of the Commission’s discretion is that sewer and water service to an area cannot be *solely* a matter of planning or otherwise wholly speculative.

If the area is reasonably close to existing lines but is not currently hooked into the lines, the Commission is free to assess all pertinent circumstances to determine the reasonable likelihood of future service. That is, the Commission may assess such factors as the capacity of the existing lines and related facilities (e.g., a sewage treatment plant), the timing of projected service under a local sewer and water plan, and the likelihood of the plan’s accomplishment. In making these judgments, the Commission has broad discretion to apply its expertise to the interpretation of its regulation. If the Commission concludes that a given proposal achieves the object that the Commission sought to accomplish through this criterion, then it should conclude that the proposal “meets” the criterion.

VI

Conclusion

In summary, it is our opinion that:

1. Mandatory criteria, typically those using terms like “shall” or “may not,” must be applied by the Commission as written and must be adhered to without variance by those to whom the criteria apply. COMAR 14.15.02.05C(4) is mandatory and must be applied according to its terms.

2. Criteria written in directory terms — for example, using words like “should,” or, as in COMAR 14.15.10.01K, “encourage” — reflect an intent to foster consideration of a matter. Accordingly, they should be construed to require that those preparing, submitting, or reviewing local programs at least considered the particular matter. However, the Commission should not disapprove a program solely because it does not include a program element of this kind.

3. In applying criteria that admit of more than one reasonable construction — for example, COMAR 14.15.02.04A(4) — the Commission should consider how the particular program element in question relates to the Commission’s underlying policy objective. While the Commission may not approve a local program element that is outside the scope of the pertinent criterion, taking into account the

principles of interpretation described in this opinion, the Commission has broad discretion to determine that a proposed element is consistent with the intent underlying the criterion.

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Opinions & Advice

CONSTITUTIONAL LAW

FIRST AMENDMENT—ESTABLISHMENT CLAUSE—PUBLIC SCHOOL SYSTEM MAY OPEN SCIENCE CENTER PROGRAM TO SECTARIAN SCHOOL STUDENTS

February 5, 1988

The Honorable Leo E. Green
Senate of Maryland

You have requested our opinion on whether it would be constitutional for the Board of Education of Prince George's County to make available the programs and services of the Howard B. Owens Science Center to students who attend private sectarian schools in the County.

For the reasons given below, we conclude that the opening of the Center to nonpublic school students would not violate the Establishment Clause of the First Amendment and, therefore, would be constitutional.¹

I

Operation of the Science Center

The Howard B. Owens Science Center ("Center") was built with State and local funds.² Since construction, all operating funds for the Center have been provided by the Board of Education of Prince George's County.

¹ Unquestionably, the County may open the Center to students who attend *nonsectarian* private schools. When we refer in this opinion to "private" or "nonpublic" schools, we mean sectarian ones. We also assume, for purposes of this opinion, that none of these schools exclude students because of race, creed, national origin, or other impermissible basis. See *Norwood v. Harrison*, 413 U.S. 455 (1973).

² The construction funding was as follows:

State funds, disbursed through the Interagency Committee on School Construction	\$1,414,649.00	(74.6%)
Prince George's County funds	466,761.00	(24.6%)
Prince George's County Board of Education, annual operating budget fiscal 1979, for additional equipment	15,881.00	(0.8%)
TOTAL	\$1,897,291.00	(100%)

The history, sources of funding, and operation of the Center were detailed in a letter dated March 14, 1979 to Mr. William Blount, formerly Administrative Assistant to the Superintendent, from Paul M. Nussbaum, Esquire, attorney to the Board of Education of Prince George's County. We recently verified with Mr. Nussbaum that the information about the Center set out in this Part I is accurate.

The Center is staffed by Board of Education personnel, all ten of whom are certificated professionals. The staff of the Center is paid according to the same schedules and receives the same benefits as personnel assigned to County public schools.

The Center makes its programs available for students in all grades as a complement to the County's science curriculum. Most programs are optional, and teachers' written requests are honored in turn; however, all sixth grade students are invited to participate as part of their science instruction. Students enrolled in the Science, Mathematics and Technology Magnet Program and the Talented and Gifted Program participate in programs designed especially for them. The Center accommodated over 80,000 students during fiscal year 1987 and currently has a waiting list for over 1,000 classes.

A "pre-visitation packet" is sent to the classroom teacher prior to the Center visit. The packet consists of instructions to the classroom teacher on how to make the visit a valuable educational experience, suggestions for preliminary classroom readings, a format of proposed classroom discussion, and actual instructional materials.

During the Center visit itself, students participate in activities designed, developed, and directed by Center staff. Center visits vary in time: planetarium visits are 1½ hours; some programs are one or two days (4½ hours per day); the majority of programs are 2½ hours in length. The classroom teacher accompanies his or her students throughout the visit and assists Center staff at each learning station.

After the visit, the Center issues a "post-visitation activity packet" to the classroom teacher. This packet consists of a detailed review of that which was seen by the students at the Center and may be used by the classroom teacher for follow-up activities to the visit.

We understand you to propose that nonpublic school children use the Center's services and materials in the same way that public school children do.

II

The Establishment Clause

The First Amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Fourteenth Amendment makes the First Amendment, including the portion commonly referred to as the Establishment Clause, binding on the states.

Everson v. Board of Education, 330 U.S. 1, 15 (1947).

The history, objectives and purposes of the Establishment Clause were discussed in depth in 69 *Opinions of the Attorney General* 100 (1984). As that opinion observed, "The Establishment Clause prohibitions have encountered 'their severest test' when they have been applied in the public school setting." 69 *Opinions of the Attorney General* at 114, quoting *School District of Abington Township v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring). A few forms of government assistance to sectarian education have been allowed;³ others have been prohibited.⁴

The necessary line-drawing in this area is accomplished by application of the Supreme Court's three-pronged test for Establishment Clause questions. Under this test, a governmental endeavor involving religion or a religious institution is constitutional only if it (i) reflects a secular purpose; (ii) has a principal or primary effect that neither advances nor inhibits religion; and (iii) avoids excessive entanglement of government with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *Baltimore Lutheran High School Assoc. v. Employment Security Admin.*, 302 Md. 649, 670, 490 A.2d 701 (1985). If the activity fails to meet *any* of these three criteria, it violates the Establishment Clause. *Stone v. Graham*, 449 U.S. 39, 40-41 (1980) (per curiam).

The strictures of each of the *Lemon v. Kurtzman* criteria were discussed in detail in 69 *Opinions of the Attorney General* 100, as well as in earlier opinions of this office. See 65 *Opinions of the Attorney General* 186 (1980); 59 *Opinions of the Attorney General* 209 (1974). Without retraversing that ground, we turn to the task of applying

³ The Supreme Court has found the following forms of aid to be constitutional: school bus transportation, in *Everson v. Board of Education*, 330 U.S. 1 (1947); textbook loans, in *Wolman v. Walter*, 433 U.S. 229 (1977), *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Board of Education v. Allen*, 392 U.S. 236 (1968); testing and scoring services, in *Wolman*; diagnostic services, also in *Wolman*; and tax deductions for certain educational expenses, in *Mueller v. Allen*, 463 U.S. 388 (1983).

⁴ The Supreme Court has held that the following forms of aid violate the Establishment Clause: field trip transportation services, in *Wolman*; instructional materials and equipment, in *Wolman* and *Meek*; therapeutic, guidance, remedial, and teaching services provided by public school personnel on private school premises, in *Aguilar v. Felton*, 473 U.S. 402 (1985), *Wolman*, and *Meek*; reimbursement for nonpublic school teacher-prepared tests, in *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973); salary supplements for nonpublic school teachers of secular subjects, in *Lemon v. Kurtzman*, 403 U.S. 602 (1971); reimbursement for maintenance and repair expenses at nonpublic schools, in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); and tuition grants and tax benefits for parents whose children attended nonpublic schools, in *Sloan v. Lemon*, 413 U.S. 825 (1973).

the teachings of various Supreme Court decisions to the respective aspects of the proposal at issue.

This task is not easy. As one commentator has observed: "Because of the close division of the justices in cases throughout the 1970's and 1980's . . . one cannot predict with any certainty how the Court will rule on precise forms of aid to students in religiously affiliated schools. . . ." 3 Rotunda, Nowak, & Young, *Treatise on Constitutional Law* §21.4, at 365 (1986).

We recognize that the constitutional ground might shift under us. However, we believe that each aspect of the Science Center program, if offered to nonpublic school students, would be sustainable under the current body of Establishment Clause cases.

III

Pre-Visit Instructional Materials

As discussed in Part I above, the first aspect of the Science Center programs is the provision to the classroom teacher of a "pre-visitation packet."

The loan of this packet is substantially the same as the textbook loans approved by the Supreme Court in *Board of Education v. Allen*, 392 U.S. 236 (1968), *Meek v. Pittenger*, 421 U.S. 349 (1975); and *Wolman v. Walter*, 433 U.S. 237 (1977). Indeed, the statute upheld in *Wolman* also included the loan of "book substitutes" like reusable workbooks and manuals. 433 U.S. at 238. This precedent encompasses the teacher manuals and instructional materials involved here.⁵

⁵ The Center's pre-visit packets are distinguishable from the "instructional materials and equipment" found impermissible in *Wolman*, 433 U.S. at 251, and *Meek*, 421 U.S. at 355 and 363. The Supreme Court held that a state could not constitutionally provide sectarian schools with materials and equipment like periodicals, photographs, maps and globes, charts, recordings, films, projectors, tape recorders, and laboratory paraphernalia. Despite the secular nature of the goods, the Court found that the provision of such items had the "primary effect of providing a direct and substantial advancement of the sectarian enterprise." *Wolman*, 433 U.S. at 250.

IV

Science Center Visits

We have no doubt that a decision to allow sectarian school children to visit the Science Center would reflect a secular purpose and therefore would meet the first prong for constitutionality. The lectures and activities conducted at the Center reflect a substantial and legitimate interest of the County in providing a fertile educational environment for school children and in insuring that all children receive an adequate secular education. *Wolman*, 433 U.S. at 240. This secular purpose is underscored by the fact that, although the classroom teacher accompanies and assists Center staff during the visit, Center personnel direct the format, tone, and content of lectures and activities.

The issue is closer when we turn to the “effects” test. If opened to nonpublic school students, the Center would in effect bear a portion of the cost of science instruction that the nonpublic schools would otherwise bear. The courts have recognized that, inevitably, a state’s provision of a resource to sectarian schools has the indirect effect of freeing a portion of the schools’ resources for their sectarian ends.

However, as the Supreme Court noted in *Committee for Public Education v. Nyquist*, 413 U.S. 756, 775 (1973):

[I]t is true in each case that the provision of . . . neutral, nonideological aid, assisting only the secular functions of sectarian schools, serves indirectly and incidentally to promote the religious function by rendering it more likely that children would attend sectarian schools and by freeing the budgets of those schools for use in other nonsecular areas. But an indirect and incidental effect beneficial to religious institutions has never been thought a sufficient defect to warrant the invalidation of a state law.

See also *Roemer v. Board of Public Works*, 426 U.S. 736, 747 (1976); *Hunt v. McNair*, 413 U.S. 734, 743 (1973).

Later, in *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985), the Supreme Court elaborated on the problem of “subsidization”:

[T]he Court has never accepted the mere possibility of subsidization . . . as sufficient to invalidate an aid program. On the other hand, this effect is not wholly unimportant for Establishment Clause purposes. If it were, the public schools

could gradually take on themselves the entire responsibility for teaching secular subjects . . . The question in each case must be whether the effect of the proffered aid is "direct and substantial" . . . or indirect and incidental. "The problem, like many problems in constitutional law, is one of degree."

473 U.S. at 394, quoting *Nyquist*, 413 U.S. at 784-85 and *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

The Supreme Court has not directly considered whether shared time instruction taught at public schools violates the "effects" prong of the test.⁶ Nevertheless, guidance can be derived from certain cases by analogy. The issue in *Grand Rapids*, for example, was a "shared time" program under which public school employees taught remedial and enrichment mathematics and reading, art, music, and physical education on the premises of the nonpublic schools. These courses were intended to be supplementary to the core curriculum courses required as a part of any accredited school program. The courses represented approximately 10 percent of any nonpublic school student's time during the academic year, or approximately one or two class periods per week.

The Supreme Court found the program unconstitutional because it had the effect of promoting religion in three ways. First, the state-paid instructors could be influenced by the "pervasively sectarian environment" of the religious schools in which they worked. 473 U.S. at 388. Second, provision of secular, state-provided instruction within a religious school building threatened to convey a "symbolic union of government and religion in one sectarian enterprise." 473 U.S. at 392. Finally, the Court found that the programs "in effect subsidize the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects." 473 U.S. at 397.

In contrast, the proposed use of the Science Center by nonpublic school children would have neither of the first two impermissible effects, because County personnel would give instruction at the Center, not on religious school premises. The third impermissible effect, "subsidization," would also not be present, because the Center would not take upon itself a "substantial portion" of the nonpublic schools' science instruction merely by permitting their students an annual visit.

⁶ "Shared time" instruction of this kind involves an arrangement for pupils enrolled in nonpublic elementary or secondary schools to attend public schools for instruction in certain subjects. *Snyder v. Charlotte Public School Dist.*, 365 N.W.2d 151, 154 (Mich. 1984).

The constitutionality of shared time instruction taught at public schools was addressed by the Supreme Court of Michigan in *Snyder v. Charlotte Public School Dist.*, 365 N.W.2d 151 (Mich. 1984). In that case, the Michigan Supreme Court relied heavily on the Supreme Court's statement in *Wolman v. Walter* that "providing therapeutic and remedial services at a neutral site off the premises of the non-public schools will not have the impermissible effect of advancing religion." 433 U.S. at 248.

Moreover, the Supreme Court held in *Wolman* that the provision of these services on public property also satisfied the "entanglement" criterion:

Neither will there be any excessive entanglement arising from supervision of public employees to insure that they maintain a neutral stance. It can hardly be said that the supervision of public employees performing public functions on public property creates an excessive entanglement between church and state.

Id.

Applying this reasoning to shared time instruction, the Michigan court upheld the constitutionality of that state's program. *Snyder*, 365 N.W.2d at 167. This holding parallels the following dictum in one Maryland case, *Thomas v. Allegany County Board of Education*, 51 Md. App. 312, 320, 443 A.2d 622 (1982): "If the legislature or the school board wishes to permit parochial school students to attend selected [public school] classes or programs, we see no impediment . . ." See also 56 *Opinions of the Attorney General* 123, 127 (1971).

In sum, we conclude that a County decision to permit nonpublic school children to participate in Science Center visits would not offend the Establishment Clause.⁷

V

Post-Visit Packet

The Science Center's programs include providing a "post-visitation packet" to the classroom teacher. This packet consists of a detailed review of the Center visit and may be used by the classroom teacher for follow-up activities.

⁷ The fact that *only* nonpublic school children might be served at the time of Center visit would not render the activity unconstitutional. See *Wolman*, 433 U.S. at 246-48.

We do not know, without further information, if these materials are readily adaptable for use as a post-visit test. The government may not assist sectarian school teachers in their preparation of tests, because “no means are available, to assure that *internally prepared* tests are free of religious instruction.” *Levitt v. Committee for Public Education*, 413 U.S. 472, 480 (1973) (emphasis added).

Nevertheless, even if these materials are usable as a post-visit test, this packet is the equivalent of textbooks and *standardized* tests, which may be provided. As the Supreme Court noted of the tests at issue in *Wolman v. Walter*:

The nonpublic school does not control the content of the test or its result. This serves to prevent the use of the test as a part of religious teaching, and thus avoids that kind of direct aid to religion found present in *Levitt*. Similarly, the inability of the school to control the test eliminates the need for supervision that gives rise to excessive entanglement.

433 U.S. at 240. This description fits the Center’s packet of post-visit materials.

Accordingly, we conclude that the provision of the packet to sectarian school teachers would be constitutionally permissible.

VI

Transportation to the Center

Everson v. Board of Education, 330 U.S. 1 (1947), established that the government’s provision of transportation for nonpublic school children to and from their nonpublic school does not violate the First Amendment. The crux of the Court’s reasoning was that the financial assistance in question was simply part of “a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.” 330 U.S. at 18. In the Court’s view, this form of aid to parents was neither prohibited state financial aid to sectarian schools nor prohibited state participation in religious affairs. *See also 56 Opinions of the Attorney General* at 129 (a county board of education may, in its discretion, provide for transportation of nonpublic school students between their home or home school and vocational centers).

However, in *Wolman v. Walter*, the Supreme Court struck down an Ohio statute that provided nonpublic schools with “field trip” transportation, where the nonpublic school could control the timing, frequency, and destinations of the trips. The Court described the field

trips at issue as follows: "The experience begins with the study and discussion of the place to be visited; it continues on location with the [nonpublic school] teacher pointing out items of interest and stimulating the imagination; and it ends with a discussion of the experience." *Wolman*, 433 U.S. at 253. The Court found that, "where the teacher works within and for a sectarian institution, an unacceptable risk of fostering religion is an inevitable byproduct" of these trips. *Wolman*, 433 U.S. at 254. Furthermore, the "close supervision of the nonpublic school teachers" that would be necessary to insure secular use of the field trips would create excessive entanglement.

In our view, the *Everson* decision is more applicable to the question at hand. As distinguished from the field trip experiences described in *Wolman*, transportation to and from the Center would be controlled in terms of timing, frequency, and destination by the Center, not by the nonpublic school. The content of discussions both before and after the visitation will be largely predetermined by the packets supplied by the Center. The staff of the Center, not the nonpublic school teacher, will point out items of interest and stimulate the imagination during the visit. Since no supervision will be necessary to insure secular use of the field trips, no excessive entanglement would result.

Accordingly, we conclude that the County's provision of transportation for nonpublic school children to the Center would not offend the First Amendment.

VII

Conclusion

In summary, it is our opinion that the Board of Education of Prince George's County may permit nonpublic school children to participate in the current programs and activities of the Howard B. Owens Science Center. The Board of Education may supply nonpublic schools with pre- and post-visit packets, may permit visits to the Center on the same basis as public school students visit, and may provide free transportation of the students to and from the Center.

Our conclusion, we wish to emphasize, is simply that these activities are constitutionally permissible. The Board of Education is legally free to choose, as a policy matter, not to provide any or all of the Center's services or materials to nonpublic school students. We understand that present demand for the Center among the County

public schools exceeds the Center's capacity. Should the Board choose for that reason to limit or exclude access to Center programs until all public school demands have been met, neither the First Amendment right to free exercise of religion nor any other constitutional or statutory right would be violated. *See Thomas v. Allegany County Board of Education*, 51 Md. App. 312, 443 A.2d 622 (1982).

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Opinions & Advice

CONSTITUTIONAL LAW—REFERENDUM—STATUTES—SEVERABILITY—
HANDGUN CONTROL PART OF CHAPTER 533 MAY BE PETITIONED TO
REFERENDUM, BUT REJECTION OF HANDGUN CONTROL PART WILL
RENDER STRICT LIABILITY PART OF CHAPTER 533 INEFFECTIVE AS
WELL.

June 8, 1988

The Honorable William Donald Schaefer
Governor

You have requested our opinion on the legal effect of a referendum on only part of Chapter 533 (House Bill 1131) of the Laws of Maryland 1988. Chapter 533 contains two main components: provisions creating a mechanism under which the manufacture and sale of cheap "Saturday Night Specials" will be banned, and provisions overturning a Court of Appeals decision imposing strict liability on the manufacturers and sellers of Saturday Night Specials put to criminal use.

Your specific questions are as follows:

1. Are the handgun control and strict liability provisions of Chapter 533 severable?
2. If they are not severable, may the handgun control portions of the act nevertheless be petitioned to referendum separately? That is, if a petition seeks a referendum on only part of Chapter 533, is that petition valid?
3. If the handgun control portions of the act only may be petitioned to referendum, what is the legal effect of such a limited referendum? That is, would the filing of a valid referendum petition limited to the handgun control portions of Chapter 533 also result in the suspension of the strict liability portions of the act? If the referendum effort succeeded, and the handgun control provisions were rejected in November, would the strict liability provisions be legally effective?

For the reasons stated below, we conclude that the handgun control and strict liability provisions in Chapter 533 are not severable. The General Assembly would not have passed the one without the other.

Because the two sets of provisions are inseparable, a good argument could be made that neither component alone is subject to referendum. Nevertheless, the Referendum Amendment expressly allows "a part of any Act" to be referred. It does not say, and no court has yet

held, that the phrase “part of any Act” in the Referendum Amendment means only a *severable* part. Without clear precedent, we are unable to conclude that this limitation on the people’s right to referendum should be imposed. Hence, in response to your second question, we advise that the handgun control provisions of Chapter 533 may be petitioned to referendum, even if the strict liability provisions are not.

However, because the two parts of Chapter 533 are not severable, a referendum on the one will have an effect on the other comparable to the effect of a successful challenge in court. That is, the filing of a valid referendum petition limited to the handgun control provisions of Chapter 533 would suspend the effectiveness of not only those provisions but also the strict liability provisions. And, if the voters were to reject the handgun control provisions of Chapter 533 at referendum, the strict liability provisions would be legally ineffective as well.

I

The 1988 Handgun Legislation

The 1988 Session of the General Assembly was marked by a contentious debate over handguns. In a classic example of legislative compromise, two wholly disparate approaches to the problem were conjoined in the single piece of legislation that became Chapter 533. This political background is essential to an understanding of the legal issue.

On February 5, 1988, Delegate Hughes and many of his colleagues introduced House Bill 1131, the short title of which was “Handguns — Manufacture and Sale — Prohibition.” As originally introduced, this bill would have required the Superintendent of the Maryland State Police to establish a handgun roster. The legislation intended that the Superintendent include in this roster handguns so constructed as to be of legitimate sporting, self-protection, or law enforcement use. Manufacture or sale of handguns not on the roster would be prohibited. Through this mechanism, handguns having some legitimate purpose could be differentiated from “Saturday Night Specials,” the cheap handguns commonly used for criminal purposes. The bill also sought to prohibit the manufacture or sale of handguns with plastic components that could escape detection at airports and public buildings.

On February 3, 1988, Senator Beck and several of his colleagues introduced Senate Bill 484, the short title of which was “Civil Actions — Prohibition of Liability for Damages Caused by Certain Criminal

Use of Firearms.” This bill was intended to achieve a statutory abrogation of the main holding in *Kelley v. R. G. Industries, Inc.*, 304 Md. 124, 497 A.2d 1143 (1985). In *Kelley*, the Court of Appeals concluded “that it is entirely consistent with public policy to hold the manufacturers and marketers of Saturday Night Special handguns strictly liable to innocent persons who suffer gunshot injuries from the criminal use of their products.” 304 Md. at 157.¹

Both bills were favorably reported out of their respective committees. House Bill 1131 passed the House on March 31 by a vote of 85-53. Senate Bill 484 passed the Senate on March 24 by a vote of 27-18.

Nevertheless, each of the two bills faced stiff opposition in the other body. Senate Bill 484 was stalled in the House Judiciary Committee, unlikely to be reported out. House Bill 1131 faced an uncertain vote in the Senate Judicial Proceedings Committee and a filibuster on the Senate floor at Sessions’s end.

The proponents of House Bill 1131 then offered a compromise. As one newspaper described it: “They will agree to overturn a landmark court decision that established liability for the makers of inexpensive handguns in return for a bill to ban the sale of cheap Saturday night specials” *Washington Post*, April 7, 1988, at A38, col. 1. This account quoted Speaker of the House R. Clayton Mitchell as saying, of the two bills, “‘I think the only way to get them is to tie them together.’” *Id.* at col. 3. See also *Baltimore Sun*, April 7, 1988, at 1A, col. 7.²

As press accounts make clear, both proponents and opponents of handgun control recognized the amalgamation of the two bills for what it was: a political compromise that gave both sides some, but not all, of what they wanted. According to the *Baltimore Sun*, “Gun control advocates on the committee hailed the bill’s passage as ‘historic,’ although some gave decidedly mixed reactions to certain compromises that were made to get the bill to the Senate floor.” April 9, 1988, at 9A, col. 4. The *Washington Post* reported that one gun control opponent “said part of the compromise included a promise from him and other opponents on the committee not to participate in a filibuster.”

¹ Similar bills were introduced in 1986 and 1987. However, none of those bills were adopted by the General Assembly.

² The compromise also changed the mechanism for the handgun roster. Instead of leaving the decision about the roster to the Superintendent of State Police alone, the compromise amended House Bill 1131 to create a Handgun Roster Board, comprising law enforcement officials, a gun control advocate, a gun user, a gun manufacturer, and three citizen members.

April 9, 1988, at B4, col. 1-2. Senator Beck, the main sponsor of Senate Bill 484, was quoted as saying that "the compromise links the bills in a 'quid per quo' [sic] basis." *Carroll County Times*, April 8, 1988.

In short, there is no doubt that the following post-session summary is accurate: "The two seemingly contradictory provisions were joined in the same bill by legislators who knew there was little chance either would pass without support from both sides in the debate." *Baltimore Sun*, May 15, 1988, at 13A, col. 1.

Thus, as enacted and signed into law, Chapter 533 contains the two elements of the compromise. Through the mechanism of the Handgun Roster Board, the manufacture and sale of some handguns will be banned in Maryland.³ At the same time, the *Kelley* decision will be overturned by a provision, to be codified at Article 27, §36-I(h) of the Maryland Code, eliminating strict liability "for damages of any kind resulting from injuries to another person sustained as a result of the criminal use of any firearm by a third person, unless the person or entity conspired with the third person to commit, or willfully aided, abetted, or caused the commission of the criminal act in which the firearm was used."

II

The Referendum

Article XVI, §1(a) of the Maryland Constitution provides that:

³ The Board is to consider the following characteristics in deciding whether to authorize the manufacture and sale of a handgun:

- "(i) Concealability;
- (ii) Ballistic accuracy;
- (iii) Weight;
- (iv) Quality of materials;
- (v) Quality of manufacture;
- (vi) Reliability as to safety;
- (vii) Caliber;
- (viii) Detectability by the standard security equipment commonly used at airports or courthouses and approved by the Federal Aviation Administration for use at airports in the United States; and
- (ix) Utility for legitimate sporting activities, self-protection, or law enforcement."

Proposed Article 27, §36J(b)(2). A party aggrieved by the Board's final decision about a handgun's inclusion on the roster has a right to judicial review. §36J(f)(5).

“The people reserve to themselves power known as The Referendum, by petition to have submitted to the registered votes of the State, to approve or reject at the polls, any Act, or part of any Act of the General Assembly . . .”

A referendum question concerning any public general law is to be submitted to the voters at the next congressional election if a “referendum petition against an Act or part of an Act . . . [is] signed by three percent of the qualified voters of the State of Maryland, calculated upon the whole number of votes cast for Governor at the last preceding Gubernatorial election, of whom not more than half are residents of Baltimore City, or of any one County.” Article XVI, §3(a)⁴ Those seeking a referendum must file at least one-third of the required number of signatures with the Secretary of State before June 1. If the remaining signatures are filed by June 30, the referred law “shall not become a law or take effect until thirty days after its approval by a majority of the electors voting thereon . . .” Article XVI, §2.

In reliance on the language that permits referral of “part of any Act,” opponents of the handgun control portions of Chapter 533 have circulated a petition that would bring to referendum only those portions of the law.⁵ On May 31, the petitioners filed their initial set of petitions, purporting to bear the signatures of about 22,000 registered voters.⁶ These petitions do not include proposed Article 27, §36-I(h), the portion of Chapter 533 that would overturn the strict liability cause of action announced in *Kelley v. R.G. Industries*.⁷

⁴ The three percent figure at present is 33,044.

⁵ Article XVI, §4 provides, in pertinent part, that: “A petition may consist of several papers, but each paper shall contain the full text, or an accurate summary approved by the Attorney General of the Act or part of Act petitioned upon.” These petitions purport to contain “the full text . . . of the . . . part of Act petitioned upon.”

⁶ The Secretary of State accepted the petitions provisionally, pending the issuance of this opinion.

⁷ Two other substantive provisions of Chapter 533 were omitted from the petition: a prohibition on the manufacture or sale of handguns on which an identification mark or number has been altered, and a savings clause having to do with the manufacture and sale of rifles. See proposed Article 27, §36-I(c) and (f).

III

Severability Principles and Chapter 533

In general, all Maryland statutes are presumed to be severable. Article 1, §23 of the Maryland Code provides as follows:

The provisions of all statutes enacted after July 1, 1973 are severable unless the statute specifically provides that its provisions are not severable. The finding by a court that some provision of a statute is unconstitutional and void does not affect the validity of the remaining portions of that statute, unless the court finds that the remaining valid provisions alone are incomplete and are incapable of being executed in accordance with the legislative intent.

Moreover, Chapter 533 itself contains a severability clause. Section 2 of the Act provides, "That if any provision of this Act or the application thereof to any person or circumstance is held invalid for any reason in a court of competent jurisdiction, the invalidity does not affect other provisions or any other application of this Act which can be given effect without the invalid provision or application, and for this purpose the provisions of this Act are declared severable."

This latter provision is a standard severability clause. Department of Legislative Reference, *Legislative Drafting Manual 1987*, at 56. The provision was in House Bill 1131 as introduced; it was not added as part of the compromise.

Neither the general nor the specific severability clause is itself determinative of the question of severability. Rather, the question of severability is in every case a question of legislative intent. Of course, the intent to be ascertained is not the actual legislative intent (which is always that the entire law should be effective), but what the General Assembly would have intended had it known that the statute could be only partially effective. *Turner v. State*, 299 Md. 565, 576, 474 A.2d 1297 (1974). In this regard, the presence of a severability clause in the statute raises a presumption that the statute was intended to be severable, "but the clause is merely declaratory of an established rule of construction; it is 'an aid merely, not an inexorable command.' " *Sanza v. Maryland Board of Censors*, 245 Md. 319, 338, 226 A.2d 317 (1967) (quoting *Dorothy v. Kansas*, 264 U.S. 286, 290 (1924) (Brandeis, J.)).

Thus, the presence of a severability clause is not conclusive. The Court of Appeals, in a number of cases, has held that unconstitutional provisions of a statute could not be severed from constitutional provisions, notwithstanding the presence in the statute of a severability

clause. *E.g.*, *Board of Public Works v. Baltimore County*, 288 Md. 678, 684, 421 A.2d 588 (1980); *Wheeler v. State*, 281 Md. 593, 608-09, 380 A.2d 1052 (1977); *State v. Schuller*, 280 Md. 305, 320-21, 372 A.2d 1076 (1977); *Police Comm'r v. Siegel Enterprises, Inc.*, 223 Md. 110, 133-34, 162 A.2d 727 (1960). As the Court of Appeals put it in *City of Baltimore v. A. S. Abell Co.*, 218 Md. 273, 290, 145 A.2d 111 (1958), a severability clause "does not operate to save provisions which clearly would not have been enacted into law except upon the assumption that the entire act was valid."

The true test of severability is whether, without the inoperable provision, the statute would still be effective to carry out the dominant legislative intent. *Turner*, 299 Md. at 577; *Siegel Enterprises, Inc.*, 223 Md. at 134; *A.S. Abell Co.*, 218 Md. at 290-91. In determining legislative intent in this regard, as in any other case, the statute must be considered in light of its context. That context includes legislative history and other external manifestations of the General Assembly's aim or purpose. *Kaczorowski v. City of Baltimore*, 309 Md. 505, 515, 525 A.2d 628 (1987). Where the legislative history of a statute demonstrates that, without the inoperable provisions, the statute would have an effect contrary to the legislative intent, the conclusion must be that the General Assembly would not have enacted the statute without the inoperable provisions. In that case, the statute's provisions must be construed as nonseverable. *See Turner*, 299 Md. at 577-80 (reviewing legislative history of Female Sitters Law to conclude that statute was not severable).⁸

Truncating a statute would have an effect contrary to the legislative intent if doing so would upset the political compromise essential to the bill's passage. The Court of Appeals has been realistic in viewing the give-and-take that is often the key to a bill's enactment. For example, in *Nutwell v. Anne Arundel County*, 110 Md. 667, 73 A. 710 (1909), the Court of Appeals considered whether a vehicle licensing provision could be severed from an unconstitutional tax exemption for those vehicles. In holding that the two provisions were not severable, even though the licensing provision could have functioned independently, the Court wrote:

⁸ This principle is most commonly applied by the courts where an exception to a prohibition is found to be unconstitutional. If the prohibition and exception were enacted together, severing the exception would extend the prohibition to a class that the General Assembly manifestly did not intend to include. *E.g.*, *Turner*, 299 Md. at 577 and 580. Under those circumstances, the courts conclude that the General Assembly would not have enacted one provision without the other.

The tax exemption feature of this Act is one of its essential parts, and was no doubt intended to secure its passage. It is inseparably connected with the whole scheme of the Act. It is so important that it cannot be presumed the Act would have passed without it.

110 Md. at 672-73. In another case, the Court observed that "it would be impossible to believe . . . that if the act had been presented to the legislature with the features eliminated which we have held invalid it would have been passed by the legislature . . ." *Curtis v. Mactier*, 115 Md. 386, 399, 80 A. 1066 (1911). Cf. *McCorkle v. United States*, 559 F.2d 1258, 1262 (4th Cir. 1977).⁹ As the leading treatise summarizes the point, "where the invalid portion was the principal inducement for the passage of the statute, the whole statute must fail. In ruling that the legislature would not have enacted separately the valid part of a statute, courts describe the valid and invalid parts of the act as having been conditions, considerations, or compensations for each other." 2 *Sutherland Statutory Construction* §44.06, at 502 (4th ed. 1986).

Based on the legislative history, recounted in detail in Part I above, there can be no doubt that the portion of Chapter 533 overturning the *Kelley* decision on strict liability would not have been enacted if the General Assembly had known that the handgun control portions of the legislation would be rendered ineffective, whether because of a court decision or a referendum petition. Handgun control was "so important [to the compromise] that it cannot be presumed the act would have passed without it." *Nutwell*, 110 Md. at 673. To quote the Court's phrase from *Mactier*, it is "impossible to believe" that any provision to overturn *Kelley* would have passed the House of Delegates if the Senate had defeated the handgun control provisions. Therefore, the two provisions are not severable.

⁹ In *McCorkle*, the Fourth Circuit held that a legislative veto provision essential to the passage of a "compromise bill" on salaries was not severable. Although later case law suggests that unconstitutional legislative veto provisions are generally severable, the court's realism in analyzing the role of the provision in the congressional compromise parallels that of the Court of Appeals.

IV

The Right to Referendum
on a Part of an Inseverable Law

Article XVI, §1 empowers those voters who are dissatisfied with "part of any Act" to take that part to referendum. Language elsewhere in the Referendum Amendment echoes this right reserved to the people, to look within an act to differentiate the part that they find objectionable from the part that is not. Article XVI, §§3(a) and 4.

Of course, the right to refer a part of a law is not unlimited. Neither the whole of, nor any part of, an "appropriation for the maintenance of State Government" may be referred, because that kind of legislation is not subject to referendum. *Kelly v. Marylanders for Sports Sanity*, 310 Md. 437, 530 A.2d 245 (1987); *Bayne v. Secretary of State*, 283 Md. 560, 392 A.2d 67 (1978).¹⁰

Moreover, one can imagine referendum attempts that so parse an enactment as to be misleading, too fragmentary, or otherwise beyond the permissible bounds of the referendum. A petition that seeks, through the device of a referendum, merely to tinker with legislative decisions is probably invalid. For instance, we doubt that a referendum petition could validly seek to transform a prohibition into an authorization by eliminating the word "not," or to change the General Assembly's decision on when to implement a law by referring only the section of an act providing for a delayed effective date. An effort of that kind would cross the line from the negative power of the referendum to affirmative legislation or initiative. "The reserved power, known as the referendum, is negative; it is entirely distinct and fundamentally different from that of the initiative." *Baird v. Burke County*, 205 N.W. 17, 23 (1925). Cf. *Cheeks v. Cedlair Corp.*, 287 Md. 595, 415 A.2d 225 (1980).

However, no such extreme case is presented here. The petitioners are not trying to alter one or another aspect of the handgun control mechanism in Chapter 533; instead, they want to negate it altogether.

¹⁰ In 22 *Opinions of the Attorney General* 240 (1937), this office considered the validity of a petition seeking to refer part of a law dealing with alcoholic beverages. The opinion concluded that the Referendum Amendment's provision for petitions on "part of a law" should be construed "to permit a referendum on part of a law, only in cases where the law as an entirety is capable of referendum." 22 *Opinions of the Attorney General* at 242. Since the entire law in question dealt with a subject excepted from referendum by Article XVI, §6, no part of it could be petitioned to a vote. This conclusion was upheld in *Berlin v. Shockley*, 174 Md. 442, 199 A. 500 (1938).

Thus, this situation presents the direct question of whether Article XVI permits a referendum on parts of an act that are not severable. We are aware of no case, in Maryland or elsewhere, that directly addresses this question.¹¹

In another context, comparable constitutional language has been construed to forbid the negation of part of an inseparable law. Article II, §17 of the Constitution empowers the Governor "to disapprove of any item or items of any [appropriations] Bills . . . , and the part or parts of the Bill approved shall be the law, and the item or items of appropriations disapproved shall be void unless repassed . . . over the Executive veto." In 61 *Opinions of the Attorney General* 247 (1976), this office suggested that, if two items in an appropriation bill had "such manifest interdependence between them as to require both to fall if one is unable to stand," the Governor would not be empowered to veto one item but not the other. 61 *Opinions of the Attorney General* at 253.¹² Cf. *Commonwealth v. Barnett*, 48 A. 976, 978 (Pa. 1901) ("part" means a "distinct and severable" part of an appropriation).

We recognize the force of the parallel argument that, when the General Assembly has enacted an inseparable law, the voters should be asked to approve or disapprove that legislative decision as a whole,

¹¹ In 22 *Opinions of the Attorney General* 240, discussed in note 10 above, Attorney General O'Connor observed, rather cryptically, as follows: "Aside from the technical question of constitutional and statutory construction, it would seem that the reference of part of an Act should not be readily implied, for the reason that in the absence of a separability clause in the Act, the burden rests upon the party challenging the same to establish separability." 22 *Opinions of the Attorney General* at 242-43. Given that the Constitution expressly provides for reference of part of an act, we do not see how that right is "implied." Rather, the question is whether the constitutional language implies a limit on that right, when a bill is not severable. Since Chapter 533 does contain a severability clause, presumably the passing comment in the opinion about the petitioners' burden would not apply here in any event.

¹² The items in question were found to be severable, so the problem was not squarely posed. See also *Nowell v. Harrington*, 122 Md. 487, 492-93, 89 A. 1098 (1914) (expressing no opinion on whether the Governor could approve a part and disapprove a part of an inseparable item). Cases from other states tend to view the problem not in terms of a limit on a governor's veto power but rather in terms of the legal consequences after a governor vetoes part of an inseparable unit. See, e.g., *State v. Holder*, 23 So. 643 (Miss. 1898). But see *State ex rel. Wisconsin Telegraph Co. v. Henry*, 260 N.W. 486, 99 A.L.R. 1267, 1275 (Wis. 1935) ("It may well be that section 10, Art. 5, Wis. Const., was not intended to empower the governor in vetoing parts of an appropriation bill to dissever or dismember a single piece of legislation which is not severable or so as to leave provisions which are not a complete or fitting subject for a separate enactment by the Legislature:").

not a piece of it, just as the Governor should. However, the fact remains that Article XVI has never been construed authoritatively to impose on the petitioners the duty to ascertain, as best they can and at their peril, whether disparate parts of an act are severable and, if the parts are not severable despite a severability clause, to petition the whole act to referendum whether they want to or not. Indeed, the one out-of-state case that dwells at length on the impact of a "partial" referendum of a nonseverable bill nowhere suggests that such a referendum is itself improper. *Baird v. Burke County*, 205 N.W. 17 (N.D. 1925) (discussed in detail in Part V below).

In short, absent authoritative guidance from the courts, we find it difficult to conclude that severability doctrine should be so fully read into the Referendum Amendment as to prevent part of Chapter 533 from going on the ballot. The power of referendum is "vital," this office has observed, one "which the People have solemnly and expressly reserved to themselves . . ." 63 *Opinions of the Attorney General* 157, 163 (1978). In the final analysis, we think that doubts should be resolved in favor of the right to referendum.

Therefore, we conclude that the petitions seeking a referendum on only the handgun control portions of Chapter 533, if validated, are legally proper.

V

Effect of Partial Referendum

Our conclusion that the handgun control provisions of Chapter 533 alone may be petitioned to referendum does not resolve the question of what happens to the rest of the act if the petition is valid and if the voters reject the handgun control provisions. That is, if the petition results in the suspension of the handgun control provisions, which would otherwise become effective on July 1, will the strict liability abrogation in §36-I(h) also be suspended? If the referendum results in the negation of the handgun control provisions, will §36-I(h) also be negated? Based on the severability analysis set out above and the compelling reasoning of the one case directly on point discussed below, our answer to both of these questions is "Yes." If the handgun control provisions are rendered ineffective, temporarily or permanently, the *Kelley* repealer provision will also be ineffective.

In *Baird v. Burke County*, 205 N.W. 17 (N.D. 1925), the North Dakota Supreme Court applied the usual principles of severability in the context of that state's referendum provision. The North Dakota

Legislature had enacted a law, one part of which levied retroactively a certain tax. Another part of the act ratified certain settlement agreements that had been reached during the period when the tax in question had mistakenly been repealed. Under a provision of the North Dakota Constitution allowing a referendum on a law or part of law, the voters of that state rejected the provision to ratify the settlements, which was the only section of the law petitioned to referendum. Thus, the question before the court was whether the provision applying the tax retroactively, which had not been put to referendum, could be given effect.

The North Dakota Supreme Court summarized as follows its rule of severability, substantially identical to that of the Maryland Court of Appeals: "If striking out a part of the law results in a substantial departure from the legislative purpose, or effects an object not within the contemplation of the lawmaking body when the law was passed, and it cannot be presumed that the law would have been passed without the void part, the entire statute falls" 205 N.W. at 23. The court then held that the same principle is to be applied when the excision of a part of a law is the result of a referendum, instead of a court decision:

It is strongly urged that the same result must follow when, through the referendum, the legislative purpose is completely frustrated or altered by striking a portion. Upon what sound principle can a distinction be drawn under the facts in this case? We see none.

Id. The court continued: "From the standpoint of the effect of an adverse referendum of a part of an enactment upon the legislative intention, it is difficult to discover any distinction in principle between excision of a section or a part of a law by the referendum and the same operation through the decision of a court that such section or part is void because unconstitutional." *Id.*

Finally, the court concluded that, because the provision defeated in the referendum was a main inducement to the enactment of the statute, the statute in its entirety could not survive the excision of that provision:

We conclude that if the result of striking from a law an item, a part, clause, or section, be to take from it the principal inducement that led to its passage in the Legislature, and to leave a portion which, standing alone, in reality is a fundamental perversion of the purpose the lawmaking body intended to effect when the whole was enacted, the effect of such a referendum is to nullify the whole act as if the statute had

been disapproved by the people in its entirety.

205 N.W. at 24.

We believe that the Court of Appeals would adopt the same approach. In any realistic assessment of the process that led to the enactment of Chapter 533, a court would find it a "fundamental perversion" of legislative intent if handgun control were nullified but the *Kelley* repealer survived. Hence, if the referendum process suspends or nullifies the one, it will have the same effect on the other. The filing of a valid petition will suspend all of Chapter 533.¹³ Therefore, a plaintiff will continue to have a cause of action under *Kelley* until the referendum. If the referendum results in the rejection of handgun control, *Kelley* will remain part of this State's common law.

We recognize that this outcome presents the voters with a question that is incomplete, in an important sense. A voter who votes against handgun control is also voting, in effect, against the abrogation of *Kelley*. However, one can envision other situations in which a referendum would have important collateral consequences not stated in the ballot question itself. For example, suppose that a newly enacted State statute were a prerequisite to the receipt of millions of dollars in federal aid. A successful referendum on that statute would result in the loss of the money—a collateral consequence of major importance nowhere reflected in the wording of the referendum.

A referendum on part of Chapter 533 will inevitably be influenced by factors that go beyond the ballot question itself, one of which might be the collateral effect on the *Kelley* decision. In this instance as in others, the referendum process works well only if the debate about a question educates the voters fully and fairly. See Article 33, §23-4 of the Maryland Code.

¹³ Significantly, Article XVI does not contain language, comparable to that in referendum provisions of other state constitutions adopted contemporaneously, creating a special rule of severability when part of a law is put to referendum. For example, Article II, §1(d) of the Washington Constitution provides that: "The filing of a referendum petition against one or more items, sections or parts of any act, law or bill shall not delay the remainder of the measure from becoming operative." See also Kentucky Constitution, §171; North Dakota Constitution, Article II, §25; Ohio Constitution, Article II, §1c.

V

Conclusion

In summary, it is our opinion that:

1. Although Chapter 533 of the Laws of Maryland 1988 comprises two strikingly different elements, the two are not severable. The manifest legislative intent was to fashion a compromise in which handgun control and the abrogation of *Kelley v. R.G. Industries* would stand or fall together.

2. Although the issue is not free from doubt, Article XVI, §1 of the Maryland Constitution should be read to permit a petition to refer only the handgun control provisions of Chapter 533, despite the inseverability of that provision from the act's other provisions.

3. Because no part of Chapter 533 is severable, if the handgun control provisions are suspended through the filing of a referendum petition, the entire act—including the abrogation of *Kelley's* strict liability holding — will be suspended. If the handgun control provisions are nullified at referendum, the entire act will be nullified.

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

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Opinions & Advice

Editor's Note: The referendum petition discussed in this opinion was found to be sufficient, and so Chapter 533 was suspended. However, on November 8, 1988, the voters overwhelmingly approved Chapter 533. Hence, it became effective 30 days later.

CONSTITUTIONAL LAW—SEPARATION OF POWERS—JUDICIARY—CIRCUIT COURT MAY BE MADE SUBJECT TO COUNTY PURCHASING LAWS, SO LONG AS LAWS ARE NOT APPLIED IN A WAY TO DEPRIVE COURT OF NECESSARY ITEMS.

July 14, 1988

The Honorable William H. McCullough
County Administrative Judge
Circuit Court for Prince George's County

You have requested our opinion on the validity of Article 24, §8-101(5) of the Maryland Code, under which a Circuit Court “is subject to the budget and fiscal policies and purchasing laws of the county in which it is located.” Specifically, you ask whether this provision, as applied in Prince George’s County, violates the separation of powers requirement embodied in Article 8 of the Maryland Declaration of Rights.

For the reasons given below, we conclude that Article 24, §8-101(5) of the Maryland Code does not violate the separation of powers requirement of Article 8 of the Maryland Declaration of Rights. Accordingly, the Circuit Court for Prince George’s County is subject to “the budget and fiscal policies and purchasing laws of the county,” including the county’s Minority Business Enterprise Program. However, the county may not apply its purchasing regulations to the court in a way that would deprive the court of adequate and suitable facilities, equipment, or personnel reasonably necessary to carry out the court’s judicial function.

I

Prince George’s County Purchasing Laws

Prince George’s County has recently amended its purchasing laws in a way that may have a significant effect on the budgets of entities subject to those laws. County Council Bill 112-1987, effective January 11, 1988, modifies the county’s Minority Business Enterprise Program for the purpose of increasing the participation of minority business enterprises in county contracts.

In several instances, the new ordinance explicitly permits or requires governmental entities to forbear from seeking the lowest price for goods or services in order to increase the likelihood of awarding

a procurement contract to a minority business enterprise. For example, for the purpose of determining the lowest responsible and responsive bidder on competitively bid contracts of not more than \$500,000, any bid submitted by a minority business enterprise must be "reduced" by multiplying the bid amount by a "bonus factor."¹ By this procedure, the bid of a minority business enterprise may be regarded as the lowest for purposes of awarding the contract, although the price that the county will actually pay on the resultant contract — the actual price bid — is not the lowest bid submitted. Prince George's County Code §10-152(c). Similarly, §10-152(g) of the County Code allows competitive bidding on contracts to be restricted to certified minority business enterprises under certain circumstances, so long as the resultant contract price is not as much as 15 percent above the most recent price or the market price for the goods or services being purchased.²

Thus, if the Circuit Court for Prince George's County must conform to the county's Minority Business Enterprise Program, it may experience an increase in the cost of goods and services that it purchases. This potential effect has prompted your inquiry as to the

¹ The "bonus factor" is ordinarily .05, but is increased to .10 if the minority business enterprise is based in Prince George's County. Prince George's County Code §10-152(c).

² We are not faced with, and do not address, any question of the constitutionality of the county's Minority Business Enterprise Program under the Equal Protection Clause of the Fourteenth Amendment. In *Wygant v. Jackson Board of Educ.*, 476 U.S. 267 (1986), the Supreme Court invalidated a public employer's affirmative action program on Equal Protection grounds. Federal appellate courts have relied on *Wygant* to strike down minority preference laws for public contracts. *E.g.*, *J.A. Croson Co. v. City of Richmond*, 822 F.2d 1355 (4th Cir. 1987), *prob. juris. noted*, 108 S.Ct. 1010 (1988); *Associated Gen'l Contractors of Calif. v. City & County of San Francisco*, 813 F.2d 922 (9th Cir. 1987); *J. Edinger & Son, Inc. v. City of Louisville, Ky.*, 802 F.2d 213 (6th Cir. 1986). However, the various plurality opinions in *Wygant* leave unclear the standards by which the constitutionality of minority preference programs is to be judged. The City of Richmond's appeal from the invalidation of its minority preference program in the *J. A. Croson* case is now pending before the Supreme Court.

In an amicus brief in *Croson*, we have urged the Supreme Court to reject a "Draconian strict scrutiny standard that permit[s] no leeway for legitimate legislative judgment." Instead, "a less rigid, 'intermediate' standard of review should be applied to MBE legislation. A court should consider the totality of the circumstances justifying imposition of affirmative action legislation to determine whether the Equal Protection Clause is offended." Brief of the State of Maryland as Amicus Curiae in Support of Appellant at 2-3, *City of Richmond v. J. A. Croson Co.* (No. 87-998).

validity of Article 24, §8-101 as applied to the courts³

II

Separation of Powers

Article 8 of the Maryland Declaration of Rights provides “[t]hat the Legislative, Executive, and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other.” The Court of Appeals long ago pointed out that:

The evident purpose of [Article 8] is to parcel out and separate the powers of government, and to confide particular classes of them to particular branches of the supreme authority. That is to say, such of them as are judicial in their character to the judiciary; such as are legislative to the legislative, and such as are executive in their nature to the executive. Within the particular limits assigned to each, they are supreme and uncontrollable.

Wright v. Wright, 2 Md. 429, 452 (1852). Therefore, “one branch may not *usurp* the *essential* functions and powers of another branch . . . , may not act to *destroy* the *essential* functions and powers of another branch . . . , and may not *delegate* its *essential* functions and powers to another branch” 63 *Opinions of the Attorney General* 305, 310 (1978) (emphasis in original; citations omitted).

Nonetheless, the Court of Appeals has also long recognized that Article 8 does not require a complete separation between the departments of government. *City of Baltimore v. State ex rel. Board of Police*, 15 Md. 376, 457 (1860). “[T]he separation of powers concept may constitutionally encompass a sensible degree of elasticity and should not be applied with doctrinaire rigor.” *Department of Natural Resources v. Linchester Sand & Gravel Corp.*, 274 Md. 211, 220, 334 A.2d 514 (1975). The separation of powers requirement “is not intended to

³ Article 24, §8-101 also applies to county boards of supervisors of elections, State’s Attorneys’ offices, Sheriffs’ offices, and county boards of liquor license commissioners. However, it does not apply to the offices of the clerks of the circuit courts. Those offices are subject to State fiscal procedures. Article IV, §10 of the Maryland Constitution; 72 *Opinions of the Attorney General* 21, 24-26 (1987).

prevent one branch from exercising its own powers simply because they affect or even nullify the acts of another branch." 63 *Opinions of the Attorney General* at 310⁴ It is only the essential functions of each branch of government that are exclusive to it; in other areas, the branches may have concurrent powers.

"[T]he essence of judicial power is the final authority to render and enforce a judgment . . ." *Attorney General v. Johnson*, 282 Md. 274, 286, 385 A.2d 57, *appeal dismissed*, 439 U.S. 805 (1978). To carry out that function, the judiciary necessarily has certain implied or inherent powers: "the power to protect itself; the power to administer justice . . . ; the power to promulgate rules for its practice; and the power to provide process where none exists." *In re Bruen*, 172 P. 1152 (Wash. 1918) (quoted with approval in *Commission on Medical Discipline v. Stillman*, 291 Md. 390, 400, 435 A.2d 747 (1981). *Accord Attorney General v. Waldron*, 289 Md. 683, 690-91, 426 A.2d 929 (1981).

But not every act that a court may perform is necessarily a judicial act. *See Robey v. County Comm'rs of Prince George's County*, 92 Md. 150, 162, 48 A. 48 (1900). For example, courts have inherent power to appoint persons needed to assist them in the conduct of judicial business. *Prince George's County v. Mitchell*, 97 Md. 330, 338-39, 55 A. 673 (1903). Yet the Court of Appeals has acknowledged that the appointment of personnel is in the nature of an executive, not a judicial, act. *Boyer v. Thurston*, 247 Md. 279, 295, 231 A.2d 50 (1967). In areas like this the General Assembly may act, notwithstanding that its actions affect the courts: "[S]o long as legislation does not usurp the judicial power and permits the courts to effectively exercise the judicial power, the General Assembly is not precluded from exercising its plenary power on matters affecting the judiciary, and the inherent powers of the courts are qualified by the exercise of this legislative power." 65 *Opinions of the Attorney General* 309, 312 (1980).

In that opinion, this office concluded that the General Assembly may establish a personnel system for the courts, because that is not an exclusive judicial function. We think that the same is true of the establishment of procedures and policies to be followed in the purchase of goods and services for the use of the courts. In our view, the setting of those policies is not a core judicial function, but is in the nature of a legislative act. Accordingly, it may be performed by

⁴ In that opinion, the Attorney General concluded that the separation of powers provision would not prevent the General Assembly from exercising its plenary legislative power to enact ethical standards for members of the judicial, as well as the legislative and executive, branches of government. 63 *Opinions of the Attorney General* at 311.

the General Assembly in the exercise of its legislative authority. By the same token, the General Assembly may delegate that policy-making function to the legislative bodies of the counties. *Cox v. Board of County Comm'rs of Anne Arundel County*, 181 Md. 428, 434, 31 A.2d 179 (1943). See also *City of Bowie v. County Comm'rs of Prince George's County*, 258 Md. 454, 461, 267 A.2d 172 (1970).⁵

To be sure, budget and fiscal policies may not be applied to the courts in a way that prevents the courts from carrying out their judicial function. "It was certainly never intended that any one department, through the exercise of its acknowledged powers, should be able to prevent another department from fulfilling its responsibilities to the people under the Constitution." *O'Coin's, Inc. v. Treasurer of the County of Worcester*, 287 N.E. 2d 608, 612 (Mass. 1972). A legislative body may not refuse to provide a court with adequate and suitable facilities, equipment, and personnel to carry out the administration of justice. See *State ex rel. Hottle v. Board of County Comm'rs of Highland County*, 370 N.E. 2d 462, 464 (Ohio 1977). We think that this principle is equally applicable to the administration of Prince George's County's Minority Business Enterprise Program: the county may not require the court to purchase goods or services from a particular supplier if that supplier is unable to provide adequate and suitable goods or services to meet the court's needs. So long as the court's needs are met, however, the constitutional requirement of separation of powers is not violated by subjecting the court to budget and fiscal policies and purchasing laws formulated by the legislative branch.

III

Conclusion

In summary, it is our opinion that Article 24, §8-101(5) of the Maryland Code does not violate the separation of powers requirement of Article 8 of the Maryland Declaration of Rights. Accordingly, the Circuit Court for Prince George's County is subject to "the budget and fiscal policies and purchasing laws of the county," including the county's Minority Business Enterprise Program. However, the county may not apply its purchasing regulations to the court in a way that

⁵ As a charter home-rule county, Prince George's County has been granted full legislative power to enact local laws for the maintenance of peace, good government, and the health and welfare of the county. *Montgomery Citizens League v. Greenhalgh*, 253 Md. 151, 159-60, 252 A.2d 242 (1969).

would deprive the court of adequate and suitable facilities, equipment, or personnel reasonably necessary to carry out the court's judicial function.

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Opinions & Advice

Editor's Note: The *Croson* case, discussed in note 2 of this opinion, was decided by the Supreme Court on January 23, 1989. 109 St. Ct. 706 (1989). We analyzed *Croson* and applied it to the State's Minority Business Enterprise program in 74 *Opinions of the Attorney General* — (1989) [Opinion No. 89-007 (February 22, 1989)].

CONSTITUTIONAL LAW—CRIMINAL LAW—VAGUENESS—OVERBREADTH—
CAMBRIDGE LOITERING ORDINANCE NOT UNCONSTITUTIONAL IF IT IS
APPLIED ONLY IN ACCORDANCE WITH NARROWING CONSTRUCTION.

August 10, 1988

Chief Russell E. Wroten
Chief of Police
City of Cambridge

You have requested our opinion on the constitutionality of the anti-loitering ordinance of the City of Cambridge, §12-1 of the City Code.

For the reasons given below, we conclude that the ordinance may properly be construed so that it is not unconstitutional. At the same time, we caution that it must be applied in strict accordance with this narrowing construction to avoid unconstitutional applications.

I

Constitutional Principles

Loitering, vagrancy, and disorderly conduct statutes and ordinances have been challenged in numerous cases, and a number of those enactments have been invalidated. *E.g.*, *Kolender v. Lawson*, 461 U.S. 352 (1983); *Gooding v. Wilson*, 405 U.S. 518 (1972); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). Those decisions have found the challenged enactments unconstitutionally vague or overbroad.¹

¹ In recent years, a number of state courts have also invalidated statutes or ordinances pertaining to loitering or disorderly conduct on grounds of their vagueness or overbreadth. *People v. Bright*, 526 N.Y. 2d 66 (1988) (loitering in transportation facility); *Musselman v. Commonwealth*, 705 S.W.2d 476 (Ky. 1986) (harassment); *State v. Williams*, 479 N.E.2d 687 (Mass. 1985) (obstructing travel); *Pompano Beach v. Capalbo*, 455 So. 2d 468 (Fla.App. 1984) (sleeping in vehicle); *Childers v. City of Tulsa*, 658 P.2d 497 (Okla. App. 1983) (refusal to obey peace officer's order to leave public place); *Gates v. Santa Clara County*, 185 Cal. Rptr. 330 (App. 1982) (loitering for purpose of solicitation); *State v. Stillely*, 416 So. 2d 928 (Cal. 1982) (loitering at polling place); *Bullock v. City of Dallas*, 281 S.E.2d 613 (Ga. 1981); *State ex rel. C.M.*, 630 P.2d 593 (Colo. 1981) (loitering on school property); *State v. Bloss*, 613 P.2d 354 (Haw. 1980) (loitering near pinball machine).

A. *Vagueness*

“As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender*, 461 U.S. at 357. Thus, the doctrine has two aspects. First, it requires that a criminal law “give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.” *United States v. Harriss*, 347 U.S. 612, 617 (1954). Accordingly, “the Legislature may not criminalize conduct that is inherently innocent merely because such conduct is ‘sometimes attended by improper motives,’ since to do so would not fairly inform the ordinary citizen that an otherwise innocent act is illegal . . .” *People v. Bright*, 526 N.Y.2d 66, 69 (1988) (citations omitted). Second, the doctrine requires that “a legislature establish minimal guidelines to govern law enforcement.” *Smith v. Goguen*, 415 U.S. 566, 574 (1974). The second aspect is the more important, for the lack of enforcement guidelines “may permit ‘a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.’” *Kolender*, 461 U.S. at 358 (quoting *Smith*, 415 U.S. at 575).²

Nonetheless, the Constitution does not demand absolute precision in the wording of statutes and ordinances. “[L]ack of precision is not itself offensive to the requirements of due process. ‘. . . [T]he Constitution does not require impossible standards’; all that is required is that the language ‘conveys sufficiently definite warning as to the proscribed

² Relying on *Kolender* and *Papachristou*, Assistant Attorney General Richard E. Israel advised that the State’s then-existing tramp law, former Article 27, §581, was “of doubtful validity on account of vagueness.” Letter to Delegate Virginia Thomas at 2 (April 5, 1985). That statute provided:

Every person, not insane, who wanders about in this State and lodges in market houses, marketplaces, or in other public buildings, or in barns, outhouses, barracks, or in the open air, without having any lawful occupation in the city, town or county in which he may so wander, and without having any visible means of support, shall be deemed to be a tramp, and to be guilty of a misdemeanor, and shall be subject to imprisonment, at the discretion of the court hearing the charge, for a period of not less than thirty days, nor more than one year. This section does not apply to Allegany County.

Mr. Israel concluded that the statute did not clearly apprise ordinary people of what conduct is forbidden, in light of the vagueness of the phrase “wanders about,” and vested very broad discretion in law enforcement officers to decide whether particular conduct violated the statute. The tramp law was repealed by Chapter 71 of the Laws of Maryland 1986.

conduct when measured by common understanding and practices" *Roth v. United States*, 354 U.S. 476, 491 (1957) (quoting *United States v. Petrillo*, 332 U.S. 1, 7-8 (1947)).

Further, "a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).³ Thus, the void-for-vagueness doctrine will invalidate an enactment only if it is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971).

B. Overbreadth

The closely related doctrine of overbreadth may lead to the invalidation of a statute or ordinance if the enactment implicates First Amendment rights of freedom of speech or assembly. "In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940). "Criminal statutes must be scrutinized with particular care . . . ; those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." *City of Houston, Texas v. Hill*, 107 S.Ct. 2502, 2508 (1987) (citations omitted). For example, an enactment that regulates speech "must be carefully drawn or be authoritatively construed to punish only unprotected speech . . ." *Gooding*, 405 U.S. at 522. It must not be "susceptible of application to speech, although vulgar or offensive, that is protected by the First and Fourteenth Amendments." *Lewis v. City of New Orleans*, 415 U.S. 130, 134 (1974).

The overbreadth doctrine does not mean, however, that municipalities may never enact ordinances that might impinge to some extent upon the exercise of First Amendment rights. "Only a statute

³ A "scienter" requirement is a provision in a criminal law that makes the deliberateness of an accused person's conduct a necessary element of the offense. For example, a State statute makes it unlawful to "wilfully disturb any neighborhood ... by loud and unseemly noises" Article 27, §121. Thus, the statute was not violated by one who shouted extremely vulgar language in protest against a police officer's actions because he did not do so to disturb the neighborhood. *Diehl v. State*, 294 Md. 466, 472, 451 A.2d 115 (1982). See also 66 *Opinions of the Attorney General* 73, 77-78 (1981).

that is substantially overbroad may be invalidated on its face.” *Hill*, 107 S.Ct. at 2508.

Municipalities are “free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct.” *Coates*, 402 U.S. at 614. *See also Cox v. Louisiana*, 379 U.S. 536, 554 (1965). Further, municipalities “are free to ban the simple use, without demonstration of additional justifying circumstances, of so-called ‘fighting words,’ those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.” *Cohen v. California*, 403 U.S. 15, 20 (1971). The overbreadth doctrine invalidates an enactment only if it is not narrowly directed to activity that may be prohibited, but also significantly inhibits the exercise of constitutionally protected rights. *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984).

II

Cambridge Loitering Ordinance

The loitering ordinance of the City of Cambridge, §12-1 of the City Code, provides as follows:

(a) As used in this section, ‘loitering’ shall mean remaining idle in essentially one location and shall include the concepts of spending time idly, loafing, or walking about aimlessly, and shall also include the colloquial expression ‘hanging around.’ Public places shall include not only streets, alleys, and sidewalks but those establishments generally open for the public convenience.

(b) No person shall loiter in a public place in such manner as to:

(1) Create or cause to be created a danger of a breach of the peace;

(2) Create or cause to be created any disturbance or annoyance to the comfort or repose of any person;

(3) Obstruct the free passage of pedestrians or vehicles;

(4) Obstruct, molest, or interfere with any person lawfully in any public place.

This paragraph shall include the making of unsolicited remarks of an offensive, disgusting, or insulting nature or which are calculated to annoy or disturb the person to, or in whose hearing they are made.

(c) Whenever the presence of any person in any public place is causing or is likely to cause any of the conditions enumerated in subsection (b), any police officer may order that person to leave that place. Any person who shall refuse to leave after being ordered to do so by a police officer shall be guilty of a violation of this section.

(d) Any person violating this section may be deemed to be guilty of an infraction, the fine for which shall be fifty dollars (\$50.00). Repeat offenses occurring within a period of one year from the initial violation shall be subject to a fine of one hundred dollars (\$100.00).

Courts reviewing statutes or ordinances challenged on constitutional grounds will construe the enactments to avoid doubts as to their constitutionality, if the construction is reasonable. *Davis v. State*, 294 Md. 370, 278, 451 A.2d 107 (1982). Therefore, in examining the constitutionality of §12-1, we consider whether its language may reasonably be construed to avoid problems of vagueness or overbreadth.

This question, like all questions of statutory construction, is one of legislative intent — that is, of the legislative purpose, aim, or policy reflected in the enactment. *Kaczorowski v. City of Baltimore*, 309 Md. 505, 513, 525 A.2d 628 (1987). The legislative purpose or goal is sought first from the language of the enactment. *Boulden v. Mayor*, 311 Md. 411, 414, 535 A.2d 477 (1988). But that language is not to be read in isolation; it must be construed in light of the enactment's context. *Kaczorowski*, 309 Md. at 514-15. In particular, the ordinance under consideration must be read in conjunction with related enactments to determine its intended scope and effect. 309 Md. at 516-17.

III

Narrowing Construction of the Loitering Ordinance

A. *New Jersey Precedent*

The New Jersey state courts have upheld a loitering ordinance virtually identical to that of Cambridge. *Camarco v. City of Orange*,

295 A.2d 353 (N.J. 1972), *aff'g* 283 A.2d 122 (N.J. App. Div. 1971), *aff'g* 268 A.2d 354 (N.J. Super. 1970).⁴ The definition of "loitering" in Cambridge City Code §12-1(a) and the substantive prohibitions of §12-1(b) are word-for-word the same as the parallel provisions of the New Jersey ordinance.⁵ The New Jersey ordinance's provision paralleling §12-1(c), however, provides as follows:

Whenever *any police officer shall, in the exercise of reasonable judgment, decide that* the presence of any person in any public place is causing or is likely to cause any of the conditions enumerated in Section 2 [the equivalent of §12-1(b)], he may, *if he deems it necessary for the preservation of the public peace and safety,* order that person to leave that place. Any person who shall refuse to leave after being ordered to do so by a police officer shall be guilty of a violation of this Section.

(Emphasis added.)

⁴ More recently, the Supreme Court of New Jersey held that an identical ordinance of the city of Newark has been preempted by state law. *State v. Crawley*, 447 A.2d 565, 568-69 (N.J. 1982). Although the court noted concerns about the constitutionality of loitering laws that had led the state legislature to decriminalize loitering, it did not reconsider its decision in *Camarco*.

⁵ The trial court in *Camarco* indicated that the New Jersey ordinance was closely patterned on a draft proposal for the Model Penal Code's section on loitering. 268 A.2d at 357. However, as finally adopted in 1974, that Model Penal Code section provides:

"A person commits a violation if he loiters or prowls in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity. Among the circumstances which may be considered in determining whether such alarm is warranted is the fact that the actor takes flight upon appearance of a peace officer, refuses to identify himself, or manifestly endeavors to conceal himself or any object. Unless flight by the actor or other circumstance makes it impracticable, a peace officer shall prior to any arrest for an offense under this section afford the actor an opportunity to dispel any alarm which would otherwise be warranted, by requesting him to identify himself and explain his presence and conduct. No person shall be convicted of an offense under this Section if the peace officer did not comply with the preceding sentence, or if it appears at trial that the explanation given by the actor was true and, if believed by the peace officer at the time, would have dispelled the alarm."

Model Penal Code (U.L.A.) §250.6 (1974). This final version of the section was proposed "in order 'to save the section from attack and possible invalidation as a subterfuge by which the police would be empowered to arrest and search without probable cause.'" *People v. Berck*, 347 N.Y.S. 2d 33, 39 (1973) (quoting Model Penal Code §250.6 comment (Proposed Official Draft, 1962)). Courts have nonetheless differed on the

continued

The New Jersey courts “readily recognized that if the ordinance broadly proscribed loitering or idling without more it would be unconstitutional.” *Camarco*, 295 A.2d at 354.⁶ With that constitutional inevitability in mind, those courts construed the ordinance instead to “simply proscrib[e] loitering which obstructs, molests or interferes with others lawfully in public places or which threatens an immediate breach of the peace.” Thus circumscribed, the reach of the ordinance was constitutional. In addition, they held that a violation of the ordinance may arise only when a person who is committing one of the prohibited acts of loitering refuses to obey a police officer’s order to move. *Id.* Because the ordinance considered in *Camarco* is essentially identical to the Cambridge loitering ordinance, we will look to the New Jersey courts’ opinions for guidance in construing the Cambridge ordinance.⁷

Note 5 continued

constitutionality of the final Model Penal Code formulation. Compare *Fields v. City of Omaha*, 810 F.2d 830 (8th Cir. 1987) (invalidating ordinance) with *Bell v. State*, 313 S.E. 2d 678 (Ga. 1984) (upholding statute). Moreover, one court has stated that a statute patterned on the final Model Penal Code provision, “although constitutional, plainly reaches the outer limits of constitutionality and must be applied by the courts with special care so as to avoid unconstitutional applications.” *D.A. v. State*, 471 So. 2d 147, 153 (Fla. App. 1985). The New Jersey Supreme Court, discussing that state’s decision to delete the Model Penal Code’s provision from the revised state penal code, took note of criticism by the chairman of the New Jersey Criminal Law Revision Commission that “[t]he Model Penal Code draftsmen . . . tried with little success to develop a defensible statute on loitering that would be definite enough to give notice, provide a standard of guilt, and prevent official harassment.” *State v. Crawley*, 447 A.2d at 568, n.3 (quoting Knowlton, “Comments Upon the New Jersey Penal Code,” 32 Rut. L. Rev. 1 (1979)).

⁶ Another state court has noted that “[t]he word ‘loiter’ has no sinister meaning and, by itself, implies no wrongdoing or misconduct, or engagement in prohibited practices.” Thus, loitering is not a crime in itself and cannot be punished constitutionally.” *People v. Smith*, 254 N.W.2d 654, 656 (Mich. App. 1977) (quoting *Detroit v. Hodges*, 164 N.W.2d 781, 782 (Mich. 1968)). Accord *People v. Bright*, 526 N.Y. S.2d 66, 70 (1988). The United States Supreme Court has similarly pointed out that the overt actions targeted by laws that criminalize vagrancy or loitering in themselves — such actions as idling, loafing, and walking about aimlessly — “are historically part of the amenities of life as we have known them.” *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972).

⁷ We note, however, that another ordinance similar to Cambridge’s has more recently been invalidated. *Derby v. Town of Hartford*, 599 F. Supp. 130 (D. Vt. 1984). Hartford’s ordinance defined “loitering” to mean “remaining idle in essentially one location and shall include the concept of spending time idly; to be dilatory; to linger; to stay; to

continued

B. Construction With Other Law

In our construction of §12-1 of the Cambridge City Code, we will not follow precisely the same path trod by the New Jersey courts in *Camarco*; nor do we reach precisely the same terminus. The New Jersey courts found no related ordinance to which it was necessary to refer in construing the loitering ordinance. However, the Cambridge City Code does include additional ordinances also pertaining to disorderly conduct.⁸ We believe that §12-1 must be construed in light

Note 7 continued

saunter; to delay; to stand around and shall also include the colloquial expression "hanging around." ' The substantive provisions were as follows:

"(a) It shall be unlawful for any person to loiter, loaf, wander, stand or remain idle either alone and/or in consort with others in a public place in such manner so as to:

(1) Obstruct any public street, public highway, public sidewalk or any other public place or building by hindering or impeding or tending to hinder or impede the free and uninterrupted passage of vehicles, traffic or pedestrians [sic].

(2) Commit in or upon any public street, public highway, public sidewalk or any other public place or building any act or thing which is an obstruction or interference to the free and uninterrupted use of property or with any business lawfully conducted by anyone in or upon or facing or fronting on any such public street, public highway, public sidewalk or any other public place or building, all of which prevents the free and uninterrupted ingress, egress, and regress, therein, thereon and thereto.

(b) When any person causes or commits any of the conditions enumerated in Subsection (a) herein, a police officer or any law enforcement officer shall order that person to stop causing or committing such conditions and to move on and disperse. Any person who fails or refuses to obey such orders shall be guilty of a violation of the Ordinance."

599 F. Supp. at 131, n.2. The town asserted that the ordinance would be violated only if a person causing an obstruction in a public place failed to "refrain from obstructing" after being warned by police to do so. 599 F. Supp. at 135. Nonetheless, the court held that the ordinance was unconstitutionally vague, noting that "there is no indication as to how long one can remain 'idle in essentially one location' before that conduct constitutes loitering." Thus, the court concluded that the language of the ordinance was not in reality limited to obstructive conduct, but would permit an arrest merely for remaining idly in one place. *Id.*

⁸ "Disorderly conduct" is a term of indefinite meaning, "signifying generally any behavior that is contrary to law, and more particularly such as tends to disturb the public peace or decorum, scandalize the community, or shock the public sense of morality." *Black's Law Dictionary*, 422 (5th ed. 1979).

of those ordinances. See *Kaczorowski v. City of Baltimore*, 309 Md. at 515 (context of enactment includes related enactments).

Section 12-2 of the Cambridge City Code provides:

It shall be unlawful for any person within the corporate limits of the City to disturb, tend to disturb, or aid in disturbing the peace of others by violent, tumultuous, offensive, or obstreperous conduct and no person shall knowingly permit such conduct upon any premises owned or possessed by him or under his control. Any person violating this section may be deemed to be guilty of an infraction, the fine for which shall be fifty dollars (\$50.00). Repeat offenses occurring within a period of one year from the initial violation shall be subject to a fine of one hundred dollars (\$100.00).

Section 12-4 of the Cambridge City Code provides:

No person shall indulge in loud and boisterous laughing or talking, engage in the blowing of horns, or with the voice or by any other means make any loud or unseemly noises to the disturbance of the quiet or comfort of the people who may reside or be in the neighborhood. Any person violating this section shall be fined not less than one dollar (\$1.00) or more than one hundred dollars (\$100.00).⁹

Enactments pertaining to disorderly conduct not infrequently appear to overlap each other to a certain extent. Compare Article 27, §121 with §122 and §123. See *In re Nawrocki*, 15 Md. App. 252, 257-59, 289 A.2d 846 (1972) (construing statutes). Nonetheless, §12-1 was clearly intended to do more than merely duplicate any of the provisions of §§12-2 and 12-4. Therefore, while §12-1 may reach some of the same general kind of conduct reached by §§12-2 and 12-4, §12-1 must be construed to also reach different forms of conduct. Accordingly, we will follow *Camarco* as a guide, but we will not adhere completely to the construction of the loitering ordinance there adopted. To the extent that the *Camarco* construction may simply duplicate §§12-2 or 12-4, it is not fully applicable to §12-1.

⁹ Section 12-3 prohibits the keeping of a disorderly house, including a house of prostitution or a place for gambling. Thus, it also forms a part of the City's general system for controlling disorderly conduct, although its provisions are not directly relevant to our discussion of §12-1.

IV

Cambridge City Code §12-1

A. “*Create or cause to be created a danger of a breach of the peace*”
— §12-1(b)(1)

The New Jersey Appellate Division concluded that “breach of the peace” imports conduct that is violent or that incites or provokes others to violence and destruction of public order. 283 A.2d at 124-25.¹⁰ Therefore, it held that the first prohibition is directed to “only such loitering conduct as clearly will cause an immediate, actual, physical violent reaction from any person, which violent reaction will cause a threat to the peace and order of the public.” 283 A.2d at 125.

However, another provision of the Cambridge City Code reaches conduct of this kind. Section 12-2 of the City Code prohibits “disturb[ing], tend[ing] to disturb, or aid[ing] in disturbing the peace of others by violent, tumultuous, offensive, or obstreperous conduct”¹¹ Thus, this other ordinance is aimed specifically at conduct that is violent or belligerent. In addition, we think that the references to conduct “tending” toward or “aiding” in a disturbance, as well as the described nature of the prohibited conduct, indicate that §12-2 is aimed at disturbances involving more than one participant. Accordingly, we conclude that §12-2 is aimed at conduct that, by virtue of its violent nature, is a direct participation with others in a disturbance or incites or provokes others to engage in similarly violent or obstreperous behavior.

The construction given to the equivalent of §12-1(b)(1) by the New Jersey courts would reach some conduct of the same type addressed by §12-2 — conduct that, because of its violent nature, “will cause an immediate, actual, physical violent reaction from any person”

¹⁰ Of the three published decisions in *Camarco*, only that of the Appellate Division explains the basis of the construction given to the ordinance; the Supreme Court of New Jersey adopted that construction without additional comment. 295 A.2d at 354-355. Hence, our discussion will focus on the decision of the intermediate court.

¹¹ In addition, §12-2 prohibits “knowingly permit[ting] such conduct upon any premises owned or possessed by [the actor] or under [the actor’s] control.”

283 A.2d at 125. Thus, under this construction, some violent conduct would be punishable under either §12-1(b)(1) or §12-2.¹² However, the New Jersey courts did not limit the provision’s applicability to conduct that induces a violent reaction by virtue of its own violent nature. To the contrary, the Appellate Division indicated that the term “breach of the peace” “includes not only violent acts but acts and words likely to produce violence in others.” *Id.* (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940)). Thus, the construction adopted by the New Jersey courts would reach both the violent conduct that we believe to be embraced by §12-2 and additional conduct — specifically, conduct that, albeit not violent in itself, nonetheless is inherently likely to induce a violent reaction in others.

Because the New Jersey courts’ construction reaches beyond the scope of §12-2, we believe it is a proper construction of §12-1(b)(1). Our view in this regard is bolstered by consideration of the definition of “loitering” in §12-1(a) in conjunction with the substantive provision of §12-1(b)(1). While “breach of the peace” undeniably includes violent conduct, “spending time idly, loafing, walking about aimlessly, and . . . ‘hanging around’ ” denote conduct that simply cannot be described as inherently violent. We believe that the conduct described by the definition may, however, include inciting others to violence.

We believe that this provision, as thus construed, is not unconstitutional on its face. While it would unquestionably apply to speech, it would prohibit only speech that “advocate[s] imminent lawless action and [is] likely to incite a breach of the peace . . .” *Diehl v. State*, 294 Md. 466, 472, 451 A.2d 115 (1982) (applying Article 27, §121). Speech of that nature may constitutionally be prohibited. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). *See also Cohen v. California*, 403 U.S. 15, 20 (1971) (state may prevent a speaker from intentionally provoking a given group to hostile reaction).

At the same time, we caution that the provision must be applied with great care to avoid unconstitutional applications. The Supreme Court has made it clear that the expression of ideas or opinions may not be punished merely because the speech disturbs those who hear it. The constitutionally guaranteed freedom of speech “may indeed

¹² To be sure, a person may not be convicted under *both* §12-1(b)(1) and §12-2 for the same conduct. However, a single sequence of acts may comprise differing conduct violative of each. *See, e.g., Hallengren v. State*, 14 Md. App. 43, 52, 286 A.2d 213 (1972) (making loud and unseemly noises violated Article 27, §121; exhorting crowd to kill police and throwing stone and bottle violated §123; and convictions did not merge, although conduct constituted “a continuous sequence of criminal acts”).

best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. City of Chicago*, 337 U.S. 1, 3 (1949).¹³ The determination of whether a violation has occurred cannot "involv[e] calculations as to the boiling point of a particular person or a particular group, [rather than] an appraisal of the comments *per se*." *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966).

B. "Create or cause to be created any disturbance or annoyance to the comfort or repose of any person" — §12-1(b)(2)

The New Jersey Appellate Division found this provision to be "very similar" to a previously upheld New Jersey statute punishing "any person who by noisy or disorderly conduct disturbs or interferes with the quiet or good order of any place of assembly . . ." 283 A.2d at 125 (quoting N.J. Stat. Ann. §2A:170-28). In addition, the Appellate Division took note of *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), in which the United States Supreme Court held that states may constitutionally prohibit the unjustified use of words that, by their nature, will provoke the ordinarily sensitive addressee to a violent reaction. 283 A.2d at 126. The Appellate Division pointed out that, in an earlier case, it had held that "an ordinance proscribing loud, offensive, disorderly, threatening, abusive, or insulting language and offensive, disorderly, threatening, abusive, or insulting manner" prohibited only "actions . . . such as would usually be considered as having a direct tendency to cause acts of violence by the persons to whom addressed." *Id.* (quoting *In re B.N.*, 238 A.2d 486, 489 (N.J. App. Div. 1968)). The Appellate Division concluded that this provision of the loitering ordinance "proscribes loitering which will so disturb a person as to cause such person to react immediately in such a way as to threaten by physical violence the peace and order of the public." *Id.*

As thus construed, there is no apparent distinction between this provision and the first — both prohibit conduct, including "fighting words," that will provoke another person to physical violence. Indeed, a partial concurrence in the Supreme Court of New Jersey rejected the Appellate Division's construction of this provision expressly on the ground of its redundancy:

¹³ In *Terminiello*, the Supreme Court held unconstitutional an ordinance that had been construed to punish speech that "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance." *Id.*

To read into [this provision], as the Appellate Division did, the qualification that the forbidden conduct must be as to threaten physically “the peace and order of the public” is to ignore that the ordinance separately, in [the equivalent of §12-1(b)(1)], already forbids loitering which would “create or cause to be created a danger of a breach of the peace” and that therefore the other [provisions] must have meant to proscribe conduct which need not create a danger of breach of the peace.

295 A.2d at 356 (Conford, J., concurring in part).¹⁴ We are likewise unable to conclude that a legislative body intends, when it adopts differently worded provisions in a single law, that those provisions should have the same effect. See *Kaczorowski v. City of Baltimore*, 309 Md. 505, 513, 525 A.2d 628 (1987) (“[W]hat the legislature has written in an effort to achieve a goal is a natural ingredient of analysis to determine that goal.”) Therefore, we believe that §12-1(b)(2) is intended to reach conduct that is not within the reach of §12-1(b)(1).

In seeking to delineate that conduct, we believe it necessary to consider §12-4 of the Cambridge City Code. That section prohibits the making of “any loud or unseemly noises to the disturbance of the quiet or comfort of the people who may reside or be in the neighborhood.” In our view, this ordinance’s reference to “the people who may *reside* or be in the neighborhood” indicates that its aim is to prevent the making of excessive and unseemly noise that disturbs the peace of residential areas. Section 12-1, in contrast, is concerned with conduct in public places, specifically including “those establishments generally open for the public convenience.” Reading §12-1(b)(2) in the context of §12-4, therefore, we infer that §12-1(b)(2) was intended to prohibit the making of excessive and unseemly noise to the disturbance of the peace in nonresidential areas or to the disturbance of any lawful assemblage of persons in a public place. Thus, we construe this provision more narrowly than did the New Jersey courts.

¹⁴ This partial concurrence applied the same criticism to the Appellate Division’s construction of the fourth substantive provision. See Part IIB4 below. Feeling constrained to reject that construction, the concurrence was also unable to uphold the validity of those provisions: “[T]hose paragraphs extending, *inter alia*, to conduct which is an ‘annoyance’ to, or ‘calculated to annoy or disturb,’ others, they fall afoul of the strictures against facial overbreadth in relation to freedom of expression . . .” *Id.* The concurrence agreed with the majority only that the appellants were not aggrieved by the decision of the Appellate Division.

Giving §12-1(b)(2) this construction, we believe that it is not unconstitutional on its face. Disruption of lawful assemblies is one of the “countless . . . forms of antisocial conduct” that a city is free to prevent. *See Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). Put another way, §12-1(b)(2) represents a restriction “designed to promote the public convenience in the interest of all . . .” *Cox v. Louisiana*, 379 U.S. 536, 554 (1965). The Maryland Court of Appeals has pointed out that, while speech intended to convey a message is ordinarily protected by the First Amendment, “if however, the verbal conduct was noncommunicative but, nevertheless could be reasonably expected to cause a potentially violent disruption, then there was no speech interest involved and the conduct may be constitutionally controlled.” *Diehl v. State*, 294 Md. 466, 471, 451 A.2d 115 (1982).

C. “Obstruct the free passage of pedestrians or vehicles” — §12-1(b)(3)

The New Jersey Appellate Division found “nothing vague about the conduct proscribed by this portion of the ordinance.” 283 A.2d at 126. In that conclusion we fully concur: §12-1(b)(3) clearly and simply prohibits loitering in such a way as to block a sidewalk, a street, or any other passage used by pedestrians or vehicles.

We also concur in the New Jersey courts’ conclusion that this provision is constitutional. It can hardly be questioned that the city may constitutionally prohibit blocking sidewalks and obstructing traffic. Indeed, the Supreme Court has expressly noted that “[t]he control of travel on the streets is a clear example of governmental responsibility to insure men [the] necessary [public] order [for the preservation of liberty] Governmental authorities have the duty and responsibility to keep their streets open and available for movement.” *Cox v. Louisiana*, 379 U.S. at 554-55. *But see State v. Williams*, 479 N.E.2d 687 (Mass. 1985) (invalidating as unconstitutionally vague ordinance prohibiting sauntering or loitering so as to obstruct travel).

D. “Obstruct, molest, or interfere with any person lawfully in any public place” — §12-1(b)(4)

This provision “include[s] the making of unsolicited remarks of an offensive, disgusting, or insulting nature or which are calculated to annoy or disturb the person to, or in whose hearing they are made.” The New Jersey Appellate Division found it unnecessary to discuss this provision at any length. That court concluded that the first sentence “is clear and suffers from no possible constitutional

infirmity," and it applied to the second sentence the same construction it had given to the equivalent of §12-1(b)(2). 283 A.2d at 126.¹⁵ Because we believe it necessary to construe the provisions of §12-1 to avoid redundancy, we believe that this provision requires some additional discussion.

We have concluded that §12-1(b)(2) prohibits disrupting lawful public assemblies and that §12-1(b)(3) prohibits obstructing traffic generally. That is, those provisions prohibit conduct aimed against groups or the public at large. In contrast, this provision seems clearly to be concerned with conduct directed against particular individuals. The first sentence, which prohibits conduct that "[o]bstruct[s], molest[s] or interfere[s] with any person lawfully in any public place" was evidently intended to punish the harassment of a person who is peaceably going about his or her business. Cf. Article 27, §121A (prohibiting following another about or maliciously engaging in course of conduct that alarms or seriously annoys another, with intent to harass, alarm or annoy). The words used to describe the prohibited conduct are generally understood to refer to behavior that is deliberate and hostile. To "molest" another, for example, means to "interfere with or meddle with unwarrantably so as to injure or disturb." *Webster's New International Dictionary* 1580 (2d ed. 1953). Thus, we think that this provision is intended to reach conduct that does not merely inconvenience another person, but that is inherently frightening or seriously annoying.

Although the question is a close one, we conclude that this first part of the provision, as thus construed, is not facially unconstitutional. Because we conclude that it should be construed to reach only conduct inherently likely to frighten or seriously annoy another, its violation does not turn on the sensitivity of a particular person. Cf. *Coates v. City of Cincinnati*, 402 U.S. at 614 (ordinance prohibiting conduct annoying to passersby lacks specification of standard of conduct because "[c]onduct that annoys some people does not annoy others"); *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966) (statute prohibiting conduct "calculated to create" disturbances of peace "involves calculations as to the boiling point of a particular person or a particular group, not an appraisal of the nature of the comments *per se*"). Therefore, it does not fail to warn the ordinary person of what conduct is prohibited nor fail to provide standards for its enforcement.

¹⁵ As noted above, that construction also duplicated the construction given to the equivalent of §12-1(b)(1). See text accompanying note 13 above.

But see Musselman v. Commonwealth, 705 S.W.2d 476 (Ky. 1986) (invalidating as overbroad statute prohibiting harassment by coarse or abusive language).

However, this part of the provision must be applied with special care. We note that a State statute prohibiting harassment by the use of the telephone has been held by the Court of Special Appeals to be constitutional because it explicitly requires proof of the actor's specific intent to "annoy, abuse, torment, harass, or embarrass . . ." *Caldwell v. State*, 26 Md. App. 94, 105, 337 A.2d 476 (1975) (upholding Article 27, §555A).¹⁶ Similarly, the State's harassment statute, Article 27, §121A, is clearly constitutional because it prohibits "engag[ing] in a course of conduct that alarms or seriously annoys another person . . . with intent to harass, alarm, or annoy the other person . . . after reasonable warning or request to desist by the other person . . . without a legal purpose." In a letter of advice, a member of this office concluded that the intent requirement obviates any problem of vagueness and the remaining provisions obviate any problem of overbreadth. Letter from Staff Attorney Kathryn M. Rowe to Senator Leo E. Green (January 20, 1986).

The Cambridge ordinance does not explicitly include a specific intent requirement, nor is it worded as precisely as Article 27, §121A. Therefore, to avoid unconstitutional applications of this provision, it should be applied only to conduct directed against a particular person that is of a nature inherently likely to frighten or seriously annoy the other person and that is persisted in after a police officer's warning to desist.¹⁷

The New Jersey court indicated that both §12-1(b)(2) and the second sentence of §12-1(b)(4) should be construed to prohibit the use of "fighting words." We did not so construe §12-1(b)(2); however, that construction is clearly applicable to the second sentence of §12-1(b)(4). The Supreme Court first upheld a prohibition against the use of "fighting words" in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). Notably, the statute at issue in that case was worded similarly to §12-1(b)(4): It provided that "[n]o person shall address any offen-

¹⁶ The Court of Special Appeals also held that there was insufficient evidence to sustain a conviction under the statute where the evidence showed that the target of the telephone calls was disturbed by them, but not that the caller intended to harass, alarm, or annoy her. 26 Md. App. at 113.

¹⁷ We believe that refusal to obey a police officer's warning or order to desist is a prerequisite to any arrest under §12-1. See Part III E below.

sive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name” *State v. Chaplinsky*, 18 A.2d 754, 757 (N.H. 1941). The New Hampshire court construed that statute to reach only such words “as have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.” 18 A.2d at 758. Hence, “[d]erisive and annoying words can be taken as coming within the purview of the statute . . . only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace.” 18 A.2d at 762. In our view, the loitering ordinance’s prohibition against “offensive, disgusting, or insulting” remarks or remarks “calculated to annoy or disturb” is likewise properly construed as reaching only those direct personal insults that are inherently likely to provoke a violent reaction on the part of the person to or of whom they are spoken.

In light of the Supreme Court’s decision in *Chaplinsky*, we think that this second part of §12-1(b)(4), as we construe it, is clearly constitutional. To be sure, the city may not punish speech merely because it is offensive to some who hear it. *Gooding v. Wilson*, 405 U.S. 518, 527 (1972). See also *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966) (“to make an offense of conduct which is ‘calculated to create disturbances of the peace’ leaves wide open the standard of responsibility”). As the Supreme Court observed in another case: “Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us.” *Cohen v. California*, 403 U.S. 15, 25 (1971). Nonetheless, the city may prohibit the use of epithets “which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Chaplinsky*, 315 U.S. at 572.

In *Downs v. State*, 278 Md. 610, 614-15, 366 A.2d 41 (1976), the Court of Appeals noted that, in light of the Supreme Court’s decisions in *Cohen* and *Gooding*:

[T]he only speech which can be punished, in this context, is that which has “a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.” . . . In effect, “fighting” words have been recognized as having some social value and are punishable now not on a “per se” basis but only when there is a likelihood of imminent disturbance.

(Citations omitted.)¹⁸ The correctness of that summary has recently

¹⁸ Accordingly, the Court of Appeals held that a vulgarly worded racial slur could not
continued

been confirmed in *City of Houston, Texas v. Hill*, 107 S.Ct. 2502, 2509-10 (1987). Therefore, this provision may be applied only to the face-to-face utterance of direct personal insults inherently likely to cause an imminent disturbance.¹⁹

E. “[R]efuse to leave after being ordered to do so by a police officer” — §12-1(c)

The New Jersey Supreme Court held that the provision equivalent to §12-1(c) establishes an essential and limiting element of a loitering violation. Thus, “where there is conduct contrary to [the substantive prohibitions] there must, in addition, be a refusal to obey a police order to move on before a charge under the ordinance may be prosecuted.” 295 A.2d at 354. The partial concurrence disapproved this aspect of the ordinance’s construction because a later section of the ordinance “says the violation of any provision of the ordinance is punishable as an offense. Thus conduct violative of any [substantive] provision . . . is a completed offense even if there is no officer present to require the offender to move on.” 295 A.2d at 356 (Conford, J., concurring in part). The Cambridge ordinance contains no such provision; it provides simply that a violation of “this section” is a municipal infraction. §12-1(d). Therefore, we have no hesitation in concurring with the New Jersey courts that a violation of the loitering law arises only when a person who is engaged in one of the prohibited forms of conduct refuses to obey a police officer’s order to leave.

We note that §12-1(c) authorizes a police officer to order a person to leave not only when that person is actually causing any of the

Note 18 continued

be punished as “fighting words” where there was no evidence that it was spoken to or heard by anyone who would regard it as a personal insult; there was no evidence that anyone was in fact offended; “[a]nd, even if someone were offended by it, there was no evidence that any person was so aroused as to respond in a violent manner.” 278 Md. at 618.

¹⁹ We note particularly that, in *Hill*, the Supreme Court acknowledged that its earlier decision in *Lewis v. City of New Orleans*, 415 U.S. 130 (1974), suggests that the “fighting words” doctrine enunciated in *Chaplinsky* “might require a narrower application in cases involving words addressed to a police officer,” because police officers may be reasonably expected to have been trained to exercise restraint. _____ U.S. at _____ [107 S.Ct. at 2510]. The Maryland Court of Appeals has likewise pointed out that “there is some question as to whether words addressed to the police can be classified as ‘fighting words,’ or whether a different and higher standard applies when the addressee is a police officer.” *Diehl v. State*, 294 Md. 466, 477, 451 A.2d 115 (1982). In any case, “the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers.” *Hill*, 107 S.Ct. at 2502.

prohibited conditions, but also when "the presence of any person in any public place . . . is *likely* to cause any of the conditions enumerated" In our view, that language does not authorize a police order to leave unless there is a clearly imminent threat of a disturbance. *See People v. Agnello*, 66 Cal. Rptr. 571, 574 (1968) ("likely" means at least probable, if not something stronger).

Accordingly, we do not think that the additional language contained in the ordinance considered in *Camarco* adds any vital substance to this provision. *See* Part IIA above. In our view, Cambridge's ordinance inherently requires that a police order to leave be reasonable and "necessary for the preservation of the public peace and safety."

Because we construe this provision to authorize an arrest only when there is both conduct that violates one of the substantive prohibitions and a refusal to obey a reasonable police order to move, we conclude that §12-1(c) is constitutional. *See Cox v. Louisiana*, 376 U.S. 536, 551 (1965) (refusal to move on, as element of offense, "is narrow and specific"). *Cf. Childers v. City of Tulsa*, 658 P.2d 497 (Okla. App. 1983) (invalidating ordinance prohibiting remaining on public property after demand by peace officer to leave, where no other unlawful conduct required). Yet we point out that, in upholding a similar ordinance, the Supreme Court remarked that "it requires no great feat of imagination to envisage situations in which such an ordinance might be unconstitutionally applied." *Shuttlesworth v. City of Birmingham*, 383 U.S. 87, 91 (1965). We caution that care must be taken to ensure that this provision, like the other provisions of §12-1, is not applied merely to remove from the streets persons whose presence is an irritant to a police officer or other person.

V

Conclusion

In summary, we conclude that Cambridge's loitering ordinance, §12-1 of the Cambridge City Code, may properly be construed so that it is not unconstitutional. At the same time, we caution that it must be applied in strict accordance with this narrowing construction to avoid unconstitutional applications.

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Opinions & Advice

CREDIT REGULATION

RETAIL INSTALLMENT SALES ACT ("RISA") — VEHICLE SALES — RISA
PROHIBITS SEPARATELY STATED "SELLER DOCUMENTATION FEE" OR
"CONSUMER SERVICE CHARGE."

August 10, 1988

The Honorable Alan T. Fell
Commissioner of Consumer Credit

You have requested our opinion on two issues involving retail installment sales of automobiles under Subtitle 6 of Title 12 of the Commercial Law Article ("CL" Article), the Retail Installment Sales Act ("RISA"):

1. Does RISA prohibit the inclusion of a "seller documentation fee" or "consumer service charge" as a separate charge for a vehicle, the purchase of which is financed by the seller?

2. If a fee of this kind is prohibited, what sanctions may be imposed against the seller or lender by the Commissioner of Consumer Credit?

For the reasons stated below, we conclude as follows:

1. RISA prohibits a separately stated "seller documentation fee." RISA also prohibits a separately stated "consumer service charge" unless the charge is levied for bona fide optional services performed on the vehicle, rather than for services that must be provided in any event when a dealer sells a new car.

2. If the seller imposed a prohibited charge in good faith and, after discovery of the overcharge, the seller (or subsequent holder of the installment sale agreement) acts promptly to refund it, the violation of RISA will have been corrected. If, however, the Commissioner of Consumer Credit finds either that the seller imposed the charge in knowing violation of RISA or that the seller (or subsequent holder) failed to make a refund promptly after discovery, the Commissioner may order the forfeiture of all finance charges on the loan.

These conclusions reflect what we believe is the better reading of RISA. Nevertheless, RISA does not address the problem as clearly as we would wish. This opinion tries to identify and honor the underlying legislative objective, but we strongly recommend that the General Assembly clarify its intent concerning the kinds of separate charges discussed in this opinion.

I

The Dealer Charge In Question

Your questions arise because of a complaint filed with your office by a new car purchaser who was charged a \$99 "seller documentation fee." The dealer listed this fee on the first page of its consolidated conditional sale contract and truth in lending disclosure statement separately from the discounted price of the automobile.¹

At first, the dealer explained that the documentation fee was for the filing of title documents to perfect the seller's lien on the vehicle and arrange vehicle registration for the purchaser. Subsequently, the dealer's attorney provided us with a copy of the second page of the dealer's purchase order form, presumably used in the complainant's transaction, which sets out the following definition:

Consumer service charge. This charge is a one-time charge by the seller covering the following services provided to the customer in conjunction with the delivery of a new and [sic] used automobile to the customer: data entry of warranty information, key number, and vehicle information for future consumer, service, and manufacturer use; collection and processing of liability insurance information required by Maryland Motor Vehicle Administration; post delivery follow-up by employees or contractors of the seller with the customer; final delivery preparation including washing, pointing up, vacuuming and final pre-delivery check.

The seller asserts that the "consumer service charge" and the "seller documentation fee" are one and the same and relies on the printed definition as a listing of the actual purposes for the charge. The question is whether such a fee, however labeled, is permitted under RISA.

¹ On page one of the statement, the dealer showed a "Total Cash Sale Price" of \$9,238.95, calculated by adding the vehicle price (\$8,700.00) the excise tax (\$439.95), and the "Seller Documentation Fee" (\$99.00). On page two of the statement, the dealer showed the "Time Balance Owed" as \$10,243.20, calculated by deducting the buyer's \$1,000 down payment from the cash price, then adding an "Amount Paid to Public Officials" (\$57.00) and the finance charge (\$1,947.25).

II

Applicability of RISA

One threshold question is whether RISA's restrictions apply to the fee at all. The dealer's attorney suggests that the "documentation fee" or "service charge" is not part of the installment sales contract because the purchaser made a cash downpayment. That is, because the \$99 fee was paid in cash from the downpayment amount, it was not part of the amount financed. Hence, the dealer's attorney concludes, the charge is not a part of the financing transaction.

Whatever the merits generally of the theory that fees charged contemporaneously with an installment sale but paid by borrower in cash are somehow outside the financing transaction, in this case the statute settles the matter. CL §12-601(e) defines "installment sale agreement" to mean:

[A] contract for the retail sale of goods, negotiated or entered into in this State under which:

(i) *Part or all* of the price is payable in one or more payments after the making of the contract; and

(ii) The seller takes collateral security or keeps a security interest in the goods sold.

(Emphasis added.)

By including in the definition of "installment sale agreement" a transaction in which the purchaser makes a partial cash payment, the General Assembly has applied the provisions of RISA to all aspects of a sale involving any sort of time payment. We cannot interpret the statute to permit the seller to impose charges that would otherwise be prohibited in an installment sale agreement, simply because those fees are collected in cash at the inception of the deferred payment contract.

Secondly, the seller's counsel argues that because this fee is charged to every automobile buyer, whether or not the buyer obtains financing through the dealer, the fee should be considered part of the purchase price of the car and not part of the financing agreement. Indeed, under the federal Truth in Lending Act, this type of universally applicable fee would not be included in the finance charge. See 12 C.F.R. §226.4(a) (finance charge does not include any charge of a type payable in a comparable cash transaction). However, the Maryland RISA does not set forth a similar exemption for such charges. RISA governs all aspects of the sale of a motor vehicle that is financed by

or through the seller. Therefore, a charge that might be permitted in a cash transaction nevertheless might violate RISA if the dealer finances any part of the purchase price. We address another aspect of this issue in more detail in Part III B below.

In short, we conclude that the legality of the “documentation fee” or “consumer service charge” must be determined by applying RISA’s prohibitions and authorizations. The charge is not outside the purview of RISA.

III

Charges Under RISA — Express Delineations

A. *Applicability of CL §§12-609 and 12-614*

RISA contains a specific provision, CL §12-609, governing the charges that may be imposed in a retail installment sale of a motor vehicle. CL §12-609(a) establishes maximum finance charge rates applicable to sales of new and used vehicles, and permits the collection of insurance premiums. CL §12-609(b) provides that “[a] service or other charge not specifically provided for in this section may not be included in a retail installment sale of a motor vehicle.”

The General Assembly’s use of the words “service or *other* charge” indicates an intention to cover a wide range of charges, whether or not part of the finance charge itself.² The legislative goal in framing special restrictions applicable to vehicle financing is clear. Bargaining over a car centers around the dealer’s cash price. The buyer is at a significant disadvantage when other charges are kept out of that figure, as if they were not subject to bargaining (which is true, of course, about taxes and governmental fees but is assuredly *not* true of charges levied and kept by the seller). A related legislative goal, we infer, is to create a “level playing field” among dealers, so advertised cash prices will be fairly comparable, not artificially deflated by a dealer’s shifting part of the price to a separate charge.³

² RISA was amended to provide this special protection for automobile buyers. As originally phrased, what is now CL §12-609(b) provided that, “No service charge or *other charge* not specifically provided for herein shall be included in a retail installment sale of motor vehicles.” Chapter 80, Laws of Maryland 1954 (emphasis added).

³ See note 16 below.

RISA “is remedial in character and was intended to curb serious actual or potential evils. It was passed to protect installment plan buyers and was intended not only to prevent actual frauds, but to close avenues to fraud.” 62 *Opinions of the Attorney General* 181, 183 (1977). See *Griffin v. Baltimore Federal Savings and Loan Assn.*, 204 Md. 154, 102 A.2d 804 (1954); *Stride v. Martin*, 184 Md. 446, 41 A.2d 489 (1945). The “documentation fee” or “consumer service charge” in question here is a “service or other charge” within the meaning of CL §12-609(b).

The only asserted purpose for the charge that is even conceivably within the scope of CL §12-609 is the collection of insurance data. However, CL §12-609(d)(1) prohibits the collection of any charge in excess of the actual premium for the insurance coverage: “A holder of the installment payment obligation may not collect from the buyer a greater amount than that allowed by the State Insurance Department for the insurer carrying the risk.” Thus, a separate charge for collection of insurance data is prohibited.

We conclude, therefore, that none of the asserted purposes for the “consumer service charge” qualifies the fee as a permitted service charge under CL §12-609. Accordingly, the charge is prohibited unless some other provision of law authorizes it.⁴

CL §12-614 enumerates certain permitted charges, mostly in connection with collection of the debt, none of which is relevant here. This section prohibits the “direct or indirect” imposition of any charge or fee not specifically listed in CL §12-614(b).⁵ Thus, under both sections of RISA that expressly authorize the collection of fees, the “consumer service charge,” for the purposes listed by the dealer, is prohibited.

⁴ CL §12-609(b) prohibits charges “not specifically provided for in this section . . .” (Emphasis added.) Read literally, this language would prohibit the dealer’s collection of even those charges otherwise authorized by law. But a literal reading that ignores this provision’s “relationship to earlier and subsequent legislation” would disserve the goal of statutory construction—to discern the overall “legislative purpose or goal.” *Kaczorowski v. City of Baltimore*, 309 Md. 505, 515, 525 A.2d 628 (1987). This problem in the wording of RISA, nevertheless, suggests the need for legislative correction. See also note 11 below.

⁵ Apart from enumerated exceptions inapplicable here, CL §12-614(a) prohibits, “in connection with any agreement, any charge or amount for the extension of credit, interest, fees, commissions, delinquency, collection, repossession, and foreclosure or otherwise.” (Emphasis added.)

This office previously reached the same conclusion about a "settlement fee" included by an automobile dealer in a retail installment sale transaction. In 62 *Opinions of the Attorney General* 181, 184 (1977), this office considered the same statutes at issue here and advised you as follows:

[W]e conclude that the "settlement fee" is not specifically provided for in Section 12-609 and, therefore, is barred under Section 12-609(b). We further conclude that the "settlement fee" is a "direct or indirect" charge which is barred under Section 12-614(a) and that it falls within none of the exceptions in Section 12-614(b).⁶

Relying on that opinion's construction of CL §12-609, this office later advised that RISA prohibited "a fee to cover the delivery of titling documents to the Motor Vehicle Administration." Letter from Attorney General Sachs to Mr. Benno Hurwitz at 1 (June 23, 1982).

Since the 1977 opinion, the General Assembly has amended CL §12-609 several times. It has not, however, changed the pertinent restriction in CL §12-609(b). Although we recommend that the General Assembly revisit the issue and clarify the scope of the restriction, this legislative acquiescence in the Attorney General's interpretation for over a decade is significant.⁷

B. *Separate Charges and the "Cash Price"*

The dealer's attorney has suggested that, because the "consumer service charge" is assessed in comparable cash transactions, it is therefore part of the "cash price" of the vehicle rather than a fee "separate from the cash price" subject to the disclosure provisions of CL §12-606(b)(2). The definition of "cash price" in §12-601 reads as follows:

⁶ The opinion contained no description of the purpose for the "settlement fee." From the context, it appears to have been simply a post-bargaining extraction by the dealer.

⁷ As the Court of Special Appeals observed:

"The Legislature, which is presumed to know of the interpretations made of statutes by the Attorney General, has met at least annually since Attorney General Hammond handed down his opinion in 1951, but that body has not changed the statute. Thus, the General Assembly has *sub silentio* tacitly approved the Attorney General's interpretation."

Nelson v. Real Estate Comm'n, 35 Md. App. 334, 342, 370 A.2d 608 (1977) (citations omitted).

“Cash price” means the minimum price for which goods subject to an installment sale agreement, or other goods of like kind and quality, may be purchased for cash from the seller by the buyer.

Because the fee is part of the cash price, the argument goes, the fee is not a “service or other charge” prohibited by CL §§12-609 or 12-614.

The cash price of a vehicle offered for sale presumably includes an amount that covers the dealer’s cost of goods and business overhead, together with a profit margin. The services that underlie the “consumer service charge” are a part of that overhead and thus may properly be included in the dealer’s calculation of the lowest price for which the dealer is willing to sell the goods. But if the charge is part of the cash price, the dealer cannot list it as a separate fee, as was done here.⁸ RISA requires a disclosure of the “cash price of the goods sold,” and — as a separately tabulated item — “[a]ll charges for delivery, installation, or repair of or other services to the goods which, *separate from the cash price*, are included in the installment sale agreement.” CL §12-606(b)(1) and (2) (emphasis added). If a charge is part of the vehicle’s cash price, CL §12-606(b)(1) requires that it be included in that element of the price disclosure. If it is separate from the vehicle’s cash price, CL §12-606(b)(2) requires that it be disclosed separately and be subject to RISA’s limits on other charges. In other words, a fee cannot be justified on the theory that it is not really distinct from the vehicle’s cash price but then also be listed “separate[ly] from the cash price.”

We recognize that, in some measure, this analysis emphasizes form over substance. However, in the field of credit regulation, the form of the transaction is extremely important. In fact, most credit laws impose specific formats for lending transactions, to standardize the terms of credit products so that the consumer can understand the true cost of a transaction, make meaningful comparisons, and bargain if possible. RISA seeks, in particular, to eliminate ambiguities and uncertainties in credit sales of goods. See *Griffin v. Baltimore Federal*, 204 Md. at 158-59.

⁸ See note 1 above.

C. Implied Authorization

The seller's counsel has also suggested that other charges typically collected by new car dealers are not listed in CL §§12-609 or 12-614 and yet nevertheless are considered legal. A dealer collects the excise tax, fees paid to the Motor Vehicle Administration for title and vehicle registration, and sometimes a charge for optional items added by the dealership or its contractors rather than by the manufacturer. The dealer in this case seeks to draw a comparison between the "consumer service charge" and these other fees, in order to suggest that a literal reading of the prohibitions in CL §§12-609(d) and 12-614(a) should not be given. We will address each of these charges in Part IV below.

IV

Other Authorizations For Charges

A. Excise Tax

The sale of a new or used motor vehicle is exempt from Maryland's general sales tax. Article 81, §326(g) of the Maryland Code. However, §13-809(c)(1) of the Transportation Article ("TR" Article) imposes a five percent excise tax on sales of automobiles (subject to certain exemptions set out in TR §13-810). TR §13-812 expressly permits a licensed dealer to collect the excise tax on behalf of the Motor Vehicle Administration.⁹

In our view, this specific authorization must be given effect over the more general prohibitions in CL §§12-609 and 12-614. Originally enacted in 1941, RISA was intended as a remedial measure to protect installment plan buyers from misleading or ambiguous lending practices. We read in that purpose no intent to inhibit the statutorily authorized collection of State taxes.¹⁰

⁹ The dealer keeps 1.2 percent of the gross tax collected.

¹⁰ The excise tax on the titling of vehicles was part of the original Motor Vehicle Code, former Article 66 1/2, §25A. See Chapter 1007, Laws of Maryland 1943. The General Assembly last increased the tax, to its current five percent of fair market value, in 1977. Chapter 672, Laws of Maryland 1977.

B. Fees for title and vehicle registration

CL §12-616(a) provides, in part:

If the holder [of the retail installment obligation] does not pay out to a public official the full amount charged to the borrower for filing and recording instruments, the buyer shall receive credit for the amount so charged to him and not paid out.

This section, a part of RISA, impliedly authorizes the collection of fees like those charged by the Motor Vehicle Administration for filing title and vehicle registration information. Otherwise, the section would have no purpose. However, CL §12-616(a) authorizes neither the “seller documentation fee” initially charged by the dealer nor the recharacterized “consumer service charge.”

C. Dealer improvements to a vehicle

CL §12-606 provides a listing of fees and charges that must be disclosed to a purchaser in any installment sale contract. CL §12-606(b) provides in part:

An installment sale agreement also shall state in simple tabular form the following separate items in the following order:

- (1) The cash price of the goods sold;
- (2) All charges for delivery, installation, or repair of or other services to the goods, which, separate from the cash price, are included in the installment sale agreement.

One way of reading CL §12-606(b)(2) is that it merely requires disclosure of fees and charges permitted by other law but does not itself authorize charges not provided for elsewhere. However, it is both a permissible reading of the language and a reflection of long-accepted practice to read CL §12-606(b)(2) as impliedly authorizing legitimate charges for actual services of the types listed.¹¹

¹¹ See also note 4 above. Although we believe that the construction of CL §12-606(b)(2) given in the text is defensible, we recommend that the General Assembly consider remedial legislation to expressly permit those charges regarded as legitimate.

But even this liberal construction does not vindicate the dealer's "consumer service charge" in this case because, with one possible exception, none of the asserted services giving rise to the fee is "delivery, installation, or repair of or other services to the goods." The dealer's purchase order explains, essentially, that the charge is for the collection of insurance data; computer entry of information relating to the vehicle and the transaction; postdelivery follow-up with the buyer; and "final delivery preparation including washing, pointing up, vacuuming and final pre-delivery check" of the car. With the possible exception of the last category, none of these constitutes "delivery, installation, or repair of or other services to the goods."

We understand "delivery charge" to mean a fee for moving the goods to an agreed location, where the buyer takes possession. For an automobile, the only bona fide delivery charges are "destination" charges that defray the cost of transporting the vehicle from the manufacturer to the dealer or to some other location specified by the purchaser other than the dealership. See *Rocky Mountain Fire & Cas. Co. v. Goetz*, 633 P.2d 109, 112 (Wash. App. 1981). The dealer's "consumer service charge" in this case does not purport to be a "delivery charge."

Whether the charge can be regarded as "installation," "repair," or "other services to the goods" is a harder question. The charge includes "washing, pointing up, vacuuming and final pre-delivery check." In some contexts, at least, these acts might be considered "installation" or "repair."¹² They are also, in a literal sense, "services to the goods": a dirty car becomes clean, for instance, or a car with dislodged trim has it reaffixed (if a remedial step of this sort is what "pointing up" means).¹³

The difficulty with this application of the statutory language, however, is that it is inconsistent with the very nature of the goods for which a cash price was paid — a *new* car. Under TR §11-138, a "new vehicle" is one "[t]hat has never been used to destroy its newness" When a buyer pays the sale price of a new car, the buyer is paying for a vehicle that is clean and in good working order. A dealer who

¹² "The ordinary meaning of the word 'install' is 'set up or fix in position for use or service.'" *Town of Greenland v. Bunker*, 394 A.2d 321, 322 (N.H. 1978). At least one case holds that the word "repair" includes cleaning operations. *Tesche v. Best Concrete Products, Inc.*, 325 P.2d 150, 155 (Cal. App. 1958).

¹³ Not every car will need "pointing up," of course; yet, the "consumer service charge" is the same for every car.

sells “[d]eteriorated” goods as “new” violates the Consumer Protection Act. CL §13-301(2)(iii). As the Court of Special Appeals observed of a new vehicle:

‘New’, like ‘chaste’, is not a matter of degree, and once lost may only be referred to thereafter in the comparative sense, never again as an absolute. The subject of that adjective may be just-like-new or even just-as-good-as-new, but it can never again be new.

Wheaton Dodge City v. Baltes, 55 Md. App. 129, 132 (1983).

In other words, we doubt that CL §12-606(b)(2) can properly be read to authorize separate charges for services that are necessarily included in the vehicle price. Rather, it refers to the dealer’s adding optional items in or on the car that are not put on by the manufacturer. CL §12-606(b)(2) permits charges for a dealer’s tangible improvements to the vehicle itself. Actions that are necessary in any event to sell a car as “new” do not fall within this category.

In sum, CL §12-606(b)(2) impliedly authorizes certain enumerated charges in addition to the cash sale price, so long as the charges are for the tangible, legitimate services listed in that paragraph. The “consumer service charge” addressed here does not fall within any of the fees or charges permitted under CL §12-606(b)(2). The charge is best viewed as a part of the “cash price,” as defined in CL §12-601(d), and thus may not be listed or charged separately in a retail installment sale of a motor vehicle.

D. *Summary*

In our opinion, the “consumer service charge” or “seller documentation fee” in question here does not fall within any grant of permission in RISA, express or implied.¹⁴ It is, therefore prohibited.¹⁵

¹⁴ The strictures of RISA may be avoided if the seller elects to extend financing under the provisions of CL Title 12, Subtitle 10 (Credit Grantor Closed End Credit Provisions). Credit sales of automobiles are permitted under CL Subtitle 10 as an alternative to RISA. CL §10-1013. While the Credit Grantor statute affords the lender more flexibility, the statute restricts specifically enumerated fees and charges that can be imposed in connection with an extension of credit to a consumer to “actual and verifiable expense[s] of the credit grantor not retained by him.” CL §12-1005(c)(2). In our view, the “consumer service charge” assessed by the dealer in this case would be prohibited under this statute as well because it is retained by the dealer.

¹⁵ Depending on the particular circumstances, a charge of this kind also raises serious

V

Enforcement Provisions

CL §12-609(c) sets forth a specific penalty for the charging of any fee that violates the restrictions in CL §12-609:

Except for an overcharge which results from a bona fide error in computation and which is corrected within 60 days from the date of the agreement, if a holder collects a charge greater in amount than the maximum permitted by this section, he shall forfeit to the buyer all finance charges paid or payable under the agreement.

This penalty provision applies, we believe, to any fee or charge that violates this section. A prohibited charge is by definition "greater in amount than the maximum permitted." A seller cannot justify an otherwise illegal charge on the grounds that the aggregate of all charges does not exceed the interest rate maximum. However, §12-630(c), which generally enumerates the penalties for violations of RISA, provides relief from this penalty if the overcharge is genuinely unintentional and is refunded promptly:

If the seller or any subsequent holder unintentionally and in good faith fails to comply with any provision of §§12-609 through 12-612 of this subtitle, the holder may correct the error within 10 days after:

- (i) He notices it; or
- (ii) The buyer notifies him in writing of the error.

Whether the lesser consequence of "correction" under CL §12-630(c) is available in any particular case before you can only be determined after your full review of all relevant circumstances and an admin-

Note 15 continued

questions of compliance with the Maryland Consumer Protection Act. A price advertisement that fails to disclose an extra service charge might well be deceptive and hence a violation of the Act. *See* CL §13-301(1),(3),(5),(6), and (9). Moreover, if a dealer imposes a charge for services that are not actually performed, or if the charge purports merely to compensate the dealer for services that are actually paid for by the manufacturer, the Act might also be violated. Deceptive practices like these might also violate the dealer licensing provisions of the Maryland Vehicle Law. *See* TR §§15-312(b) and 15-313(a) and (b).

istrative finding that the overcharge was either “unintentional[] and in good faith” or not.¹⁶ You also may exercise some discretion in determining when a holder may be said to “notice” an overcharge, for purposes of the 10-day deadline for a refund.

Part of your second question asks us to detail the enforcement process that you should use in imposing the penalties set forth above. CL §12-631 establishes the jurisdiction of the Commissioner of Consumer Credit to investigate and act upon complaints alleging any violation of RISA:

If a complaint for violation of any provision of Part II of this subtitle is filed with the Commissioner of Consumer Credit, he may investigate the complaint and hold a hearing on it in accordance with §11-413 of the Financial Institutions Article.

. . .

If, after the hearing, the Commissioner finds that a person has engaged or is in engaging in any act or practice prohibited by Part II of this subtitle, he shall order the person to cease and desist from the act or practice.¹⁷

In a prior opinion, this office construed a similar statutory grant of power to issue cease and desist orders as including a power to prohibit a lender from collecting a loan for which usurious interest was charged. 54 *Opinions of the Attorney General* 281 (1969). That opinion construed the following provision:

The Administrator of Loan Laws shall have, in addition to all other powers conferred upon him by this article, the power to issue orders directed to a licensee to cease and desist from a course of conduct if he shall find, after notice and hearing, that the [course] of conduct of the licensee results in an evasion or violation of any provision of this article, or of rules and regulations promulgated in pursuant thereof.

Former Article 58A, §11(c). The Attorney General concluded that the language of that statute “constitutes a mandate that the Administrator

¹⁶ The particular complaint that gave rise to your inquiry has been settled.

¹⁷ The investigatory powers of the Commissioner are set out in §11-413 of the Financial Institutions Article. CL §12-631(c)(2) provides that “[t]he order of the Commissioner shall comply with the Administrative Procedure Act.” See Subtitle 2, Title 10 of the State Government Article.

require a licensee to cease and desist" collecting a usurious loan. 54 *Opinions of the Attorney General* at 287.

We likewise conclude that the similar language of CL §12-631 requires you, upon an administrative finding that the statute has been violated intentionally, to order the seller or subsequent holder to cease and desist from collecting any interest or finance charges "paid or payable" on the complainant's loan. CL §12-609(c). Additionally, the order should require the seller to cease and desist from charging the illegal fee in future transactions. *See generally Beneficial Finance Co. v. Administrator of Loan Laws*, 260 Md. 430, 272 A.2d 649 (1971).

VI

Conclusion

In summary, it is our opinion that:

1. RISA prohibits a separately stated "seller documentation fee." RISA also prohibits a separately stated "consumer service charge" unless the charge is levied for bona fide optional services performed on the vehicle, rather than for services that must be provided in any event when a dealer sells a new car.

2. If the seller imposed a prohibited charge in good faith and, after discovery of the overcharge, the seller (or subsequent holder of the installment sale agreement) acts promptly to refund it, the violation of RISA will have been corrected. If, however, the Commissioner of Consumer Credit finds either that the seller imposed the charge in knowing violation of RISA or that the seller (or subsequent holder) failed to make a refund promptly after discovery, the Commissioner may order the forfeiture of all finance charges on the loan.

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

J. STEVEN LOVEJOY, *Assistant Attorney General*

JACK SCHWARTZ

Chief Counsel

Opinions & Advice

Editor's Note: The applicability of the Retail Installment Sales Act to "seller documentation fees" and similar charges is at issue in *Maryland New Car and Truck Dealers Ass'n, et al. v. State of Maryland, et al.*, Case No. 10-552/7272 (Cir. Ct. for Harford County filed August 22, 1988).

CRIMINAL LAW

CONSTITUTIONAL LAW—LESSER INCLUDED OFFENSES—CHARGING DOCUMENT NEED NOT EXPLICITLY DESIGNATE LESSER INCLUDED OFFENSE IF ALL ELEMENTS ARE PROPERLY ALLEGED.

May 24, 1988

Alexander J. Palenscar, Esquire
Deputy State's Attorney for
Baltimore City

You have requested our opinion on whether a charging document that explicitly charges only a single crime would be legally sufficient to support a prosecution and conviction of the accused on lesser offenses included in the crime charged.

For the reasons given below, we conclude that a charging document is legally sufficient for that purpose if its averments clearly allege all the elements of the lesser included offense and the specific conduct charged in connection with that offense. Under those circumstances, neither the United States Constitution nor the Maryland Declaration of Rights requires that the lesser included offense be explicitly designated.

I

Background

At present, charging documents commonly contain multiple counts.¹ Those counts may allege the commission of a greater crime — for example, robbery with a deadly weapon — and also specifically allege the commission of any lesser offense included within the greater — for example, robbery or attempted robbery. At the trial, the State's Attorney's Office may present evidence to prove all or fewer than all of the offenses charged; by the same token, the defendant may

¹ The term "charging document" means "a written accusation alleging that a defendant has committed an offense," including an indictment returned by a grand jury or an information filed by a State's Attorney. Rule 4-102(a).

ultimately be convicted of a lesser included offense and be acquitted of the greater.

The Office of the State's Attorney for Baltimore City proposes to begin using a single-count charging document in these cases, explicitly charging only the commission of the greater crime. The use of single-count charging documents would have the desirable effect of simplifying recordkeeping. Your concern, however, is whether it would prevent the State's Attorney's Office from continuing to seek convictions on only the lesser included offenses in appropriate cases.

II

Constitutional Considerations

The Sixth Amendment to the United States Constitution provides in part that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . ."² Similarly, Article 21 of the Maryland Declaration of Rights provides "[t]hat in all criminal prosecutions, every man hath a right to be informed of the accusation against him [and] to have a copy of the Indictment, or charge, in due time (if required) to prepare for his defense. . . ." The Court of Appeals has described the underlying purpose of these provisions as follows:

The purposes served by these organic requirements concerning the criminal charge are several: (i) to put the accused on notice of what he is called upon to defend by characterizing and describing the crime and conduct; (ii) to protect the accused from a future prosecution for the same offense; (iii) to enable the defendant to prepare for his trial; (iv) to provide a basis for the court to consider the legal sufficiency of the charging document; and (v) to inform the court of the specific crime charged so that, if required, sentence may be pronounced in accordance with the right of the case.

Ayre v. State, 291 Md. 155, 163, 433 A.2d 1150 (1981) (citations omitted).

The test for the sufficiency of an indictment is two-pronged: The indictment must put the accused on notice of the charges, and it must preclude the possibility of a subsequent prosecution for the same offense. *Byrd v. State*, 16 Md. App. 391, 397, 297 A.2d 312 (1972).

² That guarantee is part of the guarantee of due process under the Fourteenth Amendment and, therefore, applies in state as well as federal prosecutions. *Faretta v. California*, 422 U.S. 806, 818 (1975).

Accord Lank v. State, 219 Md. 433, 436, 149 A.2d 367 (1959).³ To give the accused adequate notice of the charges, the charging document must allege all the essential elements of the crime charged and must "furnish the defendant such a description of the particular act alleged to have been committed as to inform him of the specific conduct with which he is charged." *Id.* (citations omitted).⁴

Nonetheless, we do not believe that it is necessary for a charging document to explicitly designate each lesser offense included in the crime charged. "It is a well-established general rule that when an indictment charges an offense which includes within it another, lesser offense, or one of a lower degree, the defendant, although acquitted of the higher offense, may be convicted of the lesser . . ." 41 Am. Jur 2d *Indictments & Informations* §313 (1968). *Accord*, 42 C.J.S. *Indictments & Informations* §271 (1944); 2 *Wharton's Criminal Procedure*, §292 (12th ed. 1975). The Court of Special Appeals has expressly held that this rule applies in Maryland: If a lesser offense is necessarily included in a greater, conviction of the lesser offense is permissible under a document that explicitly charges only the greater. *Johnson v. State*, 38 Md. App. 100, 109-10, 379 A.2d 436 (1977).⁵

A charging document must clearly allege and describe *all* elements of the crime charged — necessarily including all elements of any lesser included offense. *See Ayre*, 291 Md. at 163. A charging document that clearly alleges and describes the elements of the lesser included offense would put the accused on notice of those averments relating to the lesser offense. *United States v. Miller*, 471 U.S. 130, 134-35 (1985).⁶ Under these circumstances, the charging document would also

³ The Fifth Amendment provision that no person may "be subject for the same offense to be twice put in jeopardy of life or limb" applies to the states. *Benton v. Maryland*, 395 U.S. 784, 796 (1969). For a discussion of "the test for determining the identity of offenses" for double jeopardy purposes, see *Newton v. State*, 280 Md. 260, 373 A.2d 262 (1977). *Cf. Blockburger v. United States*, 284 U.S. 299 (1932).

⁴ In *Ayre*, the charging documents in a prosecution for distributing obscene matter were held to be fatally defective because they did not directly allege the obscenity of the matter distributed or that the distribution was "knowing" — two essential elements of the statutory crime. 291 Md. at 162 and 166.

⁵ In *Johnson*, this issue was raised and decided incidentally to the central issue of double jeopardy. The Court of Appeals has issued writs of certiorari in several cases decided since *Johnson* to determine this issue, but it has never been able to reach the issue. *See Shell v. State*, 307 Md. 46, 51 n.2, 512 A.2d 358 (1986).

⁶ In *Miller*, the Supreme Court held that a prosecution for a narrow offense contained

continued

be sufficient to bar any subsequent prosecution based on the same act. *See State v. Ferrell*, 67 Md. App. 631, 643, 508 A.2d 1023 (1986). We believe that such a charging document, accordingly, would not violate the rights of an accused under the United States Constitution or Article 21 of the Declaration of Rights solely because it did not specifically designate, in a separate count, a lesser offense necessarily included in the crime charged. Hence, such a charging document would support a prosecution or conviction for the lesser offense alone.

We caution, however, that this is so only if the lesser offense is in fact a lesser *included* offense. A "lesser included offense" is an offense the essential elements of which are also essential to the greater: "An offense qualifies as a lesser-included offense only if the elements of the included offense are fewer in number than the elements of the greater offense, and only if the greater offense cannot be committed without also committing the lesser offense." 2 *Wharton's Criminal Procedure*, §292. Thus, if an essential element of the lesser offense is not essential to the greater, a document charging only the greater offense will not support a prosecution for the lesser. *Cf. Veney v. State*, 227 Md. 608, 614, 177 A.2d 883 (1962) (no merger of offenses for double-jeopardy purposes where essential element of lesser is not essential to greater). Put another way, "unless the allegations relating exclusively to the greater crime can be stricken from the indictment and still leave averments relating to the lesser crime sufficient to constitute the latter, the lesser is not necessarily included within the greater so as to support a conviction of the lesser offense." 42 C.J.S. *Indictments & Informations*, §275.

III

Conclusion

In sum, it is our opinion that a charging document need not explicitly designate a lesser offense necessarily included in the crime

Note 6 continued

within the broad offense alleged in an indictment also did not violate the Fifth Amendment right to be tried only on charges presented in an indictment returned by a grand jury. 471 U.S. at 144. That right, however, does not apply against the states. *Hurtado v. California*, 110 U.S. 516, 534-35 (1884). *See also Branzburg v. Hayes*, 408 U.S. 665, 688 n.25 (1972). Nor does the Maryland Constitution or any other State law grant a right to indictment by a grand jury. *Moaney v. State*, 28 Md. App. 408, 416, 346 A.2d 466 (1975).

charged. However, to support a prosecution and conviction for the lesser included offense, the charging document must clearly allege all the essential elements of the offense and the specific conduct charged in connection with that offense.

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C.J. MESSERSCHMIDT, *Assistant Attorney General*

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Opinions & Advice

ELECTIONS

CHANGE OF ELECTION DATE—INCLEMENT WEATHER—GOVERNOR HAS
POWER TO CHANGE DATE OF ELECTION IF WEATHER EMERGENCY
PREVENTS OPENING OF POLLS.

January 26, 1988

Mr. Gene M. Raynor
State Administrator of Election Laws

You have requested our opinion concerning the procedures to be followed by local boards of election in the event that severely inclement weather interferes with the operations of polling places on election day. Your question results from the concern of local election officials that a snow storm might cause havoc on March 8, the unusually early date set for this year's primary election.

For the reasons stated below, we conclude as follows: Inclement weather ordinarily would not be a reason for any change in the conduct of the election. Neither the State Administrative Board of Election Laws nor any local election board has the power to alter the date or times prescribed by law for an election, on grounds of bad weather or for any other reason. However, if weather conditions were so severe that a substantial number of polling places in one or more jurisdictions could not open, the Governor has the power to declare a state of emergency and suspend the provision of the Election Code that mandates the conduct of the primary election on March 8. Alternatively, a local election board might petition the circuit court of a county adversely affected by weather conditions to reschedule the election in that jurisdiction, but the court's authority to take that action is uncertain.

I

Time of Election

The Election Code prescribes the date on which elections are to take place and the hours at which the polls are to be open. Specifically, Article 33, §5-2(a) of the Maryland Code provides that the presidential primary "shall be held throughout this State on the second Tuesday in March," this year on March 8. No election official

has authority to alter a date prescribed by statute.

Similarly, the hours for voting are mandatory: "The polling places throughout the State shall be opened by the judges at 7:00 o'clock a.m. on the day of election and the polling places shall remain open until 8:00 o'clock p.m. on the same day, when the polling places shall be closed." Article 33, §15-2. *See also* Article 33, §16-15(a).

The Election Code has no express provision for the adversities of inclement weather. So far as we are aware, no weather emergency has caused general disruption to voting in the past, and election officials are required to overcome the effects of bad weather if at all possible.¹

Given Maryland's fickle weather in late winter, local election officials have expressed concern about the consequences of a severe snow or ice storm on March 8. In order to prepare for the worst, you have asked about the legal alternatives should the weather make it impossible to open the polls on March 8.

II

Emergency Powers of the Governor

The Governor has the power to proclaim a state of emergency "if he finds that an emergency has developed or is impending for any cause whatsoever." Article 16A, §6A(a). An "emergency" includes a "snowstorm . . . or other catastrophe in any part of the State which requires State emergency assistance to supplement local efforts in order to save lives and protect public health and safety." Article 16A, §3(d). Obviously, a three or four inch snow fall, though it might fray the nerves of drivers, is not an emergency. But a severe snow or ice storm that paralyzes traffic might well rise to the level of an "emergency" within the meaning of the statute.

If the Governor does declare a state of emergency in all or part of the State, he has the power to "[s]uspend the provisions of any statute, or of any rule or regulation of any State or local agency." Article 16A, §6A(c)(1). Acting under this broad grant of authority, the

¹ For example, when electrical storms have caused temporary power outages at a few polling places, election officials have arranged for emergency lighting. (Voting machines do not operate electronically.)

Governor could suspend the provision of the Election Code mandating the March 8 primary date. Implicit in this grant of authority is the duty to direct alternative arrangements in lieu of the suspended provision, in order to achieve the objective of the suspended statute. Hence, if the Governor suspends the March 8 primary because of a weather emergency, he should set a date for the holding of the election after the end of the emergency.

III

Authority of the Courts

In your inquiry, you pointed to a recent Pennsylvania decision regarding the power of the trial courts in that state to suspend the conduct of an election during an emergency. *In re General Election-1985*, 531 A.2d 836 (Pa. Cmwlth. 1987). That case involved flooding in one county during the 1985 general election. Because of the flooding, the trial court ordered 11 precincts to be closed and ordered the resumption of the election two weeks later. The appellate court affirmed the trial court's power to take these extraordinary measures.

So far as we are aware, this is the only reported case in which a court has ordered an election postponed because of weather conditions. The case may not be helpful in evaluating judicial authority under Maryland law, because the Pennsylvania decision rested in part on a statute vesting broad power in the trial court to superintend election matters.²

The Election Code does not expressly grant Maryland courts comparable general power to supervise elections. However, Article 33, §19-2 does provide for judicial relief from certain acts or omissions relating to an election:

If no other timely and adequate remedy is provided by this article, . . . any registered voter may seek judicial relief from any act or omission relating to an election, whether or not the election has been held, on the grounds that the act or omission:

² As summarized by the appellate court, the statute provides that "the court of common pleas of each county or a judge thereof shall on election day be in continuous session from 7 a.m. to 10 p.m. and during such period shall 'decide . . . matters pertaining to the election as may be necessary to carry out the intent of this Act . . .'" 531 A.2d at 839.

(1) Is inconsistent with this article or other law applicable to the elections process; and

(2) May change or have changed the outcome of the election.

Although we doubt that the General Assembly had adverse weather conditions in mind when it enacted §19-2, the language might be broad enough to permit a court action based on such conditions. A local election board that, because of the weather, was unable to open the polls could be said to have caused an “omission relating to an election . . . [that] is [i]nconsistent with this article . . . and . . . [m]ay change . . . the outcome of the election.” Under these circumstances, “any registered voter” — including, presumably, the members of the election board itself — might petition the circuit court to “direct that the election . . . be postponed and rescheduled on a date set by the court.” §19-5(2)(ii).

Beyond pointing out the possible applicability of this language, we simply cannot advise whether a court would view postponement of an election because of adverse conditions as a proper judicial action.

IV

Conclusion

In summary, it is our opinion that if a weather emergency on election day prevents the conduct of the election, the Governor has power to postpone the election. More doubtfully, a circuit court might also have comparable authority.

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

JACK SCHWARTZ

Chief Counsel

Opinions and Advice

FAMILY LAW

DOMESTIC VIOLENCE ACT – “HOUSEHOLD MEMBERS” — ACT APPLIES TO SPECIFIED RELATIVES WHO LIVED TOGETHER WHEN ABUSE OCCURRED, WHETHER OR NOT THEY LIVE TOGETHER AT TIME OF COURT HEARING.

January 12, 1988

The Honorable Timothy F. Maloney
Maryland House of Delegates

You have requested our opinion on the applicability of the Protection from Domestic Violence Act to an alleged abuser who has left the family home. Specifically, you ask whether that person is a “household member” within the meaning of §4-501(e) of the Family Law Article (“FL” Article).

For the reasons discussed below, we conclude that the Act applies to a spouse, blood relative, stepparent, or stepchild who abuses another such relative while they live together. As long as the relatives lived together when the abuse occurred, they are “household members” as defined in FL §4-501(e), whether or not they live together at the time of any court action.

I

Background

FL §4-501(e) is a part of the Protection from Domestic Violence Act (“Act”), enacted in 1980 and codified at Subtitle 5, Title 4 of the FL Article. Under the Act, a household member, or certain persons acting on behalf of a minor household member, may petition the court for protection from continuing abuse by another household member. See 72 *Opinions of the Attorney General* 115 (1987).

Specifically, you seek clarification of the definition of the term “household members” in FL §4-501(e). Under that provision, “[h]ousehold members’ means spouses, parents, stepparents, children, stepchildren, or blood relatives, who live together at the time of an act of abuse.” You have advised us that some courts have interpreted this definition to require that the abuser be living in the family

home at the time of the hearing on a petition for a protective order. Apparently, courts have sometimes refused to issue protective orders solely because the abuser, who was living in the family home when the abuse occurred, subsequently moved.

II

Meaning of "Household Members"

"The cardinal principle of statutory interpretation is to ascertain and carry out the legislative intent." *Heileman Brewing v. Stroh Brewery*, 308 Md. 746, 754, 521 A.2d 1225 (1987). Although external evidence of intent like legislative history may be considered, statutory language that is unambiguous, consistent with the statute's apparent purpose, and not illogical is ordinarily determinative. *Heileman Brewing*, 308 Md. at 755. "Sometimes the language in question will be so clear in its import and not productive of any absurd result that we will give full effect to its meaning." *State v. One 1984 Toyota Truck*, 311 Md. 171, 181, 533 A.2d 659 (1987). See also *Kaczorowski v. City of Baltimore*, 309 Md. 505, 515, 525 A.2d 628 (1987); *Potter v. Bethesda Fire Dep't.*, 309 Md. 347, 355, 524 A.2d 61 (1987).

The language of FL §4-50(e) is plain and unambiguous. It establishes two criteria for determining whether individuals are household members: that they are "spouses, parents, stepparents, children, stepchildren, or blood relatives"; and that they "live together at the time of an act of abuse." Neither FL §4-50(e) nor any other provision of the Act requires the household members to be living together at the time of the court action. The plain and unambiguous language of §4-50(e) evidences a legislative intent to consider relatives to be household members as long as they lived together when the abuse occurred.

The legislative history confirms that the statutory language expresses the actual legislative intent. As originally proposed, House Bill 1945 (1980 Session) would have defined "household members" as certain related persons "who reside together." But after amendment, Chapter 887 of the Laws of Maryland 1980 defined "household members" as certain related persons "who resided together at the time of the act of abuse." See former §4-50(e) of the Courts Article. In amending the definition, the General Assembly manifested its intent that certain related persons would be "household members" if they lived together when the abuse occurred, no matter where they lived afterwards.

In 1984, the Act was recodified into the FL Article and the current definition of "household members," related persons "who live together at the time of an act of abuse," was adopted. As the Revisor's Note states, "the only changes [were] in style." Thus, FL §4-501(e) simply carried forward the legislative decision that the Act is to apply to related persons who live together at the time of an act of abuse. *See Office and Professional Employees Int'l v. MTA*, 295 Md. 88, 100, 453 A.2d 1191 (1982).

Moreover, if FL §4-501(e) were interpreted so as to require an abuser to be living in the family home, the result would be illogical. "It is axiomatic that a court must shun a construction of a statute that will lead to absurd consequences." *Heileman Brewing*, 308 Md. at 755 n. 9.

The Act's purpose is to provide victims of domestic violence with protection from continued violence. The Act's essential mechanism is a court order that requires the abuser to refrain from violence and that may include other relief. *See* FL §§4-505 and 4-506. In describing the relief that a court may afford, the Act recognizes that sometimes the alleged abuser will still be residing in the family home and will have to be ordered out, if only temporarily. FL §§4-505(a)(2)(i) and (ii) and 4-506(e)(1) and (2). *See Zerhusen v. Zerhusen*, 73 Md.App. 386 (1988). But other remedial provisions are worded more broadly, especially the requirement that "[t]he protective order shall order the alleged abuser to refrain from abusing household members" Presumably, the General Assembly recognized that an order will often be most valuable when it protects those remaining in the household against the abuser who has moved out.

If the Act applied only if the abuser were in the family home at the time of the court hearing, an abuser could avoid the reach of the Act merely by moving out of the home after a petition is filed and staying out until the hearing. That interpretation would provide no recourse to the victim and would frustrate the General Assembly's intent in enacting the Act.

III

Conclusion

In summary, it is our opinion that a spouse, blood relative, step-parent or stepchild who abuses another relative at a time when both

are living together is a “household member” under FL §4-501(e). The individuals need not be living together at the time of any court action for the Act to apply.

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Opinions & Advice

Editor's Note: Chapter 112 (House Bill 67) of the Laws of Maryland 1988 amended FI §4-501(e) to include within the definition “individuals who are not married but have at least one minor child in common residing with the petitioner.”

FINANCIAL INSTITUTIONS

FIRST MORTGAGE LOANS—FEDERAL PREEMPTION—MARYLAND STATUTE
PROHIBITING A LENDER FROM REQUIRING ADVANCE PAYMENT OF
INTEREST IS PREEMPTED BY FEDERAL LAW.

April 5, 1988

*Mr. William Beans, Director
Home Ownership Programs
Community Development Administration
Department of Housing and Community Development*

You have requested our opinion on whether §12-103(b)(1)(vi) of the Commercial Law Article ("CL" Article), which prohibits a lender from requiring advance payment of interest on a first mortgage loan, has been preempted by §501 of the federal Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA").¹

For the reasons given below, we conclude that the State law provision has been preempted by federal law and, accordingly, lenders who make loans secured by first mortgages on residential property to which the DIDMCA applies may not be prohibited from collecting interest in advance at the time of loan closing.²

I

Background

The Community Development Administration ("CDA") issues tax-exempt mortgage revenue bonds to finance the purchase of homes by first-time homeowners at rates of interest below the market rate. CDA relies upon financial institutions around the State for the origination and closing of these mortgage loans, and it provides these lenders with mandatory loan closing documents that conform to legal requirements.

¹ DIDMCA §501 has never been codified, but is found in a note following 12 U.S.C. §1735f-7.

² We thus concur in the views expressed by the General Counsel for the Federal Home Loan Bank Board. Letter from Harry W. Quillian, General Counsel, to Assistant Attorney General Francis X. Pugh (May 8, 1987).

Maryland law generally sets limits on the effective rate of simple interest that lenders may charge for various types of loans³ However, CL §12-103(b)(1) permits lenders to charge “interest at any effective rate of simple interest” on a loan secured by a first mortgage or first deed of trust on residential real property, under certain circumstances. By that exception, mortgage lenders are allowed to charge interest at the market rate, but are required to conform their loans to stated conditions. One of those conditions is that “[t]he lender does not require payment of any interest in advance except any points permitted under this subtitle [‘Interest and Usury’].” CL §12-103(b)(1)(vi).⁴ That condition was added by Chapter 628 of the Laws of Maryland 1986.

In the past, it has been the practice of mortgage lenders to require the borrower to pay, at the time of the loan closing, the amount of interest on the loan that will accrue between the closing date and the beginning of the first full month. This practice made it possible to recite even monthly installments of principal and interest in the deed of trust note used in connection with CDA loans. However, the enactment of CL §12-103(b)(1)(vi) effectively prohibited lenders from requiring that interest for the partial month, or “odd days,” be paid in advance. Accordingly, CDA has furnished to its lenders mandatory loan closing documents that do not provide for advance payment of a partial month’s interest.

II

DIDMCA Preemption Provisions

DIDMCA §501(a)(1) expressly preempts State usury laws applicable to first mortgages on residential property: “The provisions of the constitution o[r] the laws of any State expressly limiting the rate or amount of interest, discount points, finance charges, or other charges

³ “ ‘Effective rate of simple interest’ means the yield to maturity rate of interest received or to be received by a lender on the face amount of a loan,” except that any interest charged at or before the inception of a loan contract is deducted from the face amount to determine the principal of the loan, for the purpose of calculating the effective rate of simple interest. CL §12-101(d).

⁴ “ ‘Point’ means a fee, premium, bonus, loan origination fee, service charge, or any other charge equal to 1 percent of the principal amount of a loan which is charged by the lender at or before the time the loan is made as additional compensation for the loan.” CL §12-101(h). The circumstances under which a lender may charge points are set forth in CL §12-108.

which may be charged, taken, received, or reserved shall not apply to any loan, mortgage, credit sale, or advance" that is secured by a first lien on residential real property.⁵ However, regulations adopted by the federal Home Loan Bank Board make it clear that the DIDMCA does not preempt "limitation[s] in state laws on prepayment charges, attorneys' fees, late charges or other provisions designed to protect borrowers." 12 C.F.R. §590.3(c).⁶

DIDMCA §501(b)(2) authorizes states to override the federal preemption of their usury laws.⁷ To do so, a state must adopt, between April 1, 1980 and April 1, 1983, a provision "which states explicitly

⁵ DIDMCA §501(a)(1) applies to all "federally related mortgaged loans," as described in 12 U.S.C. §1735f-5 and as that description is expanded by DIDMCA §501(a)(1)(C). Thus, the preemption applies to any loan that is:

(1) Secured by residential real property, stock in a residential cooperative housing corporation, or a first lien on a manufactured home; and

(2) Made by a lender insured or regulated by an agency of the federal government, approved by the Secretary of Housing and Urban Development for participation in a mortgage insurance program under the National Housing Act, or who is an individual financing the sale or exchange of the individual financing the sale or exchange of the individual's principal residence; or

(3) Made, insured, guaranteed, supplemented, or assisted in any way by an officer or agency of the federal government or under or in connection with a housing, urban development, or related program administered by a federal officer or agency; or

(4) Eligible for purchase by the Federal National Mortgage Association, the Government National Mortgage Association, or the Federal Home Loan Mortgage Corporation or is from a financial institution from which it could be purchased by the Federal Home Loan Mortgage Corporation; or

(5) Made by a creditor who makes or invests in residential loans including loans or credit sales secured by first liens on manufactured homes, aggregating more than \$1,000,000 per year; or

(6) Made by any creditor who sells manufactured homes financed by loans or credit sales, if the creditor has an arrangement to sell or does sell the loans or credit sales to another lender, institution, or creditor that does make or invest in residential real estate loans or loans or credit sales secured by first liens on manufactured homes aggregating more than \$1,000,000 per year.

⁶ This regulation codifies a statement in the legislative history that DIDMCA §501(a)(1) was not intended to preempt "limitations on prepayment charges, attorney fees, late charges, or similar limitations designed to protect borrowers." S. Rep. No. 368, 96th Cong., 2d Sess. 19, *reprinted in* 1980 U.S. Code Cong. & Admin. News 236, 255.

⁷ DIDMCA §501(b)(4) permits states, at any time after March 31, 1980, to "adopt a provision of law placing limitations on discount points" charged in connection with residential mortgages. CL §12-103(b)(1)(vi) clearly is not such a provision — points are expressly exempted from its operation.

and by its terms that such State does not want the provisions of subsection (a)(1) to apply with respect to loans, mortgages, credit sales, and advances made in such state.” To be effective, any state override provision must be very specific:

Under this requirement the state law, constitutional provision, or other override proposal must specifically refer to this Act and indicate that the state intends to override the federal preemption this Act provides. Since each of the [DIDMCA’s] federal preemptions provides for a separate right of state override, the state’s override proposal would be required to refer to the specific preemption, such as that on mortgage loans

S.Rep. No. 368, 96th Cong., 2d Sess. 79, *reprinted in* 1980 U.S. Code Cong. & Admin. News 236, 309.

CL §12-103 was amended during the period between April 1, 1980 and April 1, 1983 by Chapter 752 of the Laws of Maryland 1982, but that enactment made no reference to federal law.⁸ The prohibition against requiring payment of interest in advance was enacted by Chapter 628 of the Laws of Maryland 1986, long after the period set by DIDMCA §501(b)(2); Chapter 628 also made no reference to the federal law.

In light of the specificity required for a State law override of the federal preemption, it is clear that Maryland has not overridden the federal preemption. Therefore, if CL §12-103(b)(1)(vi)’s prohibition against requiring the payment of interest in advance is a limit on the “rate or amount of interest, discount points, finance charges or other charges,” it has been preempted by federal law. If, however, it is a provision “designed to protect borrowers,” like a limitation on prepayment charges, attorneys’ fees, or late charges, it is exempt from preemption under 12 C.F.R. §590.3(c).

III

Exemption from Federal Preemption

The provisions of CL §12-103(b)(1) are in part designed to protect borrowers. For example, CL §12-103(b)(1)(i) requires a written agree-

⁸ Chapter 2 of the Laws of Maryland 1981 also amended CL §12-103, but that enactment made only technical corrections and was not intended to affect any substantive law.

ment signed by the borrower setting forth the rate of interest charged, and CL §12-103(b)(1)(iii) prohibits the imposition of prepayment penalties. Those provisions clearly are not preempted. 12 C.F.R. §590.3(c). The prohibition against requiring payment of interest in advance was enacted as part of an effort to reduce closing costs for home buyers. However, we think that it is not the kind of provision to which federal preemption is inapplicable.

Prepayment charges, attorneys' fees, and late charges are not interest on the loan itself, but ancillary fees or penalties. That is, they do not reflect the actual cost of credit, but incidental expenses that a lender may incur in handling a loan — for example, in processing a payment made early or late. Hence, restrictions on the amount of those fees or penalties protect borrowers from being required to pay undue amounts in penalties or incidental expenses not related to the cost of credit.

The "odd days" interest addressed by CL §12-103(b)(1)(vi), in contrast, is not such an ancillary expense. Rather, it is normal interest on the loan for the period between the loan closing date and the beginning of the first full month. Moreover, the prohibition against requiring payment of that interest in advance was not enacted to protect consumers from an unduly large fee or penalty, but to postpone the date on which they may be required to pay interest actually accruing on the loan itself. Therefore, we believe that CL §12-103(b)(1)(vi) is not exempt from federal preemption under 12 C.F.R. §590.3(c).⁹

IV

Preemption of CL §12-103(b)(1)(vi)

A. *Effect of CL §12-103(b)(1)(vi)*

CL §12-103(b)(1)(vi) is not a direct restriction on the rate of interest that may be charged for a loan secured by a residential mortgage:

⁹ For much the same reason, we think that "odd days" interest is not the equivalent of discount points, which may be limited under DIDMCA §501(b)(4). A point is a fee or charge imposed in addition to the interest payable over the term of the loan and designed, in general, to recoup the lender's administrative or operating costs in negotiating a loan. See CL §12-101(h); *B.F. Saul Co. v. West End Park North, Inc.*, 250 Md. 707, 714, 246 A.2d 591 (1968). That "odd days" interest is not an additional charge, but only the application of the normal interest on the loan to a portion of the loan's term, is illustrated by the difference in practical effects of points and "odd days" interest. The amount of money that a lender receives as a point does not vary with the length of time between the closing date and the beginning of the first full month. The amount of money received as "odd days" interest does, of course, vary according to the length of time to which it applies, just as the total amount received as interest on the entire loan varies with the term of the loan.

The amount of “odd days” interest due is calculated at the rate that applies to the full term of the loan, which the lender is authorized to set at the market rate. The State law provision regulates only the time at which interest on the “odd days” portion of the loan may be collected.

However, the time when a payment is received necessarily affects its value to the lender because the ability to make use of or receive interest on money during a given time is itself of value to the recipient. Thus, by delaying the date when interest for “odd days” may be received, CL §12-103(b)(1)(vi) decreases the effective value of that interest to the lender. In our view, CL §12-103(b)(1)(vi) is therefore an effective limit on “the amount of interest, discount points, finance charges, or other charges which may be . . . received” by the lender.

B. *Legislative Intent*

Further, the legislative history of the federal preemption provision clearly states Congress’s intent to preempt limitations on all charges that are included in the “annual percentage rate.” S.Rep. 368, 96th Cong., 2nd Sess. 19, *reprinted in* 1980 U.S. Code Cong. & Admin. News 236, 255. The annual percentage rate, which the Truth in Lending Act requires be disclosed in connection with any extension of consumer credit, reflects the amount of the finance charge for the credit. 15 U.S.C. §1606.¹⁰ The finance charge is “the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditors as an incident to the extension of credit.” 15 U.S.C. §1605(a). Clearly, the interest charged for the period between the closing of the loan and the beginning of the first full month is a part of the finance charge for the loan. Accordingly, we believe that, because CL §12-103(b)(1)(vi) effectively reduces the value of “odd days” interest, it is within the intended scope of DIDMCA §501(a)(1).

C. *Purpose of DIDMCA §501*

To be sure, the decrease in effective value of the “odd days” interest in any particular case may be small. But the overall effect of the

¹⁰ The regulations adopted under the Truth and Lending Act define “annual percentage rate” as “a measure of the cost of credit, expressed as a yearly rate, that relates the amount and timing of value received by the consumer to the amount and timing of payments made.” 12 C.F.R. §226.22(a)(1). The term “finance charge” means “the cost of consumer credit as a dollar amount.” 12 C.F.R. §226.4(a).

provision may be significant for a lender that issues large numbers of mortgage loans or for which mortgage lending is a major part of the lender's business. Therefore, we believe that construing DIDMCA §501(a)(1) as applicable to the prohibition against requiring the payment of interest in advance comports with the purpose for which the federal preemption was enacted.

Mortgage lenders typically carry large portfolios of outstanding mortgages issued over a number of years. When market rates of interest are volatile, lenders may face a large negative difference between the market interest rates and the average rates of mortgages in their portfolios. To avoid loss in a volatile interest market, lenders must have the ability to issue new loans at market rates. Patently, state usury laws that restrict lenders to below-market rates restrict their ability to participate successfully in the mortgage lending market. *Lindenberg v. First Federal Savings & Loan Association*, 528 F.Supp. 440, 446-47 (N.D. Ga. 1981).

The DIDMCA was enacted during such a period of rapidly escalating market interest rates. The Senate Banking, Housing, and Urban Affairs Committee's Report on the legislation explained the adverse effects at the national level that State usury laws can have under those circumstances:

[W]here state usury laws require mortgage rates below market levels of interest, mortgage funds in those states will not be readily available and those funds will flow to other states where market yields are available. This artificial disruption of funds availability not only is harmful to potential home buyers in states with such usury laws, it also frustrates national housing policies and programs.

A stable home financing system was the principal reason for the establishment by the federal government of the FHA and VA programs, the federal chartering of savings and loan associations, and the national secondary market mechanisms.

...

The Committee believes that this limited modification in state usury laws will enhance the stability and viability of our nation's financial system and is needed to facilitate a national housing policy and the functioning of a national secondary market in mortgage lending.

S.Rep. No. 368, 96th Cong., 2d Sess. 19, *reprinted in* 1980 U.S. Code Cong. & Admin. News 236, 254-55.

DIDMCA §501 was specifically enacted “to ease the severity of the mortgage credit crunches of recent years” by removing artificial disruptions in the national mortgage lending market caused by restrictive state laws. *Id.*, reprinted in 1980 U.S. Code Cong. & Admin. News 254. See also *Bank of New York v. Hoyt*, 617 F.Supp. 1304, 1309 (D.R.I. 1985). DIDMCA was intended to apply broadly, to facilitate the free flow of capital for homebuying into all states. *Doyle v. Southern Guaranty Corp.*, 795 F.2d 907, 911 (11th Cir. 1986). It was expected that the law would “assist both borrowers and lenders by freeing up additional credit for housing” *Quiller v. Barclays American/Credit, Inc.*, 764 F.2d 1400, 1403 (11th Cir. 1985) (Hill, J., dissenting).

Because CL §12-103(b)(1)(vi) reduces the value of “odd days” interest, it has the potential to render the Maryland mortgage market less attractive to lenders. To be sure, its effect is unlikely to be as severe as that of a state law setting mortgage rates at a level below the market rate for the entire period of the loan. Nonetheless, we think that it may create the kind of artificial disruption in the market that DIDMCA was intended to prevent.

V

Conclusion

In summary, it is our opinion that CL §12-103(b)(1)(vi) is a limitation on the amount of interest that a lender may receive for a loan secured by a first mortgage on residential property. As such, it is preempted by DIDMCA §501(a)(1). Accordingly, lenders who make loans secured by first mortgages on residential property may not be prohibited from collecting interest in advance at the time of loan closing.

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

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JACK SCHWARTZ

Chief Counsel

Opinions & Advice

GAMBLING

CASINO NIGHTS—FINANCIAL BENEFIT—TIPS—DEALERS AT CASINO NIGHTS
IN PRINCE GEORGE'S COUNTY MAY NOT ACCEPT TIPS FROM PATRONS.

February 2, 1988

The Honorable Leo Green
*Senate of Maryland**The Honorable Dennis C. Donaldson*
Maryland House of Delegates

You have each requested an opinion on whether dealers or other attendants at casino nights in Prince George's County may accept tips from patrons.

For the reasons given below, we conclude that the practice is not permitted by Article 27, §255 of the Maryland Code and, thus, that organizations knowingly permitting the practice would be engaged in illegal gambling.

I

Background

Article 27, §255 authorizes "volunteer fire compan[ies] or bona fide fraternal, civic, war veterans', religious or charitable organization[s]" in 18 counties, including Prince George's County, to raise funds for their purposes through gambling. However, §255(b)(1) authorizes those gambling activities only "if no individual or group of individuals benefits financially from the holding of [the gambling activity] or receives or is paid any of the proceeds from [the gambling] for personal use or benefit."

Section 258B, which applies specifically to Prince George's County, similarly authorizes the conduct of "benefit performances" including gambling by "[a]ny group of citizens of Prince George's County, or any company, association or body corporate, bona fide organized . . . within said county for the promotion of the purposes of a volunteer fire department, or of any charitable, benevolent, patriotic, fraternal, educational, religious or civil object or objects, and not organized for

the private profit or gain of any member”¹ Under that statute, “the net proceeds of [the] benefit performance shall inure to such group, company, association or body corporate . . . to be used for one or more of the objects hereinbefore set forth, and not for the private gain of any member of such group or organization”

A number of organizations in Prince George’s County conduct casino nights — fundraising events that consist of gambling by means of card games, wheels of fortune, or roulette wheels — under those sections. The Task Force on Gaming Laws in Prince George’s County, Maryland, established in accordance with Chapter 194 of the Laws of Maryland 1987, sec. 2, received information during the course of its study that patrons at certain casino nights make a practice of giving gratuities in the form of cash or chips to the members of the sponsoring organizations who are dealers or operators of the games. Because the tips may be substantial, some individuals have apparently joined a large number of nonprofit organizations solely for the purpose of serving as dealers at their casino nights²

II

Permissibility of Tipping

We do not think that tips given to dealers or other members of an organization conducting a casino night by patrons of the activity are “proceeds of the gambling.” In general, “proceeds” means the money or other thing of value that is produced by a transaction. *Black’s Law Dictionary* 1082 (5th ed. 1979). The gambling “transaction” engaged in by patrons of a casino night is the process of betting on the outcome of a game and playing the game to obtain its outcome. Giving a tip to the dealer or other attendant is not an element or step of the gambling transaction itself. Rather, the tip is a gratuity, a gift

¹ A group or organization that wishes to conduct a benefit performance must first obtain a permit from the County’s department of inspections and permits. §258B(a). Section 258B does not itself contain special provisions governing the issuance of permits, but authorizes the County’s governing body to “restrict or prohibit the issuance of written permits authorized under this section.” §258B(c)(1).

² Article 27, §255(b)(3) requires that gambling activities “be managed by the members of the [sponsoring organization] personally”; §258B(a) requires that gaming activities be “managed and operated only by members of [the sponsoring] group or organization personally.”

voluntarily given to one who performs a service. *Black's Law Dictionary* 631. Therefore, the receipt of tips by dealers or other attendants at a casino night does not violate the prohibition of §255(b)(1) against the receipt by any individual or group of individuals of the proceeds of a nonprofit organization's gambling; nor does it violate the requirement of §258B(a) that the net proceeds of gaming activities in Prince George's County inure to the benefit of the sponsoring organization, rather than for the private gain of any member.

However, §255(b)(1) provides that fundraising by means of gambling activities is permitted only "if no individual or group of individuals benefits financially from the holding of [the fundraiser] or receives or is paid any of the proceeds." The use of the word "or" indicates that the General Assembly intended to contrast the receipt of proceeds with other forms of improper personal profit. *Walker v. Lindsay*, 65 Md. App. 402, 407, 500 A.2d 1061 (1985).

We think that a member of an organization who receives tips for serving as a dealer or other attendant at the organization's casino night clearly does "benefit[t] financially from the holding of" the casino night. Moreover, we think that the benefit to that individual is a direct one and thus clearly contravenes the intent of the restriction. Cf. Opinion No. 85-001 at 4 (January 15, 1985) (unpublished) (purchase of supplies or lease of space at ordinary rental from disinterested third person would not violate restrictions). Accordingly, we conclude that the receipt of tips by dealers or other attendants at casino nights violates §255(b)(1).

Section 258B(a) does not contain language like that in §255(b)(1) expressly imposing a broad prohibition against private gain from the holding of a fundraiser. Accordingly, it does not by itself clearly prohibit dealers or attendants from accepting tips. However, we do not think that §258B was intended to negate any of the restrictions imposed by §255 on gambling for charitable purposes.

Section 258B was enacted by Chapter 342 of the Laws of Maryland 1973. Section 255 was made applicable in Prince George's County by an amendment enacted in the same session of the General Assembly. Chapter 438, Laws of Maryland 1973. The General Assembly was presumably aware that it was enacting two laws, with somewhat differing language, regarding gambling by nonprofit organizations in Prince George's County. Therefore, the two laws should be read together so as to give full effect to each. *Kaczorowski v. City of Baltimore*, 309 Md. 505, 516, 525 A.2d 628 (1987). That can be accomplished by reading their provisions as cumulative, giving effect

to the more restrictive whenever the provisions are not identical.³

That construction also comports with the guiding principle for construction of the gambling statutes: "The courts shall construe the [statutes] relating to gambling and betting liberally, so as to prevent the mischiefs intended to be provided against." §246.⁴ As a necessary corollary of this rule, exceptions to the gambling statutes such as §§255 and 258B must be construed narrowly.

The practice of tipping raises the possibility that tips may be offered and accepted to influence dealers or attendants to manipulate the games in the tippers' favor. That result would clearly contravene the purpose for which both §255 and §258B were enacted. Those statutes were intended to authorize gambling, not for any private gain to either players or dealers, but only to raise funds for purposes that contribute to the public welfare. *See generally State v. Wyand*, 304 Md. 721, 728-30, 501 A.2d 43 (1985). Moreover, they were enacted against a background of legislative intent to broadly prohibit any gambling for profit, as reflected in §246. The statutes may not be construed to permit a practice inconsistent with those intentions. *Kaczorowski v. City of Baltimore*, 309 Md. at 516. Accordingly, we believe that dealers and attendants at gambling events in Prince George's County are prohibited by §255(b)(1)'s prohibition against individual financial benefit from accepting tips, despite a lack of any parallel prohibition in §258B(a).⁵

³ In Opinion No. 85-001 at 3 (January 15, 1985) (unpublished), we considered whether a particular proposed bingo operation was permissible under either §255 or §258B, suggesting that the one governs occasional games and the other governs recurring games. Because we concluded that neither statute permitted the proposed operation, any assumed difference in their applicability had no real consequence for that opinion. In *American Legion v. State*, 294 Md. 1, 444 A.2d 842 (1982), the Court of Appeals approved the use of a tip jar, which was operated daily. Thereby, the court indicated that §255 does not restrict the frequency of nonprofit organizations' gambling activities.

⁴ In *Gaither v. Cate*, 156 Md. 254, 258-59, 144 A. 239 (1929), the Court of Appeals held that this principle applies to all statutes enacted to prevent gambling, whether they were enacted before or after §246.

⁵ We believe that the validity of this conclusion is not affected by the inclusion of a broad prohibition against individual financial benefit in §258B(b), which governs raffles in Prince George's County. The General Assembly may have determined that some peculiarity of raffles made it more necessary to reiterate the prohibition in that context than in the context of other fundraising events. In any case, we think that the legislative policy with regard to gambling, outlined above, is best effectuated by applying the prohibition contained in §255(b)(1) to all gambling for charitable purposes in

By the terms of §255(b)(1), gambling activities by nonprofit organizations are permitted only if they are conducted in conformance with the financial restrictions. Thus, gambling that does not conform to those restrictions is not authorized. Accordingly, an organization that knowingly permits its members to accept tips from patrons at its casino nights would not be engaged in authorized gambling activities.

III

Conclusion

In summary, it is our opinion that, under §255(b)(1), dealers and attendants at nonprofit organizations' casino nights are not permitted to accept tips from patrons. Accordingly, organizations that knowingly permit their members to accept tips would be engaged in illegal gambling activities.

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Chief Counsel

Opinions & Advice

Note 5 continued

Prince George's County — and effectuation of the legislative purpose, aim, or policy is the goal of all statutory construction. *Kaczorowski*, 309 Md. at 514.

GAMBLING—LOCAL GOVERNMENT—MUNICIPALITIES—MUNICIPALITIES
LACK STATUTORY AUTHORITY TO REGULATE OR PROHIBIT GAMBLING
ACTIVITIES PERMITTED BY STATE LAW, BUT GENERAL ASSEMBLY MAY
GRANT SUCH POWER.

December 2, 1988

The Honorable Leo E. Green
Senate of Maryland

You have requested our opinion on whether incorporated municipalities have, or may be given by statute, authority to regulate or prohibit the gambling activities of charitable and other nonprofit organizations.

In Opinion No. 85-033 at 5-6 (December 19, 1985) (unpublished), this office advised the Sheriff of Wicomico County that the county may regulate the value of prizes awarded at charitable organizations' gambling events and the frequency of those gambling events. Our discussion on that point focused solely on whether county regulation had been preempted by or would conflict with State law; we assumed without discussion that a charter home rule county's power to enact ordinances for the general welfare extends to the regulation of charitable organizations' gambling activities.

In response to your request, we have directly considered whether the power to regulate those activities is among the "general welfare" powers of charter home rule counties and municipal corporations. Our review of a pertinent case—*Steimel v. Board of Election Supervisors of Prince George's County*, 278 Md. 1, 357 A.2d 386 (1976)—has persuaded us that our earlier assumption was incorrect.

For the reasons given below, we conclude that municipal corporations presently have no authority to regulate or prohibit gambling activities that are permitted by State law. However, municipal corporations may be given statutory authority to regulate or prohibit gambling activities otherwise permitted by State law, even if a county has authority to license or regulate those gambling activities.

I

Background

A number of State statutes authorize various charitable, civic, and similar nonprofit organizations to conduct gambling activities under

certain circumstances, notwithstanding the general prohibitions against gambling. *See, e.g.*, Article 27, §255. In Prince George's County, those organizations are required by Article 27, §258B to obtain a permit for their gambling activities from the county's Department of Inspections and Permits, and §258B(c)(1) authorizes the county's governing body to restrict or prohibit the issuance of permits.

Acting pursuant to that authorization, Prince George's County has enacted an ordinance regulating the issuance of permits for casino nights.¹ However, you indicate that some municipalities located in the county believe that there is a need for more stringent regulation than that enacted by the county.

II

Authority of Municipalities

Under Article 23A, §2(b)(23), municipalities have authority to "punish and suppress vagrancy, vice, [and] gambling . . ." However, in our view, that provision authorizes only the enactment of ordinances imposing sanctions on illegal gambling. The phrase "punish and suppress" clearly connotes the imposition of sanctions to prevent the occurrence of prohibited action. Moreover, the other activities mentioned in §2(b)(23) all are crimes. Therefore, we believe that the provision does not authorize ordinances to regulate or prohibit gambling activities that are permitted by State law.

Municipalities also have a grant of general police power—the power to enact ordinances "they may deem necessary in order to assure the good government of the municipality, . . . to preserve peace and good order, . . . and to protect the health, comfort and convenience of the citizens of the municipality . . ." Article 23A, §2(a).² That grant of power is unquestionably broad. Nonetheless, we think that it does not encompass regulation of gambling activities conducted by charitable and similar organizations.

¹ The term "casino night" is defined for that purpose as "a benefit performance conducted under the provisions of this section at which card games, wheels of fortune, or roulette are played and prizes are awarded." Article 27, §258B(c)(2).

² This grant of authority is much the same as Article 25A, §5(S)'s grant to charter counties of power to enact "such ordinances as may be deemed expedient in maintaining the peace, good government, health and welfare of the county."

In *Steimel v. Board of Election Supervisors of Prince George's County*, 278 Md. 1, 357 A.2d 386 (1976), the Court of Appeals considered the analogous question of the power of charter counties to regulate Sunday business closings under their power to enact ordinances for the general welfare. In that case, the validity of an enactment of the General Assembly applicable solely to Prince George's County and made subject to a referendum was challenged by county residents on two alternative grounds: As a public general law, it could not be made subject to a referendum; or, as a public local law on a matter within the express powers of a charter county, it violated Article XI-A, §4 of the Maryland Constitution.³

The Court of Appeals held that the enactment was a public local law, noting that its operation was confined to prescribed territorial limits and equally applicable to all persons within those limits and that its subject matter was of no significant interest outside Prince George's County. 278 Md. at 5. *See also Norris v. Baltimore*, 172 Md. 667, 681, 192 A. 531 (1937) (public local law is statute dealing with matter peculiarly local in character, in which persons outside locality have no direct interest; public general law deals with subject in which all citizens of State are interested alike). As a public local law, the law could be made subject to a referendum under *Stewart Petroleum Co. v. Board*, 276 Md. 435, 446, 347 A.2d 854 (1975). Hence, the Court rejected the first objection to the law.

The Court also held that the matter of Sunday business closings is not encompassed within the express powers of charter counties. 278 Md. at 11. In this regard, the Court noted (i) the lengthy history of extensive, county-by-county regulation of Sunday closings by the General Assembly; (ii) the previous failure of any political subdivision to challenge the General Assembly's power to enact those laws; and (iii) the failure of any political subdivision to regulate Sunday closing except when expressly authorized to do so. 278 Md. at 9-11.

In our view, the same factors mandate the conclusion that regulating the gambling activities of charitable and similar organizations is not a matter included within the powers of local governments. The "Gaming" subtitle of Article 27 — §§236 through 264C —

³ Article XI-A, §4 prohibits the General Assembly from enacting any public local law for a charter county or the City of Baltimore on any subject covered by the express powers of those subdivisions. Article XI-E, §1 similarly prohibits the General Assembly from acting "in relation to the . . . government, or affairs" of municipal corporations other than "by general laws which shall in their terms and in their effect apply alike to all municipal corporations . . ."

consists largely of statutes authorizing and regulating charitable gambling in particular counties. The first of those statutes were enacted in 1939 and applied to specified individual counties. Chapter 716, Laws of Maryland 1939 (bingo in Baltimore City); Chapter 701, Laws of Maryland 1939 (bingo in Allegany County). Since then, laws regarding gambling, like those regarding Sunday closings, have frequently been enacted for particular charter, as well as noncharter, counties. See 287 Md. at 9. Indeed, some of the most recently enacted statutes have applied to individual charter counties. *E.g.*, Chapter 7, Laws of Maryland 1987 (Baltimore County); Chapter 190, Laws of Maryland 1987 (Howard County); and Chapter 193, Laws of Maryland 1987 (Anne Arundel County). As in the case of Sunday closing laws, no political subdivision has challenged the General Assembly's gambling enactments as violative of the home rule powers of either counties or municipal corporations. See 287 Md. at 10. Nor does any political subdivision appear to have regulated charitable organizations' gambling activities in the absence of legislative authorization to do so.

Under these circumstances, we think that *Steimel* compels the conclusion that the regulation of gambling by charitable organizations is not a matter that the General Assembly included within the police powers granted to political subdivisions. Instead, the subdivisions have authority to regulate those activities only if the authority is granted to them expressly or as a necessary concomitant of an express power like the power to license the gambling activities. See *Montgomery Citizens League v. Greenhalgh*, 253 Md. 151, 158, 252 A.2d 242 (1969) (power of political subdivisions to enact laws depends on extent of General Assembly's delegation of legislative powers). Accordingly, we now believe that our 1985 opinion incorrectly assumed that the police powers of home-rule political subdivisions encompass the regulation of gambling activities by charitable and similar organizations⁴

The General Assembly, however, may by statute authorize municipal corporations to regulate or prohibit charitable organizations' gambling activities. That power may be granted in addition to or in substitution for any regulatory or licensing power granted to counties. See *Town of Forest Heights v. Frank*, 291 Md. 331, 346, 435 A.2d 425 (1981) (General Assembly may by statute delineate respective

⁴ We do, believe, however, that a grant to a political subdivision of power to license those gambling activities includes the power to make reasonable regulations governing the issuance of licenses. No express statutory provision is necessary to grant officials charged with administering a statute authority to adopt rules necessary for administration of the statute. 62 *Opinions of the Attorney General* 36, 38 (1977).

powers of counties and municipalities generally or in specific areas). Thus, the General Assembly may authorize municipal corporations to regulate or prohibit gambling in general or particular gambling activities, notwithstanding any authorization granted to counties to license and regulate the gambling activities of charitable organizations.

III

Conclusion

In sum, it is our opinion that municipal corporations presently have no authority to regulate or prohibit gambling activities of charitable and similar organizations that are permitted by State law. However, municipal corporations may be given statutory authority to regulate or prohibit gambling activities otherwise permitted by State law, notwithstanding any grant to a county of authority to license or regulate those gambling activities.

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

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Opinions & Advice

HEALTH CARE

MEDICAL TREATMENT — INFORMED CONSENT — LIFE-SUSTAINING
PROCEDURES — ARTIFICIALLY ADMINISTERED SUSTENANCE—LIVING
WILL LAW — DURABLE POWER OF ATTORNEY — SURROGATE
DECISIONMAKING.

October 17, 1988

The Honorable Rosalie S. Abrams
Director, Office on Aging

This opinion addresses the effect of Maryland law on one of the dilemmas presented by modern medicine: whether to forgo artificially administered sustenance — that is, the use of devices that supply nutrients and liquids through a tube inserted into the body — when a person is terminally ill or permanently unconscious.

These decisions are forged out of personal emotions, medical and ethical judgments, and religious beliefs. No opinion of the Attorney General can really go to the heart of the matter. What we can do, however, is to make clear how the law affects this most private and deeply felt of decisions.

You ask whether a person with the capacity to decide about medical treatment has a legal right to instruct that artificially administered sustenance is not to be used if the person becomes terminally ill or permanently unconscious. You also ask about decisionmaking on behalf of a person who lacks the capacity to decide about medical treatment and has not previously rendered a legally effective instruction about tube feeding.

As your letter requesting this opinion points out, “the Office on Aging regularly receives questions related to the withholding of artificial nutrition. [The Attorney General’s] assessment of the legal situation would not only benefit the Office on Aging in carrying out its responsibilities but also would inform the patients, family members, physicians and other health care professionals who must face decisions about artificial nutrition every day in the hospitals and nursing homes of this state.”

Addressing these issues has required an opinion of unusual length, the conclusions of which cannot be summarized in a sentence or two. In an effort to be as clear as we can, we shall summarize our main conclusions in a series of specific questions and answers:

1. What is the scope of the opinion? What types of situations does it deal with?

The opinion addresses decisions to refuse insertion or continued maintenance of a feeding tube when a patient is terminally ill or permanently unconscious. We are not stating any conclusions about patients who are badly debilitated but not yet terminal, except to say that if such a patient has not personally decided the question, artificially administered sustenance may not be withheld without court approval. *See* pages 167-69.

As we explain in detail on pages 168-69 below, the permanently unconscious are those who have irretrievably lost all awareness of self or environment. This category does *not* include those who are mentally retarded or who have other mental or emotional handicaps, even severe ones. We caution against unwarranted extension of this opinion to situations that it does not address.¹

2. Does a person with the capacity to decide about medical treatment choices have a legal right to instruct that artificially administered sustenance not be used when the person is terminally ill or permanently unconscious?

Yes. Every individual has a constitutional and common law right to make that choice. *See* pages 170-75.

3. Does that decision have to be stated in a formal document?

No. A competent person may simply tell his or her attending physician of the decision. *See* page 185. But advance written instructions assure that the person's wishes will be known even if the person later becomes disabled.

4. May a person set out a decision about artificially administered sustenance in a living will?

Yes. A person may set out instructions about artificially administered sustenance in a living will. If the person writes a living will that follows the model in the statute and that therefore calls only generally for the withholding of "life-sustaining procedures," that person's living will is *not* sufficient to direct the withholding of artificially administered sustenance. But if the person so chooses, he or she may incorporate in a living will an express, specific directive

¹ This opinion also does not address the special problems of ending life-sustaining treatment for infants. *See Child Abuse Amendments of 1984*, Pub. L. No. 98-457, Title I, Part B, 98 Stat. 1752; 45 C.F.R. §1340.15.

that artificially administered sustenance is not to be used when the person is terminally ill. *See* pages 180-83.

5. May a person set out a decision about artificially administered sustenance in a medical durable power of attorney?

Yes. A person may specify the conditions under which artificially administered sustenance is to be used or not used, or the person may delegate to some other person the power to make that decision. *See* pages 183-85.

6. If a person lacks the capacity to decide about artificially administered sustenance and had not previously written a living will or medical durable power of attorney, does the person have a right to have someone else make that treatment decision?

Yes. A person’s constitutional and common law right to decide is not forfeited simply because the person is unable to make the decision personally. *See* pages 175-78.

7. On what basis is the decision about artificially administered sustenance for that disabled person to be made?

In every case, the decisionmaker should first seek to do what the disabled person would want done under the circumstances. In the case of terminally ill patients, if there is no way to know that, the decisionmaker should decide on the basis of the disabled person’s best interest. *See* pages 186-90.

8. Who makes the decision for that disabled person?

If there is a guardian of the person, the guardian may authorize artificially administered sustenance or, with court approval, may direct the withholding or withdrawal of such sustenance. *See* pages 190-92.

If there is no guardian, a close family member may consent to artificially administered sustenance under the substituted consent procedures of §20-107 of the Health-General Article (“HG” Article). HG §20-107 does not apply to decisions to forgo treatment. *See* pages 192-95. Nevertheless, a close family member may decide that artificially administered sustenance is to be withheld or withdrawn, without court proceedings, if all of the following conditions are met:

(i) the person is both disabled and terminally ill;

(ii) the attending physicians agree that forgoing treatment is medically proper;

(iii) the family member determines that forgoing treatment is what the disabled person would want done or, if that is unknown, is

in the person's best interest;

(iv) no other family member disagrees with the decision; and

(v) when applicable, the hospital's patient care advisory committee has not advised against forgoing treatment. *See* pages 196-99.

9. May a family member make a comparable decision to end artificially administered sustenance of a permanently unconscious person who has not already made a personal decision on the question?

No. Ordinarily, a family's judgment about what the patient would want is entitled to the greatest respect. Nevertheless, the need to protect those who are not terminally ill against premature or wrongly motivated decisions to end life-sustaining treatment means that a surrogate's decision to end artificially administered sustenance of a permanently unconscious person must be approved by a court. *See* pages 199-201.

10. Does the Nursing Home Patient's Bill of Rights, HG §19-344, authorize a surrogate decisionmaker to refuse artificially administered sustenance on behalf of a disabled resident of a nursing home?

No. The Nursing Home Patient's Bill of Rights does not authorize a surrogate to refuse medical treatment for a nursing home resident. *See* pages 201-02.

11. May a nursing home or hospital discharge or transfer a patient if the patient's (or surrogate's) decision to refuse artificially administered sustenance conflicts with the nursing home's or hospital's policy that it will not withhold such sustenance?

A nursing home may not discharge or transfer a patient for this reason alone. A hospital may discharge or transfer a patient for this reason alone only if doing so would not impose an undue burden on the patient. *See* pages 202-06.

After discussing the medical background, the scope of the opinion, and the reasons why we are writing it (Part I), we turn to an analysis of the common law and constitutional rights of individuals to make their own medical treatment decisions (Part II), including the right to decide about artificially administered sustenance (Part III). Then we consider the ways in which a competent person may express a decision about artificially administered sustenance: in a living will (Part IV), in a durable power of attorney (Part V), and by direct instructions to a physician (Part VI). Next we treat the special problem of decisionmaking on behalf of persons who have not decided themselves and who, at the time the decision needs to be made, lack decision-making capacity (Parts VII, VIII, and IX). Then we assess medical

decisionmaking under the Nursing Home Patient's Bill of Rights (Part X) and limitations on the power of nursing homes and hospitals to enforce policies requiring the use of artificially administered sustenance (Part XI). Finally, we look briefly at pertinent regulatory requirements (Part XII).

I

Background

A. Artificially Administered Sustenance

Physiological problems prevent many patients from adequately fulfilling their need for nutrition and hydration. Strokes, neuromuscular disorders, or cancers of the mouth or throat might result in an inability to swallow; tumors, scarring, or other obstructions might block the gastrointestinal tract; toxic substances or neurologic malfunctions might cause the gastrointestinal tract to fail; and enzymes and other factors necessary to absorb nutrients in the intestines might be inadequate. In addition, a patient might choose not to eat for psychological reasons. Major, *The Medical Procedures for Providing Food and Water: Indications and Effects*, ("Medical Procedures") in *By No Extraordinary Means, The Choice To Forgo Life-Sustaining Food And Water* 21 (J. Lynn ed., 1986).

Various medical techniques, generally divided into "enteral" and "parenteral" procedures, are used to provide food and water. Enteral procedures are those in which nutritional formulas and water are introduced into the patient's stomach or intestine by means of a tube, such as a nasogastric ("NG") tube or a gastrostomy tube. The Hastings Center, *Guidelines On The Termination Of Life-Sustaining Treatment And The Care Of The Dying* 140 (1987) ("Hastings Center Guidelines").² A nasogastric feeding tube is inserted into the nose, through the posterior pharynx and esophagus and into the stomach. A gastrostomy feeding tube is inserted through the abdominal wall

² The Hastings Center devotes itself to the research of ethical problems in medicine, biology, and the life sciences.

directly into the stomach by a simple surgical procedure. Medical Procedures at 25-26.³

An NG tube can be irritating to the nose. It can cause vomiting and aspiration, possibly resulting in a serious aspiration pneumonia. Because an NG tube can be irritating, many patients must be restrained to prevent them from removing the tubes. In some nursing homes, patients on NG tubes have their hands encased in boxing gloves or their arms strapped to the bed. A gastrostomy tube will not cause the nasal, pharyngeal, and esophageal irritation common to the NG tube, although complications from the surgery necessary for insertion can occur. *Id.*

Parenteral nutritional procedures are those in which nutritional formulas and water are introduced into the patient's body by means other than the gastrointestinal tract. Those procedures include total parenteral nutritional support, in which a formula capable of maintaining the patient for prolonged periods of time is infused in a vein, usually a large central vein in the patient's chest; and intravenous procedures, in which water and a nutritional formula are introduced into a peripheral vein. *See Hastings Center Guidelines* at 140-41. Medical complications can arise from the surgical technique by which intravenous feeding catheters are introduced and from the use of the feeding solutions.

B. *Scope of Opinion*

Your questions and this opinion address the use of artificially administered sustenance for persons in two medical conditions: the terminally ill and the permanently unconscious. In a few respects, the different medical conditions require different legal responses.

By "terminally ill," we refer to a condition defined as follows in HG §5-601(g), part of the Living Will Law:

"Terminal condition" means an incurable condition of a patient caused by injury, disease or illness which, to a reasonable degree of medical certainty, makes death imminent and from which, despite the application of life-sustaining procedures, there can be no recovery.

³ In addition to the often used NG and gastrostomy tubes, another enteral procedure becoming more common is the jejunostomy tube, which is inserted through the abdomen into the small intestine. *See U.S. Congress, Office of Technology Assessment, Life-Sustaining Technologies and the Elderly*, 282 (1987).

In this definition, the General Assembly recognized that the time at which a person's death is both inevitable and "imminent" ought to be identified by the doctors treating a particular patient, not by some arbitrary time limit in the statute. As one court observed, when construing the phrase "imminent danger of death": "Imminent means close in point of time, but closeness is likewise a term of many degrees, according to the circumstances." *State Dep't of Human Serv. v. Northern*, 563 S.W.2d 197 (Tenn. App. 1978). The Tennessee appellate court found that if death would likely occur sometime during a patient's hospitalization, albeit not necessarily immediately, death was "imminent" for purposes of an emergency treatment statute. 563 S.W.2d at 205 and 209. Similarly, a trial court in Virginia, rejecting the contention that "imminent" could only describe a death likely to occur within hours, suggested that a person "within a few months of death" faced "imminent" death. *Hazelton v. Powhatan Nursing Home, Inc.*, 6 Va. Cir. 414, 417 (Cir. Ct. Fairfax County 1986). See *Black's Law Dictionary* 676 (5th ed. 1979) ("imminent" means "near at hand, mediate rather than immediate, close rather than touching, impending, on the point of happening, threatening, menacing, perilous").

This opinion does not address the forgoing of life-sustaining treatment for severely debilitated patients, including those with advanced Alzheimer's Disease, who are not terminally ill. For some of these patients, we recognize, the point at which death becomes imminent is not a sharply defined event. But the difficulty of linedrawing does not absolve us from doing so.

At present, we are unable to offer guidance about forgoing artificially administered sustenance for patients who are severely debilitated, not capable of making their own medical choices, but not yet terminally ill.⁴ We can only counsel that those seeking to refuse this form of treatment on behalf of such patients may do so only with court approval.

Our opinion does address, however, one category of patients who are not terminally ill, about whom much case law has developed — the

⁴ To be sure, our analysis of a person's right while competent to decide whether to accept treatment or not is pertinent for these patients as well. See *In re Westchester County Medical Center*, 532 N.Y.S.2d 133 (App. Div. 1988) (artificially administered sustenance may be withheld from severely debilitated patient if there is clear and convincing evidence of patient's decision to refuse, made when competent). Moreover, one case holds that, under some circumstances, stopping artificially administered sustenance might be in the best interest of such a patient. *In re Conroy*, 98 N.J. 321, 486 A.2d 1209 (1985).

permanently unconscious. For these patients, who are sometimes described as being in an irreversible coma or a persistent vegetative state, "all possible components of mental life are absent — all thought, feeling, sensation, desire, emotion, and awareness of self or environment. . . . Only vegetative functions and reflexes persist." President's Commission for the Study of Ethical Problems in Medicine and Biomedical Behavioral Research, *Deciding To Forego Life-Sustaining Treatment* 174-75 (1983) ("President's Commission Report").⁵ According to the American Academy of Neurology, they "do not have the capacity to experience pain or suffering." American Academy of Neurology, *Position of the American Academy of Neurology on Certain Aspects of the Care and Management of the Persistent Vegetative State Patient* at 1 (1988). These patients are permanently unconscious and yet may stay alive for an indefinite period of time because their basic metabolic functions continue.⁶

C. Current Legal Uncertainty

Your request for this opinion arises out of your concern that families, physicians, and institutional administrators are making decisions against a background of legal confusion. Some believe that the Living Will Law prohibits the withholding or cessation of artificially administered sustenance under any circumstances. Others question whether a medical durable power of attorney is a proper means to state a person's decision to forgo artificially administered sustenance. On the question of surrogate decisionmaking, the uncertainty is even worse. There is sharp disagreement over whether HG §20-107, the substituted consent procedure, authorizes a decision to withhold artificially administered sustenance. Moreover, some nursing home administrators view HG §19-344(q), which authorizes certain individuals and entities to exercise the rights of disabled nursing home patients, as a basis for substituted decisionmaking about medical treatment,

⁵This commission was created by Congress in 1978 to study the ethical and legal implications of questions concerning medical and biomedical or behavioral research. See 42 U.S.C. §300V. The President's Commission believes that the term "permanent loss of consciousness" is more accurate and comprehensive than "coma" or "persistent vegetative state," terms often used in the cases and medical literature. See President's Commission Report at 174-75.

⁶ Permanent unconsciousness is different from the "[i]rreversible cessation of all functions of the entire brain, including the brain stem," which is a basis for a determination that the person is dead. HG §5-202(a)(2).

including artificially administered sustenance. In this opinion, we will try to clarify what current law allows and what it does not.

II

The Right To Make Medical Treatment Choices

A. *Competent Persons*

We begin with a basic societal concept, long recognized in the common law — the right of an individual to safeguard the integrity of his or her own body.⁷ The Supreme Court endorsed this concept of self-determination in *Union Pacific Railroad Co. v. Botsford*, 141 U.S. 250, 251 (1891):

No right is held more sacred or is more carefully guarded by the common law than the right of every individual to the possession and control of his own person, free from all restraints or interference by others, unless by clear and unquestionable authority of law.

Applying this common law doctrine to medical decisionmaking, then-Judge Cardozo wrote what has since become a maxim: "Every human being of adult years and sound mind has the right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault for which he is liable in damages." *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 129-30, 105 N.E. 92, 93 (1914).⁸

⁷ See *Mercy Hospital, Inc. v. Jackson*, 62 Md. App. 409, 418, 489 A.2d 1130, 1134 (1985), *vacated as moot*, 306 Md. 556, 510 A.2d 562 (1986). Although the decision of the Court of Special Appeals is not true precedent, because it was vacated, we cite it in this opinion for the value of its reasoning. See also, e.g., *Tune v. Walter Reed Army Medical Hospital*, 602 F.Supp. 1452, 1455 (D.D.C. 1985); *Rasmussen v. Fleming*, 154 Ariz. 207, 741 P.2d 674, 683 (1987); *Barber v. Superior Court of California*, 147 Cal. App. 3d 1006, 195 Cal. Rptr. 484, 489 (1983); *Goody v. Manchester Memorial Hospital*, 40 Conn. Supp. 127, 482 A.2d 713, 718 (1984).

⁸ In Maryland, a physician's failure to obtain the informed consent of his or her patient prior to performing an operation or treatment gives rise to a tort action for negligence. See *Sard v. Hardy*, 281 Md. 432, 440 n.4, 379 A.2d 1014 (1977); *Zeller v. Baltimore Medical Center*, 67 Md. App. 75, 81-82, 506 A.2d 646 (1986); *Accord, Leach v. Shapiro*, 73 Ohio App. 3d 393, 469 N.E. 2d 1047, 1055 (1984) (claim for relief exists where treatment is administered without consent and causes pain and suffering).

In recognition of the common law right of self-determination and its modern offspring, the doctrine of informed consent, the Maryland Court of Appeals has held that "[t]he law does not allow a physician to substitute his judgment for that of the patient in the matter of consent to treatment." *Sard v. Hardy*, 281 Md. 432, 440, 379 A.2d 1014 (1977). The patient's right to bodily integrity would mean little unless the right to informed consent included the right to informed refusal as well:

[T]he value of patient autonomy or self-determination . . . establishes the right of the patient to determine the nature of his or her own medical care. This value reflects our society's long-standing tradition of recognizing the unique worth of the individual. We respect human dignity by granting individuals the freedom to make choices in accordance with their own values. The principle of autonomy is the moral basis for the legal doctrine of informed consent, which includes the right of informed refusal.

Hastings Center Guidelines at 7. The right of informed consent encompasses both the right of a competent adult person to consent to, or to decline, the initiation or continuation of treatment.⁹

We perceive no legal or public policy justification for distinguishing between the initiation and the continuation of treatment. As the New Jersey Supreme Court explained:

This distinction [between initiating and withdrawing life-sustaining treatment] is more psychologically compelling than logically sound The line between active and passive conduct in the context of medical decisions is far too nebulous to constitute a principled basis for decisionmaking. Whether necessary treatment is withheld at the outset or withdrawn later on, the consequence — the patient's death — is the same. Moreover, from a policy standpoint, it might well be unwise to forbid persons from discontinuing a treatment under circumstances in which the treatment could permissibly be

⁹ See, e.g., *Rasmussen v. Fleming*, 741 P.2d at 683; *Barber v. Superior Court of California*, 195 Cal. Rptr. at 489; *Foody v. Manchester Memorial Hospital*, 482 A.2d at 718; *Satz v. Perlmutter*, 362 So. 2d 160, 162 (Fla. Dist. Ct. App. 1978), approved, 379 So. 2d 359 (Fla. 1980); *Mercy Hospital, Inc. v. Jackson*, 62 Md. App. at 418; *In re Farrell*, 108 N.J. 335, 529 A.2d 404, 410 (1987). One Maryland statute codifies this common law right as part of the Nursing Home Patient's Bill of Rights. See HG §19-344(f)(1)(ii), discussed further at page 203 below.

withheld. Such a rule could discourage families and doctors from even attempting certain types of care and could thereby force them into hasty and premature decisions to allow a patient to die.

In re Conroy, 98 N.J. 321, 486 A.2d. at 1234 (1985). See also President's Commission Report at 75.

In addition to the common law underpinnings that support the right of a competent person to refuse medical treatment, the constitutional right to privacy affords a strong basis for asserting dominion over one's bodily integrity. Although the Supreme Court has not held that the United States Constitution encompasses the right to refuse medical treatment, numerous state courts have concluded that the constitutional right to privacy is broad enough to encompass the competent person's right to make his or her own medical decisions, including the decision to forego life-sustaining treatment.¹⁰ State courts recognizing this right have relied on prior pronouncements by the Supreme Court concerning the right to privacy.¹¹ Citing as authority eleven appellate court decisions from around the country, the Arizona Supreme Court recently held as follows: "The right to refuse medical treatment is a personal right sufficiently 'fundamental' or 'implicit in the concept of ordered liberty' to fall within the constitutionally protected zone of privacy contemplated by the Supreme Court." *Rasmussen v. Fleming*, 154 Ariz. 207, 741 P.2d 674, 682 (1987).

The right to refuse treatment, whether emanating from the constitutional right to privacy or premised on the common law doctrine of self-determination, is not absolute, however.¹² Courts have

¹⁰ See, e.g., *Rasmussen v. Fleming*, 741 P.2d at 681; *In re Severns*, 425 A.2d 156, 158 (Del. 1980); *John F. Kennedy Memorial Hospital v. Bludworth*, 452 So. 2d 921, 924 (Fla. 1984); *In re Farrell*, 529 A.2d at 410; *In re Quinlan*, 70 N.J. 10, 355 A.2d 647, 662-63 (1976). Some courts have also held that the right to refuse treatment is protected by state constitutional law. See, e.g., *Rasmussen v. Fleming*, 741 P.2d at 682; *In re Quinlan*, 355 A.2d at 663.

¹¹ See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (contraception); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraception). Although the constitutional right of privacy is not limitless, see *Bowers v. Hardwick*, 478 U.S. 186, 190-91 (1986) (excludes homosexual sodomy), the right to refuse medical treatment entails matters of autonomy and physical integrity similar to the decisions protected by prior Supreme Court decisions. See Merritt, *Equality for the Elderly Incompetent: A Proposal for Dignified Death*, 39 Stan. L. Rev. 689, 700 n.71 (1987).

¹² Our general discussion of the right to refuse treatment is not intended to encompass refusals of medication by a person committed to an inpatient psychiatric
continued

recognized four state interests that might outweigh an individual's right to refuse treatment.¹³ These interests are: the preservation of life; the prevention of suicide; the protection of the interests of innocent third parties; and the maintenance of the ethical integrity of the medical profession. But as far as we know, no court has found these interests sufficient in an actual case to override the right of a competent, terminally ill patient to refuse life-sustaining treatment.

One federal district court aptly explained why the state's general interest in the preservation of life must yield to the choice of a person who is about to die:

[W]hile preservation of life in the abstract is no doubt a transcendent goal for any society which values human life, the State's interest in maintaining life must defer to the right to refuse treatment of a competent, emotionally stable, but terminally ill adult whose death is imminent and who is, therefore, the best, indeed, the only, true judge of how such life as remains to him may best be spent.

Tune v. Walter Reed Army Medical Hospital, 602 F. Supp. 1452, 1455-56 (D.D.C. 1985). See also, e.g., *Satz v. Perlmutter*, 379 So. 2d 359, 360 (Fla. 1980).

Courts have also unanimously rejected the notion that the state interest in the prevention of suicide—which is really just a specific application of the state's more general interest in the preservation of life—would warrant placing a limitation on the right of a competent, terminally ill patient to refuse medical treatment. As a legal matter, "suicide is not involved when permission is not being sought to terminate a healthy life by artificial, self-induced means, but merely to allow nature to take its course." *Tune*, 602 F. Supp. at 1455 n.8.¹⁴

Note 12 continued

facility. This specific problem is addressed by HG §10-708. See generally *Johnson v. Silver*, 742 F.2d 823 (4th Cir. 1984).

¹³ See, e.g., *Tune v. Walter Reed Army Medical Hospital*, 602 F.Supp. at 1455; *Rasmussen v. Fleming*, 741 P.2d at 683; *John F. Kennedy Hospital v. Bludworth*, 452 So. 2d at 924; *Mercy Hospital, Inc. v. Jackson*, 62 Md. App. at 415; *In re Farrell*, 529 A.2d at 410-11.

¹⁴ *Accord, Bartling v. Superior Court of the State of California*, 163 Cal. App. 3d 186, 209 Cal. Rptr. 220, 225-26 (1984); *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417, 426 n.11 (1977).

The third interest, the rights of innocent third parties, has been limited to situations in which the interests of the patient's dependents may be adversely affected. "The State's interest may well be superior to an adult's right of self-determination when the exercise of that right deprives dependents of a source of support and care." *Delio v. Westchester County Med. Center*, 129 A.D.2d 1, 516 N.Y.S.2d 677, 693 (App. Div. 1987) (citations omitted). See *Application of the President and Directors of Georgetown College, Inc.*, 331 F.2d 1000, 1008 (D.C. Cir. 1964) (court authorized unconsented blood transfusion partly on basis of state's interest in not allowing patient to abandon her seven-month old child).¹⁵ This state interest does not arise, however, if the patient has no dependents. *Rasmussen v. Fleming*, 741 P.2d at 685; *Delio v. Westchester County Med. Center*, 516 N.Y.S.2d at 693. For a terminally ill patient, moreover, the state's interest is diminished even if the patient does have a dependent. That is, a patient who is not terminally ill will be in a position to care for a dependent after receiving treatment. By contrast, no such outcome is possible for the terminally ill patient. Under typical circumstances, the state's interest in protecting the rights of dependent third parties would not be achieved by prohibiting the competent, terminally ill patient from refusing life-sustaining treatment.

Although courts recognize the importance of the fourth state interest, maintaining the ethical integrity of the medical profession, no court has held that this interest outweighs the right of a competent, terminally ill patient to refuse life-sustaining treatment. To the contrary:

The force and impact of this interest is lessened by the prevailing medical ethical standards. . . . Prevailing medical ethical practice does not, without exception, demand that all efforts toward life prolongation be made in all circumstances. Rather . . . the prevailing ethical practice seems to be to recognize that the dying are more often in need of comfort than treatment. Recognition of the right to refuse necessary treatment in appropriate circumstances is consistent with existing medical mores; such a doctrine does not threaten either the integrity of the medical profession, the proper role

¹⁵ In *Mercy Hospital, Inc. v. Jackson*, 62 Md. App. at 418, the Court of Special Appeals held "that a competent, pregnant adult has the paramount right to refuse a blood transfusion in accordance with her religious beliefs, where such decision is made knowingly and voluntarily and *will not endanger the delivery, survival or support of the fetus.*" (Emphasis added.)

of hospitals in caring for such patients or the State's interest in protecting the same. It is not necessary to deny a right of self-determination to a patient in order to recognize the interests of doctors, hospitals, and medical personnel in attendance on the patient. Also, if the doctrines of informed consent and right of privacy have as their foundations the right to bodily integrity . . . and control of one's own fate, then those rights are superior to the institutional considerations.

Satz v. Perlmutter, 362 So. 2d 160, 163-64 (Fla. Ct. App. 4th Dist. 1978); *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417, 426-27 (1977).

In sum, although courts routinely invoke these state interests, the case law teaches that the balance has already been struck for this category of patient: The right of a competent, terminally ill patient to refuse life-sustaining treatment outweighs these state interests, individually and cumulatively.¹⁶ The only state interest that conceivably might be given controlling weight in a particular case is the protection of dependents.

B. *Rights of Disabled Individuals*

Disabled individuals, who lack the capacity to make their own treatment decisions, present a more difficult problem. A patient is a "disabled individual," as defined in the law authorizing certain family members to consent on the patient's behalf to medical treatment and as meant in this opinion, when the patient's physical or mental condition is such that the patient "lacks sufficient understanding or capacity

¹⁶ In a few cases, courts have addressed the rights of competent patients to refuse life-sustaining treatment where the patient, although not terminally ill, is suffering from a debilitating disease. In *Bowvia v. Superior Court*, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297, 302 (1986), the court held that a 28 year old quadriplegic, suffering from severe cerebral palsy and severely crippling arthritis, had the right to refuse life-sustaining treatment, including artificial nutrition and hydration. The *Bowvia* court held that "there is no practical or logical reason to limit the exercise of this right to 'terminal' patients." 225 Cal. Rptr. at 302. The court rejected arguments urged by the hospital, physicians, and administrators that the interests of the state should prevail over the rights of the patient. *Accord*, *Bartling v. Superior Court*, 209 Cal. Rptr. at 220 (competent, non-terminal patient has right to authorize discontinuation of respirator).

to make or communicate a responsible decision on health care . . .” HG §20-107(a)(2).¹⁷

A person does not come within this description merely because the person disagrees with a physician's suggested treatment plan. As the Court of Appeals held in *Sard v. Hardy*, “[t]he law does not allow a physician to substitute his judgment for that of the patient in the matter of consent to treatment.” 281 Md. at 440. As another court explained: “[I]t is the patient, not the physician, who ultimately decides if treatment — any treatment — is to be given at all. . . . The rule has never been qualified in its application by either the nature or purpose of the treatment, or the gravity of the consequences of acceding to or foregoing it.” *Tune v. Walter Reed Army Medical Hosp.*, 602 F. Supp. at 1455.¹⁸

¹⁷ The complete definition is as follows:

“ ‘Disabled individual’ means an individual who lacks sufficient understanding or capacity to make or communicate a responsible decision on health care for the individual because of:

- (i) A physical disability;
- (ii) Chronic alcoholism;
- (iii) Drug addiction;
- (iv) A disease; or
- (v) A mental disability, including senility.”

A fuller discussion of this law appears at pages 192-95 below. This definition is consistent with that set forth in §13-705(b) of the Estates and Trusts Article, which provides the grounds for the appointment of a guardian of the person: “A guardian of the person shall be appointed if the court determines from clear and convincing evidence that a person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person, including provisions for health care. . . .”

¹⁸ The principle was applied not long ago by the Circuit Court for Baltimore City:

“[The patient] is alert and oriented and demonstrates a basic understanding of the proposed treatments and the risks and benefits. She has repeatedly been told the details of the suggested course of treatment and the almost certain consequences [i.e., death] of failure to proceed with treatment. Her negative response is a rational one, *although contrary to the recommendation of the medical staff.*”

In re Cooper, No. 87329035/CE74214 (December 21, 1987) (emphasis added). The case arose when the Baltimore City Department of Social Services sought appointment of a guardian after the patient refused to consent to the proposed treatment. According to expert testimony, without the treatment the probability of death was 90%; with the treatment, 40%.

A necessary starting point for ascertaining the rights of the disabled patient is the New Jersey Supreme Court's analysis in *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976). Karen Ann Quinlan was "in a chronic, and persistent vegetative state." *Quinlan*, 355 A.2d at 655. Quinlan's father, as guardian, sought court authorization to remove the respirator that was prolonging his daughter's life. Removing the respirator, it was thought, would quickly result in her death. The court approved the father's request on the condition that Quinlan's entire family and attending physician concurred with the decision and that the hospital ethics committee agreed that there was no "reasonable possibility of Karen's ever emerging from her present comatose condition to a cognitive, [sentient] state." *Quinlan*, 355 A.2d at 671. The court reasoned that Quinlan, were she competent and desired to have the respirator removed, would have a constitutional right to refuse that treatment, even though it was sustaining her life. 355 A.2d at 663. Since she could not express her interest herself, the court permitted Quinlan's father to assert his daughter's right to privacy on her behalf. As the court explained:

If a putative decision by Karen to permit this non-cognitive, vegetative existence to terminate by natural forces is regarded as a valuable incident of her right of privacy as we believe it to be, then it should not be discarded solely on the basis that her condition prevents her conscious exercise of the choice. The only practical way to prevent destruction of the right is to permit the guardian and family of Karen to render their best judgment, subject to the qualifications hereinafter stated, as to whether she would exercise it in these circumstances.

355 A.2d at 664.

Relying on this analysis, the Supreme Court of Massachusetts held the next year that there is "a general right in all persons to refuse medical treatment The recognition of that right must extend to the case of an incompetent, as well as a competent, patient because the value of human dignity extends to both." *Superintendent of Belchertown State School v. Saikewicz*, 370 N.E.2d at 427.¹⁹

Thus, the courts have recognized that the right to refuse treatment is as basic a right for the individual lacking decisionmaking capacity as it is for the competent patient. As the Delaware Supreme Court

¹⁹ *Accord, Rasmussen v. Fleming*, 741 P.2d at 685; *John F. Kennedy Memorial Hospital v. Bludworth*, 452 So. 2d at 924.

wrote of a permanently unconscious patient, "to deny the exercise of [the right] because the patient is unconscious would be to deny the right [itself]." *Severns v. Wilmington Medical Center, Inc.*, 421 A.2d 1334, 1347 (Del. Ch. 1980).²⁰ Moreover, courts have consistently recognized that a disabled patient, whether terminally ill or permanently unconscious, has a right to refuse life-sustaining treatment that outweighs the state interests discussed at pages 172-75 above.²¹

III

The Right To Refuse Artificially Administered Sustenance

As discussed at pages 166-67 above, various medical techniques are used to provide nutrition and hydration artificially. Foregoing these procedures is controversial. Some regard these techniques as no different in ethical principle than the non-medical means of sustaining life that must always be provided, for to do otherwise would deprive patients of the ordinary care all persons are entitled to receive. *See, e.g.*, Horan & Grant, *The Legal Aspects of Withdrawing Nourishment*, 5 J. Legal Med. 595, 600-01 (1984); Smith, *Hospital Liability* §13.03[1] at 13-32 (1986); Comment, *Artificial Nutrition and the Terminally Ill; How Should Washington Decide?* 61 Wash. L. Rev. 419, 421 (1986).²² Others consider these techniques artificial means that impose benefits in some circumstances but burdens in others and that, like other medical interventions, ethically may be forgone in some circumstances. *See, e.g.*, Hastings Center Guidelines at 61 (all enteral

²⁰ See also, *Rasmussen v. Fleming*, 741 P.2d at 685-86; *Barber v. Superior Court of California*, 195 Cal. Rptr. at 484; *Foody v. Manchester Memorial Hospital*, 482 A.2d at 718.

²¹ Explaining why the state's interest in the preservation of life does not outweigh the previously expressed wishes of a man who had become permanently unconscious, a New York court observed that "there is no benefit to the State in prolonging [the patient's] existence under circumstances he would have found demeaning and degrading to his humanity and which would serve merely to lessen the value of his life by denying him the right to choose the course of his medical treatment." *Delio v. Westchester Med. Center*, 516 N.Y.S.2d at 692 (citations omitted). See also *Rasmussen v. Fleming*, 741 P.2d at 683; *Barber v. Superior Court of California*, 195 Cal. Rptr. at 484; *Foody v. Manchester Memorial Hospital*, 482 A.2d at 718; *John F. Kennedy Hospital v. Bludworth*, 452 So. 2d at 924.

²² In addition, some participants in the ethical and medical debate have raised concerns that the withdrawal or withholding of artificially administered sustenance causes

and parenteral techniques should be considered procedures that the patient or surrogate may choose to forgo); *Current Opinions of the Council on Ethical and Judicial Affairs of the American Medical Association* 12-13 (1986) (in some circumstances it is not unethical to discontinue all means of life prolongation, including artificially supplied nutrition or hydration); President's Commission Report at 3 and 190 (life-sustaining treatment encompasses all health care interventions, including special feeding procedures.)

We do not join this debate; it is not our role to offer ethical judgments or comment on matters of religious doctrine. The legal analysis is clear, however: Every appellate court that has addressed the issue has held that there is no difference as a matter of law between artificially administered sustenance and other forms of life-sustaining treatment.²³ As the New Jersey Supreme Court summarized the point, "[a]nalytically, artificial feeding by means of a nasogastric tube or intravenous infusions can be seen as equivalent to artificial breathing by means of a respirator. Both prolong life through mechanical means when the body is no longer able to perform a vital bodily function on its own." *Conroy*, 496 A.2d at 1236.²⁴

Note 22 continued

pain and suffering. However, one court that canvassed the literature found to the contrary: "Patients who are near death and not receiving nourishment may, in fact, be more comfortable than comparable patients who receive conventional amounts of nutrition and hydration." *In re Grant*, 109 Wash. 2d 545, 747 P.2d 445, 453 (1987). Recent empirical evidence suggests that dehydration does not cause pain for a terminally ill patient; to the contrary, artificially administered sustenance can cause the terminally ill patient pain and discomfort. See Cox, *Is Dehydration Painful?*, 9 Ethics & Medics 1-2 (1987). Moreover, since a permanently unconscious patient is by definition unaware of sensation, he or she will not experience pain from dehydration. *Id.* at 1.

²³ See, e.g., *Barber v. Superior Court*, 195 Cal. Rptr. at 490 (1983); *Corbett v. D'Alessandro*, 487 So. 2d 368, 371 (Fla. Dist. Ct. App. 1986); *In re Gardner*, 534 A.2d 947, 954 (Me. 1987); *In re Jobes*, 108 N.J. 394, 529 A.2d 434, 444 n.9 (1987); *In re Peter*, 108 N.J. 365, 529 A.2d 419, 427 (1987); *In re Conroy*, 486 A.2d at 1236; *Delio v. Westchester County Medical Center*, 129 A.D. 2d 1, 516 N.Y.S.2d 677, 689 (1987); *In re Grant*, 747 P.2d at 454; *Accord, In re Drabick*, 200 Cal. App. 3d 185, 245 Cal. Rptr. 840 (1988); *Bouvia v. Superior Court*, 255 Cal. Rptr. at 306; *Brophy v. New England Sinai Hospital, Inc.*, 398 Mass. 417, 497 N.E.2d 626, 637 (1986).

²⁴ In another case, the New Jersey Supreme Court rejected the argument that "the withdrawal of artificial feeding directly causes death while the withdrawal of other forms of life-support only indirectly causes death." As the court observed:

"Just as a patient does not die because of the withdrawal of a kidney dialysis machine, but because his underlying disease has destroyed the proper functioning of his kidney, so [the patient] will not die from the withdrawal of the

continued

Thus, we conclude that the constitutional and common law right to refuse treatment includes the right to refuse artificially administered sustenance. In Parts IV, V and VI below, we consider the ways in which a competent person may make this choice. In Parts VII, VIII, and IX, we discuss the ways in which a surrogate may make this choice on behalf of a person without decisionmaking capacity.

IV

The Living Will Law

The Living Will Law is an express statutory procedure through which a competent person may exercise choice about treatment decisions that might have to be made when the person is terminally ill and no longer able to decide.²⁵ As this office summarized: "In authorizing living wills, the General Assembly recognized the importance of individual self-determination and dignity in death." 70 *Opinions of the Attorney General* 138, 139 (1985).

Under HG §5-602(a), a competent person over 18 "may execute a declaration . . . directing the withholding or withdrawal of life-sustaining procedures under this subtitle."²⁶ If a declaration has been properly executed, the individual has a statutory right to have his or her decisions about life-sustaining procedures carried out. HG §5-604(a)(2). Correspondingly, those who carry out the provisions of a living will are afforded certain statutory protections when they do so. HG §§5-607(b) and (c) and 5-613.

Note 24 continued

nasogastric tube, but because of her underlying medical problem, *i.e.*, an inability to swallow. Withdrawal of the nasogastric tube, like discontinuance of other kinds of artificial treatment, merely acquiesces in the natural cessation of a critical bodily function. The cessation is the cause of death, not the acquiescence."

In re Peter, 529 A.2d at 428.

²⁵ The statute is formally termed the Life-Sustaining Procedures Act. For simplicity's sake, and to reflect common usage, we refer to it as the Living Will Law.

²⁶ "Life-sustaining procedures" are defined as follows: "Any medical procedure, treatment, or intervention which uses mechanical or other artificial means to sustain, restore, or supplant a spontaneous vital function or is otherwise of such a nature as to afford a patient no reasonable expectation of recovery from a terminal condition and which, when applied to a patient in a terminal condition, would serve to secure only a precarious and burdensome prolongation of life."

Artificially administered sustenance falls within the term "life-sustaining procedures." Had the General Assembly not specially addressed the question of sustenance, a declaration generally "directing the withholding or withdrawal of life-sustaining procedures" would be applied to forgo artificially administered sustenance.

In fact, however, the General Assembly sought to prevent a generally worded living will from being applied in that way. The Living Will Law contains two provisions that expressly address the provision of food and water to a terminally ill patient who has executed a declaration. HG §5-605(1) provides that a declaration "may not be implemented . . . [b]y the denial of food, water, or of such medication and medical procedures as are necessary to provide comfort care and to alleviate pain." Similarly, the model declaration in HG §5-602(c)(1) sets out the qualified person's instruction that he or she "be permitted to die naturally with only the administration of medication, the administration of food and water, and the performance of any medical procedure that is necessary to provide comfort care or alleviate pain."

The legislative history confirms the General Assembly's recognition that, for some patients, food and water can only be provided through artificial means. The House Environmental Matters Committee report states that a "common method of giving comatose patients food and water is through tubes. Therefore, this [bill] requires if food and water are provided through tubes, that food and water could not be withheld." Report on House Bill 453, at 6-7 (February 19, 1985). As the preamble to the Living Will Law states, the law "is intended to ensure that such basic measures as nursing care, nutrition, and hydration will be maintained out of respect for the human dignity of every patient." See generally Kronmiller, *A Necessary Compromise: The Right to Forego Artificial Nutrition and Hydration Under Maryland's Life-Sustaining Procedures Act*, 47 Md. L. Rev. 1188 (1988).

In light of this legislative history, we understand HG §5-605(1) to mean that a declaration calling generally for the withholding of life-sustaining procedures may not itself serve as the basis for withholding artificially administered sustenance.²⁷

²⁷ Two commentators have suggested that the Living Will Law's provisions on food and water can be construed to mean that "medically administered . . . food and water . . . are to be discontinued except as they are appropriate for comfort and pain control." Landsman and Mertes, *Slow Death in a Nursing Home*, Md. Bar J. March-April 1988, at 45, 47. This construction seems to us somewhat strained, given the language of HG §5-605(1) and the legislative history.

Yet, as the preamble also recognizes, “it is the fundamental right of competent adults, based on the autonomy and sanctity of the individual, to control decisions relating to the rendering of their medical care and treatment.” This right finds statutory recognition in HG §5-610(1), which states that the provisions of the Living Will Law “are cumulative and may not be construed to impair or supersede any legal right or responsibility that any person may have to effect the initiation, continuation, withholding, or withdrawal of life-sustaining procedures.”

As discussed at pages 171-72 above, a person has a constitutional right to refuse consent to the insertion or the continued presence of a feeding tube. HG §5-610(1) should be construed to recognize that right. Put differently, HG §5-610(1) leads us to conclude that the General Assembly did not intend to require that a feeding tube be inserted into or be maintained in the body of a person who has *expressly* rejected that form of treatment.²⁸

Taking account of all pertinent provisions, we conclude that the Living Will Law applies as follows to artificially administered sustenance:

1. If a declaration specifically refers to artificially administered sustenance and states that the declarant wishes the continuation of sustenance in this form, those providing care may not terminate this form of treatment. *See* HG §5-611.

2. If a declaration specifically refers to artificially administered sustenance and states the declarant's instruction that this form of treatment not be initiated or be discontinued if already initiated, those providing care should carry out this instruction. Because such a provision effectuates a right recognized by HG §5-610(1), the provision is “not inconsistent with” the Living Will Law and therefore may be included in a declaration. HG §5-602(c)(2).

3. If a declaration does not specifically address artificially administered sustenance but instead simply follows the model declaration set out in HG §5-602(c)(1), the declaration cannot rightly be

²⁸ The Living Will Law's provisions on food and water apply only to persons who have executed a declaration. They do not address the artificial administration of sustenance to those without living wills. If the Living Will Law were construed to require artificially administered sustenance for all declarants, the law would create a striking anomaly: Those who have taken advantage of a law designed to give expression to individual choice would have *less* right to choose than those who have not prepared a living will. We cannot suppose that the General Assembly intended so absurd a result. *See, e.g., Coerper v. Comptroller*, 265 Md. 3, 6, 288 A.2d 187, 188 (1972).

construed to state an intention regarding tube feeding. On the one hand, HG §5-605(1) prevents such a declaration from serving as the basis for withholding artificially administered sustenance. On the other hand, we think it likely that the average person executing a declaration calling for “the administration of food and water” does not understand these words to be a consent to medical treatment — that is, consent for a feeding tube to be inserted or kept in the person’s body. If a living will follows the model form, it should be viewed as not stating any decision about artificially administered sustenance. Hence, the question of artificially administered sustenance would then be resolved through application of the other forms of medical decisionmaking discussed in this opinion.

This approach to the Living Will Law seeks to harmonize HG §5-605(1) and HG §5-610(1). Properly construed, HG §5-605(1) assures that a declaration calling only generally for the cessation of life-sustaining procedures will not itself result in the cessation of sustenance in any form. At the same time, HG §§5-602(c)(2) and 5-610(1) together mean that a person is not barred from embodying in a living will the specific expression of the person’s constitutional and common law right to refuse artificially administered sustenance.

Moreover, our construction is also necessary to avoid serious constitutional difficulties. Like a court, we “will, whenever reasonably possible, construe and apply a statute to avoid casting serious doubt upon its constitutionality.” *Yangming Transport v. Revon Products*, 311 Md. 496, 509, 536 A.2d 633 (1988). *See also, e.g., Davis v. State*, 312 Md. 172, 179, 539 A.2d 218 (1988). If the provisions on food and water in the Living Will Law were construed to prohibit a person’s exercise of the right to refuse artificially administered sustenance, those provisions would likely be found unconstitutional. *See In re Drabick*, 200 Cal. App. 3d 185, 245 Cal. Rptr. 840, 859-60 (1988); *Corbett v. D’Alessandro*, 487 So. 2d 368, 370 (Fla. Dist. Ct. App. 1986); *In re Gardner*, 534 A.2d 947, 952 n.3 (Me. 1987).

V

Durable Power of Attorney

Section 13-601 of the Estates and Trusts Article (“ET” Article) authorizes the creation of a “durable power of attorney,” a legal instrument authorizing another to act on a person’s behalf when the person is incapacitated. Although durable power of attorney statutes “were enacted primarily to avoid the expense of full guardianship or conservatorship proceedings when dealing with small property

interests, . . . the language of these statutes can accommodate the appointment of a surrogate for [health care decisionmaking] and nothing in the statutes explicitly precludes such a use." President's Commission Report at 147. Indeed, although ET §13-601 does not expressly authorize the delegation of health care decisionmaking, nothing in the statute or other law prevents it.

Moreover, specific references to a durable power of attorney for health care decisionmaking appear in three places in the Health-General Article. HG §20-107(d) provides:

In the absence of a durable power of attorney that relates to medical care and is executed under §13-601 of the Estates and Trusts Article, or in the absence of a judicially appointed guardian, conservator, committee, or trustee who has the authority to consent to medical care, any of the following individuals may give a substituted consent for furnishing medical or dental care and treatment to a disabled individual

(Emphasis added.) HG §19-370(d)(7) includes within the definition of "petitioner" (that is, one who may request advice from a hospital's patient care advisory committee) "[a]n individual with a power of attorney to make a decision with a medical consequence for a patient." Finally, newly enacted HG §19-344(b)(3)(i) authorizes a nursing home to ask (but not require) prospective residents "to execute valid durable powers of attorney designating an attorney in fact to make . . . medical . . . decisions in the event of the applicant's disability." Chapter 452, Laws of Maryland 1988. These statutory references confirm the General Assembly's recognition that a medical durable power of attorney is a legally effective instrument.

A person (the principal) may use a durable power of attorney to direct an agent (the attorney in fact) to carry out the principal's specific directive concerning medical treatment, including the withholding or withdrawing of artificially administered sustenance under specified circumstances. Alternatively, a principal may choose to empower the attorney in fact to make all medical decisions on his or her behalf, rather than directing a specific treatment decision. *See In re Peter*, 108 N.J. 365, 529 A.2d 419, 426 (1987) (recognizing the right of a principal to authorize an agent to make health care decisions on the agent's behalf if the principal lacked the capacity to make treatment decisions).

Although a medical durable power of attorney is legally effective, no law spells out important safeguards like formalities for its execution. We recommend that the General Assembly consider legislation

specifically addressing these matters.²⁹

VI

Prior Instructions to Physician

A person need not execute a formal document to make a choice about artificially administered sustenance. Instead, a person who is competent to make medical decisions at the time of decision about insertion of a feeding tube can decide whether to allow that procedure or not by simply telling the attending physician, who should document the decision in the patient's record.³⁰

The right of self-determination about medical treatment means that a competent person may engage in direct decisionmaking when the person and the physician are discussing a future course of treatment. That discussion might well deal with questions of the person's consent to treatment if various contingencies were to arise.

To take a common example, a person about to undergo a biopsy procedure might well discuss with the doctor the question of further surgery if the tumor were found to be malignant. That is, the patient might be asked whether he or she consented to further surgery immediately after the biopsy results are known, or whether the patient would rather make a separate decision later about follow-up surgery. The same principle — that a person has a right to decide about future treatment alternatives — would permit the patient to make a choice about life-sustaining procedures, including artificially administered sustenance, should that situation arise. Just as the person's other contingent decisions about treatment must be given effect, so must this one. *See, e.g., In re Farrell*, 108 N.J. 335, 529 A.2d 404, 410 (1987).³¹

²⁹ *See* Cal. Civil Code §§2430-2444 and 2500 (West 1988).

³⁰ Similarly, the patient may decide in the same way to have a feeding tube withdrawn that previously had been inserted with his or her consent, or without such consent under the emergency provisions of HG §20-107(c). *See* note 48 below.

³¹ A patient's exercise of the right to refuse a particular form of treatment in the course of discussion with the patient's doctor, properly recorded in the patient's medical records, is an extraordinarily reliable form of decisionmaking. Thus we characterize it as "direct decisionmaking," to be carried out even if the patient later becomes disabled. A few cases treat a patient's discussions with family or friends as potentially a comparable form of direct decisionmaking, if there is "clear and convincing" evidence of the patient's

continued

VII

Standards For Surrogate Decisionmaking

A. *Introduction*

In this part we discuss the substance of surrogate decisionmaking — decisions about life-sustaining treatment made on behalf of a patient who is unable to decide personally. Two underlying values govern surrogate decisionmaking: respecting patient self-determination and promoting patient welfare. See *In re Jobes*, 108 N.J. 532, 529 A.2d 434, 436; *In re Conroy*, 486 A.2d at 1227; *In re Grant*, 109 Wash 2d 545, 747 P.2d 445, 457 (1987). See also President's Commission Report at 132. If a surrogate decisionmaker knows enough to judge what the disabled person would decide if he or she were able to, the surrogate should make that choice. This preferred form of decisionmaking is called "substituted judgment." If this subjective standard cannot be used, the surrogate decisionmaker must base a decision on the objective costs and benefits of treatment for the terminally ill patient, to determine what is in the patient's "best interest." These two standards should guide every surrogate decision, whether made by a guardian, a family member, or the court.³²

B. *Substituted Judgment*

The substituted judgment standard requires that a surrogate decisionmaker attempt to reach the decision that the patient would have made if he or she were able to choose.³³ This standard respects the patient's own definition of well-being as well as his or her interest in self-determination. President's Commission Report at 132-33. The

Note 31 continued

decision to refuse treatment. See *In re Gardner*, 534 A.2d at 953; *In re Jobes*, 108 N.J. 394, 529 A.2d 434, 443 (1987); *In re Storar*, 52 N.Y.2d 363, 420 N.E. 2d 64, 72 (1981). In our view, the sounder and more cautious practice is to view a now-disabled person's prior conversations with persons other than the attending physician as evidence to be weighed under the "substituted judgment" form of surrogate decisionmaking, rather than as a form of direct decisionmaking by the patient. See pages 186-87 below.

³² These standards should also guide an attorney in fact if a medical durable power of attorney delegates decisionmaking authority to the attorney. See pages 183-85 above.

³³ See, e.g., *In re Severns*, 425 A.2d at 159; *Brophy v. New England Sinai Hospital, Inc.*, 497 N.E. 2d at 634-35; *Superintendent of Belchertown State School v. Saikewicz*, 370 N.E. 2d at 431; *In re Jobes*, 529 A.2d at 444; *In re Conroy*, 486 A.2d at 1229.

best proof of a patient's wishes are the patient's own previous expressions. President's Commission Report at 133. This standard, however, can only be used if a patient was once capable of developing views relevant to the decision at issue. *See, e.g., In re Storar*, 52 N.Y.2d 363, 420 N.E.2d 64, 72 (1981).

Two cases illustrate the kind of evidence that can lead to a decision based on substituted judgment.³⁴ In *Brophy v. New England Sinai Hosp., Inc.*, 298 Mass. 417, 497 N.E.2d 626 (1986), the court identified the following factors in determining whether a patient in a "persistent vegetative state" would refuse a feeding tube:

- (1) the patient's expressed preferences;
- (2) the patient's religious convictions and their relation to the refusal of treatment;
- (3) the impact on the patient's family;
- (4) the probability of adverse side effects;
- (5) the prognosis with and without treatment; and
- (6) the impact on the patient of his present and future incompetency.

The court affirmed the trial judge's determination that if Brophy, the patient, were presently competent, he would choose to forgo the administration of nutrition and hydration through artificial means. 497 N.E.2d at 635.³⁵ The trial court based its conclusion on Brophy's prior vehement objections to the use of life-sustaining treatment and the fact that his religious convictions would not bar the refusal of such treatment. In another case, the New Jersey Supreme Court, relying on the substituted judgment standard, found that a patient would, if competent, choose to withdraw artificially administered sustenance. The court was convinced of this result, based on testimony confirming the patient's repeated prior statements that "under no circumstances would I want to be kept alive on a life-support system." *In re Peter*, 529 A.2d at 426.

³⁴ The caselaw does not permit us to generalize about an evidentiary standard. As the two cases discussed in the text illustrate, courts simply evaluate the evidence in a particular case for its reliability and application to the treatment decision in question.

³⁵ Brophy suffered serious and irreversible brain damage. He lacked cognitive functioning. The court found it highly unlikely that he would ever regain cognitive behavior and thus would forever lack the ability to communicate and the capability to interact with his environment. Since he was not terminally ill and his other organs functioned relatively well, he could live in a "persistent vegetative state" for several years. 497 N.E.2d at 630.

C. *Best Interest*

Although a surrogate decisionmaker should always be guided by evidence of the patient's own wishes if possible, in many cases the surrogate will have no basis for substituted judgment. Furthermore, some patients have never had decisionmaking capacity: their subjective wishes would be impossible to discern with any certainty. President's Commission Report at 134.³⁶ In these circumstances, a surrogate decisionmaker must make a decision that seeks to implement what the surrogate believes would be in the patient's best interest.³⁷ The value underlying a best interest analysis is the protection of a patient's welfare, rather than the value of self determination.³⁸ The President's Commission observed that, when "assessing whether a procedure or course of treatment would be in a patient's best interests, the surrogate must take into account such factors as the relief of suffering, the preservation or restoration of functioning and the quality as well as the extent of life sustained." President's Commission Report at 135. But "quality . . . of life" does *not* mean "the value that others find in the continuation of the patient's life, perhaps in terms of their estimates of the patient's actual or potential productivity or social contribution." Rather, the best interest standard looks only to "the value of the patient's life *for the patient*." President's Commission Report at 135 n.43 (emphasis added). For a terminally ill patient, the surrogate decisionmaker should consider "whether forgoing treatment will allow the patient to avoid the burden of prolonging dying with pain or suffering, and whether the patient has the potential benefit of achieving some satisfaction if he or she survives longer." Hastings Center Guidelines at 28.

³⁶ See, e.g., *In re Storar*, 420 N.E.2d at 72; *In re Grant*, 747 P.2d at 445-46; *In re Hamlin*, 102 Wash. 2d 810, 689 P.2d 1372, 1378 (1984). But see *Superintendent of Belchertown State School v. Saikewicz*, 370 N.E.2d at 431 (court applied substituted judgment standard in making decision on behalf of patient who had never been competent to make treatment decisions.)

³⁷ See, e.g., *Rasmussen v. Fleming*, 741 P.2d at 689; *In re Drabick*, 245 Cal. Rptr. at 846; *Barber v. Superior Court of California*, 195 Cal. Rptr. at 493; *In re Grant*, 747 P.2d at 457. But see *In re Storar*, 420 N.E.2d at 71 (best interest test inapplicable to terminally ill patient who was never competent).

³⁸ Although a patient may lack the capacity to make a decision about forgoing artificially administered sustenance, a patient's conduct—for instance, forcible resistance to the insertion of a feeding tube or continued efforts to remove a tube — nonetheless should be considered in determining whether continuation of artificially administered sustenance is in the patient's best interest.

A recent Washington case illustrates application of the best interest standard. In *In re Grant*, the Washington Supreme Court recognized that it was in the best interest of a 22 year old patient suffering from an incurable neurological disorder to withhold life-sustaining procedures, including artificially administered sustenance. 747 P.2d at 457. Barbara Grant's intellectual and cognitive functions had virtually disappeared; she was in the end stages of a terminal disease with no hope of improvement. She could not move her body and had to be tied down in bed to avoid harmful movement caused by seizures. Although she had never expressed her desires concerning the use of life-sustaining measures, her mother believed she would not have wanted such treatment based on her prior dislike for medication and medical procedures as well as her dislike for the medical staff. 747 P.2d at 448.³⁹ The court set forth the following factors that a surrogate decisionmaker should use in determining whether the withdrawal of life-sustaining measures is in the best interest of the patient:

[E]vidence about the patient's present level of physical, sensory, emotional, and cognitive functioning; the degree of physical pain resulting from the medical condition, treatment, and termination of treatment, respectively; the degree of humiliation, dependence, and loss of dignity probably resulting from the condition and treatment; the life-expectancy and prognosis for recovery with and without treatment; the various treatment options; and the risks, side effects, and benefits of each of those options.

747 P.2d at 457. In recognizing that it was in Grant's best interest to withhold all life-sustaining treatment, the court held that "the individual's right to die with dignity must not be ignored A terminally ill patient may wish to avoid not only prolonged suffering, but also '[t]he ultimate horror . . . of being maintained in limbo, in a sterile room, by machines controlled by strangers.'" 747 P.2d at 451 (quoting *In re Torres*, 357 N.W.2d 332, 340 (Minn. 1984)).

Patients who are permanently unconscious pose a difficult problem for application of the best interest standard. According to medical experts, someone who is permanently unconscious does not experience suffering, either physically or emotionally. See page 169 above. Nor is the person capable of experiencing any of life's satisfactions. The

³⁹ This kind of evidence is relevant to both substituted judgment and best interest. The boundary between these two categories is not an exact one. See President's Commission Report at 132.

balancing of costs and benefits *to the patient* that a surrogate must undertake for a terminally ill patient cannot be done in the same way for a patient who is permanently unconscious. *See In re Peter*, 529 A.2d at 425.

To be sure, the traditional benefits of treatment cannot be obtained. President's Commission Report at 181. The American Academy of Neurology, in a recent position paper, declared that: "Medical treatment, including the medical provision of artificial nutrition and hydration, provides no benefit to patients in a persistent vegetative state" Position of the American Academy of Neurology at 3. The only value to the patient in continuing treatment resides in the exceedingly small possibility that the prognosis of permanent unconsciousness is incorrect. President's Commission Report at 182 and 459.⁴⁰ To continue treatment to maintain a patient in a state of permanent unconsciousness when treatment provides no medical benefit imposes severe emotional burdens on a patient's family — people for whom the patient, if conscious, presumably would be most concerned. President's Commission Report at 183.

Still, we are very reluctant to conclude that the best interest standard, properly applied, takes into account anything other than the patient's actual interest alone. Until the issue is addressed more fully by Maryland courts or the General Assembly, we reach no conclusion about the application of the best interest standard to the permanently unconscious.

VIII

Guardianship

ET §13-704 authorizes the appointment of a guardian of the person for a disabled person: "The court may superintend and direct the care of a disabled person, appoint a guardian of the person, and pass orders and decrees respecting the person as seems proper, including

⁴⁰ But see *W. May et al., Feeding And Hydrating The Permanently Unconscious And Other Vulnerable Persons*, *Issues in Law & Medicine* No. 3, at 203, 209 (1987) (providing fluids by tube is not useless because it benefits the permanently unconscious by preserving their lives and preventing their death).

an order directing the disabled person to be sent to a hospital.”⁴¹ ET §13-101(d) defines a disabled person as:

[A] person other than a minor who:

(1) (i) Has been judged by a court to be unable to manage his property for reasons listed in §13-201(c)(1) of this subtitle; and

(ii) As a result of this inability requires a guardian of his property; or

(2) (i) Has been judged by a court to be unable to provide for his daily needs sufficiently to protect his health or safety for reasons listed in §13-705(b) of this subtitle; and

(ii) As a result of this inability requires a guardian of the person.

In *Kicherer v. Kicherer*, 285 Md. 114, 118-19, 400 A.2d 1097, 1100-1101 (1979), the Court of Appeals provided the following framework for guardianship proceedings: “[A] court of equity assumes jurisdiction in guardianship matters to protect those who, because of illness or other disability, are unable to care for themselves. In reality the court is the guardian; an individual who is given that title is merely an agent or arm of that tribunal in carrying out its sacred responsibility [A]ppointment to that position rests solely in the discretion of the equity court and the administering of that office as it pertains to both the person and property of the ward is subject to judicial control.”

ET §13-708(b)(8) authorizes a guardian of the person “to give necessary consent or approval for medical or other professional care, counsel, treatment, or service.” By necessary implication, this authority includes the power to withhold or withdraw consent to medical treatment. ET §13-708(b)(8) cannot logically be read as authorizing only the power to consent, since “often times a patient’s interests are best served when medical treatment is withheld or withdrawn. To hold otherwise would . . . reduce the guardian’s control over medical treatment to little more than a mechanical rubberstamp for the wishes of the medical treatment team.” *Rasmussen v. Fleming*, 741 P.2d at 688.⁴² Thus, what is contemplated is not only the power to accept

⁴¹ A disabled person might also have a guardian of the property. See ET §13-201.

⁴² See also *In re Colyer*, 99 Wash. 2d 114, 660 P.2d 738, 746 (1983); *In re Hamlin*, 689 P.2d at 1375.

medical treatment but also the power to refuse medical treatment, terminate already existing medical treatment, or choose among alternative medical treatments. *See generally* Horan, *Euthanasia, The Right To Life And Termination Of Medical Treatment: Legal Issues*, in *Moral Responsibility in Prolonging Life Decisions* 170 (D. McCarthy, A. Moraezewski, eds. 1981.)

The guardian's power is limited, however, since "the court must authorize any medical procedure that involves a substantial risk to life." Although ET §13-708(b)(8) generally authorizes a guardian to refuse medical treatment, the guardian may not direct the withholding or withdrawing of artificially administered sustenance or any other life-sustaining treatment, since to do so would involve "a substantial risk to life." Instead, the guardian must petition the court for authorization to withhold or withdraw artificially administered sustenance.⁴³ In deciding whether to approve this treatment decision, the court, like the guardian, should apply the substantive standards discussed in Part VII above.⁴⁴

IX

Surrogate Decisionmaking By Family Members

A. *Scope of HG §20-107*

In general, HG §20-107 addresses the problem of medical decision-making on behalf of "an individual who lacks sufficient understanding or capacity to make or communicate a responsible decision on health care for the individual" because of several specified physical and

⁴³ Read literally, ET §13-708(b)(8) would not require court approval of a guardian's decision to decline life-sustaining treatment, for it speaks only of the court's "authoriz[ing]" an affirmative "medical procedure." So literal a construction does not comport with the apparent legislative purpose, however. Suppose doctors recommend surgery for a patient who would die without the surgery, even though the surgery itself poses a high risk of death. ET §13-708(b)(8) requires court approval of the guardian's decision to consent to the surgery; it would make no sense to say that the guardian may decline the surgery without court approval. The purpose of ET §13-708(b)(8) is to assure that the court itself will make the decision when the consequences are so grave.

⁴⁴ In a recent decision in the Circuit Court for Prince George's County, the court applied the substituted judgment standard in approving a guardian's request to remove a feeding tube from a permanently unconscious patient. The court has sealed the case to protect the privacy of the family involved, so we omit the specific citation.

mental ailments.⁴⁵ HG §20-107(d) grants decisionmaking authority to family members, as follows:

In the absence of a durable power of attorney that relates to medical care and is executed under §13-601 of the Estates and Trusts Article, or in the absence of a judicially appointed guardian, conservator, committee, or trustee who has the authority to consent to medical care, any of the following individuals may give a substituted consent for furnishing medical or dental care and treatment to a disabled individual in accordance with the following priorities provided the provisions of subsection (e) of the section have been met:

- (1) A spouse, or, if not reasonably available;
- (2) An adult child, or, if not reasonably available;
- (3) A parent, or, if not reasonably available;
- (4) An adult sibling, or, if not reasonably available;
- (5) A grandparent, or, if not reasonably available;
- (6) An adult grandchild.⁴⁶

A “health care provider” who carries out treatment based on substituted consent gains immunity from liability based on his or her reliance on the consent. HG §20-107(g)(2).⁴⁷

⁴⁵ These are:

- “(i) A physical disability;
- (ii) Chronic alcoholism;
- (iii) Drug addiction;
- (iv) A disease; or
- (v) A mental disability, including senility.”

HG §20-107(a)(2). Another subsection, HG §20-107(e), specifies careful protections to assure that the patient really is medically disabled.

We note that the term “senility” is no longer recognized as a valid medical description. The General Assembly should consider revising this language.

⁴⁶ HG §20-107(e) requires written certification by two physicians that the person “is incapable of making a responsible decision regarding the proposed health care” HG §20-107(f) sets out circumstance under which substituted consent may not be given, including when “the health care provider is aware that the person for whom the health care is proposed has expressed disagreement with the decision to provide health care.”

⁴⁷ The term “health care provider” includes a “hospital administrator or his designee” but does not include a “nursing home administrator” or the “administrator’s designee.” This omission suggests to some that HG §20-107 does not apply to decisions made within nursing homes. Although the legislative history of §20-107 does not explain the omission, the underlying rationale for allowing surrogate decisionmakers to provide consent for proposed treatment is applicable to residents of nursing homes as well as patients in other facilities. Moreover, “treatment” of a nursing home resident would typically be administered by a physician, a registered nurse, or a licensed practical nurse — all of whom *are* within the definition of “health care provider.” HG §20-107(a)(3)(iii), (vii), and (ix).

The insertion or continued use of a feeding tube is the "furnishing [of] medical . . . care and treatment"; hence, it is within the scope of HG §20-107, and a family member may surely consent under HG §20-107(d) for its insertion or maintenance, as recommended by a physician.⁴⁸ The harder question is whether the family and physicians may likewise invoke HG §20-107 as a basis for a decision to decline the use of a feeding tube.

The argument in favor of an expansive reading of HG §20-107 is a respectable one. Medical decisions often involve a choice among treatments: consent to one form of treatment impliedly rejects alternate treatments. If the demonstrable purpose of HG §20-107 were to provide a means by which a family member may broadly make "a responsible decision regarding the proposed health care" when the patient cannot [HG §20-107(e)], we would be inclined to a reading of the statute that would encompass decisions not to treat.

In our view, however, neither the statutory language nor the legislative history sustains so expansive a construction of HG §20-107. HG §20-107(d) speaks of "a substituted consent for *furnishing* . . . treatment." The ordinary meaning of "furnish" is to "supply, provide, or equip, for accomplishment of a particular purpose." *Black's Law Dictionary* 608 (5th ed. 1979). For medical treatment, the term is synonymous with "administer." *State v. Wilson*, 71 Kan. 263, 80 P.565 (1905). The term "treatment" likewise ordinarily refers to actions

⁴⁸ In an emergency, a physician may insert a feeding tube without consent, under HG §20-107(c):

"A health care provider may treat a disabled individual without consent if:

- (1) A person who is authorized to give the consent is not available immediately;
- (2) The attending physician determines:
 - (i) There is a substantial risk of death or immediate and serious harm to the disabled individual; and
 - (ii) With a reasonable degree of medical certainty, the life or health of the disabled individual would be affected adversely by delaying treatment to obtain consent; and
- (3) Treatment is of an emergency medical nature."

A health care provider who provides treatment under HG §20-107(c) is afforded limited immunity under HG §20-107(g)(1).

This provision authorizes emergency treatment only if a decisionmaker "is not available immediately." It does not countenance a physician's evasion of the need to obtain consent if possible.

rather than inaction. See *Pfahler v. Eclipse Pioneer Div.*, 21 N.J. 486, 122 A.2d 644, 646 (1956).⁴⁹

The legislative history of the bill that enacted the substituted consent mechanism underscores the General Assembly's exclusive focus on the issue of how consent is to be given, when a family member wants to give it for a treatment that a physician recommends. A committee report states: "This bill provides that a health care provider may treat a disabled individual, even if that individual is not able to give consent, if certain relatives of the individual have given consent" Senate and Finance Committee Report on Senate Bill 433 (1984). Similarly, a floor statement observes that: "Currently there is no provision in the law which would enable a family member to consent to medical or dental treatment for a disabled individual who is unable to give consent, if certain relatives of the individual have given consent" Senate and Finance Committee Report on Senate Bill 433 (1984). Similarly, a floor statement observes that: "Currently there is no provision in the law which would enable a family member to consent to medical or dental treatment for a disabled individual who is unable to give consent — short of going through guardianship proceedings which can be expensive and which can be too time-consuming and public for handling non-controversial medical treatment in which there is no expressed disagreement between the patient, the substitute decisionmaker and the health care provider." Floor Statement on Senate Bill 433 (1984). There is no discussion anywhere within the legislative history that HG §20-107 would be a mechanism for allowing surrogate decisionmakers to direct the withholding or withdrawing of life-sustaining treatment.

Thus, in our view, the better reading of HG §20-107 is that it does not apply to decisions to refuse a form of treatment. It neither authorizes nor prohibits family decisions to refuse treatment on behalf of a disabled family member; instead, it simply does not address this form of surrogate decisionmaking and leaves it to other legally recognized procedures.

⁴⁹ Other portions of HG §20-107 likewise reflect an exclusive focus on affirmative treatment steps. HG §20-107(b) precludes reliance on the section for "treatment . . . against the religious belief of the disabled individual." HG §20-107(e) speaks of "proposed health care." Finally, HG §20-107(f)(4) refers to "the performance of the treatment."

B. *Family Decisionmaking Under Common Law*

If HG §20-107(d) does not authorize decisions to forgo life-sustaining treatment, what does? That is, if a disabled person has no living will or durable power of attorney and did not previously instruct the attending physician about treatment choices, must a spouse or other family member initiate a guardianship proceeding in order to forgo life-sustaining treatment when the disabled person has become terminally ill? In practice, every day in this State doctors are recommending and families are confirming decisions not to use various means of treatment for terminally ill patients who cannot decide for themselves. Many of these decisions — not to resuscitate, not to use a respirator, not to treat an infection with antibiotics, not to insert or maintain a feeding tube — mean that a terminally ill patient will die a little sooner, but without unduly prolonged suffering.

The General Assembly not long ago recognized this reality, indirectly but distinctly. In Chapter 749 of the Laws of Maryland 1986, the General Assembly required each hospital to establish a patient care advisory committee. HG §19-371(1). Among other duties, the committee on request “shall give advice concerning the options for medical care and treatment of an individual with a life threatening condition.” HG §19-374(a). The statute recognizes family members as potential participants in the decision about which “option” to choose. *See* HG §§19-370(d)(5), 19-372(a)(3)(iii), 19-373(b)(1), and 19-374(b)(1). The bill’s preamble spoke of “[d]octors, patients, *relatives*, and the courts . . . being forced to make difficult choices with respect to medical treatment and care” and of the “need for . . . policies to help *families* and care providers who face these difficult choices. . . .” (Emphasis added.)⁵⁰

Because decisions about treatment of a terminally ill patient usually must be made quickly, an informal parallel to HG §20-107 procedures has developed, albeit without a direct basis in that statute. If the attending physicians have concluded that forgoing life-sustaining treatment is consistent with proper standards of patient care, the physicians make that recommendation. If close family members agree with that recommendation, the decision to forgo treatment is carried out without court involvement.

⁵⁰ At the same time, Chapter 749 reaffirmed the primacy of an individual’s own decision: “Any information or document that indicates the wishes of the patient shall take precedence in the deliberations of the advisory committee.” HG §19-374(b)(2).

In our view, this kind of surrogate decisionmaking is a legally proper means of effectuating the constitutional and common law rights of a terminally ill patient. We start with the premise, set out in Part IIB above at pages 175-78, that a disabled person has a right to refuse life-sustaining treatment, including artificially administered sustenance.

If a terminally ill patient is forced to endure the burdens of unwanted treatment and a prolonged dying process while awaiting a court decision, the person's rights will have been defeated in practice even if upheld eventually. Some of the leading decisions establishing the right to refuse treatment were announced, with unintended irony, after the person's dying had been prolonged by that very treatment.⁵¹

For that reason, some courts have articulated a common law procedure "to allow the surrogate decision maker, the family, to make the decision free of the cumbersomeness and costs of legal guardianship proceedings." *In re Hamlin*, 102 Wash. 2d 810, 689 P.2d 1372, 1377 (1984). As the New Jersey Supreme Court put it:

Family members are best qualified to make substituted judgments for incompetent patients not only because of their peculiar grasp of the patient's approach to life, but also because of their special bonds to him or her. Our common human experience informs us that family members are generally most concerned with the welfare of a patient. It is they who provide for the patient's comfort, care, and best interests, . . . and they who treat the patient as a person, rather than a symbol of a cause.

In re Jobes, 108 N.J. 394, 529 A.2d 434, 445 (1987) (citations omitted). See also, e.g., *John F. Kennedy Hosp. v. Bludworth*, 452 So. 2d 921, 926 (Fla. 1984).

The California Court of Appeals has expressly rejected the argument "that only duly appointed legal guardians have the right to act on behalf of another. While guardianship proceedings might be used in this context, we are not aware of any authority requiring such procedure." *Barber v. Superior Court*, 147 Cal. App. 3d 1006, 195 Cal.

⁵¹ See *Corbett v. D'Alessandro*, 487 So. 2d at 369; *In re Farrell*, 529 A.2d at 409-10; *In re Storar*, 420 N.E.2d at 66 n.1 (1981).

Rptr. 484, 492 (1983) (emphasis in original).⁵² In the case before it, the court continued, the attending physicians had “consulted with and relied on the decision of the immediate family, which included the patient’s wife and several of his children In the absence of legislation requiring [guardianship] proceedings, we cannot say that failure to institute such proceedings made [the doctors’] conduct [in discontinuing life-sustaining treatment] unlawful.” *Id.*⁵³

These cases emphasize the importance of collaborative decision-making among physicians and family members (and sometimes an advisory group like a hospital’s ethics committee). If any participant in the decision to withhold life-sustaining treatment objects, treatment must be continued until a court decides the matter. *Rasmussen v. Fleming*, 741 P.2d at 691; *In re Grant*, 747 P.2d at 456. “Where, however, all affected parties concur in the proposed plan of medical treatment, court approval of the proposed plan of medical treatment is neither necessary nor required.” *Rasmussen*, 741 P.2d at 691.⁵⁴

⁵² Decisions recognizing a guardian’s right to refuse life-sustaining treatment on behalf of a disabled person cannot be read to *require* guardianship proceedings. Since a previously appointed guardian petitioned the court to have the life-sustaining procedures withdrawn, the courts focused primarily on the authority of the guardian and not on a situation in which a guardian had not been appointed. *See, e.g., Rasmussen*, 741 P.2d 674; *Brophy*, 497 N.E. 2d 626. *But see In re Conroy*, 486 A.2d at 1240 (guardian must be appointed to act on behalf of patient who was neither terminal nor experiencing a permanent loss of consciousness before withholding or withdrawing life-sustaining treatment).

If a close family member is the guardian of the person, one might argue that the family member may invoke either decisionmaking process, that available to guardians or that available to close family members. Nevertheless, the legislative policy reflected in the introductory language to HG §20-107(d), which we believe a court would apply in this analogous situation, gives primacy to decisionmaking under a guardianship, with no distinction made between family member guardians and stranger guardians. Until the General Assembly addresses the matter further, a family member who is a guardian of the person should follow the decisionmaking procedures applicable to guardians. *See* pages 190-92 above.

⁵³ For a discussion of one aspect of *Barber* that we are unable to endorse, see page 200 below.

⁵⁴ *See also Barber*, 195 Cal. Rptr. at 493; *Corbett*, 487 So. 2d at 370; *In re Gardner*, 534 A.2d at 949-50; *Brophy*, 497 N.E. 2d at 635; *In re Jobes*, 529 A.2d at 451; *In re Peter*, 529 A.2d at 430; *In re Quinlan*, 355 A.2d at 669; *In re Grant*, 747 P.2d at 456; *Compare*, (1981); *Leach v. Shapiro*, 469 N.E.2d 1047 (1984). *Cf. Superintendent of Belchertown State School v. Saikewicz*, 370 N.E. 2d at 434 (court approval required where treatment would extend a patient’s normal cognitive functioning).

Relying on this body of case law, and mindful of the fact that protection of the terminal patient's right requires swift decisionmaking, we conclude that a decision to forgo life-sustaining treatment, including artificially administered sustenance, may lawfully be made on behalf of a disabled person if:

- (i) the disabled person is terminally ill;
- (ii) the attending physicians advise that forgoing treatment is medically proper;⁵⁵
- (iii) a close family member determines that forgoing treatment is what the disabled person would want done or, if that is unknown, is in the person's best interest;⁵⁶
- (iv) no other family member disagrees with the decision; and
- (v) where applicable, the hospital's patient care advisory committee has not advised against forgoing treatment.⁵⁷

We are unable to reach the same conclusion about nonterminal, permanently unconscious patients. In our view, any decision to end artificially administered sustenance for these patients must be made by a court, unless the patient, while competent, decided the matter directly or executed a medical durable power of attorney.

⁵⁵ The Council on Ethical and Judicial Affairs of the American Medical Association has stated its view that, "[f]or humane reasons, with informed consent, a physician may . . . cease or omit treatment to permit a terminally ill patient whose death is imminent to die." A physician has no duty to initiate or continue useless treatment. See *Barber v. Superior Court of California*, 195 Cal. Rptr. at 491. Accord, *In re Dinnerstein*, 38 N.E.2d at 139 n.10; President's Commission Report at 191 n.50. See generally Horan, *Euthanasia and Brain Death: Ethical and Legal Consideration*, 315 Annals N.Y. Acad. Sci. 363, 367 (1978).

We note that a health care provider's decision not to treat is outside the scope of the limited immunity in HG §20-107(g)(2), which applies only to treatment in "reliance on the substituted consent." However, if the decision not to treat were in accordance with accepted standards of practice, the decision would not be a basis of liability in any event.

⁵⁶ In our view, although HG §20-107(d) is inapplicable, its priority ranking of family members reflects a legislative judgment that can be applied in this context. Those listed in HG §20-107(d) are "close family members," as we use the term. We recognize that, in some situations, no such family member is available to discuss the situation. If the attending physician has concluded that artificially administered sustenance is medically improper, the physician should take steps to obtain court approval, through a guardianship proceeding, before terminating treatment. See *In re Hamlin*, 689 P.2d at 1378 (where patient is incompetent and where there is no family available, a guardian must be appointed to represent the patient's best interests).

⁵⁷ Nursing homes are not required to establish patient care advisory committees. The General Assembly may wish to consider extending the requirement of HG §19-371 to nursing homes.

We readily acknowledge that the case law approving family decisionmaking deals with the permanently unconscious as well as the terminal. In fact, more cases involve the permanently unconscious. In *Barber v. Superior Court of California*, for example, the court approved a spouse's authorization of the withholding of all life-sustaining treatment from a patient who was "in a deeply comatose state from which he was not likely to recover." 195 Cal. Rptr. at 486. The court held that the patient's family was best able to know what was in the patient's best interest since they knew his feelings and desires and were most concerned for his comfort and welfare. 195 Cal. Rptr. at 493 n.2.⁵⁸

But we cannot be content merely to report these cases. We must analyze them as well, for if their reasoning is questionable, then our confidence that Maryland courts would take the same position is lessened.

We have serious reservations about the reasoning of decisions that allow families to decide, without court approval, to end artificially administered sustenance for a patient whose death might otherwise be averted indefinitely.⁵⁹ Undoubtedly, in most cases involving the permanently unconscious, family members are sincerely trying to do what the patient would want. Yet we must also recognize the possibility that a family's decision to refuse substituted consent for artificially administered sustenance might be the product of selfish or other wrong motives.

If the family has unsupervised decisionmaking power, there is little safeguard against aberrant decisions. To be sure, the same risk of wrong motives attends decisionmaking about the terminally ill. In that situation, though, the right of the *patient* to avoid needless suffering is compromised as judicial proceedings take their course or,

⁵⁸ See also, e.g., *In re Jobes*, 529 A.2d at 446-47; *In re Grant*, 747 P.2d at 456; *In re Hamlin*, 689 P.2d at 1379. So far as medical ethics are concerned, the Council on Ethical and Judicial Affairs of the American Medical Association has advised that "it is not unethical to discontinue all means of life prolonging medical treatment" when "a patient's coma is beyond doubt irreversible . . ." AMA, "Withholding or Withdrawing Life Prolonging Medical Treatment" (1986). According to a recent survey, when a cross-section of physicians was asked, "Would you favor or oppose withdrawing life support systems, including food and water, from hopelessly ill or irreversibly comatose patients if they or their families request it?" 78% favored withdrawing; 15% opposed it. *AMA Survey of Physician and Public Opinion on Health Care Issues* 24 (1988).

⁵⁹ We are not referring to a family member who is empowered to act under the patient's medical durable power of attorney.

faced with this burden, the decisionmaker abandons the effort to refuse treatment. The permanently unconscious, who are neither on the verge of death nor suffering, are not themselves comparably harmed by a more deliberate course of decisionmaking.⁶⁰

It may well be that, like courts in other states, the Court of Appeals ultimately will conclude that families, not courts, ought to decide for themselves whether to end life-sustaining treatment for the permanently unconscious.⁶¹ Until that happens, however, it is our opinion that a family member who wishes to end life-sustaining treatment of a permanently unconscious patient must seek court approval through a guardianship proceeding (unless the family member has power to decide under the patient's medical durable power of attorney).

X

Nursing Home Patient's Bill of Rights

As part of the Nursing Home Patient's Bill of Rights, HG §19-344(f) provides that "a resident of a facility . . . [m]ay refuse medication or treatment."⁶² In addition, HG §19-344(r) provides:

[I]f a resident is adjudicated a disabled person, is found to be medically incompetent by the attending physician of the resident or is unable to communicate with others, the rights of the resident may be exercised by:

- (1) The next of kin of the resident;
- (2) The guardian of the person of the resident;
- (3) The sponsoring agency of the resident; or

⁶⁰ The family, it is true, must bear a considerable financial and emotional burden if court approval is required.

⁶¹ As the President's Commission pointed out, judicial review of a family's decision is frequently "merely a formality. Judges may feel that they are unable to add much to the decisions already worked out among those most intimately involved, particularly in cases that are brought simply to obtain judicial sanction for a course of conduct on which all are agreed." President's Commission Report at 160.

⁶² A "facility" is a "comprehensive care facility or an extended care facility." HG §19-343(a). For ease of reference, we will simply speak of "nursing homes."

(4) Unless the facility is the representative payee, the representative payee that the Social Security Administration designates for the resident.⁶³

See also 42 C.F.R. §§405.1121(k) and 442.312.

Some contend that HG §19-344(r) authorizes a surrogate decision-maker to refuse medication or treatment on behalf of a patient. We do not agree with this construction. As we read it, HG §19-344(r) authorizes a surrogate to ensure that the general rights granted to a resident by HG §19-344 are protected but does not provide a mechanism for surrogate decisionmaking for medical treatment.

This interpretation is supported by a comparison of HG §19-344(r) and HG §20-107. Unlike HG §20-107, HG §19-344(r) fails to set priorities among the persons who may exercise the rights of the patient. We do not think it possible that the General Assembly intended to give equal authority over medical decisions to the nursing home resident's next of kin and the resident's Social Security Administration representative payee. Nor do we think that the General Assembly meant to give persons power to refuse treatment on behalf of the patient even though those persons are without authority to consent to treatment. Hence, we conclude that HG §19-344(r) does not authorize a surrogate to refuse treatment on behalf of the patient. Surrogate decisionmaking on behalf of a nursing home patient is to be accomplished in the same way as it is on behalf of a hospital patient.

XI

Institutional Policies And Procedures

What happens when a patient (or a surrogate, acting for a disabled patient) decides to refuse artificially administered sustenance but the hospital or nursing home has a policy that disallows this choice?

First of all, the institution may not enforce its policy by simply inserting or maintaining a feeding tube without the consent of a competent patient or properly authorized surrogate. Such an action would make a nullity of the doctrine of informed consent. *See Sard v. Hardy*, 281 Md. 432, 379 A.2d 1014 (1977). *See generally* pages 170-75 above. In a nursing home, forced insertion of a feeding tube over objection

⁶³ This subsection formerly was designated as HG §19-344(q). It was redesignated by Chapter 452, Laws of Maryland 1988.

would also violate the patient's statutory right to "refuse medication or treatment." HG §19-344(f)(1)(ii). Nor would it matter that the patient, explicitly or implicitly, had agreed at admission to abide by the policy on artificially administered sustenance. The right to reject medical treatment means that after consenting to treatment, one may change one's mind.⁶⁴

The practical question, as we see it, is whether the institution may discharge or transfer a patient whose choice is ruled out by the policy.⁶⁵

When an institution seeks to discharge or transfer a patient because the patient will not follow its rules, it is enforcing a contract — the agreement by which the patient entered the facility.⁶⁶ But when a person needs hospital or nursing home care, he or she is hardly in a position to bargain over the terms of admission. "The admission room of a hospital contains no bargaining table where, as in a private business transaction, the parties can debate the terms of their contract." *Tunkl v. Regents of Univ. of Calif.*, 60 Cal.2d 92, 32 Cal. Rptr. 33, 39 (1963). Rather, the admissions agreement "possesses all the characteristics of a contract of adhesion." *Wheeler v. St. Joseph Hosp.*, 63 Cal. App. 3d 345, 133 Cal. Rptr. 775 (1977).⁶⁷ Contracts of this kind are not necessarily invalid, but "courts . . . review adhesion contracts for fairness, and refuse to enforce those adhesion terms which are demonstrably unfair to the stuck party." *Corbin on Contracts* §559A at 566 (Kaufman supp. 1984). So, for example, a hospital may not extract from a patient a release of liability as a condition for

⁶⁴ See cases cited in note 9 above and accompanying text.

⁶⁵ The few out-of-state cases bearing on this question are mixed. Compare *Jobes*, 529 A.2d at 450, and *Requena*, 517 A.2d at 870 (institutions not permitted to discharge patients) with *Brophy*, 497 N.E.2d at 639 (hospital permitted to transfer patient).

⁶⁶ Compliance with an institution's policy on artificially administered sustenance cannot be said to be part of the patient's contractual undertaking if the policy is articulated only after the patient is admitted. *Jobes*, 529 A.2d at 450; *Requena*, 517 A.2d at 870.

⁶⁷ A contract of adhesion has the following characteristics:

"a standardized contract prepared entirely by one party to the transaction for the acceptance of the other; such a contract, due to the disparity in bargaining power between the draftsman and the second party, must be accepted or rejected by the second party on a 'take it or leave it' basis, without opportunity for bargaining and under such conditions that the 'adherer' cannot obtain the desired product or service save by acquiescing in the form agreement."

Steven v. Fidelity & Casualty Co., 58 Cal. 2d 862, 27 Cal. Rptr. 172, 185 (1962) (emphasis added).

admission. *Tunkl*, 32 Cal. Rptr. at 39. This approach to adhesion contracts is but a special application of the general principle that a “contractual provision that violates public policy is invalid,” to the extent of the conflict. *State Farm Mut. v. Nationwide Mut.*, 307 Md. 631, 643, 516 A.2d 586, 592 (1986).⁶⁸

This State’s public policy objective of protecting an especially vulnerable group is declared in a statute that imposes limits on a nursing home’s power to transfer or discharge a patient:

A resident of a facility may not be transferred or discharged from the facility involuntarily except for the following reasons:

- (1) A medical reason;
- (2) The welfare of the resident or other patients;
- (3) Knowingly transferring personal assets in violation of a contract provision and only to become eligible for Medicaid benefits;⁽⁶⁹⁾ or
- (4) A nonpayment for a stay.

HG §19-345(a). *See also* 42 C.F.R. §§405.1121(h)(4) and 442.311(c). A provision in a nursing home’s admission agreement (or in any policies incorporated by reference) that purported to authorize transfer or discharge for any other reason would be void as a violation of this statute.

A patient’s refusal of artificially administered sustenance could justify involuntary discharge only if that refusal were a “medical reason.” But the patient’s exercise of the right to refuse a particular treatment cannot be, in and of itself, a “medical reason” justifying transfer. While the medical facts about a patient’s condition are crucial to a decision about life-sustaining treatment, they are not the only factors. The decision may turn on religious, moral, or family concerns. *See Brophy*, 497 N.E. 2d at 635. Perhaps, as a collateral consequence of the decision, the patient will prove to need — and will consent to —

⁶⁸ Contractual waiver of a statutory right is ineffective if the statute declares the State’s public policy. *Spruell v. Blythe*, 215 Md. 117, 137 A.2d 183 (1957). *See generally Brooklyn Savings Bank v. O’Neil*, 324 U.S. 697, 704-05 (1945). Any purported waiver of the Nursing Home Patient’s Bill of Rights is ineffective. *Summit Nursing Home v. Medical Care Programs, DHMH*, Medicare and Medicaid Guide (CCH) ¶33, 977 (DHMH Hearing Referee) (May 8, 1984).

⁶⁹ This office has advised that this provision conflicts with federal law and therefore is unenforceable. Letter from Attorney General Stephen H. Sachs and Assistant Attorney General David F. Chavkin to Lawrence R. Payne, Director of the Medical Assistance Compliance Administration (July 7, 1982).

care beyond the capacity of the nursing home to provide. In this unusual circumstance, there might be a legitimate "medical reason" for a transfer to an institution that could meet those needs. But the patient's (or surrogate's) decision itself, though contrary to the nursing home's policy, is not. Therefore, the decision may not serve as a basis for involuntary discharge or transfer.

For hospitals, there is no comparable statutory restriction on discharge or transfer.⁷⁰ However, the General Assembly has enacted a provision, HG §19-308.2, designed to assure the well-being of a patient transferred from one hospital to another.⁷¹ This provision reflects an obvious public policy concern for the protection of patients. The same concern animates judicial decisions that balance the institution's right to enforce its policy against the harm to the patient caused by discharge or transfer. "[A]pplication [of a hospital's policy prohibiting withholding of artificially administered sustenance] should be limited to the circumstances where it is reasonable and equitable to apply it without undue burden to the patient." *In re Requena*, 213 N.J. Super. 443, 517 A.2d 869, 870 (1986). *See also Jobs*, 529 A.2d at 450. *Cf. Brophy*, 497 N.E.2d at 639 (transfer to enforce policy permissible if hospital assists in securing placement in another facility); *Delio*, 516 N.Y. 2d at 694 (hospital may either assist in discontinuance of treatment or assist in transferring patient to a suitable facility or to his home). Put differently, a hospital cannot enforce a term in its adhesion contract in a way that unfairly burdens a patient.

In sum, we conclude that:

(i) A nursing home may not discharge or transfer a patient solely because the patient (or a surrogate) has refused artificially administered sustenance; and

(ii) A hospital may not discharge or transfer a patient solely because the patient (or a surrogate) has refused artificially administered sustenance, if the discharge or transfer would impose an undue burden on the patient.

⁷⁰ Accredited hospitals must meet the standards of the Joint Commission on Accreditation of Hospitals. *See* HG §§19-301(b), 19-308(c), and 19-319(c)(2)(i). We are aware of no standard, however, expressly delineating permissible bases for discharge or transfer.

⁷¹ HG §19-308.2 provides as follows, in pertinent part: "The Department shall adopt guidelines . . . governing the transfer of patients between hospitals to ensure that transfers of patients between hospitals are accomplished in a medically appropriate manner and in accordance with the health care policies of the State. . . ."

Our conclusion refers to institutional policies formulated by a nursing home or hospital on the basis of its view of proper patient care. We do not address the question of whether a religiously affiliated institution, whose policy disallowing the refusal of artificially administered sustenance is founded on religious doctrine, has a right under the Free Exercise Clause of the First Amendment to discharge or transfer patients who will not comply with that policy.

XII

Regulatory Requirements

Both federal and State regulations require hospitals and nursing homes to meet the nutritional needs of their patients. *See* 42 C.F.R. §405.1125; 42 C.F.R. §482.28; COMAR 10.07.02.13E and 10.07.03.11A(2). Nothing in these regulations, however, mandates the administration of artificial sustenance. Rather, the regulations recognize that the nutritional needs of patients are to be met in accordance with the orders of the attending physician and the consent of the patient. If a physician has documented that a patient or the patient's authorized surrogate has refused artificially administered sustenance, the institution's honoring of that treatment decision would not violate either State or federal nutritional regulations.

Apart from these nutritional regulations, we are not aware of any other regulations bearing on the issues treated in this opinion. However, the Department of Health & Mental Hygiene has proposed new regulations applicable to nursing homes. 14:26 Md. Reg. 2758 (Dec. 18, 1987). The proposal, generally intended to ensure patients' rights, has a section dealing with medical decisionmaking. Proposed COMAR 10.07.09.04. The Department, we understand, is now evaluating comments about the proposal and considering what changes, if any, to make.

XIII

Conclusion

We hope that this opinion provides useful guidance about current law to families and doctors, who must struggle with decisions about their loved ones and patients. We also hope that the General Assembly will address itself to these questions, so that those best able to fashion

public policy will strike the right balance between affirming individual choice and protecting the vulnerable among us.

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HEALTH OCCUPATIONS

SOCIAL WORKERS—SCOPE OF PRACTICE—DIAGNOSIS—CLINICAL SOCIAL
WORKER MAY DIAGNOSE DISORDERS AFTER PHYSICIAN REFERRAL.

November 9, 1988

The Honorable Peter G. Callas
Maryland House of Delegates

You have requested our opinion concerning the authority of clinical social workers to render diagnoses. You and several of your colleagues asked us to review this issue in light of advice earlier this year to the Board of Social Work Examiners that called into question what had been widely assumed to be a permissible aspect of the practice of clinical social workers.

For the reasons stated below, we conclude as follows:

1. A clinical social worker may not render a diagnosis unless a physician has first personally assessed the patient's needs and, after that assessment, has referred the patient to the social worker.
2. However, once a physician has assessed the patient's needs and referred the patient to a clinical social worker, the social worker may make a diagnosis of the person's social, mental, or emotional disorder and may use whatever diagnostic coding is appropriate for the patient's medical records or for insurance reimbursement purposes.

I

Background

At least for the last decade, specially trained clinical social workers have been part of the system for delivery of mental health care services in Maryland.¹ No one questions that clinical social workers may provide treatment within the scope of their practice. What is at

¹ By "clinical social worker," we mean a licensed certified social worker who has satisfied the practice and approval requirements in the "vendorship" regulations of the Board of Social Work Examiners. COMAR 10.42.02.02A and B. See Part IIC below.

issue is whether social workers may also diagnose an individual or whether that initial step in the treatment process is outside the permissible scope of practice of clinical social workers.

II

Provision of Services By Clinical Social Workers

A. *Medical Practice Act*

Diagnosis means "the discovery of the source of the patient's illness or the determination of the nature of his disease from a study of its symptoms." *Black's Law Dictionary* 408 (5th ed. 1979). Diagnosis is part of the practice of medicine, defined as follows in the Maryland Medical Practice Act:

"Practice medicine" includes doing, undertaking, professing to do, and attempting any of the following:

(i) Diagnosing . . . any physical, mental, or emotional ailment or supposed ailment of an individual . . ."

§14-101(j)(2) of the Health Occupations Article ("HO" Article). In general, only licensed physicians may practice medicine, including the rendering of diagnoses. HO §14-701. *See Reams v. State*, 279 So. 2d 839 (Fla. 1973).

Nevertheless, the Medical Practice Act "does not limit the right of . . . an individual to practice a health occupation that the individual is authorized to practice under this article." HO §14-102(a)(1). In other words, an individual who practices another health occupation is authorized to diagnose if diagnosis is permitted by the laws governing that occupation. Hence, we turn to the Maryland Social Workers Act to determine if diagnosis is permitted. If so, it is not prohibited by the Medical Practice Act.

B. *Social Work Act and Subsequent Legislation*

The "practice [of] social work" includes the following activities:

- (1) Helping individuals, groups, or communities to enhance or restore their capacity for social functioning;
- (2) Seeking to create societal conditions favorable to this goal; and

(3) By the application of social work values, principles, and techniques:

- (i) Helping people obtain tangible services;
- (ii) Helping persons, communities, and groups provide or improve social and health services; and
- (iii) Counseling with individuals, families, and groups.

HO §18-101(e).² The statute does not use the term “diagnosis” or any synonym for it.

When we construe a statute, however, we may consider “its relationship to subsequent legislation and other material that 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, 525 A.2d 628 (1987).

In 1977 the General Assembly amended the Insurance Code to provide “that an insured, covered under certain policies, is entitled to reimbursement for certain services performed by certain duly licensed certified social workers if the insured was referred to the social worker by a physician.” Chapter 298 (Senate Bill 117), Laws of Maryland 1977. One of these provisions, applicable to nonprofit health care service plans like Blue Cross/Blue Shield, reads as follows:

(a) Every group health insurance policy or individual policy or certificate delivered or issued for delivery in this State or issued to a group which is incorporated or has a main office located in this State, or covering persons who reside or work within this State, which provides for reimbursement for any service which is within the lawful scope of practice of a licensed certified social worker shall provide such benefit whether the service is performed by a doctor of medicine or by a licensed certified social worker who has had at least two years or 3,000 hours of post-masters supervised clinical social work practice in a clinical program as established by the State Board of Social Work Examiners if the insured or the person covered by the policy was referred to the social worker by a physician.

² The original Social Workers Act, Chapter 853 (Senate Bill 1026) of the Laws of Maryland 1975, contained a definition of “social work practice” substantially similar to HO §18-101(e)(3).

(b) The provisions of this section shall apply to all such policies and certificates issued, renewed, modified, altered, amended, or reissued on or after January 1, 1978.

Article 48A, §354L. *See also* Article 48A, §§470K (health insurance) and 477-0 (group health insurance). These provisions are typical of several in the Insurance Code evidently intended to encourage the use of comparatively low cost providers of health care services. *See* Article 48A, §§354N (reimbursement for services of nurse midwife), 354S (reimbursement for services of certified nurse practitioner) and 354Y (reimbursement for services of certified nurse anesthetist).

Under §354L and its companion provisions, if an insurance policy covers mental health services that a social worker may perform — for instance, “counseling with individuals, families, and groups,” HO §18-101(e)(3)(iii) — then the insurer must reimburse a clinical social worker who performs those services, if the patient “was referred to the social worker by a physician.” *See generally* 65 *Opinions of the Attorney General* 266, 267 (1980).

The statute expressly requires a physician referral as a prerequisite to its reimbursement mechanism. We infer from this a legislative recognition that some emotional or behavioral problems might be symptomatic of a physiological disorder that can be treated only by a physician. The referral requirement is intended to assure that, before someone is treated by a social worker, the person will first have been screened by a physician so that physiological problems may be identified and treated. The physician is the gatekeeper, empowered to determine whether the patient's disorder requires medical treatment. Referral to a clinical social worker reflects the physician's judgment that the disorder is amenable to the clinical social worker's professional expertise. The clinical social worker may then apply that expertise to determine the nature of the patient's social, mental, or emotional disorder — in other words, to diagnose.

The evident statutory purpose of §354L and parallel provisions is to facilitate reimbursement and thereby enhance the ability of clinical social workers to provide comparatively low cost mental health care services. The General Assembly recognized the practical reality that reimbursement from an insurer is impossible unless the practitioner identifies the nature of disorder that is being treated. Hence, reading the pertinent Insurance Code provisions together with the Social Workers Act, we conclude that it is within the permissible scope of practice of a clinical social worker to render a diagnosis after the patient has been referred by a physician. “Our endeavor always is to construe a statute so as to implement the legislative goal, not to

frustrate it." *NCR Corp. v. Comptroller*, 313 Md. 118, 146, 544 A.2d 764 (1988).³

C. Vendorship Regulations

The Board of Social Work Examiners has adopted regulations, peculiarly entitled "Vendorship," to define the category of licensed certified social workers who qualify for insurance reimbursement under Article 48A, §354L and parallel sections of the Insurance Code. COMAR 10.42.02. In essence, the Board has identified a specially trained category of clinical social workers who meet the statutory requirements. Clinical social workers provide services designed to:

(a) Modify psycho-social conditions which affect individuals or groups of individuals with respect to behavior, emotions, and thinking as these relate to their interpersonal and intrapersonal processes;

(b) Assist individuals to achieve a better psycho-social adaptation; and

(c) Assist individuals to reduce stress.

COMAR 10.42.02.01B(1). "Clinical social work" includes "treatment designed to alleviate social, mental, and emotional disorders in individuals, groups, couples, and families" COMAR 10.42.02.01B(2)(a).

Clinical social work also includes "providing diagnostic evaluation, based on social work principles and methods . . ." COMAR 10.42.02.01B(2)(d). This provision is consistent with the clinical social worker's authority to render a diagnosis following a physician's referral. Indeed, the phrase "diagnostic evaluation" seems to be more expansive than the term "diagnosis" alone, for a diagnostic evaluation "is frequently, but not always, directed toward planning for [the individual's] care or for the arrangement of his environment." *Id.* This element of planning is not a part of "diagnosis" itself. See Part IA above.

³ It is noteworthy that two of the principal sponsors of the Social Workers Act also sponsored the bill on service reimbursement for clinical social workers. Compare 1975 Senate Journal 1377 with 1977 Senate Journal at 152. These sponsors evidently viewed the 1977 enactment as furthering the purposes of the 1975 act.

III

DSM-III

Part of the controversy in this matter has turned on the use by clinical social workers of the diagnostic codes in a particular document, the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (3d ed. 1980), commonly referred to as DSM-III.⁴ DSM-III contains an elaborate classification system for mental disorders, including diagnostic criteria and descriptions of the disorders. Although published by the American Psychiatric Association, DSM-III is explicitly intended to provide "clinicians" with "a common language with which to communicate about the disorders for which they have professional responsibility. Planning a treatment program must begin with an accurate diagnostic assessment." DSM-III at 1. A social worker coordinated the field trials used in the development of DSM-III.⁵

Because we have concluded that, after physician referral, a clinical social worker acts within the scope of his or her licensed practice by rendering a diagnosis, the clinical social worker may state that diagnosis in the terminology of DSM-III.

IV

Conclusion

In summary, it is our opinion that:

1. A clinical social worker may not render a diagnosis unless a physician has first personally assessed the patient's needs and, after that assessment, has referred a patient to the social worker.

⁴ DSM-III has recently been revised. The new document is referred to as DSM-III-R.

⁵ See Williams, *DSM-III: A Comprehensive Approach to Diagnosis*, Social Work, March 1981, at 101.

2. However, once a physician has assessed the patient's needs and referred the patient to a clinical social worker, the social worker may make a diagnosis of the person's social, mental, or emotional disorder and may use whatever diagnostic coding is appropriate for the patient's medical records or for insurance reimbursement purposes.⁶

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

JACK SCHWARTZ, *Chief Counsel*
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⁶ This opinion should not be taken to suggest that the management of a medical facility is *compelled* to give diagnostic responsibilities to clinical social workers. The Department of Health and Mental Hygiene, for example, is free to allocate responsibilities among the health care professionals employed at its institutions in whatever way best comports with the Department's policies on patient care. See COMAR 10.21.05.04D(3).

HOMEOWNERS ASSOCIATION ACT

CONDOMINIUMS / COOPERATIVES — ACT APPLIES ONLY TO THOSE CONDOMINIUMS AND COOPERATIVES THAT ARE SUBJECT TO THE FEE-SETTING AUTHORITY OF A SEPARATE HOMEOWNERS ASSOCIATION.

May 16, 1988

The Honorable Idamae Garrott
Senate of Maryland

You have requested our opinion concerning the applicability of the Maryland Homeowners Association Act, Title 11B of the Real Property Article (“RP” Article), to condominiums and cooperatives. Specifically, you pose the following questions:

1. Do RP §§11B-106, 11B-111, and 11B-112 apply to condominiums?
2. Do any of these sections apply to cooperatives?
3. Are the provisions of the Homeowners Association Act and the Maryland Condominium Act incompatible with respect to the resale of a condominium unit subject to both acts?

For the reasons stated below, we conclude as follows:

1. The Homeowners Association Act does not apply to condominiums as such. It applies to condominiums only if they are part of a development, as defined in RP §11B-101(e). If a condominium is part of a development, RP §11B-106 applies to the resale of condominium units. However, even if the condominium is part of a development, RP §§11B-111 and 11B-112 do not govern the meeting and recordkeeping practices of the condominium itself.

2. The applicability of the Homeowners Association Act to cooperatives is the same as its applicability to condominiums.

3. The Homeowners Association Act and the Condominium Act require different disclosures. However, the two acts may be read together so that, if both apply to the resale of a condominium unit, the seller is required to provide all of the disclosures required by both acts.

I

Background

The Maryland Homeowners Association Act became effective on July 1, 1987. Chapter 321 (Senate Bill 96), Laws of Maryland 1987. The background of the legislation and a detailed analysis of many of its provisions are set out in an earlier opinion of this office. 72 *Opinions of the Attorney General* 158 (1987).

In practice, sellers and their agents faced significant practical problems in complying with the Homeowners Association Act. In an effort to preserve the consumer protection objectives of the original act while easing some of the burdens on sellers, the Department of Housing and Community Development led an effort to amend it.¹ This effort culminated in the enactment of emergency legislation, Chapter 82 (House Bill 388) of the Laws of Maryland 1988, which took effect on April 12, 1988.²

II

Applicability To Condominiums And Cooperatives

The Homeowners Association Act contains a maze of definitions that must be traced to determine its applicability to condominiums and cooperatives. These provisions are confusing, even seemingly self-contradictory. Nevertheless, the General Assembly's intention is clear: The Homeowner Association Act is not meant to apply to most condominiums and cooperatives. It only applies to those few condominiums and cooperatives in which the owners are subject to an obligation to pay fees not only to the condominium or cooperative itself but also to a separate homeowners association.

¹ We received your inquiry when the Department was engaged in the effort to develop revisions to the act. So as to avoid providing you with an interpretation that might immediately be outdated, we held your request pending the outcome of the legislative process.

² All references in this opinion are to the Homeowners Association Act as amended by Chapter 82.

We begin with a provision generally excluding condominiums and cooperatives from the act. RP §11B-102(e) provides that:

Except as provided in §11B-101(f) of this title, this title does not apply to any property which is:

- (1) Part of a condominium regime governed by Title 11 of this article;
- (2) Part of a cooperative housing corporation; or
- (3) To be occupied and used for nonresidential purposes.

The exception “as provided in §11B-101(f)” refers to the definition of the key term “development.” This definition is as follows:

- (1) “Development” means property subject to a declaration.
- (2) “Development” includes property comprising a condominium or cooperative housing corporation to the extent that the property is part of a development.
- (3) “Development” does not include a cooperative housing corporation or a condominium.

Reading §§11B-102(e) and 11B-101(f) together, we conclude that the Homeowners Association Act applies to a condominium or cooperative only if the condominium or cooperative, apart from its independent legal status as such, also is “part of a development.”³

Because the definition of “development” refers to the term “declaration,” we turn next to that definition. RP §11B-101(d)(1) provides as follows:

“Declaration” means an instrument, however denominated, recorded among the land records of the county in which the property of the declarant is located, that creates the authority

³ The general exclusion in RP §11B-102(e) refers to a “*property* which is . . . [p]art of a condominium” or cooperative. Likewise, the inclusive provision in RP §11B-101(f)(2) refers to “*property* comprising a condominium or cooperative . . . to the extent that the *property* is part of a development.” On the other hand, the reiterated exclusion in RP §11B-101(f)(3) refers to a “cooperative . . . or a condominium,” with no reference to “property.” Cf. RP §11B-101(h)(2) (“‘lot’ includes a unit within a condominium or cooperative . . . if the condominium or cooperative . . . is part of a development”). We do not believe that these variances in phrasing are significant. Under the Maryland Condominium Act, “‘condominium’ means *property* subject to the condominium regime established under this title.” RP §11-101(e). See also §5-6B-01(f) and (g) of the Corporations and Associations Article (definitions of “cooperative housing corporation” and “cooperative interest”).

for a homeowners association to impose on lots, or on the owners or occupants of lots, or on another homeowners association, condominium, or cooperative housing corporation 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.

A "homeowners association," referred to in this definition, "means a person having the authority to enforce the provisions of a declaration." RP §11B-101(g)(1).

These labyrinthine definitions do lead to a conclusion: The owners of most units in condominiums or interests in cooperative housing corporations are not subject to any instrument regarding mandatory fees, other than the documents creating and governing the condominium or cooperative itself.⁴ The ordinary condominium, for instance, is subject to the authority of its own council of unit owners and board of directors regarding fees, RP §11-109; it is *not* subject to the authority of a separate homeowners association. The Homeowners Association Act would apply to a condominium or cooperative only in the comparatively rare instance in which it is "part of a development" because it is subject to the authority of a separate homeowners association.

If the condominium or cooperative is part of a development, a "contract for the resale of a lot within [the] development . . . is not enforceable by the vendor" unless the disclosure requirements in RP §11B-106 are satisfied.⁵ The seller is required to provide the buyer with these disclosures "on or before entering into the contract for

⁴ Under the Maryland Condominium Act, a recorded instrument also called a "declaration" establishes the obligation of each unit owner to bear a proportional share of the condominium's common expenses. RP §§11-103(a)(5), 11-107(b) and 11-110(b). The General Assembly could not have intended a condominium declaration to fall within the definition of "declaration" in the Homeowners Association Act, however. Such a construction would necessarily apply the Homeowners Association Act to all condominiums, thus improperly negating the express exclusion of condominiums in RP §§11B-101(b)(3) and 11B-102(e)(1). Moreover, the legislative history confirms that the Homeowners Association Act was generally intended to supplement the Condominium Act, not duplicate it. Letter to Governor Hughes from Governor's Commission on Condominiums, Cooperatives, and Homeowners Associations at 8-9 (Jan. 27, 1986).

⁵ RP §11B-101(h)(2) provides that the term "'lot' includes a unit within a condominium or cooperative housing corporation if the condominium or cooperative housing corporation is part of a development."

the sale of such lot, or within 20 calendar days of entering into the contract.” RP §11B-106(a)(1).⁶

Apart from the disclosure requirements in RP §11B-106, you also asked about the applicability of RP §§11B-111 and 11B-112.⁷ As we read them, neither of these sections applies to a condominium or cooperative, even if the condominium or cooperative is “part of a development” and therefore subject to the act. RP §11B-111 imposes certain open meeting requirements on “all meetings of the homeowners association, including meetings of the board of directors or other governing body of the homeowners association or a committee of the homeowners association. . . .” RP §11B-111(1). Similarly, the requirements of RP §11B-112, pertaining to certain information disclosures and the availability of books and records, applies to “the homeowners association.” The condominium or cooperative, even when covered by the act, is not the “homeowners association.”⁸ That association is the legal entity empowered to enforce the provisions of a declaration against the condominium or cooperative. RP §11B-101(g)(1).

III

Construction With Condominium Act

In our view, the Homeowners Association Act and the Condominium Act are not incompatible in their respective disclosure requirements. The Condominium Act requires a seller of a condominium unit to make certain disclosures to the buyer. RP §11-135(a). These disclosures are intended to inform the buyer of the financial and other obligations that he or she will be undertaking with respect to the condominium itself.

⁶ The act affords the buyer a right to cancel the contract in light of post-contractual disclosures: “Any purchaser who has not received all of the disclosures . . . 5 calendar days or more before the contract was entered into, within 5 calendar days following receipt by the purchaser of the disclosures . . . may cancel in writing the contract without stating a reason and without liability on the part of purchaser.” RP §11B-108(b)(1).

⁷ These are the section numbers in the act as amended by Chapter 82. In the original version of the act, what is now RP §11B-111 was RP §11B-110; and what is now RP §11B-112 was RP §11B-111.

⁸ The Maryland Condominium Act itself regulates the meeting and record access practices of each council of unit owners and board of directors of a condominium. RP §§11-109(c), 11-109.1 and 11-116(c).

If the Homeowners Association Act applies to a condominium because it is "part of a development," the owner of a condominium unit who resells the unit will also be subject to the disclosure requirements in RP §11B-106.⁹ These disclosures are intended to inform the buyer of the financial and other obligations that he or she will be undertaking as a result of the condominium's relationship to the homeowners association.¹⁰

A basic principle of statutory construction is that "where two statutes deal with the same subject matter, . . . they 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 Serv. v. Sandefur*, 300 Md. 332, 341, 478 A.2d 310 (1984). That rule is easy to apply here. There is no inconsistency between the two acts. The seller is obligated to comply with the disclosure requirements of both acts and the buyer has the rights afforded by both acts.¹¹

IV

Conclusion

In summary, it is our opinion that:

1. The Homeowners Association Act does not apply to condominiums as such. It applies to condominiums only if they are part of a development, as defined in RP §11B-101(e). If a condominium is part of a development, RP §11B-106 applies to the resale of condominium units. However, even if the condominium is part of a development, RP §§11B-111 and 11B-112 do not govern the meeting and recordkeeping practices of the condominium itself.

⁹ See note 5 above and accompanying text.

¹⁰ Even if individual condominium unit owners do not pay a fee directly to the homeowners association, the condominium's obligation to pay the fee has a direct financial impact on the unit owners, for the fee will simply be passed through by the condominium to the owners as part of their monthly condominium fee.

¹¹ The time period within which a buyer may cancel a contract after receiving the required disclosure differs under the two acts. Compare RP §11B-108(b)(1) (five days) with RP § 11-135(b) (seven days). If the buyer receives the disclosures at different times, each cancellation period applies separately. If the buyer receives all of the disclosures required by both acts at the same time, the longer period applies.

2. The applicability of the Homeowners Association Act to cooperatives is the same as its applicability to condominiums.

3. The Homeowners Association Act and the Condominium Act require different disclosures. However, the two acts may be read together so that, if both apply to the resale of a condominium unit, the seller is required to provide all of the disclosures required by both acts.

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Opinions & Advice

LAW ENFORCEMENT OFFICERS

DEATH BENEFITS — PRE-EXISTING DISORDER — BENEFITS PAYABLE IF
CAUSAL CONNECTION BETWEEN PERFORMANCE OF DUTY AND DEATH
IS ESTABLISHED.

February 5, 1988

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

You have requested our opinion regarding the proper construction of Article 41, §4-1002. This statute provides for payment of a death benefit to survivors of a law enforcement officer of the State or any political subdivision "who is killed or dies in the performance of duties . . ." Specifically, you ask about payment of death benefits in the following circumstances:

1. Officer dies while on duty from a heart, lung or similar medical condition. In this context, the term 'on duty', I believe, refers to the officer being then in the course of a normal shift or other active work assignment, as opposed to being off duty.

2. Officer has a pre-existing medical condition and later dies from that medical condition or a related one. Does this mean that if the officer dies from such a condition while on active duty, a benefit is to be paid, but if the death occurs while off duty, the benefit is not to be paid?

3. With regard to question 2 above, would it matter if the pre-existing medical condition was not work related but was aggravated by the performance of the officer's duty?

For the reasons given below, we conclude as follows: Article 41, §4-1002 authorizes payment of a death benefit if an officer's performance of duties aggravates a pre-existing physical disorder and this aggravated condition causes death — in other words, if the job-related aggravation is a contributing cause of death. Our response to the several hypotheticals you pose is that, in each case, entitlement to payment of the death benefit depends on whether the requisite causal connection exists between death and performance of official duties.

I

Background

Article 41, §4-1002(b)(1) provides:

A death benefit shall be paid to the surviving spouse, children, or designated beneficiary of any law-enforcement officer of the State or of any political subdivision of the State, any sheriff or deputy sheriff, any correctional officer, or any volunteer or professional firefighter or rescue squad member who is killed or dies in the performance of duties on or after January 1, 1980. The amount of the benefit shall be \$25,000.

The underlying purpose of Article 41, §4-1002 is to provide additional benefits to dependents of safety officers in light of the unusual risks these officers face in their work. *Cf. Police Commissioner of Baltimore City v. King*, 219 Md. 127, 148 A.2d 562 (1950). The statutory death benefit is not a form of life insurance. The benefit, therefore, is not available for death under all circumstances while an officer is on duty. Rather, it is limited to deaths caused by hazards involved in the services rendered.

As enacted by Chapter 539, Laws of Maryland 1971, §4-1002 (then Article 41, §59A-1) provided in pertinent part:

The sum of fifteen thousand dollars (\$15,000.00) less any lump sum death benefit, exclusive of any return of contributions, payable by the State or any political subdivision shall be paid to the surviving spouse or children of any law enforcement officer of the State or of any political subdivision of the State who is killed in the performance of his duty. This sum shall be in addition to any workmen's compensation benefits.

The statute subsequently was amended several times.¹ Most recently, Chapter 387, Laws of Maryland 1986, inserted the words "or dies" in subsection (b)(1) of §4-1002, making the benefit available when an officer "is killed or dies in the performance of duties . . ."²

¹ Chapter 539, Laws of Maryland 1971; Chapter 32, Laws of Maryland 1972; Chapters 823 and 824, Laws of Maryland 1975; Chapters 55 and 551, Laws of Maryland 1976; Chapter 406, Laws of Maryland 1980; Chapter 350, Laws of Maryland 1981; Chapter 254, Laws of Maryland 1985; and Chapter 387, Laws of Maryland 1986.

² Chapter 387, among other things, also excluded special police officers from the purview of the statute, established a priority of beneficiaries, and provided for the right of judicial review.

The events preceding the 1986 amendment to Article 41, §4-1002 indicate that the addition of the words "or dies" was intended to cover deaths caused by aggravation of medical conditions. In 1985, the Board of Public Works faced the issue of the effect of pre-existing disease on death benefit eligibility. The Board was advised informally by its counsel that entitlement under such circumstances generally was found under statutes providing for payment not only in the event an officer "is killed," but also if an officer "dies" from duty-related injuries; however, the Maryland statute, then providing for award only where an officer was "killed in the performance of duties," suggested that the benefit was limited to accidental deaths. The Board was also advised that Maryland follows the view that for an "accident" to have occurred, there must be an accidental cause and not simply an accidental result: in cases of pre-existing disease, the Court of Appeals generally has not recognized claims made under statutes requiring accidental death or disability on the theory that if the injury is attributable to a pre-existing cause, it is not an accidental injury.³

The General Assembly promptly responded to this problem in the application of the statute. In the next legislative session, the statute was broadened to provide the benefit when an officer "is killed *or dies* in the performance of duties."

³ For example, in *Courtney v. Board of Trustees*, 285 Md. 356, 402 A.2d 885 (1979), a member of the Maryland Teachers Retirement System sought a retirement allowance for mental incapacitation under Article 73B, §86(4a), which authorizes the payment of an "accidental disability retirement benefit" to a member who "has been totally and permanently incapacitated for duty as the natural and proximate result of an accident occurring while in the actual performance of duty . . ." The claimant described the "accident" that caused his mental incapacitation as "[a] two year period of being severely understaffed, plus a lack of administrative concern [which] led to severe depression . . . and culminated in . . . a nervous breakdown." 285 Md. at 357-58. Although the expert testimony was conflicting, the Medical Board determined that Courtney had not suffered an "accidental injury" since his disability was attributable to a pre-existing condition of paranoia-schizophrenia. The Court of Appeals agreed. The Court explained that to be accidental, an injury must result "from some unusual strain or exertion of the employee or some unusual condition of employment." 285 Md. at 363, quoting *Board of Trustees v. Grandinetti*, 269 Md. 733, 739, 309 A.2d 764 (1973). If the injury is attributable to a pre-existing cause, the Court wrote, it is not an accidental injury, and the claimant is not entitled to the benefit. See also *Baker v. Board of Trustees of Employees' Retirement System*, 269 Md. 740, 744, 309 A.2d 768 (1973) (accidental disability benefits denied to a marine engineer who claimed that an incapacitating heart attack he suffered was the result of striking his head on a pipe while on the job; court ruled that because the claimant "had a predisposition toward this sort of attack and . . . his head injury was not the direct cause of the myocardial infarction"); *Vaughan v. Mayor and City Council of Baltimore*, 229 Md. 547, 184 A.2d

continued

II

Causation and Pre-existing Disease

Although the phrase "is killed or dies in the performance of duties" has not been construed in any case involving Article 41, §4-1002, the Court of Appeals has interpreted similar language in closely related statutes to mean that the death or the injury must result from the job. For example, in *Police Commissioner of Baltimore City v. King*, a provision of the Baltimore City Code provided for payment of benefits to survivors of a member of the police department who was killed "while in the actual performance of duty" or who had died in consequence of injuries received "while in the discharge of duty."⁴ Denying benefits where an officer had died from a self-inflicted accidental gun shot wound, the Court of Appeals held that the requirement that death occur in the performance of duties means that a causal connection must exist between the injury or sickness resulting in death and the decedent's official duties. In other words, benefits are not payable unless death occurred *because* the decedent was an officer, rather than merely *while* the decedent was an officer. See 219 Md. at 133. See also *Lodowski v. State*, 302 Md. 691, 731 (1985) ("on duty" status in itself does not determine benefit award).

When death occurs in the performance of duties but involves pre-existing disease, the issue is whether the death was caused by the duties of the job or whether the death was caused by a disorder outside the statute's scope. Typically, cases of this nature involve an individual with a history of heart disease who has a heart attack on the job and dies at some later time.

Note 3 continued

842 (1962), and *Williams v. McCardell*, 198 Md. 320, 84 A.2d 52 (1951) (both upholding denial of accidental disability benefits to firemen with history of heart disease who suffered heart attacks while on duty); *Stancliff v. H. B. Davis Co.*, 208 Md. 191, 117 A.2d 577 (1955) (death not accidental when pre-existing cardiac condition was worsened by exposure to fumes). But see *Lovellette v. City of Baltimore*, 297 Md. 271, 465 A.2d 1141 (1983) (heart attack suffered by a firefighter as a result of unusual job related physical strain may be compensable as an accidental injury); *Landis Office Center v. Barefield*, 73 Md. App. 315, 533 A.2d 1332 (1987) ("accident," for worker's compensation purposes, includes heart attack precipitated by on-the-job stress, even if also linked to pre-existing disease).

⁴ "The Special Fund," codified as Sections 580-596, Charter and Public Local Laws of Baltimore City (Flack 1949).

In our judgment, the current scope of §4-1002 — that is, that the benefits are payable not only when an officer “is killed” but also when an officer “dies” in the performance of duties — reflects a legislative intent that pre-existing disease not foreclose recovery. If the performance of duties aggravates a medical condition, thereby accelerating death, the necessary causal connection is established. The aggravating event serves as the link between the death and the duties, keeping the chain of causation intact.⁵

Seybold v. Commonwealth, Dept. of Gen. Services, 461 A.2d 353 (Pa. 1983) strongly supports our conclusion that the phrase “is killed or dies” in §4-1002 contemplates cases involving pre-existing disease. In *Seybold*, a firefighter died from a heart attack a half hour after returning from the scene of a fire. Although there was evidence that the decedent’s death was the result of a “slowly progressive disease process that had built up to a climax resulting in cardiac death,” the court awarded the statutory death benefit. 461 A.2d at 354. The court explained that Pennsylvania’s death benefit statute, as originally enacted, provided for payment if a firefighter were “killed in the performance of his duties” but subsequently was amended to include “the deaths of all firefighters . . . dying . . . as the direct result of injuries sustained in the performance of their duties.” 461 A.2d at 355. The Pennsylvania court concluded that the amendatory language clearly allowed the benefit where a fire-fighter with a history of heart disease experienced a fatal heart attack that could be traced to the hazardous aspect of his job.

Numerous other cases hold that aggravation of a pre-existing condition satisfies the causation requirement under similarly worded statutes. In *Sabathier v. Board of Trustees, Firemen’s Pension and Relief Fund*, 72 So.2d 1 (La. 1954), the court explained that the duties of the job must be the effective cause of death, but not necessarily the sole cause:

Although [the decedent firefighter] experienced at the time a heart disorder, very likely his demise would not have taken place had he refrained from enduring the heat and smoke and from expending extraordinary energy in handling the hose.

⁵ This reasoning is entirely consistent with general principles of tort law. See, e.g., *Reagan v. Rider*, 70 Md. App. 503, 508, 521 A.2d 1246 (1987) (there is no requirement that a proximate cause be the sole cause of an injury); *Mitchell v. City of Springfield*, 410 S.W.2d 585 (Mo. 1966) (whatever is the product of two or more concurrent and contributing causes is the direct result of each, though neither is the sole cause).

This activity, according to medical testimony, accelerated or aggravated decedent's condition; it was a contributing, if not the efficient, cause of death. 72 So.2d at 3.⁶

To cite another example, in *Bergman v. Board of Trustees*, 425 S.W.2d 143 (Mo. 1968), the court ruled that, under a city ordinance providing for increased benefits if a fireman was "killed or fatally injured in the line of duty," aggravation of a pre-existing heart condition that precipitated a fatal coronary thrombosis was an injury resulting in death. See also, e.g., *Vernon v. Firemen's Pension Fund*, 52 A.2d 199, 201 (Pa. 1947) (benefit allowed when fireman died from heart attack at scene of fire under statute covering individuals "who may be killed or die from injuries . . ."); *Naughton v. Retirement Board of San Francisco*, 110 P.2d 714 (Cal. 1941) and *Buckley v. Roche*, 4 P.2d 929 (Cal. 1931) (both holding that benefits were payable to widow of police officer who died of heart attack although heart disease was pre-existing condition, under statute providing for benefits to the family of any officer "who may be killed or injured while in the performance of his duties, and who shall have died within three (3) years from the date of such injury . . .").

As amended, the death benefit provided by Article 41, §4-1002 to survivors of a law enforcement officer who is "killed or dies" in the performance of duties is payable if there is a causal connection between death and the decedent's duties as a police officer. The death of an officer from a heart, lung, or similar medical disorder in the course of a normal shift ordinarily will be compensable if the death can be directly attributed to duties being performed by the officer. To illustrate, if an officer has a fatal heart attack while actively discharging his duties (for example, while pursuing a suspect), benefits would be payable if medical evidence establishes that the death was attributable to that activity. In contrast, were that same officer to collapse and die at his desk while performing some bookkeeping task, the causation requirement presumably would not be met.

Even if the officer in the hypothetical above had a history of heart disease, his survivors most likely would still be eligible for the benefit if he were engaged in a hazardous activity when he suffered a heart

⁶ The statute in *Sabathier* provided for payment of a death benefit if a fireman, "while in the act of performing any part of his duties as a fireman, is killed or receives injuries which result in his death . . ."

attack. The activity could qualify as an aggravating circumstance, linking the job performance to the death for purposes of establishing causation. The survivors likewise could be eligible for the benefit if the officer experienced a heart attack in the course of that activity but died at a later time, if the chain of causation remained intact — that is, if no other force intervened to cause death.

III

Conclusion

In summary, it is our opinion that the survivors of a law enforcement officer who “is killed or dies in the performance of duties” are entitled to the payment of a death benefit pursuant to Article 41, §4-1002 if a causal connection between the officer’s official responsibilities and death is established.

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

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Opinions & Advice

LEGISLATION

GOVERNOR—STATE ADVISORY COUNCIL FOR HANDICAPPED INDIVIDUALS—
PROCEDURAL REQUIREMENTS ON LEGISLATIVE MATTERS—AUTHORITY
TO STATE SEPARATE POSITION.

February 26, 1988

*Ms. Gertrude R. Jeffers, Director
Office for Handicapped Individuals*

You have requested our opinion concerning the authority of the State Advisory Council for Handicapped Individuals to take positions on proposed legislation. From the materials that you provided us, we understand your question to be whether the Council may take a position on legislation that differs from the position of the Governor.

For the reasons stated below, we conclude that the Council is subject to the procedures regarding departmental legislation prescribed by the Governor's Office. Under these procedures, any disagreement between the Council and another Executive Branch agency should be presented to the Governor's Legislative Office for resolution. However, if the disagreement cannot be resolved, the Council may state its position to the General Assembly even if its position is contrary to the position urged by another agency and ultimately adopted by the Governor.

I

Background

The State Advisory Council for Handicapped Individuals was created by Chapter 295, Laws of Maryland 1984. Under §9-1109 of the State Government Article ("SG" Article), the Council has the following duties:

The Council shall:

- (1) advise the Office [for Handicapped Individuals] in carrying out its duties;
- (2) review statewide activities for handicapped individuals, including reviewing reports and publications of committees and commissions;

(3) foster coordination of and support for programs for handicapped individuals;

(4) study ways to maximize the use of the facilities and services available to handicapped individuals; and

(5) hold:

(i) at least quarterly, regularly scheduled meetings; and

(ii) open meetings to provide direct communication, between handicapped individuals and private and public organizations and the general public, about programs and services for and needs of handicapped individuals.

The Council consists of 26 gubernatorial appointees, who serve three-year staggered terms. Some of the Council members represent specified Executive Branch agencies. *See* SG §9-1107(b)(3), (b)(6), (b)(7), (b)(9), (c), and (d). The majority are members of the general public. SG §9-1107(e).

The Office for Handicapped Individuals, which the Council advises, is established as part of the Office of the Governor. SG §9-1102. However, the statute does not specifically identify an organizational context for the Council.¹

II

Legislative Advocacy

Under Article II, §19 of the Constitution, the Governor is empowered to "recommend to [the Legislature's] consideration such measures as he may judge necessary and expedient." One court has paraphrased this section as follows: "The obvious import of this section is that the Governor may recommend such legislation for the General Assembly's consideration as he might determine in his discretion is in the public interest." *United States v. Mandel*, 415 F.Supp. 997, 1023 (D. Md. 1976), *aff'd* 602 F.2d 653 (4th Cir. 1979).

¹ SG Title 9 was captioned "Miscellaneous Executive Agencies" by the Revisor of Statutes. *See* Chapter 284, Laws of Maryland 1984, at 1198. Some of these agencies are expressly identified as part of the Executive Department or a cabinet department. *E.g.*, SG §§9-202 (State Commission on Uniform State Laws), 9-302 (Office of Minority Affairs), and 9-802 (War Memorial Commission). Others are expressly made "independent units." SG §§9-906 (Maryland Veterans Commission) and 9-1201(b) (Office of Special Counsel). Still others, like the Council, are simply established without further elaboration. *E.g.*, SG §§9-103 (State Lottery Agency) and 9-704 (Council on the State Capital).

In order to carry out this power, the Governor must be able to structure the process by which Executive Branch legislative recommendations are made. *See generally* 1 *Sutherland Statutory Construction* §13.08, at 538 (rev. 4th ed. 1985). If the Governor exercises his discretion to support or oppose some piece of legislation, officials subject to the Governor's supervision generally are not entitled to advocate a different position without the Governor's approval.²

The Governor also has the power to implement Article II, §19 by prescribing the procedures under which an Executive Branch agency may request legislation or state its position on a bill. Current procedures embody a process for dispute resolution when Executive Branch agencies disagree about legislation: "Under ordinary circumstances an agency should not testify or lobby against another agency position without *first* having its position cleared with the Legislative Office so that all reasonable efforts to resolve agency conflict are attempted." Memorandum from Alan Rifkin, Chief Legislative Officer, at 1 (July 14, 1987) (emphasis in original).

However, the General Assembly itself has the power to vest in an agency the duty to make legislative recommendations. The General Assembly might well perceive the need for an agency not only to administer existing law but also to ascertain and report on the need for legislative change. *See, e.g.*, Article 33, §1A-1(e)(5) of the Maryland Code (State Administrative Board of Election Laws); Article 40A, §2-103(d) (State Ethics Commission); SG §9-109(c)(3) and (4) (State Lottery Agency). The task of assessing the need for legislative change surely might be one "which the Legislature deems desirable and necessary to forward the health, safety, welfare and morals of the citizens of this State," and therefore to be a proper function of an administrative agency. *Department of Natural Resources v. Linchester Sand & Gravel Corp.*, 274 Md. 211, 222, 334 A.2d 514 (1975). We do not believe that the Governor's constitutional power to recommend legislation divests the General Assembly of *its* power to obtain legislative recommendations from specified agencies.

In our view, the following principles harmonize the prerogatives of the Governor and the General Assembly: Every Executive Branch agency is subject to the Governor's procedural requirements regarding

² This opinion does not treat the First Amendment right of individuals to express their views personally, as distinct from views expressed in their official capacity. The authority of constitutional officers other than the Governor to address legislative matters is also outside the scope of this opinion.

legislative agenda, as contemplated by Article II, §19. However, if an agency's statute indicates the General Assembly's intent that the agency make its own legislative recommendations, the agency may do so even if the Governor has a different position.³

III

The Council's Responsibility

As we read the statute, the Council was created for two main purposes: to advise the Office for Handicapped Individuals, and to serve as an advocate for the interests of the handicapped. Both of these roles imply some degree of independence. If the Council were intended to be merely an agent of the Governor for the carrying out of the Governor's policy regarding the handicapped, it would essentially duplicate the role of the Office. Moreover, the statute's specification of departmental representation on the Council suggests that the Council as a whole was meant to serve as a forum where the Governor's point of view would be presented, but would not necessarily emerge as the position of the Council itself. Finally, the Council's statutory duty to "foster . . . support for programs for handicapped individuals" could not be carried out effectively if the Council were unable to make known its support for the very legislation that would embody such programs. Thus, we think that the Council may take a position that deviates from that of the Governor on legislation pertinent to the handicapped. At the same time, we conclude that the Council remains subject to the procedures for legislation prescribed by the Governor. The requirement that the Council submit its legislative positions in advance to the Governor's Legislative Office is not inconsistent with the Council's underlying authority to make known its positions, even over the Governor's objection.

³ If the Governor disapproves of the agency's legislative recommendation, he will ultimately be able to act on that disapproval through his power of appointment.

IV Conclusion

In summary, it is our opinion that the State Advisory Council for Handicapped Individuals is subject to the procedures regarding departmental legislation prescribed by the Governor's Office. Under these procedures, any disagreement between the Council and another Executive Branch agency should be presented to the Governor's Legislative Office for resolution. However, if the disagreement cannot be resolved, the Council may state its position to the General Assembly even if its position is contrary to the position urged by another agency and ultimately adopted by the Governor.

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

JACK SCHWARTZ, *Chief Counsel*
Opinions & Advice

LOCAL GOVERNMENT

MUNICIPAL CORPORATIONS—CONDEMNATION—MUNICIPALITY LACKS
AUTHORITY TO CONDEMN COUNTY-OWNED LAND FOR A SEWAGE
DISPOSAL SITE.

February 11, 1988

Guy R. Ayres III, Esquire

On behalf of the Mayor and Council of Berlin, you have requested our opinion concerning the authority of Berlin to condemn, for use as a spray irrigation sewage disposal site, a tract of land owned by Worcester County. You have reviewed the matter and have advised the town that it lacks the authority to condemn the County land in question.

For the reasons stated below, we likewise conclude that Berlin lacks the authority to condemn this land.

I

Background

Under a consent order with the State, Berlin is required to submit plans and specifications for "a land application treatment system which when constructed would allow the applicable discharge permits to be met." *State of Maryland, Department of Health & Mental Hygiene v. Mayor & Council of Berlin*, Case No. 87CV0510 (Cir. Ct. for Worcester County, June 29, 1987).

The proposed site for this sewage disposal system is a tract of land outside the limits of Berlin that is owned by the County Commissioners of Worcester County. Your letter describes the present status of the land as follows:

The County Commissioner of Worcester County, by a formal resolution, voted that the subject property was excess property, and not needed for the present or future needs of the county. Further, by formal resolution, they voted that the need of Berlin was a public need so that the land would not have to be sold to the highest bidder.

Letter from Guy R. Ayres III to Jack Schwartz, at 1 (October 21, 1987). However, after hearing objections from nearby property owners, the Worcester County Commissioners have hesitated to transfer the land to Berlin. The possibility that they will not go forward with the conveyance has led to the question of whether Berlin may take the land under the following grant of power:

A municipal authority may:

...

(5) In order to exercise any power set out in this subtitle with regard to any part of any [water or sewerage] system, acquire by purchase, in fee or as an easement, from any owner, or if the owner objects, by condemnation, any property inside or outside the municipality

Section 9-705(5) of the Environment Article ("EN" Article).

II

Authority to Condemn Public Property

EN §9-705(5) empowers a municipality to condemn "any property" needed in connection with its sewerage system, even if the land is located outside the municipality. *See* Opinion No. 85-015 (May 20, 1985) (unpublished). While thus generally authorizing extraterritorial condemnation of privately owned land, the statute does not specifically authorize a municipality to condemn land owned by another political subdivision. Nor did Opinion No. 85-015 address that unusual situation.

To the best of our knowledge, the question has not been squarely addressed in any reported decision in Maryland. Several decisions of the Court of Appeals suggest that political subdivisions generally do not have the power to condemn one another's property. In holding that a county with eminent domain power nevertheless may not appropriate State-owned land, the Court of Appeals cited approvingly a treatise-writer's conclusion that the land of local subdivisions was to be treated in equivalent fashion. *County Commissioners v. Maryland Hospital for the Insane*, 62 Md. 127, 129 (1884). Two other old cases suggest that condemnation statutes are not to be read as authorizing the appropriation of land already publicly owned. *Gist v. Owings*, 95 Md. 302, 306, 52 A. 395 (1902); *Baltimore v. Bouldin*, 23 Md. 328, 373 (1865). *Cf.* 41 *Opinions of the Attorney General* 135 (1956).

But see 57 Opinions of the Attorney General 121 (1972). *See generally* Ritchie, *Law of Municipal Condemnation in Maryland*, §14 at 11-13 (1904).

Moreover, the pertinent terminology in EN §9-705(5) is "owner." We agree with you that, like other terms of comparable generality, "owner" does not extend to the State or its political subdivisions in the absence of some manifest legislative intention that they be included. *See, e.g., Unnamed Physician v. Comm'n on Medical Discipline*, 285 Md. 1, 400 A.2d 396 (1979); *State Comm'n on Human Relations v. Baltimore*, 280 Md. 35, 371 A.2d 645 (1977).

Nevertheless, the matter is not free from doubt, given the fact that the County land is surplus. In *Northern Central Railway Co. v. Baltimore*, 133 Md. 658, 106 A. 159 (1919), the Court of Appeals held that the City lacked power to condemn certain railroad property "already subject to a public use which the State itself has sanctioned." 133 Md. at 661. By emphasizing the existing public use, the Court perhaps implied that the railroad's land would have been subject to condemnation if it were not in use.

This unexpressed implication is developed in some out-of-state authority. As one treatise summarizes: "Where . . . land is held for the public use, but is not actually so used or needed, it has been held that it is subject to condemnation like the property of private individuals in that it may be taken under general legislative authority without finding a specific intent to authorize taking of public property." 1 *Nichols on Eminent Domain* §2.2, at 2-67 (rev. 3rd ed. 1985). However, the cases cited for this proposition generally deal with lands owned by publicly chartered corporations like railroads, rather than by governmental units themselves. And, there is out-of-state authority to the contrary. For example: "[W]e hold that in the absence of express or necessarily implied legislative authorization, . . . counties do not have the power to acquire by condemnation property owned by the state or a subdivision thereof, regardless of the use to which that property is being put." *King County v. City of Seattle*, 414 P.2d 1016, 1019 (Wash. 1966). *See also Village of Elmwood Park v. Forest Preserve District of Cook County*, 316 N.E.2d 140, 142 (Ill. App. 1974). *See generally Power of Eminent Domain as Between State and Subdivision or Agency Thereof, or as Between Different Subdivisions or Agencies Themselves*, 35 A.L.R.3d 1293 (1971).

In short, the case law is mixed—too mixed, in our view, to serve as a basis for our predicting that the Court of Appeals would find that Berlin has the power to condemn the County's land.

III

Conclusion

In summary, it is our opinion that the Town of Berlin does not have the authority under EN §9-705(5) to condemn land owned by Worcester County.

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

JACK SCHWARTZ, *Chief Counsel*
Opinions & Advice

LOCAL GOVERNMENT—MUNICIPALITIES—COUNTIES—ZONING—MUNICIPAL
ZONING ORDINANCE DOES NOT APPLY TO MONTGOMERY COUNTY
FACILITIES LOCATED WITHIN TOWN LIMITS.

March 23, 1988

Richard S. McKernon, Esquire
Town Attorney for Poolesville

On behalf of the Commissioners of Poolesville, you have requested our opinion concerning the applicability of the Town's zoning ordinance to county-owned facilities within the corporate limits of the Town. Specifically, you ask whether the Town may by ordinance require Montgomery County to obtain approval from the Town's Planning Commission and the Commissioners of Poolesville before establishing any publicly owned or operated building or use.

For the reasons given below, it is our opinion that the Town may not require the County to obtain the Town's approval as a prerequisite to establishing County facilities needed in carrying out the County's governmental functions.

I

Proposed Zoning Ordinance Amendments

Presently, the zoning ordinance of the Town of Poolesville permits a "[p]ublicly owned or operated building and use, including community building and park, playground, picnic area, swimming pool and other recreational area" in any zone as a matter of right. *E.g.*, Poolesville Zoning Ordinance §4.1. The Commissioners of Poolesville propose to amend the ordinance to make site plan approval by the Town's Planning Commission and general approval by the Commissioners of Poolesville prerequisites to the establishment of those uses.

The proposed amendment would impose on publicly owned or operated buildings and uses in all zones the site plan review requirements presently applicable to privately owned uses in general commercial zones. For those uses, a detailed drawing of the existing site and a plan of the proposed development must be submitted to the Planning Commission, which has authority to require modifica-

tions in the plan or to disapprove the plan. Poolesville Zoning Ordinance §5C. In making its decision, the Planning Commission must determine (i) whether the proposal meets all the requirements of the zone in which it is to be located; (ii) whether the proposed locations of structures, open spaces, landscaping, and pedestrian and vehicle ways are “adequate, safe and efficient”; and (iii) whether each proposed structure and use “is compatible with other uses and other site plans and with existing and proposed adjacent development.” Poolesville Zoning Ordinance §5C(3).

This site plan review process is intended to achieve considerably more than simple technical compliance with the minimum standards expressly set forth elsewhere in the zoning ordinance:

The planning commission shall not approve the site plan if it finds that the development would not achieve a maximum of compatibility, safety, efficiency, and attractiveness; and the fact that a site plan complies with all of the stated general regulations, development standards, or other specific requirements of the zone shall not, by itself, be deemed to create a presumption that the proposed site plan is, in fact, compatible with surrounding land uses and, in itself, shall not be sufficient to require approval of the site plan.

Poolesville Zoning Ordinance §5C(3).

The proposed amendments’ provision for additional approval by the Commissioners of Poolesville — approval not required for privately owned and operated uses — is apparently intended to empower the elected officials of the Town to determine the general appropriateness of public uses. The stated goal of the amendments is to give the Town full control over the establishment of those uses:

[T]he proposed amendments are necessary to ensure that governmental entities seeking to establish publicly owned or operated uses in town officially and formally consult with and obtain the approval of the Commissioners of Poolesville and the Planning Commission before establishing such uses. The amendments are necessary because of the substantial impact of such publicly owned or operated uses upon the public facilities of the town and its future development.

II

Applicability of Town Zoning Ordinance to County

A. *Case Law*

The Maryland appellate courts have 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, 378 A.2d 1326 (1977). Likewise, the use of State-owned land by a private entity for a public purpose is not subject to local zoning. *City of Baltimore v. State Dep't of Health and Mental Hygiene*, 38 Md. App. 570, 578, 381 A.2d 1188 (1978). However, the use of State-owned land by a private entity for a private purpose is subject to local zoning control. *Youngstown Cartage Co. v. North Point Peninsula Community Co-ordinating Council*, 24 Md. App. 624, 630, 332 A.2d 718 (1975).¹

The State's immunity to local zoning controls derives from its sovereignty. 62 *Opinions of the Attorney General* 45, 49 (1977). Counties, however, "are not sovereign bodies, having only the status of municipal corporations . . ." *Maryland Comm. for Fair Representation v. Tawes*, 229 Md. 406, 412, 184 A.2d 715 (1962), *rev'd on other grounds*, 377 U.S. 656 (1964). Like municipalities, counties have no inherent powers, receiving their power instead by delegation from the State.

Counties and municipalities serve quite different functions, however: "The powers and functions of the county, as distinguished from municipal corporations, have a direct reference to the general, rather than the local, policy of the government of the state. Municipal corporations are created principally for the advantage and convenience of the people of the locality." *Centreville v. Queen Anne's County*, 199 Md. 652, 655, 87 A.2d 599 (1952).

¹ In *Youngstown Cartage Co.*, the Court of Special Appeals held that the private entity's use of State-owned property for a truck terminal was not a public use because "[t]he public has no right to enter upon or make use of the subject property so long as appellant remains a lawful tenant thereof." 24 Md. App. at 630. Subsequently, in *State Dep't of Health and Mental Hygiene*, the Court of Special Appeals pointed out that "[t]here is no one definition of the phrase 'public use' which can be utilized in order to determine whether a use is public or private." 38 Md. App. at 575. Noting that many State-owned facilities may not be freely entered by the public, the court concluded that a private entity's home for children in need of supervision was a public use because it was used for the benefit of the general public, albeit the public could not freely enter the property. 38 Md. App. at 577.

In light of the decision in *Youngstown Cartage Co.*, we think that any use of County-owned land for private purposes clearly is subject to the Town's zoning ordinance. Therefore, we will address only the applicability of the Town's zoning ordinances to buildings or uses owned or operated by the County in its governmental capacity.

As far as we are aware, no Maryland court has ruled directly on whether a municipality may apply a zoning ordinance like Poolesville's to a county. In general, according to a leading treatise, "[m]unicipal zoning regulations or restrictions usually do not apply to the state or any of its subdivisions or agencies, unless the legislature has clearly manifested a contrary intent. Thus, properties and the uses thereof may be immune or exempt from the operation of municipal zoning regulations where owned or controlled by counties" 8 *McQuillan Municipal Corporations* §25.15, at 39 (rev. 3d ed. 1983). See *Lauderdale County Bd. of Educ. v. Alexander*, 269 Ala. 79, 110 So. 911 (1959); *County of Los Angeles v. City of Los Angeles*, 28 Cal. Rptr. 32 (Cal. App. 1963); *Edelen v. Nelson County*, 723 S.W.2d 887 (Ky. App. 1987).

We have no reason to conclude that this State's law is otherwise. Indeed, the Court of Appeals has strongly suggested that a municipality's traditional zoning ordinance does not apply to a county government.

Ironically, in that case — *City of Annapolis v. Anne Arundel County*, 271 Md. 265, 316 A.2d 807 (1974) — the Court of Appeals held that Anne Arundel County must comply with the historic district ordinance enacted by the City of Annapolis. Therefore, the county could not demolish a historic structure that it owned, without the approval of the city's Historic District Commission. Nonetheless, we think that the court's decision in that case indicates that a municipality's traditional zoning ordinance does not apply to a county's use of its property for governmental purposes.

In reaching its conclusion, the Court of Appeals pointed out that "there are substantial and significant differences between traditional zoning and historic area zoning, which indicate that the General Assembly by [the provisions of Article 66B concerning historic area zoning] intended that the political subdivisions owning land within a historic district be subject to the jurisdiction of the Historic Area Commission." 271 Md. at 291. First, traditional zoning is concerned with the use of land and the density and location of buildings on the land, while historic area zoning deals only with the preservation of the exteriors of buildings having historic or architectural merit. Thus, the application of the city's historic area zoning to the county's property would not interfere with the county's ability to use its property as necessary in carrying out its governmental functions. *Id.* Second, the purposes of historic area zoning cannot be accomplished unless the exteriors of buildings having historic or architectural merit are preserved regardless of the nature of the entity that owns them. 271 Md. at 291-92.

In addition, the court noted that Article 66B, §8.02 mandates use of the same procedure for establishing a historic district as that used for establishing or changing “areas and classifications of zoning.” In the court’s view, that express mandate indicated “that the General Assembly intended that the *substance* of the new legislation in regard to historic area zoning was to be *different* than that of traditional zoning, rather than the contrary.” 271 Md. at 292 (emphasis in original).

In our view, the court’s emphasis on the substantive differences between historic area zoning and traditional zoning strongly suggests that it would reach a different conclusion as to the legislative intent regarding the applicability of a municipality’s traditional zoning ordinance to a county.² We think that the factors on which the court focused — the possible interference with the county’s use of its property and the need for that interference to accomplish a State goal — indicate a legislative intent that a municipality’s traditional zoning does not apply to a county’s governmental facilities.

We do not read *Centreville v. Queen Anne’s County*, 199 Md. 652, 655, 87 A.2d 599 (1952), to suggest the contrary. In that earlier case, the Court of Appeals stated broadly that “[t]he powers of the counties under the general law of the State do not include the police power. The police power is delegated to the municipal corporations. The counties must comply with reasonable police regulations in the interest of the general welfare.”³ Nonetheless, we do not believe that *Centreville* establishes a right of municipalities to control counties’ use of county-owned property.

The court held that under the circumstances of that case, Queen Anne’s County could not prevent the Town of Centreville from placing parking meters on sidewalks located on property owned by the county

² In 62 *Opinions of the Attorney General* 45, 51 (1977), this office previously suggested this view. In that opinion, the Attorney General stated that a county liquor control board’s liquor dispensary was not subject to a municipal zoning ordinance, whether the board was a State or a county agency, noting the distinction drawn between historic and traditional zoning in *City of Annapolis*.

³ At the time of the decision in *Centreville*, Montgomery County was the only county with a home rule charter, which it had adopted on November 2, 1948. *County Comm’rs of Montgomery Co. v. Supervisors of Elections*, 192 Md. 196, 200, 63 A.2d 735 (1949). Subsequently, the Court of Appeals held that the grant to home rule counties of authority under Article 25A, §5(S) to enact laws for the general welfare grants those counties full legislative power to adopt enactments within the police power. *Montgomery Citizens League v. Greenhalgh*, 253 Md. 151, 160-61, 252 A.2d 242 (1969). With respect to the legislative power of code home rule counties under Article XI-F of the Constitution, see 62 *Opinions of the Attorney General* 275, 290-99 (1977).

for its courthouse. The placement of the parking meters was an exercise of the town's right to control public ways — an exercise of the police power with which the county could not interfere.

However, the Court of Appeals did not ground its holding on any power of the town to control land use generally. Instead, it found that the particular sidewalks at issue were public ways as to which the county had relinquished control: The sidewalks had been used by the general public for many years without the county's objection or attempt to limit their use; the sidewalks were located inside the line of the original fence, which the county had removed; and the county had not objected to the town's earlier placement of parking signs around the courthouse property, nor to its placement of parking meters on the sidewalks along one side of the property. 199 Md. at 658. In light of those facts, the court concluded that "the county offered the sidewalks for the use of the public and the town's exercise of control over them established their acceptance for the purpose." *Id.*

Because the decision in *Centreville* is thus based on the county's abandonment of control over its sidewalks, it does not indicate that the sidewalks would have been subject to the town's control under other circumstances. Still less, in our view, does it suggest that the municipality had the power to determine whether the county would be permitted to construct a courthouse on the county's property in the first instance.

B. *Analysis of Poolesville Proposal*

Municipal corporations do not have inherent zoning power; that power derives solely from the statutory grant of the General Assembly. *Perry v. Board of Appeals*, 211 Md. 294, 303-04, 127 A.2d 507 (1956); 60 *Opinions of the Attorney General* 573, 573 (1975). Therefore, the municipal zoning power may be exercised only to the extent of the General Assembly's grant. *Cardon Invs. v. Town of New Market*, 55 Md. App. 573, 588, 466 A.2d 503 (1983), *aff'd*, 302 Md. 77, 485 A.2d 678 (1984). We believe that the traditional zoning authority granted to municipal corporations was not intended to apply to land owned by a county.

The application of a traditional municipal zoning ordinance to property owned by a county could interfere significantly with a county's ability to establish facilities or uses needed to carry out the county's functions. For example, the zoning ordinance amendments proposed by Poolesville would, if valid, appear to permit the Town's Commissioners to prevent Montgomery County from establishing a govern-

mental facility if the Commissioners disagreed with the County's determination of the need for the facility. Thus, the proposed amendments could lead to disruption of the County's ability to carry out its functions.

Under Article XI-A of the Maryland Constitution, a home rule county like Montgomery County has the authority and duty to enact public local laws in the interest of the county as a whole. *Town of Forest Heights v. Frank*, 291 Md. 331, 341-42, 435 A.2d 425 (1981).⁴ In the exercise of that authority, a home rule county may provide governmental services in municipalities — services that the municipality may be unable to provide. 291 Md. at 345. If the county's use of property that it owns inside the boundaries of a municipality were subject to control by the town's zoning authorities, the town would be able to prevent the establishment of public facilities that the county had determined to be necessary for the general public welfare. We do not think that the General Assembly's grant of zoning power to municipalities was intended to restrict the ability of home rule counties to carry out the very functions for which they were created. Hence, we think that Poolesville's zoning ordinance does not apply to Montgomery County's property used for governmental functions, because the Town's regulation of those uses could impair the County's ability to carry out its functions.

Further, subjection of the County to the Town's zoning ordinance is not necessary to accomplish any statewide public purpose comparable to the preservation of structures of historic and architectural value. *Cf. City of Annapolis*, 271 Md. at 282. Indeed, the goals of any municipal zoning ordinance are quintessentially matters of "the advantage and convenience of the people of the locality," rather than of the State. We neither dispute nor devalue the interest of the Town's residents in the coordinated development of the Town. However,

⁴ At the time of the decision in *Frank*, Article 23A, §2(a) granted municipal corporations authority to enact ordinances "not contrary to the public general or public local laws and the Constitution of Maryland . . ." The Court of Appeals concluded that the enactments of home rule county councils are "public local laws within the meaning of that provision." 291 Md. at 348-49. Accordingly, the court held that a county ordinance prevails over a conflicting municipal ordinance, unless that result would be inconsistent with the legislative intent embodied in a statute enacted by the General Assembly. 291 Md. at 350-51. That outcome was modified by the subsequent enactment of Article 23A, §2B, which provides that, except in specific cases, an ordinance enacted by a municipality under authority granted to it by a public general law or its municipal charter prevails over a conflicting county ordinance.

the Town need not have effective veto power over the County's use of the County's property to protect that interest.⁵

III

Conclusion

In summary, it is our opinion that the zoning ordinance of the Town of Poolesville is not applicable to governmental facilities owned or operated by Montgomery County within the Town's corporate limits. Therefore, the Town may not, by an amendment to its zoning ordinance, require the County to obtain approval from the Town's Planning Commission and the Commissioners of Poolesville before establishing publicly owned or operated buildings or uses needed in carrying out the County's governmental functions.

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

C.J. MESSERSCHMIDT, *Assistant Attorney General*

JACK SCHWARTZ

Chief Counsel

Opinions & Advice

⁵ The County Executive of Montgomery County has offered to enter into a Memorandum of Understanding to provide for notice to and review and comment by the Commissioners of Poolesville on any proposed county facility within the Town. Letter from the Honorable Sidney Kramer, County Executive of Montgomery County, to the Honorable Charles W. Elgin, Sr., President, Commissioners of Poolesville (October 19, 1987). Of course, the General Assembly has power to require, by public general law, that charter counties generally consult with incorporated municipalities within their borders before locating public facilities in those municipalities. Indeed, the General Assembly may require joint decisionmaking as to certain facilities, if it deems that appropriate. See 67 *Opinions of the Attorney General* 254 (1982).

LOCAL GOVERNMENT—CHARTER COUNTIES—HOME RULE POWERS—
CHARTER HOME RULE COUNTY MAY CREATE EXPRESS PRIVATE
RIGHTS OF ACTION AS A REMEDY FOR VIOLATION OF AN ORDINANCE.

May 24, 1988

Clyde H. Sorrell, Esquire
County Attorney for Montgomery
County Maryland

You have requested our opinion on whether the Montgomery County Council has the authority to create a private right of action for violation of a county law. Specifically, you ask whether the private right of action contained in Chapter 29, Laws of Montgomery County 1988, is valid.

For the reasons stated below, it is our opinion that a charter home rule county generally has authority, under the Express Powers Act, to specify a private right of action as a remedy for violation of a county law. The treble damages remedy in Chapter 29 is a valid exercise of that authority.¹

I

Towing Ordinance

In Chapter 29 (Bill No. 16-87) of the Laws of Montgomery County 1988, the County Council enacted a new Chapter 30C of the County Code, entitled "Motor Vehicle Towing from Private Property." Among other provisions, Chapter 30 specifies the procedures to be followed before a vehicle may be towed. *E.g.*, §30C-4(c).

Section 30C-9(a) creates a private right of action for a vehicle owner whose vehicle is improperly towed or damaged:

¹ Chapter 29 is the subject of currently pending litigation. *Cade v. Montgomery County*, Civil Action No. 31777 (Cir. Ct. Mont. Cty. filed April 22, 1988). However, the complaint does not raise any issue related to the topic of this opinion.

Any trespass towing service, and any private property owner who authorizes, expressly or under a standing authorization, the towing of a vehicle from private property, are both liable for:

(1) any towing of a vehicle that does not comply with [Chapter 30-C]

(2) any towing of a vehicle in the mistaken belief that the vehicle was not authorized to park in the place from which it was towed; and

(3) any damages to a towed vehicle incurred during the tow or storage and caused by a lack of reasonable care by the towing service, the property owner or an agent of either.

The ordinance specifies damages at “3 times the amount of any towing, release or storage fees charged.” §30C-9(e).

II

Charter Home Rule Powers

Montgomery County, having adopted a home rule charter under Article XI-A of the Constitution, may exercise the powers set out in the Express Powers Act, Article 25A of the Maryland Code. In addition to a series of enumerated powers, the Express Powers Act provides as follows:

The foregoing or other enumeration of powers in this article shall not be held to limit the power of the county council, in addition thereto, to pass all ordinances, resolutions or bylaws, not inconsistent with the provisions of this article or the laws of the State, as may be proper in executing and enforcing any of the powers enumerated in this section or elsewhere in this article, as well as such ordinance as may be deemed expedient in maintaining the peace, good government, health and welfare of the county.

Article 25A, §5(S).

This provision is “a broad grant of power to legislate on matters not specifically enumerated in Art. 25A . . .” *Montgomery Citizens League v. Greenhalgh*, 253 Md. 151, 161, 252 A.2d 242 (1969). As the Court of Special Appeals recently summarized: “This grant of powers provides charter counties with a general police power to enact

ordinances for the public good as long as the ordinances are not inconsistent with the other provisions of Article 25A or the other laws of the State." *Holiday Universal Club v. Montgomery County*, 67 Md. App. 568, 573, 508 A.2d 991 (1986), *appeal dismissed* 107 S.Ct. 920 (1987).

We have no doubt that, under Article 25A, §5(S), the Montgomery County Council may enact an ordinance to regulate the towing of vehicles from private property.² Less clear is whether Article 25A, §5(S) authorizes the county to create a private right of action as the means of enforcing its towing regulations.³

III

Implied and Express Private Rights of Action

According to a leading treatise, "[t]he well-established general rule is that a municipal corporation cannot create by ordinance a right of action between third persons or enlarge the common law or statutory duty or liability of citizens among themselves." 6 *McQuillan Municipal Corporations*, §22.01, at 380 (3d ed. 1980). The cases cited in support of this generalization are of two types. Some held that the state legislature had not authorized the local government to create a private right of action. *E.g.*, *Brown v. Parish of East Baton Rouge*, 126 So.2d 173 (La. 1960). Others held that the local government did not intend to create such a right, since the ordinance did not expressly provide for it. *E.g.*, *Bittle v. Brunetti*, 750 P.2d 49, 59 (Colo. 1988); *Papen v. Karpow*, 643 P.2d 375, 377-78 (Or. App. 1982); *Flynn v. Canton Co. of Baltimore*, 40 Md. 312 (1874).

The *Flynn* case involved a Baltimore City ordinance requiring property owners to keep the sidewalks surrounding their property free from ice and other obstructions. The ordinance did not expressly

² The problem addressed by Chapter 30C is described succinctly in the legislative history: "[C]ounty residents have complained of excessive rates, little or no notice of which areas are off-limits to parking, and difficulty in redeeming towed vehicles." Legislative Request Report, Bill No. 16-87. The Maryland Vehicle Law does not address the towing of vehicles from private property.

³ Article 25A, §5(A) empowers charter home rule counties to enforce local laws by criminal sanctions and "civil fines and penalties." However, §5(S) grants supplementary power "in executing and enforcing" ordinances. Hence, the omission of any reference to private rights of action in §5(A) is itself inconclusive.

create a private right of action. The Court of Appeals held that the plaintiff, injured when she fell on a patch of ice, had no cause of action based on the defendant's violation of the ordinance. A private right of action, the Court concluded, was not contemplated by the framers of the ordinance. Instead, "the only liability resting upon the property owner is that which the ordinance itself imposes, viz: the prescribed fine or penalty for each neglect, and the cost of removal . . ." 40 Md. at 325. The Court of Appeals, however, did not hold that the city lacked the power to create a private right of action; rather, the Court simply held that the ordinance at issue did not implicitly create a private right of action since the intent to do so was lacking⁴

Other jurisdictions have recognized a local government's power, under sufficiently broad authorizing legislation, to create express private rights of action. In *Bittle v. Brunetti*, 750 P.2d 49 (Colo. 1988), the Colorado Supreme Court held that the violation of a municipal ordinance requiring owners and occupants of property to clear snow and ice from adjacent sidewalks did not give rise to civil liability under the doctrine of negligence per se. The court also held, however, that "a municipality can create a right of action against abutting owners by 'express provision' . . ." 750 P.2d at 59. Similarly, in *Papen v. Karpow*, 673, 643 P.2d 375, 377-78 (Or. App. 1982), the court held that a municipal ice and snow ordinance "may, by express provision, give third parties a right of action against the abutting owner . . ."

Although the Court of Appeals has not rendered a comparable decision approving a county's express creation of a private right of action, *County Council v. Investors Funding Corp.*, 270 Md. 403, 312 A.2d 225 (1972) may be read as recognizing this power. In *Investors Funding*, the Court of Appeals upheld the county's authority to create a Commission on Landlord-Tenant Affairs, an administrative body empowered, among other things, to award damages to landlords and tenants. The Court approved the delegation of power to this agency on the basis of the "declared public interest in landlord-tenant

⁴ The Court of Appeals also reaffirmed its prior holding in *Owings v. Jones*, 9 Md. 108 (1856), in which the Court treated the defendant's deliberate noncompliance with a regulatory ordinance as evidence of the defendant's wrongful conduct for purposes of tort liability. In *Owings*, however, the Court did not hold that the ordinance itself impliedly created a private right of action.

relationships." *Investors Funding*, 270 Md. at 437.⁵

Part of the county's response to these inequities in the apartment rental business was the provision of a range of remedies, including the awarding of damages by the Commission. In effect, this ordinance created an express private right of action for a landlord or tenant to seek damages from the other. To be sure, the right could be exercised only through the private party's initial recourse to the Commission. Nevertheless, the Commission's award of damages was not itself a binding judgment: "Court action, instituted by the County attorney or the parties before the Commission, is always required." 270 Md. at 437 (emphasis added).

In short, the county's landlord-tenant law created, and the Court of Appeals approved, a remedial measure closely resembling a traditional private right of action in court. That a tenant aggrieved by a landlord's violation of the ordinance (or vice versa) must take his or her claim for damages to the Commission first does not change the fundamental nature of the remedy.⁶

Montgomery County has a legitimate public policy objective in ensuring that private vehicles are not improperly towed.⁷ Presumably, the County Council determined that the most effective way of protecting its citizens against unlawful towing was to enact §30C-9, a private right of action without the prerequisite of administrative

⁵ The County Council set forth the following legislative findings:

"[T]here is often unequal bargaining power between landlords and tenants; . . . the common law principles pursuant to which leases are interpreted as grants of right of possession rather than mutual and dependent covenants evolved in an agricultural setting and are ill-suited to the modern residential setting of this urban County; . . . in order to facilitate fair and equitable arrangements, foster the development of housing which will meet the minimum standards of the present day, and promote the health, safety and welfare of the people, it is necessary and appropriate that the County provide a commission and office to determine certain minimum rights and remedies obligations and prohibitions, for landlords and tenants of certain kinds of residential property."

Investors Funding, 270 Md. at 406-07.

⁶ Similarly, the Court of Special Appeals in *Holiday Universal Club v. Montgomery County* held that Montgomery County had the authority under its police powers to enact an ordinance prohibiting discrimination in places of public accommodations. 67 Md. App. at 575. As part of its regulatory scheme, the county created a commission with the authority to award monetary damages for violations of the county ordinance.

⁷ See note 2 above.

agency adjudication. In terms of the county's power under Article 25A, §5(S) to fashion remedies that best serve the exercise of its police power, we see no difference between the private damages remedy upheld in *Investors Funding* and that created by Chapter 30C.

IV

Conclusion

In summary, it is our opinion that a charter home rule county may create an express private right of action as a remedial device in an ordinance authorized by the Express Powers Act. The private right of action in §30C-9(e) of the Montgomery County Code is valid.

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Opinions & Advice

LOCAL GOVERNMENT—VEHICLE LAWS—PREEMPTION—PARKING—CITY OF
ROCKVILLE HAS AUTHORITY TO REGULATE PARKING OF TRUCKS ON
PRIVATE PROPERTY.

August 17, 1988

The Honorable George W. Owings, III
Maryland House of Delegates

You have requested an opinion concerning the authority of the City of Rockville to regulate the parking of trucks on private property. Previously, a member of this office was asked for her view of the matter. Her initial assessment, based on incomplete information regarding the ordinance, was that the City did not appear to have that authority. We have now had an opportunity to review the issue in fuller detail, and, for the reasons given below, we conclude that Rockville does have authority to regulate the parking of trucks on private property.

I

Relevant Laws

A provision of the zoning ordinance of the City of Rockville limits the vehicles that may be parked "off street" in certain residential zones to "passenger vehicles, not more than one (1) delivery type commercial vehicle not exceeding three-fourths ton capacity and one (1) trailer which shall not be used for dwelling purposes or any accessory use, provided such trailer is parked behind the front building line." Rockville City Code §3-401(l). In addition, the City has enacted an ordinance generally regulating the parking of trucks in residential areas. Rockville City Code §11-1.02 (as amended by Ordinance No. 29-86 (September 8, 1986)). Under the ordinance, vehicles below a designated size and weight and having no more than four wheels generally may be parked in any residential area; certain larger vehicles may be parked in residential areas only with a special permit; and very large vehicles may not be parked in residential areas.¹ The

¹ A permit is required for any vehicle with a rated-load capacity of more than three-fourths ton, but not more than one ton; a gross vehicle weight of more than 10,000 pounds but not more than 13,000 pounds; more than four, but not more than six, wheels; or a width of not more than 96 inches. Vehicles that exceed these standards may not be parked in residential areas.

parking permit may be granted only on the basis of findings that the parking would not (i) overburden roads and other public facilities; (ii) be detrimental to the use or development of nearby properties; (iii) adversely affect the health or safety of residents or workers in the area; (iv) or constitute a violation of any other law.

The Maryland Vehicle Law, titles 11 through 27 of the Transportation Article ("TR" Article), regulates all aspects of traffic. Title 21 of the Maryland Vehicle Law particularly regulates parking, extensively and in detail. For example, TR §21-1001(b) prohibits leaving a vehicle standing on a highway outside a business or residential district without providing an unobstructed width of the roadway opposite the vehicle for the free passage of other vehicles; §21-1001(c) prohibits stopping a vehicle on a highway outside a business or residential district unless the vehicle can be seen clearly from 200 feet away in each direction on the roadway. *See also* TR §21-1003 (prohibiting stopping, standing, or parking in 29 specified types of places) and TR §21-1004 (additional parking regulations). In particular, TR §21-1004(e)(1) provides that "[a] person may not stop, stand, or park a vehicle on any private property not owned by the owner or driver of the vehicle unless the person has express or implied permission from the property owner, his tenant, or his agent to stop, stand, or park the vehicle, as the case may be."

It has been suggested that the parking provisions of the Maryland Vehicle Law preempt local authority to enact regulations like Rockville's. In particular, it has been suggested that the enactment of TR §21-1004(e)(1) indicates that, had the General Assembly believed additional regulation of parking on private property to be appropriate, it would have included the regulation in the Maryland Vehicle Law.

II

Preemption Analysis

The Maryland Vehicle Law is in general intended to preempt local legislation. Indeed, TR §25-101.1(c) is an express preemption provision:

Except as otherwise provided in the Maryland Vehicle Law:

- (1) The provisions of the Maryland Vehicle Law prevail over all local legislation and regulation on any subject with which the Maryland Vehicle Law deals;

- (2) All public local laws, ordinances, and regulations that are inconsistent or identical with or equivalent to any provision in the Maryland Vehicle Law are repealed; and
- (3) The charters of all political subdivisions of this State are modified to prohibit the political subdivision from making or enforcing any ordinance or regulation in violation of the Maryland Vehicle Law.

Nonetheless, the Maryland Vehicle Law is not intended to preempt all local regulation of traffic-related matters. TR §25-102 enumerates various powers that a local authority may exercise “as to highways under its jurisdiction”; those powers include “[r]egulating or prohibiting the stopping, standing, or parking of vehicles . . .” TR §25-102(a)(1).² In addition, a “political subdivision” may “[r]egulate the parking of vehicles,” enforced by impoundment and citation. TR §26-301(b).

Thus, the City of Rockville, like other local authorities, may regulate parking on City streets. Further, we believe that the City has equally clear authority to regulate parking on private property — that is, off-street parking.

In our view, the Maryland Vehicle Law does not preempt Rockville’s regulation of off-street truck parking because, quite simply, the matters covered by Rockville’s ordinance are not covered by the Maryland Vehicle Law. The State statutes pertaining to parking generally regulate parking on highways; with few exceptions, they do not apply to off-street property. *See, e.g.*, TR §§21-1003 and 21-1004(a) through (d). *Cf.* TR §21-1003(v) through (z) (prohibiting parking on property owned by certain county boards of education). TR §11-127 defines the term “highway” to include “the entire width between the boundary lines of any way or thoroughfare of which any part is used by the public for vehicular travel,” but the term does not include private parking lots and driveways. *Walmsley v. State*, 35 Md. App. 148, 151-52, 370 A.2d 107 (1977). Indeed, the only State parking laws that explicitly address any question of parking on private property are TR §21-1004(e)(1), which prohibits parking on the private

² A “local authority” is “a political subdivision or a local board or other body, that, under the laws of this State, has authority to enact laws and adopt local police regulations related to traffic.” The City of Rockville, as an incorporated municipality, clearly has that authority under the general grant of police power in Article 23A, §2(a). *Cf.* Article 25, §2 (granting county commissioners power to regulate parking of vehicles on public highways) and Article 25A, §5(S) (granting police power to chartered counties).

property of another without the property owner's permission, and TR §21-1006, which requires handicapped parking spaces on certain retail store lots.

We do not think that TR §21-1004(e)(1) can be construed to grant an unbridgeable right to park on private property when the owner permits or when the property owner also owns the parked vehicle. That provision is no more than a prohibition against parking on private property in one set of circumstances — without “the express or implied permission of the property owner. . . .” In the absence of further restrictions, parking on private property under other circumstances would undeniably be permitted. But that would result merely from the absence of other restrictions, not because TR §21-1004(e)(1) affirmatively grants a right immune from other restriction.

The Court of Appeals has pointed out that “a political subdivision may not prohibit what the State by general public law has permitted, but it may prohibit what the State has not *expressly* permitted.” *City of Baltimore v. Sitnick and Firey*, 254 Md. 303, 317, 255 A.2d 376 (1969) (emphasis in original). TR §21-1004(e) clearly does not itself expressly grant permission to park on any private property. Moreover, we think that TR §25-102(a)(1)'s express designation of parking as a matter subject to local regulation indicates that none of the provisions of the Maryland Vehicle Law is intended to grant implied permission to park in certain locations merely because State law does not prohibit parking there.

Further, we believe that there is no inconsistency between Rockville's parking ordinance and the State's parking laws. The purpose for which the State regulates parking generally is simply to facilitate and expedite the movement of traffic. *Whoolery v. Hagan*, 247 Md. 699, 706, 234 A.2d 605 (1976); *Maggitti v. Cloverland Farms Dairy, Inc.*, 201 Md. 528, 532, 95 A.2d 81 (1953). TR §21-1004(e)(1) evidently addresses a different concern: protection of the right of property owners to prevent unauthorized persons from parking on their property.³ The legislative purpose of Rockville's parking ordinance is different from either of those purposes: As reflected in the conditions for granting a special parking permit, that purpose is

³ As originally enacted, that provision made it a misdemeanor to park a motor vehicle on the property of another after the property owner or the owner's tenant or agent asked that the vehicle be removed. Chapter 388, Laws of Maryland 1966. It was amended by Chapter 375 of the Laws of Maryland 1977 to prohibit parking on another's property without permission.

to separate from residential areas a land use deemed inappropriate and detrimental to persons and property in those areas. The enforcement of Rockville's ordinance would in no way interfere with the accomplishment of the purposes of either TR §21-1004(e)(1) or the State's parking regulations generally. By the same token, the enforcement of the State's laws in no way interferes with the accomplishment of Rockville's purpose.

Hence, we think that Rockville's truck parking ordinance is not "inconsistent or identical with or equivalent to any provision in the Maryland Vehicle Law," nor does it deal with any subject covered by the Maryland Vehicle Law. Accordingly, we believe that Rockville's ordinance is not preempted by any provision of the Maryland Vehicle Law.

We have no doubt that, in the absence of State preemption, the City has power to enact an ordinance prohibiting parking large trucks in residential areas. Under Article 23A, §2(a), the City has broad power to enact ordinances that it "deem[s] necessary in order . . . to protect the health, comfort and convenience of the citizens of the municipality . . ." Cf. Article 25A, §5(S) (grant of police power to chartered counties). In addition, the City has express authority to enact planning and zoning regulations to promote the orderly development and use of land and structures. Article 23A, §2(b)(30) and (36). Cf. Article 25A, §5(X) (planning and zoning powers of chartered counties). Further, Article 66B, which grants municipal corporations and county commissioners zoning and planning powers, expressly grants authority "to regulate and restrict . . . off-street parking . . ." Article 66B, §4.01(a). The City's truck parking ordinance clearly is related to the health, comfort, and convenience of the citizens of the municipality; moreover, it furthers the general policy of zoning ordinances to separate incompatible land uses.

III

Conclusion

In summary, it is our opinion that the City of Rockville has authority to regulate the parking of trucks on private property.

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Opinions & Advice

LOCAL GOVERNMENT—CHARTER COUNTIES—BONDS—MARYLAND
INDUSTRIAL DEVELOPMENT FINANCING AUTHORITY (“MIDFA”)—
FEES—TAXES—HOWARD COUNTY MAY NOT IMPOSE A CHARGE OF
0.125% OF THE FACE AMOUNT OF MIDFA REFUNDING BONDS.

November 28, 1988

Mr. Benjamin L. Hackerman
Executive Director
Maryland Industrial Development Financing Authority

You have requested our opinion concerning the validity of legislation recently enacted by Howard County that requires an entity applying to the County for approval of the refunding of industrial development revenue bonds, including bonds issued by the Maryland Industrial Development Financing Authority (“MIDFA”), to pay a charge of 0.125% of the face amount of the refunding bonds issued. The legislation refers to the charge as a “fee” for the “advertising, processing, and review” of such bonds “whether or not Howard County, Maryland is the issuer” of the bonds. Specifically, you have asked whether Howard County has the authority to impose this charge when MIDFA issues refunding bonds for a project in Howard County.

For the reasons given below, we conclude that the charge may not be imposed on refunding bonds issued by MIDFA.

I

Background

A. *MIDFA Bonds*

MIDFA issues and sells bonds to finance or refinance facilities by authority of §13-138 of the Financial Institutions Article (“FI Article”) and in accordance with the Maryland Economic Development Revenue Bond Act, Title 14, Subtitle 1 of Article 41 of the Maryland Code. MIDFA may issue either tax-exempt or taxable bonds and may refinance existing bonds issued by MIDFA or any other issuer.

FI §13-138(e) requires that, prior to the issuance and sale of MIDFA bonds, the county or municipality in which the financed facility is to

be located must adopt a resolution describing the facility and the public purpose that it will serve. Also, Section 147(h) of the Internal Revenue Code of 1986 requires that a public hearing be held in the local jurisdiction before bonds are issued. Generally, a county or municipal government need only perform these two functions when MIDFA issues bonds.

When MIDFA determines to issue bonds for a facility in a particular county or municipality, MIDFA's bond counsel prepares a resolution and a public hearing announcement, known as a TEFRA notice, which are submitted to appropriate officials of the county or municipality with a request for enactment of the resolution. The county or municipal officials forward the resolution, TEFRA notice, and request with background information for review by legal counsel and the members of the county or municipal legislative body. After review, MIDFA's bond counsel arranges to have the TEFRA notice properly published and prepares an appropriate number of original resolutions for presentation to the legislative body. The resolution is then formally presented at a regular meeting of the body and voted on for approval. This meeting often serves to satisfy the public hearing requirement of the federal tax law. If not, a separate hearing is held. Finally, a formal written resolution is signed and delivered to MIDFA.

Often, the county or municipality will charge a fee to cover its costs for processing the request for the resolution and holding the public hearing. The fee is ultimately paid by the developer of the facility. Section 148 of the Internal Revenue Code of 1986 limits the total amount of annual charges and fees an issuer of bonds can take, including the county's fee, to 0.125% of the outstanding balance of the bonds.

B. Howard County Bill No. 26

Howard County Bill No. 26 (effective August 8, 1988) amends §22.600(a) of the Howard County Code. The former text of §22.600(a) read as follows:

The following fee schedule shall apply for the advertising, processing and review of industrial development revenue bonds and Maryland Industrial Development Financing Authority loans or bonds . . . whether or not Howard County, Maryland is the issuer of the related bonds or other obligations:

- (1) A fee of \$500 shall be levied and collected against each industrial development revenue bond or Maryland Industrial Development Financing Authority loan or bond in any amount up to \$500,000.
- (2) A fee of \$1,000 shall be levied and collected against each industrial development revenue bond or Maryland Industrial Development Financing Authority loan or bond of over \$500,000.

Bill No. 26 revised §22.600(a) to provide that the former fee schedule shall apply only to new industrial development revenue bonds or MIDFA bonds, and added a separate fee schedule for “re-funding” bonds, as follows:

- (3) A fee of 0.125% of the aggregate amount of the re-funding bonds or loan shall be levied and collected with respect to each issue of re-funding industrial revenue bonds or re-funding Maryland Industrial Development Financing Authority loan or bond. The fee shall be paid as follows:

A non-refundable fee of \$1,000 shall accompany all applications for the issuance of re-funding industrial development revenue bonds or re-funding Maryland Industrial Development Financing Authority loans or bonds. The remainder of the fee, 0.125% of the aggregate amount of the re-funding bonds or loan minus the \$1,000 application fee, shall be paid at the closing for the bonds or loan.

Notwithstanding the provisions of this paragraph, the fee collected pursuant to this paragraph shall not exceed the amount which may be collected by the County with respect to such re-funding bonds or loans under the provisions of the Internal Revenue Code.

II

Analysis

A. Introduction

You have asked whether Howard County is authorized by law to impose the charge provided in Bill No. 26 when MIDFA issues refunding bonds. Under Article XI-A, §2 of the Maryland Constitution, a charter home rule county like Howard County possesses only those powers granted by the General Assembly.

Charter home rule counties have broad police powers. Article 25A, §5(S) of the Maryland Code. We do not doubt that a charter county may charge fees as compensation for services provided within its enumerated powers. See *Portsmouth Stove & Range Co. v. Baltimore*, 156 Md. 244, 249, 144 A. 357 (1929). See generally 9 McQuillan, *Municipal Corporations* §26.15, at 35 (3d ed. 1986).

However, the Maryland Constitution prohibits local governments, including charter counties, from imposing taxes to raise general revenues without express authorization from the General Assembly. *Reinhardt v. Anne Arundel County*, 31 Md. App. 355, 356 A.2d 917 (1976); *Griffin v. Anne Arundel County*, 25 Md. App. 115, 333 A.2d 612 (1975). Your question, then, involves two issues: (1) whether the charge is a "fee" or a "tax"; and (2) if it is a "tax", whether Howard County has authority to impose it.

B. "Fee" vs. "Tax"

In determining whether a governmental charge is a fee or a tax, the purpose of the enactment, rather than the term used to refer to the charge, is dispositive. *Campbell v. City of Annapolis*, 289 Md. 300, 305, 424 A.2d 738 (1981). A "fee" is a charge fixed by law for the services of a public officer that is regarded as compensation for the services rendered. *Black's Law Dictionary* 553 (5th ed. 1979); 36A C.J.S. *Fee* at 248 (1961).

For example, court charges imposed on a litigant to defray the expenses of the litigation are fees. See *Crocker v. Finley*, 459 N.E.2d 1346, 1350 (Ill. 1984). A charge imposed on commercial, industrial, and municipal haulers for the use of a county landfill qualified as a "fee" when used to fund the landfill costs. *Barnhill Sanitation Services, Inc. v. Gaston County*, 362 S.E.2d 161 (N.C. App. 1987). Charges imposed by a state insurance department against an insurance company were fees for services performed in connection with the examination of the operations of the particular company when imposed to defray the expenses of the inspection. *Leggett v. Missouri State Insurance Company*, 342 S.W.2d 833, 875-76 (Mo. 1961).

On the other hand, a "tax" is a charge or burden imposed by legislative power on persons or property to raise money for public purposes. *Black's Law Dictionary* 1307 (5th ed. 1979); 84 C.J.S. *Taxation* §1.b., at 34-35 (1954). A tax is imposed for the purpose of raising general revenue for the benefit of the public and not merely particular parties. See *United States v. State of Maryland*, 471 F. Supp. 1030, 1036 (D. Md. 1979).

For example, statutes imposing a graduated probate fee based upon the value of the estate, where no reasonable relationship between the size of the estate and the amount of services required in its administration is shown, have been held to be taxes. *Smith v. Carbon County*, 63 P.2d 259 (Utah 1936). Cf. *Foreman v. Treasurer of Oakland County*, 226 N.W.2d 67 (Mich. 1974). A statute requiring dissolution-of-marriage petitioners to pay a \$5.00 charge, in addition to a court filing fee, where the \$5.00 collected goes to the state treasury to fund a domestic violence program, imposes a "tax." *Crocker v. Finley*, 459 N.E.2d 1346 (Ill. 1984). Likewise, a \$1.00 charge collected with other marriage license fees is a tax because the \$1.00 was not used to compensate the county ordinary for services rendered but went toward an ordinaries' retirement fund. *Gunby v. Yates*, 102 S.E.2d 548 (Ga. 1958). Special benefit assessments for particular public improvements are levied as an exercise of the taxing power. *Hagerstown v. Startzman*, 93 Md. 606, 609-11, 49 A. 838 (1901); *Gould v. Baltimore*, 59 Md. 378, 380 (1883).

We derive from these definitions and examples this guiding principle: A charge bearing a reasonable relation to the services rendered is a fee; a charge having no relation to the services rendered, "assessed to provide general revenue rather than compensation," is a tax. *Crocker v. Finley*, 459 N.E.2d at 1350. Cf. 67 *Opinions of the Attorney General* 307, 311 (1982).

Applying this principle to the charge in question, we conclude that the charge imposed under Bill No. 26, although referred to as a fee, is in reality a tax.

First, Bill No. 26 adds charges to a fee schedule that applies "whether or not Howard County, Maryland is the issuer of the bonds." When the county is the issuer of the bonds, its costs and expenses will be much greater than if it is merely approving a resolution and holding a public hearing for a MIDFA bond issue.¹ The schedule fails to account for the difference between the cost of services provided when the county is the issuer and the costs of its services when MIDFA is the issuer.

Second, Bill No. 26 establishes a fee for refunding bond issues that is different from the fees for new bond issues. However, the same services are being provided by Howard County whether MIDFA

¹ These costs will include services rendered by staff, bond counsel, and the county attorney for, among other things, drafting and reviewing documents, negotiating with developer's counsel, advertising, printing, mailing, and the like.

issues new bonds or refunding bonds for a project in the county.

Third, Bill No. 26 bases the charge for MIDFA's refunding issues on the amount of the bonds issued. However, the services provided by Howard County for these issues are the same regardless of amount.

Fourth, and perhaps most telling, the amount of the charge imposed on MIDFA's refunding issues is greatly disproportionate to the value of the services rendered by Howard County. A typical refunding bond issue may amount to \$10 million; a charge of 0.125% of this amount would provide Howard County with \$12,500. Even assuming that \$1,000 is an appropriate fee for processing a bond resolution and holding a public hearing, the charge imposed by Bill No. 26 will generate far more revenue than is needed to cover Howard County's costs.

In addition, one other aspect of Bill No. 26 suggests to us that this is not a fee but a revenue-generating measure. The legislation provides that the fee is to be paid in two parts: initially, a non-refundable "application fee" of \$1,000 payable with the application; later, the balance of the charge at the closing of the bond issue. The \$1,000 application fee is commensurate with the fee levied for new bond issues and is collected at the time that the county's services are actually rendered. The remainder of the charge is not paid until some time later, when the bond issue is closed — an event at which the county has no involvement. This later payment is so far removed in time from the performance of the county's services as to be inconsistent with the notion that the charge is compensation for these services.

It is evident from all of these factors that the charge under Bill No. 26 bears no reasonable relation to the services rendered by Howard County. The potential amount of monies it will produce for the county suggests that it is imposed as a general revenue-raising measure and therefore is a tax.

C. *Taxation Power*

"[I]t is fundamental that the power of a County . . . to tax is not inherent but is a delegated power and exists only when and to the extent granted by the State." *Griffin v. Anne Arundel County*, 25 Md. App. 115, 126, 333 A.2d 612 (1975). The General Assembly has not granted Howard County the power to tax in the manner provided by Bill No. 26.

While the Express Powers Act, Article 25A, §5 of the Maryland Code, endows charter home rule counties with a wide array of

legislative and administrative powers over local affairs, it grants no general taxing power. *Montgomery County Board of Realtors, Inc. v. Montgomery County*, 287 Md. 101, 107, 411 A.2d 97 (1980). Section 5(0) of the Express Powers Act grants only the power to provide for a property tax. *Montgomery County v. Maryland Soft Drink Association*, 281 Md. 116, 337 A.2d 486 (1977). The charge imposed under Bill No. 26 is in the nature of an excise tax, not a property tax. See *Weaver v. Prince George's County*, 281 Md. 349, 357, 379 A.2d 399 (1977).

We have reviewed other State statutes relating to State and local taxing power and are unable to find any authority granted to Howard County to impose an excise tax on the issuance of bonds. We conclude, therefore, that the tax on MIDFA issues imposed by Bill No. 26 was enacted without necessary legislative authority and may not be enforced. If the General Assembly believes that this revenue source ought to be available to Howard County or other jurisdictions, it may of course enact an appropriate law.

III

Conclusion

In summary, we conclude that the 0.125% charge on MIDFA refunding bonds imposed by Howard County under Bill No. 26 is a tax, levied without authorization from the General Assembly. Accordingly, Bill No. 26 may not be applied to MIDFA refunding bonds.²

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JACK SCHWARTZ

Chief Counsel

Opinions & Advice

² This opinion is limited to Howard County's charge for MIDFA refunding bonds and should not be viewed as calling into question charges by local governments that are reasonably related to the costs associated with other bond issues.

LOCAL GOVERNMENT—MUNICIPALITIES—PLANNING AND ZONING—
APPOINTMENT PROCESS FOR PLANNING COMMISSION AND BOARD OF
ZONING APPEALS.

December 9, 1988

Guy R. Ayres, III, Esquire
City Attorney for Ocean City

On behalf of the Town of Ocean City, you have requested our opinion concerning the appointment process for the Ocean City Planning Commission and Board of Zoning Appeals. In your letter, you state that at the present time the Mayor and Council make appointments to the Commission and the Board. In doing so, the Mayor and each member of the Council casts one vote.

For the reasons stated below, we conclude that this practice is in accord with State law.

I

Statutory Background

Municipal corporations may enact "reasonable zoning regulations subject to the referendum of the voters." Article 23A, §2(b)(30) of the Maryland Code. Nevertheless, it is Article 66B that comprehensively defines the power of the municipal corporations and counties, other than charter counties, to enact planning and zoning ordinances. As a municipal corporation, Ocean City is subject to the provisions of that general law even though it enjoys home rule. Article XI-E, §6 of the Maryland Constitution.

Article 66B, §3.01 authorizes the counties and municipal corporations to establish planning commissions. Article 66B, §3.02 provides for the appointment of members in the following manner:

The members shall be appointed by the local legislative body or by such person or persons as the local legislative body creating the commission in the ordinance may designate as the appointing power. Where there is a single local elected executive, the members shall be appointed by the local executive and confirmed by the local legislative body. All members may serve with the compensation the local legis-

lative body deems appropriate Vacancies occurring otherwise than through the expiration of term shall be filled for the unexpired term by the local legislative body or by whatever person or persons as the local legislative body creating the commission may designate in the ordinance as the appointing power.

The terms “local executive” and “local legislative body” are defined by Article 66B, §1.00 as follows:

“Local executive” means the chief executive of the political subdivision whether the official designation of his office be elected county executive or executive head, mayor, or similar term.

“Local legislative body” means the elected body of a political subdivision whether known as county commissioner, or county council, city, town, or village council, or similar terms.

An Ocean City ordinance provides for the appointment of the “Planning and Zoning Commission” by the “Mayor and Council.” Ocean City Code §14-2. The question has arisen whether Article 66B, §3.02 requires that the appointment be made by the Mayor subject to the approval of the Council. The answer depends on whether the Mayor is a “local elected executive” within the meaning of §3.02.

II

Power to Appoint — Legislative History

The term “local executive” clearly refers to a single official. Moreover, this official must be “the chief executive.” Although Article 66B, §1.00 includes a “mayor” within the term “local executive,” it does not necessarily include all mayors. A mayor who merely presides over a council, acts as a member of the council, and performs ceremonial functions would not be a “chief executive” in the sense of an official who effectively exercises the executive authority of local government. This view is supported by the legislative history of §§1.00 and 3.02, which also suggests that the term “local executive” is intended to refer only to elected officials and that the reference in §3.02 to “a single local elected executive” has become redundant as the result of statutory revision.

In 1927 the General Assembly enacted general legislation conferring planning and zoning powers on Baltimore City and the larger incorporated towns. Chapter 705, Laws of Maryland 1927. This enactment, which was codified as Article 66B, was supplemented in 1933 by a comprehensive planning and zoning law for some but not all of the counties and municipalities. Chapter 599, Laws of Maryland 1933. Following a review of Article 66B by a study commission in 1969, the General Assembly extensively revised this article. See Maryland Planning and Zoning Law Study Commission, *Final Report Legislative Recommendations* (1969) ("*1969 Study Report*"); Legislative Council of Maryland, *Report to the General Assembly of Maryland of 1970* at 995-1013; Chapter 672, Laws of Maryland 1970.

The 1933 enactment provided that a planning commission was to consist of one member of the council and four persons appointed "by the mayor, and confirmed by the council, if the mayor be an elective officer; otherwise by such officer as council may designate" by ordinance. Vacancies were to be filled by the "mayor and confirmed by the council." Chapter 599, Laws of Maryland 1933, §3, *codified at* former Article 66B, §12 (1935 Supp.). The term "Mayor" was defined as the "chief executive of the political subdivision, whether the official designation of his office be Mayor, City Manager or otherwise." Former Article 66B, §10 (1935 Supp.). By explicitly including "City Manager" within the definition of "Mayor," the General Assembly intended the term to refer not only to an elected chief executive but also to an unelected chief executive. However, for purposes of appointments to the planning commission, the 1933 law required that the mayor make the regular appointments only if the mayor was an elected official. In the absence of such an official, the council was to decide how the appointments would be made.

The 1969 study commission did not recommend any substantial change in the appointment process for the planning commission. It merely suggested that either five or seven members be allowed; that the terms "single local elected executive" and "local legislative body" be substituted for the references to an elective mayor and council; and that in the absence of such an executive, the council be permitted to designate a person or persons, not an "officer," to make the appointments. The Commission recommended that vacancies be filled "by the local executive and confirmed by the local legislative body." *1969 Study Report* at 23. Although the term "single local elected executive" was not defined, the following definition of "local executive" was suggested:

"Local Executive" means the chief executive of the political subdivision whether the official designation of his office be

elected county executive or Executive Head, Mayor, City Manager, or similar term.

The Commission noted that the new term did not apply to the president of the board of county commissioners, thus suggesting that the term referred only to the official who effectively exercised the executive power of local government. *1969 Study Report* at 17-18. The retention of the reference to "City Manager" in the definition clearly meant that "local executive," like "Mayor," included unelected as well as elected chief executives.

In considering the bill that embodied the study commission's draft, Senate Bill 356, the General Assembly made only a few substantive changes in the appointment provision for the planning commission. The appointment of a member of the council was made optional, and vacancies were to be filled not by the local executive with confirmation by the local legislative body, but by the local legislative body or such persons as the local legislative body might designate by ordinance. Chapter 672, Laws of Maryland 1970 at 1889. In the same enactment, the General Assembly also amended the term "Local executive" to delete the reference to "City Manager." This reference may have been regarded as redundant in view of the remaining reference to "executive head." However, the more plausible explanation is that the Legislature wished to restrict this term to an elected official who effectively exercises the executive authority of local government. Although §3.02 was not amended to delete what would then be a redundant reference to "a single local elected executive" appointing the planning commission, this may well have been an oversight.

III

Application to Ocean City

With respect to appointments to the Ocean City Planning Commission, the question then becomes whether the Mayor is the "local executive" in the sense of an elected official who effectively exercises the executive authority of the municipality. Although the Mayor is elected by the voters, the City Charter expressly provides that, "The Council . . . shall hold all the legislative and except for the mayoral veto, all the executive powers of the town." Ocean City Charter §§C-401, C-413A and C-604.

Because the Mayor of Ocean City is not the "chief executive" within the meaning of Article 66B, §§1.00 and 3.02, there is no requirement in §3.02 that the Mayor appoint the members of the Planning Commission with the approval of the Council. In the absence of a "local executive," §3.02 merely requires that the members of the Planning Commission be appointed by the "local legislative body or by such person or persons as the local legislative body creating the commission in the ordinance may designate as the appointing power." As the Ocean City Charter refers to the Council as consisting of seven members and exercising all legislative power and makes no reference to the Mayor, the Mayor and Council would not constitute the "local legislative body" under §§1.00 and 3.02. However, §3.02 also permits the local legislative body to designate the appointing authority and this could certainly be the Mayor and Council, as is provided for in §14-2 of the Ocean City Code.

With respect to appointments to the Board of Appeals, §4.07 provides that "[t]hey shall be appointed by the local executive, [and] confirmed by the local legislative body." The 1933 law provided that this board is to be appointed "by the mayor [and] confirmed by the council." Chapter 599, Laws of Maryland 1933, §13, *codified at* former Article 66B, §22 (1935 Supp.). However, as already indicated, the term "local executive" now refers to an elected official who effectively exercises the executive authority of local government, and the Mayor of Ocean City does not hold a position of this type. Thus, §105-119 of the Ocean City Code, which provides for appointment by the Mayor and confirmation by the Council, is not in accord with §4.07. Although the 1969 study commission suggested that Article 66B needed to be revised to recognize that not all local governments have a traditional mayor and council form of government, the mere revision of the terminology in §4.07 did not accomplish this objective.

In circumstances such as these, where there is no "local executive" as contemplated by §4.07, evidently the local legislative body may exercise the broad authority under the introductory sentence of §4.07 "to provide for the appointment of a board of appeals." Thus, as applied to Ocean City, §4.07 sanctions the practice of the Mayor and Council making appointments to the Board of Appeals. However, it would be advisable to codify this practice in the city's ordinances.

IV

Conclusion

In summary, it is our opinion that State law permits the current

practice of the Mayor and Council of Ocean City in making appointments to the Planning Commission and to the Board of Appeals.

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

RICHARD E. ISRAEL, *Assistant Attorney General*

JACK SCHWARTZ

Chief Counsel

Opinions & Advice

MARYLAND STADIUM AUTHORITY

BASEBALL STADIUM—"LONG-TERM LEASE"—AGREEMENT BETWEEN
AUTHORITY AND BALTIMORE ORIOLES MEETS THE "LONG-TERM
LEASE" REQUIREMENT FOR ISSUANCE OF BONDS.

September 27, 1988

Herbert J. Belgrad, Esquire
Chairman, Maryland Stadium Authority

You have requested our opinion on whether the memorandum of agreement between the Maryland Stadium Authority and the Baltimore Orioles meets the requirement for a "long-term lease" set forth in §13-712.1(4)(i) of the Financial Institutions Article ("FI" Article).

For the reasons stated below, we conclude that the memorandum of agreement meets this statutory requirement.

I

Legislative Requirement for a "Long-Term Lease"

FI §13-712.1 sets out certain requirements that must be met for the Authority to be permitted to "close on the sale of bonds to finance any segment of the facility . . ."¹ One of these is that a "long-term lease" must have been secured with the Orioles before the Authority may issue bonds for a baseball stadium:

The Authority may not close on the sale of bonds to finance any segment of the facility unless the Authority:

...

(4) Has secured, as approved by the Board of Public Works, . . .:

¹ The term "facility" is defined in FI §13-701(c).

(i) With respect to site acquisition and the construction of a baseball stadium, a long-term lease for a major league professional baseball team.²

On May 5, 1988, the Board of Public Works approved the Memorandum of Agreement Between Maryland Stadium Authority and Baltimore Orioles, Inc. (the "Agreement"). See letters from James J. McGinty, Jr., Secretary of the Board to Herbert J. Belgrad, Chairman of the Authority (May 11 and May 17, 1988).

The Agreement provides that the Authority will construct and maintain a new baseball stadium at Camden Yards, which the Orioles will use. Agreement at 1. The Orioles promise to use the new stadium for 15 years after it is completed, and they have an option to use the stadium for an additional five years. Agreement ¶4. The Agreement also contains elaborate formulas for determining the rent to be paid by the Orioles. Agreement ¶¶10 and 10A.

The Agreement expressly recites that it is binding on the Orioles, regardless of any possible change in ownership: "This Agreement shall be binding upon the Orioles and its successors and assigns, including, but not limited to, assignees of the franchise as a consequence of a sale of assets or stock, merger, consolidation or other form of disposition, from the date hereof until the end of the term." Agreement ¶19. It also provides for binding arbitration on "[a]ll disputes regarding this Agreement" [¶25] and for each party's "right to seek the specific performance of this Agreement" [¶26].

The Agreement also contemplates a later, "more formal agreement which shall incorporate in greater detail all of the provisions of this Agreement . . ." [¶36] and which would elaborate on the following matters: liquidated damages in the event that the new stadium is not ready in a timely manner, ¶6; rental parity and resolution of schedule conflicts with a future football tenant, ¶¶10(d) and 24; insurance and indemnification requirements, ¶30; force majeure, ¶31; anti-discrimination clauses, ¶36; any necessary bond sale requirements, ¶36; and other customary provisions, "not inconsistent with the terms of [the] Agreement," ¶36.

² A long-term lease is not a prerequisite to the Authority's acquisition of property from revenue sources other than bonds. See FI §13-711(a); §7-312(e) of the State Finance and Procurement Article.

Paragraph 35 of the Agreement specifies the conditions that make the Agreement binding:

This Agreement shall become effective when (a) each party hereto has taken all board, stockholder and other action necessary to make this Agreement a binding, valid and enforceable obligation of such party, (b) all necessary approvals and consents to this Agreement have been obtained from all governmental, Major League and American League authorities, (c) a concessionaire has been selected and has entered into a binding Agreement (which may contemplate a further, more formal Agreement) with the Orioles containing the provisions set forth in Paragraph 13 hereof, and (d) the binding commitment pertaining to the Season Ticket Purchase Plan and Operating Guaranty has been received by the Orioles.

You have advised us that all of these events have occurred. Therefore, the Agreement is effective. The question, then, is whether the Agreement is the "long-term lease" required by FI §13-712.1(4)(i). In Part II below, we conclude that the Agreement is a "lease," as envisioned by the General Assembly. In Part III below, we conclude that it is "long-term."

II

Nature of a "Lease"

When the General Assembly used the term "lease" in FI §13-712.1(4)(i), it could not have meant to require that the Authority already be in possession of the land to be leased.³ The securing of a "long-term lease" is a prerequisite to the Authority's issuance of bonds to finance "site acquisition," and the General Assembly surely contemplated that one possible financing mechanism for acquiring land was the issuance of bonds. Department of Fiscal Services, *The Stadium Issue* at 15 (March 1987). Under those circumstances, the General Assembly could not have legislated a Catch-22, requiring the Authority to have already obtained land in order to issue bonds to finance the acquisition of that very land.

³ Generally, "to establish tenancy, it must be shown that the lessor had actual possession of the land and that the lessee was let into possession by him." 49 Am. Jur.2d *Landlord and Tenant* §14, at 58 (1970).

At the same time, the term "lease" connotes a legally binding contract creating a landlord-tenant relationship between the Authority and the Orioles, albeit one that will commence in the future. In our view, the Agreement is such a contract.

In the world of real estate development, parties often agree that one (the prospective lessor) will rent to the other (the prospective lessee) property that the prospective lessor does not yet own.⁴ Such a contract, typically called an agreement to lease, might well be necessary if the prospective lessor is to obtain the financing with which to buy the property.

A contract of this kind is enforceable through specific performance. *Motels of Md., Inc. v. Baltimore County*, 244 Md. 306, 314-16, 223 A.2d 609 (1966).

Moreover, once the Authority acquires title to the stadium site, the Agreement will be no different in its effect than if the Authority had title when it entered into the Agreement. As the Court of Appeals has held: "[W]here a lease of real estate is made by a person who has no present interest therein, but who acquires an interest during the term, the lease, by the doctrine of estoppel, will operate upon his estate as if vested at the time of its execution." *Columbian Carbon Co. v. Kight*, 207 Md. 203, 211, 114 A.2d 28 (1955).

The Agreement embodies the essentials of a lease. "A lease is, in shorthand, a contract for the possession of land or space on the one side, and a recompense of rental income on the other." *Progressive Ass'n v. Rose*, 235 Md. 169, 174, 201 A.2d 8 (1964). The Agreement recognizes a landlord and tenant relationship; it contemplates that the new stadium will be owned by the Authority and used, in part, by the Orioles for a determined rent and term.

In our view, the Agreement unquestionably reflects the parties' mutual intention to bind the Authority to build the new stadium for the Orioles at the site it will acquire, on the one hand, and to bind the Orioles to play there for 15 or more years for specified rent, on the other. Because the Agreement is by itself legally binding and will assure that the Orioles continue to play in Baltimore once the new stadium is built, it is the kind of "lease" meant by the General Assembly in FI §13-712.1(4)(i), even if it is technically an agreement to lease rather than the lease itself.

⁴ The practice is sufficiently common to merit a model in a form book. 11 Am. Jur. Legal Forms 2d *Leases of Real Property* §161:18 (1972).

III

Durational Requirement

In order to understand fully what the General Assembly intended by the phrase "long-term lease," we must examine other statutory provisions and relevant legislative history:

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. City of Baltimore, 309 Md. 505, 514-15, 525 A.2d 628 (1987). As the Court of Appeals recently summarized: "We look at the words of the statute in the context of their adoption and from that perspective determine the meaning of the language in a manner consistent with the goal the legislature was trying to achieve." *Carolina Freight Carriers v. Keane*, 311 Md. 335, 339, 534 A.2d 1337 (1988).

In light of these principles, we conclude that the General Assembly's purpose in enacting FI §13-712.1(4)(i) was to obtain a commitment from a major league professional baseball team to remain in Maryland for at least 15 years. The Agreement does exactly that.

During the 1986 Session, when the General Assembly was contemplating the bill to create the Authority, the owner of the Orioles wrote to the Governor expressing the Orioles' "willingness to enter into a long term arrangement for the use of" a new stadium. The General Assembly's acceptance of this goal is reflected in the following provision, added to the bill by amendment:

[T]his Act shall take effect July 1, 1986. It shall remain effective for 3 years and, at the end of June 30, 1989, if no long term lease with the corporation known as the Baltimore Orioles or a professional football franchise has been entered into with the Maryland Stadium Authority and approved by the Board of Public Works, that with no further action required by the General Assembly, this Act shall be abrogated and of no further force and effect. The Board of Public Works

shall determine what constitutes a long term lease for the purposes of this section.

Section 3, Chapter 283 (Senate Bill 297), Laws of Maryland 1986.

The General Assembly enacted FI §13-712.1 at the next session. Chapter 124 (Senate Bill 847), Laws of Maryland 1987. Its legislative history indicates that the General Assembly was aware that a 15-year commitment by the Orioles might be the nature of the desired "long-term" lease. On March 4, 1987, while testifying before the Senate Finance Committee on Senate Bill 847, the Orioles' owner stated his view that a "long-term" lease was between 15 and 30 years. *See* Senate Finance Committee Minutes, SB No. 847; Department of Fiscal Services, *The Stadium Issue* at 1 (March 1987).

The General Assembly did not define a "long-term lease" in either piece of legislation, however. Perhaps this omission was purposeful, in order not to limit the Authority's ability to negotiate successfully. In any event, the legislation empowers the Board of Public Works to decide what constitutes a "long-term lease" for the purpose of permitting the continued existence of the Authority. *See* Section 3 of Chapter 283, Laws of Maryland, 1986. The Board has exercised its discretion and has determined that the Agreement satisfies that undefined requirement, and its decision is entitled to considerable weight. *E.g.*, *Comptroller v. Rockhill, Inc.*, 205 Md. 226, 233, 107 A.2d 93 (1954).

IV

Conclusion

In summary, it is our opinion that the Memorandum of Agreement Between Maryland Stadium Authority and Baltimore Orioles, Inc. approved by the Board of Public Works on May 5, 1988, is the "long-term lease" required by FI §13-712.1(4)(i). Accordingly, the Authority may close on the sale of bonds to finance site acquisition and construction of a baseball stadium.

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

NORMAN E. PARKER, JR., *Assistant Attorney General*

JACK SCHWARTZ

Chief Counsel

Opinions & Advice

MARYLAND STADIUM AUTHORITY—FACILITIES FUND—STADIUM
AUTHORITY MAY USE FACILITIES FUND MONIES TO ACQUIRE
PROPERTY WITHOUT EFFECT ON BOND CEILING.

November 2, 1988

Herbert J. Belgrad, Chairman
Maryland Stadium Authority

You have requested our opinion on two questions:

1. Whether the Maryland Stadium Authority is authorized by §7-312(e)(3) of the State Finance and Procurement Article ("SF" Article) to use monies in the Maryland Stadium Facilities Fund to finance the acquisition of property in Camden Yards?

2. If so, whether the use of such "pay-go" monies reduces the \$235 million ceiling on "outstanding and unpaid" bonds established by §13-712(a)(1)(ii) of the Financial Institutions Article ("FI" Article)?

For the reasons stated below, we conclude that the Authority may use Facilities Fund monies to acquire property in Camden Yards and that the use of these "pay-go" funds does not reduce the bond ceiling.

I

Statutory Background

In Chapter 124 of the Laws of Maryland 1987, the General Assembly created an intricate public financing mechanism to fund the building of sports facilities for professional baseball and football at Camden Yards. *See Kelly v. Marylanders for Sports Sanity*, 310 Md. 437, 467, 530 A.2d 245 (1987). The legislation requires at least two, but not more than four, sports lotteries to be held for the benefit of the Maryland Stadium Authority. §9-120.1 of the State Government Article. Lottery proceeds are paid into the Maryland Stadium Facilities Fund created by SF §7-312. The Fund can also receive monies "from any source," including appropriations and transferred funds, and can be invested with earnings being retained in the Fund. SF §7-312(b) and (d). Under SF §7-312(e):

Monies credited to the Maryland Stadium Facilities Fund may be used, in accordance with approved comprehensive financing plans, to:

- (1) pay rent to the Maryland Stadium Authority;
- (2) with the approval of the Board of Public Works, make grants or loans, not exceeding \$1 million in any fiscal year, to the Authority for its corporate purposes;
- (3) with the approval of the Board of Public Works, finance capital construction in lieu of issuing bonds; or
- (4) financially support, through equity investment, loan, guarantee, or otherwise, full or partial private financing of any element of the facility.

The Fund can contain up to \$24 million, plus a sizable "debt service reserve fund." SF §7-312(f)(1). Although excess revenues are to be transferred to the State Reserve Fund, they can be recaptured by an appropriation or budget amendment approved by the Legislative Policy Committee. SF §7-312(f)(2).

This legislation enables the Authority to issue taxable or tax-exempt lease-backed revenue bonds with a term of up to 40 years, the debt service of which is to be financed primarily by annual lease payments to the Authority appropriated by the General Assembly. The sports lotteries, in turn, constitute the main source of revenues for the lease payment appropriation. *See Kelly*, 310 Md. at 445. The General Assembly contemplated that \$206 million in bonds might be issued in segments beginning in January 1988. 310 Md. at 473.¹ However, it gave the Authority discretion as to the timing of bond issues and significant leeway on the total amount and term of the issues. FI §13-712(a)(1)(ii) provides that:

Unless authorized by the General Assembly, the Board of Public Works may not give approval to an issuance of bonds if after issuance there would be outstanding and unpaid \$235 million face amount of bonds, whether taxable or tax exempt, for the purposes of financing site acquisition and preparation, relocation, demolition and removal, construction and related

¹ The General Assembly was also aware that the State had allocated \$200 million of its 1986-87 private activity bond cap under the federal 1986 Tax Reform Act ("TRA") for stadium bond issues. *See* Department of Fiscal Services, *The Stadium Issue* 13-14 (March 1987). In light of the TRA's cutback of the private activity bonds available in future years, this selection of the stadiums over other private activity bond projects and needs was necessary to insure the tax exempt status of \$200 million worth of stadium bonds. These bond allocations expire three years from the date they were made.

expenses for construction management, professional fees, and contingencies of baseball and football stadiums or a multiuse stadium.²

In the preamble to Chapter 124, the General Assembly "expressed a preference . . . to minimize the use of state lottery revenues." *Kelly*, 310 Md. at 467. However, as the Court of Appeals also noted, "this preference was not intended . . . to partially or totally inhibit or forestall public involvement where that course of action becomes essential." *Id.* In fact, although the bond issues contemplated for the project were keyed in some measure specifically to the anticipated cost of the facilities, the lottery revenues in the Facilities Fund were not.³

Finally, SF §7-312(e) authorizes the Authority to "finance capital construction in lieu of issuing bonds."⁴ As noted by the *Senate Budget and Taxation Committee*, this provision "would allow pay-go if there were sufficient revenues." Floor Report on Senate Bill 847, at 3. With a first bond issue being forecast for January 1988, the General Assembly probably did not expect that there would be sufficient revenues in the Fund immediately for purposes other than debt service. However, it did contemplate that at some point the Fund would be sufficient. *See The Stadium Issue* at 18 ("If revenues and expenditures accrue as projected, some portion of the fund could be used to offset a portion of the bond issue for the football stadium or to fund any 'call provisions' included in the bond issues, or to provide for a renovation reserve fund.")⁵

² The General Assembly placed other restrictions on the issuance of bonds, including requiring a long-term Oriole lease in connection with the baseball facility and the obtaining of an NFL franchise and a long-term lease in connection with the football facility. FI §13-712.1. *See 73 Opinions of the Attorney General* 270 (1988).

³ Under §9-120.1(a) of the State Government Article, the State Lottery Agency "shall conduct at least 2, but no more than 4, sports lotteries for the benefit of the Maryland Stadium Authority." The Senate committees considering Chapter 124 rejected a ceiling on lottery revenues: "One option is to cap the amount raised to \$18 million so as not to decrease general fund revenues from other State lotteries." *SB 847 Issues* (document in the files of the Senate Budget and Taxation Committee and Senate Finance Committee) (1987).

⁴ Facilities Fund monies were also authorized without limit to financially support private financing of the stadiums "through equity investment, loan, guarantee, or otherwise." SF §7-312(e)(4).

⁵ The Authority's consultants had noted the advantages of "pay-go." Peat Marwick, *Report on Phase 2*, at 39 (Feb. 2, 1987). At one time, they recommended "a combination of debt financing with some pay-as-you-go options." *The Stadium Issue* at 13.

II

Stadium Authority Financing Plan

The comprehensive financing plan of the Stadium Authority dated October 5, 1988, features a combination of "pay-go" and 30-year lease-backed revenue bonds. Under the plan, if only a baseball stadium is constructed, approximately \$153 million in bonds will be outstanding by the end of fiscal year 1990, and \$39 million of Facilities Fund monies will have been used for pay-go purposes. If both a football and baseball stadium are built, approximately \$217 million in bonds will be outstanding by December 1990, and \$62 million of Facilities Fund monies will have been used for pay-go purposes.⁶

III

Scope of "Pay-Go" Authority

In our opinion, SF §7-312(e)(3), viewed in context and in light of the purposes of the stadium legislation, does not preclude use of Facilities Fund monies to finance the acquisition of property in Camden Yards as well as stadium construction.

⁶ Under FI §13-712(a)(1)(ii)2, the Authority is subject to certain caps on bonds for aspects of the overall stadium project:

"A. \$85 million in bonds for the purposes of site acquisition and preparation, relocation, demolition and removal at, and construction and related expenses for construction management, professional fees, and contingencies for Camden Yards;

B. \$70 million in bonds for the purposes of site work, construction and related expenses for construction management, professional fees, and contingencies of a baseball stadium;

C. \$80 million in bonds for the purposes of site work, construction and related expenses for construction management, professionals fees, and contingencies of a football stadium, and an additional \$15 million in bonds if a football stadium is constructed prior to a baseball stadium in which case the \$70 million in bonds for a baseball stadium is reduced to \$55 million; and

D. \$195 million in bonds for the purposes of the site acquisition and preparation, relocation, demolition and removal, construction and related expenses for construction management, professional fees, and contingencies of multiuse stadium."

To exceed these limits, "the Authority shall obtain the authorization of the Board of Public Works and notify the Legislative Policy Committee with accompanying justification."

We begin, as we must, with the pertinent statutory language. *NCR Corp. v. Comptroller*, 313 Md. 118, 124, 544 A.2d 764 (1988). SF §7-312(e)(3) authorizes pay-go financing of “capital construction” — a term used only infrequently in the Maryland Code and in no other place in the stadium legislation.

The term’s use elsewhere in the Code does help clarify the intended reach of the term, however. Article 25, §§233, 234 and 235 authorize Harford, St. Mary’s, and Calvert Counties to borrow money for the “capital construction costs” of library buildings. The provision for Harford County, §233, is the model:

The Board of County Commissioners of Harford County may borrow funds for paying part or all of the capital construction costs of public library buildings in Harford County; and they may issue bonds, notes, or other evidence of indebtedness for the repayment of any such borrowed funds, and may levy for payments of principal and of interest on these evidences of indebtedness.

This legislation was meant to provide the financial means by which new libraries might be built in the county. It seems most unlikely that this broad grant of borrowing authority could only be exercised to build needed libraries on land already owned by the county. Rather, we believe that “capital construction” was the term chosen to describe all of the costs associated with building a library — including land acquisition costs. And, indeed, we understand that on two occasions bond proceeds under §233 have been used to purchase land.

SF §2-105 also uses the term “capital construction”:

On or before January 10 of each year, each unit of the State government, including the University of Maryland System, that is using nonbudgeted or dedicated funds for a capital construction project shall submit to the Joint Budget and Audit Committee a detailed report on the use of those funds.

We are confident that here, too, the General Assembly meant to include land acquisition for a building within “capital construction” project costs and, we understand, SF §2-105 has always been so applied.⁷

⁷ See also *Wright v. City of Palmer*, 468 P.2d 326, 329-30 (Alaska 1970) (term “capital improvement” includes land acquisition for purposes of a building).

This interpretation of the term “capital construction” — that it includes all elements reasonably related to the erection of a stadium — is best-suited to accomplishing the legislative purpose.⁸ “Our endeavor always is to construe a statute so as to implement the legislative goal, not to frustrate it.” *NCR Corp.*, 313 Md. at 146. *See generally Kaczorowski v. City of Baltimore*, 309 Md. 505, 514, 525 A.2d 628 (1987). There is evidence in both the text of the 1987 stadium legislation and its legislative history that the General Assembly viewed site acquisition as an integral phase of the stadium capital construction project. For example, key portions of the title and preamble of Chapter 122 of the Laws of Maryland 1987 refer to the General Assembly’s approval of “a facility site” at Camden Yards, while the body of the bill approves both the acquisition *and* construction. The preamble to Chapter 124 encourages financing of “construction” with private investment, while SF §7-312(e)(4) authorizes the Stadium Authority to support private funding of “any element of the facility.” Most importantly, there is a significant overlap between acquisition and construction in the legislative descriptions of particular bond issues. For example, the bond issue described in *The Stadium Issue*, at page 7, as being for “site acquisition” actually includes certain construction expenses. *See* FI §13-712(a)(1)(ii)2.A.⁹

Critical in our view is the fact that pay-go authority was viewed by both the General Assembly and the stadium’s consultants as a desirable mechanism to diminish reliance on financing solely by issuing bonds — bonds that were authorized for all segments of the stadium project, including both construction and site acquisition.¹⁰ In fact, we

⁸ In our view, the term “capital construction” in this context is broader than the term “construction” might be in a wholly different statutory setting. *Cf. Demory Brothers, Inc. v. Board of Public Works*, 273 Md. 320, 329 A.2d 674 (1974). In *Demory*, the Court of Appeals concluded that the words “construction costs” in the State’s Prevailing Wage Law applied to the costs of the improvements located on a site but not to the costs of land acquisition. However, the language and purpose of that statute left little doubt that the legislative intent was to cover only structural costs.

⁹ It is true that when the Legislature wanted to differentiate between the two, *e.g.* for purposes of emphasizing that a long-term Orioles lease or an NFL franchise was a precondition to the issuance of bonds for any phase of the project, it clearly did so. *See* FI §13-712.(4). However, in other parts of the statute, the line between the two is less clear.

¹⁰ In *Kelly*, the Court noted that the site acquisition and financing bills in the stadium package were intended as “a unitary solution to [a] singular objective.” 310 Md. at 473. The Court specifically noted that site selection, site acquisition, and funding the project over a 30-year period would “accomplish the end result of stadium construction.” *Id.*

can conceive of no reason why the General Assembly would have prohibited the Stadium Authority from using pay-go at the acquisition stage and sanctioning it only for construction activities.¹¹ In short, when the term "capital construction" is placed in its context and SF §7-312(e)(3) is reasonably construed in light of its purpose, we conclude that this provision enables the Stadium Authority to use the Facilities Fund to finance land acquisition as well as construction.

IV

Impact of the Bond Ceiling

At present, the question of whether the Authority may use pay-go monies and also have a full \$235 million in bonds outstanding is decidedly hypothetical. The Stadium Authority has not yet secured an NFL franchise — a precondition to issuing bonds for the football stadium. FI §13-712.1(4)(ii). Even if it had, under the Authority's present plans the amount of outstanding bonds and anticipated use of pay-go monies would not exceed \$235 million until fiscal year 1991. See Part II above. Moreover, if only a baseball stadium is built, direct expenditure of Facilities Fund dollars and anticipated bond issues would never approach \$235 million. However, because the Authority must be prepared for any eventuality and must necessarily engage in long-term financial planning, we will address the issue.

The 1987 stadium legislation does not contain an express ceiling on either Facilities Fund expenditures or lottery revenues; nor does it have within it a specific mechanism for the deduction of bond issuances or authorizations from the \$235 million bond cap. The question we must decide is whether the statute that authorizes pay-go "in lieu of issuing bonds" impliedly mandates a reduction of the \$235 million bond cap for each pay-go dollar expended on capital construction. In our opinion, it does not.

¹¹ Because a bond issue was scheduled for January 1988, the General Assembly may have believed that there would be insufficient revenues in the Facilities Fund for site acquisition. However, even though the Legislature timed the stadium project "for immediate implementation," *Kelly*, 310 Md. at 473, it nevertheless intended a provision such as SF §7-312(e)(3) "to be capable of encompassing circumstances and situations which did not exist at the time of its enactment." *Kindley v. Governor of Maryland*, 289 Md. 620, 625, 426 A.2d 908 (1981).

By its express terms, the \$235 million cap imposed by FI §13-712(a)(1)(ii) is a ceiling only on the face amount of bonds outstanding and unpaid at any given time. It is not a cap on the total cost of the project; indeed, it always has been clear that debt service will take the total cost well beyond \$235 million. Neither does the cap limit the total amount of bonds that may be issued for the project. So long as less than \$235 million is outstanding and unpaid at any given time, total bond issuances may exceed \$235 million. The cap, therefore, is merely a limit on outstanding debt principal at any given time. Its sole apparent function is to prevent the stadium project from adversely affecting the State's triple-A bond rating.

In the light of the bond cap's limited purpose and function, the use of the words "in lieu of" in SF §7-312(e)(3) cannot reasonably be construed to reflect a legislative intention that the bond cap be reduced to the extent that Facilities Fund pay-go, instead of bond proceeds, are used to fund the project. The two have entirely different functions. Unlike the bond cap, the pay-go authorization reaches well beyond the amount of debt principal outstanding at any given time. Its function is to reduce the overall cost of the project by eliminating the cost of debt. To condition the use of pay-go upon a corresponding reduction in the bond cap would be to transform the cap from a limit on outstanding debt principal into a limit on total project cost, while at the same time creating an economically perverse disincentive for the use of Facilities Fund pay-go.¹² Only if the bond cap were a cap on total project cost would the pay-go authorization affect the cap. The language of the cap demonstrates conclusively that the cap is not a cap on total project cost; therefore, the cap is not reduced by the use of Facilities Fund pay-go. "We look at the words of the statute in the context of their adoption and from that perspective determine the meaning of the language in a manner consistent with the goal the legislature was trying to achieve." *Carolina Freight Carriers v. Keane*, 311 Md. 335, 339, 534 A.2d 1337 (1988).

Consequently, in our opinion, it is within the discretion of the Stadium Authority, with the approval of the Board of Public Works,

¹² It is quite possible that expenditure of pay-go monies plus bond issues — all in excess of \$235 million — would still bring the State greater savings than years of debt financing at \$17 million per annum. For instance, the Authority has the power to issue 40-year bonds, rather than the 30-year bonds presently planned. See FI §13-712. Use of pay-go monies now could avoid resort to an additional 10 years of debt financing. Moreover, because FI §13-712(a)(1)(ii) is only a limit on the amount of bonds outstanding at any one time, the cap could be avoided by the simple device of using pay-go monies to retire old bonds, then initiating new debt.

to use Facilities Fund monies instead of bond proceeds to finance, in whole or in part, capital construction. And because bond proceeds in excess of \$235 million may be used to finance capital construction so long as the face value of the bonds that are outstanding and unpaid is less than \$235 million, it necessarily follows that a combination of bond proceeds and Facilities Fund monies in excess of \$235 million also may be used to finance capital construction, so long as the face value of the bonds that are outstanding and unpaid is less than \$235 million.

To summarize, when the General Assembly authorized the Authority's use of lottery revenues "in lieu of issuing bonds" to finance the stadium project, it meant to provide an additional financing tool. At any stage of the project, the Authority may use bonds exclusively. But if the Authority finds that the use of lottery funds "in lieu of" exclusive reliance on bonds is financially advantageous, it (with approval of the Board of Public Works) may use that combined financing instead. The statutory authorization to use monies credited to the Facilities Fund "to finance capital construction . . . in lieu of issuing bonds" simply means that lottery revenues may be used in lieu of using bond proceeds alone to finance the entire cost of capital construction.

V

Conclusion

In summary, it is our opinion that SF §7-312(e)(3) permits the Stadium Authority to use Facilities Fund monies to finance acquisition of property in Camden Yards, and these sums need not be subtracted from the \$235 million bond ceiling established by FI §13-712(a)(1)(ii).

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PERSONNEL

DEPARTMENT OF TRANSPORTATION — INDEPENDENT SALARY-SETTING
AUTHORITY

October 12, 1988

The Honorable Richard H. Trainor
Secretary of Transportation

You have requested our opinion on the meaning and scope of the various statutory provisions that affect the salary-setting authority of the Maryland Department of Transportation ("MDOT") and other specific transportation agencies. You have also asked, in particular, about the authority to fix the salary of the Deputy Secretary of Transportation, the Assistant Secretaries of Transportation, and the "administrators and deputy administrators" of the Maryland Transportation Authority, Maryland Port Administration, Mass Transit Administration, and State Highway Administration.

For the reasons stated below, we conclude as follows:

1. The Maryland Transportation Authority, Mass Transit Administration, State Highway Administration, and Maryland Port Commission and Port Administration have independent authority to hire and set the compensation of their employees.
2. The Secretary of Transportation has independent authority to hire staff assistants and professional consultants throughout MDOT but does not have independent authority to set their compensation.
3. All other units of MDOT must hire their employees in accordance with the State Merit System Law and compensate them in accordance with the pay plan developed by the Secretary of Personnel.
4. Of the particular officials identified in your request, the following have their salaries set by the General Assembly in the budget: the Deputy Secretary of Transportation; the administrators of the Mass Transit Administration and State Highway Administration; and the Executive Director of the Maryland Port Administration. The following have their salaries set independently: the administrators and deputy administrators of the Maryland Transportation Authority; and the deputy administrators of the Mass Transit Administration and the Maryland Port Administration. The Assistant Secretaries of Transportation have salaries determined by the Secretary of

Personnel in the annual pay plan. In Fiscal Year 1989, certain of these positions are subject to a salary cap in the budget bill.

I

Background

All State employees are classified employees, unless a provision of law excludes a particular group of employees. Article 64A, §1 of the Maryland Code provides that “[t]he classified service means and includes all offices of profit or trust and all places of employment, whether permanent or temporary, in the service of any State officer, department, commission, board or institution, other than those in the military forces . . .,” subject to certain statutory exclusions.¹

In addition to positions in the “classified service,” State employment includes a number of positions that are not “classified,” within the meaning of the Merit System Law, but nevertheless are subject to many provisions of Article 64A (for instance, those governing leave, benefits, and grievance rights). *See, e.g.*, Article 64A, §37. This opinion will use the term “unclassified” to describe these positions.²

Additionally, some positions of State employment are wholly outside of the provisions of the Merit System Law. *See 61 Opinions of the Attorney General* 596 (1971) (Maryland Wholesale Food Center Authority). For purposes of this opinion, State employees who are not subject to the provisions of Article 64A are referred to as “independent” employees.

With respect to both classified and unclassified positions, the Secretary of Personnel prepares a pay plan in which she recommends salaries to the Governor for all classes of employees. The pay plan becomes effective “when funds for that purpose are available within the budget.” Article 64A, §27(d) (as amended by Chapter 543, Laws of Maryland 1988). The pay plan may be amended by the Secretary of Personnel, with the approval of the Governor, “to recruit or retain

¹ An early, thorough account of the scope of the classified service may be found in 24 *Opinions of the Attorney General* 547 (1939).

² An issue concerning criteria that exclude certain positions from the classified service is currently pending before the Court of Appeals. *State Election Bd. v. Billhimer*, 72 Md. App. 578 (1987), *cert. granted* 311 Md. 698 (1988).

competent personnel or to ensure that compensation rates adequately compensate the skills, knowledge, effort, responsibility, and working conditions.” *Id.*

Apart from these generally applicable personnel statutes, several provisions in the Transportation Article (“TR” Article) specifically address personnel or compensation. Part II of this opinion reviews the effect of these provisions.³

II

Scope of Independent Salary-Setting Authority

A. *Maryland Transportation Authority* (“MdTA”)

TR §4-205, which delineates the general powers of the MdTA, contains the following grant of authority:

(1) Subject to paragraph (2) of this subsection, the Authority may employ and fix the compensation of attorneys, consulting engineers, accountants, construction and financial experts, superintendents, managers, and any other agents and employees that it considers necessary to exercise its powers and perform its duties.

(2) The expense of employing these persons may be paid only from revenues or from the proceeds of revenue bonds issued by the Authority.

TR §4-205(d).

³ The Motor Vehicle Administration (“MVA”) has authority to employ “the deputies, subordinate officers, clerks, investigators and other employees necessary to carry out the powers and duties of the Administration.” TR §12-104(d)(1). MVA’s employees are statutorily specified to be within the State Merit System:

“Except as otherwise provided by law, each deputy, officer, and employee of [MVA]:

(i) Is employed under the State Merit System Law; and

(ii) Is entitled to the salary provided in the pay plan established under Article 64A, § 27 of the Code.”

TR §12-104(d)(2).

No specific statutory provisions address the personnel or salaries of the State Aviation Administration or the State Railroad Administration.

In a 1984 opinion, the Attorney General concluded that MdTA has “the power to establish a personnel system, including classification and compensation, that is independent of the State Merit System.” Opinion No. 84-012 (February 27, 1984) (unpublished). This conclusion is consistent with the Attorney General’s prior construction of similar statutory language applicable to the Maryland Wholesale Food Center Authority. *See* 61 *Opinions of the Attorney General* 596 (1976). In that opinion, the pertinent language was interpreted to mean that employees of the Food Center Authority were independent employees, subject to none of the provisions of Article 64A.

The interpretation of TR §4-205(d) contained in the 1984 opinion comports with the provision’s broad language, and the General Assembly has not changed this language since the opinion. This interpretation is also consistent with current practice, sanctioned by the Department of Personnel. Accordingly, we conclude that the MdTA has power to hire and fix the compensation of its employees, subject to the financial limitation imposed by TR §4-205(d)(2) but independent of the Merit System Law.⁴

B. *Mass Transit Administration (“MTA”)*

TR §7-206 gives the MTA broad power to establish its own personnel system independent of the State Merit System:

(a) Without regard to the laws of this State relating to other State employees, the [Mass Transit] Administration may:

(1) Create and abolish any position other than one specifically provided for in this title; and

(2) Determine the qualification, appointment, removal, term, tenure, and compensation of its employees.^[5]

(b) (1) The Administration may establish a personnel system based on merit and fitness.

⁴ We understand that the MdTA recently instituted a new personnel system applicable to MdTA toll collectors, toll facilities police, and management staff.

⁵ TR §7-202(c) provides that the MTA Administrator, who is appointed by the Secretary with the approval of the Governor, “is entitled to the salary provided in the State budget.”

The MTA has in fact established a personnel system independent of the State Merit System: employment criteria, hiring and firing decisions, holidays, and compensation are all determined in accordance with the MTA's personnel system rather than the State Merit System. This comports with the clear and unambiguous grant of personnel authority to the MTA contained in TR §7-206(a).

C. *State Highway Administration ("SHA")*

The SHA also has specific statutory authority over employment matters:

The Administration may employ and fix the compensation of engineers, accountants, professional and technical experts, surveyors, skilled and unskilled laborers, advisors, consultants and any other agents and employees that it considers necessary to carry out its powers and duties.

TR §8-204(e)(1).

This description of the SHA's personnel authority closely corresponds to the statutory language used in TR §4-205(d)(1) to delineate the MdTA's personnel powers, and we adopt a similar construction here.⁶ The SHA's grant of authority to employ all necessary personnel does not contain the limitation that such hiring must be pursuant to the State Merit System. The SHA also has express authority to fix compensation.⁷

D. *Maryland Port Commission ("MPC") and Administration ("MPA")*

The newly created Maryland Port Commission has express authority to establish an independent employment system:

⁶ In the legislation that created MDOT and its modal administrations as well as the MdTA, the General Assembly made specific references to the applicability of the State Merit System for all statutorily created subunits of MDOT except for the SHA. The same legislation established the MdTA as an independent State transportation entity. The legislation was silent on the applicability of the Merit System to the MdTA and SHA. Chapter 526, Laws of Maryland 1970.

⁷ TR §8-202(c) provides that the SHA Administrator, who is appointed by the Secretary with the approval of the Governor, "is entitled to the salary provided in the State budget."

(1) Notwithstanding any other provision of law relating to any other State employees, the Commission may adopt regulations to govern the personnel of the [Maryland Port] Administration....

...

(3) In carrying out the requirements of this subsection, the Commission may:

(i) Create or abolish any position other than one specifically provided for in this title;

(ii) Determine employee qualifications, appointment and removal procedures, terms of employment including compensation, benefits, holiday schedules, and leave policies, and any other matter concerning employees.

TR §6-201.2(a) (as enacted by Chapter 541, Laws of Maryland 1988).⁸ As is true of the MdTA, MTA, and SHA, the express power to “[d]etermine ... compensation” means that the MPC is empowered to do so independently of the pay determination procedures of Article 64A.⁹

E. *The Secretary's Office*

With respect to the Office of the Secretary of Transportation, TR §2-102(d) provides:

The Secretary [of Transportation] may have in the Department the staff assistants, professional consultants, and employees provided in the State budget. Each staff assistant in charge of an area of responsibility and each professional consultant shall be appointed by and serves at the pleasure of the Secretary. Unless otherwise provided by law, the

⁸ Under prior law, except for certain “key personnel,” full-time employees of the MPA were generally subject to the Merit System Law. Former TR §6-204(m)(2). Chapter 541 contains transitional provisions affecting MPA employees now in the Merit System. TR §6-201.2(b).

⁹ Under TR §6-203(b)(3), the MPA Executive Director, who is appointed by the Chairman of the MPC with the approval of the Governor, “is entitled to the salary provided in the State budget.”

Secretary shall appoint and remove all other personnel in accordance with the provisions of the State Merit System Law. The Secretary may delegate his authority to appoint and remove personnel of any unit to the head of that unit.¹⁰

The meaning of the “staff assistant” exception was discussed extensively in the trial court’s opinion and order in *Bender v. Bosz*, Case No. A 54296/A-455/1974 (Cir. Ct. for Balto. City, March 8, 1979). The Circuit Court held that, in order to preserve the overall strength of the State Merit System, as well as to provide some limitation on the scope of the exception provided by TR 2-102(d), the “staff assistant” exception is limited to MDOT employees who are in charge of an area of responsibility *and* who report directly to the Secretary of Transportation. Although the trial court’s decision in *Bender* was later reversed on a procedural point, *Bender v. Bosz*, 290 Md. 345, 430 A.2d 66 (1980), Judge Greenfeld’s analysis of the “staff assistant” exception remains persuasive. The best interpretation of the statutory language is that staff assistants are unclassified but not independent and that MDOT has no independent salary-setting authority for these positions.

With respect to the “professional consultant” exception, there is no reason to construe this in other than the normal meaning of that phrase. The employment of consultants from time to time to provide professional expertise to MDOT would not be governed by the State Merit System Law.

III

Procedures for Exercise of Independent Salary-Setting Authority

The pay plan prepared by the Secretary of Personnel includes “all classified and unclassified positions for which the Secretary has authority to administer pay. . . .” Article 64A, §27(a). Thus, the salary of an MDOT “staff assistant would be included in the pay plan, because the staff assistant position, though unclassified, is one “for which the Secretary [of personnel] has authority to administer pay.” See Part II.E above. Article 64A, §27(a) sets out the procedure for amending the pay plan to accomplish a salary increase, if funds are available in the budget for that purpose.

¹⁰ TR §2-102(c)(3) provides that the Deputy Secretary of Transportation, who is appointed by the Secretary with the approval of the Governor, “is entitled to the salary provided in the State budget.”

For the reasons stated in Part II, however, the Secretary of Personnel does not have authority to administer the pay of MdTA, MTA, SHA, and MPC/MPA employees. These entities may determine base salaries and grant raises pursuant to their own procedures — subject, of course, to any applicable statutory or budgetary restrictions. For instance, if an entity requires a budget amendment to effectuate a raise, it must follow the procedures in §7-209 of the State Finance and Procurement Article. *See also* Part IV below.

IV

The FY 1989 Salary Cap

In 73 *Opinions of the Attorney General* 43 (1988), we discussed in detail a budget restriction that sets a dollar amount cap on the salaries of various middle and senior management positions for FY 1989. We concluded that this salary cap “is a proper exercise of the General Assembly’s constitutional power to condition or limit appropriations.” The restriction, we observed, applied to both the salary adjustment appropriation in which the restriction is set out and the appropriations to the various Executive Branch agencies. “However,” the opinion continued, “the restriction does not prohibit the Board of Public Works from paying, out of the General Emergency Fund, an amount that would bring a manager’s effective income above the cap, if the Board concluded that unanticipated and exigent circumstances justify the payment.” 73 *Opinions of the Attorney General* at 43.

The cap applies to a number of the positions that you inquired about, including Deputy Secretary and Assistant Secretary of Transportation, Highway Administrator and Deputy Highway Administrator, and Mass Transit Administrator.¹¹ If the salary of a position subject to the cap is paid from appropriated funds, the restriction prevents a raise above the cap (except by the Board of Public Works from the General Emergency Fund), even if the entity has

¹¹ The budget restriction also includes five positions at the MPA. After the Budget Bill for FY 1989 became law, the General Assembly enacted Chapter 541 of the Laws of Maryland 1988, creating the MPC and giving it independent salary-setting authority. Pending further analysis of the relationship between the two measures, we reach no conclusion about the applicability of the cap to these MPA positions.

independent salary-setting authority.¹² “Independent salary-setting authority” is shorthand for the several provisions, discussed in Part II above, that authorize the head of a transportation entity instead of the Secretary of Personnel to set compensation. Such authority is *not* independent of the General Assembly’s power to limit or condition the appropriations needed to fund salaries at these entities. See generally 73 *Opinions of the Attorney General* at 48-50.¹³

V

Conclusion

In summary, it is our opinion that:

1. The Maryland Transportation Authority, Mass Transit Administration, State Highway Administration, and Maryland Port Commission and Port Administration have independent authority to hire and set the compensation of their employees.

2. The Secretary of Transportation has independent authority to hire staff assistants and professional consultants throughout MDOT but does not have independent authority to set their compensation.

3. All other units of MDOT must hire their employees in accordance with the State Merit System Law and compensate them in accordance with the pay plan developed by the Secretary of Personnel.

4. Of the particular officials identified in your request, the following have their salaries set by the General Assembly in the budget: the Deputy Secretary of Transportation; the administrators of the Mass Transit Administration and State Highway Administration; and the Executive Director of the Maryland Port Administration. The following have their salaries set independently: the administrators and deputy administrators of the Maryland Transportation Authority; and the deputy administrators of the Mass Transit Administration and the Maryland Port Administration. The Assistant Secretaries of

¹² If the salary of a position is not paid with appropriated funds, however, this restriction would not be legally effective. A restriction must be “directly related to the expenditure of the sum appropriated . . .” *Bayne v. Secretary of State*, 293 Md. 560, 564, 392 A.2d 67 (1978).

¹³ The budget restriction does not affect “bona fide promotions, reclassifications, or new positions authorized by law.” 73 *Opinions of the Attorney General* at 43 n.1.

Transportation have salaries determined by the Secretary of Personnel in the annual pay plan. In Fiscal Year 1989, certain of these positions are subject to a salary cap in the budget bill.

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

JACK SCHWARTZ, *Chief Counsel*
Opinions & Advice

ELENA LANGRILL, *Assistant Attorney General*

PORT ADMINISTRATION

OPERATION OF PORT FACILITIES—COLLECTIVE BARGAINING—CREATION OF
SEPARATE CORPORATE ENTITY.

November 7, 1988

The Honorable Eileen M. Rehrmann
Maryland House of Delegates

You have requested an opinion on the scope of the powers of the Maryland Port Commission and the Maryland Port Administration ("MPA"). Specifically, you ask whether, under present law, the MPA may (i) directly operate port facilities and, in that connection, employ and engage in collective bargaining with unionized labor; or (ii) establish a separate corporate entity to operate port facilities and to employ and engage in collective bargaining with unionized labor.

For the reasons given below, we conclude that the MPA may directly operate supplementary port facilities if private operation is inadequate and the public interest requires operation by the MPA. In general, the MPA may employ unionized labor and consult with its employees in determining the terms and conditions of their employment; however, the MPA may not engage in collective bargaining unless (i) it is required to operate a port facility and (ii) it cannot do so without engaging in collective bargaining. We also conclude that the MPA cannot confer on a separate entity any broader powers than the MPA itself has; therefore, any separate entity established by the MPA would be unable to perform any acts that the MPA may not perform directly.¹

¹ A previous letter of advice conveyed essentially the same conclusions to you. Letter from Assistant Attorney General Donald A. Krach to Delegate Eileen M. Rehrmann (October 6, 1988).

I

Background

The Maryland Port Authority, the predecessor of the MPA, was created in 1956 to improve the facilities and promote the use of the ports of Maryland, in recognition that “[a]ny improvement to those ports and harbors which increase their export and import commerce will benefit the people of the entire State of Maryland.” Chapter 2, Laws of Maryland 1956, sec. 1 (Spec. Sess.) (enacting former Article 62B, §1(a)). Thus, the legislative goal in creating a port agency was to improve the competitive position of the ports of Maryland in relation to other nearby ports in order “to increase the water-borne commerce of the ports in the State, and thereby to benefit the people of the State of Maryland.” *Id.* (enacting former Article 62B, §1(c)). That goal is still the underlying purpose of the MPA, as reflected in §6-102 of the Transportation Article (“TR” Article).

In 1987 the Governor established a Special Committee on the Port of Baltimore, noting that most of the competition in the port industry “is posed by port agencies that operate as private corporations or as quasi-public organizations” and that the General Assembly “has questioned the ability of the Maryland Port Administration to compete successfully against other port agencies while operating as a public agency” Executive Order 01.01.1987.16, 14:16 Md. R. 1751 (July 31, 1987).

The Special Committee similarly concluded that, as a State agency subject to State budget, procurement, and personnel regulations, the MPA was at a competitive disadvantage because it lacked the flexibility of port agencies that operate as private or quasi-public organizations. Report of Special Committee on the Port of Baltimore at 2 (October 30, 1987) (“Special Committee Report”). To address those concerns, while retaining the advantages that the MPA derives from its status as a State agency, the Special Committee recommended that a Maryland Port Commission be created as the policymaking body of the MPA and that the MPA be granted greater flexibility in making substantial expenditures from an operating contingency fund and be authorized to establish its own personnel system and its own procurement procedures. Special Committee Report at 10-11. Those proposals were enacted by Chapter 541 of the Laws of Maryland 1988.

In that Act, the General Assembly explicitly recognized that “[t]he maritime industry has become increasingly competitive due to deregulation on the federal level” and expressed its intent to increase

the MPA's efficiency and effectiveness "to further strengthen and enhance the statewide resources of the ports of Maryland and their resulting economic benefit for all of the citizens of Maryland" Chapter 541, Laws of Maryland 1988, Preamble.

II

Power of MPA to Operate Facilities

Agencies of the State, being creatures of statute, have only those powers expressly given to them by the General Assembly and those implied powers inherently necessary to carry out their express powers. *Holy Cross Hospital of Silver Spring v. Health Services Cost Review Commission*, 283 Md. 677, 683, 393 A.2d 181 (1983); *Huffman v. State Roads Commission*, 152 Md. 566, 137 A.2d 358 (1927). Therefore, the MPA may operate port facilities only if the statute under which it functions expressly gives it power to do so or if direct operation of port facilities is essential to carry out the MPA's function.

At present, the MPA acts as the landlord of State-owned port facilities. That is, those facilities are leased to private businesses and are operated by those businesses, rather than by the MPA.

However, TR §6-204(i) includes among the MPA's general powers authority to "acquire, construct, reconstruct, rehabilitate, improve, maintain, lease as lessor or as lessee, repair, and *operate* port facilities within its territorial jurisdiction" Thus, it is clear that the MPA has power to operate port facilities. Nonetheless, we do not believe that this provision can be regarded as an authorization for the MPA to operate port facilities under all circumstances.

The scope of TR §6-204(i) must be determined by reading it in conjunction with the statement of legislative intent in TR §6-102. See *Blumenthal v. Clerk of Circuit Court for Anne Arundel County*, 278 Md. 398, 403, 365 A.2d 55 (1976) (all provisions constituting general statutory scheme must be read together to ascertain legislative intent). TR §6-102(d)(1) states that, "[s]ince existing port and terminal facilities of Baltimore and other port areas have been provided mostly by private enterprise, the General Assembly seeks primarily to improve the facilities and strengthen the workings of the private operators." The General Assembly has thus clearly indicated that it did not intend the MPA to completely displace private enterprise in the operation of port facilities. TR §6-102(d)(2) more particularly specifies the purpose for which the MPA has been given authority

to operate facilities and the circumstances under which the exercise of that authority is contemplated:

However, the private operators in the port areas have a public responsibility to provide modern port and harbor facilities suited to the needs of the public that they serve. Therefore, . . . while [the MPA] should assist and encourage the extension and improvement of privately operated port facilities, it also should have the power, if private facilities are inadequate or inadequately operated at any time, to construct, and if necessary, to operate any supplementary public facilities that it considers to be required in the public interest.

"[W]here a statute authorizes or permits a person or agency to take a certain type of action in a particular manner, such manner becomes a mandatory limitation, and the action must be taken in conformity with it." *Office and Professional Employees International Union v. Mass Transit Administration*, 295 Md. 88, 96, 453 A.2d 1191 (1982). Accordingly, the power granted to the MPA to operate supplementary port facilities may be exercised only if the MPA concludes that private operation of those supplementary facilities is inadequate and the public interest requires their operation by the MPA.²

III

Power of MPA to Engage in Collective Bargaining

A. General Principles

In general, "absent express legislative authority, a government agency cannot enter into binding arbitration or binding collective bargaining agreements establishing wages, hours, pension rights, or working conditions for public employees." *Office and Professional Employees*, 295 Md. at 97. To the extent that the terms and conditions of employment are covered by statutes or regulations, they cannot be altered by agreement between the agency and its employees;

² If the MPA constructed a facility, it may also, "if necessary, operate these facilities . . . if the immediate financial returns are not sufficient to attract private capital." TR §6-102(e). Of course, the General Assembly may amend the statute to authorize the MPA to operate port facilities under other circumstances. Cf. TR §7-501 (Mass Transit Administration may operate transit facilities under its control). Whether the statute should be amended in that way is a policy question that we cannot address.

to the extent that those matters are left to the discretion of the agency, that discretion cannot be delegated or abdicated to another entity: "Any exercise of such discretion by the establishment of hours, wages or working conditions is at all times subject to change or revocation in the exercise of the same discretion." *Mugford v. City of Baltimore*, 185 Md. 266, 270, 44 A.2d 745 (1945) (dicta).³ See also 59 *Opinions of the Attorney General* 578, 583-84 (1974) (Police Commissioner of Baltimore City cannot enter into binding commitment regarding terms and conditions of employment.) Cf. 65 *Opinions of the Attorney General* 136 (1980) (charter county may adopt ordinance permitting or requiring collective bargaining that does not require adherence to terms of agreement or arbitrator's decision).

B. MPA's Personnel Powers

In Chapter 541 of the Laws of Maryland 1988, the General Assembly conferred upon the MPA broad discretion to establish its own personnel system, in provisions now codified at TR §6-201.2. Those provisions include power to "[d]etermine employee qualifications, appointment and removal procedures, terms of employment including compensation, benefits, holiday schedules, and leave policies, and any other matter concerning employees"

Despite its breadth, this grant of power does not expressly authorize the MPA to enter into binding collective bargaining agreements. Cf. TR §7-601(b) (duty of Mass Transit Administration to enter collective bargaining agreements). We conclude, accordingly, that the MPA, as a general matter, may not enter into any collective bargaining agreement that purports to bind the MPA regarding terms and conditions of employment.⁴

³ Although the holding in *Mugford* concerned only whether the city had a right to deduct union dues from employees' wages, this statement of the Court's view was relied on in *Office and Professional Employees* and in *Maryland Classified Employees Ass'n v. Anderson*, 281 Md. 496, 380 A.2d 1032d (1977), both of which held that governmental entities may not enter into binding collective bargaining agreements without express authorization.

⁴ This is not to say, however, that the MPA may not employ members of a labor union and consult with its employees' representatives in determining the terms and conditions of employment. In *Office and Professional Employees*, 295 Md. at 97, the Court of Appeals held that State agencies may not enter into binding collective bargaining agreements without express authorization, but it did not hold that agencies may not consult with their employees. And, while disapproving a binding collective bargaining

C. Collective Bargaining if Essential to MPA Port Operation

However, we do not think that the MPA is prohibited from engaging in binding collective bargaining under all circumstances. The purpose for which the MPA has been empowered to operate port facilities is to ensure the effectiveness of Maryland's ports. The MPA is clearly intended, under TR §6-102(d)(2), to operate port facilities in a commercially effective fashion when private operators fail to maintain the port's competitive posture. The nature of the work involved in port operations may require laborers with particular skills, and, under some circumstances, it may be essential to enter into collective bargaining agreements in order to engage the necessary labor. Hence, as a practical matter, operation of certain port facilities in the way required by the public interest and intended by the General Assembly might well be virtually impossible under some circumstances if the MPA could not engage in collective bargaining with unionized labor.

The General Assembly was undoubtedly aware of this practical aspect of the matter when it conferred on the MPA authority to operate port facilities if the public interest requires. It cannot reasonably be assumed that the General Assembly intended to effectively negate that authority by withholding from the MPA all authority to engage in collective bargaining, if collective bargaining proved to be essential to port operation. *Cf. Kaczorowski v. City of Baltimore*, 309 Md. 505, 518, 525 A.2d 628 (1987).

Our conclusion that the MPA may engage in collective bargaining under these narrow circumstances does not depart from general principles governing agency powers. We are *not* saying that agencies are empowered to engage in collective bargaining whenever they deem it necessary to carry out agency functions. Rather, in this instance, the General Assembly has expressly assigned to the MPA a unique responsibility — under exceptional circumstances, to operate port

Note 4 continued

agreement in *Mugford*, the Court of Appeals at the same time pointed out that "it by no means follows that employees may not designate a representative or spokesman to present grievances." 185 Md. at 270. The Court of Appeals further noted in *Mugford* that, just as a governmental entity may not discriminate in favor of members of a labor union, so also "a citizen who is a member of a union cannot, by that fact alone, be barred from a position in the public service." *Id.* In 65 *Opinions of the Attorney General* at 160 n.10, this office suggested that the Court's comments may have been intended as tacit approval of legislative requirements that governmental entities consult with representatives of their employees regarding terms and conditions of employment. *See* Chapter 541, Laws of Maryland 1988, sec. 4 (uncodified).

facilities competitively in lieu of private sector operators who, historically, have engaged in collective bargaining.

The General Assembly could not have intended to assign the MPA this task without the power to do, if necessary, what private operators have always found essential. As a Texas court put it in a recent case:

It is axiomatic that [administrative] agencies are creatures of statute and have no inherent authority. They may, therefore, exercise only those specific powers conferred upon them by law in clear and express language and no additional authority will be implied by judicial construction. However, with respect to a power specifically granted the agency, the full extent of *that* power must be ascertained with due regard for the rule that the Legislature generally intends that an agency should have by implication such authority as may be *necessary* to carry out the specific power delegated, in order that the statutory purpose might be achieved.... The Legislature does not intend that agency functions be an exercise in futility.

Sexton v. Mount Olivet Cemetery Association, 720 S.W.2d 129, 137 (Tex. App. 1986) (emphasis in original). See also *City of Columbia v. Board of Health*, 355 S.E.2d 536, 538 (S.C. 1987). Cf. *Peoples Natural Gas Co. v. Minnesota Public Utilities Commission*, 369 N.W. 2d 530, 534 (Minn. 1985) (scope of power derived from express grant is determined by consideration of "the necessity and logic of the situation").

In sum, we think that the MPA has implied authority to engage in collective bargaining if, but only if, that is essential to its direct operation of port facilities. At the same time, we believe that the matter is not free from doubt. The General Assembly may wish to clarify the scope of authority of the MPA in this regard; whether that should be done and the form that any legislative change should take are questions of policy that we cannot address.

IV

Establishment By MPA of Separate Corporate Entity

Your final question is whether the MPA may establish a separate corporate entity to operate port facilities and engage in collective bargaining with unionized labor.

It has been held that administrative agencies cannot, in the absence of express legislative authorization, delegate powers or functions, particularly those requiring the exercise of discretion or judgment, to others. *In re New Jersey District Water Supply Commission*, 417 A.2d 1095, 1115 (N.J. Super App. Div. 1980). See also 73 C.J.S. *Public Administrative Law and Procedure* §56 (1983). This nondelegation doctrine arises largely from concern for the loss of public accountability that would result from the relinquishment by an administrative agency of its powers and functions to a private entity. However, it is by no means clear that the establishment of a private or semi-public entity to operate MPA-owned port facilities would necessarily amount to an improper delegation of the MPA's authority. See *In re North Jersey District Water Supply Commission*, 417 A.2d at 1115-16 (no impermissible delegation where public agency shared ownership of water supply system with private entity and agency did not relinquish any statutory powers).

What is clear, however, is that the MPA cannot delegate any power that it does not itself have. Nor has the General Assembly expressly authorized the MPA to establish a private or semi-public entity with power to operate State-owned facilities under circumstances in which the MPA could not operate those facilities directly. Therefore, we believe that any entity established by the MPA could operate port facilities and engage in collective bargaining only under the circumstances in which the MPA could do so directly.

At the same time, the General Assembly unquestionably may establish a separate entity with general power to operate State-owned facilities and, in that connection, to engage in collective bargaining with unionized labor. The General Assembly has previously created corporate entities to carry out public purposes. See, e.g., Article 10, §§45A to 45-O (Maryland Legal Services Corporation).

It is also clear that a wholly private corporation could be formed under the general incorporation laws that would have as its corporate purpose the operation of State-owned port facilities, for corporations may be formed for any lawful purposes. §2-101(a) of the Corporations and Associations Article. However, as a State agency, the MPA may not discriminate in favor of any particular private corporation by granting it preferences in the operation of State-owned facilities.

The determination of whether to establish an entity separate from the MPA to operate State-owned port facilities, and which of the many possible forms the entity should take, requires consideration of a number of policy questions. We note that the Maryland Port Commission created by Chapter 541 is required to report to the General

Assembly on its activities annually, and that report must include “any recommendations of the Commission for future changes in legislation, capital funding, or operational flexibility for consideration by the General Assembly.” TR §6-201.2(e). In view of the wide variety of legal issues that might arise in connection with various policy decisions yet to be made, we believe that a detailed discussion of possible legal considerations will be most useful after the General Assembly has had an opportunity to consider the Commission’s recommendations. We will at that time be happy to assist and advise you in any way that we can.

V

Conclusion

For the reasons given, we conclude that the MPA may directly operate supplementary port facilities if private operation is inadequate and the public interest requires operation by the MPA. In general, the MPA may employ unionized labor and consult with its employees in determining the terms and conditions of their employment; however, the MPA may not engage in collective bargaining unless (i) it is required to operate a port facility and (ii) it cannot do so without engaging in collective bargaining. We also conclude that the MPA cannot confer on a separate entity any broader powers than the MPA itself has; therefore, any separate entity established by the MPA would be unable to perform any acts that the MPA may not perform directly. Should the General Assembly determine, as a policy matter, that the MPA’s powers should be expanded, additional legislation would be necessary.

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RETIREMENT SYSTEMS

GOVERNORS—RETIREMENT ALLOWANCE RECEIVED BY GOVERNOR HUGHES
AT THE TIME OF HIS ELECTION WAS PROPERLY SUSPENDED DURING
HIS TERM AS GOVERNOR.

June 14, 1988

Mr. Bennett H. Shaver
Executive Director
Maryland State Retirement
and Pension Systems

On behalf of former Governor Harry R. Hughes, you have requested an opinion on whether the Retirement Systems acted properly when the agency suspended the retirement allowance being received by Governor Hughes at the time of his election to the office of Governor.

For the reasons given below, we conclude that Governor Hughes's retirement allowance was properly suspended during his term as Governor.

I

Suspension Of Governor's Retirement Allowance

Before being elected to the office of Governor, Harry Hughes had served the State for 22 years, first as a member of the General Assembly and later as the State's first Secretary of Transportation. After resigning his office and leaving State service, Mr. Hughes began receiving a retirement allowance from the Employees' Retirement System ("ERS") on June 1, 1977. Based on those years of service and the office he held, he received benefits under Article 73B, §11(12), which provides in pertinent part as follows:

Notwithstanding anything to the contrary in this article, if any person, while being a member of the State Employee's Retirement System, has been or may hereinafter be appointed or elected to any State office, . . . for a fixed or indefinite term and not be continued in office after serving in such position for a period of one (1) year, reappointed or reelected, provided

that the termination of employment was involuntary, except for officials elected or appointed prior to July 22, 1981, as determined by the Secretary of Personnel, after the completion of sixteen years of creditable service, regardless of age, such member may elect, in lieu of the withdrawal of his accumulated contributions, to have such contributions paid to him in an annuity of an equivalent actuarial value, in which event he shall be paid a pension equal to the ordinary disability pension that would have been payable at such time had he been retired on an ordinary disability retirement”

Article 73B, §11(12) is intended “to provide a special benefit to those who, while members of the Retirement System, have chosen to continue their service to the State in an untenured or, at best, a limited-tenured position, with little if any job security.” 66 *Opinions of the Attorney General* 211, 214 (1981).

The payment of this retirement allowance to Governor Hughes was suspended in January 1979, upon his inauguration as Governor, and no further retirement benefits were paid to him during the time he served in that office. However, on February 1, 1987, Governor Hughes again began receiving retirement benefits, based on his years of service as Governor as well as his earlier service to the State.

The Retirement Systems suspended Governor Hughes’s retirement allowance because it determined that the following language in Article 73B, §11(12) applied to him:

Should [an ERS] beneficiary be appointed or elected to any office, the salary or compensation of which is paid by the State, his retirement allowance shall cease, and he may again become a member of the retirement system and shall contribute thereafter at the same rate he paid prior to his retirement. Any prior service credit on the basis of which his service was computed at the time of his retirement shall be restored to full force and effect, and in addition upon his subsequent retirement he shall be credited with all his service as a member, provided his pension upon such subsequent retirement shall not exceed the pension he was receiving prior to restoration plus such pension as may have accrued on account of his membership service after restoration.

Relying on the determination of the Retirement Systems, Governor Hughes did not dispute the suspension of payment of his retirement allowance, either at the time the suspension began or subsequently during his service as Governor. However, he has now questioned whether the suspension was proper.

Governor Hughes notes that State employees who retire and subsequently become judges have apparently been permitted to continue receiving retirement allowances from the ERS while receiving their judicial salaries. The office of judge is, of course, an appointive or elective office, "the salary or compensation of which is paid by the State." Governor Hughes argues that he should have been treated in the same way as a retired member of the ERS who becomes a judge — that is, his retirement allowance from prior service should have been continued during his service as Governor.

II

Propriety of Suspension

A. Constitutional Considerations

The pension provisions established for different groups of State employees need not be the same. *Hargrove v. Board of Trustees of Maryland Retirement System*, 310 Md. 406, 424, 529 A.2d 1372 (1987). There is "no constitutional requirement that retirement systems having disparate membership and organized under different statutes be operated under the same set of rules." *Ornstein v. Regan*, 604 F.2d 212, 215 (2d Cir. 1979). In our opinion, the State accordingly may make different retirement provisions for a retired member of the ERS who is elected Governor from those it makes for retired members of the ERS who are appointed or elected as judges. See *Clark v. Tawes*, 187 Md. 195, 200-01, 49 A.2d 463 (1946) (approving different treatment for retired appointed judges and retired elected judges).

B. Statutory Construction

For the purposes of the ERS provisions, the term "employee" is defined by §1(3) to "include any appointed or elected employee of the State . . ." However, the term "exclude[s] . . . any judge of the circuit courts, Court of Appeals of Maryland, Court of Special Appeals, and District Courts . . ." Because the term "retirement system" is defined by §1(1) to mean only the ERS, an ERS beneficiary who becomes a judge may not "again become a member of the retirement system," as provided in §11(12).

Judges instead become members of the Judges' Retirement Plan, under §§55 to 63A. Therefore, a judge's continued receipt of a retirement allowance from the ERS does not create a situation in which

an employee is receiving a retirement allowance from a system in which he or she is simultaneously earning entitlement to additional retirement benefits to be paid in the future.

Governor Hughes suggests that he likewise could not be restored to membership in the ERS upon becoming Governor because he was then a member of a separate retirement system — one whose membership is restricted to Governors. Governor Hughes bases this contention on §11(19), under which former Governors are entitled to retirement benefits that are different from those available to other members of the ERS. Under §11(19)(b), “[a] person serving in the office of Governor after January 17, 1979, shall be eligible to receive a retirement allowance equal to one third the annual salary received during his last term of office, provided that the Governor has served at least one full term and has attained age 55.”

However, nothing in §§1(3), 11(19), or elsewhere in Article 73B expressly withdraws Governors from membership in the ERS. By contrast, judges, for whom a special retirement system has been created, are explicitly excluded from the ERS by §1(3). Nor is there any clear inference to be drawn from §11(19) that the General Assembly intended to create a “Governors’ Pension System” separate from the ERS. Yet, for judges and other separate systems, the General Assembly has clearly expressed precisely the intention to differentiate. *See, e.g.*, §§55 to 63A (establishing Judges’ Retirement Plan); §§81 to 103 (establishing Teachers’ Retirement System). *Cf.* §158 (enumerating different retirement and pension systems). The smallest of the separately designated systems is the Judicial Plan, with 249 members. *See 1 Budget for Fiscal Year 1989*, at 391. Simply as a matter of administration, we doubt that the General Assembly would have created, without saying so expressly, a separate system with an active membership of one.

Moreover, the retirement benefits provided for Governors by §11(19) are paid by the ERS. Governor Hughes’ receipt of benefits for his earlier service during his term in office therefore would have created a situation in which an employee was receiving benefits from a system in which he was simultaneously earning entitlement to receive additional benefits in the future. We believe that the pertinent restriction in §11(12) was intended to prevent that result.

Governor Hughes also suggests that the restrictive language in §11(12) is inapplicable to him because it conditions the suspension of payment of benefits to an ERS beneficiary on the beneficiary’s making contributions to the ERS during his or her term as an appointed or elected official. Under §11(19), a Governor is entitled to retirement

benefits without having made contributions to any retirement system during the Governor's term. However, in our view, the suspension of benefits under §11(12) during service as an appointed or elected official is mandatory, without regard to whether the official becomes a member of and makes contributions to the ERS.

Certainly, the language of the suspension provision is mandatory: Upon appointment or election to an office compensated by the State, an ERS beneficiary's "retirement allowance *shall* cease . . ." The General Assembly's use of that language is of some significance in determining the provision's meaning and effect. *Kaczorowski v. City of Baltimore*, 309 Md. 505, 513, 525 A.2d 629 (1987).

To be sure, §11(12) also states that upon appointment or election the official "may again become a member of the retirement system and shall contribute thereafter at the same rate he paid prior to his retirement." Membership in the ERS is optional for appointed and elected officials under §3(2); under §14(1), each member of the ERS is ordinarily required to make contributions. In our view, then, the provisions of §11(12) regarding an official's restoration to ERS membership merely recognize the right of appointed or elected officials to become members of the ERS or not, as they choose, and the ordinarily concomitant duty to make contributions to the ERS. These provisions do not explicitly condition the suspension of retirement benefits on the official's making that election, and we do not believe that they were intended to have that effect. Upon an ERS beneficiary's appointment or election to office, two distinct events occur: the beneficiary's retirement allowance is suspended; and the official may elect to become a member of the ERS again by making the required contributions. If an official declines to contribute, that official does not thereby escape the suspension of retirement allowance.

Likewise, Governor Hughes did not contribute to the ERS during his tenure as Governor, because Governors need not contribute in order to gain the special benefits of §11(19). Nevertheless, his lack of contributions to the ERS during his terms did not negate the statutory command that "his retirement allowance shall cease" during his service as Governor.

The provision for suspension of retirement benefits is evidently designed to prevent "double-dipping" — that is, the simultaneous receipt of retirement benefits and a salary from the State. That policy is similarly embodied in provisions regarding other retirement systems. *See, e.g.*, §86(9) (offsetting or canceling retirement benefits of a retired teacher upon reemployment). As this office observed in

connection with a provision that reduces a judge's pension under certain circumstances, "that policy is not uniquely applied to only one class of retirees. Rather, it is a policy similarly reflected in other statutes, applicable to other State retirees . . ." 69 *Opinions of the Attorney General* 260, 267 (1984). In light of that firmly established policy, we think that the General Assembly would not have left it to the particular retiree under §11(12) to decide, through the decision about ERS contributions, whether he or she would be prevented from simultaneously receiving a salary for service as an appointed or elected official and a retirement allowance for previous service. At a minimum, we believe that, had it been the General Assembly's intent to allow double-dipping whenever a retiree under §11(12) did not contribute toward future benefits, it would have expressed that intent clearly and explicitly.

We recognize that the public policy against double-dipping is not served if an ERS beneficiary is appointed or elected as a judge and thereafter continues to receive a retirement allowance simultaneously with the judicial salary. However, it is a proper exercise of the General Assembly's judgment to determine the scope and applicability of that policy and the circumstances under which it may be overridden by other policy considerations. See *Hargrove v. Board of Trustees of Maryland Retirement Systems*, 310 Md. 406, 423-24, 529 A.2d 1372 (1987).

III

Conclusion

In summary, it is our opinion that the retirement allowance being received by former Governor Hughes at the time of his election to the office of Governor was properly suspended during his service in that office. The provisions of Article 73B, §11(12) that require suspension of a retirement allowance from the Employees' Retirement System upon the retiree's appointment or election to an office other than a judgeship applied to the Governor. The provisions' inapplicability to retirement beneficiaries who become judges does not require that the same treatment be accorded a retirement beneficiary who becomes Governor.

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Opinions & Advice

RETIREMENT SYSTEMS—JUDICIAL PENSION PLAN—SPECIAL MASTERS—
“EMPLOYMENT”—SERVICE AS SPECIAL MASTER IS “EMPLOYMENT,”
BUT OFFSET APPLIES ONLY TO PORTION OF COMPENSATION RECEIVED
FROM PUBLIC FUNDS.

July 1, 1988

Mr. Bennett H. Shaver
Executive Director
Maryland State Retirement
and Pension Systems

You have requested our opinion on whether the offset provisions of Article 73B, §56(c)(1) of the Maryland Code apply to the pension of a retired judge who is appointed as a special master in circuit court. Specifically, you pose the following questions:

1. Does the term “employment” in Article 73B, §56(c)(1) include service as a special master?

2. If service as a special master is “employment” under Article 73B, §56(c)(1), does the offset provision apply to the total compensation received for service as a special master or only to the portion of the compensation that comes from public funds?

For the reasons stated below, we conclude as follows:

1. Service as a special master is “employment” under Article 73B, §56(c)(1).

2. The offset provision of §56(c)(1) applies only to the portion of a special master’s compensation that is received from public funds.

I

Asbestos Case Special Masters

Currently pending in the Circuit Court for Anne Arundel County is a massive damages action by the State against numerous asbestos manufacturers. As part of its effort to manage the case, the court has adopted procedures by which the parties may submit various factual issues for resolution by special masters. Pretrial Order No. 7, at 1 (January 12, 1988). Pursuant to this order, the parties have submitted to the court the names of those whom they recommend as special

masters. One of the candidates selected by the parties to serve as one of the special masters (or as an alternate) is a retired State judge who is entitled to receive a judicial pension under Article 73B, §56(a).

The order provides that “all costs of proceedings before the special masters charged to the parties shall be borne by the State and the participating defendants on a pro rata basis . . .” Pretrial Order No. 7, at 21.¹ The parties estimate that the State will pay approximately one-third of the total costs payable by the parties. Whether the court will provide any financial assistance towards the masters’ compensation is unclear, although the court will provide the masters with office space and support personnel.

II

Statutory Offset

A. *Adjustment Provision*

Article 73B, §56(a) provides that “[a] judge, after termination of his service, shall be paid [a] pension . . . until his death.” Article 73B, §56(c)(1) provides for an adjustment of a judicial pension as follows:

Except as provided in paragraph (2) of this subsection, a retired judge eligible for benefits under this subtitle may accept employment in which all or part of the compensation for the employment comes from municipal, county, State, or federal funds, if he immediately notifies the board of trustees of the Employees’ Retirement System of his intention to accept the employment and specifies the compensation to be received for the employment. The annual retirement allowance receivable by the former judge plus the annual compensation for the position may not exceed in amount the compensation upon which the retirement allowance is based. During any period in which the total of the annual retirement allowance and the annual compensation for the position in fact

¹ Rule 2-541(a)(2) provides: “The court may appoint a special master for a particular action and shall prescribe the compensation, fees, and costs of the special master and assess them among the parties.”

exceeds the compensation upon which the retirement allowance is based, the retirement allowance shall be reduced by that amount necessary to bring the former judge's total compensation within the limit specified in this subsection.²

Under this section, a retired judge may accept local, State or federal governmental "employment." However, when a retired judge's total income from public employment plus his or her pension benefits exceed the compensation on which the pension benefits are based, the statute requires a dollar-for-dollar offset of pension benefits for each additional dollar of public employment salary. See *Hargrove v. Board of Trustees*, 310 Md. 406, 410, 529 A.2d 1372 (1987); 69 *Opinions of the Attorney General* 260 (1984).³

B. "Employment"

To determine whether a retired judge who is appointed to serve as a special master has accepted "employment" for purposes of Article 73B, §56(c)(1), we must construe that term "in a manner consistent with the goal the legislature was trying to achieve." *Carolina Freight Carriers v. Keane*, 311 Md. 335, 339, 534 A.2d 1337 (1988).

In our view, the General Assembly used the word "employment" to describe the conventional relationship of a master and servant; it did not intend to include an independent contractor within that term.⁴

² The exception "in paragraph (2) of this subsection" applies to temporary assignments to a court under Article IV, §3A of the Maryland Constitution. For this service, a judge receives a per diem payment that does not affect the judge's retirement allowance. §1-302(f) of the Courts Article.

³ The masters' compensation will come in part from State funds, because the State's pro rata share will be paid out of FY 1989 appropriated funds allocated to the Asbestos Litigation Division of the Office of the Attorney General. See FY 89 Budget Analyst's Rep. at 4. The fact that the funds are to be paid as a litigation cost borne by the State as a party and not as an employer does not change the fact that the compensation comes from State funds. Similarly, if the court itself provides part of the compensation, the funds will come from county funds. Thus, there is no question that "all or part of the compensation . . . comes from municipal, county, State or federal funds." Article 73B, §56(c)(1).

⁴ The core definition of "employment", the "act of employing or the state of being employed; that which engages or occupies; that which consumes time or attention . . ." could include both those in a conventional master-servant relationship as well as those holding the status of independent contractors. *Black's Law Dictionary* 471 (rev. 5th ed. 1979). See *Hinton v. Columbia River Packers Ass'n*, 117 F.2d 310, 313 (9th Cir.

continued

We derive this construction primarily by comparing Article 73B, §56(c)(1) with other pension law offset provisions that apply more broadly. See *Kaczorowski v. City of Baltimore*, 309 Md. 505, 515, 525 A.2d 628 (1987) (a provision's "relationship to earlier and subsequent legislation" bears on legislative purpose.)

Prior to July 1, 1983, the offset provision applicable to retired members of the State Employees' Retirement System described the effect of "temporary employment in which all or part of the compensation . . . comes from State funds . . ." Former Article 73B, §11(15). The offset provision formerly applicable to retired members of the Teachers' Retirement System was likewise worded to describe the effect of such "temporary employment." Former Article 73B, §86(9). See also former Article 73B, §§117(14) and 145 (13). The Retirement Systems applied these provisions to retirees who were temporarily rehired by the State if, but only if, the relationship between the State and the employee was that of master and servant; it did not read these provisions as applicable to retirees who were independent contractors.

Then, in Chapter 560 of the Laws of Maryland 1983, the General Assembly reworded the employees' and teachers' offset provisions so that they apply to "temporary employment or . . . a contract for personal services with the State, local school system, library, community college or a participating municipal corporation . . ." Article 73B, §§11(15)(a), 86(9)(a), 117(14)(a), and 145(13)(a).

In light of this legislative change, the Retirement Systems now applies these offset provisions to independent contractors. The agency continues to construe the term "employment" to refer to master-servant relationships only, but it takes the statutory phrase "contract for personal services" to refer to independent contractors.⁵

Note 4 continued

1941) (the term "employment" is broad enough to include independent contractors); *Kiecker v. Pacific Indemnity Co.*, 5 Wash. App. 871, 491 P.2d 244, 248 (1971) ("employment" encompasses both an employee and an independent contractor). Like many other legal terms, however, the meaning of "employment" varies from one context to another. See *Comptroller v. Crofton Co.*, 198 Md. 398, 403, 84 A.2d 86 (1951); *Bostetter v. Fahrney-Keedy Memorial Home*, 20 Md. App. 234, 241, 316 A.2d 301 (1974).

⁵ This interpretation is supported by the definition of "services" in the Procurement Law, which provides that "... 'services' includes services provided by attorneys, accountants, physicians, consultants, and other professional persons who are independent contractors, as opposed to State employees." §11-101(ii)(3) of the State Finance and Procurement Article.

Significantly, the General Assembly did *not* amend Article 73B, §56(c)(1) to extend the offset for retired judges beyond “employment” to “a contract for personal services” also. In light of the administrative construction given the term “employment,” we can only assume that the General Assembly meant to continue to exclude independent contractors from §56(c)(1). We do not know why the General Assembly made this policy choice. As we recently observed, however, “it is a proper exercise of the General Assembly’s judgment to determine the scope and applicability of [the policy against double-dipping] and the circumstances under which it may be overridden by other policy considerations.” 73 *Opinions of the Attorney General* at 309 (1988).

C. *Applicability to Special Masters*

A special master “serves at the pleasure of the appointing court and is an officer of [that] court . . .” Rule 2-541(a)(3). Under the court’s order in the asbestos case, the special masters are to make certain factual findings, but these findings are subject to further review by the court or jury. Pretrial Order No. 7, at 13. The masters’ procedures are set by the court. Pretrial Order No. 7, at 12.

In *Brady v. Ralph Parsons Co.*, 308 Md. 486, 499, 520 A.2d 717 (1987), the Court of Appeals construed the terms “employer” and “employee” in the Workers’ Compensation Act. The Court, describing these terms as “equivalent to and synonymous with the words ‘master’ and ‘servant,’” summarized the common law test as “whether the employer has the right to control and direct the servant in the performance of his work and in the manner in which the work is to be done.” 308 Md. at 499.

Though the courtroom is far from a construction site, the same basic principle applies. In terms of the specific criteria identified by the Court of Appeals in *Brady*, the circuit court in this case will have selected and appointed the special masters, set the basis on which their wages will be paid, and controlled their conduct by order. The circuit court also has the power to discharge the special masters. Rule 2-541(a)(3). Finally, the special masters’ work “is part of the regular business of the employer”—judging cases. 308 Md. at 499. Unquestionably, the court controls the special masters in the performance of their work and the manner in which the work is to be done. For this reason, the special masters are employees of the court, not independent contractors. Thus, a retired judge who is appointed as a special master accepts “employment” for purposes of Article 73B, §56(c)(1).

We turn next to the question of whether the offset provision of §56(c)(1) applies to the total compensation paid to the special master or only to the portion that comes from public funds. Article 73B, §56(c)(1) provides in pertinent part:

The annual retirement allowance receivable by the former judge plus the annual compensation for the position may not exceed in amount the compensation upon which the retirement allowance is based. During any period in which the total of the annual retirement allowance and the annual compensation for the position in fact exceeds the compensation upon which the retirement allowance is based, the retirement allowance shall be reduced by that amount necessary to bring the former judge's total compensation within the limit specified in this subsection.

In *Attorney General v. Waldron*, 289 Md. 683, 723 n.21, 426 A.2d 929, (1980) the Court of Appeals observed that “the [judicial] pension law is intended to prevent ‘double-dipping’ by reducing pension benefits if a retired judge accepts employment compensated by ‘[public] funds,’ . . . but this in no way limits income from private sources.” If we were to construe the offset in §56(c)(1) to apply to compensation paid from both public and private sources, we would be applying the language beyond the General Assembly’s intent. When a retired judge simultaneously receives a State pension and private funds, the judge is “receiving only a ‘single dip’ of public funds . . .” 69 *Opinions of the Attorney General* at 269.

Although the statutory language is ambiguous, we believe the goal of preventing double-dipping can be accomplished by interpreting the offset requirement of §56(c)(1) as applicable only to compensation coming from public funds. Thus, we believe that a retired judge’s judicial pension need be reduced only to the extent that the retirement allowance and the portion of the special master’s compensation that comes from public funds together exceed the amount on which the retirement allowance is based. Article 73B, §56(c)(1) does not affect the portion of the special master’s compensation from non-public sources.⁶

⁶ Ordinarily, a retired judge who accepts employment for which the compensation comes from public funds is to “specif[y] the compensation to be received for the employment.” §56(c)(1). A retired judge who cannot report in advance because of uncertainties about the level or source of compensation should make arrangements with the Retirement Systems for an alternative form of reporting.

III

Conclusion

In summary, it is our opinion that:

1. Service as a special master is "employment" under Article 73B, §56(c)(1).
2. The offset provision of §56(c)(1) applies only to the portion of a special master's compensation that is received from public funds.

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

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Opinions & Advice

RETIREMENT SYSTEMS—WORKERS' COMPENSATION—SET-OFF FOR
WORKERS' COMPENSATION BENEFITS APPLICABLE ONLY TO DISABILITY
RETIREMENT BENEFITS PAYABLE ON ACCOUNT OF ON-THE-JOB
ACCIDENTAL INJURY OR OCCUPATIONAL DISEASE.

December 23, 1988

Mr. Bennett H. Shaver
Executive Director
Maryland State Retirement
and Pension Systems

You have asked for our opinion on the proper interpretation of provisions of the retirement and pension laws that require certain retirement benefits to be reduced by the amount of workers' compensation benefits paid or payable after the date of retirement. Specifically, you have asked whether these provisions apply only to disability retirement benefits payable on account of an on-the-job injury or occupational disease, in light of the recent Court of Appeals decision in *Newman v. Subsequent Injury Fund*, 311 Md. 721, 537 A.2d 274 (1988).

For the reasons stated below, we conclude that the offset requirements apply only to disability retirement benefits payable on account of injuries or occupational disease for which the State must pay workers' compensation.

I

The *Newman* Decision

Newman v. Subsequent Injury Fund arose when Prince George's County stopped making workers' compensation payments to an employee who had retired on the basis of her age and length of service after her injury. The county relied upon Article 101, §33(c) of the Maryland Code, which provides that workers' compensation benefits payable by public employers must be offset by retirement benefits furnished by those employers. The Court determined that the provision requires a setoff only of "similar benefits" and that retirement benefits based on age or length of service are not "similar" to disability benefits under the Workers' Compensation Act. 311 Md.

at 724. *See also Oros v. City of Baltimore*, 56 Md. App. 685, 468 A.2d 693 (1983), *aff'd on other grounds* 301 Md. 460 (1984).

In reaching its conclusion, the Court of Appeals reviewed prior decisions finding a policy on the part of the General Assembly that public employees receive only one benefit for a single injury. 311 Md. at 724-26. As a corollary, the Court held, "when the benefits are dissimilar, the set-off provisions of [Article 101,] §33(c) do not apply." 311 Md. at 728.

II

The State Retirement and Pension Systems

The retirement and pension systems with which you are concerned are the Employees' Retirement System, the Teachers' Retirement System, the Employees' Pension System, the Teachers' Pension System, and the State Police Retirement System.

Each of these systems offers three types of retirement benefits to State and municipal employees, teachers, and State police officers: service retirement, ordinary disability retirement, and accidental disability retirement. Service retirement is available to any member upon attainment of a specified age or the completion of a specified number of years of service. Article 73B, §§11(1), 86(1), 117(1), 145(1); Article 88B, §53(a). Ordinary disability retirement is available to any member with five or more years of creditable service who becomes physically or mentally incapacitated for the further performance of duty otherwise than as a result of an on-the-job injury. Article 73B, §§11(4), 86(3), 117(5), 145(5); Article 88B, §53(c). Finally, accidental disability retirement is available to "any member who has been totally and permanently incapacitated for duty as the natural and proximate result of an accident occurring while in the actual performance of duty at some definite time and place, without willful negligence on his part." Article 73B, §§11(6) and 86(4a). *See also* Article 73B, §§117(7) and 145(7); Article 88B, §53(e).¹

¹ These other provisions of Article 73B vary only slightly in language from the quoted provisions and are identical in substance. The State Police Retirement System provision authorizes "special disability" retirement benefits for "any member who has been totally and permanently incapacitated for duty arising out of or in the course of the actual performance of duty, without wilful negligence on his or her part. . ." Thus,

continued

III

The Set-Off Provision

Article 73B, §11(20) provides:

Any pension allowance shall be reduced by the amount of any workmen's compensation benefits paid or payable after the effective date of retirement on account of an accidental personal injury or occupational disease arising out of and in the course of the retired member's employment by the State if such workmen's compensation benefits are paid or payable for a period during which a pension allowance is paid or payable. This provision is applicable to both the retired member and any beneficiary designated under any option provided under this article. Provided, however, the pension allowance to be reduced shall be the allowance at the time of retirement, and shall not include any adjustment of the allowance after retirement, and this provision shall be retroactive to benefits received before July 1, 1980.^[2]

This provision, far from a model of legislative drafting, presents a difficult interpretive issue: whether the phrase "on account of an accidental personal injury or occupational disease arising out of and in the course of the retired member's employment by the State" was meant to qualify the word "benefits" or the word "retirement." One reading is that the provision concerning accidental personal injuries and occupational diseases qualifies the word "benefits" — that is, any pension allowance, no matter the basis for it, would "be reduced by the amount of any workmen's compensation benefits paid or payable . . . on account of an accidental personal injury or occupational disease arising out of and in the course of the retired member's employment by the State." If this interpretation is correct, the set-off would apply to all retirement allowances.

Note 1 continued

"special disability" benefits are available to members of the State Police Retirement System under broader circumstances than are "accidental disability" benefits for other State employees.

² This provision applies to the Employees' Retirement System. Substantially identical provisions apply to each of the other State retirement and pension systems. Article 73B, §86(7a) (Teachers' Retirement System); Article 73B, §§117(18) (Employees' Pension System); Article 73B, §145(18) (Teachers' Pension System); and Article 88B, §53(h) (State Police Retirement System). For convenience we will refer principally to Article 73B, §11(20).

The other reading is that the provision concerning accidental personal injuries and occupational diseases qualifies the word "retirement" — that is, a pension would be set off by workers' compensation benefits from the State if the "retirement [is] on account of an accidental personal injury or occupational disease . . ." If this latter interpretation is correct, the set-off would apply only to disability retirement allowances because of job related accidental personal injury or occupational disease, not to service retirement allowances or disability retirement allowances unrelated to such injury or disease.

IV

Interpretation of Set-Off Provisions

A. Introduction

The aim of interpreting statutory language is to identify the legislative intent. *Comptroller v. Fairchild Industries*, 303 Md. 280, 284, 493 A.2d 341 (1985). The primary source of legislative intent is the language of the provision itself, which must be given its natural and ordinary meaning, bearing in mind the statutory objective. *Boulden v. Mayor and Commissioners of Town of Elkton*, 311 Md. 411, 414, 535 A.2d 477 (1988). If possible, statutory language is to be read so that no word or phrase is rendered surplusage or superfluous. *Management Personnel Serv. v. Sandefur*, 300 Md. 332, 341, 478 A.2d 310 (1984). In addition to the language itself, we should consider other "external manifestations" of legislative intent like the title and function paragraphs of the enactment, its legislative history, and its relationship to other laws on the same subject. *Kaczorowski v. City of Baltimore*, 309 Md. 505, 515, 525 A.2d 628 (1987).

B. Language

The term "disability" does not appear in the set-off provisions. Indeed, all explicit references to disability pensions were deleted from the bill that enacted the provisions pertaining to the Employee's Retirement System, Teachers' Retirement System, and State Police Retirement Systems. See Chapter 911, Laws of Maryland 1977 (enacting Senate Bill 796). The provisions pertaining to the Employees' and Teachers' Pension Systems, enacted in 1979, were patterned on the earlier enacted provisions; accordingly, they likewise do not refer explicitly to disability pensions. See Chapter 23, Laws of Maryland 1979

at 105 and 135; and Chapter 24, Laws of Maryland 1979 at 185 and 215 (both enacting Article 73B, §§117(18) and 145(18)).³ However, the structure of the provisions, and the language used, indicate an intention to limit their applicability to disability retirement benefits.

It is generally recognized that a qualifying clause is confined to the immediately preceeding word or phrase, particularly in the absence of a comma before the qualifying clause. *In re Mid-Atlantic Toyota Antitrust Litigation*, 525 F.Supp. 1265, 1286 (D. Md. 1981), *aff'd* 704 F.2d 125 (4th Cir. 1983); *Sullivan v. Dixon*, 280 Md. 444, 451, 373 A.2d 1245 (1977). Here, the qualifying clause "on account of an accidental personal injury or occupational disease arising out of and in the course of the retired member's employment by the State" follows the word "retirement," and no comma separates them. Thus, the clause should be read to modify that term, not some other part of the provision.

Furthermore, workers' compensation benefits are payable only on account of injuries or occupational diseases arising out of and in the course of the workers' employment. Article 101, §§15 and 22(a). Therefore, reading the qualifying clause as modifying "workmen's compensation benefits" would render the clause superfluous.

C. Legislative History

One source of information that can be used in determining the legislative intent regarding a provision is the legislative history of its enactment. *See, e.g., City of Baltimore v. Hooper*, 312 Md. 378, 388-90, 539 A.2d 1130 (1988). The legislative history of Chapter 911 of the Laws of Maryland 1977, while not conclusive, nonetheless sheds some light on the set-off provisions.

As introduced, Senate Bill 796 of 1977 would have repealed the workers' compensation set-off provision in Article 101, §33, substituting requirements that disability retirement payments under the State retirement and pension systems be reduced by the amount of concurrently paid workers' compensation and that the pension reserves be reduced by the amount of any lump sum workers' compensation payments. Those original provisions of the bill were deleted in their entirety by the Finance Committee and replaced by the current pension set-off provisions. 1977 Maryland Senate Journal 2613.

³ Chapter 23 enacted Senate Bill 394 and Chapter 24 enacted House Bill 636 of 1979. The acts were identical.

See Chapter 911, Laws of Maryland 1977. Notations in the committee file reveal that one reason for the change was that the repeal of Article 101, §33, would have left those counties and municipalities that are not part of the State systems with no set-off provision at all.

The language of the set-off provisions was taken from Senate Bill 1191, also introduced in 1977, which died in the Rules Committee. See 1977 Senate Journal 1459. A marked-up copy of Senate Bill 1191 that appears in the committee file on Chapter 911 indicates that, while references to disability pensions were deleted from Senate Bill 1191, a suggestion to move the qualifying clause so that it would clearly modify "workmen's compensation benefits," and thereby apply it to all retirement benefits, was rejected.

D. Title

Another source of legislative intent is the title of the bill. *McAlear v. McAlear*, 298 Md. 320, 343 n.25, 469 A.2d 1256 (1984). The title of Chapter 911 was taken directly from Senate Bill 1191. It reflects that the act was "[f]or the purpose of clarifying the administrative procedure prohibiting multiple payments in certain cases." Compare Chapter 911, Laws of Maryland 1977 with 1977 Maryland Senate Journal 1459 (introduction of Senate Bill 1191).

To have the effect of "clarifying administrative procedure," the act must have been intended, at most, to make minor changes in an existing procedure. Under then-existing law, the State had no authority to offset workers' compensation benefits against retirement benefits.⁴ Instead, State accidental disability retirement payments were offset against workers' compensation benefits for the same injury pursuant to Article 101, §33.⁵

⁴ The retirement law as originally enacted provided that benefits from workers' compensation were to be offset against retirement benefits paid "on account of the same disability." Chapter 377, Laws of Maryland 1941. However, this provision was repealed six years later by Chapter 117 of the Laws of Maryland 1947. The repeal was made retroactive to June 1, 1941 "in order not to deprive any member of the Employees' Retirement System of any of the benefits of said System on account of the payment of any compensation under Article 101 of the Annotated Code on account of injuries received in the performance of duty."

⁵ While the limitation of this provision to disability retirement was not decided by the Court of Appeals until the *Newman* decision, testimony by representatives of the Workmen's Compensation Commission before the House Appropriations Committee on April 7, 1977, reflects that the Commission had so interpreted Article 101, §33.

Thus, the title of Chapter 911 indicates that its purpose was not to extend the situations in which the set-off was applied, but to change the way in which the existing set-off operated.⁶ Indeed, if the act had purported to do more, its title might have rendered it ineffective under Article III, §29 of the Maryland Constitution.

E. Other Statutes

When two or more statutory provisions deal with the same subject, they should be construed in harmony with each other, to give full effect to each and to fully carry out the intent of the statutory scheme. *Willis v. State*, 302 Md. 363, 375, 488 A.2d 171 (1985); *Haskell v. Carey*, 294 Md. 550, 558, 451 A.2d 658 (1982). Therefore, the set-off provisions in the retirement and pension laws should be construed to harmonize with the set-off provision of the Workers' Compensation Act.

The underlying purpose of all of the set-off provisions is to prevent an employee of a public entity from receiving dual compensation from the employer for the same injury. See *Frank v. Baltimore County*, 284 Md. 655, 659, 399 A.2d 250 (1979). However, as the Court of Appeals made clear in *Newman*, it was not the legislative intent to deprive government employees of benefits that accrue to them on differing bases, merely because those different benefits would be paid by the same employer. 311 Md. at 728. Because the set-off provisions in the retirement and pension laws were clearly intended to complement that in the Workers' Compensation Act, the retirement and pension provisions should be construed to reflect and effectuate the same intent.

F. Agency Interpretation

An additional source for legislative intent is the interpretation placed on the statute by the agency responsible for its administration. *Supervisor v. Chase Associates*, 306 Md. 568, 574, 510 A.2d 568 (1986). However, the deference to be given to agency interpretation varies, based on such factors as the timing and consistency of the agency's position and the nature of the agency's expertise. *Batterton v. Frances*, 432 U.S. 416 (1977).

⁶ By doing so, the General Assembly provided a tax benefit to those subject to the setoff, as workers' compensation benefits, unlike pension benefits, are not taxable.

The Maryland State Retirement and Pensions Systems have consistently interpreted Article 73B, §11(20) to apply to all retirement benefits since the Systems were separated from the Department of Personnel.⁷ However, prior agency interpretation was to the contrary.

Shortly after the passage of Senate Bill 796 (1977), then-Secretary of Personnel Henry G. Bosz wrote to then-Governor Marvin Mandel, encouraging him to sign the bill. The letter reflected the agency's view that the bill would reduce "the *disability* benefits payable by the State Retirement Systems by the amount of any Workmen's Compensation benefits." Letter from Henry G. Bosz, Secretary of Personnel, to the Honorable Marvin Mandel, Governor (April 20, 1977) (emphasis added). In addition, updates to the Retirement Coordinators Manual dated July 1, 1978, reflected only that disability benefits would be reduced: The Manual's provisions on service retirement were left unchanged. *See* Retirement Coordinators Manual, former §§11.01.00.00 (July 1, 1975) and 11.02.00.00 (July 1, 1978)⁸ In light of this inconsistency, the agency interpretation cannot be given great weight.

V

Conclusion

For all of the above reasons, it is our opinion that the provisions of the retirement and pension laws requiring the offset of workers'

⁷ The Systems were removed from the Department of Personnel by Chapter 506 of the Laws of Maryland 1982. The new position was reflected in the updated Retirement Coordinators Manual §§12.01.01.00, 12.01.02.00, 12.03.01.00 and 23.03.02.00 (July 1982).

⁸ The Department of Personnel was not alone in this interpretation. The bill analysis of House Bill 2026 of 1980 (enacted as Chapter 509 Laws of Maryland 1980), stated that it added "with respect to an accidental disability benefit reduced by workmen's compensation benefits" a provision that the deduction does not apply to cost of living adjustments. And in 69 *Opinions of the Attorney General* 260, 268 n. 9 (1984), this office described Article 73B, §11(20) as a statute "under which the State pension of an employee who retired because of a disability is reduced by the amount of any workers' compensation benefits payable to the employee."

compensation benefits apply only to disability retirement allowances payable on account of injuries or occupational disease for which the State must pay workers' compensation.

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Opinions & Advice

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adopted regulations, applicable to SMLL licensees, that provide for the preservation of certain records by the licensee, truth in lending disclosures to borrowers, and a formula for calculating interest rates for secondary mortgage loans. COMAR 09.03.02.

A "secondary mortgage loan" includes any loan secured by a lien on residential real property that is subordinate to one or more prior liens. FI §12-302(g). The SMLL licensing provisions apply to any person who makes more than three secondary mortgage loans in a calendar year.

SMLL licensees are subject to the credit provisions of the SMLL, codified at CL Title 12, Subtitle 4. However, they may also make mortgage loans — including first mortgage loans — under CL Title 12, Subtitles 9 and 10, known as the Maryland credit grantor statutes.

The Commissioner of Consumer Credit has broad regulatory authority over SMLL licensees:

The Commissioner of Consumer Credit and the Bank Commissioner jointly may adopt rules and regulations to carry out the provisions of this subtitle.

FI §12-303.³

In addition, the Commissioner of Consumer Credit is authorized to suspend or revoke an SMLL license upon a finding that the licensee has:

(1) Made any material misstatement in an application for a license;

(2) In connection with any secondary mortgage loan transaction:

(i) Committed any fraud;

(ii) Engaged in any dishonest activities; or

(iii) Misrepresented or failed to disclose any material facts to anyone entitled to that information;

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* The reference to the Bank Commissioner reflects the fact that, at one time, some SMLL licensees were regulated by that office. Cf. FI §12-301(b). Since 1984, either through statutory amendments or administrative transfer, all SMLL licensees have been licensed and regulated by the Commissioner of Consumer Credit. Because the Bank Commissioner no longer licenses any SMLL licensees, in practice the Commissioner of Consumer Credit now alone determines whether to exercise this grant of rulemaking authority.

(3) Violated any provision of the Maryland Secondary Mortgage Loan Law or of any rule or regulation adopted under it; or

(4) Otherwise demonstrated unworthiness, bad faith, dishonesty, or any other quality that indicates that the business of the licensee has not been or will not be conducted honestly, fairly, equitably, and efficiently.

FI §12-316.

III

Enforcement of Subtitle 5 Requirements Against SMLL Licensees

Administrative agencies derive all power to act from statutory authority granted by the General Assembly. A regulatory agency may not adopt or enforce regulations concerning subject matter that is outside the scope of that authority. *See Sullivan v. Board of License Comm'rs*, 293 Md. 113, 442 A.2d 558 (1981); *Department of Natural Resources v. Linchester*, 274 Md. 211, 222-23, 334 A.2d 514 (1975). This office has described as a "fundamental premise" that "the actions of an administrative agency must be consistent with the statute that grants it the authority to act." 70 *Opinions of the Attorney General* 135 (1985). *See also, e.g.*, 71 *Opinions of the Attorney General* 136 (1986), 66 *Opinions of the Attorney General* 151 (1981), and 54 *Opinions of the Attorney General* 281 (1969) (all advising that agency actions were beyond the agency's statutory authority).

Your first question is whether the Commissioner may charge an SMLL licensee with a violation of Subtitle 5 or the regulatory Code of Conduct issued under it, in connection with a first lien mortgage transaction.

No statute provides that Subtitle 5 and regulations under it may serve as the basis for sanctions under the SMLL. To the contrary, the express, unqualified exemption in FI §12-502(a) indicates that these provisions do not apply to an SMLL licensee. In contrast, FI §12-302, which sets forth exemptions from the SMLL, exempts certain entities from the *licensing* provisions only.

Under the circumstances, we conclude that the General Assembly intended the exemptions in FI §12-502(a) to encompass all of the provisions of Subtitle 5. The Commissioner of Consumer Credit may not enforce laws or regulations that simply do not apply to SMLL licensees.

We do not believe that *Schmidt v. Beneficial Finance*, 285 Md. 148, 400 A.2d 1124 (1979), requires a different conclusion. In *Schmidt*, a borrower sought to avoid repayment of a secondary mortgage loan that he had received from Beneficial Finance. The suit was grounded upon the uncontested fact that Beneficial had charged an interest rate in excess of the maximum permitted under CL §12-404(b). At the time the loan was made, Beneficial was licensed by the Commissioner of Consumer Credit under the Consumer Loan Law, now codified at FI Title 11, Subtitle 2. Beneficial therefore was exempt from the licensing requirement for secondary mortgage lenders, who then were licensed and regulated by the Bank Commissioner.

The issue was whether Beneficial could make a loan secured by a second mortgage under the Consumer Loan Law's credit regulations as an alternative to the SMLL's credit regulations. At the time, a lender could charge a higher interest rate for loans under the Consumer Loan Law than under the SMLL. Beneficial's interest charge complied with the higher maximum permitted under the Consumer Loan Law.

The Court of Appeals held that any secondary mortgage loan was subject to the credit regulations for secondary mortgage lending, despite the fact that the more general Consumer Loan Law did not purport to limit loans made under that statute to those not secured by secondary mortgage liens. Thus, the Court held, Beneficial could not collect the loan. In so holding, the Court addressed an argument raised by Beneficial about the statutory exemption from the SMLL licensing provisions, which Beneficial enjoyed by virtue of its consumer loan license. Beneficial argued that the SMLL licensing exemption meant that it was also exempt from the credit provisions of the SMLL and any applicable rules adopted by the Bank Commissioner. The argument focused on the possibility that Beneficial might be subjected to regulations adopted by the Bank Commissioner when it was licensed and regulated by a different authority, the Commissioner of Consumer Credit: "Beneficial thinks that it is 'inconceivable that the legislature could have intended such a collision of regulatory authority without expressly providing a resolution for the conflict.'" 285 Md. at 159. The Court of Appeals summarily dismissed this argument: "If there be a conflict, the resolution is obvious — when a secondary mortgage loan is made, the Secondary Mortgage Loan Law and regulations promulgated thereunder prevail." *Id.*

Nevertheless, we do not read *Schmidt* to mean that the Commissioner of Consumer Credit may directly enforce Subtitle 5 or the Code of Conduct applicable to Subtitle 5 licensees.

compensation benefits apply only to disability retirement allowances payable on account of injuries or occupational disease for which the State must pay workers' compensation.

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

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Opinions & Advice

SECONDARY MORTGAGE LOAN LAW

MORTGAGE BANKERS/MORTGAGE BROKERS—APPLICABILITY OF CODE OF CONDUCT TO SECONDARY MORTGAGE LOAN LAW LICENSEES—SCOPE OF COMMISSIONER'S RULEMAKING AUTHORITY.

February 9, 1988

The Honorable Alan T. Fell
Commissioner of Consumer Credit

You have requested our opinion on whether the Commissioner of Consumer Credit has the authority to apply the statutory and regulatory requirements governing mortgage brokers and mortgage bankers to a licensee under the Secondary Mortgage Loan Law ("SMLL"), when that licensee is engaged in making or brokering first lien mortgage loans. Mortgage bankers and brokers are subject to various requirements in Title 12, Subtitle 5 of the Financial Institutions Article ("FI" Article) and the Code of Conduct issued under Subtitle 5.¹ Specifically, your questions are as follows:

1. May the Commissioner of Consumer Credit directly enforce Subtitle 5 and the Code of Conduct against an SMLL licensee, for an offense committed in connection with a first mortgage loan transaction?
2. May the Commissioner of Consumer Credit adopt regulations similar to the substantive provisions of Subtitle 5 and the Code of Conduct, applicable to SMLL licensees making first lien mortgage loans?

For the reasons stated below, we conclude as follows:

1. The Commissioner of Consumer Credit has no authority to enforce against an SMLL licensee provisions that govern Subtitle 5 licensees, even when the SMLL licensee makes a first lien mortgage loan.

¹ To avoid endless repetition of the phrase "mortgage bankers and mortgage brokers," we shall refer to "Subtitle 5 licensees" in the rest of this opinion. Licensees under the Secondary Mortgage Loan Law will be termed "SMLL licensees."

2. The Commissioner of Consumer Credit may well have authority under the SMLL to require, by regulation, that SMLL licensees conform to many of the same requirements to which Subtitle 5 licensees are subject. However, the Commissioner's authority to do so is not free from doubt, and we recommend that the General Assembly consider a legislative change that would deal with the problem more surely.

I

Regulation of Subtitle 5 Licensees

The Bank Commissioner has power to license and regulate mortgage bankers and mortgage brokers under FI Title 12, Subtitle 5. Some of the requirements applicable to Subtitle 5 licensees are set out in the statute — for example, a \$50,000 bonding requirement. FI §12-504(c)(3)(i). Others are left to a regulatory “code of conduct,” which the Bank Commissioner is expressly empowered to adopt. FI §12-507. The Code of Conduct, originally issued in 1980 and amended since then, prescribes detailed rules to which a Subtitle 5 licensee must adhere in dealing with prospective mortgage borrowers. COMAR 09.03.05. Subtitle 5 licensees are also subject to the restrictions set forth in Title 12, Subtitle 1 of the Commercial Law Article (“CL” Article).

Subtitle 5 applies to, among other things, first lien mortgage lending or brokering. However, certain entities are exempted from the provisions of Subtitle 5, including any SMLL licensee. *See* FI §12-502(a)(6).²

II

Regulation of SMLL Licensees

Secondary mortgage lenders are licensed and regulated by the Commissioner of Consumer Credit under FI Title 12, Subtitle 3. Pursuant to FI §12-303, the Commissioner of Consumer Credit has

² Also exempt are: any bank, trust company or savings bank, savings and loan association, credit union, insurance company, and notably, any licensee under the Maryland Consumer Loan Law.

adopted regulations, applicable to SMLL licensees, that provide for the preservation of certain records by the licensee, truth in lending disclosures to borrowers, and a formula for calculating interest rates for secondary mortgage loans. COMAR 09.03.02.

A "secondary mortgage loan" includes any loan secured by a lien on residential real property that is subordinate to one or more prior liens. FI §12-302(g). The SMLL licensing provisions apply to any person who makes more than three secondary mortgage loans in a calendar year.

SMLL licensees are subject to the credit provisions of the SMLL, codified at CL Title 12, Subtitle 4. However, they may also make mortgage loans — including first mortgage loans — under CL Title 12, Subtitles 9 and 10, known as the Maryland credit grantor statutes.

The Commissioner of Consumer Credit has broad regulatory authority over SMLL licensees:

The Commissioner of Consumer Credit and the Bank Commissioner jointly may adopt rules and regulations to carry out the provisions of this subtitle.

FI §12-303.³

In addition, the Commissioner of Consumer Credit is authorized to suspend or revoke an SMLL license upon a finding that the licensee has:

- (1) Made any material misstatement in an application for a license;
- (2) In connection with any secondary mortgage loan transaction:
 - (i) Committed any fraud;
 - (ii) Engaged in any dishonest activities; or
 - (iii) Misrepresented or failed to disclose any material facts to anyone entitled to that information;

³ The reference to the Bank Commissioner reflects the fact that, at one time, some SMLL licensees were regulated by that office. Cf. FI §12-301(b). Since 1984, either through statutory amendments or administrative transfer, all SMLL licensees have been licensed and regulated by the Commissioner of Consumer Credit. Because the Bank Commissioner no longer licenses any SMLL licensees, in practice the Commissioner of Consumer Credit now alone determines whether to exercise this grant of rulemaking authority.

(3) Violated any provision of the Maryland Secondary Mortgage Loan Law or of any rule or regulation adopted under it; or

(4) Otherwise demonstrated unworthiness, bad faith, dishonesty, or any other quality that indicates that the business of the licensee has not been or will not be conducted honestly, fairly, equitably, and efficiently.

FI §12-316.

III

Enforcement of Subtitle 5 Requirements Against SMLL Licensees

Administrative agencies derive all power to act from statutory authority granted by the General Assembly. A regulatory agency may not adopt or enforce regulations concerning subject matter that is outside the scope of that authority. *See Sullivan v. Board of License Comm'rs*, 293 Md. 113, 442 A.2d 558 (1981); *Department of Natural Resources v. Linchester*, 274 Md. 211, 222-23, 334 A.2d 514 (1975). This office has described as a "fundamental premise" that "the actions of an administrative agency must be consistent with the statute that grants it the authority to act." 70 *Opinions of the Attorney General* 135 (1985). *See also, e.g.*, 71 *Opinions of the Attorney General* 136 (1986), 66 *Opinions of the Attorney General* 151 (1981), and 54 *Opinions of the Attorney General* 281 (1969) (all advising that agency actions were beyond the agency's statutory authority).

Your first question is whether the Commissioner may charge an SMLL licensee with a violation of Subtitle 5 or the regulatory Code of Conduct issued under it, in connection with a first lien mortgage transaction.

No statute provides that Subtitle 5 and regulations under it may serve as the basis for sanctions under the SMLL. To the contrary, the express, unqualified exemption in FI §12-502(a) indicates that these provisions do not apply to an SMLL licensee. In contrast, FI §12-302, which sets forth exemptions from the SMLL, exempts certain entities from the *licensing* provisions only.

Under the circumstances, we conclude that the General Assembly intended the exemptions in FI §12-502(a) to encompass all of the provisions of Subtitle 5. The Commissioner of Consumer Credit may not enforce laws or regulations that simply do not apply to SMLL licensees.

We do not believe that *Schmidt v. Beneficial Finance*, 285 Md. 148, 400 A.2d 1124 (1979), requires a different conclusion. In *Schmidt*, a borrower sought to avoid repayment of a secondary mortgage loan that he had received from Beneficial Finance. The suit was grounded upon the uncontested fact that Beneficial had charged an interest rate in excess of the maximum permitted under CL §12-404(b). At the time the loan was made, Beneficial was licensed by the Commissioner of Consumer Credit under the Consumer Loan Law, now codified at FI Title 11, Subtitle 2. Beneficial therefore was exempt from the licensing requirement for secondary mortgage lenders, who then were licensed and regulated by the Bank Commissioner.

The issue was whether Beneficial could make a loan secured by a second mortgage under the Consumer Loan Law's credit regulations as an alternative to the SMLL's credit regulations. At the time, a lender could charge a higher interest rate for loans under the Consumer Loan Law than under the SMLL. Beneficial's interest charge complied with the higher maximum permitted under the Consumer Loan Law.

The Court of Appeals held that any secondary mortgage loan was subject to the credit regulations for secondary mortgage lending, despite the fact that the more general Consumer Loan Law did not purport to limit loans made under that statute to those not secured by secondary mortgage liens. Thus, the Court held, Beneficial could not collect the loan. In so holding, the Court addressed an argument raised by Beneficial about the statutory exemption from the SMLL licensing provisions, which Beneficial enjoyed by virtue of its consumer loan license. Beneficial argued that the SMLL licensing exemption meant that it was also exempt from the credit provisions of the SMLL and any applicable rules adopted by the Bank Commissioner. The argument focused on the possibility that Beneficial might be subjected to regulations adopted by the Bank Commissioner when it was licensed and regulated by a different authority, the Commissioner of Consumer Credit: "Beneficial thinks that it is 'inconceivable that the legislature could have intended such a collision of regulatory authority without expressly providing a resolution for the conflict.'" 285 Md. at 159. The Court of Appeals summarily dismissed this argument: "If there be a conflict, the resolution is obvious — when a secondary mortgage loan is made, the Secondary Mortgage Loan Law and regulations promulgated thereunder prevail." *Id.*

Nevertheless, we do not read *Schmidt* to mean that the Commissioner of Consumer Credit may directly enforce Subtitle 5 or the Code of Conduct applicable to Subtitle 5 licensees.

First, the issue in *Schmidt* was the applicability of two facially conflicting statutory interest rate ceilings. Undoubtedly, the Commissioner of Consumer Credit may discipline an SMLL licensee for violating credit strictures set out in the Commercial Law Article and generally applicable to first lien mortgage transactions — in other words, to impose discipline for violating a law applicable to any lender.⁴ It does not follow from the Court's dictum that an SMLL licensee who makes a first mortgage loan is subject to all regulations issued under a statute from which the licensee is exempt.

Second, the *Schmidt* case was brought by a consumer borrower seeking a private remedy. It simply did not deal with a regulatory agency's power to enforce its requirements against those exempt from licensure under its statute.

For the reasons set forth earlier, we conclude that the Commissioner of Consumer Credit may not directly enforce the provisions of FI Title 12, Subtitle 5, or the Code of Conduct, which are applicable only to Subtitle 5 licensees, against SMLL licensees.

IV

Rulemaking to Define SMLL “Unfair” Practices

FI §12-303 provides the following grant of rulemaking authority: “The Commissioner of Consumer Credit and the Bank Commissioner jointly may adopt rules and regulations to carry out the provisions of this subtitle [the SMLL licensing provisions].” One such provision is FI §12-316(4), which authorizes the Commissioner of Consumer Credit to discipline an SMLL licensee if the licensee “[o]therwise demonstrates unworthiness, bad faith, dishonesty, or any other quality that indicates that the business that the licensee has not been or will not be conducted honestly, *fairly*, equitably, and efficiently.” (Emphasis added.) This basis for discipline, unlike FI §12-316(2), is not limited to secondary mortgage loan transactions. The introductory word “otherwise” indicates that the Commissioner has the power to discipline dishonest or unfair acts in any aspect of “the business of the licensee,” including first mortgage transactions.

⁴ First lien mortgage loans are governed generally by CL Title 12, Subtitles 1 or 9 and 10. However, interest rate ceilings and related restrictions for most first lien mortgage loans have been preempted by §501(a) of the federal Depository Institutions and Monetary Decontrol Act of 1980. 12 U.S.C. §1735f-7(a).

Thus, if an SMLL licensee commits fraud or exhibits bad faith in dealing with a first lien mortgage borrower, FI §12-316(4) permits the Commissioner of Consumer Credit to charge the offender and impose sanctions. To take another example, if a licensee were convicted of some crime involving moral turpitude, the Commissioner of Consumer Credit could apply sanctions under the theory that the licensee had demonstrated "dishonesty."

In our view, the Commissioner of Consumer Credit also has the power, under the grant of rulemaking authority in FI §12-303, to specify the business practices that constitute a violation of FI §12-316(4).⁵ The Commissioner's power to adopt rules that would define the conduct prohibited under FI §12-316(4) has not been tested or approved by the courts. However, analogous federal precedent supports the exercise of this rulemaking power.

The Federal Trade Commission has the power to "prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. §45(a)(2). The FTC also has the power "to make rules and regulations for the purpose of carrying out the provisions of [the FTC Act]." 15 U.S.C. §46(g). Putting these two grants of authority together, the FTC adopted a rule in 1971 that the failure to post octane numbers on gasoline pumps at service stations would be an unfair method of competition. Those affected by the rule challenged the FTC's authority. In *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973), the court sustained the Commission's exercise of its rulemaking power. The court stressed the need to "interpret liberally broad grants of rule-making authority like the one we construe here . . ." 482 F.2d at 680. See also 62 *Opinions of the Attorney General* 535 (1977) (rulemaking authority of Consumer Protection Division regarding "unfair" trade practices to be construed liberally).

Moreover, the FTC's construction of its mandate to prevent "unfair" practices provides a body of law to which the Commissioner might refer in considering rules to spell out the prohibition in FI §12-316(4). The FTC has articulated the following standard for identifying practices that are unfair to consumers:

⁵ See note 3 above.

To justify a finding of unfairness the injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided.

American Financial Services Ass'n v. FTC, 767 F.2d 957, 971 (D.C. Cir. 1985). This methodology for weighing consumer injury led the FTC to conclude that the use by creditors of certain remedies amounted to an unfair practice.⁶

Hence, it is at least possible that the Commissioner of Consumer Credit might likewise find that many of the requirements of the Code of Conduct applicable to Subtitle 5 licensees must be adhered to by SMLL licensees as well, in order to avoid unfair practices in the conduct of their first mortgage transactions. If the Commissioner were to reach that conclusion after following required rulemaking procedures and weighing the record, the resulting rule would be a proper implementation of the Commissioner's authority under FI §12-303.

We acknowledge that our view of the Commissioner's rulemaking power is an expansive one. However, we think it reasonable to suppose that the General Assembly meant to grant the Commissioner the power to deal with what would otherwise be a serious loophole in its overall scheme of licensing.⁷ We do not lightly suppose that the General Assembly intended, when it exempted SMLL licensees from the requirements of Subtitle 5, that they be free to make first mortgage loans without regulation of their business practices. Indeed, taken to its logical extreme, this loophole would permit a person to obtain an SMLL license and thereby avoid the direct application of Subtitle 5 requirements, even if the SMLL licensee intended to make or broker first lien mortgage loans only.

We also recognize that our construction is not free from doubt. The licensing scheme is, in some respects, inescapably anomalous. By way of illustration, it would seem to us inconsistent for the statutes to require a \$50,000 bond for a Subtitle 5 license but only a \$10,000 bond for an SMLL license, when the latter entitles the holder to do

⁶ The FTC Credit Practices Rule, 16 C.F.R. Part 444, prohibits or restricts confession of judgment clauses, waiver of exemptions, wage assignments, security interests in household goods, cosigner liability, and pyramiding of late charges. *See also* 16 C.F.R. Part 433 (consumer credit contracts to contain clause preventing application of holder in due course doctrine).

⁷ The legislative history does not contain any discussion pertinent to this issue.

everything a Subtitle 5 licensee can do, and more. However, the bonding requirements under the two statutes are just that. Further, it is beyond dispute that an SMLL licensee is not required to post any bond whatsoever covering first lien mortgage transactions. *See* FI §12-306(c). In short, an SMLL licensee might persuade a court that the exemption in FI §12-502(a)(6) creates precisely the regulatory vacuum that we seek to avoid — a vacuum that can only be dealt with by new legislation.

Indeed, our construction of the SMLL in any event is not as complete, effective, simple, or certain as legislative action to correct the problem. At a minimum, the uncertainties discussed in this opinion make it difficult to predict how the courts would address the issue.

A legislative response need not be a complex one. The elimination of the exemption for SMLL licensees from FI §12-502 would result in a requirement for lenders to obtain the proper license for the type of lending in which they engage. Moreover, the lines of regulatory and enforcement authority would be clarified without elaborate changes to the statutes or current regulations.⁸ Accordingly, we recommend that you consider requesting the enactment of legislation to eliminate the exemption that has created the problems reflected in your inquiry.⁹

V

Conclusion

In summary, it is our opinion that:

1. The Commissioner of Consumer Credit has no authority to enforce against an SMLL licensee provisions that govern Subtitle 5 licensees, even when the SMLL licensee makes a first lien mortgage loan.

⁸ Although other changes in the statute to address these problems might be devised, no other solution is as complete. For example, the General Assembly could change the language in FI §12-502(a) to exempt certain entities only from the licensing provisions of the subtitle. However, that would not address the circumstance that the bond required for secondary mortgage loan licensees does not cover first lien mortgage transactions. FI §12-306(c).

⁹ Virtually the same problems exist with respect to Consumer Loan Law licensees, which are also exempt from Subtitle 5. FI §12-501(a)(5).

2. The Commissioner of Consumer Credit may well have authority under the SMLL to require, by regulation, that SMLL licensees conform to many of the same requirements to which Subtitle 5 licensees are subject. However, the Commissioner's authority to do so is not free from doubt, and we recommend that the General Assembly consider a legislative change that would deal with the problem more surely.

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

J. STEVEN LOVEJOY, *Assistant Attorney General*

JACK SCHWARTZ

Chief Counsel

Opinions & Advice

Editor's Note: Under Chapter 530 (House Bill 1484) of the Laws of Maryland 1988, an SMLL licensee "who acts as a mortgage banker or mortgage broker shall be subject to the provisions of" Subtitle 5, with certain exceptions. See FI §12-505(b)(1).

STATUTES

CRIMINAL INJURIES COMPENSATION BOARD—1988 AMENDMENTS TO
CRIMINAL INJURIES COMPENSATION ACT APPLY RETROSPECTIVELY.

August 2, 1988

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

You have requested our opinion on the application of Chapter 250 (House Bill 823) of the Laws of Maryland 1988, which enacted various amendments to the Criminal Injuries Compensation Act, Article 26A of the Maryland Code. Specifically, you ask whether the amendments apply retrospectively to claims pending on Chapter 250's effective date of July 1, 1988, or must be applied only prospectively. If the provisions of Chapter 250 must be applied prospectively, you further ask whether they apply to all claims filed on or after the effective date or only to claims arising from crimes committed on or after the effective date.

For the reasons given below, we conclude that Chapter 250's provisions apply retrospectively, to all pending claims on which no final decision had been rendered by July 1, 1988.¹

I

Provisions of Chapter 250

Chapter 250 has increased the number of members of the Criminal Injuries Compensation Board (the "Board") from three to five; significantly altered the procedure for reviewing and deciding claims for criminal injuries compensation; given final decisionmaking authority to the Secretary of Public Safety and Correctional Services (the "Secretary"); and limited the amount of compensation that may be granted.

¹ In light of our conclusion, we do not address whether the date of filing a claim or the date of the incident giving rise to the claim would determine the applicability of Chapter 250 if that enactment were applicable prospectively only.

Previously, Article 26A provided that each claim would be referred for initial review and decision to a single member of the Board. For that purpose, the Board members were authorized to decide the claim without a hearing, on the basis of supporting documents filed by the claimant and the report of the Board's own investigation of the claim; or to hold a hearing on the claim, if the documentary record should be inadequate to permit a decision. Former §8. The claimant had a right to seek review of the single member's decision by the full Board. Former §9(a). On review, the full Board had discretion to supplement the record by holding a hearing, if it deemed the receipt of additional evidence to be necessary, and to affirm, reverse, or modify the initial decision. In any case, the full Board's decision on the claim was final. Former §9(b). The claimant, the Secretary, and the Attorney General were entitled to appeal that decision to the appropriate circuit court. Former §10.

Under Chapter 250, a claim is to be reviewed initially by a panel of three members of the Board, who may recommend a tentative decision on the basis of the supporting documents filed and the report of the Board's investigation or may order a hearing if they are unable to decide the claim on the basis of that documentary record. Article 26A, §8(a) and (d). If a tentative decision is recommended, the claimant may request a hearing before the panel to present additional information. §8(d).² Thereafter, the three-member panel of the Board issues its decision in the form of a report to the Secretary, who may modify, affirm, or reverse the Board's decision. §8(f). The claimant may appeal the Secretary's decision to the circuit court in accordance with SG §10-215.

In addition to these changes in the process for reviewing and deciding claims, Chapter 250 has imposed maximum limits on the amounts that may be awarded as disability benefits and for reimbursement of medical expenses, as well as on the total amount of compensa-

² Because the former law did not require that the claimant be given an opportunity for a hearing before determination of the claimant's entitlement to an award, the Administrative Procedure Act's provisions concerning agency adjudications did not apply to proceedings before the Board. See *Criminal Injuries Compensation Board v. Gould*, 273 Md. 486, 499, 331 A. 2d 55 (1975). Those provisions, §10-201 through §10-214 of the State Government Article ("SG" Article), apply only to "contested cases." A "contested case" is a proceeding to determine a matter "that is required by law to be determined only after an opportunity for an agency hearing." SG §10-201(c). However, Article 26A, §8(d), as amended by Chapter 250, now grants the claimant a right to a hearing before the claim is decided. Therefore, the Administrative Procedure Act now applies to proceedings before the Board.

tion that may be awarded under all provisions of Article 26A. Article 26A, §12(b) requires that awards of disability benefits be calculated in accordance with Article 101, §36 as that section existed on July 1, 1974. Under that version of Article 101, §36, the largest amount of compensation available for a permanent partial disability is \$26,000, which may be granted only for the complete loss or loss of use of an arm or a leg.³ The amount of benefits available for permanent total disability under Article 101, §36(1), however, is effectively unlimited, because those benefits are to continue throughout the period of the disability. Chapter 250 amended Article 26A, §12(a)(2) to provide that criminal injuries compensation "shall not exceed \$25,000 for any disability related claim and \$45,000 for any medical claim." In addition, §12(a)(2) as amended now provides that "[t]he maximum amount awarded under all of the provisions of this [Criminal Injuries Compensation] Act shall not exceed \$45,000, including any subsequent and supplemental awards."

II

Retrospective or Prospective Application

A. General Principles

A retrospective application of a statute determines the legal significance of acts that occurred before the statute's effective date. *Washington Suburban Sanitary Comm'n v. Riverdale Heights Volunteer Fire Co.*, 308 Md. 556, 561, 520 A.2d 1319 (1987). "Thus a statute, though applied only in legal proceedings subsequent to its effective date and in that sense, at least, prospective, is, when applied so as to determine the legal significance of acts or events that occurred prior to its effective date, applied retroactively." *State Comm'n on Human Relations v. Amecom Division of Litton Systems, Inc.*, 278 Md. 120, 123, 360 A.2d 1 (1976).

³ The workers' compensation provisions in Article 101, §36 generally require that disability compensation be calculated as a specified amount of compensation for a specified number of weeks, the number of weeks varying according to the nature and degree of the disability. The basic formulas applicable to loss of use of an arm or a leg provide compensation at \$35.00 a week for 300 weeks. However, Article 101, §36(4a) treats that disability as a "serious disability," for which the compensation is increased to \$65.00 per week for a total of 400 weeks.

The question whether a statute is applicable retrospectively is a question of legislative intent. *Mason v. State*, 309 Md. 215, 219, 522 A.2d 1344 (1987); *Wittel v. Baker*, 10 Md. App. 531, 539. Because retrospective application carries with it a potential for interference with substantive rights, however, it is presumed that the General Assembly ordinarily intends statutes to apply only prospectively. *Mason v. State*, 309 Md. at 221.⁴ Nonetheless, there is no absolute bar to retrospective application. *Spielman v. State*, 298 Md. 602, 607, 471 A.2d 730 (1984).

Moreover, the presumption concerning legislative intent favors retrospectivity when the statute at issue affects only procedure or remedies. If the statute neither creates nor impairs any substantive right, therefore, the statute ordinarily applies to pending proceedings, as well as to those instituted after the statute's effective date. *Aviles v. Eshelman Electric Corp.*, 281 Md. 529, 533, 379 A.2d 1227 (1977).⁵

⁴ In *Mason*, the Court of Appeals enumerated certain "well settled rules" for determining whether a statute is intended to apply retrospectively or prospectively:

"(1) A statute is presumed to operate prospectively from its effective date, absent clear language to the contrary, or unless the manifest intention of the Legislature indicates otherwise; (2) Despite the presumption of prospectivity, a statute affecting a change in procedure only, and not in substantive rights, ordinarily applies to all actions whether accrued, pending or future, unless a contrary intention is expressed; and (3) A statute affecting or impairing substantive rights will not operate retrospectively as to transactions, matters, and events not in litigation at the time the statute takes effect unless its language clearly so indicates."

Mason v. State, 309 Md. at 219-20 (footnotes omitted). In *Janda v. General Motors Corp.*, 237 Md. 161, 168-69, 205 A.2d 228 (1964), the Court of Appeals enumerated a similar series of four rules. The fourth rule there stated was:

"A statute which affects or controls a matter still in litigation when it became law will be applied by the court reviewing the case at the time the statute takes effect although it was not yet law when the decision appealed from was rendered, even if matters or claims of substance (not constitutionally protected), as distinguished from matters procedural or those affecting the remedy are involved, unless the Legislature intended the contrary."

237 Md. at 169. However, that rule was expressly disapproved by the Court of Appeals in *Riverdale Heights Volunteer Fire Co.*, 308 Md. at 565, as "inconsistent with the general body of Maryland law on the subject" of retrospectivity.

⁵ However, procedural changes are not applied to nullify actions taken under the former procedures before the effective date of the change in procedure. See *Luzmanor Citizens Association v. Burkart*, 266 Md. 631, 646, 296 A.2d 403 (1972) (decision of County Board

B. *Revision of Decisionmaking Process*

To be sure, it is not always easy to distinguish between changes in law that affect only remedies or procedural matters and those that affect vested substantive rights. For example, in *Mason v. State*, 309 Md. at 221-22, the Court of Appeals held that, although the Post Conviction Procedure Act is procedural in nature, an amendment limiting to two the number of petitions for relief that an inmate might file could not be applied to bar the filing of a petition after the amendment's effective date by an inmate who had filed two petitions before the effective date. To do so, the Court held, would be to extinguish rights acquired by petitioners before the effective date of the amendment. Similarly, in *Gee v. Mass Transit Admin.*, 75 Md. App. 253, 260-61, 540 A.2d 1194 (1988), the Court of Special Appeals held that the adoption by the Commission on Human Relations of regulations promulgating its procedural rules and public hearing process did not apply to a discrimination complaint filed before the issuance of the regulations, when applying the regulations would require the Commission to dismiss the complaint. *See also Blocher v. Harlow*, 268 Md. 571, 581, 303 A.2d 395 (1973) (limitation period stipulated in statute creating cause of action is not ordinary statute of limitations, but substantive limitation, and amendment of limitation period does not apply to causes of action already accrued).

Nonetheless, we think it clear that certain provisions of Chapter 250 are merely procedural in nature. Those are the amendments increasing the size of the Board, altering the procedure for hearing and deciding claims, and giving the authority to issue final decisions on claims to the Secretary. Those amendments do not make any change in the circumstances under which a claim for compensation may arise; they do not change the time within which or the persons by whom an application for compensation may be filed; they do not alter the standards for dismissing an application or for determining the claimant's entitlement to an award; nor do they increase or diminish the compensation available. Because these amendments thus

Note 5 continued

of Appeals made by three to two vote was not nullified by subsequent amendment requiring affirmative vote of four members); *Breedon v. Maryland Department of Education*, 45 Md. App. 73, 83, 411 A.2d 1073 (1980) (revocation of authority of circuit courts to receive additional evidence in administrative review proceedings applied to actions pending on effective date in which evidence had not been taken under prior law).

do not affect any substantive right, they may properly be applied to any claim pending before the Board on which a decision has not yet been rendered.

C. *Limits on Compensation*

The amendment to §12(f)(2), limiting the amount of compensation that may be granted, poses a more difficult problem. Under the former law, a claimant whom the Board found to be permanently and totally disabled received compensation to the full extent of the serious financial hardship caused by the disability. In addition, all claimants whom the Board found to be entitled to reimbursement of expenses received full reimbursement, without regard to the amount. Under Chapter 250, a crime victim who is permanently and totally disabled may receive compensation for the financial hardship caused by the disability only up to the amount of \$25,000 — or less, if the claimant also received more than \$20,000 in reimbursement of medical expenses. Likewise, a claimant may receive reimbursement of medical expenses that will cause financial hardship only up to \$45,000 — or less, if the claimant also received other compensation. The impact of these limits on very severely injured claimants clearly may be significant. Nonetheless, we believe that this amendment does not impair any vested substantive rights of claimants, but affects only a remedy.

An injured crime victim does not have a right to be compensated for those injuries by the State: “In the absence of statutory provision or special undertaking, of course, an innocent victim of a crime has no claim to redress by the State.” *Regan v. Crime Victims Compensation Board*, 455 N.Y.S.2d 552, 553 (N.Y. 1982). And, the enactment of Article 26A did not confer upon crime victims a right of action against the State: The General Assembly established criminal injuries compensation, not as a legal obligation taken on by the State, but only “as a matter of moral responsibility.” §1. Cf. §3-902 of the Courts and Judicial Proceedings Article (“CJ” Article) (creating right of action for wrongful death). Thus, criminal injuries compensation is a government financial assistance program in the nature of welfare. See *Criminal Injuries Compensation Board v. Gould*, 273 Md. 486, 498, 331 A.2d 55 (1975). Crime victims, therefore, have only an expectation of receiving the benefits provided, not a substantive right to those benefits: “[I]t is generally held that welfare benefit laws — although creating an expectation of public benefits — do not confer a contractual right to receive the expected amount.” *Division of Worker’s Compensation, Bureau of Crimes Compensation v. Brevda*, 420 So.2d 887, 891-92 (Fla. App. 1982) (citations omitted). *Accord Bureau of Crimes Compensation v. Williams*, 405 So.2d 747, 748 (Fla. App. 1981).

Nor, indeed, does Article 26A confer benefits upon every person who suffers injury as a result of a crime. Rather, an injured crime victim may receive an award only if the Board finds that he or she meets the statutorily prescribed prerequisites for an award and would suffer serious financial hardship if not granted the award. See *Williams v. Criminal Injuries Compensation Board*, 307 Md. 606, 614, 516 A.2d 573 (1986). Consequently, a claimant has no legally enforceable right to compensation until the Board has made those findings and has granted an award. Cf. *State v. Richardson*, 233 Md. 534, 541, 197 A.2d 428 (1964) (right to workers' compensation is fixed by statute as soon as worker sustains injury arising out of and in course of employment).⁶ Under these circumstances, retrospective application of Chapter 250's limit on the amount of awards would not impair any substantive right of claimants. Accordingly, that amendment is presumed to apply to pending claims, as well as to those instituted or arising after its effective date. *Aviles v. Eshelman Electric Corp.*, 281 Md. 529, 533, 379 A.2d 1227 (1977).

We recognize that statutes that impose, remove, or change a monetary limitation on recovery for personal injuries or death are generally applied only prospectively. *Unsatisfied Claim and Judgment Fund Board v. Bowman*, 249 Md. 705, 710, 241 A.2d 714 (1968); *Wittel v. Baker*, 10 Md. App. 531, 541-42, 272 A.2d 57 (1970). See generally Annotation, *Retroactive Effect of Statute Which Imposes, Removes, or Changes a Monetary Limitation of Recovery for Personal Injury or Death*, 98 A.L.R. 2d 1105. However, those cases concern statutes that create rights of action, like the Wrongful Death Act at issue in *Wittel*, or statutes pertaining to the enforcement of preexisting rights of action, like the motor vehicle insurance statutes at issue in *Bowman*. Where a statute concerns an injured person's right of action against the person causing the injury, a change in the amount of compensation to which the injured person is entitled might well be regarded as affecting a substantive right. Because crime victims have no right to compensation from the State, there is a significant difference between the limitation imposed by Chapter 250 and

⁶ In applying a victim's compensation statute virtually identical to Maryland's, a New York appellate court held that the law "creates no legally cognizable cause of action or right of recovery which can be said to vest in a person claiming to be eligible for an award Thus, until the board has made the necessary finding of 'serious financial hardship' . . . and exercised its power to make an award as a matter of grace, a claimant can have no legally enforceable right." *Gryziec v. Zweibel*, 426 N.Y.S.2d 616, 619 (App. Div. 1980).

the limitations considered in *Bowman* and *Wittel* — a difference that, in our view, subjects Chapter 250's limit to the general presumption of retrospectivity regarding legislative alteration of remedies.

Chapter 250 contains no clear expression of legislative intent that would overcome this presumption of retrospectivity. Further, the context of the enactment of Chapter 250 indicates that the act's purposes would be most fully effectuated by applying it retrospectively.⁷

House Bill 823, which was enacted as Chapter 250, was requested by the Department of Public Safety and Correctional Services against a background of recent shortfalls in the funds appropriated for awards. Under §12(a)(2), no award may be made "unless funds are appropriated and available for the full amount of the award." Therefore, if awards made early in the fiscal year absorb the full amount of the appropriation for that year, crime victims who suffer their injuries later in the fiscal year cannot be promptly compensated. The limit on awards was intended in part to ensure that each claimant found to be entitled to an award could be granted some compensation, without any necessity for special appropriations, by limiting the amount of compensation that may be awarded to any one claimant. Indeed, this office has in the past suggested that a limit on awards "may be advisable" for just this reason. 68 *Opinions of the Attorney General* 222, 225 n.3 (1983).

The fiscal note on the bill submitted to the General Assembly predicted substantial reductions in State expenditures as a result of the bill's enactment. Those predictions included an estimate that expenditures would be reduced by some \$450,000 in fiscal year 1989 — that is, the fiscal year beginning July 1, 1988. The fiscal note makes clear that an important goal of the bill was to reduce the total cost of the criminal injuries compensation program to the State. The fiscal note also indicates that it was within the General Assembly's

⁷ All enactments are to be construed in light of the purpose or goal that the General Assembly sought to achieve. *Kaczorowski v. City of Baltimore*, 309 Md. 505, 516, 525 A.2d 628 (1987). The legislative purpose or goal may be ascertained through consideration of all relevant materials. 309 Md. at 515. See also *City of Baltimore v. Hooper* 311 Md. 193, 539 A.2d 1130 (1988). Moreover, the Court of Appeals has long held that "the Court may seek the legislative intention by considering the facts of contemporary history, the prior state of the law, and the particular evil, abuse or defect which the statute was designed to correct and the remedy which was intended." *Department of Tidewater Fisheries v. Sollers*, 201 Md. 603, 611, 95 A.2d 306 (1953).

contemplation that this goal would be achieved immediately, by application of the monetary limits to pending cases.⁸

Moreover, when the General Assembly previously enacted amendments to Article 26A that it intended would not apply to pending cases, it expressly stated that intent. Thus, in enacting a provision authorizing the Board to waive the general ineligibility for an award of a crime victim assaulted by a member of his or her family, the General Assembly expressly provided that the amendment "shall be applied only to claims filed on or after July 1, 1985," the effective date of the amendment. Chapter 120, Laws of Maryland 1985, sec. 2.

III

Conclusion

In sum, it is our opinion that all of Chapter 250's provisions — including its provision for monetary limits on awards — apply retrospectively, to all claims on which no final decision had been rendered by July 1, 1988.

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

C.J. MESSERSCHMIDT, *Assistant Attorney General*

JACK SCHWARTZ

Chief Counsel

Opinions & Advice

⁸ The analysis of the bill's fiscal impact estimated that "[t]his bill could reduce FY 89 general fund expenditures by \$451,379, representing the net result of hiring 2 additional board members . . . and . . . the estimated savings if the maximum award for medical and disability claims are \$45,000 and \$25,000, respectively." Fiscal Note, House Bill 828 (1988) at 1.

TAXATION

RECORDATION TAX—COVENANT NOT TO ENCUMBER OR CONVEY REAL ESTATE IS NOT SUBJECT TO RECORDATION TAX AND IS NOT RECORDABLE.

July 5, 1988

Mr. Bolton H. Rankin
Assistant Deputy Clerk
Circuit Court for Anne Arundel County

You have requested an opinion concerning the continuing validity of a 1966 opinion of this office, 51 *Opinions of the Attorney General* 226, which concluded that a covenant not to encumber or convey real estate is subject to recordation tax when recorded.

For the reasons stated below, we conclude that a subsequent decision of the Court of Appeals has eroded the underlying premise of the 1966 opinion. Hence, the opinion is overruled. A covenant not to encumber real estate is neither taxable nor recordable.

I

The 1966 Opinion

In 51 *Opinions of the Attorney General* 226 (1966) the Attorney General was asked whether a “covenant not to encumber or convey real estate,” executed as security for a loan, was subject to the Maryland recordation tax. The tax, then codified in former Article 81, §277, was imposed “upon every instrument of writing conveying title to real or personal property, or creating liens or encumbrances upon real or personal property, offered for record and recorded in this State.” Observing that “the list would seem to be sufficiently broad to cover any voluntary instrument which could possibly convey title or create liens or encumbrances,” the opinion considered whether a covenant not to encumber or convey real property came within this category. 51 *Opinions of the Attorney General* at 227.

The opinion concluded that it did, because a lien “can amount to nothing more than the paralyzation of title as a security device.” 51 *Opinions of the Attorney General* at 229. Hence, the opinion advised,

the covenant was "an instrument creating a lien or encumbrance, securing a debt, within the meaning of Maryland Code Article 81, §277, and is subject to the recordation tax." *Id.*

II

The 1980 Court of Appeals Decision

In *Equitable Trust Co. v. Imbesi*, 287 Md. 249, 271, 412 A.2d 96 (1980), the Court of Appeals was asked whether a covenant not to encumber or convey real estate was an equitable lien or mortgage.¹ The covenant in question, like that addressed in the 1966 opinion, secured a bank loan. The Court observed that the instrument was "plain and unambiguous. It does nothing more than to recite that there is a debt to [the bank] and that in consideration of that debt [the borrower] will not encumber or convey specified land so long as the debt remains unpaid." 287 Md. at 270-71. This kind of instrument, the Court continued, does not "purpor[t] in any way to convey or to place a lien upon land. The agreement is barren of anything to indicate an intent to create a lien. We have nothing but an agreement *not* to do a particular thing." 287 Md. at 271 (emphasis in original). Hence, the Court concluded, "we find no equitable lien." *Id.* The Court also noted that "[w]riters who have discussed negative covenants seem to be in unanimous agreement that these covenants do not create a security interest." 287 Md. at 269.

III

Application of *Imbesi* to Current Law

Section 12-102 of the Tax-Property Article ("TP" Article) imposes recordation tax only on an "instrument of writing" as defined in §12-101. That definition extends to any document that "creates or

¹ The question was certified from the United States District Court in a case involving priority among creditors.

gives notice of a security interest in real property.” TP §12-101(c)(1)(i)²

Under *Imbesi*, a covenant not to encumber or convey real estate is not an “instrument of writing” because it does *not* “create or give notice of a security interest in real property.” A covenant not to encumber or convey merely recites a debt and the promise not to encumber or convey a piece of real property until the debt is paid off. If the debtor fails to pay off his or her debt, the creditor has no right to seize or otherwise execute on the property unless the debt is first reduced to a money judgment. Should the debtor go into bankruptcy, the creditor would be an unsecured creditor similar to a holder of a simple note.

Because a covenant not to encumber or convey is not an “instrument of writing,” it is not subject to the recordation tax. Moreover, it is not within the class of documents that may be recorded. This office consistently has advised that the two categories are meant to be congruent. Unless the General Assembly has provided otherwise in a specific instance, a document that is recordable generally is taxable, and a document that is not taxable generally is not recordable. This conclusion follows from the legislative intent underlying §3-102 of the Real Property Article. This section provides in relevant part

² TP §12-101(c)(2) illustrates the types of documents within the definition:

“ ‘Instrument of writing’ includes:

- (i) a deed or contract;
- (ii) a mortgage, deed of trust, or other contract that creates an encumbrance on real property;
- (iii) a lease of real property;
- (iv) an assignment of a lessee’s interest in real property;
- (v) articles of transfer;
- (vi) a security agreement;
- (vii) articles of merger or other document which evidences a merger of foreign corporations; and
- (viii) articles of consolidation or other document which evidences a consolidation of foreign corporations.”

The term “security interest” is defined in TP §12-101(f):

- (1) ‘Security interest’ means an interest in real property or personal property that secures payment or performance of an obligation.
- (2) ‘Security interest’ includes a lien or encumbrance on real property or personal property.”

Although these definitions are somewhat broader than the language used in former Article 81, §277(a)(i), because they cover any security interest, not just a lien or an encumbrance, the Court of Appeals’ decision in *Equitable Trust Co. v. Imbesi* indicates that a typical covenant not to encumber does not create any security interest.

that “[a]ny . . . instrument affecting property, including any contract for the grant of property or any subordination agreement establishing priorities between interests in property, may be recorded.” This provision, like similar predecessor language, has long been understood to require that the instrument itself affect the title to land.

Applying this interpretation, counsel to the clerks of the circuit courts have advised that a building contract, a simple note, a death certificate, an agreement to receive annual charges, and an agreement to sell capital stock are not properly recorded in the land records, because the instruments themselves do not affect real property. *See* letter from Assistant Attorney General Bonnie A. Travieso to the Honorable Frank W. Hales (March 6, 1981); letter from Assistant Attorney General Francis X. Pugh to Mrs. Dorothy B. Kucher (July 20, 1972). Properly viewed in light of *Imbesi*, a covenant not to encumber or convey real estate falls into this category as well.

IV

Conclusion

In summary, it is our opinion that a covenant not to encumber or convey real estate is neither taxable nor recordable. We overrule 51 *Opinions of the Attorney General* 226 (1966).³

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

JULIA M. FREIT, *Assistant Attorney General*

JACK SCHWARTZ

Chief Counsel

Opinions & Advice

³ For a summary of the standards that we apply in considering whether to overrule a prior opinion, see 72 *Opinions of the Attorney General* 200 (1987).

VEHICLE LAWS

TOWING—FEES—LIENS—CIRCUMSTANCES UNDER WHICH VEHICLE
OWNER MUST PAY TOWING AND STORAGE CHARGES.

December 19, 1988

The Honorable Albert R. Wynn
Senate of Maryland

You have requested our opinion on whether a vehicle owner who parks on private property without permission is liable for the cost when the property owner has the vehicle towed away. In addition, you ask whether a tow truck operator who tows a vehicle at the request of a property owner may retain the vehicle until the vehicle owner pays the towing and storage fees.

For the reasons set forth below, we conclude as follows:

1. A vehicle owner who parks without permission on private property and whose vehicle is towed away at the direction of the property owner is liable for reasonable towing and storage costs if (i) a conspicuously posted sign on the property provides unambiguous notice to the vehicle owner that the owner bears the liability for those costs, or (ii) a statute or ordinance imposes liability on the vehicle owner.

2. A tow truck operator who, at the request of the property owner, tows and stores a vehicle parked without permission on private property may retain the vehicle until the vehicle owner pays reasonable towing and storage costs if (i) a conspicuously posted sign on the property provides unambiguous notice to the vehicle owner that an improperly parked vehicle will be subject to such a lien, or (ii) a statute or ordinance creates a lien in favor of the tow truck operator.

I

Liability For Towing And Storage Costs

A. *Common Law*

There are two types of implied contracts, one implied in fact and the other implied in law. Parties who manifest their agreement by conduct create a contract implied in fact. This contract is actually no

different than one in which the parties manifest their agreement by words; the law views both modes of assent as express contracts. See 1 *Corbin on Contracts* §18, at 41 (1963). A contract implied in law, however, commonly referred to as a "quasi-contract," is not a true contract, but rather is "the theory of recovery by which courts give a remedy similar to that historically available for breach of contract when courts find that justice requires such a remedy." 1 *Corbin on Contracts* §19A, at 34-35 (1984 Supp.). A quasi-contract is imposed "[i]f the plaintiff reasonably expected to be paid, if the defendant reasonably expected to have to pay, or if society's reasonable expectations of security of person and property would be defeated by non-payment." *Id.*

In our view, these contract principles logically apply to a trespassing vehicle owner's liability for the cost of towing and storage. In *Capson v. Superior Court*, 139 Ariz. 113, 677 P.2d 276 (1984), a towing company was charged with theft for refusing to release an automobile until the vehicle owner paid a \$75 towing fee. The vehicle owner had parked in an area where signs prohibited parking and "indicated that violators' automobiles would be towed away and a \$75 towing fee incurred." 677 P.2d at 277. When the owner attempted to retrieve his vehicle, the towing company, which had been employed by the property owner, refused to return the vehicle until the fee was paid.

The towing company argued that there was an implied agreement by the vehicle owner to pay the \$75 towing fee, because the no-parking signs made the cost clear. The court recognized that a contract in fact might exist since the driver parked in a designated no-parking area and was placed on notice of the financial consequence of his decision. 677 P.2d at 278.

Even if such an express contract were not found, we believe that a court would find an implied contract and impose the financial burden on a trespasser who parked in defiance of a prominently posted warning sign. "Society's reasonable expectation," in Corbin's phrase, is that the trespasser ought to bear the financial burden of rectifying the trespass. After all, a property owner has the right to have his property free from trespass. See *Murrell v. Trio Towing Service, Inc.*, 294 So. 2d 331, 332 (Fla. App. 1974).¹

¹ In *Fields v. Steyaert*, 21 Ariz. App. 30, 515 P.2d 57, 61 (1974) (Stevens, J. dissenting in part and concurring in part), Judge Stevens viewed the towing company as a constructive bailee when at the request of the police it towed an illegally parked car. Judge Stevens applied the law of restitution to hold the vehicle owner liable for towing and
continued

B. *Statutory Obligation*

The obligation to pay may also be statutory. In *T.R. Ltd. v. Lee*, 55 Md. App. 629, 465 A.2d 1186 (1983), a police officer, acting pursuant to a county ordinance, directed a towing company to “unload, right, tow and store” an overturned tractor-trailer. 55 Md. App. 630. When the vehicle owner demanded that the towing company return the tractor-trailer, the company refused “until all assessed towing and storage charges were paid.” *Id.*

The police had directed that the tractor-trailer be towed pursuant to §26-160 of the Prince George’s County Code, which provided that “the County Police Department shall have authority to impound and remove [an unattended motor vehicle] and charge the owner thereof the costs of towing, storage and any other charges incurred in connection therewith.” The court held that “a debt in the amount of reasonable towing and storage charges was incurred” by the vehicle owner under the authority of §26-160. 55 Md. App. at 633.

Although the ordinance did not apply to a request made by a private property owner, we have no doubt that the court’s rationale would apply if the General Assembly or a local jurisdiction enacted a law that authorizes property owners to remove an illegally parked vehicle and imposes the financial burden on the vehicle owner.² Such a law would provide the basis for holding a vehicle owner liable for the cost of towing and storing a trespasser’s vehicle. *See, e.g.*, Chapter 30C of the Montgomery County Code.

Note 1 continued

storage costs since, “[a] person legally assuming custody over another’s property for its preservation is entitled to compensation.”

Like the law of contracts, a bailment relationship may be implied in fact or in law. 8 Am. Jur. 2d *Bailments* §62, at 798 (1980). When the law imposes a bailment, it is known as a constructive bailment. Unlike an implied contract, however, these principles may not necessarily impose liability on the owner. *See Pollaro v. Borneman*, 201 N.W. 525 (S.D. 1924) (where there is no privity of contract between the property owner and bailee, the owner is not liable).

² No State statute regulates private towing practices. *Cf.* §26-306 of the Transportation Article (reimbursement for towing costs when government agency wrongfully authorizes towing). In the 1988 Session of the General Assembly, several bills were introduced for the purpose of regulating the towing of vehicles from private property. *See, e.g.*, Senate Bill 534 and Senate Bill 570, House Bill 306, and House Bill 1466. None of these bills, however, was enacted.

II

Creation Of A Lien

A. Common Law

In *T.R. Ltd.*, the Court of Special Appeals defined a common law lien as "the right 'in one man to retain that which is in his possession belonging to another till certain demands of him [by] the person in possession are satisfied.'" 55 Md. App. at 634 (quoting Brown, *The Law of Personal Property* §107 (2d ed. 1955)).³ The basis of such a lien is an express or implied agreement between the owner of the goods and the person who renders some service with respect to those goods; thus, it must be consensual. *Id.* In *T.R. Ltd.*, the police authorized the towing pursuant to a county ordinance. Because the vehicle owner had neither expressly nor impliedly consented to being towed, the court held that the towing company had no common law possessory lien since "[t]he debt . . . arose not out of contract but by operation of law." 55 Md. App. at 635.

Similarly, in *Kunde v. Biddle*, 41 Ill. App. 3d 223, 353 N.E. 2d 410, 415 (1976), the court rejected a towing company's claim that it had a right to retain a vehicle until its owner paid for towing and storage costs: "[T]he mere towing of an automobile from a private parking lot without the owner's or lawful possessor's consent does not create a lien against that automobile. An automobile taken from a private parking lot without the lawful possessor's consent may not be withheld from him for his failure to pay the expense of the towing and storage." See also *Younger v. Plunkett*, 395 F. Supp. 702, 707-8 (E.D. Pa. 1975); *Murrell v. Trio Towing Service*, 294 So. 2d 331 (Fla. App. 1974). The towing company must look to the property owner for payment. *Murrell v. Trio Towing Service*, 294 So. 2d at 333 n.3.

In all of these towing cases, the vehicle owners were not put on notice that a lien would be created if they parked improperly. Thus,

³ At its inception, the common law lien was a very limited right in the debtor's goods. It "was limited to those circumstances where a lien creditor undertook to render his services upon the implied promise of the lien debtor to pay him." *Younger v. Plunkett*, 395 F.Supp. 702, 707 (E.D. Pa. 1975). The lien creditor could not sell the debtor's goods to satisfy the lien nor did he have a right of present use and enjoyment. The lien only extended to the goods upon which he rendered his services, not to all of the debtor's property. 395 F.Supp. at 707 n.6.

they had not impliedly consented to the creation of a lien. In short, these cases suggest that a common law implied lien is not readily created.⁴

Yet *T.R. Ltd.* and other cases do recognize the possibility of an implied lien, presumably involving conduct by the vehicle owner from which consent to the lien's creation is to be inferred. See *Re Dave Noake*, 12 Bankr. Ct. Dec. (CRR) 815, 816 (Bankr. D. Vt. 1984) (vehicle owner's failure to claim vehicle for two months after notice of towing is deemed consent to lien for storage charges). Cf. *Association Financial Services Co. Inc. v. O'Dell*, 417 A.2d 604, 606 (Pa. 1980) ("nothing in the circumstances of this case suggests implied consent" by a vehicle owner to lien for garageman's expenses).

Hence, although we can find no case so holding, we conclude that a common law possessory lien in favor of a tow truck operator could arise by implication through posting of a sufficiently explicit sign plainly visible to all parkers. The sign would have to do more than notify trespassers that they will be liable for towing costs; it must also put them on notice that their improper parking will subject them to a lien for the payment of those costs.⁵

B. Statutory Lien

In *T.R. Ltd.*, the Court of Special Appeals observed that: "Consent being an important element of a common law lien, any statutory attempt to create such a lien without the element of consent would have to be strictly construed as in derogation of the common law." 55 Md. App. at 635. The court further held that the Prince George's County ordinance authorizing the removal of an unattended motor vehicle and imposing a financial obligation on the vehicle owner "did not create or purport to create any lien as security for debts arising" under the law. *Id.* The court explained: "There is no mention of a lien, and none can be implied from the mere establishment of a monetary obligation on the owner of a vehicle." *Id.*

⁴ A towing company that retains a vehicle unlawfully would be liable for conversion. See *Bender v. Bender*, 57 Md. App. 593, 599, 471 A.2d 335 (1984).

⁵ In *Capson v. Superior Court*, the Arizona court did not find that the vehicle owner had impliedly consented to the creation of a lien even though a sign had "indicated that violators' automobiles would be towed away and a \$75 towing fee incurred." 677 P.2d at 277.

Applying these same strict requirements, the court found no lien to have been created by §16-202(c)(2) of the Commercial Law Article, which provides as follows: "Any person who, with the consent of the owner, has custody of a motor vehicle and who, at the request of the owner, provides a service to or materials for the motor vehicle, has a lien on the vehicle for any charge incurred for . . . [s]torage." The court held that, although the trooper had custody when he impounded the tractor-trailer, he did not have the "possession equivalent to ownership that is required to confer a mechanics' lien" 55 Md. App. 636.⁶

In sum, no State statute expressly creates a lien in favor of a towing company. Therefore, no statutory lien will be found unless a local ordinance creates it.⁷

III

Conclusion

In summary, it is our opinion that:

1. A vehicle owner who parks without permission on private property and whose vehicle is towed away at the direction of the property owner is liable for reasonable towing and storage costs if (i) a conspicuously posted sign on the property provides unambiguous notice to the vehicle owner that the owner bears the liability for those costs, or (ii) a statute or ordinance imposes liability on the vehicle owner.

2. A tow truck operator who, at the request of the property owner, tows and stores a vehicle parked without permission on private property may retain the vehicle until the vehicle owner pays reasonable towing and storage costs if (i) a conspicuously posted sign on the

⁶ The court also rejected the argument that the towing company had a statutory carrier's lien under §7-307 of the Commercial Law Article.

⁷ Under Article 25A, §5(S) of the Maryland Code, charter home rule counties have power to regulate the towing of vehicles from private property. 73 *Opinions of the Attorney General* 246 (1988).

property provides unambiguous notice to the vehicle owner that an improperly parked vehicle will be subject to such a lien, or (ii) a statute or ordinance creates a lien in favor of the tow truck operator.⁸

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

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JACK SCHWARTZ

Chief Counsel

Opinions & Advice

⁸ This opinion does not address the procedural due process issues that might arise from a statute governing towing. See *DeFranks v. Mayor and City Council*, 777 F.2d 185 (4th Cir. 1985); *Huemmer v. Mayor and City Council*, 632 F.2d 371 (4th Cir. 1980).

WASHINGTON SUBURBAN SANITARY COMMISSION

PROCUREMENT—MINORITY BUSINESS ENTERPRISE PROGRAM—CRIMINAL
SANCTIONS FOR INTENTIONAL MISREPRESENTATIONS.

September 19, 1988

Nathan J. Greenbaum, Esquire
General Counsel
Washington Suburban Sanitary Commission

You have requested our opinion as to whether an intentional misrepresentation about compliance with minority business participation requirements made by a contractor to secure a contract from the Washington Suburban Sanitary Commission ("WSSC") constitutes a violation of §11-148(e) of the State Finance and Procurement Article ("SF" Article). You also asked whether this kind of violation of WSSC procedural regulations is a misdemeanor under Article 29, §18-104(a)(5) of the Maryland Code.

For the reasons given below, we conclude that the WSSC is not subject to the provisions of the State Procurement Law. Therefore, misrepresentations made by prime contractors and minority firms would not constitute violations of SF §11-148. However, misrepresentations by the contractors in violation of the WSSC's regulations are criminal misdemeanors under Article 29, §18-104(a)(5).

I

Background

Chapter 122 of the Laws of Maryland 1918 established the WSSC within Prince George's and Montgomery Counties. This bicounty agency provides residents of the two counties with water and sewer service.

Pursuant to Article 29, §§3-102(d)(2) and 9-101, the WSSC by resolution and by implementing regulations has established a Mandatory Minority Business Utilization Program ("MBE Program").¹ The MBE

¹ Article 29, §9-101(c) provides that "any rule or regulation adopted by the WSSC . . . has the force and authority of law."

program is intended to facilitate the participation of certified minority business enterprises in competitively bid construction contracts and negotiated contracts for architectural and engineering consultant services. Standard Operating Procedure E-86-04, at ¶¶ I and II.²

In accordance with Article 29, §3-102(d)(2), the WSSC regulations adopt the definition of "minority business enterprise" in SF §11-148.³ The WSSC also recognizes any minority firm certified by the Maryland Department of Transportation's Minority Business Certification Board or under any other substantially identical certification program of the State or a county.

An apparent low bidder is required to submit an MBE Participation Plan after bid opening, within the time specified in the Invitation for Bids. Failure to submit the MBE Plan within the specified time is cause for notifying the bidder that the WSSC will proceed with awarding the contract to the next low bidder. An apparent low bidder is also allowed to seek a waiver of the MBE requirements based upon its good faith efforts to subcontract with certified MBE's.

The WSSC's Internal Audit Unit performs random audits of contracts to determine MBE Program compliance. The results are then forwarded to the contracting officer. The WSSC makes a final determination that a contractor has not complied with its MBE Execution Certification or that a MBE subcontractor has participated in a fraud or impropriety only after providing the contractor or subcontractor with an opportunity for a hearing before the contracting officer. A contractor found to have violated the regulations governing the MBE Program is subject to disqualification from participating in WSSC contracting activities.

² Our summary of the provisions of the MBE Program is drawn from Standard Operating Procedure E-86-04.

³ SF §11-148(a)(3) defines "minority business enterprise," in pertinent part, as "any legal entity, other than a joint venture, organized to engage in commercial transactions which is at least 51 percent owned and controlled by one or more minority individuals..." The term "minority individual" is defined in SF §11-148(a)(4).

When Chapter 48 of the Laws of Maryland 1988 takes effect on October 1, 1988, SF §11-148 will be recodified in several sections of SF Title 14, Subtitle 3.

II

Analysis

A. Applicability of SF §11-148 to the WSSC

The requirements of the State Minority Business Enterprise law are set out in SF §11-148.⁴ The statute requires participation by minority business enterprises, as follows:

Each designated department, except the Department of Transportation as to construction contracts, shall structure its procedures for procuring supplies, services, construction, construction related services, architectural services, and engineering services to attempt to achieve, consistent with the purposes of this section, the result that a minimum of 10 percent of the total dollar value of such procurements are made directly or indirectly from certified minority business enterprise.

Each procurement agency shall structure its procedures for procuring supplies, services, construction, construction related services, architectural services, and engineering services to encourage participation in the process by certified minority business enterprise and to attempt to provide to certified minority enterprise a fair share of State contracts.

⁴ The substantive fraud provisions for MBE violations outlined in SF §11-148 apply to "any minority enterprise matter administered pursuant to [that] subtitle." SF §11-148(e) provides that it is a violation to:

"(i) fraudulently obtain, retain, attempt to obtain or retain, or aid another in fraudulently obtaining or retaining or attempting to obtain or retain certification as a minority business enterprise for the purposes of this section;

(ii) in any minority business enterprise matter administered pursuant to this subtitle willfully falsify, conceal or cover up by any trick, scheme or device a material fact, or make any false, fictitious or fraudulent statements or representations, or make use of any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry.

(iii) willfully obstruct, impede, or attempt to obstruct or impede any State official or employee who is investigating the qualifications of a business entity which has request certification as a minority enterprise, or

(iv) fraudulently obtain, attempt to obtain, or aid another person fraudulently obtaining or attempting to obtain, public moneys to which the person is not entitled under this subtitle."

SF §11-148(b). By its terms, SF §11-148 applies to “designated departments” and “procurement agencies.” “Designated departments” are defined in SF §11-148(a)(2) to include:

the University of Maryland, the Departments of General Services and Transportation, the Maryland Food Authority, the Maryland Stadium Authority, or the Interagency Committee on Public School Construction, or, for procurements specified in Title 3, Subtitle 4 of this article, the Department of Budget and Fiscal Planning.

The WSSC does not fall within the definition of a “designated department.” Therefore, the applicability of the provisions of SF §11-148 turns on whether the WSSC is a “procurement agency” within the meaning of SF §11-148. A “procurement agency” is defined as “a State agency that is authorized by law or regulations to procure or contract.” SF §11-101(aa).

The question of whether a particular entity is a “State agency” is a difficult and recurring issue. *See* 60 *Opinions of the Attorney General* 813, 814 (1975). The test to be applied is not fixed, and a particular agency may be determined to be a “State agency” for purposes of one statute but not necessarily for purposes of another. *Clauss v. Board of Education*, 181 Md. 513, 520, 30 A.2d 779 (1973); 60 *Opinions of the Attorney General* at 815.

In *Katz v. WSSC*, 284 Md. 503, 397 A.2d 1027 (1979), the Court of Appeals held that the WSSC is a “State agency” for purposes of sovereign immunity. The Court of Appeals has also held that WSSC is a “State agency” for purposes of the Administrative Procedure Act. *See Donocam Assocs. v. WSSC*, 302 Md. 501, 510, 489 A.2d 26 (1985); *Prince George’s Co. v. Blumberg*, 288 Md. 275, 294-95, 418 A.2d 1155 (1980). In an earlier decision, *Barranca v. Prince George’s County*, 264 Md. 562, 287 A.2d 286 (1972), the Court of Appeals, in an opinion resolving issues about the removal of members of the WSSC, approved in *dictum* a trial judge’s conclusion that the WSSC’s “members are State, rather than County, officers and therefore the manner of appointment and removal of its membership was governed by State law.” 264 Md. at 567.

On the other hand, the Court of Appeals held in *WSSC v. C.I. Mitchell and Best Co.*, 303 Md. 544, 495 A.2d 30 (1985), that the WSSC is not a “State agency” within the meaning of Article 81, §215, which permits claims for refunds of overpayments to certain authorized state agencies. In addition, this office concluded that the WSSC is not a “State agency” for purposes of former Article 19A, the State Code of Ethics. 60 *Opinions of the Attorney General* 813 (1975). That

opinion pointed out that the “*dictum* of the Court of Appeals in *Barranca* . . . that the members of the WSSC are State officers [was] not persuasive authority and does not compel a conclusion that the Commission members are subject to Article 19A.” 60 *Opinions of the Attorney General* at 821.

For procurement purposes, SF §11-101(jj) provides the following definition of “State agency”:

(1) [A]n agency, association, board, bureau, college, commission, committee, council, foundation, fund, department, institute, institution, public corporation, service, trust university, or other unit of the Executive Branch of State government.

. . .

(3) “State Agency” does not include bistate, multistate, bicounty, or multicounty governmental agencies or political subdivisions of the State; including counties, municipalities, special tax districts, sanitary districts, soil conservation districts and water supply districts.

In the most recent revision of the Procurement Law, Chapter 48 of the Laws of Maryland 1988, the General Assembly substituted the term “unit” for the former terms “procurement agency” and “State agency” in SF §11-101, to conform to language used in comparable sections of other revised articles. The Revisor’s Note states that the new language was “derived without substantive change from former SF §11-101(aa) and (jj)(1).” The revised language, to be codified as SF §11-101(v), reads as follows:

(1) “Unit” means an officer or entity that is in the Executive Branch of the State government and is authorized by law to enter into a procurement contract.

(2) “Unit” does not include:

(i) A bistate, multistate, bicounty or multicounty governmental agency; or

(ii) A special tax district, sanitary district, drainage district, soil conservation district, water supply district, or other political subdivision of the State.

In our view, the WSSC is properly characterized as either a “bicounty governmental agency,” “water supply district,” or “sanitary district.” The capital and operating budgets of the WSSC are not included in the State budget submitted by the Governor and approved

by the General Assembly. WSSC's budget is approved by the county councils of Montgomery and Prince George's Counties. Article 29, §1-204. Therefore, the WSSC does not fall within the definition of a "unit" of the Executive Branch of State Government, and accordingly, the provisions of State Procurement Law are not applicable. We understand that this conclusion is consistent with your prior interpretation that other WSSC procurement-related matters are exempt from the State Procurement Law.

B. *Criminal Misdemeanors — Article 29, §18-104*

Article 29, §18-104(a) specifically provides that:

A person who violates any of the following provisions is guilty of a misdemeanor and on conviction is subject to a fine not exceeding \$1,000 or imprisonment not exceeding 30 days or both:

. . .

(5) WSSC rules and regulations (except for those specified in subsections (f) and (g) of this section).

WSSC regulations pertaining to its MBE Program do not fall within the specified exceptions in §18-104(f) and (g). Therefore, we conclude that documented cases of fraud and misrepresentations may be prosecuted as misdemeanors under Article 29, §18-104(a)(5).

III

Conclusion

In summary, it is our opinion that the MBE fraud provisions outlined in the State Procurement Law, SF §11-148(e), are not applicable to the WSSC. However, the violations of the WSSC's MBE regulations are misdemeanors under Article 29, §18-104(a)(5).

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Opinions & Advice

**SYNOPSIS
OF
UNPUBLISHED
OPINIONS**

Synopses of Unpublished Opinions

ELECTIONS

CANDIDACY—"ANTI-HATCH ACT"— PUBLIC OFFICERS—INCOMPATIBLE POSITIONS.

1. Article 33, §28-1 of the Maryland Code affords an employee of the Town of Oakland a right to run for municipal elective office, not withstanding any prohibition in the Town's charter or ordinance.

2. If the employee were elected to the office of Mayor, and if the employee is subject to the supervision of the Mayor, the common law doctrine of incompatible positions would preclude his simultaneous service as an employee of the Town. If he accepted the office of Mayor, he would vacate the position of employee.

Opinion No. 88-014

To:

Robert E. Watson, Esquire

March 1, 1988

GAMING

CASINO NIGHTS—MANAGEMENT / OPERATION— FREDERICK COUNTY.

An organization authorized to conduct casino nights in Frederick County may not delegate management of the events or the operation of the games to persons other than members of the organization.

Opinion No. 88-018

To:

*The Hon. George H. Littrell, Jr.
Maryland House of Delegates*

March 18, 1988

TIP JARS—NONPROFIT ORGANIZATIONS— BINGO PARLORS—WASHINGTON COUNTY.

A bingo parlor licensed under Article 27, §255 of the Maryland Code may permit a volunteer fire department to operate a tip jar in the

bingo parlor. However, the bingo parlor may not be compensated for the use of its premises, and the tip jar must be managed by the members of the volunteer fire department personally.

Opinion No. 88-016

March 11, 1988

To:

*The Hon. M. Kenneth Long, Jr.
State's Attorney for Washington County*

HEALTH OCCUPATIONS

DIETITIANS—LICENSING.

1. A dietitian registered by the Commission on Dietetic Registration of the American Dietetic Association (the "CDR") through application of its examination waiver requirement may also be granted a waiver by the State Board of Dietetic Practice.
2. A dietitian registered by the CDR after passing the CDR's examination, rather than by waiver, may be licensed by the Board when the Board's approval of the CDR examination becomes effective.
3. Upon Board approval of the CDR examination, CDR-registered dietitians would not be required to take an examination in order to meet the qualifications for licensure, because all CDR-registered dietitians would either have met the waiver of examination requirement in §4.5-305(b)(2)(ii)2 of the Health Occupations Article or would have taken an examination approved under HO §§4.5-302(b) and 4.5-303(a)(3).

Opinion No. 88-015

March 9, 1988

To:

*Ms. Gloria B. Jones
Chairperson, State Board of Dietetic
Practice.*

INSURANCE

NONPROFIT HEALTH SERVICE PLANS—REIMBURSEMENT CLAIMS—INTEREST—LIABILITY.

Article 48A, §354Z(b) requires that a nonprofit health service plan pay interest on claims that remain unpaid 30 days after the filing of the

claim, unless there is a good faith dispute concerning the legitimacy of the claim or the amount of reimbursement due. The person entitled to reimbursement is not required to demand payment of the interest.

Opinion No. 88-038

To:

September 6, 1988

*The Hon. Kenneth H. Masters
Maryland House of Delegates*

JUVENILE COURT

VEHICLE LAWS—JURISDICTION.

When a juvenile is charged with a jailable traffic offense, the juvenile must be charged and tried on a juvenile petition in juvenile court.

Opinion No. 88-011

To:

February 17, 1988

*The Hon. John F. Slade, III
Maryland House of Delegates*

LOCAL GOVERNMENT

ELECTIONS—COUNTY EXECUTIVE— TWO-TERM LIMIT—BALTIMORE COUNTY.

If the two-term limitation of §402(a) of the Baltimore County Charter were removed by the voters in 1990 or 1992, the incumbent county executive could run and serve another term beginning in 1994. If the restriction were not removed until 1994, the incumbent county executive would not be able to serve a third consecutive term.

Opinion No. 88-042

To:

October 3, 1988

*Arnold Jablon, Esquire
County Attorney
Baltimore County Office of Law*

ENVIRONMENT—PREEMPTION / CONFLICT— SEWAGE SLUDGE.

Although the State has enacted a general law concerning the authority to enact ordinances controlling the land application of sewage sludge, the various counties are not entirely precluded from enacting their own regulations. Except for sewage sludge composting facilities,

however, the counties may not veto the issuance of a State permit. Moreover, any county regulation must be consistent with State law.

Opinion No. 88-050

To:

November 17, 1988

*The Hon. Frederick C. Malkus
Senate of Maryland*

MUNICIPALITIES—SEWER LINES.

Because the Town of Oakland has not previously extended its sewer lines beyond the town boundaries and did so only to satisfy conditions for receiving federal and State assistance, the town may decline to make sewer connections along these lines if that refusal is consistent with the conditions. However, where connections are made in particular areas with already-developed property, the refusal to connect newly-developed property in the same area would be unlawful.

Opinion No. 88-039

To:

September 15, 1988

*Robert E. Watson, Esquire
Town Attorney for Oakland*

MUNICIPALITIES—ZONING—HISTORIC AREA ZONING.

The height and bulk restrictions in the historic district ordinance of the City of Annapolis do not apply as absolute limits on the construction by Anne Arundel County of an addition to the County courthouse. However, the City's Historic District Commission may consider the appropriateness of the planned height and bulk of the proposed addition in determining whether to approve the addition.

Opinion No. 88-043

To:

October 4, 1988

*Jonathan A. Hodgson, Esquire
City Attorney
City of Annapolis*

TAXATION—COUNTIES—TAX AMNESTY— WASHINGTON COUNTY.

The Board of County Commissioners of Washington County does not have the authority under current law to waive the collection of interest on delinquent personal property taxes. The authority to adopt such a tax amnesty program must be obtained from the General Assembly.

Opinion No. 88-034

To:

August 3, 1988

*Mr. Todd L. Hershey,
County Treasurer for Washington County*

MARYLAND STADIUM AUTHORITY

PROPERTY ACQUISITION—BOND PROCEEDS.

The Maryland Stadium Authority may use bond proceeds to acquire the whole of the Camden Yards site, once it has obtained a long-term lease with the Baltimore Orioles.

Opinion No. 88-013

February 26, 1988

To:

Herbert J. Belgrad, Esquire
Chairman, Maryland Stadium Authority

PESTICIDE REGULATION

PREEMPTION—SECRETARY OF AGRICULTURE.

1. Federal law preempts all local jurisdictions from regulating the use of pesticides.
2. The Secretary of Agriculture has the power to require pest control applicators to warn chemically sensitive persons of pesticide applications.

Opinion No. 88-006

February 4, 1988

To:

The Hon. Joan B. Pitkin
Maryland House of Delegates

PUBLIC OFFICERS

BONDING REQUIREMENTS—COMPTROLLER'S AUTHORITY—CIRCUIT COURT CLERKS—REGISTERS OF WILLS—COLLECTORS OF TAXES.

The Comptroller has the authority to obtain a blanket bond to cover clerks of the circuit courts, registers of wills, and collectors of State taxes to satisfy the statutory requirements that those officers be bonded.

Opinion No. 88-017

March 16, 1988

To:

J. Basil Wisner
Chief Deputy Comptroller

VEHICLE LAW

TRUCK LENGTHS.

The exception to the Vehicle Law's limits on truck lengths in TR §24-104.1(k)(3)(i) applies to only two types of vehicle combinations, a truck and semitrailer combination and a truck tractor and a semitrailer combination. It does not apply to a single unit truck alone — that is, a truck without a semitrailer in combination.

Opinion No. 88-026

June 20, 1988

To:

*The Hon. Norman R. Stone, Jr.
Senate of Maryland*

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